



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: 5177/2021
In the matter between:

SUPERDOC ONE CC

Applicant

and

DENNIS LOUW

Respondent

CORAM: MB NEMAVHIDI AJ

HEARD ON: 09 MAY 2024

DELIVERED ON: 27 JUNE 2024

***JUDGMENT BY:** MB NEMAVHIDI AJ

Introduction

[1] In this matter applicant seeks relief from this court to condone its non-compliance with the rules, services, time limits and directives of this court in filing its replication within the specific timeframe in terms of the uniform rules of court.

Summary of facts

[2] The applicant instituted action against the respondent on or about 10 September 2022 as a result of a breach of contract/agreement on the part of the respondent. The applicant

issued a combined summons which was issued by his legal representatives who, at that stage, were Van der Berg Van Vuuren Attorneys. The respondent duly filed and served its plea which included two special pleas raised, namely, *locus standi* and prescription to the applicant's combined summon on the 29th of September 2022. The applicant, in terms of rule 25(1) of the uniform rules of court, had to file its replication, if any, within fifteen days after the service of the plea which would have been the 28th of October 2022.

[3] The applicant in his condonation application stated that he did not have money to pay his attorney of record at that specific time. As a result, they withdrew. This was the case on several occasions. He admits that respondent will not be prejudiced if the *ipso facto* bar is removed; rather, his replication will merely crystalize the issues in the pleadings. In fact, the respondent will be afforded an opportunity to either answer or respond to his replication. Furthermore, the applicant states that, as *dominus litis*, it is pivotal to reply to the respondent's special plea in support of his claim and not leave the special plea unanswered.

[5] The prescription applicant states that he only became aware of the fact that the debt was due in January 2019. With reference to *locus standi* the respondent alleges that the applicant (Superdoc One CC) being a juristic person may not directly or indirectly hold membership interest in a corporation in terms of the Close Corporation Act 69 of 1984 (the Act). The respondent avers that the applicant holds 100% of membership interests in Superdoc One CC, and as such, the applicant should have brought the action. The appellant refers to Section 33(1) of the Act, which provides that a member's interest can be acquired directly from the close corporation, or from an existing member or his estate. In these premises, Superdoc One CC has the required *locus standi* to bring the main action.

Respondent's opposing affidavit.

[6] The Respondent states that the applicant filed its application one year and six months late and is of no purpose. Consequently, it is not necessary. In addition, the applicant's attorneys withdrew as attorneys of record on 16 May 2023. They easily could have filed the replication within the required fifteen days in October 2022. Strangely, the respondent also filed a counterclaim against the applicant on 29 September 2022 which prompted Messrs Van der Berg Van Vuuren to file a plea on the 20th of October when the applicant's replication became due. The applicant appointed Van Eden Attorneys on 25 July 2023, but he does not give an explanation why they could not attend to the filing of the replication, and those attorneys withdrew as attorneys of record on 29 September 2023.

[7] On 20 February 2023, Van Eden Attorneys served a notice as attorneys of record for the applicant. The respondent avers that the manner in which the applicant has conducted this litigation has been prejudicial to him and that applicant's *bona fides* are questionable. For example, the applicant was requested to provide discovery on 7 February 2022 but only complied on 25 July 2023. The application to compel discovery was taxed and allocated in the total amount of R22 352.50 but, to date, the applicant has failed to make payment of the taxed costs. As such, the respondent wants to have his counterclaim against applicant finalized soon.

The applicable principles

[8] The court explained that judicial discretion vested in a court in granting condonation as follows:

*'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.'*¹

[9] These principles have consistently been applied by the court in dealing with condonation applications.² Factors which normally weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation thereof, the importance of the case, a respondent's interest in the finality of the judgment, and the avoidance of unnecessary delay in the administration of justice.

[10] The Constitutional court in *Grootboom v National Prosecuting Authority and Another*³ held that:

¹ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 532 (A).

² *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others; National Director of Public Prosecutions and Another v Mulaudzi* [2017] ZASCA 88; [2017] 3 All SA 520 (SCA).

³ *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC).

'In this court the test for determining whether condonation should be granted or refused is the interest of justice. If it is in the interest of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account is that in that enquiry include:

- (a) The length of the delay,
- (b) The explanation or cause for the delay,
- (c) The prospects of success for the party seeking condonation
- (d) The importance of the issue(s) that the matter raises,
- (e) The prejudice to the other party/parties, and
- (f) The effect of the delay in the administration of justice.⁴

[11] Where the degree of non-compliance is flagrant and substantial, condonation may be refused irrespective of the prospects of success. If the explanation for such flagrant and substantial non-compliance is manifestly inadequate or there is no explanation at all, the prospects of success need not be considered.⁵ This is, without a doubt, such a case.

[12] The applicant was 18 months late with the filing of its replication as required by Rule 25 of the Uniform Rules of this court. He blames his impecunious state which caused his attorneys of record to withdraw their services. However, it is strange that, despite this aversion, his attorney of record, Van der Berg Van Vuuren Attorneys, managed to file a plea relating to the respondent's counterclaim, yet omitted to deliver the applicant's replication which was due on 22 October 2022, the same date on which the plea was filed. The conduct of the applicant is indicative of its unwillingness to timeously file its replication.

[13] In the result:

1. The application for condonation is dismissed.
2. The applicant to pay costs on a Rule 67(A) scale.



 MB NEMAVHIDI AJ

⁴ Ibid para 50.

⁵ *NSS obo AS v MEC for Health, Eastern Cape Province* [2023] ZASCA 41; 2023 (6) SA 408 (SCA).

Appearances

For the Plaintiff:

Instructed by:

Adv EE Barlow

Van Eeden Attorneys

Bloemfontein

For the Fourth Defendant:

Instructed by:

Mr AJ Maree

Mc Intyre Van der Post Attorneys

Bloemfontein