



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED. ✓	
2024-11-14	
<u>DATE</u>	<u>SIGNATURE</u>

Case Number: 13189/2014

In the matter between:

ABSA BANK LTD

Applicant

and

L.N. NDZIBA N.O.

First Respondent

M.M. NDZIBA

Second Respondent

L.N. NDZIBA

Third Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 14 November 2024.

JUDGMENT

POTTERILL J

[1] It is common cause that Absa Bank Ltd [Absa], the applicant, granted credit to Marotex (Pty) Ltd [Marotex] and the respondents, L.N. Ndziba N.O. [the executrix of the late Ruth Rose Makiwane], M.M. Ndziba and L.N. Ndziba [the Ndzibas] signed as surety and co-principal debtors on 1 March 2015 for the fulfilment of Marotex's liabilities. I use the abbreviations of the parties with no disrespect intended.

[2] On 17 February 2014 Absa issued a simple summons against the Ndzibas and on 11 March 2014 Absa applied for summary judgment. The Ndzibas filed an affidavit resisting summary judgment. On 14 May 2014 the application is removed as Absa grants the Ndzibas leave to defend with costs in the cause.

[3] On 3 July 2015 Absa filed and served its declaration. Absa served a notice of bar on the Ndzibas. On 3 November 2015 the Ndzibas file a plea and special plea against the simple summons, not the declaration.

[4] Absa on 14 March 2012⁶ filed a Rule 30 application seeking a declaration that the Ndzibas' defence be struck due to non-compliance with Rule 30(2)(b). Furthermore, that judgment be granted against the Ndzibas. An affidavit resisting the Rule 30 is filed as well as replying affidavit by Absa. On 7 September 2015 judgment is handed down with the following order:

“[23][1] The First, Second and Third Respondent's defence is struck out due to failure to comply with the Applicant's notice in terms of the provisions of Rule 30(2)(b) of the Uniform Rules of Court.”

[5] Leave to appeal against the judgment is granted on 4 February 2019. This appeal was not prosecuted and it has lapsed.

[6] On 21 February 2020 Absa files a notice of bar on the Ndzibas for failing to file a plea. The Ndzibas' attorney withdraws on 27 February 2020.

[7] On 4 June 2021 an application for default judgment is served on the Ndzibas. An opposing and replying affidavit followed. Holland-Muter AJ found that Absa's default judgment was not properly before Court due to Absa's declaration being served 13 months late and there was no application for condonation. A further order was that Absa was to "bring the aforesaid application for condonation within fifteen days from the date of this order, failing which it shall seek an order condoning the late filing of such an application." The date of this order is 7 September 2022.

The application before me.

[8] In the amended notice of motion a declaratory order is sought that by virtue of the order of Modise AJ striking the defence of the Ndzibas, Absa is entitled to judgment against the Ndzibas. Furthermore, that default judgment be granted as prayed for. Prayers 3 and 4 read as follows:

- "(3) In the alternative to prayers 1 and 2 above, that to the extent necessary condonation be granted to the Applicant for the late filing of its application for condonation.
- (4) That condonation be granted in favour of Absa for the late filing of its declaration."

[9] At the commencement of the hearing counsel for Absa informed the Court that Absa was not proceeding with the application for default judgment. Furthermore, it has an amended draft order wherein now in prayer 4 affords "The Respondents, if so

advised, shall be entitled, within 15 days from the granting of this order to file a special plea or a plea in response to the declaration which was filed on 3 July 2015.” The costs order could also be one of costs in the action.

Argument on behalf of Absa

[10] The late filing of the declaration was due to the continuous developments and actions in the extensive litigation between the parties. Pursuant to leave granted in the summary judgment application, Absa immediately instructed counsel to draft the declaration. Counsel had however requested some information and Absa had to be contacted to obtain the information. But in any event, the Ndzibas had not issued a notice under Rule 30 that the declaration was filed late and therefore could not be heard to raise an issue years later that the declaration was filed late.

[11] The dual process of the business rescue proceedings of Marotex had an effect on this matter. This is not a situation where the Ndzibas after much delay is suddenly confronted with something that was dormant for years.

[12] There is no prejudice to the Ndzibas because they will be afforded an opportunity to file a plea.

Argument on behalf of the Ndzibas

[13] The argument went that Absa had simply not complied with the order of Holland-Muter AJ. The condonation application was not brought within 15 days as ordered, and there is no condonation application for bringing the condonation application late. Once again, no compliance with the further order of Holland-Muter AJ.

[14] Condonation is not for the mere asking and must be brought without delay. The degree of lateness is 133 days. The explanation thereof lacks an account for each period of time that has lapsed for the entire period. The prospects of success are not addressed in the application. Reliance was placed on the matter of *Mziya v Putco Ltd*¹ wherein it was found that “without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, the application for condonation should be refused.”

Reasons for decision on the condonation

[15] I feel compelled to remark that upon a reading of these papers both parties' representatives before me have not fulfilled its duty to a court; in either not complying with orders or raising irrelevant issues, i.e. whether a judge is complicit in irregularly enrolling a matter, or even in this matter before me, that there was something sinister in enrolling the matter for the date it was enrolled. It is also common cause that Absa is not being paid at all. The law is not a game and finality in this matter is paramount as summons was issued 14 years ago. The cause of action and the defences thereto are simple and can in the interests of justice be finalised forthwith. To utilise machinery designed to better administration of justice for ulterior purposes is frowned upon by this Court.

[16] The prayer seeking condonation is in the alternative and only “if so necessary.” This prayer can only be interpreted as showing a total disrespect of the order of Holland-Muter AJ. Even if the ruling granted *mero motu* is debatable, it stands and Absa decided not to proceed with an appeal. When the order stands condonation must be sought, not “if so necessary”, and it must be sought in terms of the Uniform Rules of Court and within the time limits set by the Court.

¹ 2002 ZACC 30; [1999] 2 BLLR 103 (LAC)

[17] This application for condonation is not brought without delay; it is brought 133 days after the date of the order on 12 April 2023. In the replying affidavit, that is also filed late, for the first time it is set out that new attorneys were appointed for Absa, they had to study the papers and were confused because the orders of Holland-Muter AJ and Modise AJ were in conflict. The counsel had to draft this replying affidavit and a request for clarification on a number of aspects delayed the completion of the affidavit.

[18] When seeking condonation for non-compliance with a Rule, let alone a court order, good cause must be shown. The Constitutional Court has found that the principle for considering an application for condonation is the “interests of justice.”² This includes, but is not limited to, the extent and cause of the delay, the effect of the delay on the administration of justice and the other litigants and the reasonableness of the explanation for the delay. The particular circumstances of each case determines the factors to consider.

[19] Condonation is not for the mere asking and sufficient and satisfactory facts must be set out to determine the application. Prejudice to both parties is an important factor to consider.

[20] In the founding affidavit not a single reason is set out as to why the application for condonation is outside the 15 day period ordered. Only in reply is reference made to the new attorneys and the problems with drafting the replying affidavit. It is quite clear that the amended notice to seek condonation for the delay in not bringing the application was an afterthought without the substantiating evidence for condonation in the founding affidavit. If Absa cannot overcome this hurdle condonation for the late filing of the declaration cannot be entertained.

² *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) at 75H-76C; *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC)

[21] This Court cannot sanction a party who has been ordered to apply for condonation within a certain time period to as an afterthought, with no founding affidavit, apply for condonation. Although the Rules are made for the Court and a Court has a wide discretion to grant condonation, this conduct cannot be sanctioned. The application for condonation for the late filing of the condonation application for the late filing of declaration on these papers is dismissed. Consequently the condonation for the late filing of the declaration cannot be entertained and no order is made.

Was the special plea struck by the order of Modise AJ?

I decide this matter as it can be decided separately.

[22] The order reads that the “defence is struck” and it is done in terms of Rule 30(2)(b) of the Uniform Rules of Court.

[23] When interpreting a court order the established principles as set out in *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304 is to ascertain the court’s intention from the language of the order as construed to the usual, well-known rules, and from reading the order, and the Court’s reasons as a whole. These principles were endorsed in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA) at para [13]. In *Eke v Parsons*³ this principle was confirmed.

[24] Upon a reading of the Court’s reasons for the order it is clear that the court was aware that the defence consisted of a plea and special plea. Paragraph 20 of the reasons reads as follows: “I will therefore refrain from dealing with the defence of the Respondents as it is contained in their special plea and plea filed off record.”

³ 2015 (11) BCLR 1319 (CC) at par 29

[25] A defence is an issue of law or fact that, if determined in favour of the defendant, will relieve the defendant of liability wholly or in part. A defence is put forward by a party to defeat a suit or action. This is done by means of a plea and or a special plea. A “defence” thus includes a plea and special plea. This construction is based on the usual, well-known rules of court.

[26] The language of the order is plainly that the defence is struck. From a reading of the reasons the Court saw the defence as the plea and special plea.

[27] I am satisfied that the Ndzibas’ plea and special plea was struck out.

Costs

[28] Although the applicant is substantially successful, it had abandoned some of the relief sought and added new prayers and I find it reasonable that each party pay its own costs.

Regulating the process

[29] It is in the interests of justice that this matter comes to finality. In terms of section 173 of the Constitution inherent powers are conferred on the High Court to regulate its own process when confronted with a problematic scenario facing a court at a particular time. This inherent power is restricted to procedural matters. To ensure finality in this matter, I make the following procedural rulings and order.

[30] The following order is made:

- 30.1 As the applicant is not proceeding with its request for default judgment no order is made pertaining thereto.

- 30.2 A new application for condonation of the late filing of the plaintiff's declaration is to be brought within 15 days.
- 30.3 It is declared that the plea and special plea of the defendants were struck.
- 30.4 If the condonation order is granted, the defendants must file a plea and/or special plea, if it so wishes, within 15 days of the condonation order granted.
- 30.5 Each party to pay their own costs.


S. POTTERILL
JUDGE OF THE HIGH COURT

CASE NO: 13189/2014

HEARD ON: 31 October 2024

FOR THE APPLICANT: ADV. M.P. VAN DER MERWE SC

INSTRUCTED BY: Tim du Toit Co. Inc.

FOR THE RESPONDENTS: ADV. M.M. NDZIBA

INSTRUCTED BY: GM Tjiane Attorneys Inc.

DATE OF JUDGMENT: 14 November 2024