

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
DATE 28/1/2025 SIGNATURE	

CASE NO: 2018/40287

In the matter between:

MORABE: MATEBOHO PRECIOUS

PLAINTIFF

and

EP SEFATSA ATTORNEYS

DEFENDANT

JUDGMENT

JW SCHOLTZ AJ:

1. This is an interlocutory application for condonation and an amendment in a professional negligence action instituted by the plaintiff against the defendant for damages as a result of an alleged breach of mandate by the defendant in that the defendant allegedly failed to prosecute a claim on behalf of the plaintiff against the Road Accident Fund ("RAF") arising from bodily injuries allegedly sustained in a motor vehicle collision that occurred on 22 April 2012.
2. The parties agreed to separate the issues of mandate and prescription in accordance with the provisions of Rule 33(4) of the Uniform Rules of Court from all the remaining issues in the pleadings. In their joint practice note dated 22 August 2023, the issues in dispute were formulated as follows:

- 2.1 whether an agreement of mandate was concluded between the plaintiff and the defendant in terms of which the defendant would prosecute a claim on behalf of the plaintiff against the RAF as result of injuries allegedly sustained in a motor vehicle collision;
- 2.2 if the court finds that such agreement of mandate was concluded whether the plaintiff's claim against the defendant for alleged breach of the agreement of mandate has prescribed.
- 2.3 At the commencement of hearing of the matter on 4 September 2023, the separation was accordingly ordered in terms of Rule 33(4). The pleadings that were the subject of the separation were the following:
 - 2.3.1 the amended particulars of claim: paragraphs 3 and 4;
 - 2.3.2 the defendant's plea: paragraphs 3 and 4 and only insofar as they relate to the issue of mandate;
 - 2.3.3 the amended special plea: paragraphs 1 to 9; and
 - 2.3.4 the replication to the special plea: paragraphs 1, 2 and 3.
3. The evidence in the matter was heard on 4, 5, 6 and 8 September and closing submissions were heard on 13 December 2023.
4. The plaintiff contends that the defendant breached its mandate in that it failed timeously to institute her claim against the RAF. The defendant disputes the mandate and contends that the claim ought to have been lodged by 22 April 2015, that summons ought to have been served on the RAF by 22 April 2017 and that as a result of the plaintiff's failure to do so, her claim against the RAF prescribed on 23 April 2017.
5. The plaintiff alleges that she first became aware of the alleged breach in December 2017, when the defendant informed her that her claim against the RAF had not been lodged and that her claim against the RAF had become prescribed.
6. The defendant raised a special plea of prescription. The defendant contends that:
 - 6.1 On 22 February 2013, Mr Sefatsa of the defendant advised the plaintiff that he would not proceed to lodge a claim on her behalf against the RAF without cover for the costs of having the plaintiff assessed by a medical practitioner for the purposes of completing a serious injury assessment form (RAF 4) since the

defendant was not satisfied that the plaintiff's injury would qualify as a serious injury as contemplated in the Road Accident Fund Act and Regulation 3(1) of the regulations promulgated thereunder.

6.2 Thus, as at 22 April 2015, when the claim ought to have been lodged with the RAF, the plaintiff had actual knowledge of the identity of the debtor and of the facts from which her debt against the defendant arose.

6.3 Prescription commenced to run from 22 April 2015. By the time the plaintiff served summons on the defendant on 12 June 2019, her claim had already prescribed in that more than three years had elapsed from the date when the plaintiff's debt arose against the defendant.

6.4 Alternatively, in the event that the court finds that the plaintiff did not have actual knowledge of the identity of the debtor and/or of the facts from which her debt against the defendant arose before 11 June 2016, the defendant contends that the plaintiff, by exercising reasonable care, could have acquired such knowledge as early as 22 February 2013 or by 22 April 2015 or at any time before 11 June 2016. Accordingly, it is contended, the plaintiff is deemed to have had knowledge of the identity of the debtor and of the facts from which the debt arose before 11 June 2016. In the circumstances, by the time the plaintiff served summons on the defendant on 12 June 2019, her claim against the defendant had prescribed.

7. The defendant bears the onus of proving that the claim has prescribed and the plaintiff has the duty to begin and bears the onus of proving the mandate.

8. There is no dispute that the plaintiff's claim against the defendant constitutes a debt and that the applicable period of prescription is three years. When the debt arose is in dispute. The plaintiff contends that the debt arose in December 2017 whereas the defendant contends that it arose on 22 February 2013 or 22 April 2015 or at any time before 11 June 2016.

9. In September 2020, the plaintiff filed a replication to the defendant's special plea, denying the allegations contained in the special plea and reaffirming her version as pleaded in her particulars of claim.

10. The matter proceeded to trial on the separated on issues 4, 5, 6 and 8 September 2023, when evidence was led by both parties. Written closing submissions were filed

subsequently and oral closing submissions were made in December 2023. During the oral closing submissions, the plaintiff for the first time indicated an intention to amend her replication in order to place reliance on the provisions of section 12(2) of the Prescription Act 68 of 1969. The new contention is that the defendant willfully prevented the plaintiff from coming to know of the existence of the debt. Section 12(2) of the Prescription Act provides that:

"If the debtor willfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt."

11. The plaintiff now seeks leave to amend. During closing submissions on 13 December 2023 the plaintiff uploaded a further reply to the defendant's special plea. The court directed that it be regarded as a notice of intention to amend and afforded the defendant an opportunity to respond thereto. The defendant timeously filed its notice of objection on 25 January 2024. Thereafter, the plaintiff had to file her application for leave to amend within 10 days (i.e. on or before 8 February 2024). She now applies for condonation for the late filing of the application for leave to amend and for an amendment to her replication.
12. In the plaintiff's replication to the defendant's special plea and plea dated 29 September 2020, she does not rely on section 12(2) of the Prescription Act as a defence to the special plea of prescription, despite the fact that the plaintiff knew of the plea of prescription from the date of filing thereof as well as the evidence that the defendant intended to rely on.
13. During the trial it was repeatedly put to the plaintiff's witnesses that if their versions were correct, the plaintiff would have alleged and pleaded willful prevention in terms of section 12(2) of the Prescription Act. However, there was no amendment to the plaintiff's replication before or during the defendant's witness's evidence in chief and cross-examination, and it was never alleged that Mr Sefatsa willfully prevented the plaintiff from becoming aware of the debt.
14. The defendant filed its written submissions on 22 September 2023 and for reasons that are not germane to this application, the plaintiff only filed her written submissions a month later, on 23 October 2023.

15. In paragraphs 29 and 30 of the defendant's written submissions, the following is stated:

"29 *If indeed the plaintiff contacted Sefatsa in 2015 and 2016 and Sefatsa informed her that all was still on track with her claim and that he would be arranging for her to be assessed by a medical practitioner as testified by Malele [the plaintiff's brother], it begs the question why the plaintiff did not plead that the defendant wilfully prevented her from knowing that the claim had not been lodged by 22 April 2015. This conduct would certainly meet the requirements of 12(2) of the Prescription Act.*

30 *The court must infer from the plaintiff's intentional election not to rely on a wilful prevention that the aforementioned version by Malele is improbable and ought to be rejected. Similarly, given the contradictions, the plaintiff's version that she called Sefatsa in March 2017 for the first time ought to be rejected as well. Once again, if this version is to be accepted, it would mean that the defendant wilfully prevented the plaintiff from coming to know that the claim had not been lodged, yet the plaintiff failed to plead such wilful prevention. In addition, both versions by the plaintiff are not reliable; rather than corroborate the plaintiff's version, Malele's version contradicted the plaintiff's version."*

16. At no time after the conclusion of evidence on 8 September until the filing of her written submission on 23 October 2023, did the plaintiff seek to amend her replication in order to rely on section 12(2) of the Prescription Act and she also did not do so after she filed her written submissions on 23 October 2023, until oral closing submissions on 13 December 2023.
17. During argument on 13 December 2023, Mr Smit on behalf of the plaintiff referred to the defendant's argument in its heads to the effect that the plaintiff should have pleaded wilful prevention. He submitted that it could not be said that prevention had been wilful, but that it could be said that the matter had been handled negligently. The plaintiff and Mr Malele laboured under the impression that all was in order and this impression had been created negligently.
18. After his initial submissions, the court asked Mr Smit to clarify the wilful prevention point and to confirm that it was not the plaintiff's case that there had been wilful prevention, but only negligence. Mr Smit replied that he could state that there was negligence and that the court must determine if there had been willfulness. He submitted that the court

could infer that it was willful because it would be submitted that the statements could only have been made without Mr Sefatsa's satisfying himself that they were true. Mr Smit argued that Mr Sefatsa just wanted to appease the plaintiff and Mr Malele and that all evidence pointed to the fact that the plaintiff and Mr Malele had been continuously misinformed.

19. At this juncture, Mr Smit indicated that he would move for an amendment to deal with the aspect of willful prevention and that the defendant would suffer no prejudice as result of such amendment.
20. Ms Segeels-Ncube on behalf of the defendant strenuously objected to the amendment as not being properly before the court. She pointed out that if there had been willful prevention, it would have been pleaded in the replication and that she would have put it to both witnesses for the plaintiff. She argued correctly that there was no concept of negligent prevention in the Prescription Act, and that only willful prevention, if pleaded and proved, would absolve the plaintiff.
21. In reply, Mr Smit for the plaintiff moved an amendment to the replication from the bar and at the same time uploaded a document headed "Plaintiff's reply to the defendant's special plea" on CaseLines at 002-26 to 002-27. This purported amendment read as follows:

"1. The defendant willfully prevented the plaintiff from coming to know of the existence of the debt by misrepresenting to the plaintiff and/or Mr Malele that the defendant had taken all the necessary steps in order to prosecute the plaintiff's claim and by persisting with this misrepresentation until or about December 2017.

Wherefore prescription commenced to run at the earliest from December 2017."

22. Ms Segeels-Ncube quite correctly pointed out that there could be no amendment until there had been a notice of amendment and if the plaintiff wanted to bring a late amendment, she had to do so properly. She described the purported amendment as *"an ambush in the clearest form"*, as willful prevention had not been pleaded and it was not a case that the defendant had to meet.
23. Both parties agreed (correctly) that in terms of Rule 28(10), the court might at any stage before judgment grant leave to amend any pleading or document on such terms to costs

or other matters as it deems fit. However, Ms Segeels-Ncube stressed that any amendment had to comply with Rule 28.

24. The court directed that the document uploaded by the plaintiff at 002-26 and 002-27 on CaseLines was to be regarded as a notice of intention to amend and not an amendment *per se*. The defendant was given leave to respond to the proposed amendment within ten (10) days from 13 December 2023, excluding the *dies non*, after which the matter would be dealt with in terms of provisions of Rule 28. The matter was postponed to a day to be arranged and costs were reserved.
25. The defendant filed its notice of objection in terms of Rule 28(3) timeously on 25 January 2024. This meant that if the plaintiff wished to amend her replication, she was required, within ten (10) days, to lodge an application for leave to amend. It is common cause that the last date for lodgement of this application was 8 February 2024. The plaintiff did not lodge an application for leave to amend on 8 February 2024 or in the days subsequent thereto. Accordingly, I instructed my secretary on 27 February 2024 to write to the parties in the following terms:

"The Court notes that subsequent to delivery of the defendant's objection in terms of Rule 28(3), the plaintiff did not lodge an application for leave to amend in terms of Rule 28(4).

The court will now hear further submissions, if any, by way of a virtual hearing. ... The parties are requested to ascertain their joint availability... and revert to Mr Senoko."

26. On 29 February 2024, Mr Smit, counsel for the plaintiff, advised that:

"It is my instruction to apply for condonation for the late filing of an application for leave to amend. The application will be filed by no later than Monday, 4 March 2024."

27. The plaintiff indeed filed an application for condonation and leave to amend on 4 March 2024.
28. The defendant filed an answering affidavit on 10 April 2024.
29. The plaintiff did not file a replying affidavit, nor did she as *dominus litis*, take any further steps to advance the application. In order to prevent further delay in progressing this matter, the court took further steps, through the office of the Registrar of the Deputy

Judge President, to set the application down for hearing. For a variety of reasons, including the availability of all concerned, the earliest opportunity for a hearing during recess was 10 December 2024, almost a year after hearing closing submissions.

30. Sub-rule 27(3) provides that a court may *"on good cause shown"* condone non-compliance with the rules.

31. Van Loggerenberg¹ states that:

"This gives the court a wide discretion which must in principle be exercised with regard also to the merits of the matter seen as a whole. ...

The graver the consequences which have already resulted from the omission, the more difficult it will be to obtain the indulgence. There may also be an interdependence of, on the one hand, the reasons for and the extent of the omission and, on the other hand, the merits of the case. The courts have consistently refrained from attempting to formulate an exhaustive definition of what constitutes "good cause", because to do so would hamper unnecessarily the exercise of the discretion."

32. In *Grootboom v National Prosecuting Authority*² the Constitutional Court said the following:

*"It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default."*³

...

In many instances, very flimsy explanations are proffered. In others, there is no explanation at all. The prejudice caused to the court is self-evident. A message

¹ *Erasmus Superior Court Practice*, second edition ("Van Loggerenberg"), at pages D1 Rule 27-2 and D1 Rule 27-3 and the cases cited in footnotes 14 and 5

² 2014 (2) SA 68 (CC)

³ at paragraph [23], p76 C-D

must be sent to litigants that the rules and the court's directions cannot be disregarded within impunity."⁴

33. Van Loggerenberg⁵ states that one of the principal requirements for the favourable exercise of a court's discretion is

*"... that the applicant should file an affidavit satisfactorily explaining the delay. In this regard, it has been held that the defendant must at least furnish an explanation of his default sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motives. A full and reasonable explanation which covers the entire period of delay must be given*⁶*. If there has been a long delay, the court should require the party in default to satisfy the court that the relief sought should be granted, especially in a case where the applicant is the dominus litis. It is not sufficient for the applicant to show that condonation will not result in prejudice to the other party. An applicant for relief must show good cause; the question of prejudice does not arise if it is unable to do so."*⁷

34. Most authorities also lay down the requirement that the granted indulgence must not prejudice the other party in any way that cannot be compensated for by a suitable order as to postponement and costs.⁸
35. A litigant who asks for an indulgence should act with reasonable promptitude. She must be scrupulously accurate in her statement to the court and other neglectful acts in the history of the case are relevant to show her attitude and motives.⁹
36. In *Grootboom v National Prosecuting Authority*¹⁰, the Constitutional Court held that the standard for considering an application for condonation is the interests of justice. The court stated the following:

"However, the concept 'interests of justice' is so elastic that it is not capable of precise definition... It includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other

⁴ at paragraph [34], p79 A-B

⁵ at p D1 Rule 27- 4

⁶ *Van Wyk v Unitas Hospital*, 2008 (2) SA 472 (CC) at par [22], p477 E-F

⁷ *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd*, 2000 (3) SA 87 (W) at paragraphs [12] and [15], pp93 E-H and 95 D-F

⁸ Van Loggerenberg p D Rule 27 – 5 and authorities there cited

⁹ *Duncan t/a San Sales v Herbor Investments (Pty) Ltd*, 1974 (2) SA 214 [T] at 216 E to H

¹⁰ loc cit at paragraph [22], 76 A-C per Bosiello AJ.

litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised...; and the prospects of success.

It is crucial to reiterate that ... the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant."

37. The court also stated that:

*"The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example where the delays are unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition, the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as what is in the interests of justice."*¹¹

38. It has also been held by the Appellate Division (as it then was) that an applicant should, whenever he realises that he has not complied with a rule of court, apply for condonation without delay¹².

39. Van Loggerenberg submits that an application to amend as contemplated in rule 28(4) should comply with the relevant provisions of rule 6 and cannot be made orally from the bar.¹³ This was also the attitude of the defendant's counsel in this matter and one with which the court agrees. To the extent therefore, that the plaintiff's counsel purported to make an application for amendment from the bar on 13 December 2023, this was not competent. However, in order to expedite matters and to accommodate and be fair to both parties, I made an order converting (for want of a better word) the purported amendment uploaded on CaseLines on that day and during argument into a notice of intention to amend and directed that it be regarded as such, while at the same time

¹¹ per Zondo J (as he then was) at paragraph [51], 83 G-H

¹² *Commissioner for Inland Revenue v Burger*, 1956 (4) SA 446 (A) at 449 G - H

¹³ at p D1 Rule 28 -2

affording the defendant ample opportunity to respond thereto and directing that thereafter the matter be dealt with according to the provisions of Rule 28. This amounted to an indulgence to the plaintiff.

40. In *Vinpro NPC v President of Republic of South Africa*¹⁴, the full court held as follows:

"On this score, it is trite law: that a court is vested with a discretion as to whether to grant or refuse an amendment; that an amendment cannot be granted for the mere asking thereof; that some explanation must be offered therefor; that this explanation must be in the founding affidavit filed in support of the amendment application; that if the amendment is not sought timeously, some reason must be given for the delay; that the parties seeking the amendment must show prima facie that the amendment has something deserving of consideration; that the party seeking the amendment must not be mala fide; that the amendment must not be the cause of an injustice to the other side which cannot be compensated by costs; that the amendment should not be refused simply to punish the applicant for neglect and that mere loss of time is no reason, in itself, for refusing the application."

41. In *Moolman v Estate Moolman*¹⁵, the court held that:

"[T]he practical rule adopted seems to be that an amendment will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed."

42. Van Loggerenberg¹⁶ states that there may however be cases where no terms would overcome the prejudice which the amendment would cause to the other party, citing as an example that an amendment would not be allowed where it is applied at such a late stage in the proceedings and not timeously raised to enable proper investigation and response thereto.

¹⁴ Unreported Western Cape Division judgment, WCC case no 1741/2021 at paragraph [25]

¹⁵ 1927 CPD 27 at 29.

¹⁶ Page D1 Rule 28-8 and footnote 8 and the authorities there cited.

43. There is ample authority for the rule that the onus rests on the party seeking the amendment to establish that the other party will not be prejudiced by it.¹⁷
44. In *Minister van die SA Polisie v Kraatz*¹⁸ and *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd*¹⁹, the Appellate Division (as it then was) stressed that a litigant who seeks to add new grounds of relief at the eleventh hour does not claim such an amendment as a matter of right but rather seeks an indulgence. The applicant has to prove that he did not delay the application after he became aware of the material upon which he proposes to rely. He must explain the reason for the amendment and show *prima facie* that he has something deserving of consideration; a so-called triable issue.²⁰
45. In *Ciba-Geigy (Pty) Limited v Lushof Farms*²¹, the Appellate Division held that the greater the disruption caused by the amendment the greater the indulgence sought, and accordingly the burden upon the applicant to convince the court to accommodate him. In that case, the cases of both defendants had already been closed. They would have had to reopen their cases and recall witnesses to address the new allegations. The Appellate Division accordingly found that they would suffer serious prejudice and upheld the trial court's refusal of the amendment. The similarities with the present application are obvious.
46. In his submissions, Mr Smit on behalf of the plaintiff argued that the delay in bringing the application for amendment was not inordinate as it had been filed less than a month from the due date (being 8 February 2024). He further submitted that there were valid reasons for the delay, although each and every day could not be accounted for. He argued that the delay was very short and that the prospects of success were very good.
47. He further argued that the most important point was that the defendant's version was that the conversations that constituted the alleged wilful prevention did not take place and that therefore the defendant's counsel could not ask any more questions regarding conversations that did not take place. In her submissions, Ms Segeels-Ncube for the defendant said that the difficulty with the plaintiff's condonation application was that the

¹⁷ Van Loggerenberg page D1 Rule 28-9 and the authorities cited in footnote 1 on that page

¹⁸ 1973 (3) SA 490 (A) at 512 E - H

¹⁹ 1978 (1) SA 914 (A) at 928 D

²⁰ *Trans-Drakensberg Bank Limited (under judicial management) v Combined Engineering (Pty) Limited* 1967 (3) SA 632 (D) 641 A

²¹ 2002 (2) SA 447 (SCA) at 464 E

devil in the detail had been avoided and that this was not a case where the court's discretion should be exercised in favour of the plaintiff.

48. She pointed out that there were three key factors to be considered in determining the application for condonation namely: first, the extent and cause of the delay; second, the explanation for the delay; and third, the prospects of success, meaning not only the prospects of success in the main action but also, crucially, in the application for amendment. The court agrees with this analysis.
49. Referring to paragraph [23] of the *Grootboom* judgment, it was argued that the conduct of the applicant had to be reasonable enough to excuse the default. The explanation of the applicant was not reasonable because it only started on the day that the application for amendment was due. There was no explanation as to why it was not filed on that day, nor is there any explanation as to what happened before. The court needs to hear what the plaintiff did to comply or attempt to comply with the deadline first, and only then what caused her inability to do so. The applicant only deals with what happened afterwards.
50. The applicant must deal with the prospects of success of the application for leave to amend and this was nowhere dealt with. The applicant must also explain why the amendment was brought so late, particularly in the circumstances of the case, when the issue of wilful prevention had been flagged numerous times. The plaintiff must fully explain the delay in bringing the amendment, as in the absence of that it smacks of an ambush. The applicant simply says that the amendment is brought to bring it in line with evidence, but this is not so. It was repeatedly put to the plaintiff's witnesses that if their version was correct, they would have pleaded wilful prevention upfront. It was not about Mr Sefatsa's version that the conversations never happened; it was about the veracity of the plaintiff's version. Mr Sefatsa had never been told that he had to meet a case of wilful prevention. If the plaintiff had pleaded wilful prevention before the trial, the defendant would have interrogated wilful prevention and what constitutes wilful prevention, Ms Segeels-Ncube argued.
51. She further argued that the applicant had not dealt with prejudice, on which she bears the onus. She pointed out that there was also prejudice to the court. As regards prejudice, the following is stated in paragraph 11.4 of the respondent's answering affidavit at 020-28:

51.1 *"The suggestion that the respondent has not suffered prejudice is incorrect. Not only was the respondent entitled to finality of this matter, but it was also entitled to assume that the applicant had no intention to pursue the leave to amend. This has caused further delay in a long line of delays caused by the applicant. The mere fact that the applicant brought the proposed amendment on the day when closing argument was heard, shows the prejudice suffered by the respondent. The applicant does not address this at all."*

52. In paragraph 12.6 of the respondent's answering affidavit at 020-29 - 020-30, the following is stated:

"If the amendment had been made timeously and the applicant relied on wilful prevention, the respondent would have extensively cross-examined the applicant's witnesses on the veracity of their versions and whether those versions demonstrate wilful prevention. The respondent would also have spent a fair amount of time in examination in chief of its own witness to demonstrate that there was no wilful prevention. The applicant's failure to amend timeously has deprived the respondent of this opportunity. To allow the amendment would not result in the full ventilation of the issues, it would only assist the applicant to close a gap she did not appreciate until closing argument. This would severely and irretrievably prejudice the respondent. The respondent is entitled to know the case it has to meet timeously in order to prepare its defence accordingly."

53. The plaintiff did not file a replying affidavit and did not address these clearly articulated points of prejudice.

54. Ms Segeels-Ncube argued that there was no prejudice to the plaintiff because on the plaintiff's own version, she had led all the evidence she wanted to lead. This was not a case where the plaintiff was non-suited.

55. She also argued that there was no proper explanation of the late amendment. The applicant only says it is to bring it in line with its evidence. However, the cases make it clear that the party seeking amendment must say why it is late and why it did not bring the amendment earlier.

56. It was further argued that the proposed amendment, if granted, would result in reopening of the case where the plaintiff has failed to explain to the court why it should come to her aid at such a late stage.

57. Referring to the *Ciba-Geigi* case, it was argued that the greater the disruption caused by the amendment as in the present case, the greater the indulgence sought, and hence the burden upon the applicant to convince the court to accommodate her. The plaintiff has not met this burden, it was argued.
58. In reply, Mr Smit said that if the amendment were to be granted, the case need not be reopened. He said the amendment was "merely a question of housekeeping" for the plaintiff to bring the case in line with the evidence led. However, the plaintiff's grounds of prejudice are not addressed *seriatim* or at all.
59. The first difficulty that the applicant faces in this application is providing a full and proper explanation for her failure to comply with the directions of the court and the time limits imposed by Rule 28. As the Constitutional court pointed out in *Grootboom*, it is of great importance that the explanation must be reasonable enough to excuse the default. In the present case, the founding affidavit states nothing about the steps taken by the applicant to submit a proper application for leave to amend by the expiry date of 8 February 2024.
60. Mr Jordaan (the plaintiff's attorney who deposed to the affidavit in support of the application) states that he developed back pain on that day and then provides doctor's certificates that attest to his incapacity to work on a number of days during the period spanning from that day to 4 March 2024, when the application for amendment was eventually filed. What the court finds of significance is that Mr Jordaan or a member of his office did not inform the defendant or the court on or before 8 February 2024 of the fact that the applicant would be unable to file an application timeously. There was also no attempt to approach the respondent for an extension. What is also significant is that during the period in question, it appears that Mr Jordaan was well enough to attend to other matters and that there are days when his unavailability or inaction is unexplained and unaccounted for. He has not been "scrupulously accurate" in his explanation to the court. The conclusion seems inescapable that, had it not been for the Court's email of 27 February 2024 pointing out that the applicant had not filed an application for leave to amend, the matter would have been delayed even further. The law provides that an applicant should whenever he realises that he has not complied with a rule of court, apply for condonation without delay. This has not happened in the present case, because even when the court brought to his attention that the application had not been brought, he did not deal with it immediately. Mr Smit only replied on 29 February 2024 that he had been instructed to bring an application for condonation and this application was only filed on 4 March 2024. The law is clear that an applicant for condonation must

furnish an explanation sufficiently full to enable the court to understand how it really came about and to assess his conduct and motives. A full and reasonable explanation which covers the entire period of delay must be given.²² This has not been forthcoming in the present application.

61. That being the case, it needs to be considered whether there are other factors which, taken as a whole, would render it in the interests of justice to grant condonation. In this regard, the prospects of success not only in the main matter but also in the application for amendment, assumes even more of importance. In this respect, the facts and arguments which the applicant placed before the court are scant. They largely amount to assertions that there would be no prejudice to the respondent. So for example in paragraph 23 at 020-10 of Mr Jordaan's affidavit, he simply states that:

"In its objection, the defendant does not state what its prejudice would be if the amendment is allowed. I humbly submit that there is none."

62. This bald assertion was repeated by Mr Smit during closing submissions on 13 December 2023 and during the argument in the current application on 10 December 2024.
63. By contrast, the respondent sets out in some detail in its answering affidavit in this application why it would suffer prejudice. These reasons are elaborated upon in the defendant's heads of argument and were further expanded on in argument on 10 December 2024.
64. The applicant did not file a replying affidavit to address these concerns. In the applicant's heads of argument, the question of prospects of success and prejudice are also dealt with very cursorily. It is merely said in paragraph 8 of her heads of argument that the plaintiff's prospects of success in the action are patent from the founding affidavit and the evidence led at the trial. The prospects of success of the amendment are not dealt with, except in paragraph 9, where it is said that in respect of the question of prejudice, *"the defendant suffers none, whereas the plaintiff will suffer greatly if the condonation is not granted since this case is of the utmost importance to her financial future"*. The applicant is generally dismissive of the prejudice that the defendant will suffer as a result of the very late amendment sought and never addresses with any granularity the concerns enumerated by the defendant head-on, except to say that the case need not be reopened because it was *"merely a question of housekeeping for the*

²² *Van Wyk v Unitas Hospital*, paragraph [23] 477 E-F

plaintiff to bring the case in line with the evidence led". This response is, with respect, glib and insufficient to discharge the burden which the plaintiff has, to show that granting of the indulgence sought will not prejudice the defendant in any way that cannot be compensated for by a suitable order as to postponement and costs.

65. Considered holistically and making a value judgment based on the full conspectus of the pertinent facts, taking all factors into account and having particular regard to the warnings expressed in the case law referred to, to the effect that condonation is not for the mere asking, that sufficient cause must be shown and that flimsy explanations will not be countenanced, I have come to the conclusion that it would not be in the interests of justice to grant condonation.
66. As regards costs, the law is clear that the granting of an amendment is an indulgence which entails that the party seeking the amendment is generally liable for all the costs occasioned by or wasted as a result of the amendment. Such costs have often been held to include the costs of such opposition as is reasonable in the circumstances and not vexatious or frivolous. The court has an unfettered discretion as regards the award of costs and its exercise is essentially a matter of fairness to both sides²³.
67. In the result, the following order is made:

The application for condonation and hence the application for amendment are dismissed with costs, such costs to be taxed on scale B.


JW SCHOLTZ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the Parties' legal representatives by email and by being uploaded to CaseLines. The date of this judgment is deemed to be 28 January 2025

²³ *Hart v Broadacres Investments Limited*, 1978 (2) SA 47 (N) at 51D and G

Appearances:

Appearance for Applicant : Mr DJ Smit
Instructed by: Leon JJ van Rensburg
Applicant's attorneys, Edenvale

Appearance for Respondent: Adv L Segeels-Ncube
Instructed by: Eversheds Sutherland (SA) Inc, Johannesburg

Date of hearing: 10 December 2024
Date of Judgment: 28 January 2025