

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 21/14457

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

In the matter between:

**MEMBER OF THE EXECUTIVE COUNCIL FOR HUMAN
SETTLEMENTS, GAUTENG**

Applicant

and

KATEKANI INVESTMENT

Respondent

JUDGMENT

CORNELISSEN, AJ

Introduction

- [1] This is an application to uplift a bar and condone the late delivery of a plea.
- [2] On 25 March 2021, the respondent served a summons for damages flowing from the termination of a contract. In response, the applicant delivered a notice of intention to defend on 22 April 2021.
- [3] Under rule 22(1) of the Uniform Rules of Court, the applicant was required to deliver his plea (with or without a claim in reconvention), or an exception (with or without an application to strike out) within 20 days after he delivered his notice of intention to defend.
- [4] Regard being had to the intervening public holidays, the applicant's plea or exception was due on 21 May 2021.
- [5] It is common cause that the applicant did not deliver a plea or an exception, and that the respondent thereafter served a notice of bar on 21 May 2021, demanding that the applicant plead within five days, failing which, he would be ipso facto barred from doing so.
- [6] The applicant did not deliver his plea or exception and was thus, as at 28 May 2021, barred from pleading.
- [7] According to the applicant's state attorney, Rudzani Nemaconde, senior counsel had advised during consultation that it was not necessary to deliver a plea, but that the appropriate step was to lodge an interlocutory application to stay the action based on the arbitration clause contained in the contract concluded between the parties (the stay application).

[8] The stay application was served on the respondent on 28 May 2021¹; was eventually argued before Badenhorst AJ on 29 August 2023 and was dismissed with costs on 1 September 2023.

[9] Approximately four months after the stay application was dismissed, the applicant attempted to serve his plea. He was reminded by the respondent that a bar was in place, and as a result, launched the present application on 5 February 2024.

[10] In this application, the applicant seeks the following the relief:

- a. uplifting the bar placed on him in the main action;
- b. condoning his failure to deliver his plea in the main action, within the time frame stipulated in rule 22(1) of the Uniform Rules of Court;
- c. directing him to serve and file his plea within five court days from the date of granting of an order; and
- d. costs of the application, in the event it is opposed by the respondent.

Upliftment of the Bar

[11] Rule 27 of the Uniform Rules of Court deals with extensions of time, removals of bar and condonation.

[12] Under rule 27(1) read with rule 27(2) of the Uniform Rules of Court, in the absence of an agreement between the parties, the court may, upon application on notice and on good cause shown, make an order extending or abridging any

¹ This is the same day on which the applicant's plea was due.

time prescribed, and upon ordering such extension, may make such order as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed, whether those results flow from any terms of an order or from the Uniform Rules of Court.

[13] In *Smith NO v Brummer NO and another, Smith NO v Brummer*², Brink J observed that an application for a removal of a bar ought to be granted where:

- a. the applicant has given a reasonable explanation for his delay;
- b. the application is bona fide and not made with the object of delaying the opposite party's claim;
- c. there has not been a reckless or intentional disregard of the rules of court;
- d. the applicant's action or defence is not ill-founded; and
- e. any procedural prejudice caused to the opposite party can be compensated for by an appropriate order as to costs.

[14] I consider these factors in turn.

A reasonable explanation for the delay

[15] An explanation is reasonable if an applicant shows that his default was neither wilful nor due to gross negligence on his part.³

² [1954] 3 All SA 124 (O) at 358A. Also reported as *Smith v Brummer*, *Smith v Brummer* 1954 (3) SA 352 (O).

³ *Kajee and others v Investment and Finance Corporation (Pty) Ltd* [1962] 1 All SA 296 (D); 1962 (1) SA 575 (D).

- [16] Though the applicant was required to deliver his plea by 28 May 2021, he only attempted to do on 8 January 2024. That is a substantial delay.
- [17] A reading of the papers indicates that a major cause of the delay was the applicant's pursuit of his ill-fated stay application. That application was served on 28 May 2021, but was only heard more than two years later, on 23 August 2023.
- [18] The two year lapse appears to be as a result of a) the late delivery of the respondent's answering affidavit on 3 November 2021 and b) the applicant's failure to timeously deliver his heads of argument and practice note.⁴
- [19] According to Mr NemaKonde, upon receipt of the judgment by Badenhorst AJ, he immediately sent it to the relevant officials of the applicant's department for further instructions. These instructions were evidently not forthcoming since no further steps were taken by the applicant until the respondent delivered an application for default judgment on 3 November 2023 (the default judgment application).
- [20] The default judgment application undoubtedly spurred the applicant into acting and a fresh consultation with new counsel took place on 13 November 2023, with a follow up on 23 November 2023. These consultations resulted in the plea being prepared in December 2023 and delivered on 8 January 2024.
- [21] It seems as though none of the applicant's officials or legal representatives had regard to the notice of bar when these consultations took place and/or the plea was prepared.

⁴ The applicant had to be compelled to deliver his heads of argument and practice note by way of a separate interlocutory application, which was heard on 18 January 2023.

[22] It was only when the respondent informed the applicant that he was in fact barred from pleading, that he brought the application to uplift the bar on 5 February 2024.

[23] As I have indicated above, there is a substantial delay between the applicant being barred from pleading in May 2021 and the misguided delivery of his plea in January 2024.

[24] It is apparent to me from the explanation provided by Mr NemaKonde, as well as the facts placed before me by the respondent, that there were several instances where the applicant could, and should have acted with more haste to ensure that the matter reaches finality, but did not do so.

[25] However, the applicant has, for the most part, explained his delay – a significant cause of which was his pursuit of the ill-fated stay application. In this regard, I am aware that the applicant was acting on advice from senior counsel, for which he cannot be faulted.

[26] It is for this reason that I cannot regard the applicant's delay as either wilful or grossly negligent.

[27] I am accordingly satisfied that the applicant has provided a reasonable explanation for his delay in pleading.

The application is bona fide and is not made with the object of delaying the opposite party's claim

[28] The primary purpose of uplifting the bar is to provide the applicant with an opportunity of placing his defence before the Court who is to determine the respondent's damages claim.

[29] As I deal with in greater detail below, the applicant's defence appears to be that the respondent's poor performance entitled him to terminate the contract.

[30] According to the applicant, the respondent had not completed its scope of works at termination, notwithstanding the fact that the contract had been extended more than once.

[31] Whether the applicant has a valid defence in refuting the respondent's damages claim, or, whether the respondent is contractually entitled to such damages, are issues which require proper ventilation. Such ventilation may however be impeded if the Court is limited to the evidence and version put up by the respondent only.

[32] I am aware that a plea already been prepared, and thus, all that the applicant seeks is an opportunity of placing that plea before the Court who is to decide the respondent's damages claim.

[33] For those reasons, I find that the applicant's intention in bringing the application to uplift the bar is bona fide and is not intended to frustrate the respondent's claim.

There has not been a reckless or intentional disregard of the Uniform Rules of Court

[34] There was no evidence before me that the applicant had intentionally or recklessly disregarded the Uniform Rules of Court.

[35] Rather, the applicant had timeously delivered his notice of intention to defend and was advised against pleading, in favour of the stay application. The applicant had also brought this application within weeks of being reminded of the notice of bar.

[36] That is neither an intentional nor a reckless disregard of the Uniform Rules of Court.

The applicant's defence is not ill-founded

[37] As I had indicated above, the applicant alleges that the respondent had performed poorly under the contract. Having been contracted to construct 200 houses under the Reconstruction and Development Programme ("RDP") in November 2017, and notwithstanding several extensions to the contract, the respondent had not constructed the 200 houses when the contract was terminated in September 2019.

[38] Though I need not determine the veracity of the respondent's damages claim, or the applicant's defence against that claim, I cannot find that the applicant's defence is ill-founded for the reasons more fully explained in relation to the applicant's prospects of success.

An appropriate costs order

[39] I discuss costs more fully below, but it suffices to note here that any procedural prejudice caused to the respondent, may be compensated by way of an appropriate costs order.

[40] I am accordingly satisfied that the applicant has met the requirements set out in *Brummer*, and that he has made out a proper case for the bar to be uplifted.

Condonation

[41] In addition to uplifting the bar, the applicant seeks an order condoning his failure to deliver his plea within the time period stipulated under rule 22 (1) of the Uniform Rules of Court.

[42] In terms of rule 27(3) of the Uniform Rules of Court, the Court may, on good cause shown, condone any non-compliance with the Uniform Rules of Court.⁵

[43] What is to be proved in order to show good or sufficient cause, was set out in *Melane v Santam Insurance Co Ltd*⁶, 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 importance of the case. Ordinarily these facts interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course if there are no prospects of success there

⁵ Good cause is also termed “sufficient cause”.

⁶ [1962] 4 All SA 442 (A); 1962 (4) SA 531 (A).

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 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."

[44] In taking an objective conspectus of all the facts for condonation, I am particularly called upon to focus on whether the applicant's lateness in pleading is compensated by his prospects of success in the main action. However, I have already dealt with the issue of delay or lateness, and thus confine my focus to the applicant's prospects of success in the main action.

The applicant's prospects of success in the main action

[45] The main action is premised on a damages claim flowing from the contract concluded between the parties on 24 November 2017.

[46] In terms of that contract, the respondent undertook to construct 200 top structures, referred to as "RDP houses" or "low cost housing", in Soshanguve South Extension 1, 2 and 3, within a twelve month period.

[47] According to the applicant, the respondent had dismally failed to construct the required number of quality assured houses and by 24 October 2018 (more than a year after the contract was concluded), the respondent had only built ten houses.

- [48] The contract was extended several times and the final date for the completion and delivery of all two hundred houses was 30 September 2019.
- [49] The applicant did not complete the two hundred houses by 30 September 2019 and according to Mr Ronald Maguga, the Chief Construction Project Manager: Northern Cluster, the houses actually built by the respondent were poorly constructed. In addition, the respondent did not complete two quality assured show houses.
- [50] The applicant accordingly made the decision not to extend the contract for a further period and the contract was effectively terminated.
- [51] The applicant's principal defence against the respondent's damages claim appears to be that the contract was lawfully terminated as a result of the respondent's poor performance and non-compliance with its contractual obligations.
- [52] In response, the respondent avers that there was a three month delay to the start of the project and that the applicant had delayed payments to it, which in turn delayed its ability to perform under the contract.
- [53] Unfortunately, the respondent has not addressed the most pertinent allegation, which is that it had not completed the construction of the 200 houses by 30 September 2019 as it was contractually obligated to do.
- [54] Though the respondent denies the allegation that it had performed poorly under the contract, no other information or facts was put up by the respondent in support of this denial.

[55] I need not make a determination on whether the respondent has properly performed under the contract, but I do need to consider whether the applicant has strong prospects of success in the main action.

[56] In neutralising the strength of those prospects, it would have been helpful if the respondent had taken this Court into its confidence on what had actually transpired in relation to its performance under the contract and more importantly, whether it has complied with its contractual obligations.

[57] The scarcity of information by the respondent relating its performance under the contract, makes it difficult to negate the strength of the applicant's prospects of success in the main action.

[58] In addition, and as I have dealt with above, the applicant has reasonably explained the lateness of his plea.

[59] In the circumstances, the applicant's reasonable explanation and strong prospects of success in the main action, are sufficient to show good cause and condone his non-compliance with rule 22(1) of the Uniform Rules of Court.

Costs

[60] It was conceded by the applicant's counsel during the hearing that the applicant should be liable for the costs of the application.

[61] This is in line with the general rule that an applicant who seeks an indulgence, should be responsible for all of the wasted costs incurred as a result of the

application in respect of which that indulgence is sought.⁷ These costs include the costs of reasonable opposition.⁸

[62] The respondent's opposition to the application was justifiable, given the lengthy delay in these proceedings.

[63] I accordingly see no reason why the applicant should not be liable for the costs of the application.

[64] For these reasons, I make the following order:

- a. The bar placed on the applicant in terms of the notice of bar, dated 21 May 2021, is hereby uplifted.
- b. The applicant's non-compliance with rule 22(1) of the Uniform Rules of Court, is condoned.
- c. The applicant is ordered to deliver his plea within 5 (five) days from the date of this order.
- d. The applicant is to pay the costs of the application.



CORNELISSEN AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

⁷ See, *Gool v Policansky* 1939 CPD 386 at 391 and the cases quoted in that judgment.

⁸ *Myers v Abramson* [1951] 3 All SA 82 (C); 1951 (3) SA 438 (C) at 455G

For the Applicant:

L Montsho-Moloiwane SC

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For the Respondent:

N Baloyi

Instructed by Baloyi Katlego Attorneys

Date of Hearing:

11 November 2024

Date of Judgment:

03 February 2025