



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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 21 February 2025

Case No. 34899/2018

In the matter between:

ELEGANT LINE TRADING 898 CC

First Applicant

GERHARD PRETORIUS

Second Applicant

and

COURTNEY ROOFING (PTY) LTD

Respondent

In re:

COURTNEY ROOFING (PTY) LTD

Plaintiff

and

ELEGANT LINE TRADING 898 CC

First Defendant

GERHARD PRETORIUS

Second Defendant

JUDGMENT

D'OLIVEIRA AJ:

- 1 The first and second applicants are the first and second defendants, respectively, in an action that was instituted against them by the respondent on 23 September 2018. I will hereafter refer to the parties as in the action.
- 2 In the combined summons, the plaintiff claims R2 392 779.51 plus *mora* interest from the first defendant under a construction agreement for work done and material supplied on three projects during 2016 and 2017. The plaintiff claims the same amount from the second defendant in terms of a suretyship agreement that is incorporated into the construction agreement.
- 3 The defendants delivered a notice of intention to defend on 11 October 2018. They subsequently filed an affidavit resisting summary judgment on 13 November 2018, after the plaintiff had applied for summary judgment.
- 4 After the filing of the affidavit resisting summary judgment, the plaintiff elected not to proceed with the application for summary judgment. Instead, it called upon the defendants to deliver their plea.
- 5 When the defendants failed to do so timeously, the plaintiff delivered a notice of bar on 14 December 2018.
- 6 On 21 January 2019, instead delivering an exception or a plea, the defendants delivered a notice to remove cause of complaint in terms of Rule 23(1). Because a notice to remove cause of complaint in terms of Rule 23(1) is not a pleading that interrupts the *dies induciae* for a notice of bar, the plaintiff responded by delivering a notice of irregular step in terms of Rule 30.

7 Opposed interlocutory proceedings then followed which culminated in this court, per Acting Justice Malungana, granting an order on 17 April 2023 (*“the Order”*) in *inter alia* the following terms:

“1. ...

2. ...

3. *The First and Second Respondents’ Uniform Rule of Court 23(1) Notice dated 23 January 2019, is hereby set aside as constituting an Irregular Proceeding.*

4. ...

5. *The First and Second Respondents are afforded until 13h00 on 08 May 2023, to serve, file and electronically upload their application for condonation and for their launching of an application to uplift the Applicant’s Notice of Bar (‘the forthcoming application’).*

6. *In the event of the Respondents failing to comply with paragraph 5 hereof, then and in such event, the Applicant will be entitled to enrol the main action and to apply for default judgment in the main action, together with interest and legal costs.*

7. *The First and Second Respondents are ipso facto barred from entering a Plea in the Main Action, unless and until they procure an order:*

7.1. *granting both Respondents condonation for the forthcoming application whereby the First and Second Respondents wish*

*to have the Notice of Bar against them, belatedly uplifted;
and*

*7.2. granting both Respondents relief to the extent of this
Honourable Court uplifting the Notice of Bar, after
determining the forthcoming application.*

8. ...”

8 The application I must determine is the application that was envisaged in paragraphs 5 and 7 of the Order.

9 The defendants launched the application on 8 May 2023.

10 The application is opposed by the plaintiff.

11 The plaintiff contends, *in limine*, that the application should be dismissed because of the failure by the defendants to comply with the Order. In particular, the plaintiff contends that the Order imposes a double obligation on the defendants, namely:

11.1 to apply for condonation for the late launching of the application to uplift the bar; and

11.2 to apply for the uplifting of the bar.

12 The plaintiff contends that the defendants have not in the current application applied for condonation for the late launching of the application to uplift the bar at all.

- 13 The plaintiff contends, in the alternative, that the defendants' application to uplift the bar is bad, and should be refused.

Point in limine

- 14 It is clear that the Order requires that the defendants must *both* apply for condonation for the late launching of the application to uplift the bar *and* apply to uplift the bar. Paragraph 5 read with paragraph 7 of the Order are unequivocal in this regard.

- 15 It is also clear from paragraph 7 of the Order that the consequence of not obtaining condonation for the late launching of the application (*and* an order uplifting the bar) is that the defendants will remain barred from pleading. The terms of the Order dictate that the defendants "*are ipso facto barred from entering a Plea in the Main Action, unless and until they procure [such] an order*".

- 16 The plaintiff is also correct that the defendants have not applied for condonation for the late launching of the application.

- 17 There is, firstly, no prayer for that relief in the notice of motion. The relief sought in the notice of motion is as follows:

"1. That the Notice of Bar served on the Applicant be uplifted.

2. That the Applicant be allowed to file a Plea within 20 (twenty) business days after the date of this order and which service is condoned"

- 18 Moreover, even if the notice of motion were to be generously interpreted to imply an application for condonation for the late bringing of the application, no

case for condonation is made out in the founding affidavit for such relief. An application for condonation for the belated launching of the application is not made out in the founding affidavit, and the usual factors a court must consider¹ are not addressed.

19 The application is therefore liable to be dismissed for this reason alone.

Application to uplift the bar

20 Importantly, even if I were wrong in reaching the above conclusion, the defendants' application falls to be dismissed for the separate reason that the defendants have failed to make out a proper application for the uplifting of the bar.

21 The approach to determining whether a bar should be lifted, which has been applied by the courts for over five decades, was set out in *Smith NO v Brummer NO and Another* 1954 (3) SA 352 (O), at 357H–358B.

22 The following is the English translation of the ratio of that case that is contained in the headnote:

“In an application for the removal of bar the Court has a wide discretion which it will exercise in accordance with the circumstances of each case. The tendency of the Court is to grant such an application where (a) the applicant has given a reasonable explanation of 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

¹ See *Ekurhuleni City v Rohlandt Holdings CC and Others* 2025 (1) SA 1 (CC) par 25-26

disregard of the Rules of Court; (d) the applicant's action is clearly not ill-founded and (e) any prejudice caused to the opposite party could be compensated for by an appropriate order as to costs. The absence of one or more of these circumstances might result in the application being refused."

- 23 More recently, in *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* 2021 (6) SA 352 (SCA), the Supreme Court of Appeal set out the following principles when considering whether the defendants who had become barred from pleading, should be granted condonation to file its plea in terms of Rule 27:

*"Rule 27 of the Uniform Rules deals with the extension of time, removal of bar and condonation. In terms of rule 27(3) the court may, on good cause shown, condone any non-compliance with the rules. ... Generally, the concept of 'good cause' entails a consideration of the following factors: a reasonable and acceptable explanation for the default; a demonstration that a party is acting bona fide; and that such party has a bona fide defence which prima facie has some prospect of success. Good cause requires a full explanation of the default so that the court may assess the explanation."*²

- 24 The SCA did so without referring to, or overruling, the decision in *Smith NO v Brummer*. The approach set out in the earlier decision of *Smith NO v Brummer*

² *Ingosstrakh* par 20

remains sound, and may be applied in conjunction with the SCA's decision in *Ingosstrakh*.

25 Common to the approach in both decisions is the requirement that there be a proper explanation for the default. It is now trite that such explanation must be sufficiently full for the court to properly assess the reasonableness of the delay or default.

26 It is also common to the approach of the above two courts, although differently expressed, that the court must be satisfied that the claim or defence is *bona fide* and has some prospect of success.

27 In the current application, however, the defendants have failed to satisfy both of these requirements.

28 The defendants' explanation is neither full nor sufficiently detailed for the court to assess the reasonableness of the defendants' default, or the defendant's conduct and motives. The defendants provide only a bland and superficial explanation for their default. They effectively blame on their erstwhile attorney for failing to advise them properly.

29 What makes this explanation unsatisfactory is that the defendants did not have only one previous attorney, but two. There is no detail given of what attorney gave them poor advice, when that advice was given, and why it is that they continued to labour under that poor advice notwithstanding the change of attorneys.

30 The defendants' poor explanation is followed by the defendants' failure to make any effort to satisfy the court that they have a defence that is *bona fide*

and bears some prospect of success. No case is made out in the founding affidavit in this regard at all.

31 To make matters worse, when the plaintiff in its answering affidavit dealt with the merits of the plaintiff's claim and pertinently alleged that the defendants had no prospect of successfully defending the claim, the defendants failed to provide any satisfactory answer to those allegations in reply.

32 The only answer given by the defendants was that the plaintiff had not persisted with its application for summary judgment in November 2019 after the delivery of the defendants' affidavit resisting summary judgment. But this bald response does not assist the court. It does not pertinently address the substance of the plaintiffs' answering affidavit concerning its case, or show that the defendants in fact have any prospect of success in defending the plaintiff's claims.

33 The poor explanation given by the defendants, and the failure to make out any case that they have prospects of success in defending the matter, comes in the context of a long history of litigation in which the defendants have repeatedly conducted themselves in a dilatory fashion. The patently unmeritorious current application follows that pattern.

34 In the circumstances, the defendants have failed to provide a full explanation for the delay. They have also failed to satisfy the court that their application is *bona fide* and that their defence to the plaintiff's claims bears any prospects of success. In my view, this is sufficient to warrant this court exercising its discretion against uplifting the bar.

35 Accordingly, the application to uplift the bar is refused.

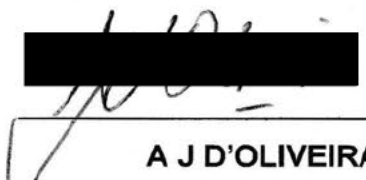
Costs

36 The plaintiff seeks the dismissal of the application with costs on an attorney and client scale. In my view, such an order is warranted. This case falls into the category of applications that are so devoid of merit as to be a waste of the court's time.³ The plaintiff should be permitted to recover the legal costs it has incurred in opposing the application as far as possible.

Order

37 The following order is made:

"The application is dismissed with costs on an attorney and client scale."


A J D'OLIVEIRA
Acting Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 21 February 2025.

HEARD ON: 28 January 2025

DECIDED ON: 21 February 2025

For the Applicants: Adv R Smith
(heads of argument prepared by Adv D Gintner)
Instructed by Kapp Attorneys Inc

For the Respondent Adv C C Ascar
Instructed by Ellis Coll Attorneys

³ See *Mashava v Eanex Africa (Pty) Ltd and Others* 2025 (1) SA 466 (GJ) par 4