

REPUBLIC OF SOUTH AFRICA



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

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

27/3/2025

DATE

[Redacted Signature]

SIGNATURE

CASE NO: 2018/40376

In the matter between:

THE MINISTER OF THE DEPARTMENT OF RURAL
DEVELOPMENT AND LAND REFORM

Applicant

And

MAROLIEN CC
(Registration Number: 1995/013716/23)

First Respondent

THE NATIONAL EMPOWERMENT FUND TRUST
(Registration Number: IT10145/00)

Second Respondent

MSWATI DLAMINI N.O.
Trustee of the MAROLIEN WORKERS TRUST
(Registration Number: IT1356/2016)

Third Respondent

BRANDVLEI MAROLIEN (PTY) LTD

Fourth Respondent

In Re:

MAROLIEN CC
(Registration Number: 1995/013716/23)

Plaintiff

And

**THE MINISTER OF THE DEPARTMENT OF RURAL
DEVELOPMENT AND LAND REFORM**

First Defendant

THE NATIONAL EMPOWERMENT FUND TRUST
(Registration Number: IT10145/00)

Second Defendant

MSWATI DLAMINI N.O.
Trustee of the MAROLIEN WORKERS TRUST
(Registration Number: IT1356/2016)

Third Defendant

BRANDVLEI MAROLIEN (PTY) LTD

Fourth Defendant

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date for hand down is deemed to be 27 March 2025.

JUDGMENT

DREYER AJ:

1. The Applicant seeks an order *inter alia* that the Notice of Bar delivered by the First Respondent on 2 December 2019 be uplifted.
2. A brief chronological background leading up to the present application is as follows:
 - 2.1 On 31 October 2018 the First Respondent instituted action against the Applicant and the Second to Fourth Respondents claiming return of certain movable property, alternatively the value thereof.
 - 2.2 On 5 December 2018 the Second to Fourth Respondents delivered an exception to the First Respondent's Particulars of Claim.
 - 2.3 On 14 June 2019 the First Respondent delivered a Notice of Intention to Amend its Particulars of Claim.
 - 2.4 On 30 June 2019 the First Respondent effected the amendment by delivering the amended pages to the Particulars of Claim.

- 2.5 On 19 July 2019 the First Respondent delivered a Notice of Bar on all of the Respondents ("the first Notice of Bar").
- 2.6 On 13 August 2019 the Second to Fourth Respondents delivered their Plea.
- 2.7 On 26 August 2019 the Applicant delivered an exception to the First Respondent's Particulars of Claim.
- 2.8 On 13 September 2019 the First Respondent delivered a Notice of Intention to Amend its Particulars of Claim.
- 2.9 On 2 October 2019 effected the amendment by delivering the amended pages to the Particulars of Claim.
- 2.10 On 2 December 2019 the First Respondent delivered a Notice of Bar only to the Applicant ("the second Notice of Bar").
- 2.11 On 9 December 2019 the Applicant's Plea was due in terms of the second Notice of Bar.
- 2.12 On 10 December 2019 the Applicant delivered a Plea, one day out of time.
- 2.13 On 5 February 2024 an order was granted by Justice Windell, *inter alia*, that the Applicant was to deliver an application for the upliftment of the Notice of Bar dated 2 December 2019 within 20 days from service of the order.

This chronological background is common cause as is evident from the Joint Practice Note prepared by Counsel.

3. The Applicant served the present application on the First Respondent on 5 March 2024. The First Respondent served its Answering Affidavit on 3 April 2024. The Applicant did not deliver a Replying Affidavit.
4. The second Notice of Bar called upon the Applicant to deliver its Plea within five (5) of the Notice being served. The second Notice of Bar was served on 2 December 2019. The Applicant therefore had to deliver its Plea on or before 9 December 2019. The Applicant served its Plea on 10 December 2019, one day late.
5. It is common cause that the Applicant's Plea was due on or before 29 October 2019 and that the Applicant was granted an indulgence by the First Respondent to file the Plea by 29 November 2019, failing which a Notice of Bar would be served on the Applicant's attorneys of record.
6. Rule 27 provides for the extension or abridging of time, removal of bar and for the condonation of non-compliance with the Rules.
7. Good cause is a requirement for any application in terms of Rule 27. Two principal requirements for the favourable exercise of the Court's discretion have crystallized out.
8. The first requirement is that the applicant should file an affidavit satisfactorily explaining the delay.
9. In *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd and Others* 2000 (3) SA 87 (W) it was held:

[12] It is a well-established that an applicant for any relief in terms of Rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in Rule 27(1) as a jurisdictional prerequisite to the exercise of the Court's discretion. The Applicant for any such relief 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 the motives. Where there has been long delay, the Court should require the party in default to satisfy the Court the relief sought should be granted.”

10. The Applicant’s application is supported by an affidavit deposed to by senior legal administrative officer in the Chief Directorate: Legal Services in the Department of Agriculture, Land Reform and Rural Development. The relevant paragraphs in the Answering Affidavit dealing with the reasons for the delay are the following:

- “18. *The reasons for the delay in filing the plea have been explained in detail by the first defendant’s attorney of record, Mr Rudzani NemaKonde, in his affidavit resisting default judgment. I will briefly reiterate the main points, and I attach a confirmatory affidavit from Mr NemaKonde confirming such.*
19. *The first point to note is that the plaintiff’s first attempt at a particulars of claim was met with a notice of exception from all the defendants’ the amended particulars of claim was then only filed on 2 October 2019 – almost a year after the original summons was served, and 10 months after the first notice of exception.*
20. *In this context, the plaintiff was relatively quick to place the first defendant under bar to file her plea – notice being delivered on 2 December 2019.*
21. *As indicated by Mr NemaKonde, counsel for the first defendant delivered the draft plea on 9 December 2019, but Mr NemaKonde was unable to file it due to loadshedding that afternoon. It is for this reason, that the plea was filed on 10 December 2019 – only one day late.*

22. *It may be said that the plea could have been prepared earlier so as to guard against the effects of loadshedding. However, I have sympathy with the counsel who was appointed to draft the plea in under 10 weeks: as a large government department, it is difficult to trace aal of the information necessary and arrange a consultation with all necessary individuals within this time frame.*
23. *In actual fact, this matter is far more complicated that is indicated on the plaintiff's papers. The first defendant has in its possession a series of forensic reports regarding what transpired at the farm during the period in question which counsel would have had to read before the plea was drafted."*
11. As set out above, the Applicant's Plea was due on or before 29 October 2019 and the Applicant was granted an indulgence by the First Respondent to file the Plea by 29 November 2019.
12. No explanation is proffered by the Applicant as to why, despite the indulgence granted, the Plea could not be filed on 29 November 2019.
13. The second requirement for the favourable exercise of the Court's discretion is that an applicant should satisfy the Court on oath that he has a bona fide defence (See *Dalhousie v Bruwer* 1970 (4) SA 566 (C); *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* 2021 (6) SA 352 (SCA)).
14. In this regard it has been held that the minimum that the applicant must show is that his defence is not patently unfounded and that it is based upon facts which must be set out in outline, and which, if proved, constitutes a defence (See *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O)).

15. The Applicant sets out the defence in paragraphs 5 to 17 of the Founding Affidavit. The Applicant avers that the tunnels claimed by the First Respondent as part of the movable property are fixtures of a permanent nature, which means that the tunnels were included in the definition of the property for purposes of the Agreement of Sale in terms of clause 13 which provides "*The property includes all fixtures and fittings of a permanent nature including stove, electric light fittings (if any exists).*" The tunnels are therefore the property of the Applicant following the sale of the farm. The Applicant furthermore avers that many of the moveable property allegedly belonging to the First Defendant were removed from the farm by the Deputy Sheriff on 28 March 2019 at the instance of ABSA Bank as Execution Creditor in a claim against the First Defendant as Execution Debtor under case number 1824/2019 in the above Court.
16. It is not for this Court to determine the validity of the defence raised by the Applicant. This will be dealt with by the Court adjudicating upon the action.
17. With regards to the movable property that was removed by the Deputy Sheriff, it however should be noted that the assets which were identified in the Settlement Agreement entered into between ABSA Bank and, *inter alia*, the First Respondent were excluded in the amended Annexure "POC1". The "NEW HINO 300", alluded to in paragraph 13.1 of the Founding Affidavit, did not form part of the assets claimed in the action.
18. It cannot be said that the Applicant's Founding Affidavit satisfactorily explains the delay. The Applicant ought to have furnished an explanation as to why, despite the indulgence granted, the Plea could not be filed on 29 November 2019.
19. The Plea was however delivered only one (1) day late after the period provided for in terms of the second Notice of Bar.

20. The validity of the Applicant's defence pertaining to the tunnels ought to be dealt with by the Court adjudicating upon the action.
21. In *Smith, NO v Brummer, NO and Another* 1954 (3) SA 352 (O) the Court held 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 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.
22. The action was instituted on 31 October 2018. It is evident that there has been delays on both sides in bringing the action to finality. The First Respondent states in paragraph 51.12 of the Answering Affidavit that it was not in a financial position to litigate this matter earlier than now. In my view, if the present application is not granted the Applicant will be prejudiced as the Applicant will not be given an opportunity to defend the action. The doors of the Court will effectively be closed to the Applicant and this will be prejudicial to the Applicant.

23. I am of the view that it would be in the interests of justice to grant the application. The Court should not readily close the doors to a litigant, even if the litigant can be faulted for the manner in which the litigant conducts litigation.
24. The general rule is that an applicant should pay all the wasted costs due to the application, as the applicant seeks an indulgence. This indulgence includes any costs of reasonable (not vexatious or frivolous) opposition.
25. Counsel for the Applicant however submitted at the hearing of the matter that any prejudice caused to the First Respondent could be compensated for by granting a costs order against the Applicant on an attorney and client scale.
26. I therefore make the following order:
- 26.1 The bar is uplifted.
- 26.2 Condonation is granted to the Applicant for the late filing of the Plea.
- 26.3 The Applicant is to pay the costs of the application on the scale as between attorney and client.



EDREYER**ACTING JUDGE OF THE HIGH COURT****GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appearance for Applicant:

Adv. VJ Heideman

Instructed by:

R NemaKonde – State Attorney,
Johannesburg

Appearance for First Respondent:	Adv. HH Cowley
Instructed by	Martin Hennig Attorneys

Date of hearing:	6 March 2025
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Date of Judgment:	27 March 2025
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