



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Reportable/Not Reportable

Case no: 20457/2023

In the matter between:

PREDYNAMIC (PTY) LTD

Plaintiff

and

KRUGER & CO INC

First Defendant

FREDERICK SAAYMAN

Second Defendant

Neutral citation: *Kruger & Co v Predynamic (Pty) Ltd* (Case no20457/2023) [2023]
ZAWCHC (02 June 2025)

Coram: LEKHULENI J

Heard: 28 March 2025

Delivered: 02 June 2025

Summary: The plaintiff applied for default judgment against the first defendant for costs due to the first defendant's failure to file a plea, despite receiving a notice of bar. In response, the first defendant applied to have the bar lifted so that it could plead to the plaintiff's summons. The court found that the first defendant showed good cause for lifting the bar and granted the application. The plaintiff's request for a

default judgment on costs was dismissed. The costs of both applications will be costs in the cause.

ORDER

- 1 The application for the upliftment of bar is granted.
 - 2 The first defendant is ordered to file its plea (should it wish to defend the matter) within five (5) days from date hereof.
 - 3 The application for default judgment on costs is hereby dismissed.
 - 4 The costs of both applications will be costs in the cause.
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JUDGMENT

LEKHULENI J

Introduction

[1] There are two applications before this Court: an application by the plaintiff for default judgment on costs against the first defendant, a firm of attorneys and an application by the first defendant for the upliftment of the notice of bar. In the application for default judgment, the plaintiff seeks an order that the first defendant pays the costs of the main action, which has since been settled. The first defendant opposed the default judgment application and applied for the upliftment of the bar as it intends to defend the question of costs that the plaintiff seeks against it in the main action.

Background facts

[2] In 2015, the first defendant (Kruger & Co Inc) represented the second defendant in a claim that the second defendant instituted against the Road Accident Fund ('RAF'). The claim against the RAF was ultimately settled, and the second defendant received a capital payment from the RAF in the sum of R3 050 000.00,

pursuant to an order of this Court taken by agreement on 3 June 2022. In June 2015, the second defendant and the plaintiff were engaged in various business transactions and ventures. As a result of those business transactions, the second defendant became indebted to the plaintiff.

[3] As it was anticipated that the second defendant would successfully prosecute his claim against the RAF, the first defendant was approached by one C H Prinsloo, a director of the plaintiff, who sought an undertaking that the amount owed by the second defendant to the plaintiff in respect of certain business transactions be paid from the proceeds of his RAF claim, should there be funds available after the deduction of legal costs had been made. The first defendant made such an undertaking in writing to CH Prinsloo ("*Prinsloo*") of the plaintiff. In addition, in 2015, after the undertaking was given, the second defendant executed an acknowledgment of debt in favour of the plaintiff for R1,000,000 plus legal costs related to certain identified business transactions. In 2018, the plaintiff obtained default judgment against the second defendant based on the Acknowledgment of debt.

[4] After the second defendant's claim with the RAF had been settled and finalised, in compliance with the undertaking, the first defendant addressed a letter of discharge to Prinsloo, the import of which was that the first defendant would pay Prinsloo the amount of R600,000 in terms of the undertaking and Prinsloo would, in turn, discharge the first defendant from its obligations and liability under the undertaking. Prinsloo and the plaintiff were dissatisfied with this. The plaintiff took the view that the undertaking was not limited to R600,000 but also included monies owed by the second defendant to the plaintiff pursuant to the judgment debt. The plaintiff and the defendant thereafter engage each other in correspondence.

[5] The plaintiff demanded to know how the first defendant had arrived at R600,000. The plaintiff sought payment under the undertaking of the full amount due to it, including that which was due in terms of the judgment debt arising from the Acknowledgment of debt. The first defendant's position was that it was largely immaterial how the sum of R600,000 was computed in that the undertaking, which defined the full extent of the first defendant's obligations to the plaintiff and or Prinsloo, was in any event limited to the amount of R600,000.

[6] In November 2023, the plaintiff instituted action against the first and second defendants. The plaintiff sought confirmation that the undertaking bound the first defendant and sought information concerning the amount the RAF awarded to the second defendant and the deductions made therefrom. The plaintiff also sought payment of the full balance after deductions held in trust by the first defendant on behalf of the second defendant or the R600,000, whichever was the greater. The first defendant held the sum of R1 366,200.98 in trust, which was the net amount received for the second defendant from the RAF after the deduction of attorney and client costs, interest, loans made, and all expenses payable.

[7] In its summons, the plaintiff contended that it was entitled to the full amount held by the first defendant in trust for the second defendant. The first defendant filed a notice of intention to defend the plaintiff's claim on 22 November 2023. According to the first defendant, the second defendant contended that the plaintiff had failed to comply with its obligations in terms of the transaction detailed in the undertaking. As such, there was no amount due thereunder. The first defendant pointed out that the undertaking provided that payment would only be made if there was indebtedness when the second defendant's RAF claim was finalised. Furthermore, the first defendant contended that the undertaking was only limited to R600,000.

[8] The parties did not agree on the total sum that must be paid to the plaintiff in terms of the first defendant's undertaking. On 13 February 2024, the plaintiff delivered a demand for plea. The first defendant asserted that while faced with these competing claims, which it could not resolve and being of the view that the main action was a dispute between the plaintiff and the second defendant and desiring only to comply with its own undertaking, it (the first defendant) launched interpleader proceedings in respect of the funds on 19 February 2024. According to the first defendant, it took the view that the interpleader proceedings would resolve the matter finally.

[9] The first defendant asserted that its understanding was that the interpleader proceedings suspended all other legal proceedings in terms of which the funds were claimed. It accordingly did not file a plea in the main action and awaited the outcome

of the interpleader proceedings. The first defendant stated that if it had made an error in that a plea should have been filed at that stage, it was a genuine mistake on its part. Moreover, this did not indicate any intent to delay the proceedings or hinder the plaintiff's claim in the main action. This Court heard the interpleader proceedings on 15 March 2024. The second defendant did not appear and made no claim to the funds. Accordingly, by an order from this Court, the funds were awarded to the plaintiff and subsequently paid in full by the first defendant. The costs of the interpleader proceedings were ordered to be cost in the cause.

[10] Subsequently, the plaintiff claimed the costs of the main proceedings, asserting that it was substantively successful in all respects with the relief sought against the first respondent. The plaintiff also asserted that in line with the usual rule regarding costs, the first defendant should be liable for the costs of the action. On 26 August 2024, the plaintiff served an application for default judgment (for costs) on the first defendant. Upon receipt of the application, the first defendant brought an application for the removal of the bar as it argued that it intended to oppose the plaintiff's claim for costs against it. The plaintiff asserts that the first defendant has, belatedly and many months after the notice of bar was served and the interpleader order was granted, brought an application to uplift the bar for the sole purpose of disputing its liability for costs.

[11] The plaintiff pointed out that the first defendant's draft plea is, in essence, an attempt to deal with the merits of the capital and interest claimed by the plaintiff in the main action. The plaintiff contends that as a result of the judgment on the interpleader, that aspect has become *res judicata* and cannot, therefore, be placed in dispute at this stage. In the plaintiff's opinion, it will serve no purpose to uplift the bar, only to allow the first defendant an opportunity to plead facts which, even if established at the trial, would not provide the first defendant with a valid defence to the plaintiff's claim for costs. According to the plaintiff, it is evident from the judgment on the interpleader that the plaintiff is successful in all aspects. In the premises, the plaintiff believes there is no reason why the first defendant's application to uplift the bar should not be dismissed with cost and why the costs of the main action should not be awarded to the plaintiff as a successful party. The plaintiff prayed that the application for default judgment against the first defendant on costs be granted and

that the application to uplift the bar be dismissed with costs. On the other hand, the first defendant prayed for the upliftment of the bar.

Discussion

[12] As discussed earlier, there are two applications before this Court. The plaintiff seeks default judgment for costs against the first defendant. In the second application, the second defendant seeks an indulgence to uplift the bar to enable it to file a plea attached to its application. In my view, it is instructive for this Court to consider the first defendant's application to uplift the bar as in the event the application succeeds, it will follow as a matter of course that the application for default judgment must fail.

[13] Rule 27 of the Uniform Rules provides for the extension of time, removal of bar and condonation. In terms of this rule, the court may, on good cause shown, condone any non-compliance with the Uniform Rules. In other words, good cause is a requirement for any extension or abridging of time and for the condonation of non-compliance with the court rules. A party seeking condonation for non-compliance with the rules must show good cause.

[14] To demonstrate good cause, an applicant should at least satisfy two requirements. First, the applicant must file an affidavit satisfactorily explaining the delay. In this regard, the defendant must at least explain his default sufficiently fully to enable the court to understand how it came about and assess his conduct and motives.¹ The application must be bona fide and not made with the intention of delaying the opposite party's claim.² The second requirement is that the applicant should satisfy the court on oath that he has a bona fide defence or that his action is clearly not ill-founded, as the case may be.³ The minimum that the applicant must

¹ *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A; *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* 2012 (2) SA 637 (CC) at 640H–I.

² *Ingosstrakh v Global Aviation Investments (Pty) Ltd* 2021 (6) SA 352 (SCA) para 21; *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476.

³ *Santa Fe Sectional Title Scheme No 61/1994 Body Corporate v Bassonia Four Zero Seven CC* 2018 (3) SA 451 (GJ) at 454F–G.

show is that his defence is not patently unfounded and that it is based upon facts which, if proved, would constitute a defence.⁴

[15] In the present matter, it is common cause that the first defendant delivered its notice of intention to defend and did not file a plea. According to the first defendant, the failure to file a plea in the main action was because it was of the bona fide belief that having launched interpleader proceedings, the main action, including the need to file a plea, was suspended. In addition, the first defendant asserted that when the interpleader was finalised, and the funds were paid to the plaintiff, it was of the view that the matter was finalised and that a plea was unnecessary.

[16] To the extent that the plaintiff is prejudiced, the first defendant stated that such prejudice could easily be cured by having the first defendant pay any wasted costs associated with the late filing of the first defendant's plea. In my view, the explanation the first defendant proffered is plausible. In fact, the plaintiff also suspended all proceedings after the interpleader summons was issued. It is important to note that a notice of bar was served upon the first defendant on 11 February 2024, requesting that the first defendant file its plea within five days. The *dies* for filing a plea expired on 18 February 2024. After the interpleader proceedings were instituted, the plaintiff did not apply for default judgment against the first defendant.

[17] Distinctly, from the conduct of both parties, it can be reasonably inferred that they both accepted that the interpleader proceedings suspended further proceedings in the main action that the plaintiff instituted against the first and second defendants. This conclusion is borne out by the following: Instead of applying for default judgment after the 5 days set out in the notice of bar expired, the plaintiff waited for six months and only applied for default judgment on 26 August 2024. In my view, the error on the part of the first defendant not to file its plea in time is bona fide and must be condoned. It is an error that was sincere and corroborated by the plaintiff's conduct. Accordingly, it was reasonable for the first defendant to labour under the mistaken belief that the matter was settled and not to proceed with filing a plea.

⁴ *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476–7.

[18] The plaintiff contended that based on the judgment on the interpleader proceedings, the question whether the plaintiff was entitled to payment by the first defendant of monies that were held in trust on behalf of the second defendant is *res judicata* as between the plaintiff and the defendants. That may be the case; however, the inquiry does not end there. This aspect is relevant to determining the costs of the main action. For instance, if it is found that the plaintiff did not have *locus standi* as it is alleged by the first defendant in its application, then the plaintiff will not be entitled to costs. Evidently, the issues raised by the first defendant in the founding affidavit and the draft plea are relevant in determining costs in the main action.

[19] Furthermore, as far as the prospects of success in the main action are concerned, the first defendant asserted in his founding affidavit that it acted reasonably at all times in balancing the interests of the plaintiff and the second defendant as competing claimants. The first defendant further stated that it had no interest or stake in the disputes between the second defendant and the plaintiff. The first defendant contended that it intended to argue the limitation of the undertaking. Furthermore, the right to argue the limitation of the undertaking was reserved in the order granted by consent during the interpleader proceeding.

[20] I firmly believe that the interpretation of the undertaking is relevant in the determination of costs in the main action. If the court finds that indeed the undertaking limits the first defendant's liability to R600 000, that will mean that the action proceedings instituted by the plaintiff would not have been necessary. This issue is therefore relevant on the determination of costs.

[21] In summary, the first defendant gave a bona fide defence to the plaintiff's claim. If the defence raised by the first defendant is proved at trial, it will constitute a defence to the plaintiff's case. If the plaintiff does not have *locus standi* to institute proceedings against the first defendant, that defence will ordinarily be dispositive of the plaintiff's claim. Accordingly, the first defendant has given a satisfactory explanation for its default and indeed raised a bona fide defence to the plaintiff's claim. It cannot be said that the first defendant's application to uplift the bar is made with the intention of delaying the plaintiff's claim.

[22] Finally, from the correspondence exchanged between the parties, the first defendant persisted in disputing the plaintiff's claim for costs against it. It is my firm view that a court should be slow to refuse a defendant who has a valid defence the opportunity to hear his defence in court. To deny a party who has raised a plausible defence in an application for rescission or condonation application, as is the case in the present matter, will violate a constitutional right of access to court as envisaged in section 34 of the Constitution.

[23] I appreciate that the plaintiff had to issue summons to enforce its right against the defendants. However, the dispute on the interpretation of the undertaking, particularly the extent to which the undertaking limits or does not limit the first defendant's liability, is relevant in determining costs. A meaningful determination in this regard can only be made once the bar is lifted.

Order

[24] Given all these considerations, the following order is granted:

- 24.1 The application for the upliftment of the notice of bar is granted.
- 24.2 The first defendant is ordered to file its plea (should it wish to defend the matter) within five (5) days from date hereof.
- 24.3 The application for default judgment on costs is hereby dismissed.
- 24.4 The costs of both applications will be costs in the cause.

LEKHULENI JD
JUDGE OF THE HIGH COURT

Appearances

For plaintiff: LN Wessels

Instructed by: Couzyn Hertzog & Horak

For respondent: A Maher

Instructed by: Kruger & CO Inc