

REPUBLIC OF SOUTH AFRICA



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

Case Number: A2024-001078

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

13 June 2025

DATE


SIGNATURE

In the matter between:

MAGDALENE GEORGIANNIS MARAIS ATTORNEYS

First Appellant

EUGENE LUKAS MARAIS

Second Appellant

**JACEK ANDRZEJ DYBALA t/a EUGENE MARAIS
ATTORNEYS**

Third Appellant

And

INDONET (PTY) LTD T/A ONE FIFTY CAPITAL

Respondent

JUDGMENT

NOKO J (NTLAMA-MAKHANYA AJ concurring)

Introduction

[1] This appeal is against the order and judgment of the Acting Magistrate V van der Merwe for the Johannesburg Central District Court granted on 7 December 2023. The Court *a quo* granted an order in favour of the respondent uplifting the bar. The appellant challenges the decision of the Magistrate on the basis, *inter alia*, first, that the Court *a quo* failed to first adjudicate the point *in limine* raised and further granted the application in instance where the respondent failed to disclose its bona fide defence.

Background

[2] The appellant obtained judgment in 2022 which the respondent successfully rescinded. The appellants subsequently amended the particulars of claim. The appellant delivered notice of bar on the respondent on 13 June 2023. The plea was then due on 21 June 2023 but was served two days later, on 23 June 2023, with the hard copy delivered on 26 June 2023.

[3] The appellant launched an application for default judgment on 5 July 2023, and the respondent launched an application to uplift the bar and condonation for the late filing of the plea on 6 July 2023.

Before Court a quo

[4] The appellant raised a point *in limine* that the respondent had failed to canvas its defence in detail in the founding affidavit and instead purported to introduce its defence in the replying affidavit. To this end, counsel argued that the application to uplift the bar should be dismissed. The Court should exclusively rely on the applicant's case as set out in the founding papers and in the absence of such allegations then *cadit questio*.

[5] In its application for rescission that the appellant referred the court to the plea and prayed that the contents thereof should be incorporated in the application to uplift the bar.

[6] The appellant contended that the respondent was aware at least on 23 June 2023 that the plea served was not accepted but failed to timeously launch an application for the upliftment of the bar. Instead, the respondent awaited the application for default judgment

served on 5 July 2023 and only then brought an application for the upliftment of the bar on 6 July 2023. To this end, counsel argued, the Court should not come to the assistance of the respondent who flagrantly disregarded the rules of court.

[7] The Court *a quo* noted that a party requesting the upliftment of the bar should persuade the court by providing sufficient reasons for the delay and demonstrate that such a party has a bona fide defence. The Court *a quo* considered the explanation proffered by the respondent and concluded that there was no utter disregard to the rules. The respondent having explained of the miscommunication between the attorneys situated in Durban and its correspondents' attorneys located in Johannesburg that the notice of bar was forwarded by the correspondent attorney in Johannesburg on 14 June 2023. The attorneys then reckoned that the 5 days meant that the plea would have to be served on 22 June 2023 and then diarised his file to the 21 June 2023.

[8] A plea was then drafted and forwarded to counsel to settle same. The counsel reverted on 21 June 2023 with a plea but still needed further information from the respondent who could not provide same on time. An extension was then requested on 22 June 2023 from the appellant's attorneys for the service of the plea. In response the appellant's attorneys stated in writing that the respondent is already under bar as the 5 days expired on 21 June 2023.

[9] The Court *a quo* had regard to the sentiments echoed in *Eke v Parsons*,¹ where it was held that the "courts should not be detained by the rules and should deviate where justice so warrant." In the premises the Court *a quo* found that the explanation by the respondent was sufficient.

[10] With regard to whether a *bona fide* defence exist the Court *a quo* had regard to what was stated in the plea incorporated in the application for rescission and noted that the respondent raised the question of *locus standi*, jurisdiction and further sought to challenge the *quantum* claimed by the appellant. These issues were not challenged by the appellant

¹ 2016 (3) SA 37 (CC).

in his papers resisting application for rescission. The Court *a quo* was therefore persuaded that a case for rescission was made out and therefore granted same.

[11] The appellants instituted the appeal process and the grounds for the appeal are detailed hereunder.

On appeal

[12] The grounds for the appeal raised by the appellants were, first, that the court *a quo* failed to make a ruling on the point *in limine* that the respondent did not set out its defence in the founding papers. Secondly, that the application for the rescission was not launched timeously. Thirdly, the explanation for failing to serve the plea timeously was not sufficiently explained. Fourthly, the Court *a quo* failed to consider that the indulgence sought by the respondent would be compensated by a suitable costs order. Fifthly, that the respondent's affidavit was deposed to by an attorney and not supported by a confirmatory affidavit by the respondent who had personal knowledge of the facts. Sixthly, that the Court *a quo* granted an extension of time for a period of 7 seven days which was not requested in terms of Rule 60(5)(a) of the Magistrate Court Rules. Lastly, that the court *a quo* ordered that each party pay their respective costs despite that the respondent having requested indulgence and further found that the appellant's opposition was vexatious or frivolous.

Submissions by the parties

Point in limine – Appealability of the order

[13] The respondent contended that the order uplifting the bar is not final in nature and therefore not appealable. The determining factor for appealability, the respondent argued, is whether the decision of the Court *a quo* disposes of an issue between the parties. In this instance the judgment is interlocutory, and no issue *inter se* was disposed of. Further that the test for appealability has been set out by the Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,² at para 53 where it was stated

² 2012 (4) SA 618 (CC).

that “... the more context-sensitive standard of the interest of justice...” is the applicable test.

[14] The appellant agreed that the test to determine the question of appealability is whether it is in the interest of justice that the order be appealed against.

[15] The *raison d'être* underpinning the prohibition of appealing some of the interlocutory orders is to avoid piecemeal adjudication of matters which may unreasonably exhaust the judicial resources. In this *lis* the order granted does not resolve any of the issues between the parties. It does not go to the root of the *lis inter partes* and this can also be noted from the fact that the defences which were raised in the plea delivered by the respondent were not dealt with. In fact, despite the fact that the respondent stated in the founding affidavit that the plea delivered should be incorporated in the affidavit- the appellant did not specifically or at all engaged with the said defences. In the circumstances I find that indeed the order granted is interlocutory and not appealable and the point *in limine* is sustainable.

[16] Having concluded as aforesaid, there is no reason for this Court to interrogate the grounds upon which the appeal is predicated.

[17] Even if the foregoing conclusion is found wanting, the Court *a quo* considered the requirements for the upliftment of the bar.³ The explanation advanced by the respondent for failure to deliver the plea timeously (being late only with two days) was found to be sufficient by the Court *a quo*. A finding to the contrary would have meant that the Court a

³ As can be gleaned from Rule 27(3), the Court, may on good cause shown, condone any non-compliance with the Rules of Court. It therefore was peremptory for the applicants to establish the existence of good cause, why its application for condonation should be granted, to pave the way for it to deliver its pleas. Good cause in broad entails the consideration of the following: (i) a reasonable and acceptable explanation for the default; (ii) a demonstration that a party is acting bona fide; (iii) that such party has a bona fide defence which prima facie has some prospects of success; (iv) a full explanation of the default so that a court may assess the explanation. (See *Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills (Cape)* 2003 (2) All SA 113 (SCA). The aspect of good cause was reiterated in *Dalhousie v Bruwer* 1970 (4) SA 566 (C) by adding two requirements. Firstly, the applicant should file an affidavit satisfactorily explaining the delay. Secondly, the applicant should satisfy the court on oath that he has a bona fide defence. A third requirement has been added by authorities namely, the granting of the indulgence sought must not prejudice the plaintiff. (vi) In *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at p358, five factors were highlighted where the courts have a tendency to grant a removal of bar. (vii) In *Ferris v FirstRand Bank Ltd* 2014(3) SA 39 CC the Constitutional Court held that lateness is not the only considering factor. The test for condonation is whether it is in the interest of justice to grant it, which includes factors such as applicant's prospects of success and the importance of the issue to be determined.

quo has applied the rules blindly.⁴ Secondly, the requirement that a party should demonstrate that there is a *bona fide* defence has been satisfied by the respondent who set out its defences in its plea which was incorporated as set out in para 7 of the founding affidavit in support of the application to uplift the bar. Those defences were not engaged with or gainsaid by the appellant at all.⁵

Costs

[18] The general principle that the costs should follow the result is trite and it brooks no further interrogation.

Order

[19] In the premises I order as follows:

The Respondent's point *in limine* is upheld and the appeal is dismissed with costs.



M V NOKO
Judge of the High Court
Johannesburg

DISCLAIMER: This judgment is handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it on Case Lines. The date for hand-down is deemed to be 13 June 2025 at 12:00.

⁴ The Constitutional Court held in *Eke v Parsons*, that: '[w]ithout doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. The Court further in *PFE International Inc (BVI) and others v Industrial Development Corporation of South Africa Ltd*, that: '[s]ince the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules.

⁵ It is noted further some of the grounds for appeal were not even raised before the Court *a quo*.

Dates:

Date of Hearing: 30 January 2025

Date of Delivery: 13 June 2025.

Appearances:

For the Appellant:

JK Maxwell, instructed by Eugene Marais
Attorneys.

For the Respondent:

U Ahir, instructed by Strauss Daly INC
Attorneys.