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

**JUDGMENT**

**Not Reportable**

Case no: 14121/2020

In the matter between:

**KINDROGEN RF (PTY) LTD**

Plaintiff

*(Registration Number: 2010/018505/07)*

and

**MILTONS MATSAMELA INC**

**t/a MILTONS MATSAMELA ATTORNEYS**

First Defendant

*(Registration Number: 2001/001112/21)*

**MILTONS MATSAMELA TABLE VIEW INC**

Second Defendant

*(Registration Number: 2012/073697/21)*

**MARYKE DE VILLIERS N.O.**

Third Defendant

(in her capacity as trustee for the time being of the  
AMAZING VOUCHERS TRUST (I[...]))

**CARMEN DEN HAAN N.O.**

Fourth Defendant

(in her capacity as trustee for the time being of the  
AMAZING VOUCHERS TRUST (I[...]))

**JACO DEN HAAN N.O.**

Fifth Defendant

(in his capacity as trustee for the time being of the  
AMAZING VOUCHERS TRUST (I[...]))

**ATLANTIC EXECUTORS AND  
ADMINISTRATORS (PTY) LTD N.O.**

Sixth Defendant

(in its capacity as trustee for the time being of the  
AMAZING VOUCHERS TRUST (I[...]))

**GREYSTONE TRADING 132 CC  
t/a RE/MAX PROPERTY ASSOCIATES**  
(Registration Number: 2000/062869/23)

Seventh Defendant

**Neutral citation:** *Kindrogen RF (Pty) Ltd v Miltons Matsamela Inc and Others* (Case no 14121/2020) [2025] ZAWCHC 357 (19/08/2025)

**Coram:** NUKU J

**Heard:** 30 July 2025

**Delivered:** 19 August 2025

**Summary:** Practice – Pleadings – Late delivery of a notice in terms of Rule 36(9)(a) and (b) – application for condonation in terms of Rule 27 – good cause requirements – in the interest of justice to condone late delivery of the notice in terms of Rule 36(9)(a) and (b) where refusal may lead to injustice.

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## ORDER

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- 1 The late delivery by the third to sixth defendants of the expert report of Jan Daniel Swart Oberholzer (Oberholzer) dated 26 June 2025, as per their notice in terms of Rule 36(9)(a) and (b) dated 30 June 2025, is condoned.
- 2 The third to sixth defendants are permitted to rely on the expert report of Oberholzer dated 26 June 2025, in accordance with their notice under Rule 36(9)(a) and (b) dated 30 June 2025; and to call Oberholzer as an expert.
- 3 The third to sixth defendants shall pay the costs of the application, together with the costs of the Rule 30 Application, and such costs shall be on Scale C.

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## JUDGMENT

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### Nuku J

[1] This is an interlocutory application brought by the third to sixth defendants (the Trust), seeking condonation for the late delivery of the expert report dated 26 June 2025 by Jan Daniel Swart Oberholzer (the Oberholzer report) and the Trust's Rule 36(9)(a) and (b) notice dated 30 June 2025.

[2] The plaintiff opposes the application, arguing that the Oberholzer report and the Trust's Rule 36(9)(a) and (b) notice were delivered late, and the Trust has failed to demonstrated good cause for why the late delivery these documents should be condoned.

[3] The background to this interlocutory application can be summarised as follows: the plaintiff instituted an action against the defendants, claiming payment of R1 475 766.24, which it had paid to the second defendant between November 2019 and March

2020. The specified amount was paid in anticipation of the plaintiff's liability for transfer duty related to a property the plaintiff had offered to purchase from the Trust. For reasons not germane to this application, the sale of the property did not proceed resulting in the claim for the repayment of the monies paid.

[4] The Trust is actively defending the action and has also launched a counter-claim against the plaintiff. The Trust, in its counter-claim, alleges it has suffered damages amounting to R2 869 565.22. This amount represents the difference between the price at which the property would have been sold to the plaintiff and the price at which it was sold following the cancellation of the sale to the plaintiff.

[5] The plaintiff and the Trust both delivered expert summaries in accordance with Rule 36(9)(a) and (b) regarding the value of the disputed property. Subsequently, the experts appointed by both parties convened on 1 August 2024, as required by Rule 36(9A), and prepared a joint minute, which was delivered on 5 August 2025. The joint minute produced by the parties' experts was recorded in a pre-trial minute prepared by the legal representatives of the parties, dated 7 August 2024.

[6] On 15 August 2024, Wille J certified the matter as trial-ready. Subsequently, a trial date was scheduled for 20 February 2025. On 12 February 2025, the parties reached an agreement to postpone the trial to 30 July 2025.

[7] On 2 June 2025, the attorneys for the Trust informed the plaintiff's attorneys that the Trust would not be calling the expert whose report had been submitted. The letter also notified them of the Trust's disassociation from the agreement reached between its expert and the plaintiff's expert. A subsequent letter dated 3 June 2025, was delivered in which the Trust presented some without prejudice settlement proposals. These proposals were rejected by the plaintiff in a letter dated 5 June 2025.

[8] On 10 June 2025, the plaintiff's legal representatives communicated via a letter to the Trust's legal representatives, noting, among other things, that the Trust was not

entitled to unilaterally repudiate the agreement reached between the parties' experts, that it would be inappropriate for the Trust to appoint another expert, and that the plaintiff would oppose such a step, which would in any case be deemed irregular.

[9] On 30 June 2025, the Trust delivered the Oberholzer report along with its Rule 36(9)(a) and (b) notice. The legal representatives of the plaintiff, in a letter dated 3 June 2025, expressed their objections and demanded that the Trust withdraw both the Oberholzer report and its Rule 36(9)(a) and (b) notice.

[10] The Trust rejected the plaintiff's demands. Instead, it was suggested on behalf of the Trust that the plaintiff's expert meet with Mr Oberholzer to prepare a joint minute. As it became clear that the Trust was not withdrawing, the plaintiff's legal representatives served a notice under Rule 30(2)(b) and 30(A)(1) (Rule 30 Notice) on 11 July 2025.

[11] The plaintiff states in its Rule 30 Notice, that it was irregular for the Trust to deliver the Oberholzer report and Rule 36(9)(a) and (b) notice because they had not been submitted within the timeframes specified in Rule 36, and were contrary to the directives issued by Wille J during the pre-trial proceedings.

[12] On 16 July 2025, the Trust launched the present interlocutory application. On 23 July 2025, the plaintiff launched an application pursuant to Rule 30 to set aside the delivery by the Trust of the Oberholzer report as well as the Trust's Rule 36(9)(a) and (b) notice.

[13] During the hearing, the legal representatives of both parties reached an agreement that the Court only needs to decide on the condonation application, given its significance for the Rule 30 application. Legal representatives for both parties concurred that the Trust must establish good cause for its failure to deliver the Oberholzer report along with its Rule 36(9)(a) and (b) notice in order to succeed. The outcome of the condonation application revealed a disagreement between legal representatives of the parties involved. The Trust's legal team asserted that the Trust

had demonstrated good cause, while the plaintiff's legal representatives argued against this position.

[14] The disagreement between the parties regarding the outcome of the condonation emerge from their differing approaches to determine whether good cause has been demonstrated.

[15] According to the plaintiff, there are two principal requirements for good cause that must be established by an applicant as a jurisdictional prerequisite for condonation, by actually proving them rather than merely alleging them.<sup>1</sup> And these are that:

15.1 A full and reasonable explanation which covers the entire period of the delay must be given,<sup>2</sup> and

15.2 There must be something worthy of consideration.

[16] The plaintiff's argument extended to the assertion that prejudice only arises when both of these requirements are satisfied. In other words, prejudice does not come into discussion if the applicant for condonation has not demonstrated good cause, as it is insufficient for the applicant to demonstrate that condonation will not cause prejudice to the other party..<sup>3</sup>

[17] It was subsequently submitted on behalf of the plaintiff that the Trust took approximately 11 months from the filing of the parties' expert joint minute to deliver the Oberholzer report and its Rule 36(9)(a) and (b) notice. Furthermore, the Trust has failed to offer a satisfactory explanation for that delay. The plaintiff further expressed discontent with the property valuation methods employed by Mr. Oberholzer.

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<sup>1</sup> Standard General Insurance v Eversafe 2000 (3) SA 87 (W) at 93E (Standard General Insurance).

<sup>2</sup> Van Wyk v Unitas Hospital 2008 (2) SA 472 (CC) at para 22

<sup>3</sup> Standard General Insurance at 83G

[18] The Trust, for its part, relied heavily on a decision of the Constitutional Court in **Pickfords**<sup>4</sup> where that court dated that:

‘Condonation is not a mere formality – good cause must be shown. The concept of ‘good cause’ is well-known in our law. A large body of jurisprudence has developed in our courts, particularly concerning rescission and condonation applications. The requirements for ‘good cause’ are thus well established. Courts are afforded a wide discretion in evaluating what constitutes ‘good cause’ so as to ensure that justice is done. Ultimately, the overriding consideration is the interests of justice, which must be considered on the facts of each case. Factors germane to this enquiry may include the extent and the cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the issue(s) to be raised in the matter; and the prospects of success. In Ferris this court said: ‘(L)ateness is not the only consideration in determining whether condonation may be granted ... (T)he test for condonation is whether it is in the interests of justice to grant it ... (A)n applicant’s prospects of success and the importance of the issue to be determined are relevant factors.’ (underlining supplied)

[19] The Trust admits that the Oberholzer report and the notice under Rule 36(9)(a) and (b) e were not served within the timeframes established by Rule 36(9)(a) and (b) or Rule 36(9)(A), and also failed to adhere to the required pre-trial procedures. The reason provided for repudiating the joint minute by the experts, is that its former expert deviated from the valuation he had made without the Trust's consent or knowledge. It further explains that after repudiating the joint minute, it sought the plaintiff's consent to tender the evidence of Mr Oberholzer, but the plaintiff refused.

[20] The Trust submitted that the central issue, insofar as its counter-claim is concerned, cannot be properly and adequately resolved without expert evidence from a professional property valuer. If the Trust is not permitted to tender the expert evidence

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<sup>4</sup> Competition Commission of SA v Pickfords Removals SA (Pty) Ltd 2021 (3) SA 1 (CC) at para [54]

by Mr Oberholzer, it is argued that this would disadvantage the Trust. On the contrary, the plaintiff will not suffer any prejudice, nor will the court face any inconvenience if the Trust is allowed to present the expert evidence of Mr. Oberholzer.

[21] Regarding the plaintiff's criticism of Oberholzer's report, it was argued that this is a matter that falls within the purview of the trial judge, as it may be premature to assess the expert evidence before it undergoes cross-examination. For a court evaluating a condonation application, it was submitted, the significance of the Oberholzer report is that it should highlight an issue suitable for trial. The Oberholzer's actions align with conclusions that bolster the Trust's case, which is contested by an expert hired by the plaintiff.

[22] The proposition by the plaintiff's counsel, relying on *Standard General Insurance*<sup>5</sup>, that there are two jurisdictional requirements that must be proven by an applicant for condonation, does not align with my interpretation of that judgment. It is perhaps necessary to repeat the passage relied upon. It reads: 'It is 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.'

[23] What is notable from the above passage is that it does not refer to the two jurisdictional prerequisites suggested by counsel, and in my view, it is no more than the statement made in **Pickfords** that 'Condonation is not a mere formality – good cause must be shown'.

[24] While the judgement highlights the necessity of offering a sufficiently comprehensive explanation for the court's understanding of the circumstances, this is not framed as a jurisdictional requirement. Instead, it is presented as one of the factors that a court must consider when dealing with a condonation application. Furthermore,

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<sup>5</sup> 2000 (3) SA 87 (W) at 93E

the judgment does not even mention the second requirement relating to the presence of something worthy of consideration.

[25] To conclude this point, in my view, the passage relied upon by counsel merely states that an application for condonation must establish the good cause requirement contemplated in rule 27. It accomplishes this without detailing what those jurisdictional requirements are. Moreover, if it did specify them, it would, in any case, breach the doctrine of precedent, given that the Constitutional Court has stated unequivocally that 'the overriding consideration is the interests of justice.'<sup>6</sup>

[26] Turning to the facts of the present, the Oberholzer report and the Trust's Rule 36(9)(a) and (b) were delivered hopelessly out of time in relation to the current circumstances. The Trust must have been aware that its expert had deviated from the valuation it had provided by at least 7 August, when the legal representatives of the parties confirmed that their respective experts had prepared a joint minute. The Trust has not provided any explanation for its decision to wait until June 2025 to appoint an alternative expert for a trial that had been initially scheduled for February 2025.

[27] On the other hand, the Trust's counter-claim is significantly reliant on the valuation of the property.. Without an expert valuer, the Trust's counter-claim cannot even commence. Furthermore, although the appointment of Mr Oberholzer was late, efforts were made to have him meet with the expert employed by the plaintiff, however, the plaintiff refused. It is unnecessary for me to speculate on whether such a refusal was also driven by a desire to maintain the agreement stemming from the Trust's previous expert adjusting his valuation to a more favourable one for the plaintiff.

[28] The Trust contended that if the plaintiff had agreed to the Trust's involvement of Mr. Oberholzer and the proposal for the experts to convene, the matter would have been ready to proceed as these steps were taken during the early part of June, and the trial was towards the end of July 2025.

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<sup>6</sup> Pickfords at para [54]

[29] This is, in my opinion, one of those challenging issues where there seems to be no satisfactory explanation for the delay on one side, and an injustice appears imminent on the other if the condonation is not granted.

[30] Rules exist to facilitate the expeditious resolution of disputes, and failing to observe them has consequences for other parties, the Court, as well as the entire justice system. The Trust's failure to follow the rules has led to the postponement of the matter. This is an unacceptable misuse of judicial resources, and it is difficult to understand how the Trust's claim that the postponement has not inconvenienced the Court can be justified.

[31] However, the right of access to courts is enshrined in section 34 of the Constitution. This right may be threatened if a litigant is compelled to participate in a hearing under circumstances where it is clearly evident that a fair outcome cannot be assured. There are times when procedural errors should not be allowed to obstruct substantive justice, even when those errors are solely caused by that party. In my view, this is one such case where the interests of justice favour granting condonation for the Trust's failure to file its Rule 36(9)(a) and (b) notices in a timely manner.

[32] The Trust seeks an indulgence for its shortcomings and should bear the costs. Those costs should include the costs related to the Rule 30 Application because it was instituted correctly, as the Trust had taken an irregular step. Both parties, in the written submissions filed on their behalf, sought costs on scale C, and they shall accordingly be so ordered.

## **Order**

[33] As a result, I make the following order:

- 33.1 The late delivery by the third to sixth defendants of the expert report of Jan Daniel Swart Oberholzer (Oberholzer) dated 26 June 2025, as per their notice in terms of Rule 36(9)(a) and (b) dated 30 June 2025, is condoned.
- 33.2 The third to sixth defendants are permitted to rely on the expert report of Oberholzer dated 26 June 2025, in accordance with their notice under Rule 36(9)(a) and (b) dated 30 June 2025; and to call Oberholzer as an expert.
- 33.3 The third to sixth defendants shall pay the costs of the application, together with the costs of the Rule 30 Application, and such costs shall be on Scale C.

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**L G NUKU**  
**JUDGE OF THE HIGH COURT**

#### Appearances

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|----------------|---------------------------------------------|
| For plaintiff: | A Kantor SC                                 |
| Instructed by: | CK Attorneys, Bloubergrand                  |
| Care of:       | Bisset Boehmke McBlain Attorneys, Cape Town |

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|----------------------------------------|----------------------------------------|
| For the second to<br>sixth defendants: | L Hollander                            |
| Instructed by:                         | EFG Attorneys, Johannesburg            |
| C/O:                                   | Assheton-Smith Ginsberg Inc, Cape Town |