

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case Number: 1246/23

In the matter between:

MJILA AND PARTNERS INC
(Reg No: 2019/304921/21)

1st APPLICANT

MRS. ANNA MJILA N.O.
(In her capacity as Executrix of Estate
of late Abel Vumile Mjila)

2nd APPLICANT

and

CAROSPAN (PTY) LTD t/a NASHUA KIMBERLEY
(Reg No: 2012/001649/07)

RESPONDENT

In re:

CAROSPAN (PTY) LTD t/a NASHUA KIMBERLEY

PLAINTIFF

and

MJILA AND PARTNERS INC

1st DEFENDANT

(Reg No: 2019/304921/21)

MRS. ANNA MJILA N.O.

2nd DEFENDANT

**(In her capacity as Executrix of Estate
of late Abel Vumile Mjila)**

Coram: Olivier AJ

Heard: 25 July 2025.

Delivered: 8 August 2025.

Summary: *Civil Procedure – Application for uplifting of bar and condonation for late filing of Plea – Legal principles confirmed – Applicants failed to meet requirements for good cause – Applicants failed to make out case for uplifting of bar.*

ORDER

1. The application is dismissed with costs; and
 2. The costs are to be taxed on scale “B” as set out in Rule 69(7) read with Rule 67A(3) of the Uniform Rules of Court.
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JUDGMENT

OLIVIER AJ

INTRODUCTION:

[1] The Applicants approached this Court on application on 28 May 2024 for an order in essentially the following terms:

- 1.1 That the Respondent’s application for default judgment which was initially set down for 31 May 2024, be suspended pending finalization of this application;
- 1.2 That the bar to the Applicant’s entitlement to file a Plea in the action between the parties, be uplifted; and
- 1.3 That, alternatively to the above, the time periods within which the Applicants may file their Plea in the action, or take any further steps within the contemplation of the Uniform Rules of Court (herein after referred to

as “*the Rules*”), be extended by 5 (five) days from the date of the order sought.

- [2] The Applicants also moved for an order of costs against the Respondent should this application be unsuccessfully opposed.
- [3] Upon an enquiry by myself, Mr. Mathevula who appeared for the Applicants conceded that the relief sought as set out in paragraph 1.1 herein above has become moot and that the Applicants will not be moving for said relief any longer.
- [4] Counsel for the respective parties thereafter proceeded to address me on whether the bar that is currently in place and that prevents the Applicants from filing their Plea in the pending action between the parties should be uplifted, alternatively, whether the time periods for filing said Plea should be extended.
- [5] The Respondent (as Plaintiff) instituted action against the Applicants (as 1st and 2nd Defendants respectively) on 7 July 2023 and the action became defended on 1 August 2023 when the Applicants served their Notice of Intention to Defend.

The details of the Respondent’s claim against the Applicants are of no importance for purpose of this judgment.

- [6] The Applicants however failed to file a Plea in the action within the stipulated time period which led to the Respondent serving a Notice of Bar on the Attorneys for the Applicants on 5 September 2023, affording the Applicants 5 (five) days within which to file their Plea.

I will henceforth refer to the Notice of Bar of September 2023 as “*the First Notice of Bar*”.

- [7] The Applicants however elected not to file a Plea at the time, but instead served a notice in terms of *Rule 23(1)* and *Rule 30(1)* of the Rules on the Attorneys for the Respondent on 12 September 2023 in which it was alleged that the Respondent's Particulars of Claim was vague and embarrassing.

The grounds for the Applicants' intended exception against the Respondent's Particulars of Claim are also not important for purposes hereof.

- [8] This notice of intention to except was filed within the allotted time period and the Respondent was afforded the required 15 (fifteen) days within which to remove the Applicants' causes for complaint.

- [9] Counsel for the respective parties were *ad idem* that the First Notice of Bar was effectively nullified by the filing by the Applicants of their Notice in terms of *Rule 23(1)* and *Rule 30(1)* and I will consequently not deal with the First Notice of Bar herein further.¹

- [10] The relevant provisions of *Rule 23(1)* of the Rules state as follows:

"Where any pleading is vague and embarrassing ... the opposing party may ... deliver an exception thereto and may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception: Provided that –

- (a) where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice; and*

¹ See *Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality and Others: In Re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd and Others* 2010 (3) SA 81 (ECM) paras 12 and 13.

(b) *the party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph (a) is received, or within 15 days from which such reply is due, deliver the exception.*" (My omissions).

[11] It is clear from the above cited provisions of *Rule 23* that the Applicants, if they were planning on proceeding with the exception process, were supposed to deliver an Exception within 10 (ten) days from receipt of a reply on their notice in terms of *Rule 23(1)*, alternatively and in the event of such reply not being received, within 15 (fifteen) days from the date when such reply was due.

[12] It is common cause that the Respondent did not reply to the above notice within the stipulated 15 (fifteen) days and it is also common cause that the Applicants did not file an Exception thereafter.

[13] What is however important for purposes hereof is the events that followed immediately after the above events.

[14] On 12 February 2024, the Respondent served the Applicants' Attorneys with a Notice of Intention to Amend the Respondents' Particulars of Claim in terms of the provisions of *Rule 28(1)* of the Rules, wherein the Applicants were afforded the required 10 (ten) days within which to possibly object to the intended amendments.

It is common cause that the Applicants served no objection within the allotted time period.

[15] On 7 March 2024 and as a result of the failure by the Applicants to object to the intended amendments, the Respondent filed the amended pages of its Particulars of Claim.

- [16] On 19 March 2024, the Applicants served the Attorneys for the Respondent with an objection to the amendments, purportedly in terms of the provisions of *Rule 28(3)* of the Rules.
- [17] On 15 April 2024, the Respondent served the Attorneys for the Applicant with a further Notice of Bar ("*the Second Notice of Bar*") and as a result of the fact that the Applicants failed to file a Plea within the period of 5 (five) days that they were allowed to do so, the Respondent lodged an application for default judgment on or about 8 May 2024.
- [18] Suffice it to say that the application for default judgment was opposed by the Applicants and as a result of the fact that this application for the uplifting of the bar was lodged on 28 May 2024, the application for default judgment was removed from the roll on 31 May 2024.
- [19] The application for default judgment is consequently still pending and it is common cause that the Applicants have, as of yet, not filed a Plea in the action.
- [20] I am required to determine whether the bar on the Applicants, as a result of their non-compliance with the Second Notice of Bar, should be uplifted, alternatively whether the time periods for the Applicants to file their Plea should be extended.

MERITS:

- [21] Mr. Botha who appeared for the Respondent, correctly argued that in terms of the provisions of *Rule 26* of the Rules, the Applicants are *ipso facto* barred from filing their Plea and that they may only proceed with the filing of their Plea once the bar has been uplifted.
- [22] It is trite that a party barred from pleading may apply for the bar to be uplifted in terms of the provisions of *Rule 27* of the Rules, but that it is incumbent on such

party to show cause as to why the bar should be uplifted and why condonation should be granted for its failure to file the pleading in question.²

[23] The party in question is expected to show good cause by way of affidavit in which such party deals with the merits in such a way that the Court can determine the soundness of the party's case.³

[24] Generally, when Courts had to decide upon the issue of “*good cause*”, the Courts would have regard to:

- 24.1 Whether a reasonable explanation was afforded for the delay in filing the pleading in question;
- 24.2 Whether the request was made *bona fide* and not with the intention to delay the proceedings;
- 24.3 Whether or not the party in question recklessly and intentionally disregarded the Rules;
- 24.4 Whether the Applicant's action or defence is not ill-founded with *prima facie* some prospects of success; and
- 24.5 Whether or not any prejudice suffered by the opposing party can be compensated by way of an appropriate costs order.⁴

² *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* [2021] ZASCA 69; 2021 (6) SA 352 (SCA) para 21. Also see *Irvin v Nefdt* 1950 (1) SA 431 (T) at 433.

³ *Dalhousie v Bruwer* 1970 (4) SA 566 (C) at 572. Also see *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 215.

⁴ See *Ingosstrakh*, *supra*. Also see *Smith, NO v Brummer, NO and Another; Smith, NO v Brummer* 1954 (3) SA 352 (O) at 358; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* [2003] ZASCA 36; [2003] 2 All SA 113 (SCA) para 11.

[25] Good cause requires a full explanation of the default to enable the Court to properly assess the explanation and the party's conduct and motives.⁵

[26] In the present matter, the Applicants had to explain two periods of default for their failure to file their Plea, namely the period before the Second Notice of Bar was served on them as well as the period after the Second Notice of Bar was served on them.

The reason for the above is simply because the Second Notice of Bar was served on the Applicants as a result of their failure to file their Plea by the required date.

[27] In their Founding Affidavit in this application, the Applicants do not deny that they are *ipso facto* barred from filing their Plea in the action and also that the bar that is in place should first be uplifted in order for them to file their Plea.

I also did not understand Mr. Mathevula to argue anything to the contrary.

[28] The problem however for the Applicants is the fact that in their Founding Affidavit and in an attempt to meet the requirement of good cause, the Applicants appear to confuse the events surrounding the First Notice of Bar and the events surrounding the Second Notice of Bar.

[29] The Applicants alleged as follows in paragraphs 11 and 12 of their Founding Affidavit:

"11. The applicants after being served with summons from the respondent filed their notice of intention to defend, however, the Applicants were subsequently served with a notice of bar by the Respondents on the 4th of September 2023.

⁵ *Ingosstrakh, supra*. Also see *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 355.

12. On the 12th of September 2023 the applicants filed a notice of exception in terms of rule 23 ...” (My omissions).

[30] It is obvious from the above that the Applicants were dealing with the events surrounding the First Notice of Bar which, as was pointed out herein above, became a nullity because of the filing of the Applicants’ notice in terms of *Rule 23* of the Rules.

[31] The Applicants thereafter proceed to set out the circumstances surrounding the amendments to the Respondent’s Particulars of Claim and the objection thereto and then in paragraph 16 of the Founding Affidavit and in dealing with the Second Notice of Bar, the Applicants allege as follows:

“It is worth noting that at the time of the perfection of the notice of bar the applicants were under the bona fide impression that they were still embroiled in active litigation with the Respondents in terms of Rule 28 of the uniform rules, due to a bona fide oversight with respect to the receipts of the initial notice of intention to amend. This delay was not willful nor occasioned with malice. I have attached herein correspondence sent to the respondents (sic) attorneys dated 09th of May 2024...”

[32] The above is the only explanation tendered by the Applicants in their Founding Affidavit for their failure to either file their Plea prior to service of the Second Notice of Bar or to file their Plea thereafter.

[33] Despite the Applicants’ failure as referred to above, the Applicants boldly declare in paragraph 18 of the Founding Affidavit as follows:

“I am advised and it will be submitted that a satisfactory explanation for the delay has been provided.”

[34] It should be mentioned that the correspondence relied upon by the Applicants as is mentioned in paragraph 31 herein above, is a letter prepared by the Attorneys

for the Applicants and addressed to the Attorneys for the Respondent, the relevant parts of which reads as follows:

- “1. Apropos your application for default judgement and notice of bar filed on our office on the 8th of May 2024 and 15th of April 2024 respectively.*
- 2. Please note that the above documents served and filed are an irregular step and we kindly request that your office withdraw (sic) same.*
- 3. We put forth the immediately above as a result of the notice of amendment to your particulars of claim served on the 6th of March 2024, wherein our office served and filed a notice of objection to the said proposed amendments on the 19th of March 2024.*
- 4. Due to the pending objection to your amendments, which falls under Rule 28 proceedings, your notice of bar and application for default judgment are premature. The parties remain in active litigation.”*

[35] The above cited contents of the letter relied upon by the Applicants do not take the case of the Applicants any further since it does not make mention of any alleged oversight in respect of the receipt of the Respondent's notice of intention to amend as referred to in the Founding Affidavit.

[36] The Applicants, despite alleging in their Founding Affidavit that they were under the *bona fide* impression that they were still involved in active litigation in terms of the provisions of *Rule 28* of the Rules due to a *bona fide* oversight in respect of the receipt of the initial notice of intention to amend, provide no explanation as to what this alleged oversight was or how it came about.

[37] Mr. Mathevula could also not provide any clarity on the issue of the alleged oversight during his argument and I hold the view that he would have been hard pressed to do so in any event, seeing that the initial Notice of Intention to Amend was served on the Attorney for the Applicants personally.

[38] Further to the above and with regards to the allegation that the Applicants labored under the *bona fide* impression that they were still involved in litigation in terms of *Rule 28* of the Rules, the Applicants again fail to provide any explanation as to why or on what grounds they labored under this misconceived impression.

[39] Mr. Mathevula took this argument no further and he could also not explain why the objection to the amendments to the Particulars of Claim of the Respondent was filed only after the amendments were already effected, whilst *Rule 28* of the Rules clearly states that an objection should be filed after notice of intended amendments was given and before such amendments were effected.

[40] Mr. Mathevula in fact later conceded, correctly so, that the procedure followed by the Applicants in objecting to the amendments effected by the Respondent was not correct and that it does not provide a sound explanation for the default by the Applicants to file their Plea, either before or after service on them of the Second Notice of Bar.

It should be mentioned that Applicants' Replying Affidavit also fails to take the above issue any further.

[41] In as far as the Applicants' explanation for their default is concerned, I hold the view that the explanation given by the Applicants falls short of the requirements set out in the various authorities on the subject in that it fails to provide sufficient facts as to allow this Court to properly assess how the default came about.⁶

[42] Mr. Mathevula then implored me to consider granting the order prayed for in the application based thereon that it would be in the interest of justice to do so.

⁶ See *Ingosstrakh, supra* and *Silber v Ozen, supra*.

[43] Mr. Mathevula referred me to two Constitutional Court matters in support of his argument that the bar on the Applicants to file their Plea should be lifted based thereon that it would be in the interest of justice to do so, namely *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*⁷ and *Grootboom v National Prosecuting Authority and Another*.⁸

[44] In *Brummer*, the learned Yacoob J in considering the issue of condonation, stated as follows:

*“It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant’s explanation for the delay or defect.”*⁹

[45] In *Grootboom* the learned Zondo J, with reference to *Brummer*, held as follows:

“Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.

The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is

⁷ [2000] ZACC 3; 2000 (5) BCLR 465 (CC).

⁸ [2013] ZACC 37; 2014 (1) BCLR 65 (CC).

⁹ *Brummer*, *supra*, para 3.

excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.”¹⁰

- [46] In respect of the issue of the interests of justice, the Applicants state as follows in paragraph 19 of their Founding Affidavit:

“In any event it will be inimical to the interests of justice, for the applicants to be burdened with making payment on the respondent’s claim, which ex facie the pleadings are (sic) unmeritorious.”

- [47] The Applicants however tendered no further explanation for the allegation that they should not be burdened with payment of the Respondent’s claim or why they allege that the claim is unmeritorious.

- [48] The Applicants proceeded to state as follows in paragraphs 21 and 22 of their Founding Affidavit:

“The defence which are going to be advanced in the intended plea; inter alia, includes prescription of the claim which would serve, insuperable hurdles to the claim alleged by the respondents in the present case.

The applicants submits (sic) that it is in the interests of justice, that the bar be uplifted on, and the applicant be provided with an opportunity to reply to the respondents (sic) claim on the basis of a proper exercise of the audi alteram partem principle, and prior to the hearing of the default judgment application.”

¹⁰ Grootboom, *supra*, paras 50 and 51.

[49] The Applicants again failed to provide any substantiation for their allegation that the Respondent's claim has prescribed or why it would be in the interests of justice if the bar is uplifted.

[50] In his Heads of Argument, Mr. Mathevula referred me to *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Ltd and Others*¹¹, but upon a proper reading of the judgment by Ponnann JA, I hold the view that this particular matter does not support the Applicants' case in any way and that it in fact does the opposite.

[51] In *Mulaudzi* it was held as follows:

"[33] Mr Mulaudzi's application demonstrates an obvious lack of attention to matters that plainly called for an explanation and evidences a failure to fully and candidly enlighten the court, as an applicant in a matter such as this was obliged to do. I thus find it impossible to hold that the delay in bringing this application has been explained in a manner that is remotely satisfactory.

[34] In applications of this sort the prospects of success are in general an important, although not decisive, consideration ... it is advisable, where application for condonation is made, that the application should set forth briefly and succinctly such essential information as may enable the court to assess an applicant's prospects of success. This was not done in the present case: indeed, the application does not contain even a bare averment that the appeal enjoys any prospect of success. It has been pointed out that the court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration.

[35] In my view, the circumstances of the present case are such that we may well have been entitled to refuse the application for condonation irrespective of the prospects of

¹¹ [2017] ZASCA 88; [2017] 3 All SA 520 (SCA).

*success. This Court has often said that in cases of flagrant breaches of the rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal. Here, the delay is so unreasonable and the explanation offered so unacceptable and wanting that we may well have been justified in adopting that course.*¹² (My omissions).

- [52] It is evident that the Applicants' problems in the present matter were brought about by the lackadaisical way in which the matter was dealt with.

- [53] The Applicants firstly and in answer to the First Notice of Bar, gave notice of their intention to except to the Particulars of Claim, but then took the exception process no further;

- [54] The Applicants thereafter filed an objection to the Respondent's amendments to the Particulars of Claim after the amendments had already been effected and then alleged, under oath, that they failed to react to the Second Notice of Bar because they labored under the impression that they were still embroiled in litigation with the Respondent in terms of the Rule 28 processes.

- [55] The Applicants failed to afford this Court with any proper explanation for their lackadaisical approach and also failed to provide the Court with any insight into their intended defence against the Respondent's claim in that they failed to annex a draft Plea to their papers.¹³

- [56] It is consequently impossible for this Court to assess the Applicants' alleged defence to the Respondent's claim and to determine whether the Applicants do in fact have some prospects for success with their alleged defence.

¹² *Mulaudzi, supra*, paras 32 to 35.

¹³ *Minister of Police v Mogorogo N.O.* [2025] ZANWHC 41 (21 February 2025) para 24.

- [57] I hold the view that, although the conduct by the Applicants may perhaps not be described as intentional, same may well be described as recalcitrant and to a great extent reckless and it definitely appears to be *mala fide* and ill-considered attempts at delaying the claim by the Respondent.
- [58] I furthermore hold the view that, despite the fact that the interests of justice might play an important role in considering whether or not condonation should be granted, or in this case whether a bar should be uplifted, a party cannot simply approach the Court claiming that the granting of the relief that such party seeks will be in the interests of justice, without stating why the interests of justice will be served if the relief is granted.
- [59] Mr. Mathevula's argument that the uplifting of the bar will ensure adherence to the *audi alteram partem* principle, does not pass muster.
- [60] On the above premises I find that the Applicants have failed to:
- 60.1 Provide a proper explanation for their failure to file their Plea prior to and after the Second Notice of Bar;
 - 60.2 Provide the Court with any details as to their alleged defence to the Respondent's claim;
 - 60.3 Demonstrate that their actions were *bona fide*;
 - 60.4 Demonstrate that it would be in the interests of justice to afford them the relief sought; and
 - 60.5 Show good cause for the uplifting of the bar.

[61] I am therefore unable to find in favour of the Applicants in this matter and I also see no reason why the costs of the application should not follow the result.

ORDER:

[62] On the above premises, the following order is made:

1. **The application is dismissed with costs; and**
2. **The costs are to be taxed on scale “B” as set out in Rule 69(7) read with Rule 67A(3) of the Uniform Rules of Court.**



A.D. OLIVIER
ACTING JUDGE
NORTHERN CAPE DIVISION

REPRESENTATIVES OF PARTIES:

For APPLICANTS : Adv. R.C. Mathevula
o.i.o Mjila & Partners Inc t/a Mhlabeni Inc.
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