IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GQEBERHA)

NOT REPORTABLE

CASE NO: 2439/2023

In the matter between:

WILLIAM CLAUDUIS VAN HEERDEN	**FIRST APPLICANT**
CORNELIUS WILLEM VAN HEERDEN	**SECOND APPLICANT**

and

ELAINE VAN TONDER	**RESPONDENT**

JUDGMENT

Noncembu J

[1] This is an opposed application for the upliftment of bar. The applicants (defendants in the main action), after being served with summons on 27 July 2023, delivered their notice of intention to defend on 1 September 2023. They failed to file their plea within the requisite time period and were served with a notice of bar on 3 October 2023. After failing to comply with the said notice, they were *ipso facto* barred from pleading with effect from 11 October 2023.

[2] They seek the leave of this court to have the bar uplifted, stating that they were not in wilful default in failing to file their plea timeously, and that they have a bona fide defence to the action instituted against them by the respondent. The application is opposed by the respondent.

[3] By way of a background, the following facts are apposite. The respondent (plaintiff in the main action) instituted action proceedings against the applicants, where she sought payment of an amount of R 1 350 874.23, together with an order that a property jointly owned by the parties in terms of an oral agreement entered into in January 2008, be declared executable in terms of Rule 46 and 46A of the Uniform Rules of Court.

[4] The terms of the agreement, as pleaded in the particulars of claim, are that the parties were co-owners of a property situated at 1[…] E[...] Road, Weybridgepark, Gqeberha. The applicants would complete the front house of the said property professionally, with the respondent providing funding for that purpose, which would be repaid to the respondent. The agreement further provided that the parties would jointly make payments towards the Bond of the property held with

ABSA, as well as services and rates. The further terms were that the property would be rented out (the front and the back parts), with the rental payments going towards the bond payments and maintenance of the property.

[5] The further pleadings state that the applicants failed to make payments in terms of the aforesaid agreement, and that the respondent is claiming the aforementioned amount, which she paid towards the ABSA bond and the upkeep and maintenance of the property. The said action having been predicated by her receiving a letter of demand from ABSA bank for arrears incurred on the bond account.

[6] It is common cause that the notice of bar was served on the applicants on the aforementioned date. The applicants contend, however, that the reason why they did not file their plea was because of an arrangement that they had with the respondent to pend or suspend the litigation while the parties engaged in settlement negotiations.

[7] While it is not in dispute that there were settlement negotiations which took place between the parties, the respondent's case is that the applicants were *ipso facto* barred already when the negotiations commenced.

[8] From the facts presented in the matter, it is, in my view, indisputable that at the time of commencement of the negotiations, the applicants were already *ipso facto* barred from pleading. This notwithstanding, however, they were accommodated by the respondent in that the litigation was held back whilst

negotiations were ongoing, which negotiations commenced on 25 October 2023 and apparently failed in August 2024.

[9] The applicants' version is that their attorney of record withdrew on 11 October 2024, at which point they decided not to appoint new attorneys, as an oral agreement had been entered into with the respondent to try and resolve the matter in person in order to save on legal costs. The latter agreement is disputed by the respondent.

[10] The applicants contend thus that they were not in wilful default in failing to file their plea as they had always intended to defend the matter. Their argument is that the failure to file a plea was due to the fact that settlement negotiations were underway between the parties.

[11] The latter argument is clearly without merit if one considers that they were already placed in bar when the settlement negotiations commenced. However, I take the view that their non-compliance with the rules in this regard was condoned by the respondent when their request to pend the litigation at that stage pending settlement negotiations was granted.

[12] The respondent's counsel produced a letter, with the leave of this court, which he sought to rely on for the submission that the agreement at that stage was that the default judgment proceedings were to resume in the event of the settlement negotiations failing. The contents of the said letter are important in order to put the matter in its proper context. They read as follows:

‘Dear Sir

We do indeed acknowledge the Notice of Bar stands.

The request to hold off on an application for default judgment is in no way intended to prejudice your client’s rights. It stems merely from a practical standpoint in that we wish to avoid incurring the unnecessary legal cost of a condonation application at this stage given that the matter may become finalized through settlement. Should settlement fail, which we are hopeful will not be the case, litigation can proceed, and naturally, all of the parties' rights in relation to such litigation remain reserved.

We have engaged our clients in relation to availability and will revert as soon as practically possible.

Kind regards,’

[13] The letter in question, signed by the applicants’ attorneys of record at the time, clearly indicates that the applicants were aware that the lodgement of an application for a default judgment was on the cards at the time, but requested that this be held off for the time being, pending the settlement negotiations. What stands out from the said letter, however, is that already at that stage, a condonation application was contemplated by the applicants, but they resolved to put it on hold in the hope that the matter would be resolved, and thus save them unnecessary legal costs for the condonation application.

[14] It can therefore not be argued, on any interpretation of the said letter, that the applicants, or their attorney of record at the time, had stated that judgment by

default could be obtained if the settlement negotiations failed. This is further affirmed by the proviso in the letter, which reads, after the statement 'litigation can proceed': 'naturally *all of the parties' rights in relation to such litigation remain reserved'*. (emphasis intended)

[15] If anything, the letter seems to affirm the applicant's contention that they always intended to defend the action.

[16] With regard to the requirement of a bona fide defence to the claim, the applicants contend that part of their defence to the action is that the relief sought by the respondent is incompetent, both in respect of the money claimed (as the claim does not amount to specific performance) as well as the order of executability of the property in terms of Rule 46A, given that the property in question is bonded to ABSA bank, which bank has not been included as a party to the action.

[17] In addition to the above, there is a clear dispute between the parties with regard to the terms of the oral agreement entered into, which forms the subject matter of the action proceedings instituted.

[18] For an applicant to succeed in an application for the upliftment of bar, they need to satisfy the court that there is good cause for the application to be granted. In *A.M v S. M.M.*[1] this requirement was stated as follows:

'. . . In trying to demonstrate good cause there are two requirements, first, the defendant must put forward a satisfactory explanation for the delay. It was held in this regard that the defendant must at least furnish an explanation in full for his default comprehensively, such

[1] *A.M. v S. M.M* (45707/2021) [2023] ZAGP JHC 965 (25 August 2023) para 13.

that the court should be able to determine his motives. Secondly, the defendant must show he has a bona fide defence. This was confirmed by the SCA in *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others*, where it was held that "Generally, the concept of 'good cause' entails a consideration of the following factors: a reasonable and acceptable explanation for the default; A demonstration that a party is acting bona fide; and that such party has a bona fide defence which prima facie has some prospect of success. Good cause requires a full explanation of the default so that the court may assess the explanation.'

[19] In *Madinda v Minister of Safety and Security, Republic of South Africa.*[2] the following was stated:

'Good cause' looks at all those factors which bear on the fairness of granting the relief as between the parties and is affecting the proper administration of justice. In any given factual complex, it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefore.'

[20] On the facts presented by the applicants in the present matter, I am satisfied that good cause has been established. While there can be no question that the applicants failed to file their plea in the requisite time, and as such were barred from pleading, in my view, the delay was condoned by the respondent when the request for the suspension of litigation in order to pursue settlement negotiations was

[2] *Madinda v Minister of Safety and Security, Republic of South Africa* [2008] 3 All SA 143 (SCA); 2008 (4) SA 312 (SCA).

granted. From thereon, the explanation for the delay in the papers is that the parties (or at least their legal representatives) were engaged in settlement negotiations.

[21] Whilst it cannot be gainsaid that the applicants brought the current application only after they were served with the default judgment papers, one cannot lose sight of the fact that they were without legal representation at the said time, and on their version, had agreed with the respondent to engage in further settlement negotiations in person. Given that their initial request to suspend litigation pending the settlement negotiations in the matter was granted, one would have expected that, following the said negotiations becoming unsuccessful, a notice or at least a letter would have been sent to them, advising them that the suspension was now lifted and that litigation was to recommence. This is more so, given that the applicants were unrepresented at the time.

[22] The applicants have shown that they have a bona fide defence to the action which prima facie has prospects of success. They have given an explanation for the delay, which, for the most part, was due to settlement negotiations that were sanctioned by the respondent. They have demonstrated that they were not in wilful default of filing their plea and that they had always intended to defend the action. Furthermore, and perhaps most significantly, the prejudice they stand to suffer should the application not be granted far outweighs that which would be suffered by the respondent if the application is granted. The door to having the dispute in question resolved by a court of law would be permanently closed for them, while any prejudice to be suffered by the respondent can be remedied by an appropriate cost order.

[23] I am therefore satisfied that the applicants have established good cause for the relief they seek.

[24] On the question of costs, the general principle is that a party seeking an indulgence should bear the costs of the application. Furthermore, it is clear from the evidence that the applicants adopted a lackadaisical attitude in their conduct of proceedings in this matter. This is evidenced by the fact that they were already out of time and, therefore, *ipso facto* barred when the request for settlement negotiations was presented to the respondent. It can therefore not be argued that the respondent was unreasonable in opposing the application. The applicants, thus, should be mulcted with the entire costs of the application.

[25] In the result, the following order is made:

(a) The bar is uplifted.

(b) The applicants must file their plea and/ or any subsequent pleading within 15 days of this order.

(c) The applicants must pay the respondent's wasted costs in the default judgment application.

(d) The applicants must pay the costs of this application, under scale B of Rule 67A of the Uniform Rules of Court.

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JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the Applicants (Defendant):	*I Lambrechts*
Instructed by:	RDL Attorneys
	Gqeberha
Counsel for the Respondent:	*S Snail KaMtuze*
Instructed by:	Snail Attorneys @ Law Inc
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Date of hearing:	11 September 2025
Date judgment delivered:	16 September 2025