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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 2023-128784

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

In the matter between:

PARAMOUNT PROPERTY FUND First Applicant
GROWTHPOINT MANAGEMENT SERVICES (PTY) LTD Second Respondent
and

NEW AFRICA CAPITAL GROUP Respondent

JUDGMENT

Mfenyana J

Introduction

- [1] The applicants seek an order for the eviction of the respondent from the commercial premises described as Portion of Lower Ground Floor, 1 Sixty J[...] S[...], situated at 1[...] J[...] S[...] Avenue, [...], Johannesburg (the property). The first applicant had concluded a lease agreement with the respondent on 26 July 2022. On 27 November 2023, the first applicant cancelled the agreement, citing the respondent's failure to pay rental and ancillary expenses due to the first applicant in terms of the lease agreement.
- [2] The respondent opposed the application and filed the answering affidavit two months out of time. For this, the respondent seeks condonation, which is opposed by the applicants. The respondent also seeks leave to file a supplementary affidavit in answer to the applicants' replying affidavit. On the other hand, the applicants seek condonation for the late filing of their replying affidavit, which was filed one day out of time.
- [3] It is necessary to consider the merits of the condonation applications filed in respect of both the applicants and the respondent.

The respondent's condonation application

- [4] The answering affidavit is deposed to by Mr Daniel Besong (Mr Besong), who asserts that he is a director of the respondent, duly authorised to depose to the answering affidavit. He does not provide any further details in relation to his authority to act on behalf of the respondent.
- [5] Relevant to the condonation application, Mr Besong acknowledges that the answering affidavit should have been filed on 5 February 2024. It was, however, filed on 2 May 2024, a delay of close to two months. Mr Besong states that on 5 February 2024, the applicants initiated settlement negotiations, which continued until 22 March 2024. He avers that for this reason, legal proceedings were held in abeyance.
- [6] When the settlement negotiations did not yield the desired results, the respondent called upon the applicants to produce certain documents in accordance with rule 35(12), which would enable the respondent to file its answering affidavit. These documents range from documents confirming the handover of the property by the applicants to the respondent, electricity and water readings for the property and the common area from date of occupation to date of cancellation, the generator costs for the property and the property assessment rates from date of occupation to date of cancellation. The applicants did not provide the documents specified in the rule 35 (12) notice and set the matter down on the unopposed roll for hearing on 13 May 2024.

- [7] On 2 May 2024, the respondent filed its answering affidavit.
- [8] Mr Besong contends that the delay is minimal, being 22 days out of time, and thus condonation ought to be granted. He further avers that “there was clearly never any disregard of the Rules” of court, rather, there was a genuine effort to file the answering timeously. He does not provide any details to support this contention, bearing in mind that in terms of the Rules, the answering affidavit should have been delivered by 5 February 2024.
- [9] Mr Besong further avers that it is obvious that this matter is important to the respondent. He goes on to state that the deponent to the founding affidavit lacks the *locus standi* to depose to the founding affidavit. He further avers that the cancellation of the lease agreement by the first applicant is unlawful, as there was no amount owing. Instead, the respondent had paid in excess of its obligations to the respondents, he avers. Importantly, he avers that the parties’ obligations were suspended due to impossibility of performance.
- [10] The respondent thus avers that it has a legitimate case and would suffer irreparable harm if condonation is not granted, as it would be barred from properly addressing the applicants’ contentions, while the applicants would not suffer any prejudice.

[11] The respondent asserts strong prospects of success, arguing it has an unassailable defence: specifically, that the deponent lacks *locus standi* for failing to provide a resolution authorising this application. The respondent further states that it could not obtain a liquor licence despite meeting all requirements until 15 February 2024, and was thus unable to use the premises as intended for a restaurant and music lounge. The respondent claims this situation constitutes legal impossibility, which either extinguishes or suspends reciprocal obligations. Notably, the respondent argues that if performance under the lease agreement was unlawful at the time of cancellation, then terminating the lease due to an alleged breach would also be unlawful. The respondent alternates between arguments of impossibility of performance and unlawfulness of performance, contending that the applicant's reliance on a breach, while the lease was suspended, is unlawful.

[12] In opposing the condonation application, the applicants contend that the respondent has failed to provide a reasonable explanation for the delay of almost three months, and not 22 days as the respondent suggests. In this regard, the applicants argue that there was no agreement between the parties to suspend the time periods for the filing of the respondent's answering affidavit, which was due on 5 February 2024. The applicants, in essence, aver that the respondent's explanation is factually incorrect, as

the settlement negotiations collapsed on 14 March 2024 and not on 22 March as alleged by the respondent.

- [13] The applicants, however, point to a different time from 13 to 15 February 2024, when the applicants agreed to suspend legal proceedings. During this time, contend the applicants, the respondent had given an undertaking, but later failed to adhere. On that basis, the applicants on 21 February 2024 applied for a hearing date on the unopposed roll, having advised the respondent that it would do so in the event the respondent did not adhere to its undertaking. The applicants question why the respondent chose not to raise, at that stage, the existence of an agreement to suspend the proceedings.

Discussion

- [14] It is trite that condonation will not be had for the mere asking¹. An applicant for condonation seeks indulgence from the court. Such applicant must set out fully and comprehensively the reasons for the delay in not only timeously delivering the (answering affidavit), but also the delay in seeking condonation for non-compliance.² The respondent in this application glibly states that it should be granted condonation partly on the basis that the reasons why the matter is important to it are obvious. That

¹ See in this regard: *Uitenhage Transitional Local Council v South African Revenue Service* 2004(1) SA 292 (SCA).

² *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* 2017(6) SA 90 (SCA).

is not sufficient. It is not for the court to guess the importance of a matter to a party, assuming that each matter is important to the parties involved. The importance of the matter in the context of good cause pertains to the novelty of the issue or issues raised in the matter. There are no such issues in this matter.

[15] A rather disturbing aspect of the respondent's bid is that it maintains that the delay is not inordinate, as it filed its answering affidavit on 30 April 2024. It further maintains that the answering affidavit was filed 22 days out of time. This is incorrect. An email from the respondent's attorneys to the applicant's attorneys confirms that the answering affidavit was served on 2 May 2024. It is also difficult to understand how the respondent arrived at a total of 22 days from 5 February 2024 to 2 May 2024. On any interpretation, the calculation is incorrect.

[16] Even on the respondent's version, it is worth noting that at the time the respondent avers an agreement was reached to suspend legal proceedings, the *dies* for the filing of the respondent's answering affidavit had already lapsed. It is not the respondent's case that the agreement was reached in relation to its non-compliance between 5 February 2024 and the time the negotiations commenced. The answering affidavit sheds no light on this period, which, in my view, is crucial. This downplaying of the extent of the delay, which in my view is inordinate, by the respondent renders his explanation not only improbable but also mendacious. What

exacerbates the respondent's situation is that Mr Besong, who deposed to the answering affidavit, is also the attorney of record of the respondent. As such, he ought to have been privy to the correct facts of the matter. Whatever the reason behind the respondent's explanation, it falls short of the requirements for condonation as set out in Rule 27.

[17] A party seeking condonation seeks an indulgence from the court. Thus, that party ought to take the court into its confidence and state fully and honestly the reasons for its non-compliance. That party must show good cause. In this regard, the respondent merely states that it has good prospects of success, presumably because the first applicant was not entitled to cancel because the respondent had internal problems and thus the cancellation was unlawful. Nothing could be further from the truth. Taking into account the inordinate delay, the inadequate explanation by the respondent, the prospects of success and the importance of this case, no good cause has been shown. No plausible explanation which covers the entire duration of the delay was proffered by the respondent.

[18] It is well established that if, when considered in totality, the facts make an application for condonation clearly unworthy of consideration, the court is not obliged to consider the prospects of success. In this case, not only is that so, but the applicant has also demonstrated no such prospects of success. The inevitable conclusion is that the applicant either flagrantly breached the Rules of Court or cannot provide any explanation for the

delay. In these circumstances, the application for condonation is bound to fail.

[19] Having found no merit to the respondent's condonation application, the adjudication of the applicants' condonation application in respect of the filing of their replying would be academic and serve no purpose.

[20] The applicants contend that the lease agreement was for a duration of two years, from 1 September 2022 to 31 August 2024. The terms of the lease agreement are not in dispute.

[21] The applicants contend that the respondent failed to pay amounts due in terms of the lease agreement and was in arrears in the amount of R111 646.07 on 10 November 2023. The first applicant caused a letter of demand to be delivered to the respondent for payment of the arrears within seven days. When the respondent failed to remedy the breach, the first applicant delivered a letter of cancellation to the respondent on 27 November 2023, demanding that the respondent immediately vacate the property.

[22] The first applicant contends that it lawfully cancelled the lease agreement in accordance with its provisions. In this regard, clause 26.1 of the lease agreement entitles the first applicant to cancel the lease agreement if the respondent commits a breach and fails to remedy such breach within

seven days or such longer period as may be reasonable in the circumstances. Despite this, the respondent refused to vacate the property and remained in occupation, prompting the applicants to bring this application seeking to evict the respondent and all persons who occupy the premises through the respondent.

[23] The applicants, therefore, assert that the respondent's occupation of the property is unlawful, and they no longer wish for the respondent to remain in occupation of the leased premises. They further allege that, in accordance with the lease agreement, the respondent is liable for the costs of this application on an attorney-and-client scale.

[24] The version placed by the applicants before this court is clear and unambiguous, that the respondent has failed to comply with its obligations in terms of the lease agreement and has failed to meet the applicant's demand and remedy its breach within seven days as stipulated in the lease agreement. After the applicant cancelled the lease agreement, there was no valid reason for the respondent to continue occupying the premises. Moreover, the applicants state that the lease agreement has, in any event, run its course. All the documentary evidence supports the applicant's version. In my view, the applicant has made out a case for the granting of the relief sought. The respondent's continued occupation of the leased premises is unlawful.

Order

[25] In the result, I make the following order:

- a. The respondent's application for condonation for the late filing of the answering affidavit is dismissed.
- b. The respondent and all persons occupying the premises through or under the respondent are directed to vacate the premises situated at Portion of Lower Ground Floor, 1 Sixty J[...], S[...], 1[...] J[...] S[...] Avenue, R[...], Johannesburg, within seven (07) days of this order and allow the applicant vacant possession of the premises.
- c. Should the respondent and all persons occupying the premises through or under the respondent fail to vacate the premises within the time stipulated in b. above, or enter the premises after the expiry of seven days aforementioned, the Sheriff of this court or his duly authorised deputy, duly assisted by members of the South African Police Service (SAPS), if necessary, is authorised and directed to take the necessary steps to eject the respondent and all persons occupying through or under the respondent, from the premises situated at Portion of Lower Ground Floor, 1 Sixty J[...], S[...], 1[...] J[...] S[...] Avenue, R[...], Johannesburg.
- d. The respondent is ordered to pay the costs of this application on an attorney and client scale.

S MFENYANA

Judge of the High Court

Johannesburg

Appearances

For the applicant:	Adv G J A Cross instructed by NHL Inc. gareth@lazattorneys.com
For the respondent:	No appearance
Date of hearing:	30 May 2025
Date of judgment:	23 October 2025