IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Not Reportable

Case no: 219/2022

In the matter between:

GAR MOTORS (PTY) LTD t/a JB TOERUSTING	First Applicant
JAEN BURGER	Second Applicant
and	
UNITED APOSTOLIC CHURCH AND FAITH HEALING MINISTRIES	Respondent

In re:

UNITED APOSTOLIC CHURCH AND FAITH HEALING MINISTRIES	Plaintiff
and	
GAR MOTORS (PTY) LTD t/a JB TOERUSTING	First Defendant
JAEN BURGER	Second Defendant

Neutral citation: *GAR Motors (Pty) Ltd t/a JB Toerusting and Another v United Apostolic Church and Faith Healing Ministries* (219/2022).

Coram: MAMOSEBO J.

Heard: 22 August 2025.

Delivered: 09 January 2026.

Summary: Security for costs – Applicants are *incola* claiming security for costs against the *peregrinus* respondent – *Incola* does not have the right to security as of course, courts must exercise a judicial discretion taking into account considerations of fairness and equity – Regard to be had to particular circumstances of each case – Respondent's answering affidavit filed out of time – Condonation application – Condoning a party's non-compliance is an indulgence, court has a discretion whether to grant condonation – Party seeking condonation must make out a case entitling it to the court's indulgence.

ORDER

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1. The respondent's late filing of the answering affidavit to the Rule 47(3) application is hereby condoned.

2. The application in terms of Rule 47(3) of the Uniform Rules of Court is dismissed.

3. The applicants are ordered to pay the costs of the Rule 47(3) and the condonation applications, on the scale as between attorney and client, including the cost of counsel, to be taxed on scale C.

JUDGMENT

Mamosebo J

[1] This is an interlocutory application in terms of Rule 47(3) of the Uniform Rules of Court. The applicants are GAR Motors (Pty) Ltd t/a JB Toerusting and Jaen Burger, first and second defendants, respectively, in the main pending action. The United Apostolic Church and Faith Healing Ministries is

the respondent in the Rule 47(3) application and plaintiff in the main action. For convenience, I will refer to the parties as plaintiff and defendants, wherein the latter refers to the first and second defendants collectively.

Background

[2] A brief background is necessary to place the application in perspective. The plaintiff, United Apostolic Church and Faith Healing Ministries, is a voluntary incorporated association constituted as a registered faith-based organization with its address at 1[...] S[...] J[...], C[...] [...] M[...], Zimbabwe. The first defendant, GAR Motors (Pty) Ltd t/a JB Toerusting, is a private company incorporated in terms of the laws of the Republic of South Africa with its registered address at [...] I[...] Road, Barkly West, Northern Cape Province. The second defendant, Jaen Burger, is a businessman residing at [...] S[...], Upington, Northern Cape Province.

[3] In the main action, summons was served on the defendants on 28 February 2022 in which the plaintiff claims in a form of damages *ex contractu*, repayment of the purchase price for a grader bought from the first respondent in the amount of R 333 625.00 but was never delivered following full payment in October 2016; and damages *ex delicto* for the recovery of the loss of income which the church could have generated with the use of the grader in the amount of USD 1 747 200.00. In the alternative to the aforementioned claims, plaintiff claims restitution in the amount of R 333 625.00 and damages in the amount of USD 1 747 200.00 suffered as a result of the failure by the second defendant to fulfil his fiduciary duties in terms of the Companies Act 71 of 2008. The defendants filed their plea on 29 March 2022 together with a Rule 47(1) Notice which stipulates:

> 'A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.'

[4] Plaintiff continued with the discovery process but did not react to the Rule 47(1) notice when met with a Rule 47(3) application. It filed its notice to

oppose the Rule 47(3) application on 02 November 2022. Plaintiff's answering affidavit was due on 23 November 2022, but an unsigned copy was only served on 01 December 2022 followed by a signed copy on 16 January 2023. The defendants urged the Court to refuse condoning the late filing of the answering affidavit, however, should the court incline to admit same, they would need time to file a replying affidavit. I deal first with the condonation application.

Condonation application

[5] As already said, plaintiff was supposed to file its answering affidavit by 23 November 2022 but only filed an unsigned affidavit on 01 December 2022, and a signed affidavit on 16 January 2023. It is on this basis that the defendants contended that the unsigned affidavit should be discounted by this Court. The result of which is that a delay of eight days (concerning the unsigned answering affidavit) would become a delay of 54 days (concerning the signed answering affidavit). The defendants contended that such a delay of 54 days is inordinate and was not fully accounted for, which should resultantly warrant a refusal by the court to admit the answering affidavit into evidence.

[6] In *Grootboom v National Prosecuting Authority and Another*[1] the Constitutional Court articulated:

> 'I have read the judgment by my colleague Zondo J. I agree with him that, based on *Brummer* and *Van Wyk*, the standard for considering an application for condonation is the interests of justice. However, the concept "interests of justice" is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and 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 importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily

[1] 2014 (2) SA 68 (CC) paras 22 and 23.

limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.'

[7] Plaintiff furnished the following explanation in substantiation of its application for the condonation of the late filing of its answering affidavit. Counsel submitted that the first opportunity to consult with the client was on 15 November 2022. The legal team needed various documents, including but not limited to, bank statements, WhatsApp messages, and emails from various devices to compile the answering affidavit, the last of which was received only on 29 November 2022. Ms Mercia Kouter of the firm Thomas Kouter Attorneys, in her capacity as plaintiff's attorney, deposed to the founding affidavit stating that her office directed a letter dated 23 November 2022 sent by email to the defendants, indicating that an unsigned affidavit would be served on them as soon as it is received from counsel who had advised that she had been booked off sick. On 01 December 2022, a copy of the unsigned answering affidavit was served on the defendants' attorneys. The unsigned affidavit was also dispatched on the same day to its deponent, bishop Farai Mabiza, in the United Kingdom for signature.

[8] A signed copy of the affidavit was collected from bishop Mabiza on 06 December 2022, and Ms Kouter was notified in that regard. An attempt to deliver the signed answering affidavit was made on 19 December 2022 on the offices of the defendants' attorneys which were closed for the festive period. The signed answering affidavit could only be delivered on 16 January 2023. It is only on 04 April 2023 where the defendants addressed a letter to the plaintiff's attorneys intimating that a substantive condonation application would be required since the signed answering affidavit was filed two months late. A further letter was addressed to the plaintiff's attorney informing her that the defendants regard the unsigned answering affidavit as *pro non*

scripto, and objecting to the set down date for hearing (05 May 2023) on the basis that it was premature. Ms Kouter removed the matter from the roll.

[9] The plaintiff submitted that an unsigned answering affidavit was only eight days out of time and no objection was received thereto. Further, the plaintiff had explained to the defendants' attorneys that the affidavit had to be commissioned in the United Kingdom by a solicitor where a different process for the commissioning is followed. For the plaintiff to furnish a detailed explanation, it required a consolidation of all emails and waybill information displaying date stamps.

[10] It was argued on behalf of the plaintiff that, although the total number of days for the delay in filing the answering affidavit appear to be 54 days, the figure includes weekends and the *dies non* from 15 December 2022 to 15 January 2023. Calculated properly, the period should only include 23 November 2022 to 15 December 2022, which makes the delay to be a total of 16 days.

[11] The defendants were informed timeously of the reason why they were only afforded an unsigned copy of the answering affidavit at the time. There is no reason to believe that the plaintiff was dilatory in filing the answering affidavit. I am therefore not prepared to refuse to exercise my discretion in favour of the plaintiff, granting it condonation for the late filing of its signed answering affidavit. The question of prejudice does not arise as the defendants had the unsigned copy with the same content as the signed copy. It follows that the plaintiff stands to succeed in this regard. I proceed to deal with the Rule 47(3) application.

Rule 47(3) application

[12] Rule 47(3) stipulates that:

> 'If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within 10 days of the demand or the registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.'

[13] The defendants demand that the plaintiff furnish security in the amount of R 350 000.00 in the form of a bank guarantee or another form of security to the satisfaction of the defendants. The demand is said to be based on the defendants' right to security due to the plaintiff's status as *peregrinus* of this Court based in Zimbabwe, without any unencumbered immovable property in South Africa. The defendants would therefore be unable to enforce an order of costs against the plaintiff should plaintiff be unsuccessful in its action. They further contended that plaintiff's merits in the main action are weak and should its claim be dismissed, it may pose a challenge for it to satisfy a taxed bill of costs. The defendants in their replying affidavit contended that proof of funds in another jurisdiction is no defence in an application for security since the plaintiff has even failed to furnish reasons why such funds were not transferred to its attorney's trust funds until finalisation of the action.

[14] The application was contested by the plaintiff. In its answering affidavit, deposed to by bishop Mabiza, the status of *peregrinus* of Zimbabwe is not denied. What the plaintiff denies is that, that status alone is sufficient or justification for an order directing that security be furnished. Plaintiff maintains that the defendants have not placed any exceptional circumstances for this Court to rule in the defendants' favour. More significantly is that, the merits of the plaintiff's action including the defendants' *mala fide* conduct as evidenced on the WhatsApp communication between plaintiff and the second defendant, which forms the basis of the cause of action, should persuade the Court to dismiss the Rule 47(3) application. Plaintiff attached a copy of its latest bank statement to substantiate its submissions relating to its financial means thus demonstrating its capability to prosecute the action to finality.

[15] Plaintiff questions the basis for the defendants to demand the furnishing of security despite the following circumstances prevailing:

(a) The purchase price of the grader including delivery was paid in full by 10 October 2016, which is not denied.

(b) From the attached WhatsApp communication between the parties, when plaintiff enquired about delivery of the grader, an impression was created that arrangements were being made to have it delivered, including registration of the grader in plaintiff's name.

(c) As per the copy of the registration details attached to the papers as annexure "OP8" and used in the default judgment application by the creditor, Bafana Bafana Elektries, the grader was registered in Mr Burger's name (the second defendant) for the first time on 22 November 2017.

(d) Notwithstanding that the plaintiff had provided all documents as and when requested, the second defendant had never provided an Application for Registration and Licencing Form and Notice in respect of Traffic Register Number Form to the plaintiff to complete the registration of the grader in the plaintiff's name.

(e) Plaintiff had sent a mechanic to inspect the grader and found it to be in good working condition prior to its purchase. However, a certain lawyer addressed an email to the plaintiff requesting an extension for delivery in order to effect certain repairs to it. Plaintiff was informed that the defendants needed to secure funds for the repairs to the same grader, and later that the landlord had retained the grader as lien for the non-payment of rent.

(f) The grader was removed but its removal was not communicated to the plaintiff except to be informed that repairs were underway. The second defendant requested bishop Mabiza to furnish an affidavit to him stating that he, on behalf of the plaintiff, had bought the grader from the second defendant, and to quote its VIN and further provide a certified copy of his identity document, which he did, and was informed that the information was forwarded to the defendants' attorneys. The bishop was however subsequently informed that the grader was attached and removed by a creditor who was intending to sell it. The second defendant further informed the bishop that he was unable to attend to the site where the grader was kept, and claimed to have been unable to notify the new owner that it belonged to the plaintiff. The grader was sold on auction for R130 000.00, and plaintiff only became aware of the auction in May 2021.

[16] In *Magida v Minister of Police*[2] the Appellate Division elucidated:

'[A]n *incola did not have a right which entitled him as a matter of course to the furnishing of security for his costs. It was a question of practice . . . that a Judge . . .* had a judicial discretion to grant or refuse the furnishing of security…'[3]

'The rule obliging a *peregrinus* to give security for costs has grown from a general policy of our Courts to secure *incolae* for the performance of any judgment given in their favour against a *peregrinus*, actuated by the desire to assist *incolae* to litigate at home. . . . The general rule is that a *peregrinus* must give security for costs in an action against an *incola*. *Estate Fawcus v Wood*. The principle underlying the practice of ordering a *peregrinus* to furnish security for costs is, as set out above, to protect an *incola* to the fullest extent. *Saker and Co Ltd v Grainger*; *Santam Insurance Co Ltd v Korste*. A Court should therefore exercise its discretion in favour of a *peregrinus* only sparingly and in exceptional circumstances. . . . The *bona fides* or soundness of the claim of the *peregrine* plaintiff is not a fact which should play any part in the exercise of the Court's discretion. The Court will therefore not enquire into the merits of the dispute in the exercise of its discretion.[4] (Footnotes omitted.)

'A Court, in assessing whether or not to exercise its discretion in favour of a *peregrinus* and in deciding whether such exceptional circumstances exist as to justify a departure from the general rule, may look to the nature of the claim as an important motivating factor.'[5]

[17] A court has judicial discretion whether to direct the furnishing of security or not, taking into consideration particular circumstances of a case and considerations of fairness and equity to both parties. Regard must be had to the fact that the defendants are still in possession of the purchase price which was paid in full and no delivery of the goods has taken place. In reply, the defendants seem to have persisted with the plea that the grader was

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[2] 1987 (1) SA 1 (A).
[3] *Ibid* at 12A– D.
[4] *Ibid* 5D; 5G – I.
[5] *Ibid* 6C.

unlawfully attached by a third party despite being informed that it does not belong to the first defendant. Further that they were unable to file an interpleader since the first defendant was no longer the owner of the grader, and that the plaintiff had the duty to file its interpleader which it failed to do. Without getting into the merits of the matter which will be fully ventilated in the action proceedings, the explanation is unmeritorious. But for the inordinate delay in not only registering the grader in the plaintiff's details but also in delivering the grader to the plaintiff, it would not have been attached and sold by the third party.

[18] On consideration of all the relevant facts as well as considerations of equity and fairness, I deem it unfair to expect the plaintiff to fork out a further amount, equal to the amount it has paid already, as security. The mere fact that plaintiff has produced financial statements in an account held in a foreign jurisdiction to demonstrate its financial position does not justify that it would not be able to pay costs in the event that an adverse cost order is made against it. The Full Court in *Barker v Bishop's Diocesan College and Others*[6] remarked that usually, when a litigant is resisting an application for security for costs, financial documentation is furnished to support allegations of impecuniosity. I have already taken into consideration the fact that the full amount for the purchase price of the grader is still in the possession of the defendants, and that is in addition to the availed financial statements. I am of the view that the plaintiff's claim is made in good faith and the application for security is made to stifle a genuine claim.

[19] The Constitutional Court in *Giddey NO v JC Barnard and Partners*[7] held:

'Similar considerations apply to the decision whether to award security. Ordering security for costs is a procedural matter incidental to the civil proceedings. If it could be appealed on the standard of correctness each time, it might well result in lengthy delays and considerable costs. Moreover it is clear that the statute itself contemplates a discretion which vests in the court of first instance to determine whether security should be payable in a particular case. The court at first instance must consider all the relevant facts placed before it and then perform the balancing

[6] 2019 (4) SA 1 (WCC) para 10.
[7] 2007 (5) SA 525 (CC) para 22.

exercise described at para [8] above. It is best placed to make an assessment on the relevant facts and correct legal principles, and it would not be appropriate for an appellate court to interfere with that decision as long as it is judicially made, on the basis of the correct facts and legal principles. If the court takes into account irrelevant considerations, or bases the exercise of its discretion on wrong legal principles, its judgment may be overturned on appeal. Beyond that, however, the decision of the court of first instance will be unassailable.'

I am not convinced that considerations of equity and fairness demand that the plaintiff should be compelled to furnish security. On the contrary, it would be fair and equitable for it to be absolved from such an obligation. It follows that the application in terms of Rule 47(3) by the defendants stands to fail.

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

1. The respondent's late filing of the answering affidavit to the Rule 47(3) application is hereby condoned.

2. The application in terms of Rule 47(3) of the Uniform Rules of Court is dismissed.

3. The applicants are ordered to pay the costs of the Rule 47(3) and the condonation applications, on the scale as between attorney and client, including the cost of counsel, to be taxed on scale C.

MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Appearances

For the Applicants: Adv. FG Van Rensburg
On instructions of: Haarhoffs Inc.

For the Respondent:	Adv. A D Theart-Hofmeyr
On instructions of:	Thomas Kouter Attorneys