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

Case Number: 2025-016115

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	Date: 09.03.2026
	Signature: Khaba AJ

In the matter between:

ELEKANYANI PHUNDULU

Applicant

And

LERALLA PHARMACY

First Respondent

MOWANA PROPERTIES

Second Respondent

VHONANI PATRICK MUDAU

Third Respondent

WRITTEN REASONS FOR THE ORDER

KHABA AJ

Introduction:

- [1] This is an interlocutory application launched in terms of Rule 27 of the Uniform Rules of Court. The applicant seeks two interrelated orders: first, condonation for its non-compliance with Rule 25(1) read with Rule 26 of the Uniform Rules of Court and secondly, the upliftment of the automatic bar imposed on its replication dated 24 June 2025. This application was heard in the trial interlocutory roll-on 25 February 2026. This application was opposed by the second respondent. The first and third respondents did not oppose the application and have taken no part in these proceedings.
- [2] On 25 February 2026, I granted an order dismissing the applicant's condonation application with costs on an attorney and client scale, such costs to be paid by the applicant's attorney of record. Aggrieved by this decision, on 05 March 2026 the applicant's attorneys filed a notice in terms of Rule 49(1)(c) requesting written reasons to be provided in respect of the order that I granted. These are the reasons for the order.
- [3] Before turning to the merits of the application, it is necessary to set out the factual matrix within which this dispute arises. The factual background is largely common cause, although their significance is contested between the parties.

The Parties and the Factual Background:

- [4] The applicant is Mr. Elekanyani Phundulu, an adult male businessman, currently residing at 7[...] N[...] Street, P[...] N[...], C[...] 1[...]. According to the founding affidavit, the applicant holds himself out as a representative of Endzani Amalgamated Group (Pty) Ltd, a company that allegedly entered into arrangements with the first and third respondent concerning the business rescue of Leralla Pharmacy.
- [5] The first respondent is Leralla Pharmacy, a company duly registered in terms of the company laws of the Republic of South Africa. It conducts business as a pharmacy at Shop Number 2[...], T[...] P[...], E[...] Gauteng. The firsts respondent has not defended the main action
- [6] The second respondent is Mowana Properties, a property management company registered with the Property Practitioners Regulatory Authority. It operates in the general property market with its principal place of business at 1[...] R[...] Road, S[...], Johannesburg.
- [7] The third respondent is Mr. Vhonani Patrick Mudau, an adult male businessman and the managing director of Dream Quest, trading as Leralla Pharmacy. The third respondent is cited in his personal capacity and as representatives of the first respondent. Much like the first respondent, the third respondent has not defended the main action.

The following chronology, distilled from the documents filed on record by the execution and forms part of the factual matrix of this dispute:

The Factual Background to the Litigation:

- [8] On 06 February 2025, the applicant instituted an action against all three respondents by way of combined summons. The applicant claims damages in the amount of

R4 467 196 74, allegedly arising from the breach of an agreement entered into on 29 August 2019.

- [9] The material averments in the applicant's particulars of claim may be summarised as follows: On 23 August 2019, the applicant, together with the first and second respondents entered into a verbal agreement. The first respondent was represented in these negotiations by the third respondent. The material terms of the alleged agreement were that: The applicant would inject capital into the first respondent's business; The applicant would receive a shareholding or ownership interest in the first respondent; The applicant would assume responsibility for rental payments and day-to day operational expenses of the first respondent; The applicant injected an amount of R 2 567 865.00 towards rental and the day-to day running of the first respondent
- [10] The applicant alleges that the first and third respondent breached the material terms of the agreement by ceasing to trade without informing the applicant, and by failing to transfer any shares or ownership interest to the applicant as contemplated. On 19 March 2025, the second respondent entered an appearance to defend the action. The first and second respondents took no steps to defend the action.
- [11] On 30 April 2025, the second respondent delivered its plea, which encompassed both plea over the merits and special plea of misjoinder. The special plea raised fundamental questions about the propriety of joining the second respondent as a party to the proceedings. In essence, the second respondent contented that: The applicant had failed to demonstrate that the second respondent has direct or substantial interest in the subject matter of the litigation; The second respondent was at all material times merely providing rental space to the first respondent in terms of the lease agreement concluded between the second respondent (as agent for the GEPPF) and the third respondent (as representative of the first respondent); The lease agreement was concluded exclusively between the second respondent and the third respondent, and thus the second respondent had no legal relationship with the applicant that could give rise to the liability; The second respondent did not require

consent from the applicant to effect the termination of the lease agreement, as the applicant was not party to the agreement.

[12] On 24 June 2025, the applicant delivered its replication to the second respondent's plea and special plea. The replication was served and filed outside the time period as prescribed by Rule 25(1). There is a dispute between the parties regarding the precise period of delay, the applicant contends it was 15 days late while the second respondent submits it was 22 days late. This dispute arises from differing calculations of the *dies* from the date of service of the plea. For reasons that will become apparent, the resolution of this dispute is not material to the outcome of this application.

[13] On 26 June 2025, the second respondent served a notice of objection to the replication, indicating that the applicant was required to apply for condonation before the replication could be accepted as validly filed. On 11 July 2025, the applicant launched the present application seeking condonation for the late filing of its replication as well as the upliftment of the bar on the filing of its replication.

The Applicant's Case for Condonation:

[14] The founding affidavit in support of the present application was deposed to by the applicant's attorney of record Mr. Fhumulani Brian Lukhalimana (*"Mr. Lukhalimana"*). The applicant himself deposed to a confirmatory affidavit, which merely confirms the allegations in the founding affidavit *"in so far as they relate to me as the applicant"*.

[15] The explanation proffered for the delay is set out in paragraphs 13 to 20 of the founding affidavit, the following explanation is proffered for the delay:

[16] The first period of the delay (02 May 2025 – 26 May 2025): Upon receipt and perusal of the special plea and plea, Mr. Lukhalimana consulted telephonically with the applicant on 02 May 2025 to discuss the special plea of misjoinder and how to address it in a replication. Mr. Lukhalimana advised the applicant that to deal with the

special plea, he would need to obtain and furnish evidence, either real or documentary, evincing a nexus between himself and the second respondent. The applicant indicated that he had lost the required proof payments dated as far back as 2020, evidencing that he paid the second respondent. The applicant further indicated that there was written correspondence from the second respondent directed to him which he was failing to locate due to lapse of time, the applicant was already outside the 15- day period envisaged in terms of Rule 25(1) of the Uniform Rules of Court by at least 3 days.

- [17] Second period of the delay (09 June 2025 – 20 June 2025): Mr. Lukhalimana office was faced with a printer crisis. The printer broke down completely, causing material delays in releasing work and affecting service. Mr. Lukhalimana attempted to source a reliable printer supplier and found Nashua, but delivery of the new printer was delayed. It was only on 23 June 2025 that a new printer was delivered. On 24 June 2025, Mr. Lukhalimana instructed his candidate attorney to revise the replication and attend to service on the same day.
- [18] The applicant further submits that, the degree of lateness is (15 days according to the applicant, though the respondents contend it is 22 days) is not excessive. The applicant has prospects of success in the main action; The application is made in good faith; The second respondent will not suffer any prejudice that cannot be cured by a costs order; The interest of justice favour the granting of a condonation to allow the applicant to assert his section 34 Constitutional rights.

The Second Respondent's Opposition:

- [19] The second respondent opposes the application on multiple grounds, the grounds of which are set out as follows:
- [20] Inadequate explanation for the delay: The second respondent submits that the applicant has failed to provide a full and satisfactory explanation for the entire period of the delay. There is an unexplained gap between 27 May 2025 (when the evidence

was received) and 09 June 2025 (when the printer crisis allegedly began). The explanation regarding the broken printer does not justify why the applicant waited for their own printer to be fixed when other printing options (such commercial printing shops) were readily available.

- [21] Prospects of success against the respondent: The second respondent contends that the applicant has failed to establish that the second respondent has a direct and substantial interest in the main action. The second respondent was merely the landlord of the first respondent. The applicant has not allegedly or proven that the second respondent is either a shareholder or director in Leralla Pharmacy. Without such allegation, the applicant cannot sustain a cause of action against the second respondent. The special plea of misjoinder is not dilatory plea that can be cured by replication, it goes to the heart of whether the second respondent is properly before the Court at all.
- [22] Prejudice to the second respondent: The second respondent submits that it suffers financial prejudice each time it is required to obtain legal counsel to protect its interest. Valuable resources are diverted day-to day responsibilities to assist in preparing a defence. Moreover, there is prejudice to the administration of justice and to the second respondent's right not to be drawn into litigation to which it is not properly a party.
- [23] The importance of the case and the interest of justice: The second respondent submits that this is a contractual dispute between the applicant and the first respondent involving a claim for damages. No new legal or constitutional consideration arise. Justice for the applicant will still be served as he retains his claim against the first and third respondents. The only issue before this Court at this stage is whether to condone the late delivery of the applicant's replication.
- [24] The second respondent further objects to the introduction of new evidence in the applicant's replying affidavit in paragraphs 7.3 and 9.3 of the replying affidavit, and through the extensive annexures attached thereto (including annexures ("EP1";

“EP2”; and “EP3”), the applicant seeks to introduce email correspondence and bank statements that were long in his possession. The second respondent submits that this falls foul of the well-established principle that an applicant stands or falls by its founding affidavit and cannot make out a new case in reply.

The Legal Framework:

[25] Rule 27 of the Uniform Rules of Court provides: ‘

“(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

“(2) Any such extension may be ordered although the application therefore is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.

(3) A court may on good cause shown, condone any non-compliance with these rules. “

[26] The meaning of “good cause” was explained in *Madinda v Minister of Safety and Security*¹ at para 10:

“...Good cause looks at all those factors which bear on the fairness of granting the relief as between the parties and some as 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

¹ *Madinda v Minister of Safety and Security* 2008 (4) SA 312 SCA at para 10.

fides of the applicant and any contribution by other persons or parties to the delay and the applicant's responsibilities therefor."

[27] In *NUM v Council for Mineral Technology*² (hereinafter referred to as "*NUM*") the Appellate Division (as it then was) held:

"Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation"

[28] In *Smith NO v Brummer NO and Another 1954 (3) SA 352 (OPD)*³, the court held that an application for removal of bar should be granted where:

"In an Application for removal of bar the Court has a wide discretion which it will exercise in accordance with the circumstances of each case. The tendency of the Court is to grant such an application where:

(a) the applicant has given a reasonable explanation of his delay;

(b) the application is bona fide and not made with the object of delaying the opposite party's claim;

(c) there has not been a reckless or intentional disregard of the Rules of Court;

(d) the applicant's action is clearly not ill-founded, and

(e) any prejudice caused to the opposite party could be compensated for by an appropriate order as to costs;

-The absence of one or more of these circumstances might result in the application being refused".

² *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para 10

³ *Smith NO v Brummer NO and Another 1954 (3) SA 352 (OPD).*

[29] In *Ferris and Another v First Rand Bank Ltd*⁴, the Constitutional Court reaffirmed that lateness is not only a consideration, and the test for condonation is whether it is in the interest of justice to grant it. The Court emphasised that for both condonation and leave to appeal, and applicant's prospects of success and the importance of the issue to be determined are relevant factors.

[30] Regarding the explanation for the delay, in *The Chairperson of the North- West Gambling Board and Another v Sun International (SA) Limited*⁵ (hereinafter referred to as the "Sun" case), held:

- "(a) *The applicant must provide a proper explanation of the causes of the delay and explain each of the periods of delay.*
- (b) *It is not sufficient for an applicant to set out a 'number of generalised causes without any attempt to relate them to the time-frame of its default or to enlighten the court as to the materiality and effectiveness of any steps taken by the Board's legal representatives to achieve compliance with the Rules at the earliest reasonable opportunity.*
- (c) *The court has a discretion which the applicant must show should be exercised in its favour."*

[31] The court further emphasised that the onus is on the applicant to provide a full and satisfactory explanation for its failure to comply with the Rules. The explanation must cover the entire period of the delay, and where the gaps are, the application fails on this group alone.

[32] On the question of prospects of success, the authorities establish that where prospects are poor or non- existent, condonation serves no purpose. As stated in *NUM*, if there are no prospects of success, there would be no point in granting condonation. This is because condonation is not an end itself, but a means to enable

⁴ *Ferris and Another v First Rand Bank Ltd* 2014 (3) SA 39 CC at para 10.

⁵ *North- West Gambling Board and Another v Sun International (SA) Limited* [2013] ZASCA 146 at para 20.

the court to adjudicate a dispute on its merits. If the merits cannot be adjudicated in the applicant's favour, the exercise is futile.

Evaluation: The Factors Considered:

[33] I turn to apply these principles to the facts in the present case. In doing so, I consider each of the relevant factors in turn, bearing in mind that they are interrelated and must be considered holistically rather than in a piecemeal fashion.

A. The Degree of Lateness:

[34] There is some dispute between the parties regarding the precise period of delay. The applicant contends it is 15 days; the second respondent submits it is 22 days. Having examined the pleadings and the applicable time periods, I am satisfied that even on the applicant's own calculation, the delay is substantial. A period of 15 days in the context of pleading time limits – which are designed to ensure the expeditious and orderly progression of litigation – cannot be characterised as trivial or negligible. It represents a significant period of non-compliance with the peremptory time limits prescribed by the Rules.

[35] However, the authorities make it clear, the degree of lateness, while relevant, is not decisive. A short delay with poor explanation may be refused, while a longer delay with compelling explanation may be granted. The focus must be on the quality of the explanation and the other factors, considered holistically.

B. The Explanation for the Delay:

[36] The explanation proffered by the applicant's attorney, Mr. Lukhalimana falls into two distinct periods, with significant gap between them. I analyse each period in turn.

The first period 02 May to 26 May 2025:

- [37] The explanation for this period is that the applicant was collecting evidence dating back to 2020, which he had difficulty locating due to due lapse of time. Several observations must be made about this explanation.
- [38] Firstly, the difficulty in locating evidence is a problem of the applicant's own making. A litigant who chooses to institute proceedings bears the responsibility of ensuring that he has the necessary evidence to support his case. If he does not have such evidence, or cannot locate it timeously, he must bear the consequences. The Rules of Court do not exist for convenience of litigants; they exist to ensure the proper administration of justice. A litigant cannot excuse non-compliance by pointing to his own disorganisation or failure to keep proper records.
- [39] Secondly, and more significantly, the explanation for this period is provided by the applicant's attorney, and not by the applicant himself. The applicant's confirmatory affidavit merely confirms the allegations in the founding affidavit "*insofar as they relate to me*". It does not provide personal explanation for the delay, nor does it set out what efforts the applicant personally undertook to locate evidence, what difficulties he encountered, or why it took him from 02 May to 26 May 2025 to locate documents that were allegedly in his possession. This is unsatisfactory. If the applicant personally experienced difficulty in locating documents, he should have deposed to an affidavit explaining his own efforts and the reasons for the delay. The attorney, Mr. Lukhalimana, cannot speak for the applicant in matters that are within his client's personal knowledge.
- [40] Thirdly, the explanation fails address why the applicant did not have this evidence available from the outset. The special plea of misjoinder raised a fundamental question about the second respondent's interest in the matter. This was not a new or unexpected issue. The applicant ought to have anticipated that such a plea might be raised and should have had his evidence in order when the summons were issued. The fact that he did not reflects a lack of diligence in the preparation of his case.

The unexplained gap: 27 May to 08 June 2025:

- [41] The applicant's attorney, Mr. Lukhalimana, in his affidavit does not cover the period between 27 May 2025 (when the evidence was received) and 09 June 2025 (when the printer crisis allegedly began). What happened during this period? Why was the replication not prepared and finalised during this time? Mr. Lukhalimana states in his replying affidavit that a first draft was prepared on 27 May 2025, no explanation is given as to why the draft was not finalised and served in the days that followed. This gap is approximately 12 days' is entirely unexplained.
- [42] The authorities are clear that the explanation must cover the entire period of the delay. In *Sun International*, the Court emphasised that the applicant must relate the explanation to the timeframe of default and explain each period of delay. The unexplained gap in this case is fatal to the application. An applicant cannot pick and choose which periods to explain and expect the Court to fill the gaps by inference or assumption.

The second period: 09 June to 20 June 2025:

- [43] The explanation regarding the broken printer is, with respect, wholly inadequate and reflects a level of professional conduct that is difficult to comprehend. The applicant's attorney states that his office printer broke down completely, causing material delays in releasing work and affecting service. Mr. Lukhalimana contended his affidavit that he attempted to source a reliable printer supplier and found Nashua, but the delivery was delayed. It was only on 23 June 2025 that a new printer was delivered.
- [44] The explanation is unsatisfactory for multiple reasons. Firstly, in the modern era, legal practitioners have multiple options for printing and reproducing documents. Commercial printing shops such as Jetline, PostNet, and numerous other services providers are readily available in and around Johannesburg. Many even operate

extended hours and offer rapid turnaround services. The notion that an attorney's office could not produce pleadings for a period of 11 days because of a printer malfunction reflects a lack of resourcefulness and diligence that is inexcusable.

[45] Secondly, an attorney has a professional obligation to ensure that his or her office infrastructure enables compliance with Court rules and deadlines. When infrastructure fails, alternative arrangements must be made promptly, not after a delay of nearly two weeks. The attorney's failure to make such arrangements constitutes negligence.

[46] Thirdly, the explanation does not address why the replication could not have been prepared and served electronically. The Uniform Rules of Court make provision for service by electronic mail where parties have agreed to such service or where the Court so orders. The second respondent's attorneys' have provided an email address for which service of documents will be accepted. There was no need for physically printing and serve the document, if the document could be served electronically. Mr. Lukhalimana focus on the printer crisis obscures the fact that the replication could have been served without printing at all. At the very least, Mr. Lukhalimana could have served the replication without signature and notified his opposition that he will duly deliver a signed version in due course.

[47] Fourthly, the explanation regarding the printer is provided Mr. Lukhalimana, who is effectively explaining his own negligence. While it is permissible for an attorney to explain his own conduct, such explanations must be scrutinised carefully. The Court must be satisfied that the explanation is truthful, complete and reasonable. In this case, I am not satisfied.

Conclusion on the Explanation:

[48] For these reasons, I find that the applicant has failed to provide reasonable, full and satisfactory explanation for the delay. The explanation is incomplete (failing to cover the entire period), insufficient (relying on generalised causes without adequate

detail), and in significant respects, implausible (the printer crisis explanation). On this ground alone, the application must fail.

Prospects of Success:

[49] Even if the explanation were adequate, the applicant would still need to demonstrate that he has reasonable prospects of success in the main action against the second respondent. If there are such prospects, condonation serves no purpose.

[50] The test for joinder is well established. In *Judicial Services Commission v Cape Bar Council*⁶, the court, replying on *Bowring NO v Vrededorp Properties*⁷, held:

“It has now become settled law that the joinder of a party is only required as a matter of necessity- as opposed to a matter of convenience – if that party has direct and substantial interest which may be affected by the judgment of the Court in the proceedings concerned”.

[51] In *SA Riding for the disabled Association v Regional Land Claims Commissioner*⁸, the court elaborated on the test:

“What constitutes a direct and substantial interest sit the legal interest in the subject matter of the case which could be prejudicially affected by the order of court. This means that the applicant must show that it has right adversely affected or likely to be affected by the order sought.”

-The applicant failed to do so.

⁶ *Judicial Services Commission v Cape Bar Council* 2012 (6) SA 499 (SCA) at para 12.

⁷ *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) at para 21.

⁸ *Association v Regional Land Claims Commissioner* 2017 (5) SA 1 (SCA) at para 9

- [52] Applying this test to the present matter, I am constrained to conclude that the applicant has not demonstrated, and cannot demonstrate, that the second respondent has a direct and substantial interest in the subject matter of the litigation.
- [53] The applicant's own pleadings reveal that the alleged verbal agreement was between the applicant, the first respondent (represented by the third respondent), and the second respondent. However, the terms of that agreement, as pleaded relate to shareholding in the first respondent, capital injection into the first respondent's business, and the day- to day running of the first respondent. The second respondent's role, on the applicant's own version, was that of landlord. It provided rental space to the first respondent.
- [54] The lease agreement pursuant to which the second respondent provided rental space was concluded between the second respondent (as agent of the GEPPF) and the third respondent (as representatives of the first respondent). The applicant was not a party to that lease agreement.
- [55] The second respondent alleged breach, according to the particulars of claim, consist of terminating the lease agreement without consulting the applicant. The applicant has not alleged any legal basis upon which the second respondent was obliged to consult him. The applicant has not alleged that he was a party to the lease agreement, that he had any rights to thereunder, or that the second respondent owed him any duty of any kind.
- [56] The applicant claims damages arising from the termination of the lease agreement. But if the applicant was not a party to that agreement, and the second respondent owed him no duty, the applicant cannot claim damages from the second respondent for its termination.
- [57] The documentary evidence relied upon by the applicant does not assist the applicant. The email correspondence attached to the replying affidavit shows, at best that the second respondent was aware that the applicant was involved in the business rescue

of the first respondent and that the applicant made payments towards the first respondent's rental obligation. Awareness does not create liability. The fact that the second respondent accepted rental payments from the applicant (on behalf of the first respondent) does not create a contractual relationship between the applicant and the second respondent. It merely shows that the second respondent accepted payments from a third party on behalf of its tenant, a common occurrence in commercial leases.

- [58] The applicant's contention that the second respondent was "*aware*" of his relationship with the first respondent is legally irrelevant. The question is not what the second respondent knew, but what legal obligations it owed to the applicant. The applicant has not identified any source of such obligations – whether in contract, delict or otherwise.
- [59] In argument, counsel on behalf of the applicant, Miss. Nako submitted that the main action raises important contractual issues, including whether the applicant is a shareholder of the first respondent, whether the applicant must have been consulted before termination of the lease agreement, and whether the applicant suffered damages as result of the lease termination. With respect, these submissions miss the point. The question is not whether the applicant has a claim against the first and third respondents (which he may well have). The question is whether the applicant has a claim against the second respondent. On the pleadings as they stand, the answer is in the negative.
- [60] The special plea of misjoinder is not dilatory plea that can be cured by replication. It goes to the heart of whether the second respondent is properly before Court at all. If the second respondent has not direct and substantial interest in the matter., it cannot be joined. The applicant's replication, even if filed timeously, cannot create a cause of action against the second respondent where none exists. The replication may amplify or clarify the applicant's case, but it cannot create a legal relationship that did not previously exist.

[61] I am therefore compelled to conclude that the applicant's prospects of success against the second respondent are poor to non-existent. On this ground as well, the application must fail.

Prejudice:

[62] The applicant submits that the second respondent will not suffer any prejudice that cannot be cured by a costs order. I disagree.

[63] Prejudice in this context is not limited to financial prejudice. There is also prejudice to the administration of justice and to the second respondent's rights not to be drawn into litigation to which it is not properly a party. The second respondent has been obliged to defend proceedings since March 2025. It has filed a plea, opposed this condonation application, and incurred legal costs. If the condonation application is granted, the matter will proceed to trial, with further costs and diversion of resources. All of this arises from proceedings in which the second respondent may have no legal interest.

[64] While it is true that costs orders can compensate for financial prejudice, they cannot compensate for the prejudice of being compelled to participate in litigation that should not have been brought against the second respondent in the first place. Moreover, costs are compensatory, not punitive. They are designed to indemnify the successful party against the expense of litigation, not to punish the unsuccessful party. The second respondent should not have to bear any expense at all in relation to which it is not properly a party.

[65] The applicant, on the other hand, does face prejudice if condonation is refused. The applicant will be barred from filing his replication and may be unable to pursue his claim against the respondent. However, the prejudice must be balanced against the other factors. Moreover, the applicant retains his claim against the first and third respondents. The applicant is not left without a remedy entirely.

The Importance of the Case and the Interest of Justice:

- [66] The applicant contends that the case raises important contractual issues and that the interest of justice favour the granting of condonation application to allow him to assert his constitutional right of access to courts.
- [67] Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the applicant of law decided in a fair public hearing before a Court or where appropriate, another independent and impartial tribunal of forum. This right is fundamental to our constitutional order.
- [68] However, the right of access to Courts is not absolute. It must be exercised in accordance with the rules and procedures that regulate the conduct of litigation. Those rules and procedures are not ends in themselves; they are means to ensure the fair, efficient and orderly administration of justice. A litigant who fails to comply with the rules cannot simply invoke section 34 to excuse non-compliance. The interest of justice requires that both parties be treated fairly, that disputes be resolved expeditiously, and that the rules designed to achieve these ends to observed.

The Introduction of New Evidence in Reply:

- [69] Before concluding, I must address the second respondent's objection to the introduction of new evidence in the replying affidavit. Although not strictly necessary for the deposition of this application, given my conclusions on the other factors, I consider appropriate to address this issue as it bears on the conduct of the applicant's attorney.
- [70] In *Faber v Nazerian*⁹, the Court articulated the well-established principle:
- "[22] The general rule is well established in our law is that in motion proceedings, the applicant is required to make his or her case in the founding affidavit and not in the replying*

⁹ *Faber v Nazerian* (2012/42735) [2013] ZAGPJHC 65 at para 22.

affidavit. This rule is based on the principle that the applicant stands and falls by his or her founding affidavit. The rule is also based on the procedural requirements of the motion proceedings which requires that the applicant should set out the cause of action in both the notice of motion and in the supporting affidavit. The notice of motion and the founding affidavit constitute the substantive application before Court”.

- [71] The rational for this rule is clear. Motion proceedings are decided on the papers. The respondent is entitled to know the case it has to meet and to respond to that case in its answering affidavit. If an applicant is permitted to introduce new evidence in reply, the respondent is denied the opportunity to respond to that evidence. This is procedurally unfair and contrary to the principles of natural justice.
- [72] The evidence was clearly in the applicant’s possession at the time the founding affidavit was deposed to. Much of it dates back to 2020, 2021, and 2023. There is no explanation why it was not included in the founding affidavit. The introduction of this evidence in reply denies the second respondent the opportunity to respond to it and challenge its authenticity, relevance, or weight.
- [73] The applicant attorney, Mr. Lukhalima sought to justify the introduction of this evidence by referring to it in the replying affidavit and submitting that it demonstrates the nexus between the applicant and the second respondent. This approach is procedurally irregular and, if it were necessary to decide the application on this basis, it would warrant the striking out of the new evidence. However, given my conclusions on the other factors, I did not make a formal order to this effect.

The Conduct of the Applicant’s Attorney and the Cost Order:

- [74] The applicant’s attorney, Mr. Lukhalimana deposed to the founding affidavit personally. He purported to explain the delays in the litigation. However, as I have found, this explanation was inadequate and in significant respects, implausible.

- [75] The explanation regarding the printer breakdown is particularly troubling. The suggestion that an attorney's office could not produce pleadings for 11 days because of a printer malfunction reflects a lack of professionalism that is difficult to comprehend. Furthermore, the attorney's conduct in introducing new evidence in reply, after failing to include it in the founding affidavit, suggest either a lack of understanding of a basic motion procedure or deliberate attempt to evade the rules. Mr. Lukhalimana failure to address the unexplained gap between 27 May and 08 June 2005 in either the founding affidavit or replying affidavit compounds the inadequacy of the explanation.
- [76] More recently in *Public Protector v South African Reserve Bank*¹⁰ at paragraph 177, the Constitutional Court reaffirmed that courts have the power to order costs *de bonis* (personally) against legal representatives who act improperly, negligently or unreasonably. The test for such an order is stringent. It is not imposed lightly. It requires clear evidence that the legal practitioner's conduct has been such that it would be unfair to expect the client to bear the costs, or that practitioner has acted in a manner that warrants the court's disapproval.
- [77] For these reasons, the condonation application must fail. Mr. Mzinyathi who appeared for the second respondent asked for attorney and client costs on the basis that this application was lacking in merit. It is true that the application was brought on an elementary misconception of law, but I do not think that mistake can be attributed to Mr. Phundulu. The mistakes made in litigating Mr. Phundulu's case are so fundamental that it seems to me that the representation provided to the applicant fell below the standard that ought reasonably to be expected of a legal practitioner admitted to appear in our Courts. While I was loath to punish counsel for arguing unmeritorious submissions, there may well come a time when counsel who make transparently untenable arguments before me are directed to pay the costs occasioned by their gross ineptitude in their personal capacity.
- [78] However, given the high premium to be placed on the freedom of counsel to make submissions that turn out to be wrong, I do not think that stage has yet been reached.

¹⁰ *Public Protector v South African Reserve Bank* 2019 (6) 253 (CC) at paragraph 177.

Order:

[79] Accordingly, I made the following order:

1. The application is dismissed.
2. The applicant's attorney is ordered to pay the costs of this application on an attorney and client scale.

KHABA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: The written reasons for the order granted on 25 February 2026 were delivered in this matter on 09 March 2026, are digitally delivered by circulation to the parties' representatives by email and by uploading them to the electronic file of this matter on CaseLines and by publication to the South African Legal Information Institute. The date of the delivery of the written reasons is deemed to be 09 March 2026.

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