IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

Not reportable

Case number:2238/24

In the matter between:

KGETLENGRIVIER LOCAL MUNICIPALITY	Applicant
and	
MAGALIES WATER	Respondent

Coram:	Wessels AJ
Date of hearing:	27 February 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down of the judgment is deemed to be 14h00 on 23 March 2026.

Summary: Practice – Application for upliftment of notice of bar and condonation – Requirements of good cause restated – Applicant, a municipality, seeking to raise special pleas of prescription, non-compliance with s 3 of Act 40 of 2002, and arbitration clause.

Prescription – Acknowledgement of debt – Memorandum of agreement concluded post-litigation providing for partial payment of R3 million – Whether such conduct constitutes acknowledgement of liability sufficient to interrupt prescription in terms of s 14 of the Prescription Act 68 of 1969 – Held that it does.

Organs of state – s 3 notice requirement of Act 40 of 2002 – Applicability to contractual claims – Claim for payment in terms of written agreement is not a claim for damages – Notice requirement does not apply – Nicor IT Consulting (Pty) Ltd v North West Housing Corporation 2018 (3) SA 485 (SCA) followed.

Arbitration – Arbitration clause – Whether ousts court's jurisdiction – Held that it does not – Parekh v Shah Jehan Cinemas 1980 (1) SA 301 (D) applied.

Costs – Punitive costs awarded on an attorney and client scale.

JUDGMENT

Wessels AJ

Introduction

[1] This is an opposed application in which the defendant seeks an order for the upliftment of a notice of bar and condonation for its failure to file a plea timeously in the main action instituted against it by the plaintiff. The plaintiff opposes the application.

[2] The specific relief sought in the notice of motion is threefold: First, that the defendant's failure to file a plea be condoned and the notice of bar be uplifted; Second, that the defendant be granted leave to deliver and file a plea within 5 days of the order; Third, that any party opposing the application be ordered to pay the costs on Scale C.

Factual Background

[3] On 7 May 2024, the plaintiff issued a combined summons out of this Court against the defendant. The claim arises from a written Water Services Level Agreement concluded between the parties, in terms of which the plaintiff provided bulk water services, operations, and maintenance to the defendant's water treatment facilities. The plaintiff claims payment of R49 499 266.63, representing outstanding amounts allegedly due since October 2015.

[4] The defendant served a notice of intention to defend on 17 May 2024 through its erstwhile attorneys, Rangwako Attorneys Inc. The defendant's plea was due by 17 June 2024, yet no plea was filed.

[5] On 6 August 2024, the plaintiff served a notice of bar on the defendant, requiring the defendant to deliver its plea within 5 days. The five-day period lapsed on 13 August 2024 without any plea being filed. Consequently, the defendant was *ipso facto* barred from pleading.

[6] On 7 August 2024, the day after service of the notice of bar, the Municipal Council approved the suspension of the then municipal manager, Mr G.C. Letsoalo. It appointed Mr Andrew Pholose ('Mr Pholose') as the acting municipal manager.

[7] On 22 August 2024, Mr Pholose deposed that he learned of an impending application for default judgment against the defendant. He investigated the matter and, finding the explanations received from officials and the erstwhile attorneys unsatisfactory, terminated Rangwako Attorneys' mandate on 26 August 2024. On 27 August 2024, he appointed new attorneys, Fihla & Associates.

[8] On 28 August 2024, the new attorneys wrote to the plaintiff's attorneys, Shuping Attorneys, informing them of their appointment and requesting the last notice filed in the matter. Despite this communication, no steps were taken to bring the present application until the notice of motion in this application was signed on or about 18 October 2024 and served shortly thereafter.

[9] In the founding affidavit to the present application, Mr Pholose explains the delay as arising from what he describes as 'political instability' and 'institutional instability' that have plagued the defendant for years. He refers to a judgment of this Court dated 8 October 2024 in which the defendant's suspension of its municipal manager was challenged. He states that the reasons for the erstwhile attorneys' failure to file a plea are unclear but are reasonably suspected to be related to the chronic instability. He further explains that after his appointment, it took time to settle in, investigate the matter, terminate the mandate of the previous attorneys, appoint new attorneys, and for those attorneys to familiarise themselves with the matter and consult counsel.

[10] Regarding a defence, the defendant indicates its intention to assail the plaintiff's claim mainly on technical grounds being: A special plea of prescription, contending that the debt became due in October 2015 and the summons was only issued in May 2024, more than three years later; A special plea of non-compliance with s 3 of the Institution of Legal Proceedings Against

Certain Organs of State Act[1] ('Act 40 of 2002'); A special plea that the agreement contains an arbitration clause which ousts the jurisdiction of this Court.

[11] The plaintiff opposes this application. In its answering affidavit, it contends that the explanation for the delay is neither reasonable nor acceptable. The plaintiff points out that the defendant has been legally represented throughout the proceedings and cannot escape the consequences of its legal representatives' conduct. It highlights the unexplained periods of delay: from 17 May to 17 June 2024 (when the plea was due); from 18 June to 5 August 2024 (the period before the notice of bar); from 6 to 13 August 2024 (the 5-day period in the notice of bar); and from 14 August to late October 2024 (when this application was eventually launched).

[12] The plaintiff further contends that the defendant has no bona fide defence. In support of this averment, it attaches a Memorandum of Agreement ('MOA') concluded on 9 September 2024 between the parties and the Bojanala Platinum District Municipality ('Bojanala'). Under the MOA, Bojanala agreed to provide the defendant with financial assistance to pay a portion of its debt to the plaintiff. An initial payment of R3 million was made to the plaintiff on 4 October 2024 in terms of the MOA. The plaintiff argues that this payment constitutes an acknowledgement of debt, thereby interrupting prescription. It further argues that a notice in terms of s 3 of Act 40 of 2002 does not apply to contractual claims. Regarding the arbitration clause, it contends that such a clause does not oust a court's jurisdiction.

[13] In reply, the defendant advances that the MOA does not constitute an acknowledgement of the full debt and cannot interrupt prescription for a debt that

[1] Institution of Legal Proceedings against certain Organs of State Act 40 of 2002.

had already prescribed. It contends that the agreement relates only to part of the debt and that the dispute between the parties remains unresolved.

The Issues in Dispute

[14] The issues for determination by this Court are twofold: First, whether the defendant has shown good cause for the upliftment of the bar and condonation for its failure to file a plea timeously; Second, if good cause is shown, whether the defendant has disclosed a bona fide defence to the plaintiff's claim which carries prospects of success.

The Legal Framework

[15] Rule 27 of the Uniform Rules of Court provides the legal basis for this application. Rule 27(1) permits a court, upon application, to make an order extending any time prescribed by the rules and, in terms of Rule 27(3), empowers a court, on good cause shown, to condone any non-compliance with the rules.

[16] The Supreme Court of Appeal ('SCA') in *Ingosstrakh v Global Aviation Investments (Pty) Ltd*[2] confirmed that when a defendant is under bar, it must show good cause why condonation should be granted. Importantly for the present application, the court further held that a defendant must explain both the period before the notice of bar and the period thereafter. In *Madinda v Minister of Safety and Security* [3], the Supreme Court of Appeal ('SCA') held:

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[2] *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* (934/2019) [2021] ZASCA 69; [2021] 3 All SA 316 (SCA); 2021 (6) SA 352 (SCA) (4 June 2021) para 22.
[3] *Madinda v Minister of Safety and Security, Republic of South Africa* (153/07) [2008] ZASCA 34; [2008] 3 All SA 143 (SCA); 2008 (4) SA 312 (SCA) (28 March 2008) para 10.

'Good cause' looks at all those factors which bear on the fairness of granting the relief as between the parties and 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 fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefor.'

[17] Regarding the requirement of a bona fide defence, the test is not whether the defence is likely to succeed, but whether, on the facts disclosed, the defendant appears to have a defence which is both bona fide and good in law. The defendant is expected to set out its defence with sufficient particularity to enable the court to assess its prospects of success.

Absence of explanation for the default

[18] The plaintiff's primary submission is that the defendant has failed to provide a reasonable and acceptable explanation for its failure to file a plea timeously. Plaintiff's counsel argued that the explanation tendered is vague, generic, and does not account for multiple periods of delay. I turn to apply the trite principles constituting good cause to the facts of this case.

[19] Regarding the default, the defendant has failed to provide a reasonable and acceptable explanation for several distinct periods of delay. The first period is from 17 May 2024, when the notice of intention to defend was filed, to 17 June 2024, when the plea was due. There is simply no explanation for why a plea was not filed during this period. The defendant was legally represented, and its attorneys had a clear obligation to file a plea within the prescribed time.

[20] The second period is from 18 June 2024 to 5 August 2024, the period before the notice of bar was served. This spans approximately one and a half

months. Again, there is no explanation for the defendant's inaction during this time. The erstwhile attorneys were on record and took no steps to regularise the position.

[21] The third period is the five-day period stipulated in the notice of bar, from 6 to 13 August 2024. The notice of bar was an unequivocal warning that the doors of the court were closing to the defendant, yet the defendant did nothing. Even after the appointment of Mr Pholose as acting municipal manager on 7 August 2024, no steps were taken to communicate with the plaintiff's attorneys and request an extension of the period allowed by Rule 26 or file the plea.

[22] The fourth and most significant period is from 14 August 2024, when the bar took effect, to late October 2024, when this application was eventually launched. Mr Pholose was appointed on 7 August 2024. He learned of the impending default judgment on 22 August 2024, upon which he terminated the erstwhile attorneys' mandate on 26 August 2024 and appointed new attorneys on 27 August 2024. The new attorneys wrote to the plaintiff's attorneys on 28 August 2024. Despite this, the present application was not filed until late October 2024. Even if one allows time for the new attorneys to familiarise themselves with the matter and consult counsel, a delay of nearly two months from the appointment of new attorneys is excessive and, more pertinently, unexplained.

[23] The explanation that the defendant has been plagued by political and institutional instability is vague and generic. While courts are generally sympathetic to the difficulties faced by organs of State, such generalised assertions cannot constitute a reasonable and acceptable explanation for a failure to comply with the rules of court over an extended period, particularly where the defendant has been legally represented throughout. As this Court held in *Wesley*

v Minister of Police [4], shifting blame to a legal representative does not constitute a full explanation, especially where the defendant has not acted with the required speed and diligence.

[24] In *Salojee and Another v Minister of Community Development* [5], the SCA made it clear that there is a limit beyond which a litigant cannot escape the consequences of the conduct of its legal representatives. The court held:

> 'To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and D increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship,_ no matter what the circumstances of the failure are.'

[25] This principle applies with equal force to the defendant.

[26] Furthermore, the defendant has not demonstrated that it has been acting bona fide. The sequence of events suggests that this application was prompted only by the imminent threat of a default judgment by the plaintiff. The plaintiff's allegation, which is not denied in reply, is that this application was filed only after the plaintiff had set the matter down for default judgment. This indicates that the

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[4] *Wesley v Minister of Police* (219/20) [2023] ZANWHC 32 (3 March 2023) para18.
[5] *Salojee and Another v Minister of Community Development* 1965 (2) SA 135 (A) at 141C-E.

defendant was content to remain inactive until the proverbial Sword of Damocles was hanging over its head.

[27] The matter does not end there. The replying affidavit was deposed to on 15 January 2025, but was only served on the plaintiff's attorneys on 29 January 2025. No explanation is provided for this delay. Thereafter, the defendant did nothing to set the matter down. It was the plaintiff's attorneys who set the present application down on 6 October 2025 for hearing on 27 February 2026. For approximately 9 months, the defendant took no action to prosecute its own application. This conduct is entirely inconsistent with a party that claims it has always intended to defend the claim. As the SCA observed in *Madinda*[6], the strength or weakness of a party's case may colour its conduct.

[28] The defendant's prolonged inactivity speaks volumes. The conclusion is inescapable that the defendant has failed to provide a reasonable and acceptable explanation for its default.

The acknowledgement of debt and interruption of prescription

[29] The plaintiff's second argument targets the defendant's proposed special plea of prescription. The plaintiff submits that the MOA concluded on 9 September 2024 and the payment of R3 million made on 4 October 2024 constitute an unequivocal acknowledgement of indebtedness, thereby interrupting prescription in terms of s 14 of the Prescription Act[7]('Prescription Act').

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[6] *Ibid* fn3.
[7] Prescription Act 68 of 1969.

[30] Section 14(1) of the Prescription Act provides that the running of the prescription is interrupted by an express or tacit acknowledgement of liability by the debtor. The law is well settled that an acknowledgement of debt need not be in any particular form. Any conduct from which an acknowledgement can be inferred is sufficient to interrupt prescription.

[31] The facts are unassailable. On 9 September 2024, the defendant, together with the Bojanala, entered into an MOA with the plaintiff. The delivery note attached to this agreement explicitly states that the purpose of the financial assistance is 'to pay a part of the KRLM's (the defendant) debt due and owing to MWB (the plaintiff)'. The agreement itself records that Bojanala will provide financial assistance to the defendant to pay a part of the defendant's debt due and owing to the plaintiff.

[32] On 4 October 2024, payment of R3 million was made to the plaintiff. The plaintiff's bank statement reflects an incoming payment of R3 million from the defendant. This payment was made after the conclusion of the MOA and was clearly in furtherance of its terms.

[33] The defendant's contention that the agreement does not constitute an acknowledgement of the full debt misses the point. The acknowledgement relates to the debt claimed. The partial payment is an act consistent with an acknowledgement of indebtedness. Even if part of the debt had prescribed prior to September 2024, the acknowledgement and payment interrupt prescription and revive the debt. The defendant's special plea of prescription is therefore without merit.

[34] I align myself with the approach of the SCA in *Eskom Holdings SOC Ltd v Letsemeng Local Municipality*[8], where the court held:

'Letsemeng's defence on the merits is no defence at all – that it should not be ordered to pay what it agreed to pay because it was unable, due to its financial weakness, to do so. To the extent that this may amount to the tacit raising of a defence of impossibility of performance, the position is clear: **if a person promises to do something that can be done, such as delivering a thing or paying a debt, but which that person cannot do due to circumstances peculiar to themselves, they are nonetheless liable on the contract. The commercial mayhem that would result, if the rule was otherwise, is not difficult to imagine. Contractual obligations are enforced by courts irrespective of whether a defaulting party is able to pay or not. The focus is on the rights of the innocent party, not the means of the defaulting party.**' (emphasis added)

[35] The defendant has acknowledged its indebtedness, concluded an agreement providing for payment, and made a payment of R3 million. It cannot now be heard to say that the debt has prescribed.

Lack of merit in the defendant's proposed defences

[36] The plaintiff submits that each of the proposed special defences is legally untenable and that the defendant has therefore failed to disclose a bona fide defence with any reasonable prospects of success.

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[8] Eskom Holdings SOC Ltd v Letsemeng Local Municipality 2022 (2) SA 347 (SCA) para 22.

(a) Special Plea of Non-compliance with Section 3 of Act 40 of 2002

[37] The defendant contends that the plaintiff failed to serve a notice in terms of s 3 of Act 40 of 2002. This contention is unsustainable for the reasons that will follow.

[38] In referring to *Nicor IT Consulting (Pty) Ltd v North West Housing Corporation* [9], a decision of this Division, the SCA in *Vhembe District Municipality v Stewarts and Lloyds Trading (Pty) Ltd*[10] has authoritatively settled this position as follows:

'As correctly observed by Rall AJ in Thabani Zulu, the evidence in damages cases is more likely to depend on the memory of people than on documents, and it is accordingly desirable that the defendant be given timeous notice of the proceedings in order for it to be able to investigate the contemplated claim, and to secure the necessary evidence. By contrast as Lever AJ put it in Nicor Consulting (para 26), 'a claim for payment in terms of a contract is more likely to rely on documentary evidence, such as contracts, delivery notes and correspondence, as well as possible legal issues, such as whether or not the relevant functionary had the necessary authority to enter into the contract or not'. **I accordingly hold, as the high court did, that as the first respondent's claim is not a damages claim the Act does not apply to it. It was therefore unnecessary for the first respondent to have complied with s 3 of the Act.**' (emphasis added)

[39] The Court in *Nicor* concluded that a 'debt' for the purposes of Act 40 of 2002 is confined to a claim for damages. This interpretation is consistent with the traditional justification for notice provisions, which is to allow organs of state to

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[9] *Nicor IT Consulting (Pty) Ltd v North West Housing Corporation* 2010 (3) SA 90 (NWM).

[10] *Vhembe District Municipality v Stewarts And Lloyds Trading (Booysens) (Pty) Limited and Another* (397/13) [2014] ZASCA 93; [2014] 3 All SA 675 (SCA) (26 June 2014) para 16.

investigate claims that depend on witnesses' memories. As the court explained the reasoning behind a statutory demand in *Mohlomi v Minister of Defence* [11]:

'An insistence on notices of the kind required by s 113(1) is by no means peculiar to the particular proceedings that it governs. Similar conditions precedent to the institution of actions are and have long been familiar features of our statutory terrain, especially the part occupied by departments of State, provincial administrations and local authorities once they become prospective defendants. The conventional explanation for demanding prior notification of any intention to sue such an organ of government is that, with its extensive activities and large staff which tends to shift, it needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide, before getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them.'

[40] The plaintiff's claim is manifestly contractual. It is based on a written agreement and is supported by documentary evidence. During oral argument, counsel for the defendant fairly conceded this point. This concession was properly made. The special plea of non-compliance with s 3 of Act 40 of 2002 is without merit.

(b) Special Plea Based on the Arbitration Clause

[41] The defendant contends that the Water Services Level Agreement contains an arbitration clause that ousts this court's jurisdiction. This contention is equally without merit.

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[11] *Mohlomi v Minister of Defence* (CCT41/95) [1996] ZACC 20; 1996 (12) BCLR 1559; 1997 (1) SA 124 (26 September 1996) para 9.

[42] The authorities are clear that an arbitration agreement does not deprive the court of its ordinary jurisdiction. In *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* [12], the court held that:

'An arbitration agreement does not deprive the Court of its ordinary jurisdiction over the disputes which it encompasses. All it does is to oblige the parties to refer such disputes in the first instance to arbitration, and to make it a pre-requisite to an approach to the Court for a final judgment that this should have happened. While the arbitration is in progress, the Court is there whenever needed to give appropriate directions and to exercise due supervision. And the award of the arbitrator cannot be enforced without the Court's *imprimatur,* which may be granted or withheld. But that is by no means all. Arbitration itself is far from an absolute requirement, despite the contractual provision for it. If either party takes the arbitrable disputes straight to Court, and the other does not protest, the litigation follows its normal course, without a pause.'

[43] The Constitutional Court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*[13] emphasised the principle of party autonomy, but this does not mean that parties can, by private agreement, oust the constitutional jurisdiction of the courts. The court stated the following:

'The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters.'

[44] A court retains discretion to enforce the arbitration clause, taking into account the interests of justice. The defendant has not even alleged, let alone established, that it would be convenient for the dispute to be referred to

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[12] *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1980 (1) SA 301 (D) at 305 E-G.
[13] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC) ; 2009 (6) BCLR 527 (CC) (20 March 2009) para 219.

arbitration. It has not brought an application for a stay of proceedings. It has not addressed its prospects of success in such an application. In circumstances where the amount has been outstanding for years, where the defendant has acknowledged its indebtedness, and where it seeks to avoid its contractual obligations, it cannot be said that it would be convenient to refer the matter to arbitration. The arbitration clause does not render this Court's jurisdiction incompetent, and the special plea based on the arbitration clause is without merit.

(c) The Special Plea of Prescription

[45] As already dealt with extensively earlier in this judgment, the special plea of prescription is without merit in light of the existence of the MOA and the payment of R3 million. Section 14 of the Prescription Act provides that the running of prescription is interrupted by an express or tacit acknowledgement of liability by the debtor. The defendant's acknowledgement and partial payment are unequivocal.

[46] In conclusion on this issue, the defendant has failed to disclose a bona fide defence with any reasonable prospects of success. Its proposed defences, on proper analysis, lack merit.

The prejudice to the plaintiff

[47] The prejudice to the plaintiff if the bar were to be uplifted must also be considered. The plaintiff has been providing essential water services to the defendant's community without remuneration for an extended period. It is a water board, established to provide water services, and relies on payment for its services to sustain its operations. Further delay in finalising this matter would compound

the prejudice it already suffers. The defendant, on the other hand, faces no prejudice beyond being held to account for its contractual obligations.

Conclusion

[48] In conclusion, the defendant has failed to satisfy the requirements of good cause. Its explanation for the extensive delay is inadequate and falls short of the standard required by our courts. More fundamentally, it has failed to disclose a bona fide defence to the plaintiff's claim. The defences it seeks to raise are without merit and hold no reasonable prospects of success. Each of the plaintiff's three main lines of argument succeeds and the application stands to be dismissed.

Costs

[49] Regarding costs, the general rule is that costs follow the result. The plaintiff has been compelled to oppose this application. The plaintiff seeks costs on an attorney and own client scale, contending that the defendant failed to disclose material facts, namely the MOA and the R3 million payment, and has acted in bad faith throughout.

[50] The plaintiff has rendered services and should be paid therefor. The defendant concluded the MOA, acknowledging its indebtedness by having made a partial payment, yet it continues to resist payment. When the plaintiff approached this Court to enforce its rights, the defendant frustrated that attempt through this application. The conduct of the defendant, including its failure to disclose material facts, its inconsistent pleadings, and its prolonged inactivity, warrants a punitive costs order.

[51] In the circumstances, I am persuaded that this is an appropriate case for a costs order on the attorney and client scale. The defendant's conduct throughout these proceedings has been unreasonable and has occasioned unnecessary expense and delay for the plaintiff. Such conduct should be censured.

Order

[52] Accordingly, the following order is made:

1. The application is dismissed.

2. The applicant is ordered to pay the respondent's costs as between attorney and client.

[redacted]

M WESSELS

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

Appearances

For applicant	:Adv TM Makgatho
Instructed by	:Fihla and Associates
	:Pretoria
	:c/o Mothusi Marumo Attorneys
	:Mahikeng
For the respondent	:Adv OI Monnahela
Instructed by	:Shuping Attorneys
	:Rustenburg
	:c/o DC Kruger Attorneys
	:Mahikeng