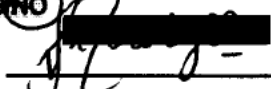


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2022/027659

(1)	REPORTABLE: YES ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3)	REVISED: YES ☒ NO
<u>1.4.2026</u> DATE  SIGNATURE	

In the matter between:

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Applicant

and

MOTLOLISI VUYELWA ROSINAH

Respondent

JUDGMENT

VAN ASWEGEN AJ

INTRODUCTION:

- [1] This is a rule 30 application to set aside the replication delivered by the Respondent whilst she was *ipso facto* barred from doing so.¹ Contrary hereto the Respondent is seeking condonation for the late delivery of the said replication.²
- [2] On 30 November 2022, the Respondent served and filed a Summons against the Applicant. The Respondent's claim is one of delict, seeking damages due to injuries incurred on 17 November 2022 after she fell into an open manhole while walking along the pavement or footway on Plein Street, Jeppestown, Johannesburg. The Respondent pleaded that the Applicant, *alternatively* the Applicant's employees, *alternatively* the Applicant's agents owed a duty of care to the road users and in particular to Respondent, to ensure a duty of care.
- [3] The Applicant served and filed its Special Plea and Plea on 13 February 2023.³
- [3.1] The special plea relates to non-compliance with sections 4(1)(b) and 4(2) of the Institution of Legal Proceedings against Certain Organs Act, Act 40 of 2002 ("the Act")
- [3.1.1] The Applicant pleads that:
- [3.1.1.1] the provisions of section 4(1)(b) as mentioned above was not adhered to in that the notice was not addressed to and sent directly to the Applicant's Municipal Manager.

¹ Case Lines 005-1

² Case lines 003-32

³ Case Lines 001-31

[3.1.1.2] the Respondent also failed to comply with the provisions of section 4(2) as mentioned above in that the notice was not delivered by hand, *alternatively* sent by certified mail within seven days of transmitting same electronically as prescribed by Section 4(2) of the Act, or at all.

[4] After the Plea and Special Plea, the Respondent did not file her Replication within the 15 days required by the Uniform Rules of Court ("Uniform Rules"), as specified in rule 25:

"25. Replication and plea in reconvention

(1) *Within 15 days after the service upon him of a plea and subject to sub-rule (2) hereof, the plaintiff shall where necessary deliver a replication to the plea and a plea to any claim in reconvention, which plea shall comply with rule 22.*

[Rule 25(1) substituted by GNR 2021 in G. 3304 with effect from 15 November 1971, GNR 2164 in G.10958 with effect from 2 October 1987, GNR 2642 in G. 11045 with effect from 31 December 1987.]"

[5] The Respondent, as a result of her failure to serve and file a Replication in the set-out time, effectively became *ipso facto* barred.

[5.1] Rule 26 states:

"26. Failure to deliver pleadings – Barring

Any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be ipso facto barred."

[6] The Respondent served and filed her Replication on 2 October 2024, without seeking an order to lift the bar.⁴ The replication was 402 days late.

⁴ Case Lines 001-39

[7] The Applicant asserts that this was an irregular step, and served a Notice in terms of Rule 30(2)(b) of the Uniform Rules to remove the aforementioned cause of complaint.⁵

[7.1] Rule 30(1) states that a party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

[8] In terms of Rule 30(2)(b) the Applicant had, within 10 days of becoming aware of the step, by written notice afforded the Respondent an opportunity of removing the cause of complaint within 10 (ten) days. The Respondent failed to do so, resulting in this Application.

[9] In terms of rule 30(1) a party to a cause, in which an irregular step has been taken by any other party, may apply to court to set it aside.

CONDONATION APPLICATION:

[10] The condonation application dated 27 November 2024,⁶ stems from the fact that the Applicant launched a Rule 30 application seeking the removal and setting aside of the Respondent's Replication, which application is opposed.

[11] In the application for condonation for the late filing of the Respondent's replication the Respondent in her affidavit explains the reasons for the delay.

[12] The Respondent contends that Advocate Mchasa was originally instructed by the Respondent's attorneys and had the chance to review both the Applicant's Plea and Special Plea. After considering these, he saw no reason to file a replication.

[13] Mr. Nentswuni, the Respondent's attorney, took all necessary steps to fulfil the Respondent's mandate concerning her case, including arranging a medico-legal evaluation with Dr. D. E. Gantz, who examined the Respondent

⁵ Case Lines 014-1

⁶ Case Lines 003-32

on *12 September 2023*. Dr. Gantz subsequently prepared a medico-legal report, which was attached to the Respondent's notice under Rule 36(a) and (b), and was electronically served on 27 April 2024.

- [14] The Respondent's attorney collaborated with the Applicant's legal representatives to facilitate the Respondent's attendance for a medico-legal assessment by Dr. S. Bugwandin, an Orthopaedic Surgeon, which was conducted on *22 August 2024*. Dr. Bugwandin subsequently prepared a medico-legal report, which was served electronically on *27 September 2024*.
- [15] In *September 2024*, Advocate Mchasa became unavailable due to other commitments and was unable to continue assisting Mr Nentswuni regarding the Applicant's matter. Consequently, Mr Nentswuni appointed a new counsel and engaged the services of Advocate M.C. Phathela.
- [16] On *11 September 2024*, the Applicant's attorneys emailed the Respondent's attorney, asking Mr Nentswuni to clarify how the Respondent planned to address the Special Plea.⁷
- [17] Mr Nentswuni sought an opinion from Advocate Phathela concerning the Applicant's attorney's request, and the advocate took some time to respond to Mr Nentswuni.
- [18] On *27 September 2024*, the Respondent's attorney sent a second email to follow up on his earlier request. Advocate Phathela was consulted and advised that it is necessary to file a replication to the Applicant's special plea.⁸
- [19] Advocate Phathela finalized the replication and provided it to Mr Nentswuni on *2 October 2024*, who served and filed it with the Applicant's attorneys that same day.

⁷ Annexure "MN1"

⁸ Annexure "MN2"

APPLICANT'S ARGUMENT:

- [20] The Applicant's counsel submitted that, due to the Respondent being *ipso facto* barred, it is necessary for the Respondent to seek leave from the court through an application to uplift the bar before the Applicant may proceed with the filing of her Replication.
- [21] After receiving a Rule 30 notice, the Respondent chose to file an Application for Condonation rather than address the complaint.
- [22] When a party requests condonation from the court, it is seeking permission to carry out a specific action that was not completed within the designated time frame.
- [23] In this instance, the Respondent had proceeded to serve a Replication without first requesting that the bar imposed upon her be lifted. Counsel for the Applicant contended that it is not permissible for a litigant to apply for condonation retrospectively.
- [24] The Applicant further asserted that requesting condonation did not alter or diminish the situation that the Respondent was experiencing.

RESPONDENT'S ARGUMENT:

- [25] The Respondent's counsel admitted that delivery of the replication was not in line with proper procedure and is irregular. He further presented the following arguments:
- [25.1] the court has a discretion to condone the irregular step;
- [25.2] that a litigant should not be punished as a result of a legal representative's negligence;
- [25.3] both the interest of justice and fairness dictate that the condonation should be granted so that the matter can proceed to trial;

- [25.4] the Respondent, being *dominus litis*, would not act in a manner detrimental to her own interests. She seeks to have the proceedings heard without undue delay.
- [25.5] Rule 27(3) of the Uniform Rules of Court allows that a court may, on *good cause* shown, condone any non-compliance with the Rules.
- [25.6] The explanation for the delay in submitting the replication was attributable to divergent opinions among the Respondent's legal representatives. The initial advocate expressed his opinion that a replication to the Applicant's Plea and Special Plea was unnecessary, whereas the second strongly insisted it was essential.
- [25.6.1] Advocate Mchasa, who initially handled the case, decided that filing a replication was unnecessary. In September 2024, however, Advocate Mchasa became unavailable due to other commitments and was no longer able to assist Mr Nentswuni with the Respondent's matter. Consequently, Mr Nentswuni sought new legal representation and subsequently appointed Advocate M.C Phathela.
- [25.6.2] On 11 September 2024, the Applicant's legal representatives emailed the Respondent's attorney. In this message, they asked Mr. Nentswuni to clarify how the Respondent intended to address the Special Plea.
- [25.6.3] Advocate Phathela, convinced Mr. Nentswuni of the importance and need to deliver a replication to the Applicant's Plea and Special Plea.

[25.6.4] The Applicant's enquiry regarding the Respondent's approach to the Special Plea may be interpreted as a request for a response to the Special Plea. It was contended that this conduct could be regarded as a waiver of any opposition, as well as an invitation for the Respondent to address the Special Plea.

[25.7] The Applicant was not prejudiced. The Replication did not raise any new issues but addressed compliance with section 3, 4(1)(b) and 4(2) of the Act. Lawful demand and notice under section 3 of the Institute of Legal Proceedings against Organ of State Act, Act 40 of 2002, along with the letter (Annexure "RV1"), were included in paragraph 12 of the Respondent's Particulars of Claim.⁹

[25.8] Any costs orders should be costs in the main action.

DELIBERATION:

[26] In *Saloojee and another, NNO v Minister of Community Development 1965 (2) SA 135 (A)* the following was held:

[26.1] condonation of the non-observance of the Rules of the Appellate Division was not a mere formality;

[26.2] the litigant applying for condonation had to satisfy the court that there was sufficient cause for excusing him/her from compliance;

[26.3] whenever a litigant realised that he had not complied with a Rule of Court, he/she had to apply for condonation without delay.

[26.4] that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the

⁹ Case Lines 001-20

explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of the Appellate Division.

- [27] In this case, the condonation application stems from conflicting views held by the two counsels appointed by the Respondent's attorney.
- [28] On 11 September 2024, the Applicant's legal team sent an email to the Respondent's attorney requesting clarification regarding the Respondent's approach to the special plea.
- [29] Mr. Nentswuni sought an opinion from Advocate Phathela regarding the request made by the applicant's attorney, who took some time to respond to Mr. Nentswuni.
- [30] On 27 September 2024, the Respondent's attorney sent a second follow-up email. Advocate Phathela advised that a replication to the Applicant's special plea is required.¹⁰
- [31] On 2 October 2024, Advocate Phathela settled the replication, which Mr. Nentswuni served and filed with the Applicant's attorneys the same day.
- [32] Upon receipt of the second counsel's opinion recommending delivery of a replication, the Respondent's attorney acted promptly. He sought to address a prior omission that had disadvantaged his client and proceeded in the client's best interests. The replication was prepared and delivered on 2 October 2024.

[32.1] In *Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys and others* (459/22) [2023] ZASCA 112 (26 July 2023) at paragraph 4 the Supreme Court of Appeal stated:

"Legal practitioners are obliged to conduct themselves with the utmost integrity and scrupulous honesty. Public confidence in the legal profession is enhanced by maintaining the highest ethical

¹⁰ Annexure "MN2"

standards. A lack of trust in the legal profession goes hand in hand with the erosion of the rule of law. The Legal Practice Act 28 of 2014 (the LPA) replaced the Attorneys Act 53 of 1979 and came into operation on 1 November 2018. Like its predecessor, the objects of the LPA are, inter alia, to promote and protect the public interest and to enhance and maintain appropriate standards of professional and ethical conduct of all legal practitioners. As such the Limpopo LPC is not an ordinary litigant, but generally acts for the public good. Legal proceedings brought by the Limpopo LPC in this regard are sui generis and the disciplinary powers of the High Court over the legal practitioners are founded in its inherent jurisdiction as the ultimate custos morum of the legal profession.”

[32.2] The Respondent's attorney, guided by the advice of second counsel, conducted himself in a professional manner by acting swiftly in preparing a replication and presenting and advocating the Respondent's case appropriately before the court. This court finds no fault with the actions of the Respondent's legal team in their diligent pursuit of their client's best interests.

[33] The Respondent's counsel acknowledged that it is an undisputed fact that the Applicant's replication was served and filed late, with the delay amounting to 402 days.

[34] The Replication, dated 1 October 2024 ,was delivered on 2 October 2024.¹¹

[35] Subsequently, the Respondent submitted a condonation application dated 27 November 2024 seeking condonation for the late delivery of the Replication, which was dated 1 October 2024.¹²

¹¹ Case Lines 001-32

¹² Case Lines 003-32

[36] The condonation application was accordingly served after delivery of the replication. It is accepted that this is not the ideal procedural sequence. However, having delivered the replication late, the Respondent was obligated to apply for condonation.

[36.1] It is trite that Rule 25(1) requires to Plaintiff, where necessary, to deliver a replication to the plea. What this means is that a replication must be filed only when it is necessary to do so.

[36.2] If the replication was filed outside the time limits set by the Rules of Court (after 15 days), the document was formally out of time and had to be accompanied or followed by a condonation application to be properly before the court.

[37] On 18 December 2024¹³ the Applicant served a Rule 30 application seeking the removal and setting aside of the Respondent's Replication.

[38] It is accepted that the normal practice would have been for the Respondent to have sought condonation for the upliftment of the bar and only thereafter to deliver her replication. However, the Respondent did seek condonation albeit after the fact (delivering of the replication). The Respondent was obligated to seek condonation.

[39] The Respondent is seeking condonation in terms of Rule 27(3) of the Uniform Rules of Court. This rule stipulates:

*"The court may, on good cause shown, condone any non-compliance with these Rules."*¹⁴

¹³ Case Lines 005-21

¹⁴ Barclays Nasionale Bank Bpk v Badenhorst 1973 (1) SA 333 (N)341; Marais v Aldridge 1976 (1) SA 746 (T) 752

- [40] This court has a discretion to condone non-compliance with the Rules, which must be exercised judicially on a consideration of the facts of each case.¹⁵ In essence it is a matter of fairness to both sides. A judicial discretion is not an absolute or unqualified discretion but must be exercised in accordance with recognised principles.¹⁶ The rules have purposely conferred a very extensive discretion on the court and it is highly desirable not to abridge this.
- [41] Certain factors have been indicated as being usually relevant but the weight to be given to any factor depends on the particular circumstances of each case.¹⁷ These factors are not individually decisive but must be weighed the one against the other. The cogency of any factor will vary according to the circumstances, including the particular rule that has been infringed. In each case the question is whether *good or sufficient cause* has been shown for the relief sought.¹⁸ *Good cause* requires that the application is *bona fide*.¹⁹ *Sufficient cause* includes the litigant's prospects of success.
- [42] The court may consider several factors, including the following:
- [42.1] the degree of non-compliance,
 - [42.2] the explanation of the delay,
 - [42.3] the prospects of success,
 - [42.4] the importance of the case,
 - [42.5] the nature of the relief,
 - [42.6] prejudice to the other side²⁰ which cannot be compensated by a suitable order for costs,
 - [42.7] the convenience of the court,

¹⁵ *Federated Employers Fire and General Insurance Co Ltd v McKenzie* 1969 (3) SA 360 (A)

¹⁶ *Kathrada v Arbitration Tribunal* 1975 (2) SA 673 (A)

¹⁷ *Federated Employers Fire and General Insurance Co Ltd v McKenzie* supra-362.

¹⁸ *Federated Employers Fire and General Insurance Co Ltd v McKenzie* supra-362

¹⁹ *TLE (Pty) Ltd v The Master of the High Court and Others* 2012 (2) SA 502 (GSJ) at [12].

²⁰ *Securiforce CC v Ruiters* 2012 (4) SA 252 (NCK) at [12];

[42.8] the avoidance of unnecessary delay in the administration of justice and

[42.9] the degree of negligence of the persons responsible for the non-compliance.²¹

[43] In this instance, the delay was attributable to differing perspectives between the two counsels. The second counsel maintained that a replication was necessary. Upon receiving this opinion, the Respondent's attorney promptly acted, the second counsel settled the replication, and it was delivered. This action addressed an earlier omission that had adversely affected the client, the Respondent, thereby safeguarding her interests. The replication was appropriately drafted and submitted.

[43.1] The facts in this case are similar to *N.F v Santam Limited (11554/2017) [2024] ZAWCHC 12 (26 January 2024)* where condonation was granted for the late filing of a replication. The condonation was only sought 5 (five) years after the close of pleadings.

[43.1.1] In the aforesaid matter the first counsel also saw no need to replicate but the second counsel differed in that a replication had to be delivered.

[43.1.2] *Good cause* and the interest of justice required the application to proceed.

[44] The condonation application is *bona fide* made, especially given the Respondent's pleadings—specifically paragraph 12 of the Particulars of Claim with reference to Annexure RV1.²² In this paragraph, the Respondent, as Plaintiff, pleaded compliance with section 3 of the Institute for Legal Proceedings against Certain Organs of State Act, Act 40 of 2002. It is evident that the replication deals with compliance regarding section 3 of Act 40 of

²¹ *Saloojee v Minister of Community Development supra-138*;

²² Case Lines 001-20

2002. The replication does not introduce new issues but instead clarifies facts already pleaded.

[45] The Applicant in this matter, who is also the Defendant in the main action, is, in accordance with section 1(1)(b) of Act 40 of 2002, a municipality and therefore an organ of state as provided for in section 151 of the Constitution. Furthermore, the debt in question arises from a delict and constitutes a debt as contemplated by section 1(1) of Act 40 of 2002.

[46] Subsections 3(1) and (2) of Act 40 of 2002 require that a notice of intended legal proceedings must be given to the concerned organ of state by the creditor within six (6) months from the date on which the debt became due. This is a peremptory step before legal proceedings can be instituted.

[47] In *Mohlomi v Minister of Defence*²³ notice requirements exist to allow an organ of state to promptly investigate alleged incidents and claims, enabling it to take timely legal action.

[48] This principle was articulated in *Mothupi v Member of the Executive Council, Department of Health Free State Province*²⁴ as follows:

"The object of a provision such as s 3 is to enable the State, a large and cumbersome organisation, to investigate claims so as to consider whether to settle or compromise a claim before costs escalate unnecessarily, or to properly prepare its defence – which may be frustrated if it is unable to investigate relatively soon after the alleged incident occurred."

[49] The Respondent also had to show *good cause*. Encapsulated in *good cause* is the reasonable explanation for the delay, prospects of success in the main case, and lack of unreasonable prejudice to the other party.

²³ 1997 (1) SA 124 (CC).

²⁴ [2016] ZASCA 27

- [50] After considering the explanation for the delay, it is accepted as reasonable, since advocates may differ in their approach to litigation and trial preparation. The court must next assess the Respondent's likelihood of success in the main case. The Respondent's claim is clearly founded on delict in that she sustained injuries from falling into a manhole, approximately one foot deep and one foot wide, on *17 August 2020* while walking along Plein Street in Jeppestown, Johannesburg. The Respondent claims that the Applicant or, *alternatively*, its employees or agents - had a duty of care to road users, specifically the Respondent, to ensure that the manhole on Plein Street was addressed and/or repaired within a reasonable timeframe.²⁵
- [51] The Applicant in its Plea admits to the duty of care subject to notification of the need for maintenance and repairs of, *inter alia*, road networks, footways, traffic mobility and management of manholes and /or manhole covers within its jurisdiction; the prioritisation thereof and the availability of financial resources and manpower in order to effect such maintenance and repairs to road networks, footways, traffic mobility and management of manholes and/or manhole covers and public spaces within its jurisdiction.²⁶
- [52] Upon review of the pleadings and the presentation of the evidence called for by the Applicant at trial stage, it appears that the Respondent has a strong likelihood of success on the merits in the main action.
- [53] As to prejudice to the Applicant, the replication does not concern and raise a new issue but deals with a pleaded fact – compliance with Act 40 of 2002. It can accordingly not be prejudicial to the Applicant. In contrast, the Respondent could face significant prejudice because non-prosecution of the main action might occur. Additionally, prescription may become relevant.

²⁵ Case Lines 001-18

²⁶ Case Lines 001-28

[54] In *Madinda v Minister of Safety and Security, Republic of South Africa* (153/07) [2008] ZASCA 34 (28 March 2008) para [10] the Supreme Court of Appeal held that:

"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 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."

[55] In assessing the issue of condonation, this court considers that the following factors support the granting of condonation:

[55.1] the importance of this case to the Respondent – the case considers a claim based upon delict for damages arising from injuries sustained by the Respondent where the Applicant has an admitted duty of care;

[55.2] the sound prospects of success – if evidence can be lead as called for by the Applicant;

[55.3] the ventilation of all issues properly and fully before a court – compliance with the Act was pleaded in the Particulars of Claim and the replication clarifies and substantiates this issue.

[55.4] the Applicant would suffer no prejudice if condonation is granted as the replication deals with pleaded facts.

[55.5] in the event of refusal of condonation the Respondent will suffer severe prejudice as her claim will be jeopardized in that it would be incapable of prosecution, the action can be dismissed which will result in the mal-administration of justice.

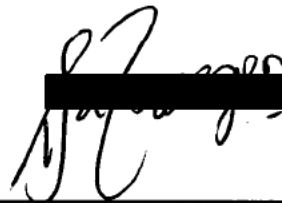
- [55.6] the Respondent has provided an adequate, satisfactory and bona fide explanation for the delay in the delivery of her replication.
- [56] Since this case has not proceeded to trial, the Respondent was entitled in these circumstances to apply for permission to file her replication late.
- [57] The replication was served before the condonation application rather than after, which Respondent's counsel acknowledged was irregular because it did not follow the usual order of applying for condonation first and then submitting the pleading. Nevertheless, it is evident that the Respondent has complied with the requirement to request condonation.
- [58] The Respondent has demonstrated valid reasons for requesting condonation by giving a reasonable explanation for the delay, showing strong prospects of success on the merits, and indicating that denying condonation would cause her significant harm (dismissal of the action) while causing no disadvantage to the Applicant.
- [59] This court is of the firm opinion that the interest of justice dictates that condonation should be granted. The Respondent ought to be permitted to pursue its claim when a compelling case exists and should not face dismissal or be precluded from prosecution solely due to an allegation of non-compliance with the Act, particularly where compliance has been asserted in the Particulars of Claim.
- [60] In summary, while the Respondent has acknowledged the irregularity in the delivery of the replication, this court, in the interest of justice, declines to set aside the replication. The Respondent has demonstrated good and sufficient cause for condonation. Accordingly, a proper case has been established by the Respondent for granting condonation for the late filing of her replication.
- [61] This court condones the irregular step. The interest of justice dictates that condonation be granted.

[62] As to costs, this court is of the opinion that the opposed costs of both the rule 30 application and the condonation application are to be costs in the main action.

[63] I accordingly make the following order:

Order

- [1] The application in terms of rule 30, to remove and set aside the Respondent's replication, is dismissed;
- [2] The Respondent's application for condonation in respect of the late filing of her replication is granted;
- [3] The costs of both the Rule 30 and condonation applications are to be costs in the main application.

A handwritten signature in black ink, appearing to read 'S Van Aswegen', is written over a solid black rectangular redaction box. The signature is cursive and fluid.

**S VAN ASWEGEN
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

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