



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: 13516/2023P

In the matter between:

KING CETSHWAYO DISTRICT MUNICIPALITY

APPLICANT

and

DUMMY AND THEMBY TRADING PROJECTS CC

RESPONDENT

Registration Number: 2009/081145/23

Coram: MOSSOP J
Heard: 16 April 2026
Delivered: 16 April 2026

ORDER

The following order is granted:

The application is dismissed with costs, which costs may be taxed on scale B.

JUDGMENT

MOSSOP J:

Introduction

[1] This is an ex tempore judgment.

[2] What follows is a truncated summary of events. A full consideration of all of the events will be attempted later in this judgment. On 27 September 2023, the respondent served a summons upon the applicant. After delivering a notice of intention to defend the action on 6 October 2023 the applicant failed to deliver its plea. It was consequently served with a notice of bar on 8 March 2024 but did not respond to it and consequently became barred. This application seeks to secure the lifting of the bar, which the respondent resists.

The history of the matter

[3] It is not in dispute that the relationship between the parties arises out of a tender awarded by the applicant, a municipality, to the respondent. The contract that resulted as a consequence related to the supply of water reticulation services to the applicant and commenced on 20 January 2021. The work was begun by the respondent, who from time to time submitted payment invoices to the applicant for consideration and payment. In all, 15 such invoices were presented to the applicant, and all were paid without demur.

[4] The difficulties between the parties initially arose with the submission of its invoice 16 and then spilled over into its invoice 17. The first mentioned invoice was delivered on 5 May 2022 and invoice 17 was submitted to the applicant approximately a month later, on 3 June 2022.¹ The total combined value of the two invoices was R2 651 016.69. The applicant refused to pay them on the grounds that the total value of the contract had already been exceeded by the previous 15 payments made to the respondent. The contract was initially valued at R28 834 321.19 and the combined value of the 15 previous invoices was allegedly R34 430 242.12. The applicant calculated that the respondent had accordingly been overpaid by an amount of R4 074 228.02. I do not understand how this figure is computed, for the amount of R4 074 228.02 does not represent the difference between the two large amounts just mentioned.

¹ In the founding affidavit, it was alleged that invoice 17 was dated 3 June 2024. Invoice 17 is attached to the indexed papers and it bears the date of 3 June 2022.

[5] The applicant, still refusing to pay invoices 16 and 17, then resolved to set off the amount allegedly overpaid against the value reflected in invoices 16 and 17, which left the respondent, on the applicant's version, owing it an amount of R604 126.70. How this was calculated is also not clear, for the applicant's mathematics simply do not add up, as deducting the value of invoices 16 and 17 from the alleged over payment amount results in a balance owed by the respondent to the applicant in the amount of R1 423 211.33 and not R604 126.70.

[6] The respondent did not accept that the applicant was entitled to avoid paying invoices 16 and 17, nor that set-off was appropriate and permissible or that it owed the applicant anything. It accordingly stopped work, and when it became apparent that it would not be paid the amount claimed in invoices 16 and 17, it quit the works and issued the summons against the applicant that was served upon it on 27 September 2023.

Events after service of the respondent's summons

[7] The applicant delivered a notice to oppose the action on 6 October 2023. On 2 November 2023, the applicant delivered a notice of intention to except in terms of Uniform rule 23(1).

[8] The notice of exception indicated that the applicant intended excepting to the respondent's particulars of claim on the grounds that it did not contain averments necessary to sustain a cause of action in that whilst the particulars of claim referred to a contract upon which the action was based, a copy of the contract had not been attached to the particulars of claim in breach of Uniform rule 18(6). While the notice of exception purported to be based upon the fact that the particulars of claim lacked allegations necessary to sustain a cause of action, the respondent was, curiously, given a period of 15 days to remove the cause of complaint, which is only required by the Uniform Rules to be given when it is alleged that a pleading is vague and embarrassing.

[9] Before the 15 day period mentioned in the notice of intention to except lapsed, the respondent's attorney wrote to the applicant's attorney on 14 November

2023 and proposed that the pleadings be held in abeyance and that an attempt be made to try and resolve the matter because, as the author of the letter put it:

‘... the contract between our clients intended the settlement of disputes amicably alternatively through adjudication and/or arbitration.’

This proposal to temporarily halt the exchange of pleadings was agreed to by the applicant.

[10] However, the purpose of the proposed interregnum produced no benefits and did not advance the resolution of the dispute. Accordingly, on 14 February 2024, the respondent’s attorneys wrote to the applicant’s attorneys and announced that the matter should now proceed, and that the applicant should attend to delivering its plea.

[11] No plea was, however, delivered. Accordingly, on 8 March 2024, a notice of bar was served on the applicant’s attorneys calling for the delivery the applicant’s plea within five days. Again, no plea was delivered and, as a consequence, the applicant became ipso facto barred.

[12] Then on 17 April 2024, the applicant stirred and delivered the exception that it had threatened to bring at the beginning of November 2023. The exception forms part of the indexed papers in this application and it repeated the grounds of objection mentioned in the notice of intention to except delivered on 2 November 2023. The delivery of the exception drew a notice from the respondent’s attorneys in terms of Uniform rule 30A, dated 25 April 2024, which pointed out that the applicant had been barred from delivering any further pleadings. As Mr Ndlovu, who appears for the respondent, submitted, no attempt was made to uplift the bar.

[13] That seemingly did not cause even a flutter of concern, or any frantic activity, in the offices of the applicant’s attorneys. Two months went by. The applicant did nothing. The respondent then resolved to apply for default judgment and enrolled such an application on the motion court roll on 7 August 2024, the notice of application being dated 19 June 2024. I happened to be in the motion court on 7 August 2024 and the application was adjourned sine die with the applicant being

directed to deliver its answering affidavit in the default judgment application by 28 August 2024.

[14] This application was then brought and was first enrolled for hearing on 5 March 2025.²

The legal requirements

[15] Uniform rule 27(1) reads as follows:

‘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.’

[16] Thus, in seeking the upliftment of the bar, the applicant is required to demonstrate the presence of good cause. Good cause requires the applicant to provide:

‘... a reasonable and acceptable explanation for the default; a demonstration that a party is acting bona fide; and that such party has a bona fide defence which prima facie has some prospect of success. Good cause requires a full explanation of the default so that the court may assess the explanation.’³

The explanation

[17] From the short history just examined, it is immediately apparent that this application is brought substantially out of time. The applicant was barred with effect from 15 March 2024 but only brought this application on 12 December 2024. An acceptable explanation for this inordinate delay is accordingly of cardinal importance when determining the prospects of this application succeeding.

[18] Two affidavits were delivered in support of the application to uplift the bar and both were deposed to by the attorney acting for the applicant, Ms Makhosazane Mhlongo (Ms Mhlongo). Rather nobly, she has called blame down upon herself. She explains in her first affidavit that the respondent’s letter of 14 February 2024

² The application was dated 12 December 2024.

³ *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* [2021] ZASCA 69 para 21.

recommencing proceedings was not immediately seen by her. This was because she ordinarily receives 'a large volume of emails'. That letter only came to her attention 'some days later.' How long it was before she came to be aware of it is never explained.

[19] However, Ms Mhlongo acknowledged that she was aware of the delivery of the notice of bar on 8 March 2024. She explains what she did after its receipt:

'... I attempted to engage and discuss with our Counsel who was on brief at the time, as to the Applicant's further step in the matter but however, I was unsuccessful as he was busy with a long running trial.'

[20] That is the only explanation provided by Ms Mhlongo for her conduct. It forms part of a portion of her first affidavit that is entitled 'Reasonable Explanation for Non-Compliance'. It need not be stated that her explanation is decidedly not reasonable and is entirely unacceptable.

[21] Ms Mhlongo delivered a supplementary founding affidavit that she deposed to on 24 March 2024. The expressed purpose of this affidavit was to cure an 'inadvertent' error in the first founding affidavit, namely her failure to attach a draft copy of the applicant's plea and claim in reconvention to it. She now attached them to her second affidavit. She, however, went on to state that she believed that good cause had been shown for the upliftment of the bar in the first affidavit to which she deposed. Notwithstanding that belief she made the following admission:

'I concede that there was regrettably an inordinate delay in filing this application.'

[22] The basis now advanced for the admitted delay was that she was inexperienced, having finished her articles of clerkship in August 2023. She had only been an attorney for a few months. She indicated that there was difficulty in obtaining instructions from her client but accepts that:

'... I should have dealt with these obstacles much better than I did.'

[23] She goes on to state that:

'I submit that I was only made aware of the urgency of filing the application to uplift the Bar when new Counsel was briefed in the matter on 29 November 2024. I then immediately

arranged urgent consultation with the Municipality. On 10 December 2024 we consulted with the Municipality with a view to prepare and draft the application. The application was then prepared and on 13 December 2024 I was then able to file and serve the founding application papers.'

[24] That then is the entire explanation for the delay of approximately nine months between the bar becoming operative and this application being launched. The respondent, as may be expected, does not accept this explanation and has criticised it in every possible way open to it.

The defence

[25] The applicant alleges overpayment by it to the respondent. Its defence is to be largely predicated on a claim in reconvention in which it claims the overpayment and the costs of employing another contractor to complete the work that the respondent apparently did not complete.

[26] As regards the overpayment, Ms Mhlongo explains that it was only appreciated at the time that invoices 16 and 17 were being considered for payment. The applicant consequently instructed its agent, the project manager, to perform a remeasuring exercise and that apparently determined the extent of the alleged overpayment in the amount of R4 074 228.02.

[27] The respondent has answered this allegation by asserting that all invoices presented for payment by it had previously been approved for payment by the applicant's appointed project manager. It denies any overpayment was made to it and asserts that there was a change in specifications, approved by the applicant, that may account for an increase in what was claimed by it.

Analysis

[28] Law is a human endeavour and is practised by human beings. Human beings make mistakes. The applicant's attorney made such a mistake in not attending to her emails when they were received and thereafter in not promptly recognising the significance of the notice of bar served upon her firm. There is no suggestion that she is the only attorney in the firm at which she practises, so it is not

clear why she would not have sought advice from other attorneys in the firm if she was uncertain how to proceed. In my view, a notice of bar is not an unexpected or unusual document to receive in the course of litigation and its consequences are easily comprehended, even by a freshly qualified attorney.

[29] The affidavits delivered by Ms Mhlongo in her attempt to explain her conduct do not serve that purpose. She was required to give a comprehensive explanation that covered the full period of inactivity on her part. In *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*,⁴ the Constitutional Court expressed itself as follows on the issue of condonation:

‘An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.’⁵

[30] Often in applications like the present one various events are mentioned by the party seeking relief in an attempt to establish good cause. In *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others*,⁶ the court observed that:

‘The mere listing of significant events which took place during the period in question without an explanation for the time that lapsed between these events does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.’

[31] I agree with that observation. But the mechanical listing of events, deprecated in the abovementioned extract, is actually not an issue in this matter because Ms Mhlongo has, in truth, not listed any significant events beyond the delivery to her of the notice of bar and her vain attempt to contact counsel. Counsel could not have conducted his long-running trial at night. Could he not have been contacted then for advice?

⁴ *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC) para 20.

⁵ *Ibid* para 22.

⁶ *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others* (2010) 31 ILJ 1413 (LC) para 13.

[32] Ms Mhlongo gives no insight into what she did after her abortive attempt to speak to counsel. The period of nine months between receiving the notice of bar and the bringing of this application is totally unaddressed by her. Once she came to understand that the bar had to be uplifted, she claims that she arranged an 'urgent consultation' with her client. That does not appear to be the case, for the appointment was only made 11 days after she came to her realisation. That does not appear to me to demonstrate any appreciation of the urgency in the matter.

[33] The defence raised by the applicant appears to me to be gossamer thin. Its agent approved payments that it subsequently paid. There is no suggestion that the work was not done or that the applicant did not receive value for what it paid out.

[34] The applicant's claim in reconvention, if the allegations in it are proved to be correct, is simply incredible. Rather than pay the respondent an amount of approximately R2 million because such payment would allegedly further exceed the contract value, the applicant chose rather to instruct another contractor and pay it the amount of approximately R25 million. The economics of the matter are astounding. Why was it not in order to pay the respondent's invoices 16 and 17, but it was in order to pay another contractor ten times the amount claimed by the respondent. Why did that payment to the other contractor not also exceed the contract value as invoice 16 and 17 allegedly did? None of this is explained.

[35] When the explanation for the default is considered together with the applicant's defence to the respondent's action, I am not convinced that the applicant has established good cause for the lifting of the bar. Ms Mhlongo repeatedly states that the applicant will be severely prejudiced if the bar is not uplifted. The fact of the matter is that this is not the true source of any prejudice that the applicant may suffer: the true source of any such prejudice is the conduct of Ms Mhlongo herself.

Conclusion

[36] The application falls to be dismissed and the applicant must pay the respondent's costs. In my estimation, those costs should be taxable on scale B.

Order

[37] I grant the following order:

The application is dismissed with costs, which costs may be taxed on scale B.

MOSSOP J

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