REPUBLIC OF SOUTH AFRICA

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

Case Number: 2024-008490

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES

[redacted]

16/4/2026
DATE

SIGNATURE

In the matter between:

ICT WORKS PROPRIETARY LIMITED Applicant/Plaintiff

and

AIR TRAFFIC AND NAVIGATION SERVICES SOC LTD Respondent/Defendant

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JUDGMENT

WENTZEL -THOMPSON J

Introduction

[1] This is an application brought in terms of Rule 27 of the Uniform Rules of Court for the upliftment of the *ipso facto bar* imposed upon the applicant in respect of the delivery of its replication to the respondent's special plea of prescription. The applicant seeks leave to file its replication out of time. The respondent opposes the application.

[2] The applicant is ICT Works Proprietary Limited ("ICT Works"). The respondent is Air Traffic and Navigation Services SOC Limited.

Background facts

[3] On 29 January 2024, ICT Works issued a combined summons against ATNS and the summons was served on ATNS on 2 February 2024. The particulars of claim comprise two claims:

a. Claim A: Payment of the sum of R1,148,186.50 in respect of unpaid invoices for software consultancy services rendered in terms of an amended master agreement;

b. Claim B: Payment of the sum of R5,148,186.50 as damages arising from delays allegedly caused by ATNS's failure to perform its obligations under the amended master agreement.

[4] The parties' contractual relationship is rooted in a Master Consultancy Agreement concluded on 30 March 2016 ('the MSA'), in terms of which ICT Works agreed to render Oracle E-Business Software and Management Consultancy Services to ATNS, including the implementation of a comprehensive Enterprise Resource Planning ("ERP") software solution. The MSA was extended by a first addendum concluded on 10 July 2018 and a second addendum concluded on 19 August 2021, the latter of which provided that the agreement would terminate on 28 February 2022 ("the amended master agreement").

[5] ATNS delivered its notice of intention to defend on 23 February 2024 and delivered its plea and counterclaim on 23 March 2024. Included in the plea was a special plea of prescription in which ATNS alleged that ICT Works's Claim B had prescribed on the basis that it arose during the period July 2019 to January 2020, and that the summons served on 2 February 2024 was served more than three years after the date on which the claim arose, resulting in its extinction by virtue of section 11 of the Prescription Act 68 of 1969 ("the Prescription Act").

[6] ICT Works delivered its plea to ATNS's counterclaim on 5 June 2024. However, no replication to ATNS's special plea was delivered within the 15-day period prescribed by Rule 25(1) of the Uniform Rules of Court, which period expired on 16 April 2024. By operation of Rule 26, ICT Works became *ipso facto* barred from replicating on that date.

[7] Subsequent to the bar taking effect, various procedural steps were taken. The parties exchanged mutual Rule 35 discovery notices in October 2024, with ATNS delivering its discovery affidavit on 4 November 2024 and ICT Works delivering

its discovery affidavit on 26 January 2025. ATNS delivered a notice of intention to amend its counterclaim on 26 November 2024 and delivered its amended pages on 11 December 2024. ICT Works did not oppose the amendment.

[8] Between July 2024 and October 2024, the parties engaged in settlement discussions. ICT Works sent a without-prejudice letter in July 2024. A without-prejudice meeting was held on 17 September 2024. ATNS submitted a counterproposal on 1 October 2024. The parties were, however, unable to reach agreement. ICT Works served a notice to discover on ATNS on 7 October 2024, effectively signalling the end of the settlement discussions.

[9] On 13 December 2024, ICT Works's attorneys wrote to ATNS's attorneys seeking consent to deliver the replication out of time, citing the settlement discussions as part of the explanation for the delay. ATNS's attorneys replied on 8 January 2025, refusing consent on the basis that ICT Works lacked good cause and that ATNS would be prejudiced.

[10] On 27 March 2025, ICT Works's attorneys again wrote to ATNS's attorneys, this time enclosing the proposed replication, and urging ATNS to reconsider its position having seen the narrow scope of the proposed replication which addresses only the issue of prescription. ATNS's attorneys declined this request on 1 April 2025 and referred ICT Works to approach the court in terms of Rule 27.

[11] ICT Works launched this application on 15 May 2025. The proposed replication is annexed to the notice of motion. ATNS delivered its notice of intention to oppose on 27 May 2025 and its answering affidavit on 13 June 2025. ICT Works delivered its replying affidavit on 30 June 2025.

The proposed replication

[12] The proposed replication is succinct. It pleads that ICT Works's Claim B has not prescribed because ICT Works's right of action only arose when the amended master agreement terminated on 28 February 2022. The replication sets out the contractual history of the MSA and its two addenda, pleads that the amended master agreement required ICT Works to complete a defined scope of work and that ATNS failed to perform between July 2019 and January 2020, causing delays. Crucially, the replication pleads that it was only upon the termination of the amended master agreement on 28 February 2022 that ICT Works became

aware, alternatively could reasonably have become aware, of the full extent of its damages. Accordingly, ICT Works contends that the three-year prescription period commenced on 28 February 2022 and that the summons served on 2 February 2024 - less than two years later - interrupted prescription in terms of section 15(1) of the Prescription Act.[2]

The parties' respective contentions

[13] ICT Works advances three principal grounds in explanation of the delay:

a. First, during the period from July 2024 to October 2024, the parties were engaged in settlement discussions and ICT Works did not wish to incur unnecessary legal costs in the event that the parties reached an amicable resolution.

b. Second, the initial legal strategy of ICT Works's erstwhile counsel was to deliver the replication by way of an amendment to the pleadings under Rule 28(10), which permits the court to grant leave to amend any pleading at any stage before judgment. However, when new counsel came on brief in November 2024, the applicant was advised that a replication was the appropriate procedural vehicle and that ATNS's consent would be required.

c. Third, there were delays in providing instructions, as all instructions required approval from ICT Works's executive committee, and certain employees involved in the matter had since left ICT Works's employ.

d. ICT Works contends that it has a bona fide and sound defence to the special plea of prescription. It argues that, on a proper application of sections 11(d), 12(1), and 12(3) of the Prescription Act, its right of action — being a debt that first became due and claimable on 28 February 2022 when the contract terminated and the project was completed — had not prescribed when summons was served on 2 February 2024. ICT Works relies on *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 662 (SCA)[3] and Makate v Vodacom (Pty) Limited [4] in support of this position.

[14] ICT Works further submits that any prejudice to ATNS is minimal, can be compensated by an appropriate costs order, and that its constitutional right of

access to courts under section 34 of the Constitution of the Republic of South Africa, 1996[5] ("the Constitution") militates in favour of granting the indulgence. It tenders costs of the application on an unopposed basis.

[15] ATNS opposes the application on four main grounds:

a. First, the delay is inordinate - ICT Works was barred on 16 April 2024 and only launched this application on 15 May 2025, some thirteen months later. No adequate explanation covers the entire period of delay.

b. Second, the reliance on settlement negotiations as a reason for delay is contrived and in bad faith, because ICT Works itself abruptly terminated the negotiations by serving a notice to discover on 7 October 2024 - only six days after ATNS delivered its counterproposal. Accordingly, ICT Works cannot use its own unilateral termination of negotiations as a shield to excuse non-compliance with the rules.

c. Third, the proposed replication does not merely address the narrow issue of prescription but amounts to an impermissible expansion or reformulation of the cause of action. ATNS contends that ICT Works had full knowledge of its damages as early as 2020/2021, evidenced by a letter dated 22 January 2021 and a spreadsheet (POC4) that accompanied the particulars of claim, both of which allegedly reflect a detailed quantification of delay damages during the period July 2019 to January 2020. This, ATNS argues, contradicts the replication's assertion that the debt only became due on 28 February 2022.

d. Fourth, ATNS will suffer prejudice that cannot be cured by a costs order, including disruption to its trial preparation strategy, continued uncertainty, and the cost of managing piecemeal and tactical litigation.

e. Fifth ATNS seeks dismissal of the application with costs on the attorney and client scale.

The applicable legal framework

[16] Rule 25(1) of the Uniform Rules of Court provides that a plaintiff who wishes to replicate must do so within 15 days after service of the plea. Rule 26 provides that the failure to do so results in the plaintiff being *ipso facto* barred.

[17] Rule 27 provides the mechanism for relief from non-compliance. Rule 27(3) provides: "*the court may, on good cause shown, condone any non-compliance with these rules*."

[18] The test for condonation under Rule 27 has been authoritatively restated on numerous occasions. The two principal requirements are: (a) a reasonable and acceptable explanation for the default; and (b) a bona fide defence which *prima facie* has some prospect of success. These requirements were set out in the matter of *Smith, N.O. v Brummer, N.O. and Another* [6] where Brink J identified the following five considerations relevant to the exercise of the court's discretion:

"*(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*."

[19] In *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* [7] the Supreme Court of Appeal confirmed that "*good cause*" requires a reasonable and acceptable explanation for the default, a demonstration that a party is acting *bona fide*, and a *bona fide* defence which *prima facie* has some prospect of success.

[20] Critically, the standard for condonation under the Uniform Rules must now be approached through the lens of the Constitution. In *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [8] the unnecessary legal costs while *bona fide* settlement negotiations are ongoing constitutes a legitimate, and indeed commercially sensible, reason for not prosecuting procedural steps. *ICT Works* cannot, however, avail itself of this explanation for the entire delay: the bar took effect on 16 April 2024, and there is no evidence of any settlement discussions prior to July 2024. This leaves a gap of approximately three months (April to July 2024) that is unaccounted for by this reason.

[21] ATNS argues that the settlement negotiations were not genuine because ICT Works unilaterally terminated them by serving a notice to discover on 7 October 2024 - six days after ATNS had delivered its counterproposal. This argument has superficial force, but on closer scrutiny it does not withstand examination as a basis for refusing the relief. It is common cause that the parties had a meeting on 17 September 2024 and that ATNS did respond with a counterproposal on 1 October 2024. The fact that ICT Works thereafter decided to proceed with formal litigation steps does not transform the period of negotiations into a sham. Parties often conduct settlement negotiations in parallel with formal litigation procedures. The more apt criticism is that ICT Works ought, at the point where negotiations failed in early October 2024, to have moved swiftly to seek ATNS's consent or to launch an application. It did not do so promptly, and this must be weighed against it.

[22] The second reason advanced - that ICT Works's erstwhile counsel initially advised it to bring its replication as an amendment under Rule 28(10) - is less convincing as a standalone explanation, but it must be assessed in its proper context. It is clear from the affidavit of the plaintiff's attorney, Ms Kayana, that new counsel only came on brief in November 2024, approximately seven months after the bar took effect. The failure to re-examine the procedural strategy sooner is a legitimate criticism. However, the proposition that a litigant's change of legal strategy, driven by a change of counsel, can never contribute to a satisfactory explanation is too absolute. Courts have repeatedly held that a litigant is not automatically disqualified from condonation merely because its former legal representatives provided incorrect advice: see *Flugel v Swart* .[15] Once new counsel came on brief in November 2024, the applicant moved promptly - writing to ATNS on 13 December 2024, barely four weeks after new counsel was appointed.

[23] The third reason - internal delays in obtaining executive committee approval -is, as fairly conceded by the respondent’s own counsel in paragraph 3 of the respondent's heads of argument, the strongest of the three explanations and covers the period from January to March 2025 with reasonable adequacy.

[24] Taking the explanation as a whole, I accept that the applicant has offered a reasonable explanation for the delay. The explanations are not contrived or fabricated. The period from April to July 2024 is the only window that is left unexplained.

[25] Furthermore, I note that ATNS itself sought and was granted leave to amend its counterclaim some eight months after the pleadings closed, without objection from ICT Works. While this does not of itself justify ICT Works's delay, it does reinforce the impression that both parties have been proceeding at a measured pace and that the litigation is not at a critical procedural juncture where a delay of this nature causes irreversible harm. This also demonstrates ICT Works' co-operative attitude to the litigation, which courtesy was not returned by ATNS.

Bona Fides

[26] I am satisfied that the application is brought *bona fide*. ICT Works has consistently communicated its desire to replicate from December 2024 onwards. It proactively shared the proposed replication with ATNS so that ATNS could assess its scope and content before deciding whether to consent. The proposed replication is indeed confined to the prescription issue. There is no indication of any intention to delay the proceedings or to frustrate ATNS's legitimate interests. The delay appears to be the product of a combination of commercial pragmatism, legal misjudgement by former counsel, and internal administrative delay - none of which suggests bad faith.

Bona Fide Defence

[27] I turn to what is, in many respects, the most significant consideration in this application. ICT Works must demonstrate a *bona fide* defence to the special plea of prescription which *prima facie* has some prospect of success.

[28] ATNS's special plea is straightforward: it contends that Claim B arose during the period July 2019 to January 2020 when it allegedly failed to perform, and that the three-year prescription period therefore expired no later than January 2023, before the summons was served on 2 February 2024.

[29] ICT Works's proposed replication counters this by pleading that it is only upon the termination of the amended master agreement on 28 February 2022 - when the project was completed and the work delivered - that ICT Works became able to calculate and claim the full extent of its damages for the delays caused by ATNS. On ICT Works's case, the "debt" only became due within the meaning of sections 11(d) and 12(1) of the Prescription Act on 28 February 2022. Since summons was served on 2 February 2024, this is within three years of that date.

[30] The legal principles applicable to this question are as follows. The Prescription Act provides, in section 12(1), that prescription begins to run "as soon as the debt is due." A debt is due when it is immediately claimable by the creditor and immediately payable by the debtor. In *CGU Insurance* the SCA held that prescription only commences once all elements of the right of action exist. In *Evins v Shield* it was confirmed that there must be an ascertainable or liquidated claim and an immediately enforceable right before prescription runs. In *Makate* the Constitutional Court confirmed that the debt in relation to financial loss arising from a wrongful act becomes due when the loss is suffered.

[31] The question whether a contract-based damages claim for delay only becomes due at contract termination - when the full extent of the delay and its financial consequences can finally be assessed and the right to claim crystallised - is a live and genuinely contested legal question.

[32] The contractual framework is significant: It is at least arguable that the amended Master Agreement was a comprehensive ERP implementation project with a fixed end date of 28 February 2022. ICT Works's claim for damages is a claim for the cost of maintaining resources during the delay caused by ATNS, not a claim for a discrete, once-off wrong at a fixed date.

[33] It is thus arguable that the financial consequences of the delay could only be fully determined at the point of project completion when the scope of ATNS's failure, and the commensurate cost to ICT Works of maintaining idle personnel, could finally be quantified in full. I mindful that there is conflicting case law on this point, but at this stage, it is sufficient for ICT Works to establish a *prima facie* defence. It has done so with reference to relevant case law that supports its argument.

[34] ATNS argues that ICT Works had knowledge of its damages as early as 2020/2021, relying on a letter dated 22 January 2021 and a spreadsheet (POC4). However, section 12(3) of the Prescription Act provides that a debt is not due until the creditor has knowledge of the facts from which the debt arises. Even accepting that a letter in early 2021 contained some quantification of interim delay costs, this does not necessarily mean that the full, final, and claimable damages had crystallised at that point, particularly where the project was still ongoing and ATNS's obligations of performance - which were the source of ICT Works's ongoing losses - continued until February 2022. A creditor's knowledge of an estimated or preliminary quantum does not necessarily constitute knowledge of a finalised and claimable debt. The 2021 letter may represent an accounting of losses to that point, not a final determination of the total debt due from ATNS. Whether this is or is not so is a matter for the trial court.

[35] Furthermore, ATNS's argument that the replication impermissibly widens the cause of action is misconceived. The replication does not create a new cause of action. It responds to the special plea of prescription by placing in issue the date upon which ICT Works's right of action arose, which is the very question that a replication is designed to address. As was explained in *Butler v Swain*[16] a replication that pleads that the defendant is estopped from raising some defence set out in the plea, or which sets up admissions or traverses the factual foundation of the special plea, does not widen the ambit of the claim - it constitutes permissible "*further pleading*." The replication here squarely and only addresses the prescription defence.

[36] I am satisfied that ICT Works has a bona fide defence to the special plea of prescription that is not frivolous and which has real, reasonable prospects of success at trial. The question of when a debt arising from a continuing contractual relationship crystallises into a claimable debt is precisely the kind of factual and legal question that should be properly ventilated at trial, not foreclosed by a procedural bar. I do not need to decide whether the prescription defence will ultimately succeed or fail - that is a matter for the trial court. I need only be satisfied that ICT Works's position is not plainly untenable, and I am so satisfied.

Prejudice

[37] I deal next with the question of prejudice. ATNS contends that it will suffer prejudice that cannot be compensated by a costs order. The nature of the alleged prejudice is disruption to its trial preparation strategy, continued uncertainty, and mounting legal costs from piecemeal and tactical litigation.

[38] I am unable to accept this characterisation of the prejudice. The matter has not been set down for trial. No pre-trial conference has been convened. Discovery has been exchanged. The parties are at a relatively early interlocutory stage. The granting of the application will merely close the pleadings in the ordinary and appropriate manner by allowing ICT Works to respond to the special plea. ATNS will then know, as it already does (having received the proposed replication in March 2025), precisely what ground ICT Works will rely on in opposition to the prescription defence.

[39] The prescription defence will, in any event, have to be ventilated at trial regardless of whether a formal replication is filed, by operation of Rule 25(2) which deems issue to be joined on all matters in the plea in the absence of a replication. All that the replication does is to articulate ICT Works's factual case in opposition to the prescription defense so that both parties and the court are better equipped to address that issue at trial. The refusal to allow the replication would not eliminate the prescription issue from the proceedings - it would merely mean that ICT Works proceeds without having formally stated its case on that issue, to the detriment of the quality of the proceedings.

[40] The only real and identifiable prejudice to ATNS is that its special plea of prescription may, at trial, be dismissed on account of ICT Works's replication. As was observed in the founding affidavit, and as is entirely correct as a matter of principle, the mere prospect that one's defence may fail is not the kind of prejudice that should motivate a court to foreclose the opposing party's right of reply. To hold otherwise would be to allow the bar to operate not as a procedural tool to regulate the timely close of pleadings, but as a substantive mechanism by which a party procures a windfall victory on prescription through the opponent's procedural default.

[41] I am satisfied that any prejudice suffered by ATNS can be adequately compensated by an appropriate order as to costs.

Interests of justice and section 34 of the Constitution

[42] Considering all the circumstances holistically - as required by *Grootboom* (supra) and *Ingqwele* - I am satisfied that it is in the interests of justice to grant the application. The issues in this matter involve a claim with a total value in excess of R6 million. The prescription point is a genuinely contested question of law and fact. Both parties should be entitled to have that dispute resolved on its merits, not foreclosed by a procedural bar. The replication is narrow. It introduces no new cause of action. The delay, while significant, was not reckless, deliberate, or in bad faith. ICT Works has acted transparently throughout and even disclosed its intended replication to ATNS in advance in an attempt to obtain consensual resolution.

[43] Section 34 of the Constitution guarantees every person the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. This constitutional imperative must inform the court's exercise of its discretion under Rule 27 in all appropriate cases. As Noko J observed in *Zervas*, the court should allow a party the opportunity to fully ventilate a matter and have access to courts where there are prospects of success and where the interests of justice so require.

[44] It is always in the interests of justice that the parties are afforded the opportunity to have their cases fully ventilated so that the real issues can be decided by the parties. This has consistently been the approach taken by our courts to the amended of pleadings, although I appreciate that the test for a right to introduce a pleading is distinct from that for an amendment.

[45] I am mindful that courts must guard against the tendency to grant condonation as a matter of course, as this would undermine the procedural rules and the orderly administration of justice. Litigants and their attorneys must be held to the standards of care required by the Rules. However, in this case I am satisfied that the balance of considerations, taken cumulatively, falls in favour of the applicant. The object of the bar under Rule 26 is to regulate the orderly close of pleadings,

not to permanently deprive a party of the right to respond to a special plea that if not opposed my effectively bar its most substantial claim.

Costs

[46] The applicant is seeking an indulgence. The ordinary rule that it should bear the costs of the application, including those reasonably incurred in consequence of the opposition: *Maloney's Eye Properties BK v Bloemfontein Board Nominees Bpk*.[17]

[47] However, I am required to determine whether the respondent's opposition was reasonable. As the applicant correctly submits, ATNS was entitled at any stage to consent to the filing of the replication. On two occasions the applicant sought this consent. On the second occasion it disclosed the proposed replication in full so that ATNS could assess its scope and content. The opposition was maintained without any real or irremediable prejudice being demonstrated. In the circumstances, ATNS's decision to oppose, while procedurally permissible, did not represent the most constructive course of litigation conduct or collegiality, particularly as an indulgence had been afforded to it when it amended its plea out of time.

[48] Had it not been for the instructions from ICT Work’s attorney to counsel to tender the costs (notwithstanding that it had previously only tended the costs in the event that there was no opposition), I would in all probability have made each party pay their own costs.

[49] In my view ATNS’s opposition was obstructive and not conducive to the cost effective and proper litigation between the parties. I am thus constrained to order that the applicant shall pay the costs of this application, including the costs of the opposition, on Scale B in accordance with its tender

Order

[50] In the circumstances, the following order is made:

1. The *ipso facto* bar imposed against the applicant in terms of Rule 26 of the Uniform Rules of Court, in respect of the delivery of its replication to the respondent's special plea of prescription, is hereby uplifted.

2. The applicant is granted leave to deliver its replication, in the form annexed to the notice of motion as Annexure "A", within ten (10) days of the date of this order.

3. The applicant shall pay the costs of this application on Scale B, including the costs of the opposition.

[redacted]

WENTZEL-THOMPSON J
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant: C van der Linde
Instructed by: CMS RM Partners Inc, Sandton

For the Respondent: S. Mohapi
Instructed by Sikunyana Inc. Attorneys

Date of the hearing: 3 March 2026
Date of judgment: 17 April 2026

Footnotes

1. Prescription Act 68 of 1969, section 11(d)
2. Prescription Act 68 of 1969, section 15(1)
3. *CGU Insurance Ltd v Rumdel Construction* (Pty) Ltd 2004 (2) SA 662 (SCA)
4. *Makate v Vodacom (Pty) Limited* 2016 (4) SA 121 (CC)
5. Constitution of the Republic of South Africa, 1996, section 34
6. *Smith, N.O. v Brummer, N.O. and Another* 1954 (3) SA 352 (OPD)
7. *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* (934/2019) [2021] ZASCA 69
8. *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC)
9. *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC)
10. *Ingqwele Consulting and Projects Management (Pty) Ltd v Cummins South Africa (Pty) Ltd* (27880/2022) [2025] ZAGPPHC 293
11. *Zervas v Greeff* (21846/18) [2023] ZAGPPHC 279
12. *A.M v S.M.M* (45707/2021) [2023] ZAGPJHC 965
13. *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O)

14. *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A)
15. *Flugel v Swart* 1979 (4) SA 493 (ECD)
16. *Butler v Swain* 1960 (1) SA 527
17. *Maloney's Eye Properties BK v Bloemfontein Board Nominees Bp*k 1995 (3) SA 249 (O)

[51]