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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 15334/2024P

In the matter of:

NKAYISHANA TRADING (PTY) LIMITED **FIRST APPLICANT**

(Registration Number: 2012/008596/07)

SIKHUMBUZO SELBY LUNGA **SECOND APPLICANT**

(Identity Number: 7[...])

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED **RESPONDENT**

ORDER

The following order is granted:

1. The bar in terms of the plaintiff's notice of bar dated 3 February 2025 is removed.

2. The defendants are granted leave to deliver their plea(s) to the plaintiff's summons and particulars of claim, issued on 7 October 2024, within ten (10) days of this order.

3. The defendants are directed to pay the costs of this application on an attorney and client scale.

JUDGMENT

Pietersen AJ:

[1] This is an application for the removal of bar in terms of Uniform rule 27(1). On 7 October 2024, the respondent (the plaintiff) instituted action against the applicants (the defendants) and claimed payment of R321 965.63 and R472 055.55, together with interest and costs, as well as the delivery of various movable assets. The parties will be referred to as they are in the main action. The plaintiff's claims against the first defendant arise from various agreements entered into between the parties, which the plaintiff contends have been breached by the first defendant. The plaintiff seeks judgment against the second defendant based on a written guarantee concluded by the second defendant in terms of which he undertook a principal and independent obligation in favour of the plaintiff for the payment of all debts which the first defendant might owe to the plaintiff.

[2] On 15 November 2024, the defendants delivered their notice of intention to defend the action. As a result, the defendants' plea was due on 13 December 2024. After the lapse of the *dies non* period on 15 January 2025, the plaintiff afforded an indulgence to the defendants to deliver their plea by 27 January 2025. This period was subsequently extended until 31 January 2025. The defendants remained in default and on 3 February 2025, the plaintiff advised the defendants that no further indulgences were to be granted and on the same day, a notice of bar was delivered.

[3] On 4 February 2025, the day after receipt of the plaintiff's notice of bar, the defendants' attorney addressed a letter to the plaintiff's attorneys to advise that the defendants' attorney is experiencing a family crisis and that the defendants' plea cannot be delivered within the *dies* indicated in the notice of bar. An undertaking was provided that the defendants' plea would be delivered on 12 February 2025, two days

after expiry of the *dies*. The plaintiff's attorney responded and advised that she was taking instructions and would revert. Two days later, on 6 February 2026, the plaintiff's attorney advised the defendants' attorney that she had not yet received instructions but, in the absence of a response, the defendants' attorney was requested to ensure that their clients' plea was delivered within the *dies* indicated in the notice of bar.

[4] The *dies* for delivery of the defendants' plea expired on 10 February 2025. The next day, 11 February 2025, the defendants' attorney's co-director, Mr Mthembu, addressed a letter to the plaintiff's attorney to advise that his colleague is still 'tied up with family matters' and the initial undertaking of the defendants' plea being delivered by 12 February 2025 was repeated. On 12 February 2025, the plea was duly delivered. On 13 February 2025, the plaintiff's attorney responded and advised that the defendants are under bar and that she held instructions to proceed with an application for default judgment. The defendants' attorney was requested to advise whether they intend bringing an application to uplift the bar. The defendants proceeded to deliver this application on 26 February 2025.

[5] In argument before me, Mr *Khumalo*, who appeared for the defendants, submitted that the defendants' plea was delivered a mere two days out of time and that the defendants had provided a reasonable explanation for their default due to the urgent family crisis experienced by the defendants' attorney. The defendants argued that the plaintiff's attorney was unreasonable in not consenting to the removal of the bar, particularly since there was no prejudice to the plaintiff in accepting the plea two days out of time. The defendants argued that their constitutional right to a fair trial would be violated if they were deprived of an opportunity to present their case at trial.

[6] The defendants further submitted that they enjoy prospects of success in the main action, as they dispute the amounts claimed by the plaintiff and the plaintiff has failed to plead that a proper search has been made in respect of the missing Covid-19 agreement. The defendants further submitted that one of the three guarantees pleaded by the plaintiff contains an election by the parties that the provisions of the National Credit Act 34 of 2005 (the NCA) be made applicable to the guarantee. The

other two guarantees contain a contrary recording of the guarantees not being subject to the provisions of the NCA.

[7] The plaintiff submitted that the defendants failed to provide a reasonable explanation for their default and that the defendants ought to explain two periods of default, being the period before the notice of bar was served as well as the period after the notice of bar was served. The plaintiff further submitted that there is a lack of *bona fides* on the part of the defendants and they failed to present a *bona fide* defence to the action. Mr *Ploos van Amstel*, who appeared on behalf of the plaintiff, further submitted that the defendants' argument before me is completely detached from what was contained in their scant founding affidavit.

[8] Rule 27(1) provides that '[i]n 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'. Condonation is not a mere formality[1] and the party seeking condonation must satisfy the court that there is sufficient cause for excusing the non-compliance.[2]

[9] The requirement to show good cause gives the court a wide discretion[3] and this discretion needs to be exercised with regard to all the circumstances of the matter.[4] The requirements in order to show good cause, which are well known, are:

(a) A reasonable explanation in respect of the delay, with sufficient particularity to enable the court to understand how the delay came about and to assess the applicant's conduct and motives;[5]

(b) The application must be *bona fide* and not made with the intention of delaying the opposite party's claim;[6] and

(c) The applicant should satisfy the court that he has a *bona fide* defence which is based upon facts which, if proved, would constitute a defence.[7]

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[1] *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) (*Gumede*) para 7.
[2] *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281G-H.
[3] *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) (*Du Plooy*) at 216H-217A.
[4] *Gumede* para 7.
[5] *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A-B.
[6] *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) (*Grant*) at 476.

[10] As indicated above, the defendants remained in default of delivering their plea, notwithstanding two indulgences afforded to them by the plaintiff's attorneys. The defendants also benefitted from the *dies non* period, which commenced shortly after the initial *dies* for delivery of their plea expired on 13 December 2024. It was, of course, open to the plaintiff's attorney to deliver a notice of bar much earlier when the *dies* for delivery of the plea expired initially. The election not to do so and the subsequent indulgences afforded to the defendants were extremely courteous and collegial. One can appreciate the plaintiff's position communicated on 3 February 2025 that no further indulgences for the delivery of the plea would be granted.

[11] Notwithstanding the above history, it remains that the defendants ultimately only need to explain their default of delivering the plea within the *dies* of the notice of bar. The only period of default for consideration is accordingly the two days after the *dies* in terms of the notice of bar expired. The defendants' explanation for their default is that their attorney experienced 'an urgent family crisis'. No further particulars are provided. However, to the credit of the defendants, their plea was subsequently delivered on 12 February 2025, in accordance with their attorney's undertaking on 4 February 2025.

[12] It is not disputed before me that the parties engaged in settlement negotiations during January and February 2025, while the defendants' plea was still outstanding. However, it seems clear from the evidence that a suspension of the *dies* was never agreed to during these discussions. The defendants' plea, therefore, remained due in terms of the rules. However, I am prepared to accept that the application is *bona fide*, considering that there were settlement discussions ongoing at the time. I further take into account the defendants' immediate committal to 12 February 2025 as the day on which their plea would be delivered and their subsequent compliance with this undertaking.

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[7] *Dalhouzie v Bruwer* 1970 (4) SA 566 (C) at 572C-D*; Du Plooy* at 217A; and *Grant* at 476.

[13] The defendants' explanation for their default is not as detailed as it could be. However, it may be that circumstances prevented the disclosure of further particulars in respect of the 'urgent family crisis'. Considering that the plea was ultimately only delivered two days late and in accordance with the defendants' undertaking, I am prepared to accept the explanation as reasonable in the circumstances.

[14] The plaintiff further submitted that the defendants have failed to advance a *bona fide* defence, insofar as they seek to dispute the amounts claimed by the plaintiff. The plaintiff seeks to rely in this regard on clause 18.14 of the credit and overdraft agreements and clause 19.18 of the Covid-19 agreement, which both read as follows:

'A certificate signed by any manager of the bank's managers, whose appointment need not be proved, specifying the amount which Nkayishana owes to the bank and stating that such amount is due, owing and payable by Nkayishana to the bank, will on its mere production be sufficient proof of any amount due and/or owing by the bank in terms of the agreements unless the contrary is proved.'

[15] It is so that the above clause allows the plaintiff to rely on a certificate of balance as sufficient proof of any amount owing to the bank. However, the clause also stipulates that the plaintiff shall be entitled to rely on such certificate 'unless the contrary is proved', thus leaving the door open to the defendants to present evidence at trial to substantiate their denial of the correctness of the claim amounts. Thus, the defendants are entitled to present evidence in order to dispute the amount owing to the plaintiff in terms of each agreement. I am therefore not persuaded that the defendants have failed to present a *bona fide* defence which would constitute a defence in the action.

[16] The application must therefore succeed.

[17] However, regarding costs, the defendants have no one to blame but themselves for their present position and the need to approach this court with this application. The defendants presented a scant founding affidavit and failed to deliver a replying affidavit. The defendants further burdened the papers before this court with a

supplementary founding affidavit, delivered without leave the day before the hearing of this application. The supplementary affidavit did not contribute at all to the issues in this application and the defendants did not request its admission.

[18] The defendants' arguments in their heads of argument and before me were further completely detached from the bare allegations contained in their founding affidavit. It seems clear that the defendants attempted to bolster their case with legal argument, instead of dealing with the facts of the matter. For these reasons, I am not prepared to order that costs be in the cause, as requested by the defendants. A punitive costs order against the defendants is justified.

[19] I make the following order:

1. The bar in terms of the plaintiff's notice of bar dated 3 February 2025 is removed.

2. The defendants are granted leave to deliver their plea(s) to the plaintiff's summons and particulars of claim, issued on 7 October 2024, within ten (10) days of this order.

3. The defendants are directed to pay the costs of this application on an attorney and client scale.

PIETERSEN AJ

Date of hearing: 12 May 2026

Date of Judgment: 15 May 2026

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