



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not Reportable

Case no: A69/2025

In the matter between:

MDOGO PROPERTY AND PLANT (PTY) LTD

APPELLANT

and

LURAMA 149(PTY) LTD t/a IMPA PAINTS CURIE

RESPONDENT

Neutral Citation: *Mdogo Property and Plant (Pty) Ltd v Lurama 149(Pty)Ltd./a Impa Paints Curie* (A69/2025) [2026] ZAFSHC 270 (29 APRIL 2026)

Coram: NAIDOO et MOLITSOANE JJ

Heard: 6 October 2025

Delivered: 29 April 2026

Summary: Condonation application – delivery of the expert notice – summary of the evidence of the expert – whether the appellant has proven good or sufficient cause to purge the delay.

ORDER

1 The appeal is dismissed with costs, which include the costs of counsel on scale B.

JUDGMENT

Molitswane J (Naidoo J concurring)

Introduction

[1] This is an appeal against the dismissal of the application to condone the late filing of the expert notice as well as the summary of the expert's opinion and reasons as contemplated in rule 24(9)(a) of the Magistrates Court Act 32 of 1944 (the Act). Any reference to rule(s) is to the Magistrates Court rule(s) promulgated in terms of the Act.

Factual background

[2] On 17 November 2017, the appellant who was the plaintiff (Mdogo) in the court a quo and the respondent who was the defendant (Impa) in the court a quo, entered into a written lease agreement in terms of which Impa leased a certain immovable property from Mdogo. The agreement was mutually terminated by the parties on 15 November 2022. Mdogo instituted an action against Impa following the termination of the agreement based on alleged breaches of the lease agreement, for water and electricity allegedly consumed by the respondent, repair work on the leased property and loss of income following the termination.

[3] The trial commenced on 16 July 2024. It was scheduled to continue on 17 July 2024 but did not proceed on that day. Before the trial commenced on

17 July 2024, Mdogo served an expert notice and summary of the opinion and reasons of its expert on Impa. Impa in turn served a rule 60/60A notice alleging that the step taken by Mdogo did not comply with the court rules, alternatively, was irregular. The filing of the rule 60/60A notice prompted Mdogo to approach the court a quo with an application seeking condonation for the late delivery of its expert notice and summary. Impa opposed the application. The court a quo after hearing the submissions of the parties dismissed the application with costs.

[4] The judgment of the court a quo is assailed primarily on the following grounds:

- a) That the court a quo erred in finding that the explanation for the late delivery of the notice as well as the summary was not bona fide;
- b) That the court a quo erred in holding that, in allowing the condonation, Impa would be prejudiced;
- (c) Concomitant with the issue of prejudice, that there was nothing unusual or impermissible for expert witnesses to testify about costs of repairs even though such repairs had already been completed.

In the court a quo

[5] The nub of Mdogo's quest to lead expert witness testimony appears to be a mischaracterisation of the issue in dispute. According to Mdogo, the factors as set out below led to its decision not to deliver the notice and expert report. It sets out the reasons as follows in the founding affidavit:

'4.2. The Applicant presented the evidence of three factual witnesses... and confirmed its intention to call Mr. Etienne Lubbe (Mr Lubbe), who was the contractor responsible for the fair repair work at the premises....

4.3. Concerning the repair work for which the applicant intends to call Mr Lubbe the Applicant's case has summarized in paragraphs 5.11 to 5.4 of the particulars of claim is that following any inspection conducted by its representatives and those of the Respondent on 30

December 2022, its representatives identified the necessary repair work needed to restore the leased premises to their original condition at the commencement of the lease.

4.4. Mr Lubbe was subsequently tasked with providing a quotation for these repairs...

4.5. In response to these allegations, the Respondent pleaded that the Applicant only identified the flooring in the room used as a tint room... which was covered in paint that required removal. Additionally, the Applicant noted that the walls needed to be repainted to a white colour, and there was necessary repair work on the door frame, as indicated during the final inspection. These defects were accordingly corrected.

4.6. *Based on the plea, I was of the view that the dispute concerning the repairs centred on whether the defects that needed to be repaired were present or absent. This, in my view, necessitated factual rather than expert testimony.*

4.7. *Additionally, I believed that the dispute has reflected in the plea would simply require the courts to make credibility findings based on the reliability of the factual evidence by the witnesses as to the presence or absence of the defects, as opposed to relying on expert testimony on the nature and cause of the defects that required repair work. (Emphasis added.)*

4.8. During cross examination, questions were posed to the Applicant's witnesses concerning the cause and nature of certain defects, including those that were allegedly caused by water seeping beneath the covering in the tint room.

4.9. These questions enlarged the issues and disputes initially presented in the plea, which primarily focused on the presence or absence of the defects requiring repair. In my opinion as well as that of counsel for the Applicant, this broadened the scope of the dispute and necessitated the introduction of expert evidence.

4.10. The reason for the Applicant's failure to file an Expert Notice and Report in accordance with Rule 24(9)(a) and (b), that is, prior to the commencement of the trial, was primarily related to the defences raised in the Respondent's Plea which the applicant needed to address and prepare for adequately.'

[6] In response, Impa's case is, first, that Mdogo' case for the repair work was a claim for damages and as such it was not liquidated. Secondly, that the nature and extent of the defects was also in issue. Impa contends that in the context of pleadings, the distinction between damages caused and fair wear and tear was a matter that fell within the purview of expert witnesses. For this reason, Impa

contends that this issue of damages was not a new issue as submitted by Mdogo. According to Impa, Mdogo bore the onus to prove its damages in order to succeed with its claim in the proceedings before the court a quo.

[7] It is also the case of Impa that should condonation be granted, it will be prejudiced. It bases its contention on the fact that, on the version of Mdogo, the defects that form the foundation of its claim have since been repaired. Impa contends that if the repairs have been effected, it would not have the benefit of appointing its own experts to examine the alleged defects in their original state. Further, Impa submits that Mdogo has not disclosed whether a new tenant now occupies the premises which factor might have a bearing on further developments and on the condition of the property following its eviction by Impa.

[8] Impa further holds the view that the expert summary does not comply with the substantive requirements of rule 24(9)(b). It contends that the report does not state whether the expert sought to be called actually conducted an inspection or when such took place. It is also attacked on the basis that it lacks a foundation in technical principles or specialised knowledge beyond the common understanding of the court and lay persons. Impa in essence contends that the expert summary does not contain sufficient data, facts or methodology on which Mr Lubbe's opinion is based in order for Impa to accurately make its own assessment.

[9] The challenge against the notice and summary also centres around the fact that, according to Impa, Mdogo impermissibly seeks to introduce or supplement its evidence through the expert evidence.

[10] The court a quo indicated that during the pre-trial conference, it was specifically stated that the damages and failure by Mdogo to maintain the lease premises were in dispute. The court a quo also noted that counsel for Mdogo also

conceded that he overlooked to file an assessment of damages which the court needed for appropriate adjudication. The court a quo held that Mdogo knew that its claim had always been for damages. The court a quo further held that should condonation be granted, Impa would be prejudiced.

[11] The central issue for determination is whether Mdogo has made out a case for condonation for the late delivery of the notice and summary of its expert witness. In order for an applicant to succeed with this kind of an application, such an applicant must show good or sufficient cause for the relief sought. The onus is on such applicant to prove good cause and not merely to allege it.¹ Condonation is not there for the asking. In *Grootboom v National Prosecuting Authority and Another*,² the court said:

‘A party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court’s direction. Of great significance, the explanation must be reasonable enough to excuse the default.’

[12] The courts have over time identified the necessary factors relevant to this inquiry which include: the degree of non-compliance, the explanation of delay, the prospect of success, the importance of the case, the nature of the relief sought, the other parties’ interest in finality, the convenience of the court.³ The court will further also consider the question of prejudice to either of the parties which may not be compensated for by a suitable order of costs.

[13] On the assessment of an indulgence, one has to look at the explanation proffered by Mdogo. The starting point should be rules 24(9)(a) and (b), which provide as follows:

¹ *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) 353G-353H.

² *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC); [2014] 1 BLLR 1 (CC) (2014) 35 ILJ 121 (CC) para 23.

³ *Ibid* para 22.

'No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter which the evidence of expert witness may be received, unless-

- i. where the plaintiff intends to call an expert, the plaintiff shall not more than 15 days after the close of pleadings or where the defendant intends to call the experts, the defendant shall not more than 30 days after that close of pleadings, have delivered notice of intention to call such expert;
- ii. in the case of the plaintiff, not more than 45 days after the close of pleadings, or in the case of the defendant not more than 60 days after the close of pleadings, such plaintiff or defendant shall have delivered a summary of the expert's opinions and the reasons therefore.'

[14] It is common cause that the plaintiff did not deliver the notice and expert summary after closure of pleadings. Such a notice and summary were only delivered after three of Mdogo's witnesses had testified. It is the case of Mdogo that the dispute concerning repairs centred on whether the defects that needed to be repaired were present or absent. This was not correct as conceded by counsel for Mdogo. The court a quo found that Mdogo was not bona fide in its application. I agree with the sentiments expressed by the court a quo. The pre-trial minute filed sets out the issues in dispute, inter alia, as follows:

'Whether or not the repairs were necessary due to damages and / or failure by the defendant to maintain the leased premises, alternatively whether it constitutes fair wear and tear.'

[15] In its particulars of claim Mdogo alleges as follows:

'In the event that the defendant fails to maintain the lease premises in a good order as contemplated in clause 12 of the lease agreement then the plaintiff will be entitled to have necessary repairs effected in order to restore the lease premises to the condition as at the commencement date. The defendant will be liable upon demand to pay the plaintiff the amount of expenses so incurred.'

[16] In response Impa pleaded, inter alia, as follows:

‘It is..., specifically pleaded that fair wear and tear is obviously expected.’

A plea of this nature should have alerted Mdogo that proof that the damages claimed were not caused by fair wear and tear, was indispensable in order to sustain its action. This would surely necessitate the leading of evidence in order to contradict the assertion of fair wear and tear. That should have prompted it to file the necessary notices. There was no reason to wait until three witnesses were called and be confronted with the version of Impa to which they could not respond because of lack of expertise.

[17] It therefore cannot be correct that Impa expanded the points of dispute during cross examination. The issue of damages and fair wear and tear was crystallised in the pleadings and also in the pre-trial conference. Mdogo was legally represented during the proceedings. Had the cross- examination strayed and went beyond the pleadings, one would have expected counsel for Mdogo to object to that kind of cross examination. That did not happen.

[18] In my view it was only during cross examination that reality set in for Mdogo, that expert evidence was necessary in order to sustain its claim. In an attempt to amplify its case, Mdogo then issued a notice as well as a summary of its expert. In trying to have the notice and summary accepted by the court a quo, its legal representative somewhat shifted the blame to himself as indicated in paragraph 5 above about what he ‘believed’ and not what the pleadings aver was the point of dispute. He conceded before the court a quo that he mischaracterised the point of dispute. But that cannot be used to disadvantage Impa. Condonation cannot be granted on this basis. To conclude on this aspect, I refer to the case of *Superb Meat Supplies CC v Maritz*,⁴ where the court said the following:

‘It has never been the law that invariably a litigant will be excused if the blame lies with the attorney. To hold otherwise it would have a disastrous effect on the observance of the rules of

⁴ *Superb Meat Supplies CC v Maritz* 2004 25 ILJ 96 (LAC) para 16.

this court and set a dangerous precedent. It would invite or encourage laxity on the part of the practitioners.'

[19] When it comes to the question of prejudice, it seems to me that Mdogo downplays the prejudice Impa would suffer should condonation be granted. The alleged defects have already been corrected. The surface forming the subject of dispute is no longer in its original form. The question then arises as to how Mdogo expects Impa's experts are to investigate and report on surfaces which are no longer in their original state. That would clearly put Impa on the back foot. I hold the view that the prejudice warrants refusal for condonation. It is in my view unnecessary to decide the issue of whether the intended summary of the expert of Mdogo complied with the rules as the stance I take above, makes it unnecessary to decide the prospects of success.

Conclusion

[20] For the reasons stated above, I conclude that the appeal must fail. There is no reason why Impa should not be entitled to its costs on resisting the appeal.

Order

[21] In the result, I make the following order:

- 1 The appeal is dismissed with costs, which include the costs of counsel on scale B.


P E MOLITSOANE
JUDGE OF THE HIGH COURT

I agree


S NAIDOO
JUDGE OF THE HIGH COURT

Appearances:

For appellant:	P J J Zietsman
Instructed by:	Muller Gonsior Attorneys, Bloemfontein
For respondents	W A Van Aswegen
Instructed by:	Kramer Wehlman Inc., Bloemfontein.