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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2022-9016

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES /NO
..... SIGNATURE	28/02/2023..... DATE

In the matter between:

SELWYN TRAKMAN N.O.

First Plaintiff

CORNE VAN DEN HEEVER N.O.

Second Plaintiff

**SOUTHLINK INVETSMENTS SHARE BLOCK
PROPRIETARY LIMITED (IN LIQUIDATION)**
(Registration number: 1973/003283/07)

Third Plaintiff

SELWYN TRAKMAN N.O.

Fourth Plaintiff

DALLIE VAN DER MERWE N.O.

Fifth Plaintiff

**ASHBERN MANSIONS SHARE BLOCK
PROPRIETARY LIMITED (IN LIQUIDATION)**
(Registration number: 1946/020618/07)

Sixth Plaintiff

SELWYN TRAKMAN N.O.

Seventh Plaintiff

JENNIFER VAN AARDT-BESTER N.O.

Eighth Plaintiff

**JOHN CRAIG PROPERTIES SHARE BLOCK
PROPRIETARY LIMITED (IN LIQUIDATION)**
(Registration number: 197/006139/07)

Ninth Plaintiff

SELWYN TRAKMAN N.O.

Tenth Plaintiff

LAURETTE VAN DER MERWE N.O.

Eleventh Plaintiff

and

GARY WASILEWSKY

First Defendant

HILTON WASILEWSKY

Second Defendant

KAREN LAZARUS

Third Defendant

DAVID COHEN

Fourth Defendant

SHARGER LAZARUS

Fifth Defendant

JUDGMENT

MANOIM J:

Introduction

[1] This is an application brought by the first defendant to uplift a bar. He applies for this relief in terms of Rule 27 of the Uniform Rules. Under that rule the first defendant has to show good cause for the upliftment of the bar.

[2] The first respondent, Gary Wasilewsky ("Wasilewsky"), is an erstwhile director, and still a shareholder, of four property holding companies. In 2018 these companies were liquidated as solvent companies in terms of section 88 of the Companies Act 71 of 2008.

[3] There are twelve plaintiffs. The large number of plaintiffs is explicable by the fact that not only are all the four companies in liquidation plaintiffs, but each is in turn also represented by two joint liquidators. The first plaintiff, Selwyn Trakman, is the only person who has been appointed as a joint liquidator of all four companies. In October 2020 the plaintiffs brought an application against Wasilewsky in which they sought certain relief. For reasons not pertinent to this decision the application was withdrawn on 23 February 2022 and the liquidators tendered costs to the Wasilewsky.

Chronology

[4] On 7 March 2022 the plaintiffs served a summons on Wasilewsky. Also cited are four other defendants, all erstwhile shareholders of the companies and relatives of Wasilewsky but no relief is sought against any of them. The relief sought and amounts claimed from Wasilewsky in the summons are the same as they were in the withdrawn application.

[5] But the decision to proceed by way of action instead of motion was not the end of the plaintiffs' woes. The particulars of claim were served on Wasilewsky's attorney electronically, but while there was no issue about that, some of the pages were missing. Wasilewsky's attorney wrote to the plaintiffs' attorney to advise her of this. On 14th March the plaintiffs' attorney emailed the particulars of claim to Wasilewsky's attorney - this time with all the pages of the particulars of claim included. But not included were the many annexures attached to the particulars of claim. The plaintiffs' attorney was fully aware of this because she says as much in

her covering letter of the 14th March. Confirming that the particulars of claim were being served without the annexures she says that the annexures would be downloaded on to Caselines the following day.

[6] Both parties accept that the annexures were downloaded on to CaseLines the next day i.e., the 15th March. However according to the Wasilewsky' attorney, the full document i.e., the particulars of claim plus the annexures were never served on her at this time. This is why on 24th March Wasilewsky's attorney served a rule 30A notice on the plaintiffs' attorney claiming the summons was incomplete. The plaintiff's attorneys then had the sheriff serve the full document (particulars of claim plus all the annexures) on the Wasilewsky's attorneys on 1 April 2022. According to Wasilewsky it is only on this date that the irregularity was cured.

[7] On 11 May the plaintiffs' attorney served a notice of bar on Wasilewsky's attorney. The notice of bar required Wasilewsky to file his plea within five days failing which he would be barred. Both parties agree that the last day for compliance was the 18 May 2022. On that day Wasilewsky's attorney served a plea, special plea, and counterclaim on the plaintiffs' attorney. I will refer to the three as the defence pleadings. But she did not file the defence pleadings on CaseLines. She only did so on the following day. Wasilewsky's attorney says she attempted to file on CaseLines on the same day, but the service was down and she was unable to do so. It was only on the following day that she was able to do so.

[8] It is common cause that in terms of the rules the defence pleadings had to be delivered. Delivery means service on the other party and filing with the court. Filing

on CaseLines suffices as filing with the court. But because the filing took place only on the 19th May not 18th May, delivery had not taken place within the five days and hence Wasilewsky was barred.

- [9] Wasilewsky's attorney then wrote to the plaintiffs' attorney to explain the difficulty she had with accessing CaseLines. The plaintiffs attorney's view was that there had not been proper compliance with the rule on delivery and that Wasilewsky was thus barred. Wasilewsky's attorney then brought this application in terms of Rule 27 for the bar to be lifted which requires a showing of good cause.

Relevant start date

- [10] As the law currently stands, the consideration of good cause requires an accounting by the applicant wanting to uplift the bar for its default in two time periods. The first is the time period between the delivery of the summons and the notice of bar. The second is the time period that elapsed after the applicant has become barred. In this case there is a dispute over the time that has elapsed in the first period. This is because the parties do not agree when the plaintiffs delivered a summons that complied with the rules. This is why I needed to give a detailed history of the filing chronology. At issue is when the clock started ticking for the applicant to file its plea.

- [11] There are three candidate start dates to consider. The plaintiffs point out that Wasilewsky filed his notice of intention to defend the action proceedings on 8 March 2022. Ordinarily in terms of the rules the plea should have been filed within

20 days thereof. Hence the first candidate date would be 12 April. In the alternative the plaintiffs suggest that even if the summons was treated as incomplete at that time, then the relevant start date would be 15 March when the full summons was loaded on to CaseLines and thus accessible to the first defendant's attorney.

[12] But Wasilewsky contends that the clock only started running when the summons had been delivered in terms of the rules. This meant not only filing on CaseLines but also service on his attorney. Since the latter only occurred on 1 April 2022 that is the relevant start date for the 20-day period to run. On that basis he should have delivered his defence documents by 5 May.

[13] In this case I have decided that the start date was 1 April 2022. Only on that date had the plaintiffs properly complied with the delivery rule. If Wasilewsky is being held to this standard for compliance of delivery his defence documents so must the plaintiffs for their particulars of claim. Thus, following this approach, the defence documents should have been delivered by 5 May. Notice of bar was on 11 May. Effectively this was only four court days later. Wasilewsky's attorney complains that the plaintiffs' attorney did not do her the courtesy of writing to her to warn of the notice of bar before filing.

Legal requirements for uplifting of the bar

[14] Rule 27 requires a case for the upliftment of bar to be made out on the standard of good cause shown. The case law has interpreted this standard to have three requirements.

- a. The applicant must have a reasonable and acceptable explanation for the default;
- b. The applicant must be *bona fide*; and
- c. The applicant must demonstrate a *bona fide* defence which prima facie has some prospects of success.¹

[15] Although the concept of bona fides is taken into account twice these are conceptually different exercises.

[16] The court is required to deal with each of these requirements in turn. For convenience I deal with these issues in reverse order.

Bona fide defence

[17] Wasilewsky was a shareholder along with other family members in four property holding companies. The companies owned properties in the inner city from which they received rental income. During the relevant period all the shareholders, bar one, relocated overseas including Wasilewsky. In March 2018 the companies were placed in final liquidation as solvent companies in terms of section 81(d)(iii) of the Companies Act, 71 of 2008.

[18] The present summons was first served on Wasilewsky on 11 March 2022. In it the plaintiffs make out three claims against Wasilewsky. The first is a claim for breach

¹ See the recent case of *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* (934/2019) [2021]ZASCA 69 (4 June 2021) at paragraph 21.

of fiduciary duties. This claim has been broken down into 37 separate amounts that Wasilewsky is alleged to have paid out from the companies accounts. These amount to R3,387,022.16. The second claim is for R1,613,442.33. The allegation is that he is liable for these amounts for allegedly under invoicing tenants of two of the properties. The third claim is for R572,000.00, in respect of amounts which Wasilewsky is said to have paid after the companies were placed in liquidation. In total these claims amount to R6,331,419.08.

[19] Wasilewsky raises a defence of prescription in respect of all three claims. On the face of its all three claims are for payments made more than three years prior to the summons being issued, and hence, according to the plea, have prescribed in terms of section 12(1) of the Prescription Act. The plaintiffs in their answering affidavit claim that their knowledge of these claims emerged only in the course of an enquiry and hence they have a defence to the prescription claim. That may be so, but this dispute raises a triable fact around prescription.

[20] Wasilewsky also raises two other defences by way of special pleas; non-joinder, and he contests the appointment of the one of the plaintiffs, Trakman as a liquidator. He alleges Trakman must be removed as a liquidator because he induced his appointment as such in contravention of section 372 of the old Companies Act. As to the merits he also raises in respect of the second claim (the rental reduction claim) that he has a legitimate business reasons for doing so as he was, de facto, the sole director of the companies at the time and this decision in respect of the rental reductions, was a business judgment call, not a breach of

a fiduciary duty. This defence also raises a triable issue over the judgment exercised by Wasilewsky.

[21] In relation to claim three his alternate defence is that these payments were made before the liquidators were appointed and would have had to be paid in any event by the liquidators. He also filed a counterclaim along with his special plea and plea. In his counterclaim he asks for the removal of Trakman as a liquidator of the various companies and for the liquidators to distribute his shareholding of the surplus assets of the companies (which he alleges is 28%) on confirmation of the final liquidation and distribution account.

[22] Whatever the merits or otherwise of the alternative defences they all raise disputes of fact which make them triable issues. In any event the claim of prescription permeates all three claims and on its own constitutes a triable issue on the current papers. The test for a bona fide defence in cases for the upliftment of a bar is the same as for resisting summary judgment.²

[23] I consider then that Wasilewsky has raised a bona fide defence.

Bona fides

[24] Rogers J has explained how the concept of bona fides has come to be understood in our law:

² *Ford v Groenewald* 1977(4) SA 224 (T) and *Breitenbach v Fiat SA (Pty) Ltd* 1976 (2) SA 226 (T).

“Bona fides have to do with the belief on the part of the litigant as to the truth or falsity of his factual statements; it is a separate element relating to the state of the defendant's mind (El-Naddaf at 784G —7858, quoting from Breitenbach).³

[25] The plaintiffs argue that Wasilewsky is not bona fide in this matter. Much reliance is placed on a statement by his attorney that she had only instructed counsel to draft the defence documents once Notice of bar had been served. This might justify criticism of the diligence of the attorney, but it does not make Wasilewsky someone who does not believe in the truth of his own claims. Indeed, the admission is a frank one. Contrast with the basis for the court rejecting the litigant's bona fides in *Ingosstrakh* where the court found that the true motive of the litigant: “...was a disguised and contrived attempt to introduce prescription as a defence to the action, a fact expressly conceded by *Ingosstrakh*'s counsel.... This put paid to any suggestion by *Ingosstrakh* that the application was pursued bona fide. Nothing more needs to be said about this.”

[26] There is no basis to find that Wasilewsky is not acting bona fide in the sense this term is used in the case law.

[27] The more difficult issue and which is why I have turned to it last, is whether Wasilewsky gives a reasonable and acceptable explanation for the default. In order to meet this standard Wasilewsky needs to explain not only his default after the

³ *Gap Merchant Recycling CC v Goal Reach Trading* 55 CC 2016 (I) SA 261 (WCC) at paragraph 23.

service of notice of bar but also his default prior to this. This is the finding in *Ingosstrakh* where the court explained it in this way:

“With regard to the explanation for the default, there are two periods of default which Ingosstrakh must explain for its failure to deliver a plea. The first is before the notice of bar was served on it, and the second relates to the period after the bar was served. This is because the notice of bar was served as a consequence of Ingosstrakh’s failure to file its plea.”⁴

[28] In this case Wasilewsky has not done that. It is clear from his attorney’s answering affidavit that she believed that the only time period that required an explanation was the period after the filing of notice of bar. However, that is not the law since the *Ingosstrakh* decision. There was a belated attempt from the bar to explain that the default during this period was due to the prevalence of public and religious holidays over the April period. However, that explanation is not on the papers nor is it consistent with attorney’s statement that she had only instructed counsel after receipt of notice of bar. It appears then that there is no satisfactory explanation for the period prior to the notice of bar being served.

[29] However even though *Ingosstrakh* requires one to consider both periods, it does not mean that they need to be looked at as self-standing explanations taken in isolation. The context of the one period might inform the context of the other. The

⁴ *Ingosstrakh* supra, paragraph 22.

case law thus far emphasises that condonation is a question of fact in each case.⁵ Nor is the negligence of an attorney fatal.⁶ The fact is that the attorney was ready to deliver on the defence documents on the final day. She served on the plaintiffs' attorneys in time to meet the deadline. The only reason she could not file on time was the problem with Caselines which was beyond her control. Had Caselines been working that afternoon, she would have completed delivery and Wasilewsky would not have been barred. There was also an attempt by the plaintiffs' attorneys to suggest that even on 19 May, the plea was not properly delivered as the attorney had not signed the pleading. This defect was later remedied but I suggest this objection was more opportunistic than substantial – an attempt to make the one day period relied on by Wasilewsky seem less compelling.

[30] Nor is the time period prior to the bar despite not being explained excessive. It amounted to just over 20 days. In a case with stop-start history as this one with neither set of litigant's devoid of missteps perhaps the attorney was reluctant to start drafting a defence until the 11th hour. She may have walked close to the edge of the cliff, but she would have made it in time but for the technical glitch with CaseLines. It would as her counsel suggested, not be in the interests of justice to deprive Wasilewsky of his defence in these circumstances. I am satisfied then that good cause has been shown for an upliftment of bar.

⁵ See *Cairns v Cairns* 1912 AD 181 where Innes J held in explaining the futility of defining good cause that: "What that something is must be decided upon the circumstances of each particular application."

⁶ See Herbstein and Van Winsen: *"The Civil Practice of the High Courts of South Africa"*. Fifth Edition, page 733.

Costs

[31] Although the applicant had initially sought costs *de bonis propriis* against the liquidator plaintiffs, counsel for the applicant fairly conceded at the hearing that this would not be appropriate and now seeks only that costs be costs in the action. I am satisfied that this is the correct order.

ORDER:-

[32] In the result the following order is made:

1. That the bar in terms of Rule 27 is hereby uplifted;
2. That the special plea, plea, and counterclaim as served on 18 May 2022 and filed on CaseLines 19 May 2022, serves as the first defendant's special plea, plea, and counterclaim;
3. Costs of this application are to be costs in the action.



N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 17 February 2023

Date of judgment: 28 February 2023

Appearances:

Counsel for the Applicant/First Defendant:

N Strathern

Instructed by.

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