IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 38592/2020

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

E.M. KUBUSHI **DATE: 02-08- 2021**

In the matter between:

S A TRANSIT SERVICES CC **APPLICANT**

and

ICOLLEGE PTY LTD **RESPONDENT**

JUDGMENT

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 02 August 2021.

INTRODUCTION

[1] The applicant, SA Transit Services CC, has approached court in terms of Uniform Rule 27, wherein it seeks an order to have the notice of bar served on it by the respondent, iCollege (Pty) Ltd, uplifted and for the condonation for the late filing of its plea in the main action.

[2] This court has directed that the application be determined on the papers filed on Caselines without oral hearing as provided for in this Division's Consolidated Directives re Court Operations during the National State of Disaster issued by the Judge President on 18 September 2020.

FACTUAL BACKGROUND

[3] The respondent in this matter (the plaintiff in the main action) instituted action against the applicant (the defendant in the main action) on 14 August 2020 wherein payment was sought in the amount of R1 201 120.00 on the grounds that the applicant was contractually liable without set-off or deduction based on a written agreement between the parties.

[4] The applicant proceeded to file a notice of intention to defend the action on 5 October 2020. In terms of the Uniform Rules of Court, the applicant was obliged to deliver its plea within twenty (20) days after filing its notice of intention to defend, being on 03 November 2020. The applicant failed to take any further steps after filing the notice of intention to defend. On 16 November 2020, that is, two (2) weeks later, the respondent served its notice of bar by email calling

upon the applicant to file its plea. The aforesaid notice provided the applicant with a further five (5) days, that is, until 23 November 2020, to deliver its plea to the respondent's claim.

[5] On 17 November 2020, that is after receipt of the notice of bar, the applicant's legal representative requested an indulgence of a further period of fifteen (15) days in which to serve the plea. It is, however, the plaintiff's contention that it never granted such indulgence.

[6] The applicant filed the plea by way of formal service on the plaintiff's attorneys of record on 07 January 2021. The respondent contends that the applicant having failed to file its plea timeously was consequently *ipso facto* barred from pleading and that the plea filed was invalid.

[7] The applicant launched the current application to seek the indulgence of the court to condone the late filing of the plea and further to remove/uplift the bar that arose from the failure to file the plea in the action brought by the respondent against the applicant, timeously.

[8] On 4 March 2021, simultaneously with the notice to oppose the application, the respondent caused to be served a notice in terms of Uniform Rule 7 disputing and challenging the authority of FSV Attorneys and/or Mr Frederik Cornelius Johannes van Schalkwyk ("Mr Frik van Schalwyk") to launch/institute the application and to depose to the founding affidavit on behalf of the applicant. The applicant has responded to this notice but the respondent

is not satisfied by such response, as such FSV Attorneys and/or Mr Frik van Schalwyk's authority to act on behalf of the applicant, is still at issue.

[9] Besides the Rule 7 Notice dispute, the respondent is opposing the application on the grounds that the applicant is not *bona-fide* in its quest, has failed to set out a full and proper explanation for its delay and has not, in the application, dealt with its alleged *bona fide* defence nor has it met the standard of good cause as required.

[10] The respondent contends further that the applicant has failed to file a replying affidavit in its application, as such, the allegations stated by the respondent in its answering affidavit remain unchallenged and should, accordingly, be accepted.

ISSUES FOR DETERMINATION

[11] As *per* the joint practice note filed by the parties the issues for determination are whether

11.1 FVS Attorneys and/or Mr. Frik van Schalkwyk has properly responded to the Rule 7 Notice and satisfied the court that he is so authorised to act.

11.2 the applicant's replying affidavit filed on 21 May 2021, that is, thirty (30) court days after the 9 of April 2021 on which day it ought to have been filed, is properly before court and should be accepted.

11.3 the applicant has shown good cause, shown an absence of prejudice, a *bona fide* mistake and has a defence to the claim of the respondent and satisfied the requirements in order to uplift the bar and obtain relief in terms of Uniform Rule 27.

I deal hereunder with the issues in turn.

The Uniform Rule 7 Dispute

[12] The current application was launched by FVS Attorneys purportedly on behalf of the applicant. The founding affidavit herein was deposed to by Mr. Frik van Schalkwyk of FVS Attorneys as attorney of record of the applicant, a Close Corporation, without a confirmatory affidavit by the applicant.

[13] As earlier indicated, the respondent had simultaneously with the notice to oppose the application served a notice in terms of Uniform Rule 7 in which it contests FVS Attorneys and/or Mr Frik van Schalkwyk's authority to launch/institute the current application and also to depose to the founding affidavit on behalf of the applicant. It is submitted on behalf of the respondent that there are reasonable grounds to believe that the applicant is unaware of the current application and attempt to uplift the bar and seek condonation.

Analysis

[14] Uniform Rule 7 provides a mechanism to establish the mandate of the attorney concerned and to prevent persons launching proceedings in the name of litigants who never authorised or are unaware of same and provides that the authority of anyone acting on behalf of a party may, within ten (10) days, be

disputed where after such person may no longer act unless she/he satisfies the court that she/he is so authorised.

[15] The difference is that the respondent, in this instance, is not challenging the authority of the attorney to act on behalf of the applicant in the main action. The challenge as I understand relates to the authority to institute the present application. Ordinarily the authority of an attorney is challenged in respect of the action as a whole. It is not normally so that an attorney's authority would be challenged when an interlocutory application is launched.

[16] What, in this instance, makes the respondent want to challenge the authority of the applicant's attorney, is because the founding affidavit to the application is deposed to by Mr Frik van Schalkwyk, who professes to be the attorney of record on behalf of the applicant in this application and the attorney of record on behalf of the applicant in the main action, and being a major male attorney and a director of the firm FVS Attorneys, the attorneys of record representing the applicant in this matter.

[17] It is trite that a notice of motion can be supported by any person who is in a position to provide the necessary material to support the claim, and any person who can lawfully be a witness can execute an affidavit. As correctly argued by the respondent, it is the institution of the proceedings and the prosecution thereof that must be authorised.[1] Therefore, it is not necessary that the person who is to depose to the founding affidavit should be authorised to

[1] Ganes v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at 624F – G.

do so. The respondent's argument that because the applicant is a close corporation, the person who deposes to the founding affidavit must also be authorised to represent the close corporation, is without merit, because, any person who professes to have personal knowledge of the facts deposed to in that affidavit, can depose to such affidavit.

[18] Having said that, it still remains to question whether the attorney of record had been duly authorised to launch the present application.

[19] In response to the respondent's Rule 7 Notice FVS Attorneys and/or Mr. Frik van Schalkwyk filed an affidavit, again deposed to by Mr. Frik van Schalkwyk, as proof that he is authorised to act on behalf of the applicant. Mr. Frik van Schalkwyk also attached a document to the said affidavit which he refers to as his mandate to act on behalf of the applicants, Mrs and Mr Massyn (members of the applicant) and on behalf of SA Transit Services CC.

[20] The submission by the respondent in this regard is that neither the founding affidavit nor the affidavit in response to the Rule 7 Notice contains a supporting affidavit, document or communique from the applicant or its members. The respondent further contends that the purported mandate of Mr. Frik van Schalkwyk is not what is contended for, but rather a mere "client information form" which is seemingly dated 2018/2019.

[21] Uniform Rule 7 (1) is said to be only concerned with the mandate of an attorney to act in instituting or defending legal proceedings on behalf of a party

and to act in matters incidental to such proceedings,[2] which would include interlocutory applications.

[22] Therefore, if an attorney provides proof that he has the authority to act on behalf of a client and an interlocutory application is launched in such proceedings, it would not be necessary for the applicant to provide a fresh mandate. The original mandate provided authorises the attorney to act in all matters incidental to such proceedings which will be inclusive of all interlocutory applications that may be launched.

[23] I find that it was not necessary for the applicant to file any affidavit in support of the affidavit in response to the Rule 7 Notice.

[24] The respondent is, nevertheless, challenging the mandate furnished by the applicant to its attorneys as a mere client information form.

[25] In terms of Uniform Rule 7 (1), a person whose authority to act on behalf of a party is disputed, must satisfy the court that she/he is authorised so to act.

[26] The sub-rule does not provide a hard and fast rule of how to establish authority, where it is challenged. The sub-rule only requires such person to satisfy the court that she/he has been so authorised. Production of a power of attorney or a resolution of a company or close corporation is normally produced in order to establish the authority of the attorney so to act. But, then, the sub-

[2] Eskom v Soweto City Council 1992 (2) SA 703 (W).

rule does not prescribe that the power of attorney or mandate must necessarily be framed in a particular way or format.

[27] In *Administrator, Transvaal v Mponyane and Others,*[3] the court (*per* Botha J) stated:

> "[19] In my view there is nothing in Rule 7 in its present form that requires the authorisation of an attorney to be embodied in a document styled a power of attorney. The provisions of Rule 7 specifically requiring powers of attorney in appeals fortifies the impression that otherwise an attorney's mandate can be proved otherwise than by the production of a written power of attorney. I also think that Rule 7 should be viewed against the background of its original form. Before its recent amendment it only required powers of attorney to be lodged in the case of actions and appeals. See *Edmund Woodhouse (Pty) Ltd v Brits* 1967 (40 SA 318 (T) and *Brown v Oosthuizen en 'n Ander* 1980 (2) SA 155 (O). I have no doubt that the underlying intention of the recent amendment of Rule 7 was to make the Rule less cumbersome and formalistic.
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> I therefore conclude that proof of the authority of the respondents' attorney is not dependent on the production of a written power of attorney.
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> [20] It followed, accordingly, that what mattered was the substance rather than the form of the power of attorney contemplated under Rule 7(1)."

[28] I align myself with the aforementioned reasoning of Botha J that there is nothing in Rule 7 that requires the authorisation of an attorney to be embodied in a document styled a power of attorney. Thus, an attorney's mandate can be proved otherwise than by the production of a written power of attorney. Of

[3] 1990 (4) SA 407 (WLD) at 409C-E.

importance is that the court must be satisfied that the attorney has been mandated to act.

[29] In this instance, from perusing the document purporting to mandate Mr Frik van Schalkwyk to act on behalf of the applicant, the document appears to be a client information form as indicated by the respondent. However, in addition to that, the document indicates the process of submission of invoices/billings to the applicant by FVS Attorneys. When the document is considered together with the fact that Mr Frik van Schalkwyk has on previous occasions assisted the applicant in settlement negotiations with the respondent before summons in this matter was issued and the fact that FVS Attorneys have filed the notice to defend the action and further negotiated indulgence for filing the plea late, on behalf of the applicant, it makes sense that Mr Frik van Schalkwyk might have been authorised to act on behalf of the applicant. The affidavit filed in response to the Rule 7 Notice read together with the document attached thereto, suffices as proof that Mr Frik van Schalwyk and/or FVS Attorneys had been authorised to act on behalf of the applicant.

[30] I am, thus, satisfied that FVS Attorneys and/or Mr Frik van Schalkwyk were authorised by the applicant to defend the action and to act in matters incidental to such proceedings (interlocutory applications), on its behalf.

Condonation Applications

[31] There are two condonation applications before me. One is in respect of the condonation for the late filing of the plea and the upliftment of the bar ("the

main application"), and the condonation for the late filing of the replying affidavit.

[32] I intend, hereunder, to deal first with the application for condonation in respect of the main application, for if I find that the applicant has not made out a case for such condonation, it will not be necessary to decide the condonation application in respect of the replying affidavit.

The Legislative Framework

[33] An applicant for a condonation application approaches court for relief in terms of Rule 27 (3) of the Uniform Rules of Court. The sub-rule authorises the court to, on 'good cause shown', condone any non-compliance with the Rules of Court. The court is said to be vested with a wide discretion in this respect, but with the added safeguard for the applicant to show good cause, for the court to exercise the discretion.[4]

[34] Courts have consistently refrained from attempting to formulate an exhaustive definition for what constitutes "good cause". The Appellate Division (as it then was) in its judgment in *Melane v Santam Insurance Co Ltd*,[5] had this to say in its explanation of the phrase 'good cause shown':

> "In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and

[4] See Erasmus: Superior Court Practice 2nd Volume 2 pD1-326.
[5] 1962 (4) SA 531 (A) at 532B-E.

the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked." (my emphasis)

[35] In recent years the Constitutional Court in *Van Wyk v Unitas Hospital,*[6] relying on a previous decision of the same court in *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*[7] set a standard for the court's consideration of an application for condonation along the following lines:

"[20] The Court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success. (my emphasis)

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[6] See *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC).

[7] 2000 (3) SA 837 (CC). See also Grootboom v National Prosecuting Authority and Another 2014 (2) SA 68 (CC) para 23.

[36] It follows, therefore, that in order to succeed in its application the applicant must show that, it is in the interests of justice, that the application be granted. In proving the interests of justice, the applicant must prove 'good cause'. It is trite that 'good cause' requires the applicant to furnish a full, reasonable and acceptable explanation, for the full period of delay including the cause of the delay.

[37] The general principle is that the court has a wide discretion to grant condonation on good cause shown. Two requirements in this regard have crystallised, namely, firstly the requirement that the applicant should furnish a sufficient explanation for her or his default, to enable the court to understand how it really came about and to assess her or his conduct and motives. Secondly, the requirement that the applicant should satisfy the court that she or he has a *bona fide* defence.[8]

[38] There is no comprehensive definition of what constitutes good or sufficient cause for the granting of the indulgence of an extension of time. The overriding consideration is that the matter rests in the judicial discretion of the court, to be exercised with regard to all the circumstances of the case. [9]

[39] The principles upon which the court exercises its discretion have been stated as follows:[10]

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[8] Mynhardt v Mynhardt 1986 (1) SA 456 (T) at 461 I – J and Kritzinger v Northern Natal Implement Co (Pty) Ltd 1973 (4) SA 542 (N) at 546.

[9] See Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa 10ed vol. 1 p600.

[10] See Byron v Duke Inc 2002 (5) SA 483 (SCA) para 2.

"[2] The principles governing condonation applications and the factors which weigh with this Court are well-known and have been often restated. The main principles are succinctly formulated in *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 362F - H as follows:

> '(T)he factors usually weighed by the Court include the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent's interest in the finality of the judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice; . . .' (my emphasis)

The Applicant's Case

[40] The applicant's case for condonation is stated as follows in its founding papers:

"**EXPLANATION FOR THE LATE FILING OF THE PLEA**:

6.1. I deem it necessary at this juncture to provide a brief synopsis of the circumstances which preceded the late filing of my Plea as follows:

6.1.1. Pursuant to entering an Appearance to Defend, a consultation had to be arranged with my client in order to prepare and finalise my Plea to the Plaintiff's claim, however due to the fact that I had to attend 2 (two) Court appearances in Port Elizabeth in November 2020, and had to prepare for the Court appearances beforehand, I was unable to arrange a consultation timeously;

6.1.2. Court closed 15 December 2020 for recess and my offices subsequently closed on 18 December 2020.

6.1.3. By virtue of the aforesaid, it was not possible to consult with my client in order to finalise the Plea to the Plaintiff's claim before January 2021;

6.1.4. Notwithstanding December recess, I held a telephonic consultation with my client during December 2020 in order to obtain the necessary instruction for drafting of their plea;

6.1.5. I duly served the plea by way of formal service on the Plaintiff's attorneys of record on 07 January 2021.

6.2. Notwithstanding the aforesaid, the Plaintiff lodged an application for Default Judgment in terms of Rule 31(5) in terms of the Uniform Rules of Court on 11 January 2021.

6.3. Immediately upon receipt of the above and without undue delay, I, in a *bona fide* attempt to avoid the unnecessary incurring of legal costs, disseminated a letter to the Plaintiff's Attorneys of record, wherein they were advised once again of the reasons for the late filing of the plea, a copy of which letter is annexed hereto as Annexure "S4".

6.4. I humbly submit that I have given an explanation sufficiently in full to explain the circumstances which manifested about the late filing of my plea"

Analysis

[41] An applicant for condonation must give a full explanation for the delay which must not only cover the entire period of delay but must also be reasonable. [11]

[42] The explanation for the delay given by the applicant is far from satisfactory. The explanation, as it is, does not cover a substantial amount of time spanning the entire period of delay.

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[11] See *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) para 22.

[43] I am in agreement with the respondent's contention that the following time periods/gaps are not addressed by the applicant whatsoever and thus no explanation therefor is provided:

43.1 3 November 2020 to 16 November 2020 (between when plea was due and notice of bar served);

43.2 18 November 2020 to 30 November 2020 (between the alleged trial of 17 November 2020 to date of bar being implemented and the next alleged trial of 30 November 2020);

43.3 1 December 2020 to 18 December 2020 (dates between completion of the alleged 30 November 2020 trial and closure of office);

43.4 8 January 2021 and 25 February 2021 (being dates between being notified of the application for default judgment and the eventual launching of the current application).

[44] The most important period is that between the 16 November 2020 and the 23 November 2020 when the applicant was placed under bar, for once the period of five (5) days provided by the Notice of Bar expired, the applicant became *ipso facto* barred and could no longer be able to file its plea. The negotiation with the respondent to be allowed to file the plea later and its filing of the plea after that, was of no consequence. The applicant was barred and had to apply to court for leave to file the plea out of time. In order to be granted condonation and/or to uplift the bar a full and proper explanation for the delay

during this period ought to have been set out in the applicant's founding affidavit, but the applicant failed to do so.

[45] The explanation tendered by the applicant, as such, does not cover the whole period of the delay and is inadequate for purposes of this application. The result is that on the basis of the unexplained periods alone, the applicant has failed to set out good cause and the application should fail.

[46] The applicant has, also, not bothered to set out other requirements to show good cause except an attempt to explain the requirement of delay. The court in *Van Aswegen v Kruger,*[12] held that the requirement of a *bona fide* defence in Rule 27 applications: *"would be adequately satisfied where the defendant avers that he has a bona fide defence, and he makes averments which if proved would constitute a defence."* This, the applicant failed to do. The fact that the applicant had already filed a plea does not absolve it of the obligation to aver in its founding papers that it has a *bona fide* defence and to make averments which if proved would constitute a defence.

[47] In addition, the applicant has failed to satisfy the requirement of *bona-fides.* Nothing is proffered about this requirement in the applicant's founding papers.

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[12] 1974 (3) SA 204 (OPD).

SUPPLEMENTARY HEADS OF ARGUMENT

[48] The issues raised by the applicant in its supplementary heads of argument does not take its case any further. The issues are in fact irrelevant for the purposes of determining whether condonation in the circumstances of this matter should be granted. As already stated, the authorities are clear: among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case.

COSTS

[48] As is trite, costs follow the successful party. The respondent as the successful party is, therefore, entitled to be awarded costs.

ORDER

[49] In the circumstances, the following order is granted:

1. The application is dismissed.

2. The applicant is ordered to pay the costs of this application.

E.M KUBUSHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearance:

Applicant's Counsel	: **ADV S STRAUSS**
Applicant's Attorneys	: FVS ATTORNEYS
Respondents' Counsel	: **NONE**
Respondents' Attorneys	: JOHAN NYSSCHENS ATTORNEYS
Date of hearing	: 07 June 2021
Date of judgment	: 02 August 2021