




**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: 14-02-2022

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 14 February 2022.

[1] This, opposed, application for leave to appeal against the judgment handed down by this court in favour of the respondent, emanates from the following factual background.

[2] The respondent, who is the plaintiff in the main action, had instituted action against the applicant (the defendant in the main action) wherein it sought payment in the amount of R1 201 120.00 on the basis of a written agreement between the parties.

[3] Due to the applicant's failure to take further steps after filing the notice of intention to defend, the respondent served the applicant with a notice of bar calling upon the applicant to file its plea. The plea which was eventually filed was filed out of time, and thus, the applicant was *ipso facto* barred from filing such plea.

[4] Thus, the applicant launched an application in terms of Uniform Rule 27 ("Rule 27 application") seeking the indulgence of the court to condone the late filing of the plea and further to remove/uplift the bar. Simultaneously with the notice to oppose the Rule 27 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 Schalkwyk") to launch/institute the Rule 27 application and to depose to the founding affidavit on behalf of the applicant.

[5] Besides the Rule 7 Notice dispute, the respondent opposed the applicant's Rule 27 application on the grounds that the applicant was not *bona-*

fide in its quest, had failed to set out a full and proper explanation for its delay and had not, in the application, dealt with its alleged *bona fide* defence nor had it met the standard of good cause required. The respondent contended further that the applicant had failed to file a replying affidavit in answer to its answering affidavit, and as such, the allegations stated by the respondent in its answering affidavit remained unchallenged and ought to be accepted.

[6] The issues that came for consideration in the said application hearing, were: whether FVS Attorneys and/or Mr. Frik van Schalkwyk had properly responded to the Rule 7 Notice and satisfied the court that, he was so authorised to act; and whether the applicant's replying affidavit was properly before court and should be accepted; and finally, whether the applicant had shown good cause, shown an absence of prejudice, a *bona fide* mistake and had 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.

[7] In the judgment that ensued the Rule 27 application was dismissed with costs. It is this judgment, that was handed down on 2 August 2021, which the applicant seeks to appeal.

[8] In terms of this Division's Consolidated Directives re Court Operations during the National State of Disaster issued by the Judge President on 18 September 2020, it was directed that the application for leave to appeal be determined on the papers filed, dispensing with the hearing of oral argument.

As such, the parties were called upon to file heads or argument and/or submissions for and against the application.

[9] In its heads of argument, the respondent raised an *in limine* point opposing the application for leave to appeal on the basis that the application has been filed out of time without an application for condonation. The applicant's legal representatives were directed to file supplementary heads of argument responding to the *in limine* point raised. In the supplementary heads of argument that were subsequently filed, an explanation was given as to why the application for leave to appeal was filed out of time. The applicant's legal representatives were made aware that without a formal application for condonation for the late filing of the application for leave to appeal, the application could not be entertained by the court. In response, thereto, the applicant's legal representatives filed an affidavit attested to by the applicant's attorney.

[10] The affidavit, attested to by the applicant's attorney, also seeks to explain why the application for leave to appeal was filed late, but, as correctly argued by the respondent in its supplementary heads of argument, this affidavit cannot be considered as an application for condonation. If it is purported to be an application for condonation, it is in my view, defective in that it does not comply with the requirements of the rules of court.

[11] It is trite that in order for a condonation application to comply with the Uniform Rules of Court it ought to be made on notice (either form 2 or form 2A)

which should be supported by affidavit.¹ In this instance, there is no notice of motion filed. Thus, without the notice of motion there is no indication to the court what is the relief sought by the applicant, which should have been indicated by a prayer set out in the notice of motion. In essence, the affidavit filed cannot be considered as an application for condonation but, as earlier said, it is merely an explanation by the applicant's attorney why the application for leave to appeal was filed out of time. The affidavit does, therefore, not suffice for the consideration of the application for leave to appeal.

[12] As required by the Rules of Court, without an application for condonation, this court can, thus, not entertain the applicant's application for leave to appeal.² As such, the application for leave to appeal ought to be removed from the roll.

[13] In the circumstances, the application for leave to appeal is removed from the roll with costs.



↙ **E.M KUBUSHI**

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

¹ Rule 27 (1).

² See *Ellerine Holdings Ltd v CCMA and Others* (J3336/99) [2001] ZALC 150 (26 September 2001).

Appearance:

Applicant's Counsel : **ADV M COETSEE**

Applicant's Attorneys : FVS ATTORNEYS

Respondents' Counsel : **NONE**

Respondents' Attorneys : JOHAN NYSSCHENS ATTORNEYS

Date of hearing : 14 February 2021

Date of judgment : 14 February 2021