REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REGISTRAR OF THE HIGH COURT OF
SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2022 -09- 08
JUDGE'S SECRETARY
REGTERS KLERK
GRIFFIER VAN DIE HOE HOF VAN
SUID AFRIKA GAUTENG / DELING, PRETORIA

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: ✓

8/9/2022
DATE

SIGNATURE

CASE NUMBER 13189/2014

In the matter between:

ABSA BANK LTD	Applicant
and	
L N NDZIBA N.O.	1st Respondent
MVUYO MVELASE NDZIBA	2nd Respondent
LINDELWA NOBANTHU NDZIBA	3rd Respondent

In re:

ABSA BANK LTD	Plaintiff
and	
L N NDZIBA N.O.	1st Defendant

MVUYO MVELASE NDZIBA	2nd Defendant
LINDELWA NOBANTHU NDZIBA	3rd Defendant
DEBORA LOVELL HARDING	4th Defendant

JUDGMENT

BEFORE: HOLLAND-MUTER AJ:

[1] The Uniform Rules of Court constitutes the procedural machinery of the courts and are intended to expedite court proceedings. It will be interpreted and applied in a spirit to facilitate the work of the courts and to enable litigants to resolve their differences in as speedy and inexpensive a manner possible. The Rules are there for the court and not the court for the Rules. See **Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa 4th Ed** p33.

[2] The Superior Courts may, in terms of its inherent jurisdiction, grant relief when the insistence upon exact compliance with the Rules would result in substantial injustice to one of the parties. Similar a superior court has the inherent jurisdiction to prevent the use of the Rules for ulterior purposes or where the exact compliance with the Rules would result in a substantial injustice. Such jurisdiction includes the power to grant relief when the Rules make no provision for it. See **Neal v Neal 1959 (1) SA 828 (N)** and Rule 27(3) which provides that the court on good cause shown, condone any non-compliance with the Rules.

[3] The Rules apply to all parties and may not be used sparingly by a party to obtain advantage to the detriment of its opponent. A party cannot strive for strict enforcement without similar reciprocal enforcement against itself. To put it plainly, the Rules is a double edged sword that cuts both way on similar aspects. A party who demands strict application of the Rules ought to have its house in the clear to prevent a backlash from the Rules. See **Van Winsen supra p 33.**

[4] In **Trans-African Insurance Ltd v Maluleka 1956(2) SA 273 (A) at278 F-G** it was held that:" *No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which is an important element in the machinery for the administration of justice. Technical to less than perfect procedural steps should not be permitted, and in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decisions of cases on their real merits".* The question arises whether the non-compliances on both sides are of such a nature that it causes prejudice if allowed.

[5] The litigation between the parties arose from a suretyship entered into by the respondents as sureties and co-principle debtors for debt owned by Marotex (Pty) Ltd to the applicant. The applicant, after issuing a simple summons against the respondents, also twice tried unsuccessfully to have Marotex liquidated. The first application was dismissed by Hughes J while the second application seems not finalized at present. A further Rule 30 application was launched and ended with Modisa AJ granting judgment in favour of the applicant. Modisa AJ granted the respondents leave to appeal but this lapsed for failure to prosecute the appeal timeously. This all occurred prior the present application.

[6] This application is riddled with cross allegations by both parties of non-compliances by the opposition trying to disguise their own slipups. I will refer to these unfortunate aspects below. The matter was further marked by serious

allegations of irregular enrolment of the matter on 30 May 2022 before Neukircher J. This court is not privy to the arguments raised before Neukircher J, but from the email by the respondent's attorney of record dated 27 May 2022, even the office of Neukircher J was not spared in the mudslinging between the parties. This resulted in Neukircher directing the parties to file affidavits to set out what is alleged in this regard. From what can be gathered from the explanation by Me Meyer (attorney on behalf of the applicant), it seems that during oral, arguments in court on 30 May 2022, the allegations raised against the office of Neukircher J was not continued at all. The explanatory affidavit by Mr Tjiane on behalf of the respondents does not address this specific issue.

[7] I am of the view that the specific issue of alleged irregular enrolment need not be argued later before Neukircher J. Suffice to state that Neukircher J *prima facie* held that there was in her view nothing untoward with the joint pre-trial minute. She however directed that explanatory affidavits be filed wherein the whole factual issue to be canvassed by the parties. Having read these affidavits and that of the official from the Registrar's Office, I am satisfied nothing untoward took place enrolling the application. The enrolment occurred in terms of the latest directives issued by the Judge President of this court to provide for the application of the CaseLines procedure. It is the prerogative of the Judge Presidents of each division to regulate the procedure in each division. The directives are not contrary the Uniform Rules of Court.

BRIEF SUMMARY OF THE PROCEDURES IN THIS MATTER:

[8] The procedural aspects in this matter can be summarized as follows:

8.1 The applicant issued action by way of a simple summons against the respondents on 17 February 2014 under case number 13189/2014.

8.2 The respondents filed a notice of intention to defend on 11 March 2014.

8.3 The applicant applied for summary judgment on 11 March 2014 and the respondents filed their answering affidavits resisting summary judgment on 12 May 2014.

8.4 On 14 May 2014 the applicant granted the respondents leave to defend the matter via a letter from its attorney. The parties differ whether this amounted to the mere removal of the application for summary judgment or the withdrawing of then application. In my view it is immaterial what the correct legal position would be suffice to state that the summary judgment was no longer at stake. In my view the only reasonable inference is by granting leave to defend although it was not formally sanctioned by the court does not leave it "open" for the applicant to proceed somewhere in the future with it. The applicant's conduct of filing the declaration is a concession that summary judgment was no longer to be adjudicated by the court somewhere in future.

8.5 The respondent then requested the applicant to file its declaration within 20 days after leave to defend was granted but the applicant contended that the respondents' request under Rule 32(8A) was incorrect as the rule was repealed earlier. This argument must fail because the request was made long before was before 31 May 2019 when Rule 38(8A) was repealed. The request on behalf of the respondents was filed with the special plea on 2 November 2015. The applicant elected to ignore the request by the respondents and did not file the declaration until 3 July 2015, some 13 months out of the time frame in Rule 20. The applicant must have been aware that it must apply for condonation for the extreme late filing of the declaration to explain the good cause for the late filing thereof. This was never done and in my view warrants the court to grant relief not specifically provided for in the Rules. See **par 2 supra and Neal v Neal supra.**

8.6 The applicant's contention is that the respondents should have barred the applicant but that the present request constituted an irregular step. In my view this is the pot calling the lid skew. The applicant cannot enforce the Rule one sided but try to hold the respondent to the letter of the Rule. When suiting its purpose. This is to eat your cake and hold it. See **Neal v Neal supra and par 2 supra.**

8.7 Several further notices of bar followed in the above mentioned litigation and the appeal with regard to the judgment of Modisa AJ which has lapsed. The applicant wants strict enforcement of the Rules against the respondent but conveniently fails to adhere to the Rules when necessary. The fact that there is not automatic or *prima facie* bar resulting from the non-compliance of Rule 20 (the fifteen days requirement) does not result that the out of time filed declaration becomes properly before court.

[9] It is clear from a brief summary of the chronology of the matter that from both sides certain non-compliances of the rules occurred. Neither the applicant nor the respondents' hands are clean. The result hereof will be reflected in the appropriate cost order below.

[10] There were several previous legal skirmishes between the parties, resulting in the striking of the respondent's defence but subject to an appeal which has lapsed due to non-compliance with the Rules. There is further a pending matter launched by the applicant under case number **31562/2018** (the so-called second liquidation application) after Hughes J dismissed the first liquidation application brought under case number **1046/2015** by the applicant.

[11] The respondents opposed the second application pleading *res judicata* being convinced that the second application was brought on similar issues as

the already dismissed first application. It seems that this application has not been finalised to date hereof.

[12] The applicant then brought a Rule 30(1) application to have the respondents' defence struck after the respondents pleaded to the simple summons and not the later declaration, contending that the declaration was irregular as no formal condonation application was sought by the applicant for the late filing of the declaration. Modisa AJ struck the respondents' defence and this was the subject of the application for leave to appeal which has lapsed due to failure to prosecute it timeously.

[13] It is common cause that the declaration was filed 13 months after the summary judgment application was either removed from the roll or withdrawn. In my view it does not matter whether it was merely withdrawn or removed from the roll, the crux is that it was way out of the fifteen days allowed for in Rule 20(1). Rule 20(1) is clear that a declaration ***shall*** be filed within fifteen days after receiving a notice of intention to defend.

[14] The applicant contends that, with reference to Rule 26, where a declaration is filed out of time, no *automatic or prima facie bar* applies in this instance and that the respondents should to have filed a formal notice of bar. I agree that this may be correct in the ordinary but in this instance we are dealing with the extra ordinary of the declaration filed **13 months after the permitted fifteen days** in Rule 20**.** Taken into account the peremptory provisions of Rule 20, the applicant was compelled to bring a condonation application in terms of Rule 27 for an extension of time for the late filing of the declaration. The fact that the respondents did not file any notice of bar does not undo the non-compliance of Rule 20 by the applicant.

[15] The argument on behalf of the applicant that because no automatic or *prima facie* bar exists, no condonation is needed to abridge or extend any time prescribed by the Rules, is without any merit. The fact that there is no automatic bar for the non-compliance with Rule 20 does not mean a party may file a declaration in its own time despite the peremptory fifteen days prescribed. This would render the provisions in the Rule 20 nugatory and may cause litigants to become slack and cause serious delays in process.

[16] Rule 27 clearly provides for the abridgement or extension of times not complied with by a party by the court. There need not be a formal bar served by the other side to compel the applicant to apply for condonation or abridgement of time such as in this instance. The mere non-compliance of prescribed time frames renders a pleading filed out of time irregular although not attacked by the other side. This is in my view where the court because of its inherent jurisdiction may intervene and make a ruling with regard to the irregular step taken by the applicant. See **par 2 supra.** It is in the interest of justice that the court rule that the late filing of declaration is irregular and that a proper application for condonation should be brought. The non-compliance by the applicant cries out for good cause to be shown why the court should come to the rescue of the applicant.

[17] The applicant argued that the crux of the matter is whether there is a defence left for the respondent to persuade the court for assistance after the order granted by Modisa AJ. I agree that a respondent cannot merely raise a defence in an opposing affidavit to oppose the application for default judgment, but the applicant ought to apply on proper papers. I am of the view that I need not decide whether the special plea was struck simultaneously with the plea. It makes no difference as to the status of the applicant's papers before the court. It is clear that the declaration was filed way out of time and before it can be relied upon by the applicant the papers need be in order. I am of the view that the application for default judgment cannot succeed. I agree

with the dictum in **Heiko Draht N O and Others v Thulane Joseph Manqele and Others (2014/29501) (2017) ZAGPPHC 44 (14 February 2017)** that under the circumstances the applicant's application for default judgment is not properly before the court due to the fact that the applicant's declaration on which the application is founded was delivered way out of time after the expiry of the time prescribed in Rule 20 and the applicant did not seek an order to extend that prescribed time.

COSTS:

[18] Costs are always within the jurisdiction of the court. The normal is that costs follow the result unless the court decides the contrary. The applicant knew all along of its non-compliance of Rule 20 to apply for condonation. The applicant cannot escape the provisions of Rule 27. The respondents on the other hand ought to have approached the court to compel the applicant to apply for condonation for the extreme late filing of the declaration but failed to. The respondents further by way of the dreaded E-mail to the Chambers of Neukircher J (supra) caused a further delay in the litigation. The overarching principle regarding indemnity to the successful party is trite. See **Taxation of Costs in the Higher and Lower Courts: A Practical Guide by Kruger and Mostert Lexis-Nexis p 5** and **Salie and Another v Shield Insurance Co Ltd 1978 (2) SA 396 C** with regard to wasted costs incurred. I am of the view that both parties are before court with dirty hands in one way or the other. It would be fair and just in this particular application and the previous hearing before Neukircher J that both parties are to pay its/their own costs.

ORDER:

[20] I make the following order:

1. The application for default judgment is dismissed with costs; and

2. The Respondents are to pay the wasted costs occasioned by the postponement of the matter on 30 May 2022..

3. The applicant is ordered to bring the aforesaid application for condonation within fifteen days from date of this order, failing which it shall seek an order condoning the late filing of such an application.

J HOLLAND-MUTER

Acting Judge of the Pretoria High Court

Matter heard on 10 August 2022

Judgment delivered on 7 September 2022

On behalf of the Applicant:

Attorney: Tim du Toit & Co Inc :

Martie Meyer:

mmeyer@timdutoit.co.za

Counsel: Adv MP van der Merwe:

mp@lawcircle.co.za

On behalf of the Respondents:

Attorney: GM Tjiane Attorneys Inc

graham@gmt-inc.co.za

Counsel: Adv M Ndziba

mvuyodziba@gmail.com