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**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 1403/2020

**In the matter between:**

**ROADMAC SURFACING (PTY) LTD  
(REG NO: 1999/016677/07)**

**PLAINTIFF**

**and**

**SUMEIL (PTY) LTD  
(REG NO: 2013/146387/07)**

**FIRST DEFENDANT**

**MATHENJWA VEMBANE  
(ID NO: [...])**

**SECOND DEFENDANT**

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**JUDGMENT**

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Delivered on 23 February 2021

**Mossop AJ**

1. The COVID-19 pandemic has wreaked havoc with the ordinary functioning of the affairs of the citizens of this country. It would have been unrealistic to expect that the legal fraternity would, somehow, be exempt from the fallout of this relentless virus.
2. I am called upon to determine two applications: the first involves an application brought by the plaintiff in which it seeks an order setting aside the defendants' notice in terms of rule 23 of the Uniform Rules of Court (henceforth '*the Rules*') as an irregular step in terms of the provisions of rule 30 of the Rules. The second application is brought at the instance of the defendants who seek condonation for the late delivery of the same rule 23 notice.
3. When the matter was called, I had the pleasure of hearing argument from Mr. Buys who appears for the plaintiff and Mr. Schaup who appears for the defendants.

4. The key to resolving these two applications lies in determining whether or not a notice of bar delivered by the plaintiff was served prematurely or not. The defendants submit that it was delivered prematurely whilst the plaintiff claims that the notice was properly and timeously delivered. If it was timeously delivered, it is common cause that the defendants were barred from delivering their rule 23 notice and the first application must succeed and the second must fail. If the notice of bar was delivered prematurely, the defendants were not under bar and the first application must fail and the second applicant becomes redundant as a result.
5. The answer to whether the notice of bar was served timeously depends, essentially, on the validity of certain directives issued by the Judge President of KwaZulu-Natal (henceforth '*the KZN Judge President*') and the effect of other directives issued by the Minister of Justice and Constitutional Development (henceforth '*the Minister*'). These directives were intended to be of application during the hard lockdown that this country was placed in by the President of this

country on Friday, 27 March 2020. Before continuing further, it is necessary to briefly allude to the facts of the matter.

6. Following a motor vehicle collision involving a construction vehicle belonging to the plaintiff and a truck belonging to the first defendant and which was driven by the second defendant, the plaintiff issued summons against the defendants and served it on the first defendant on 3 March 2020 and on the second defendant on 4 March 2020. By virtue of their respective addresses being outside the province of KwaZulu-Natal and consequently more than 150 kilometres from this court, the defendants were given one month within which to deliver an appearance to defend and thereafter twenty days within which to deliver their plea or exception, notice to strike out or counterclaim, if any.
7. The defendants entered their joint appearance to defend on 4 March 2020. They accordingly did not avail themselves of the extended period within which to deliver such notice. It followed, therefore, that

their plea was due to be delivered twenty days thereafter, being by close of business on 1 April 2020.

8. On 24 March 2020, the Chief Justice of the Republic of South Africa (henceforth '*the Chief Justice*') delegated certain of his powers to the Heads of Court in the Superior Courts in terms of section 8(3) of the Superior Courts Act 10 of 2013 (henceforth '*the Act*'). What was delegated was the authority to issue such directives as would enable access to courts in relation to any urgent matter, bail applications, maintenance and domestic violence related matters and cases involving matters pertaining to children.
9. On 25 March 2020, the KZN Judge President issued his first instructions (henceforth '*the KZN Judge President's first directions*'). These directions provided, *inter alia*, that the period 27 March to 17 April 2020 would be regarded in the High Court for the province of KwaZulu-Natal as *dies non* for the purposes of time limits prescribed by the Rules.

10. A day later, on 26 March 2020, the Minister published directions for the conduct of legal proceedings (henceforth '*the Minister's first directions*'). The Minister's first directions provided that they were to be of effect from midnight on Thursday, 26 March 2020 until midnight on Thursday, 16 April 2020. In terms of regulation 5(c) thereof:

*'All time limits imposed by any rule of court shall be suspended and shall recommence after the termination or lapsing of the period of the National State of Disaster, unless specific orders are granted by judicial officers in urgent and essential cases.'*

11. The two sets of directives were virtually identical in effect, save for the fact that the KZN Judge President's first directions were to endure for a day longer than the Minister's first directions.
12. The Minister's first directions were of short duration. Five days after they were published, and on 31 March 2020, the Minister published his second directions (henceforth '*the Minister's second directions*'). In

terms of direction 13 thereof, the Minister's first directions were withdrawn. The Minister's second directions themselves, however, made no mention of the suspension of time periods stipulated by the Rules. With effect from the date of publication of the Minister's second directions, the time periods prescribed by the Rules were no longer suspended in terms of the Minister's directions.

13. The KZN Judge President's directions, however, continued to remain in effect and were adhered to in the High Court for the province of KwaZulu-Natal. On 14 April 2020, after the withdrawal of the Minister's first directions, the KZN Judge President published amended directions (henceforth '*the KZN Judge President's amended directions*'). Of significance in the KZN Judge President's amended directions is the fact that the length of the *dies non* was lengthened. The KZN Judge President's amended directions now read in this regard:

*'After consultation with the Deputy Judge President and the Registrars and [sic] the following Directives will apply*

*continue to apply [sic] in the High Court of KwaZulu-Natal for the period 27 March 2020 till the end of the lockdown.*

*The aforesaid period is to be regarded as dies non for the purposes of the Rules of Court and any directives for the filing of pleadings, affidavits or notices that may be been [sic] issued by Court.'*

14. A further set of directives were published by the KZN Judge President on 1 May 2020. The issue of *dies non* did not feature in these directives. This is not surprising, as the issuing of these directives coincided with the relaxing of the national lockdown from level 5 to level 4 as provided in the Disaster Management Act 57 of 2002. As the KZN Judge President's amended regulations were in place until the end of the lock down, it now followed that the issue of *dies non* were henceforth ostensibly once again to be regulated in terms of the Rules.
15. Counsel for the plaintiff argued that the KZN Judge President's directions were inconsistent with the Minister's directions and those



of the Chief Justice, were accordingly *ultra vires* and fell to be disregarded. The argument advanced was that the KZN Judge President did not have the authority to suspend the time periods contemplated by the Rules, only the Chief Justice did. The Chief Justice himself did not suspend the running of time periods and whilst he did delegate certain of his powers as previously described, the power to suspend the running of time periods was not one of those powers delegated.

16. There are appealing aspects to this argument, and it may well be sound. In an attempt to fortify the plaintiff's argument, Mr. Buys drew my attention to directives issued by the Judge President of the Gauteng Division of the High Court (henceforth '*the Gauteng Judge President*'), issued on 2 April 2020, in which the Gauteng Judge President stated that he did not have the power to suspend the running of time periods contemplated in the Rules. It was urged that I accept this to be the case when determining the issues before me.

17. The Gauteng Judge President may well be correct. The Act may not clothe him with the power to declare the national lockdown period to be *dies non*. But there is a distinguishing feature between what happened in the Gauteng Division and what happened in the KwaZulu-Natal Division: the Gauteng Judge President declined to take a decision to suspend the running of time limits whereas the KZN Judge President took that decision and suspended their running.
18. In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*,<sup>1</sup> it was held that the proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject took of the validity of the act in question. It was for this reason that our law recognised that even an unlawful administrative act was capable of producing legally valid consequences for so long as the unlawful act was not set aside.

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<sup>1</sup> 2004 (6) SA 222 (SCA) at para 26.

19. The decision of the KZN Judge President to suspend the time periods contemplated by the Rules was an administrative act, which, until set aside by a court in review proceedings, exists in fact and is capable of having legally valid consequences. Whatever suspicions one might have as to whether the KZN Judge President's directions were validly issued, they remain valid administrative acts until set aside. In the words of Lord Radcliffe in *Smith v East Elloe Rural District Council and Others*:<sup>2</sup>

*'An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.'*<sup>3</sup>

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<sup>2</sup> [1956] 1 All ER 855 (HL) at 871G - H.

<sup>3</sup>Cited with approval in *Jacobs and others v Baumann NO and others* 2009 (5) SA 432 (SCA) at para 20.

20. There is no review application before me to declare the KZN Judge President's directions to be *ultra vires*: there are only the two applications as previously described, neither of which seeks that relief. If that was the issue that I was required to determine, there are potentially a number of parties who would presumably require to make submissions and to be heard who are not party to these two applications.
21. It is beyond question that the KZN Judge President's directions were published and given effect to in the High Court of this province over the period in question. This is so despite Mr. Buys' contention that the KZN Judge President's amended directions were not published, alternatively were not easily accessible by his instructing attorney.
22. In the view that I take of the matter, it is not necessary for me to determine which Judge President was correct. Whether the KZN Judge President's directions were validly issued the fact is that they were issued, applied and were followed by practitioners in this province. To set them aside, or to hold them to have been invalidly imposed, might

have catastrophic consequences for other litigants and adverse consequences for the general administration of justice.<sup>4</sup>

23. I accordingly find that the KZN Judge President's directions remain valid until set aside. It follows that I must accordingly find that:

(a) the earliest date of suspension of the time limits provided for in the Rules is 27 March 2020, both in terms of the Minister's first directions and the KZN Judge President's first directions; and

(b) the latest date until which the time periods contemplated by the Rules were suspended was 30 April 2020 in terms of the KZN Judge President's amended directions, that being the day immediately preceding 1 May 2020, being the date upon which the national lockdown in the country came to an end. It follows that on 1 May 2020, the *dies* commenced running again.

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<sup>4</sup> **Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and others 2008 (2) SA 481 (SCA) at para 23.**

24. The twenty-day period within which the defendants were required to deliver their plea commenced running on 5 March 2020, being the day after service of their notice of intention to defend was effected. As at midnight on 26 March 2020, sixteen of those twenty days had elapsed. The defendants accordingly had a further four days to deliver their plea after the *dies non* came to an end. I have already found that this occurred on 1 May 2020. That being the case, the defendants' plea was due by close of business on Thursday, 7 May 2020, as 1 May 2020 was a public holiday which was immediately followed by a weekend. It is common cause that the plaintiff's notice of bar was delivered on 6 May 2020.
25. On Thursday, 14 May 2020, the defendants caused a notice in terms of rule 23 of the Rules to be delivered to the plaintiff, alleging that they had a complaint with the manner in which the plaintiff's case had been pleaded thereby rendering the particulars of claim vague and embarrassing. The plaintiff was given a period of fifteen days within which to remove the cause of complaint. This document was delivered

electronically, did not bear the stamp of the Registrar of this court and was unsigned.

26. This prompted the plaintiff to deliver a notice in terms of rule 30 of the Rules the following day, alleging that the delivery of the defendants' rule 23 notice was an irregular proceeding as the defendants were allegedly under bar for failing to deliver their plea timeously.
27. The defendants thereafter delivered a signed version of their rule 23(1) notice on Thursday, 28 May 2020. It was in all respects identical to the first, unsigned version that they had delivered, save that it was now signed and bore the Registrar's stamp.
28. On Monday, 1 June 2020, the plaintiff delivered a notice in terms of rule 30 of the Rules, again alleging that the filing of the now signed rule 23 notice constituted an irregular proceeding on the principal grounds that the defendants were under bar and that it was delivered out of time. This prompted the bringing of the second application by the

defendants, which sought condonation for the late delivery of the defendants' rule 23(1) notice.

29. The defendants' attorney referred in his affidavit in the condonation application to the fact that the defendants had delivered an exception to the plaintiff's particulars of claim. They, in fact, have not done so. It was agreed by counsel at the hearing that no notice of exception has been delivered. It may well be that the defendants regard the second, signed notice as the notice of exception but it is not. It is merely a signed version of the notice to remove cause of complaint. At the conclusion of the signed document, the plaintiff is given fifteen days to remove the cause of complaint. This is not the wording of an exception. There is accordingly no exception before this court.

30. I consequently find that the plaintiff's notice of bar was delivered one day prematurely, being delivered on 6 May 2020 when the defendants had until 7 May 2020 to file their plea. Only if they failed to deliver their plea on that date could they be placed on terms in accordance



with the provisions of rule 26 of the Rules. It appears that the plaintiff was simply unaware of the KZN Judge President's amended directions as it has failed to consider their effect. Mr. Buys acknowledged in argument that this was the case. The first application must accordingly fail.

31. In the absence of a valid notice of bar, the defendants' rule 23(1) notice was properly delivered and must be dealt with by the plaintiff.<sup>5</sup> It follows that the bringing of the second application by the defendants was unnecessary and I likewise dismiss that application.

32. Both parties have accordingly felt the lash of defeat. This will be reflected in the order that I grant, which is as follows:

- (a) The applicant's application in terms of rule 30 of the Uniform Rules of Court is dismissed;
- (b) The defendants' application for condonation is dismissed;

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<sup>5</sup> **Tyulu v Southern Insurance Association Ltd 1974 (3) SA 726 (ECD) at page 729C – E.**

- (c) The plaintiff is given fifteen days from the date of this order to respond to the defendants' rule 23(1) notice;
- (d) Each party is to bear its own costs.

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**MOSSOP AJ**