IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **99075/2015**

9/2/18

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED. ✓

....
SIGNATURE **DATE**

In the matter between

JACQUES SMITH	**FIRST APPLICANT**
DAVE SMITH	**SECOND APPLICANT**
DAWIE SMITH	**THIRD APPLICANT**
DAWIE NORTJE	**FOURTH APPLICANT**

AND

JEAN PRIEUR DU PLESSIS	**RESPONDENT**

JUDGMENT

THOBANE AJ,

[1] The applicants have launched an application seeking the following relief in summary form;

1.1. That the notice of bar dated 20 July 2016 be uplifted and set aside;

1.2. That the applicants' notice of exception in terms of rule 23 be upheld;

1.3. That the respondent be ordered and directed to amend his particulars of claim within 10 days of the order of this court;

1.4. That any party opposing the application be directed to pay the costs.

[2] The application is opposed by the respondent.

[3] The following common cause events gave rise to this application;

3.1. During December 2015 the respondent caused summons to be issued against the applicants;

3.2. The summons were served on the applicants during January 2016;

3.3. On 11 January 2016 the applicants filed a notice of intention to defend;

3.4. On 15 March 2016 the respondent's new attorneys came on record;

3.5. On 18 March 2016 the respondent served a notice of bar on the applicants;

3.6. On 29 March 2016 the applicants served a notice in terms of rule 35(12) and 35(14) of the uniform rules of court on the respondent;

3.7. The response to the rule 35(12) and (14) was filed on the 7 April 2016;

3.8. On 15 April 2016 the applicants served a notice in terms of rule 23 calling on the respondent to remove the cause of complaint. I interpose to indicate that the thrust of the rule 23 notice was that the respondent's particulars of claim were vague and embarrassing. The paragraphs referred to are paragraphs 4, 5, 6, 7, 8, 14, and 17. The applicant further objected to the fact that the respondent relied on a written agreement without disclosing details thereof or attaching it to the particulars of claim. There was a further objection to reliance on a cession without better elucidation.

3.9. On 23 May 2016 the applicants served a second notice in terms of rule 23 on the respondent.

3.10. On 1 June 2016 the respondent served a notice of intention to amend, to which there was no objection;

3.11. On 21 June 2016, the respondent effected the amendment by filing amended pages.

3.12. The respondent served a notice of bar on 25 July 2016.

3.13. On 1 August 2016 the applicants by fax and email served the respondent with a rule 23 notice.

3.14. On 4 August 2016 the respondent caused a letter to be written to the applicants stating that the service of the rule 23 notice by way of fax and email was not consented to and therefore that such service would not be accepted.

[4] In addition to the above, I must mention that the applicant in the conduct of these proceedings, had appointed correspondent attorneys Ehlers Fakude Incorporated. The notice of bar which had been served on the correspondent attorneys was due to take effect on 1 August 2016. On that day the correspondent attorneys forwarded the notice of bar to the applicants' instruction attorneys by way of email. The instructing attorney sought to establish why there had been a delay in forwarding the notice to them and an explanation emanating from the correspondent attorneys was that the attorney who had been allocated the matter was on leave between 26 to July 29 July 2016. On top of that, their office server had not been working on 29 July 2016.

[5] The instructing attorneys engaged directly with the respondent's attorneys with the view to seeking an extension of time to file their plea. The response received from them was to the effect that they were prepared to extend the timeline provided the applicants were going to plead and not except. In the mean time applicants' attorneys instructed counsel to settle an exception which, after minor amendments was served by fax and email as

aforesaid and which precipitated the email objecting to the form and manner of service.

[6] The applicants are of the view that the posture adopted by the respondent, namely, to be willing to extend the timeline for the filing of the plea provided the applicants filed a plea and not a notice of exception and together with the objection to service through electronic means, in circumstances where the respondent was not prejudiced, is unreasonable.

[7] The respondent opposes the application on many fronts. Firstly, the respondent is of the view that the applicants are simply evading their responsibility to plead to the particulars of claim. In this regard, the respondent contends that a pattern of behavior on the part of the applicants, namely, their failure to plead but instead to except to the particulars of claim, was a clear indication of their abdicating their responsibility. Secondly, that absent a disclosure of a *bona fide* defence in the application, the application falls to be dismissed. Moreover, so it is contended, the issues raised in the notice of exception are dilatory in nature. Thirdly, that the correspondent attorneys were grossly negligent in not forwarding the notice of bar timeously. Other numerous grounds of opposition are advanced I however consider these to be the main ones.

[8] Uniform rules provide that in the absence of an agreement between the parties a court may on application and provided good cause is shown, make an order extending or abridging any times limits prescribed in the rules. A court also may on good cause shown condone any non-compliance with the rules.

[9] The use of the words "good cause shown" gives this court a broad discretion as to whether or not to uplift the bar and to grant the defendant leave to file its plea, or in this case for the respondent to respond to the exception.

[10] Our courts have been hesitant to formulate an exhaustive definition of what constitutes good cause because to do so will impede unnecessarily the discretion of the court. (See ***Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A)*** at 353A and ***Du Plooy v Anwes Motors (Edms) Bpk 1983 (4) SA 212 (O)*** at 215C – 217C. The requirements for the favorable exercise of a court's discretion have been crystallized in the decision of ***Smith N.O. v Brummer N.O. 1954 (3) SA 352 (O)*** at 358A. Over time courts have leaned in favor of lifting the bar where the following requirements are found to have been met;

10.1. the applicant has given a reasonable explanation for his delay;

10.2. the application is *bona fide* and not made with the object of delaying the opposite party's claim;

10.3. there has not been a reckless or intentional disregard of the rules of court;

10.4. the applicant's action is clearly not ill-founded; and

10.5. any prejudice caused to the opposite party could be compensated for by an appropriate order as to costs.

[11] The courts have held that an applicant must at least furnish an explanation of his default sufficiently to enable a court to understand how it really came about and to also assess his motives and conduct. One of the critical factors is the extent of the delay.

[12] As I follow the applicants' submissions, the correspondent attorney reverted to them, at virtually the eleventh hour, with a notice of bar. The reason for such late referral was that the attorney allocated the matter was not available. On the same day on which applicants' attorneys became aware of the notice of bar, they made contact with the respondent's legal representatives seeking from them some sort of indulgence. They were met with a conditional one, "*an indulgence can only be extended if you file a plea and nothing else".* The applicants it seems to me, felt strongly about the excipiable nature of the particulars of claim, in that instead of agreeing to file *a plea and nothing else*, chose to rather proceed by way of exception.

[13] In examining the explanation proffered for the delay, inevitably one must also closely look at the extent thereof as well as all other surrounding factors. The respondent's initial gripe or objection is premised on the fact that the parties had not agreed on the manner of service which the applicants chose to serve the notice of exception on 1 August 2016. Secondly, that although the notice of exception was properly served on 2 August 2016, it had been served out of time which meant that the applicant was *de facto* barred. While true that the parties had not agreed on the manner of service, namely email and fax, the fact that the applicants made an effort to not only fax and email the notice of exception on 1 August 2016 but to also serve it the following day, having become aware of the notice of bar that same day, suggests that the there was no intention to act *mala fide* nor was there recklessness or an intention to deliberately disregard the rules. The promptitude with which the applicants attempted to comply with the filing timelines, is in my view a clear indication that the applicants are not simply intent on simply frustrating the respondent's action.

[14] The respondent makes reference to the applicants' past conduct of having excepted to the particulars of claim, in support of his contention that the applicants have a stratagem to avoid pleading. When consideration is given to the fact that the first notice of exception yielded a substitution of the entire particulars of claim by way on an amendment, the contention that the

exception is filed for delaying purposes is not meritorious. This also goes to the question whether the application is ill-founded, which I deal with below.

[15] Whereas the nub of the applicants' first notice of exception was that the particulars of claim were vague and embarrassing, the second one was to the effect that the particulars of claim lacked averments which are necessary to sustain an action. The purpose of an exception to a pleading on the basis that a cause of action is not disclosed, is worth restating. In ***Barclays National Bank Ltd v Thompson 1989 (1) SA*** 547 at 553G-I, van Heerden JA said:

> *"It has also been said that the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial:* ***Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700*** *(A) at 706. Save for exceptional cases, such as those where a defendant admits the plaintiff's allegations but pleads that as a matter of law the plaintiff is not entitled to the relief claimed by him (cf* ***Welgemoed en Andere v Sauer 1974 (4) SA 1 (A)****), an exception to a plea should consequently also not be allowed unless, if upheld, it would obviate the leading of 'unnecessary' evidence."*

[16] The purpose of an exception the thrust of which is that the particulars of claim lack averments that are necessary to sustain an action, is aimed at disposing of the action in its entirety. *"An exception provides a useful mechanism for weeding out cases without legal merits"* ***Erasmus, Superior Court Practice, 2nd edition Vol. 2 D1-294. H v Fetal Assessment Centre 2015(2) SA 193 (CC)*** at 198; ***Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)*** at 465H. A summons that does not disclose a cause of action or lacks averments necessary to sustain it goes to the decision on a point of law without which the whole cause or part thereof may be disposed of without leading unnecessary evidence at the trial. ***Santos v Standard General Insurance Co Ltd. 1971 (3) SA 434 (O)*** at 437B;

[17] The explanation that is given for the delay, is one that this court readily accepts. The duration is equally not excessive. Although the respondent states that there is prejudice on his part in the event the application is granted, none has been pointed at or demonstrated. I am of the view that it should be left open to the respondent in the event he is of the persuasion that the exception is not meritorious, to challenge it in the normal cause.

[18] I therefore make the following order;

1. Condonation is granted to the applicant for failure to timeously plead or except;
2. The notice of bar is uplifted;
3. The respondent is directed to respond to the notice of exception within 10 days hereof;
4. The respondent is directed to pay the costs hereof on a scale as between party and party.

SA THOBANE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA