Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates:	**NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION - MAHIKENG

CASE NUMBER: 2815/24

In the matter between:

MINISTER OF POLICE **APPLICANT**

and

PETRUS DIKGANG GARENG **RESPONDENT**

Date judgment reserved: **20 June 2025**

The judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be **3 July 2025** at **10H00am**.

ORDER

(i) The point *in limine* is upheld.

(ii) The application for the upliftment of bar in terms of Rule 26 of the Uniform Rules of Court is dismissed.

(iii) The applicant is directed to pay the respondent's costs on party and party scale "B".

JUDGMENT

OOSTHUIZEN-SENEKAL AJ:

Introduction

[1] This is an opposed application for the upliftment of bar in terms of Rule 26 of the Uniform Rules of Court ("the Rules"). The applicant seeks leave to deliver a plea out of time, following its failure to do so within the period prescribed by the Rules.

[2] The respondent opposes the application on multiple grounds, including:

i. The inadequacy of the founding affidavit;

ii. The inadmissibility of hearsay evidence;

iii. The failure to demonstrate a *bona fide* defence; and

iv. The applicant's failure to provide a full and satisfactory explanation for the delay.

[3] The respondent raises, as a point *in limine*, that the applicant has failed to establish a proper case in its founding affidavit, as required in motion proceedings. It is further contended that the deponent to the founding affidavit lacks personal knowledge of the material events, and that the affidavit is devoid of the essential factual foundation necessary to sustain the application.

Background

[4] This application stems from a civil claim instituted by the respondent following his arrest on 29 July 2023. The applicant, a state organ as contemplated in the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, seeks the upliftment of bar in terms of Rule 26 of the Rules, in order to deliver its plea out of time. A chronological account of the relevant procedural steps is essential in determining whether the applicant has provided a satisfactory and acceptable explanation for its delay.

[5] The respondent issued statutory notices in terms of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the State Liability Act") on 20 November 2023**,** and these were served on the relevant organs of state. By 29 November 2023, the

applicant had acknowledged receipt of the notices. These documents included the respondent's identity number and the applicable police case number: CAS 104/07/2023**.**

[6] Following the service of summons, the applicant delivered its notice of intention to defend on 17 July 2024. However, no plea was filed within the time period prescribed by the Rules. Consequently, on 19 August 2024, the respondent served a notice of bar in terms of Rule 26, affording the applicant an additional five days within which to file its plea.

[7] When the applicant failed to deliver a plea within five days of the notice of bar, the respondent proceeded on 30 August 2024 to apply for default judgment and a trial date. No engagement followed from the applicant. A notice of set down was then served on the State Attorney's office on 25 September 2024. On 15 October 2024 the applicant launches this application to uplift the bar.

[8] According to the founding affidavit, the matter was first received by the Office of the State Attorney on 25 June 2024. Despite this, the deponent, a legal representative at the State Attorney's office, only sought formal instructions on 1 July 2024.

[9] Subsequently, on 24 July 2024, instructions were received from the client department to appoint counsel, and the contents of the police docket were allegedly obtained on the same day. However, it soon became apparent that the arresting officer's statement was not included in the docket. The deponent informed the applicant of this fact on 1 August 2024.

[10] It was only on 20 August 2024, one day after the service of the notice of bar, that the deponent followed up with the applicant regarding the missing arrest statement. No further steps appear to have been taken until the filing of the present application.

Issues for Determination

[11] The issues for determination are:

(i) Whether the applicant has provided a full and satisfactory explanation for the delay; and

(ii) Whether the applicant has established the existence of a *bona fide* defence with prospects of success."

Legal Frame Work Governing Upliftment of Bar (Rule 26)

[12] Rule 26 of the Rules provides that where a party fails to deliver a pleading within the prescribed time, and remains in default after service of a notice of bar, such party is *ipso facto* barred from delivering the pleading. A barred party may apply for the bar to be uplifted, but the discretion to grant such relief lies solely with the court.

[13] The requirements for such an indulgence are settled law. In *United Plant Hire (Pty) Ltd v Hills*[1], the Appellate Division held:

"There are two main requirements:

[1] 1976 (1) SA 717 (A) at 720E–G.

(i) The applicant must give a reasonable explanation of the default. If it appears that the default was wilful or due to gross negligence, the court should not assist.

(ii) The applicant must show that he has a bona fide defence to the claim, which prima facie carries some prospect of success."

[14] These two elements, a full explanation for the delay and,. a *bona fide* defence, must both be met. As stated in *Chetty v Law Society, Transvaal*[2], the requirement of "good cause" is conjunctive, not disjunctive. A deficient explanation cannot be cured by a strong defence, and *vice versa*.

Point *in Limine:* Founding Affidavit and Lack of Personal Knowledge

[15] The founding affidavit was deposed to by an assistant state attorney, who only became involved in the matter after much of the delay had occurred. The deponent purports to explain the delay and assert a defence on behalf of the applicant.

[16] However, the affidavit lacks foundational facts. There is no clarity on how the deponent came by the information, and no confirmatory affidavits are attached. In *President of the Republic of South Africa and Others v M & G Media Ltd*[3], the Supreme Court of Appeal cautioned:

[2] 1985 (2) SA 756 (A) at 765A–C.
[3] 2011 (2) SA 1 (SCA) at para 38.

"Merely to allege that information is within the 'personal knowledge' of a deponent is of little value without some indication… of how that knowledge was acquired."

[17] The founding affidavit is therefore laden with hearsay and speculation. The key arresting officer's statement is not attached, nor is the officer identified. The deponent's version, unsupported by facts or documentation, lacks evidentiary value.

[18] To compound matters, the applicant served a replying affidavit nearly three months late without filing an application for condonation. It cannot be considered, and is accordingly excluded from the record.

Explanation for the Delay

[19] The explanation advanced for the delay is that the applicant could not prepare a plea without the arresting officer's statement, which was allegedly missing from the docket. This explanation is not only thin on detail, but contradicted by the applicant's own conduct.

[20] The applicant has failed to provide critical information necessary to support its application. Specifically, it does not disclose when it first became aware that the statement in question was missing. This *omission* leaves the court unable to assess whether the applicant acted with the requisite diligence in addressing the absence of this key document.

[21] Furthermore, the applicant has not outlined what steps, if any, were taken to locate the missing statement. There is no indication of who ultimately found the statement or when it was located. These gaps in the narrative hinder the court's ability to evaluate the reasonableness of the delay.

[22] In addition, the applicant has not explained why the statement was not attached to the founding affidavit in support of the present application. The absence of such an important document raises questions about the *bona fides* of the application. Equally concerning is the failure to prepare and attach a draft plea after the statement was allegedly obtained. This undermines any suggestion that the applicant was ready and willing to advance its defence.

[23] The timeline of events further highlights periods of unexplained inactivity. The notice of intention to defend was filed on 17 July 2024, and the notice of bar was served on 19 August 2024. Despite this, the application to uplift the bar was only brought nearly two months later, on 15 October 2024. The applicant offers no explanation for this delay, which further calls into question the urgency and seriousness with which it approached the matter.

[24] Taken together, these omissions and delays cast doubt on the applicant's diligence and the merits of the application to uplift the bar.

[25] In *Silber v Ozen Wholesalers (Pty) Ltd*[4]1954, the Appellate Division stressed:

[4] 1954 (2) SA 345 (A) at 353A.

"The defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives."

[26] The applicant has not done so. There is no credible or adequate explanation for either the first or second period of default. The explanation falls far short of what the Rules and the case law require.

***Bona fide* Defence**

[27] The second leg of the "good cause" requirement, central to an application for the upliftment of bar, is the demonstration of a *bona fide* defence. It is not sufficient for an applicant to merely allege that it has a defence. It must set out the facts supporting that defence in a manner that reveals a triable issue worthy of determination by the court. In this case, the applicant purports to rely on various statutory provisions, including section 40(1)(b) of the Criminal Procedure Act 51 of 1977 and certain provisions of the South African Police Service Act. However, the applicant fails to apply these legal principles to any specific factual matrix.

[28] There is no factual foundation laid for the assertion that the arresting officer had a reasonable suspicion, as contemplated in section 40(1)(b) of the Criminal Procedure Act. A bare reference to the statutory provision, without any indication of what facts gave rise to such a suspicion, renders the defence hollow and conclusory.

[29] Moreover, the applicant does not provide any explanation or legal argument to clarify how the arrest was lawful under the circumstances. The court is left to speculate as to the justification for the deprivation of liberty, a serious infringement of constitutional rights, which ought to have been carefully addressed.

[30] In addition, the applicant fails to identify any triable issue arising from the defence. A *bona fide* defence must be more than a vague or general denial. It must raise a dispute of fact or law that, if proven at trial, would constitute a defence to the claim. In the absence of such clarity, the applicant's purported defence appears illusory and insubstantial.

[31] In sum, the applicant's reliance on legal provisions, unmoored from any supporting facts or context, does not meet the standard required to show a bona fide defence. Consequently, the second leg of the "good cause" inquiry is not satisfied.

[32] In *Chetty v Law Society, Transvaal, supra*, the court stated that:

> *"The applicant must at least show that his defence is not patently unfounded and is based upon facts (which must be set out in outline) which, if proved, would constitute a defence."*

[33] The applicant has not set out any such facts. It has not disclosed a draft plea, nor has it indicated what the core of its defence would be. The application is vague and speculative.

Prejudice to the Respondent and conduct of the Applicant

[34] The respondent was arrested on 29 July 2023. More than a year later, the applicant has still not filed a plea. This delay has prejudiced the respondent's right to pursue his civil claim without undue hindrance or delay.

[35] The applicant's failure to meaningfully engage, to provide a proper affidavit, and to act with expedition reflects a pattern of delay. The application appears not to be motivated by the pursuit of justice, but by a desire to obstruct proceedings.

[36] As stated in *Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa*[5], courts have consistently emphasised the importance of procedural compliance. The rules of court are not mere formalities; they serve a vital function in ensuring the orderly and efficient administration of justice. In this regard, the authors note that the courts are generally reluctant to come to the aid of litigants who act in disregard of the rules or who conduct themselves in a manner that causes undue delay in the progression of legal proceedings.

[37] This principle is rooted in the broader obligation of litigants to treat the court and their opponents with fairness and diligence. Where a party fails to comply with procedural timelines or provides inadequate explanations for such failure, the court is entitled to infer

[5] Cilliers, A.C., Loots, C. & Nel, H.C., *Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa*, 5th ed., Juta & Co. Ltd, Cape Town, 2009, p. 749

that the party lacks *bona fides* or is abusing the process to delay the matter.

[38] As emphasised in *Herbstein and Van Winsen*, *"[t]he court will not readily come to the assistance of a litigant who has been remiss in the observance of the rules and whose conduct has resulted in a delay in the finalisation of proceedings*."

[39] This principle is particularly pertinent in applications for condonation or the upliftment of bar, where the court must weigh not only the explanation for non-compliance, but also the broader interests of justice, including the need to prevent unnecessary delays. A litigant who has failed to act promptly or provide a comprehensive account of their default cannot expect the court's indulgence as a matter of course.

[40] This principle is directly applicable to this matter.

Costs

[41] The general rule is that costs follow the result. The respondent seeks costs on the attorney-and-client scale, arguing that the application was frivolous and an abuse of the court's process.

[42] A court may grant such a punitive costs order where the conduct of a litigant is unreasonable, vexatious, or in bad faith. In *Plastic Converters Association of SA v MEIBC*[6], the court stated:

[6] 2006 (11) BCLR 1319 (LC) at para 46.

"An award of attorney and client costs is an extraordinary one, which should be made only when a court is satisfied that there was conduct deserving of censure…"

[43] The Constitutional Court echoed this in *Public Protector v South African Reserve Bank*[7], noting that:

"A court may grant a punitive cost order if the conduct of a party is found to be wholly unreasonable, vexatious, or an abuse of court process."

[44] In the present matter, several procedural and substantive deficiencies are apparent. The application was launched without any meaningful factual foundation to support the relief sought. The affidavit relied upon by the applicant contains largely inadmissible hearsay, rendering much of the evidence of little probative value. Notably, the applicant failed to file either a draft plea or the relevant arrest statement, both of which would have been critical in demonstrating a *bona fide* defence and providing context for the delay.

[45] In addition to these shortcomings, the applicant's replying affidavit was served late and in an irregular manner, further compounding the procedural irregularities. These missteps not only undermined the integrity of the application but also caused unnecessary expense and delay to the respondent, who was compelled to oppose an ill-prepared and deficient application.

[7] 2019 (6) SA 253 (CC) at para 229.

[46] While I accept that the application was poorly conceived, procedurally flawed, and ultimately devoid of merit, I am not satisfied that it was brought in bad faith. There is insufficient evidence to conclude that the applicant acted with *mala fides* or with a deliberate intention to frustrate or abuse the court's process. Rather, it appears that the deficiencies stem from a lack of diligence and care in the preparation and prosecution of the application.

[47] In the present case, the applicant's conduct, while negligent and procedurally non-compliant**,** does not rise to the level of gross misconduct or bad faith required to justify an attorney-and-client costs order. The application appears to have been misguided rather than malicious.

Conclusion

[48] In considering the application for the upliftment of bar, the applicant bears the *onus* to satisfy two essential requirements; first, to provide a full, reasonable, and satisfactory explanation for the delay; and second, to demonstrate the existence of a *bona fide* defence with reasonable prospects of success. These requirements are well-established in our jurisprudence and are designed to ensure that the court's discretion is exercised judiciously and only in circumstances where it is warranted.

[49] In this matter, the applicant has failed to meet either requirement. As discussed earlier, the explanation provided for the delay is vague, incomplete, and unconvincing. Key details, such as when the applicant became aware of the missing arrest statement, what

efforts were made to retrieve it, and why a plea was not drafted once it was allegedly obtained, are absent. There is also a lengthy period of unexplained inactivity on the part of the applicant, further undermining the credibility of its explanation.

[50] Equally, the applicant has not demonstrated a *bona fide* defence. It relies on legal provisions, such as section 40(1)(b) of the Criminal Procedure Act and the SAPS Act, without setting out a factual basis for their applicability. The founding affidavit lacks any indication that the arresting officer held a reasonable suspicion, and the applicant has failed to articulate a triable issue. The evidentiary material before the court is largely inadmissible hearsay, and the application is devoid of the necessary foundational facts required to support a plausible defence.

[51] In addition, the point *in limine* raised by the respondent namely, that the applicant failed to make out its case in the founding affidavit, is well taken. In motion proceedings, it is trite that an applicant must stand or fall by its founding papers. The court is not at liberty to speculate or supplement deficiencies in the applicant's case. In this instance, the founding affidavit falls far short of the standard required. It fails to establish the factual and legal basis upon which the court could exercise its discretion in the applicant's favour.

[52] For the reasons set out above, the application cannot succeed. The application is accordingly dismissed.

Order

[53] In the result, the following order is made:

(i) The point *in limine* is upheld.

(ii) The application for the upliftment of bar in terms of Rule 26 of the Uniform Rules of Court is dismissed.

(iii) The applicant is directed to pay the respondent's costs on party and party scale "B".

CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

For the Applicant: Advocate Manungani

Instructed by: State Attorney
1st Floor, East Gallery
Mega City Shopping Complex
Mmabatho
Ref: 1391/24/P20

For the Respondent: Advocate D Smit
Email: dansmit007@gmail.com

Instructed by: Jan Ellis Attorneys
135 Peter Mokaba Avenue
Potchefstroom
c/o Loubser-Ellis and Associated Inc
Block 1, 1st Floor
4204 Palmer Cresent
Leopard Park
Mahikeng