

SOUTH AFRICA / JUDGMENT

Pedlar v Santam Limited (010346/22)

[2023] ZAGPPHC 1824 (17 October 2023)

[2023] ZAGPPHC 1824**COURT**

North Gauteng High Court, Pretoria

BEFORE

C Marumoagae

CASE / FILE NUMBER

010346/22

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Source record**REPUBLIC****OF SOUTH AFRICA****THE****HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NR: 010346/22****(1)****REPORTABLE:**

YES/NO

(2)

OF INTEREST TO OTHER JUDGES YES/NO

(3)

REVISED:**DATE:**

17 October 2023

SIGNATURE:

In

the matter between:

QUENTIN

PEDLAR

Applicant

and

SANTAM

LIMITED

Respondent

JUDGMENT

MARUMOAGAE AJ

A

INTRODUCTION

- [1] This is an interlocutory application by the applicant to uplift the respondent's bar. The applicant is also the defendant in the main action proceedings between the parties. The applicant also seeks to be allowed to file his plea (and counterclaim if any). This court is called upon to determine whether the applicant has made a case to be allowed to file his plea.

B PARTIES

- [2] The applicant is an adult male and a former employee of the respondent. The applicant chose to represent himself in these proceedings. Before the oral argument commenced, I specifically inquired from the applicant whether he still wished to represent himself. In particular, the applicant was informed that he has a right to seek legal representation. Further, if he cannot afford to obtain private legal representation at his own cost, there are institutions that offer free legal services that can be approached for legal assistance. He indicated that he wished to continue representing himself.
- [3] The respondent is a public company with limited liability incorporated in terms of South African company laws.

C

BACKGROUND

- [4] The applicant was served with the combined summons which incorporated the respondent's particulars of claim on 4 August 2022. On 17 August 2022, the applicant delivered a notice of his intention to defend the respondent's claim.
- [5] The respondent's legal representatives sent a letter on 15 September 2022 to the applicant informing him that the respondent was willing to accept his plea by 21 September 2022. The applicant failed to deliver his plea and the respondent delivered its notice of bar to the applicant on 22 September 2022.
- [6] Due to the applicant's failure to deliver his plea and the expiry of the notice period indicated by the notice of bar, the respondent filed its request for a default judgment on 11 October

2022. On 25 October 2022, the applicant served the respondent with his plea. This led to the respondent abandoning its request for a default judgment. Instead, the respondent brought an application for the applicant's plea to be set aside as an irregular step. The applicant's plea was set aside as an irregular step by this court on 20 April 2023.
- [7] On 21 April 2023, the respondent sent an email to the applicant reminding him to bring his application to uplift the bar. On 25 April 2023, the applicant responded through an email and indicated, among others, that he sought assistance from an advocate to prepare his application to uplift the bar. However, he made it absolutely clear that this advocate would not be representing him.
- [8] On 5 May 2023, the applicant brought this application. This application is opposed by the respondent.
- [9] The applicant's notice of intention to defend the main action proceedings clearly indicates that at the time when this notice was delivered, the applicant was duly represented by a firm of attorneys. However, these attorneys subsequently withdrew as the applicant's attorneys of record.

D PARTIES CONTENTIONS

i) Applicant's contentions

- [10] The applicant indicated that he is representing himself in these proceedings because he does not have the funds to obtain legal representation. He argued that should the bar not be lifted and is refused permission to file his plea, he would suffer irreversible damage.
- [11] According to the applicant, the initial plea that he served and filed contained incorrect content and has been withdrawn. He contends that the plea was delivered late because of his lack of knowledge on how to use Caselines.
- [12] The applicant contends further that there was an agreement between himself and the respondent's legal representatives that his plea should be set aside as an irregular step. Further, he had to file an application to remove the bar within ten working days from the date of the order of this court that set aside his plea as an irregular step.
- [13] The applicant also stated that he obtained critical information that he wanted to include in his plea. Further, he did not intentionally delay bringing this application.

ii) Respondent's contentions

- [14] The respondent submitted that the applicant's plea was due on 14 September 2022. The respondent agreed to accept the applicant's plea by 21 September 2022. However, the applicant failed to deliver his plea. It was contended on behalf of the respondent that the conduct of the applicant over weeks and months left the respondent with no choice but to refuse consent for the applicant to remove the bar.

[15] The respondent approached this court to set aside the applicant's plea as an irregular step. The applicant's initial plea was not withdrawn but was set aside as an irregular step. The parties agreed that within ten days of the order that set aside the applicant's plea as an irregular step, the applicant should bring his application

to remove the bar. Further, if the application was made properly and timeously, the respondent intended not to oppose this application.

The applicant's plea was set aside as an irregular step on 20 April 2023 and this application was brought on 5 May 2023.

[16] According to the respondent, the applicant's application to remove the bar was followed by an email communication where the applicant indicated that he considered the bar to have been removed by the mere delivery of his application and that he intended to deliver his plea. The respondent contends that this email communication indicated that the contemplated plea would fall foul of rules 18, 22, 6(5), and 62(3) of the Uniform Rules of Court. The respondent responded to this email communication and indicated to the applicant that the bar cannot be automatically lifted by the mere filing of the application to remove the bar. That the court must make an order to remove the bar.

[17] According to the respondent, the applicant failed to make a case to warrant this court to exercise its discretion in his favour. Further, the applicant has demonstrated an inability and/or unwillingness to adhere to the rules of this court. In the heads of argument submitted on behalf of the respondent, it was argued among others, that while the applicant may not have disregarded the rules of this court intentionally, he is either unwilling to accept that he does not have the capacity to understand and/or apply the rules or he has no interest in taking advice from the respondent's legal representatives. He ignored or spurned the respondent's legal representatives' attempts to assist him. This court should find that he has recklessly disregarded the rules.

[18] It is further argued that first, the applicant's notice of motion deviates materially from Form 2a. Secondly, the applicant's notice of motion does not provide all the necessary details and makes no provision for the delivery of any such notice. Thirdly, the applicant's affidavit is not divided into concise paragraphs. The paragraphs in his affidavit are not numbered. Fourthly, should the applicant be allowed to deliver his plea, he is more likely to deliver a plea that will amount to an irregular step because he intends to attach affidavits to his plea. Fifthly, the applicant failed to establish the requirements he ought to satisfy to get the bar removed.

[19] The respondent acknowledges that the applicant is a lay litigant who is not represented. However, the respondent is of the view that the applicant, having been alerted to the nature and extent of any prior non-compliance with the rules, should have taken reasonable steps to ensure compliance with the rules. Further, there is nothing to suggest that the applicant has taken steps to comply with the rules of the court.

- [20] It is contended by the respondent that there is nothing contained in the applicant's founding affidavit that suggests that he understands how good cause may be established. At the time his plea was due, the applicant was legally represented. His legal representation only withdrew on 29 September 2022, the date by which the notice of bar had already been served on the applicant.
- [21] It is also contended that the applicant failed to provide an account of what his defence may be and failed to mention anything about the nature of the action. He failed to demonstrate even a semblance of a bona fide defence in the main action proceedings. If the bar is lifted and the applicant is allowed to file his plea, the respondent will be prejudiced. The respondent will most likely be compelled again to request this court to set aside the applicant's plea as an irregular step.
- [22] The respondent further states that the applicant failed to explain the 'irreversible damage' that he would allegedly suffer should the bar not be removed. His application provides further evidence that he should be stopped from running roughshod over the rules of this court.
- [23] The respondent is of the view that the applicant failed to demonstrate good cause why he should be allowed to file his plea. Further, the applicant's allegation that he failed to deliver the plea because he did not know how to use case lines is unconvincing. He also failed to provide an explanation as to why he missed the original deadline for the delivery of the plea. His explanation is neither full nor reasonable. The respondent's legal representatives sought to help him navigate the Court online platform.

E LEGAL PRINCIPLES AND EVALUATION

i) Access to courts by a lay litigant

- [23] Section 34 of the Constitution of the Republic of South Africa, 1996 (hereafter 1996 Constitution) provides that:

'[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.

- [24] In *Sasol South Africa v Penkin*, it was held that the right to have access to the court '... is an embodiment of an ancient common law principle that a person has a right to a proper and fair hearing, which has, at its core, the right to a litigant to tell his or her side'.^[1] Courts have a duty when adjudicating cases where lay litigants are representing themselves to approach those cases in line with this constitutional ideal.

- [25] The Constitutional Court in *Xinwa and Others v Volkswagen of South Africa (Pty) Ltd*, authoritatively held that:

‘[p]leadings prepared by laypersons must be construed generously and in the light most favourable to the litigant. Lay litigants should not be held to the same standard of accuracy, skill and precision in the presentation of their case required of lawyers. In construing such pleadings, regard must be had to the purpose of the pleading as gathered not only from the content of the pleadings but also from the context in which the pleading is prepared. Form must give way to substance’.[2]

[26] The Constitutional Court further provided much-needed guidance in *Eke v Parsons*, where it pointed out that:

‘[w]ithout doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. [3]

[27] It is trite that rules are meant for the court and not the court for the rules.[4] The Constitutional Court in *PFE International Inc (BVI) and others v Industrial Development Corporation of South Africa Ltd*, further held that:

‘[s]ince the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules.[5]

[28] The Supreme Court of Appeal in *Arendsnes Sweefspoor CC v Botha* reasoned as follows:

‘[w]ith the advent of the constitutional dispensation, it has become a constitutional imperative to view the object of the rule as ensuring a fair trial or hearing. “Rules of court are delegated legislation, having statutory force, and are binding on the court, subject to the court’s power to prevent abuse of its process.” And rules are provided to secure the inexpensive and expeditious completion of litigation and are devised to further the administration of justice. ... Considerations of justice and fairness are of prime importance in the interpretation of procedural rules.[6]

[29] It is clear from the above-quoted authorities, which are directly binding on this court, that the rules of the court are important and should be observed. However, despite their obvious importance for the proper and speedy administration of justice, rules cannot be applied strictly in such a way that would result in an injustice to any of the parties before the court. On the one hand, the court has a duty to not allow an unrepresented litigant to conduct himself in such a way that would seriously prejudice the represented litigant by recklessly disregarding the rules of court with a view to unnecessarily delay the completion of the main dispute. On the other hand, the court is duty-bound to understand the circumstances

under which the unrepresented and lay litigant brought the dispute to court. The court cannot simply emphasize strict compliance with the rules by a person who does not have the necessary skill and capacity to not only understand the rules but to effectively use these rules

in his favour. This requires a delicate balancing exercise that is aimed at achieving a just and fair outcome.

[30] It is important to note that rules that govern the procedure of this court cannot be applied rigidly and inflexibly without a contextual understanding of the circumstances of the matter before the court. This calls for a value judgment of the potential prejudice and what the interest of justice requires. It is possible where the applicant's case does not comply with the relevant rule or rules for the applicant to succeed when the interests of justice so demand.
[7]

[31] In this case, there has never been serious opposition for the applicant to bring his application to remove the bar. In fact, paragraphs 16.3 and 20 of the respondent's answering affidavit clearly demonstrate that the respondent was prepared to consent to the applicant's application to remove the bar. This was on condition that this application was made properly and timeously. While it is not clear what the respondent actually meant by the application to be made properly, it appears that the respondent merely required the applicant to not deliver a plea that would amount to an irregular step or be excipiable.

[32] Based on the email sent by the applicant to the respondent where the applicant indicated that he has information that would likely be placed in an affidavit and made part of the plea, the respondent took a view that the applicant's plea is likely not to be properly made. Further, this will force the respondent to apply to set the plea aside as an irregular step. The respondent is of the view that it will be prejudiced should this court remove the bar and the applicant is allowed to file his plea. In that, the respondent will be forced to incur further legal costs to ensure that the rules are adhered to.

[33] While the respondent cannot be faulted for this view considering that it has already successfully applied to set aside the applicant's initial plea as an irregular step, this view appears to be presumptuous and pre-empts what the applicant is likely to do. The potential prejudice that the respondent, as one of the major financial institutions in South Africa is likely to suffer, cannot be viewed in isolation. It must be assessed with what would be in the interest of justice in the circumstances.

[34] The doors of the court cannot be shut on the applicant merely because there is a view that he is likely not to comply with the rules of the court. That approach is not constitutionally justified. I am enjoined by section 39(1) of the 1996 Constitution when interpreting section 34 of this Constitution to '... promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. The fact that the applicant cannot afford to pay for his own legal representative who can competently place his case before this court should not lead this court to allow legal technicalities to prevent him from defending

the case against him. The email that the applicant sent to the respondent should never be a catalyst for the rules that govern the procedure of this court to be strictly and inflexibly enforced to deny the applicant the opportunity to access this court and place his case before the court. To do so would be totally unjust.

- [35] The fact that the applicant was represented at a time when his notice of intention to defend was delivered is not a good enough reason to deny him the opportunity to file his plea. It is common knowledge that there are lawyers who tend not to be proactive when their clients have not paid them. Even though there is no evidence tendered before this court of the circumstances that led to the applicant's legal representatives withdrawing as his attorneys of record, the court can reasonably assume that it was due to lack of payment.
- [36] The fact is that currently, the applicant is a lay litigant who is not represented. For that reason, there are valid reasons to not only depart from a strict observance of the rules but also to interpret the rules of this court generously and in the light most favourable to the applicant as a lay litigant. The applicant should not be held to the same standard of accuracy, skill, and precision in the presentation of his case as that which both the firm of attorneys and counsel representing the respondent are held due to their legal training and expertise.
- [37] The respondent also indicated that it was willing to consent to the bar being removed if the applicant filed his application to remove the bar timeously from the date this court set aside the applicant's initial plea as an irregular step. This order was made on 20 April
2023. It is clear from paragraph 16 of the respondent's answering affidavit that this order was a result of an agreement between the parties. The applicant brought this application on 5 May 2023, which was within ten days as agreed by the parties. The days of the court are generally calculated in terms of court days. The applicant did not delay bringing this application despite not being legally represented. The only thing that the respondent takes issue with is the content and structure of the applicant's affidavit. The respondent made it clear that the contents of the applicant's

application would inform the respondent whether to oppose the application.

- [38] In my view, considering the respondent's overall attitude with respect to this application and the terms of agreement outlined in paragraph 16 of the respondent's answering affidavit, there is no real substantial opposition to the applicant's application. The opposition appears to be merely on technical grounds that will lead to the applicant being unreasonably denied the right to have access to this court and duly defend a case against him.

ii) Failure to comply with relevant rules

- [39] In terms of Rule 27(1) of the Uniform Rules of Court, in the absence of an agreement between the parties, the applicant was expected to demonstrate good cause why the respondent's bar should be removed to be allowed to file his plea. The view that the precise definition of the phrase 'good cause' is neither possible nor desirable and that the

circumstances of the case before the court must be considered has received judicial endorsement.[8] Loosely, good cause may be understood as the need to provide sufficient reasons for the failure to file a particular document or

for delivering such a document late. Ultimately, this court has wide discretion when determining whether to remove the respondent's

bar.[9]

[40] In *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others*, the Supreme Court of Appeal held that:

'[r]ule 27 of the uniform rules deals with the extension of time, removal of bar and condonation. In terms of rule 27(3) the court may, on good cause shown, condone any non-compliance with the rules. Thus, in order to succeed in this regard, Ingosstrakh would be expected to show good cause why condonation should be granted for its failure to deliver its plea. Generally, the concept of 'good cause' entails a consideration of the following factors: a reasonable and acceptable explanation for the default; a demonstration that a party is acting bona fide; and that such party has a bona fide defence which prima facie has some prospect of success. Good cause requires a full explanation of the default so that the court may assess the explanation'.[10]

[41] In the context of rule 27, it appears that there are three fundamental factors that should assist the applicant to demonstrate good cause. The first factor is to provide a reasonable and acceptable explanation for the default. The applicant appears to be offering at least one reason why he was unable to file his plea. In his founding affidavit, the applicant states that he struggled with Caselines. It is not clear whether, at the time of the alleged struggle, the applicant had already drafted the plea and merely struggled to upload it on Caselines. If it was already drafted, it is not clear why the plea was not emailed to the respondent's legal representatives because the parties had already established some communication channels by email.

[42] It appears, however, that the applicant was genuinely of the view that he ought to have only uploaded his plea on Caselines. The respondent did not deny the applicant's allegation. The respondent merely argued that if the applicant struggled with Caselines, he should have emailed the plea to the respondent's legal representative. The explanation that the applicant provided is not challenged and this court cannot simply reject it. It is only in the heads of argument where it is submitted on behalf of the respondent that the applicant's explanation is unconvincing. There is no genuine allegation that this explanation is unreasonable and unacceptable. It is not beyond the realm of possibilities that the applicant, as an ordinary member of society, struggled with Caselines. There are legal practitioners who also struggle with

Caselines. I am of the view that the applicant's explanation is acceptable.

[43] The respondent appears to expect the applicant, as a lay litigant, to provide an explanation of why he missed the first deadline and why his legal representatives before they withdrew could not attend to the delivery of his plea. Further, failure to provide this information rendered his application to be neither full nor reasonable. I disagree with this contention. This is the level of detail that you can reasonably expect from a person who possesses the skill and expertise that is necessary to provide information that responds directly to the test that must be met for the court to remove the bar.

[44] While it would have been useful for the applicant to provide more details than those, he provided in his founding affidavit, the applicant cannot be held to the standard that is required of legal representatives when drafting legal documents. The respondent did not objectively say that the applicant's explanation is false but subjectively submitted that it is not reasonable. What is reasonable to one person may not necessarily be reasonable to the other. As a layperson, the applicant succinctly provided the court with what he believed was necessary to assist the court in coming to his rescue. The applicant was clearly not aware of all the legal and technical aspects with which he was expected to comply. Any criticism of the applicant for failure to comply with these legal and technical aspects is unfounded.

[45] Secondly, the applicant is expected to demonstrate that he is acting in good faith. The test is whether the application is made in good faith and not with the intention of delaying the finalization of the main action proceedings.[11] In these proceedings, pursuant to this court granting an order setting aside the applicant's initial plea as an irregular

step, the applicant ensured that he did not delay the proceedings and timeously lodged his application to remove the bar within ten days as agreed between the parties. The respondent, and correctly so, did not allege that the applicant was acting in bad faith.

[46] Thirdly, the applicant was also required to demonstrate that he has a bona fide defence which prima facie has some prospect of success. The respondent is of the view that the applicant has failed to demonstrate this. The applicant claims to be in possession of information that he intends to put in his plea. It may be that he failed to indicate what this information is about and how it supports his defence, but it appears that he believes that this information will assist his cause. His failure to demonstrate a bona fide defense is purely due to his inability to adequately draft legal documents, something for which he cannot be punished at this stage.

It may well be that the applicant should seriously consider his options and the need to acquire legal services, including free legal services offered by university law clinics and other similar pro-bono institutions.

H

CONCLUSION

[47] In my view, given the fact that the applicant is a lay litigant, there is no merit in the criticism that was levelled against him with respect to his notice of motion and founding affidavit. This court cannot pre-empt how the applicant will draft his plea, because he may decide to draft it himself or even obtain some legal assistance to draft this document.

[48] I am satisfied that the interests of justice dictate that the bar should be removed, and the applicant should be allowed to file his plea as if he filed his notice of intention to defend the matter on the date of the delivery of this judgment.

ORDER

[49] In the result, I make the following order:

[49.1] The bar is uplifted.

[49.2] The time period for the delivery of the applicant's plea is twenty (20) days from 18 October 2023.

[49.3] Costs in the application shall be costs in the cause.

C MARUMOAGAE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of the judgment is deemed to be 10: 00am on 17 October 2023.

Counsel for the applicant: In person Counsel for the respondent: Adv Berger Instructed by: Werksmans Attorneys Date of the hearing: 09 October 2023 Date of judgment: 17 October 2023

[1] (06609/2020) [2023] ZAGPJHC 329 (14 April 2023) para 6.

[2] (CCT3/03) [2003] ZACC 7; 2003 (6) BCLR 575; 2003 (4) SA 390 (CC) ;

[2003] 5 BLLR 409 (CC) (4 April 2003) para 13. The constitutional Court cited with approval Viljoen v Federated Trust Ltd 1971 (1) SA 750 (O) at 757B-C, where it was stated that '[w]here the pleadings to which exception is taken are drawn by a lay litigant in person a Court will make allowance for the fact that such a person cannot be expected to display the same ability of draughtsmanship and precision of language as is expected by a legally trained and experienced pleader. On the other hand the Court will not ignore the interests

of the excipient and will not allow mere inexperience in matters of pleading to excuse serious non-compliance with the requirements of the Rules of Court which are, after all, based on notions of justice and fair play to both sides in litigation’.

[3] 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) para 39.

[4] Collatz and Another v Alexander Forbes Financial Services (Pty) Ltd and Others (A5067/2020; 43327/2012) [2022] ZAGPJHC 93 (10 February 2022) para 23.

[5] 2013 (1) SA 1 (CC) para 30.

[6]

[2013] 3 All SA 605 (SCA); 2013 (5) SA 399 (SCA) para 19.

[7] Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited

[2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) para 72.

[8] L v L (A3008/2021) [2022] ZAGPJHC 21 (1 February 2022) para 38.

[9] Els Sand & Grondverskuiwing CC v Lonhro Mining SA (Pty) Ltd (654/2010) [2010] ZANCHC 64 (17 November 2010) para 20.

[10]

[2021] 3 All SA 316 (SCA); 2021 (6) SA 352 (SCA) para 21

[11] See generally Smith N.O. v Brummer N.O. 1954 (3) SA 352 (O) 358A and Els Sand & Grondverskuiwing CC v Lonhro Mining SA (Pty) Ltd (654/2010) [2010] ZANCHC 64 (17 November 2010) para 22.

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