

## Practice Directive 61

## "ANNEXURE 11"

<b>Case Title:</b> FREEDOM SQUARE (PTY) LTD v THE SOCIAL SECURITY COMMISSION	<b>Case No:</b> HC-MD-CIV-ACT-CON-2017/04390 <b>Division of Court:</b> HIGH COURT(MAIN DIVISION)
<b>Heard before:</b> HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	<b>Date of hearing:</b> 16 JUNE 2020 <b>Date of order:</b> 2 JULY 2020 <b>Reasons delivered on:</b> 6 JULY 2020
<b>Neutral citation:</b> <i>Freedom Square (Pty) Ltd v The Social Security Commission</i> (HC-MD-CIV-ACT-CON-2017/04390) [2020] NAHCMD 270 (2 July 2020)	
<b>Results on merits:</b> Condonation Application. Merits not considered.	
<b>IT IS HEREBY ORDERED THAT:</b> <ol style="list-style-type: none"> <li>1. The Applicant's application for condonation is dismissed.</li> <li>2. The First Respondent's points <i>in limine</i> regarding non-compliance with the peremptory requirements in Rule 56 and failure to address any prospects of success in the founding affidavit are upheld.</li> <li>3. The Applicant to pay the costs of the application, which is limited in terms of Rule 32 (11).</li> <li>4. The case is postponed to <b>13 July 2020</b> at <b>09:00</b> for Interlocutory hearing (Reasons: First Respondent's to move its application in terms of Rule 61 and to determine the further conduct of the matter).</li> </ol>	
<b>Reasons for orders:</b>	
<p><u>Introduction</u></p> <p>[1] This matter relates to a condonation application regarding the failure to file heads of arguments in a Rule 61 application, which was to be heard on 27 March 2020. The applicant herein failed to comply with a court order dated 20 February 2020, which directed the parties to file their heads of arguments 10 and 5 days prior to the date of hearing. First Respondent, as per the order, filed its heads of arguments as directed however the applicant failed to comply with the court order which brought about this condonation application.</p>	

Parties submissions*The plaintiff*

[2] The application for condonation is supported by the affidavit of Ms Jason, counsel for the applicant. Her explanation for the non-compliance with the order relates to health issues of a sensitive nature which is more fully explained in an affidavit that was forwarded to the first respondent's counsel and the managing judge via email due to the sensitivity of the issues raised in the affidavit. Counsel for the first respondent takes no issue with the fact that the comprehensive affidavit, which consists of explanations of a sensitive nature, was emailed to him and the managing judge and does not formally form part of the record on the e justice system.

[3] Ms Jason alleges in her founding affidavit that she contacted Mr Kauta, counsel for the first respondent, the week of the 27<sup>th</sup> of March 2020 indicating that she did not file the applicant's heads as she has been ill and placed in self-isolation due to signs of possible COVID-19 symptoms. She further alleges that during lockdown she also called Mr Kauta and informed him that the heads of arguments will be filed on 28 April 2020, however she failed to file the heads on the said date. She also alleges that upon her return to office on 5 May 2020 she was inundated with preparation and attendance of board meetings, which took place on 7 and 8 May 2020 hence she couldn't file the heads upon her return to work.

[4] Ms Jason submitted that her non-compliance with the court order was not wilful nor was it a disregard for the rules of court but as a result of circumstances beyond her control. She further submitted that the first defendant suffers no prejudice as the no trial date has been yet set and the postponement of the hearing of the Rule 61 application was due to COVID-19 and not as a result of the applicant's non-compliance with the court order.

*First defendant*

[5] Mr Kauta, counsel for the first respondent, indicated to Court at the onset of oral argument that the applicant's counsel's argument is misconceived on so many levels. He argued that the applicant was given an opportunity to oppose the Rule 61 application and file heads of arguments however nothing has been filed. Ms Jason says her condonation application is simply with respect to her failure to file heads of arguments yet there is no opposition filed for the said application. Mr Kauta is puzzled as to why a condonation application with respect to the failure to file heads of argument is brought while the Rule 61 application remains unopposed.

[6] Counsel argued that his opposition to the applicant's condonation application is limited to points of law as he does not take issue with the reasons advanced for the non-compliance. He raised the following points *in limine*:

- a) Plaintiff was *ipso facto* barred for failing to comply with the court order and there is no request by the plaintiff to uplift the automatic bar in terms of Rule 54(3)<sup>1</sup>. He argued that Ms Jason's founding affidavit does not attempt to address the peremptory requirements in Rule 55.
- b) There is further no attempt by the applicant to address the peremptory requirements in Rule 56.
- c) The Rule 32(10) report shows that the plaintiff simply pays lip service to the Rules of Court.
- d) Plaintiff failed to address any prospects of success it has in the rule 61 application.

[7] Mr Kauta argued that the points *in limine* are dispositive of the applicant's application without the Court having to consider the merits.

[8] Counsel argued that he does not agree with the applicant that a bar in terms of rule 54 only relates to a pleading because the rule does not use the word 'pleading' however it uses the word 'rule, practice direction or court order.' He argued that there was a court order that needed to be complied with and to come to court to argue that a party can simply ignore the court order because heads of arguments are not pleadings is being disingenuous.

[9] Counsel submitted that if an applicant is to succeed with an application for condonation, the applicant must satisfactorily explain the reasons for not complying with the court order and allege reasonable prospects of success. He argued that condonation is not a mere formality and not for the mere asking. The Court must be satisfied that there is cause to warrant the condonation. He argued that the applicant failed to discharge that onus by failing to deal with a substantive element of the condonation application, which is to allege prospects of success. He indicated that applicant could have remedied the founding affidavit for failing to address prospects of success by filing a replying affidavit, however the applicant failed to do that. Counsel argued that it is completely wrong for a party to address something that is factual in its heads of arguments as heads do not constitute evidence. Counsel further argued that even if it were to be found by Court that the applicant was not wrong in addressing prospects of success in the heads, applicant failed to address the prospects of success in the Rule 61 application (interlocutory application) and only dealt with prospect of success in the main matter. The condonation application must therefore fail on that reason alone together

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<sup>1</sup> Rule 54(3) states that: 'Where a party fails to deliver a pleading within the time stated in the case plan order or within any extended time allowed by the managing judge, that party is in default of filing such pleading and is by that very fact barred.'

with the concession made.

[10] Counsel further argued that the applicant failed to explain how the delay came about and also fails to explain the duration of the delay as an applicant is required to tender a detailed and accurate explanation for the delay.

[11] Counsel submitted that the first respondent has been unduly prejudiced as the summons were issued on 16 November 2017 and the matter has not been set for trial as yet. He argued that a further delay in this matter, instituted more than two years ago, puts at risk the availability of witnesses due to economic hardship currently faced, exacerbated by the COVID-19 pandemic.

[12] In response to the points raised by Mr Kauta, Ms Jason argued that heads of arguments are not pleadings and rule 54 is very clear in terms of when a party is automatically barred. A party is only automatically barred when it has failed to file a pleading. Heads of arguments are court documents but cannot be regarded as pleadings hence there is no need for one to request for an upliftment of bar when heads are not filed. She argued that when a party fails to comply with a court order or a direction from Court that party approaches the Court requesting for condonation, which is what the applicant did in this matter and does not need to request for an upliftment of the bar as that does not apply in this instance.

[13] Ms Jason argued that she has fully explained what the delay was and what had the delay been occasioned by. The degree of delay and entire period has therefore been explained.

[14] Ms Jason conceded during oral argument that she failed to allege prospects of success in her founding affidavit but argued that her heads of arguments speaks to the merits of the main case. She argued that although prospects of success has not been fully explained in her founding papers it has been elucidated in the heads of arguments and further that although prospects of success is important it is not a decisive consideration for a condonation application to be granted.

#### Discussion

[15] The principles on condonation in our jurisdiction are quite clear and I do not intend to reiterate them.

[16] From the onset I would like to clarify that the applicant had indicated during oral argument that it had filed its notice to oppose the Rule 61 application, however upon perusal of the Court file no such opposition

has been filed. As it stands the Rule 61 application remains unopposed.

[17] Due to the fact the first respondent indicated that it does not take issue with the explanation advanced for the failure to comply with the court order, I do not see the need to dwell on that matter and the Court will neither consider that issue.

[18] I will hereafter deal with the points in limine, which in my view, as correctly pointed out by Mr Kauta, will dispose of the matter.

[19] I agree with Ms Jason that heads of arguments are not pleadings. Pleadings are commonly known as formal written statements of a party's claim or defence to another party's claim. The parties' pleadings in a case define the issues to be adjudicated in the action. Therefore documents such as particulars of claim, plea and replication can be regarded as pleadings. The applicant was therefore not required to request an upliftment of bar as Rule 53 (4) does not apply because it refers to the word 'pleading' and heads of arguments are not regarded as pleadings. The first respondent's point in limine is dismissed.

[20] I must point out that I am very sympathetic with counsel for the applicant's reasons for failing to comply with the court order, however it is important for parties to take cognisance of the fact that the rules are formulated for a reason and it is important when parties are seeking condonation to place confidence in Court when explaining their non-compliance. Although the first respondent and the Court does not take issue with the reasons explained for the non-compliance, counsel's founding affidavit filed on behalf of the applicant is somewhat lacking as it does not sufficiently address what is required in rule 56.

[21] The affidavit fails to satisfactorily deal with the steps taken during the entire period of delay. The court had ordered on 20 February 2020 that the heads are to be filed 10 days prior to date of hearing, which would have been on 13 March 2020, however counsel for the applicant explained that she could not begin drafting the heads as from the 19<sup>th</sup> of March 2020 as she was feeling ill. There is no explanation as to why the heads could not be filed by the 13<sup>th</sup> of March 2020 as that is the day they were due. There is therefore no explanation for the period of 13 – 18 March 2020. Court takes note that although there is an explanation for the delay as from 19 March 2020 to 5 May 2020, there is no explanation for the period of 1 – 6 May 2020 nor 11 – 13 May 2020 when the affidavit was eventually emailed to my chambers. The delay, unfortunately, was not explained in a sufficient manner, which fully details accurately the specific events. The essential allegations in rule 56 must be sufficiently addressed with reference to facts and evidence. A failure to do so amounts to a failure to make out a case for the relief sought.

[22] With regard to the point that applicant merely pays lip service to the Rule 32(9) and (10), I am satisfied that the applicant has complied with the rule and engaged the first respondent. This is evident from the evidence adduced by counsel of her communication with first respondent's counsel, which was also conceded to during oral argument.

[23] Mr Kauta argued that the most important issue upon which the applicant's application should be dismissed is the failure of the applicant to address prospects of success in its founding affidavit. He referred the Court to the case of *Stipp and Another v Shade Centre and Others*<sup>2</sup> wherein it was stated that:

' . . . an applicant in motion proceedings must set out his cause of action and supporting evidence in his founding affidavit. It is only in exceptional circumstances that the court will allow an applicant to supplement its allegations in a replying affidavit in order to establish its case. How the court should approach this issue was set out in the case of *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T). at 369 the following was stated by the learned judge:

"It lies, of course, in the discretion of the court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit."

[24] The applicant had an obligation to demonstrate on oath, by providing a sufficient factual matrix and evidence in support thereof, that it at least enjoyed *prima facie* prospects of success, however it failed to do so. It is a prerequisite in a condonation application that an applicant must allege prospect of success and the failure to do so renders the application defective. Although prospects of success is not a decisive consideration in a condonation application, an applicant must still allege that element for the court to decide whether prospect of success will be a decisive factor or not. Regard having had to the founding affidavit of Ms Jason, no such allegations were made and to now raise the issue in the heads, is not sufficient as issues of such a nature are to be alleged as evidence in an affidavit and not raised in heads. I therefor uphold the fourth point in limine raised by the first respondent.

[25] I however disagree with Mr Kauta's argument that the prospect of success relates to the Rule 61 application. His argument is misconceived as prospects of success relates to the main action and not the interlocutory application.

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<sup>2</sup> 2007 (2) NR 627 (SC) para 29 at 634.

Costs

[26] The Courts have a general discretion when it comes to granting costs. As the applicant was not successful in its application for condonation and the first respondent was justified in opposing the said application, the applicant must be liable for the cost in opposing the application.

[27] My order is therefor as set out above.

<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>First Respondent</b>
Ms A Ndeyapo Jason Of Shikongo Law Chambers	Mr P Kauta Of Dr Weder, Kauta & Hoveka Inc.