



**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1)  
OF THE SPECIAL INVESTIGATIONS UNIT AND  
SPECIAL TRIBUNALS ACT 74 OF 1999**

**(REPUBLIC OF SOUTH AFRICA)**

**CASE NUMBER: GP/10/2020**

In the case between:

**SPECIAL INVESTIGATING UNIT**

**APPLICANT**

and

**MUNICIPALITY EMPLOYEES UNION**

**RETIREMENT FUND**

**FIRST RESPONDENT**

**PHINEAS KYAHLISO LEGODI**

**SECOND RESPONDENT**

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**ORDER**

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1. The rule *nisi* which was declared to have lapsed is cancelled. The rule *nisi* is revived and extended until confirmed or discharged.
2. The second respondent is directed to pay the costs of this application.

3. The applicant is directed to pay the costs relating to the application to file a supplementary affidavit.

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## JUDGMENT

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### K PILLAY J

[1] The applicant seeks the following order:

- (a) That the rule *nisi* which was declared to have lapsed on 24 November 2020 be and is hereby revived.
- (b) Alternatively, that the time period within which the applicant must institute action proceedings for the recovery of the financial losses and damages be extended for a period of 30 days from the date of this order.
- (c) That the respondent be ordered to pay the costs of the application (only in case of opposition); and
- (d) Further and/or alternative relief.

[2] The application is opposed.

[3] The applicant instituted an *ex parte* application to withhold payment of pension fund benefits due to the second respondent which are currently held by the first respondent pending the adjudication and/or finalisation of the main action proceedings to be instituted by the applicant against the second respondent.

[4] The Special Tribunal issued a rule *nisi* on 4 September 2020, returnable on 19 October 2020 (“the interim order”). Paragraph 3 of the interim order

directed the applicant to institute action proceedings against the second respondent for the recovery of financial losses and damages within a period of 30 days from the date of the aforesaid order. The period of 30 days expired on 19 October 2020.

[5] The second respondent was served with Notice of Motion on 8 September 2020 at the 9681, Serola View, Polokwane (the address furnished by the second respondent) by the Limpopo Sheriff based in Polokwane (“the Sheriff”). The second respondent delivered his answering affidavit on 17 October 2020 which caused the rule *nisi* to be extended to 24 November 2020 (“the extended rule nisi”).

[6] Pursuant to the extension of the rule *nisi*, the applicant delivered a replying affidavit. Both parties filed their heads of arguments and practise notes timeously. However, on the extended return date of the rule *nisi*, Modiba J declared the rule *nisi* to have lapsed on the basis that the applicant had not delivered the summons on the second respondent within the 30-days period fixed by the court, namely 19 October 2020. The order of Modiba J reads as follows:

- ‘1. It is declared that the rule *nisi* granted on 4 September 2020 lapsed by virtue of the applicant having failed to comply with paragraph 3 of the rule *nisi*.
2. The applicant shall pay the costs of the application inclusive of the costs of two counsel where so employed.’

### **Applicant’s Case**

[7] The applicant grounds this application on the provisions of Rule 28(1) of the Special Tribunal rules (“the Tribunal rules”) read with Rule 27(1) of the Uniform rules. The reliance on Rule 28 of the Tribunal rules arises from the basis that Rule 14 of the Tribunal rules makes no provision for the condonation of non-compliance with the time fixed by an order of the Tribunal.

[8] I set out the aforesaid rules below as reference will be made thereto regularly.

### ***Uniform rules of court***

'27. Extension of time and removal of bar and condonation. —

(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

(2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these Rules.

(3) The court may, on good cause shown, condone any non-compliance with these Rules.

(4) After a rule *nisi* has been discharged by default of appearance by the applicant, the court or a judge may revive the rule and direct that the rule so revived need not be served again.'

### ***Special Tribunal rules***

'14. Extension of time, Removal of Bar and Condonation

(1) In the absence of agreement between the parties, Tribunal may upon application on notice and on good cause shown, make an order extending anytime prescribed by these Rules.

...

(3) The Tribunal may, on good cause shown, condone any non-compliance with these rules.

(4) After the discharge of a Rule *nisi* by default, the Tribunal may on application revive it.

...

28. Procedure not provided for in the Rules.

(1) If a situation for which these Rules do not provide arises in proceedings or contemplated proceedings, the Tribunal may adopt any procedure that it deems appropriate in the circumstances, including the invocation of the High Court Rules.

(2) The Tribunal may, in the exercise of its powers and in the performance of its functions, or in any incidental matter, take any steps in relation to the hearing of a

matter before it which may lead to the expeditious and cost-saving disposal of the matter, including the abandonment of the application of any rule of evidence in order to achieve the objects of the Act.’

[10] Given the submission that, Tribunal Rule 14, only caters for non-compliance with the rules and not of non-compliance with an order of the Tribunal the applicant thus relies on Rule 27 of the Uniform rules to cater for the lacuna. To justify the grant of the order pursuant to the provisions of the aforementioned rule, the applicant contends that it has to show good cause for the revival of the rule *nisi* alternatively for the extension of the time period within which the applicant must institute action for its claim.

[11] To demonstrate good cause, the applicant avers that the combined summons was issued by the Registrar of the Tribunal on 6 October 2020 after the Particulars of Claim were received on the same date from counsel acting on behalf of the applicant. After the summons was issued, it was discovered that an incorrect version of the Particulars of Claim was sent out. The deponent to the applicant’s founding affidavit, Gosiamo Peter Seleka (Seleka), avers that he had discussions with a legal representative, Stella Zondi (Zondi). Pursuant to those discussions, an instruction to serve the summons was made through a courier company (“the courier”) on 12 October 2020 to deliver the summons to the Sheriff by 15 October 2020.

[12] The Sheriff received instructions from the courier on 13 October 2020. The summons was not served timeously. Enquiries from the Sheriff’s Office revealed that due to non-payment of a previous bill, the Sheriff decided not to deliver the summons as required. Zondi requested an account which was only furnished on 23 November 2020. The account was settled and the summons was then served on 27 November 2020.

[13] On 3 November 2020, the Sheriff produced a return of non-service on the second respondent, with the Sheriff indicating that the second respondent’s address was not located. Instructively, as pointed out, the Sheriff had managed to serve the application for the rule *nisi* on the second respondent at the same

address. The return of non-service was only delivered to the applicant's attorney on 24 November 2020. The Sheriff, it seems, sat with the return of non-service from 3 November 2020 to 24 November 2020, when it was delivered to the applicant's attorneys.

[14] The applicant therefore contends that there was no deliberate disregard of the Tribunal rules by the applicant or its attorneys and that the second respondent did not suffer any prejudice as a result of the non-compliance, whereas the applicant will be prejudiced if the second respondent were to dispose of the pension fund benefits held by the first respondent, pending the finalisation of the action instituted.

### **Second Respondent's Case**

[15] The second respondent contends that the revival of the rule claimed by the applicant is not merely a procedural matter, as the revival relief, if granted, would result in an order precluding him from accessing his pension fund benefits held by the first respondent. He submits that the reliance by the applicant on Rule 28(1) of the Tribunal rules is inappropriate in that the aforesaid rule provides for those instances where a procedural situation arises and in respect of which the Tribunal rules do not provide for the manner in which to deal with such a situation.

[16] A further submission is that Rule 27 of the Uniform rules does not provide for the general revival of a rule *nisi*. In support thereof, counsel for the second respondent refers to the wording of the aforesaid as cited above.

[17] It is pointed out that in these proceedings the rule *nisi* was not discharged by default of appearance by the applicant as the applicant was present in court when the rule *nisi* was declared lapsed by Modiba J. In this case, the second respondent filed an affidavit showing cause why the rule *nisi* should not be made final, therefore it would now be absurd, according to the second respondent, to revive a rule *nisi* that calls upon him to show cause why the order

sought should not be made final. The doctrine of effectiveness militates against the grant of the revival relief.

[18] The second respondent submits further that the explanation furnished by the applicant for its failure to comply with the court order timeously, is 'hopeless'. In this regard, the second respondent points out that the applicant has not explained what had happened between 4 September 2020 and 6 October 2020. The Sheriff is alleged to have received the summons on 13 October 2020, with express instructions to effect service by no later than 15 October 2020, yet the applicant furnishes no explanation for any follow up enquiries pursued with the Sheriff to confirm if the Sheriff had complied.

[19] It is contended by the second respondent that from 16 to 19 October 2020, the applicant ought to have followed up with the Sheriff to ensure that the summons was served or instituted an application in terms of Rule 14 of the Tribunal rules for the extension of the 30-day period. The applicant also failed to request an extension on 19 October 2020, when the matter was before court. On 24 November 2020, when the applicant became aware that the rule had lapsed, it did not raise the issue *mero motu* but did so only when the court raised an issue regarding the service of the summons. The second respondent contends that the applicant could have used other options to effect service on the second respondent as foreshadowed in Rule 6 of the Tribunal rules.

[20] The applicant then sought leave to file a supplementary affidavit to address the lacuna between 4 September 2020 to 6 October 2020, raised by the second respondent. The application was opposed, by the second respondent who filed an affidavit in opposition thereto. The supplementary affidavit dealt with an explanation of the events that occurred between 4 to 6 October 2020. I considered the contents of these affidavits together with the reasons for the opposition thereto. Exercising my discretion, I granted the application. Clearly the applicant, seeking an indulgence, has to pay the costs of this application.

### **Issue**

[21] The issue herein is whether the applicant has made out a case for the revival of the lapsed rule, alternatively the extension of the period within which the applicant must institute action proceedings against the second respondent for the recovery of financial loss and damages.

### **Evaluation**

[22] In my view, the starting point to determining this issue is to consider the wording of paragraph 3 of the court order and the interpretation thereof. Paragraph 3 of the court order, inter alia, reads as follows:

‘The applicant shall institute the action ... within 30 days from the date of this order.’

[23] It is not in dispute that the action was instituted on 06 October 2020. Action is defined in Rule 1 of the Uniform rules as ‘a proceeding commenced by summons’. Unfortunately, ‘institute’ or ‘instituted’ is not defined in either the Rules or the Superior Courts Act 10 of 2013. Similarly, the Special Investigating Units and Special Tribunals Act 74 of 1996 and the Tribunal rules do not define either of these words.

[24] In *Nxumalo v Minister of Justice and Others* 1961 (3) SA 663 (W) at 667D Kuper J wrote:

‘...it seems to me to be clear that an action is commenced by the issue of summons.’

At 667A-B he wrote:

‘It is quite clear in my view that, once a summons has been issued, i.e. once it has been signed by the Registrar... and handed to the plaintiff’s attorney to enable him to have the matter served, the litigation has commenced...’

And at 668C-E

‘Now, the commencement of the proceedings is the institution of the action. It seems to me that no other meaning can be given to those words...When did this action commence? Inevitably the answer would be: The day when the summons was issued.’

I would only add that, if it could be contended that the ordinary meaning of the words “the commencement of the proceedings” could be either the date of the issue of summons or equally the date of service of the summons, the former view would have to prevail.’

[25] In *Mati v Minister of Justice, Police and Prisons, Ciskei* 1988 (3) SA 750 (CK) at 753, Claassens J stated:

‘...that in general terms as well it has been held that action is commenced or action is instituted when summons is issued.’

[26] As per AC Cilliers *et al Herbstein and Van Winsen: The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa* 5 ed (2009) at 503:

‘(b) The issue of summons, not service of it, ordinarily constitutes the commencement of proceedings. The issue of a summons is the initiation of an action.’

(Footnotes omitted.)

[27] In the *Puma SE v Ham Trading Enterprise CC and others* [2018] ZAKZDHC 42, an unreported judgment by Olsen J, the following was said:

‘[6] Counsel for the plaintiff have drawn my attention to the judgment in the matter of *Jazz Cellular CC v Nokia Corporation and others* 2008 BIP 352 (C) where the point which concerns me was taken. As to the argument that service is required, and not merely the issue of the process, the learned Judge stated (at 357A-B) that he agreed with counsel’s submission

“that this contention has been disposed of by this court in *Commissioner of the South African Revenue Service and others v Shoprite-Checkers* 2006 BIP 243 (C). I agree that there is no requirement of service within 10 court days, only institution of proceedings within that time. Of course, service would have to take place for the action to proceed, but service after the 10 day period would not have the effect of non-suiting a plaintiff.”

The *Shoprite Checkers* case referred to in *Jazz Cellular* dealt with a requirement of confirmation by a court of steps taken by an inspector on application “brought within 10 days of the day on which those steps had been taken”. On the question of whether service of the process within the allotted time was required, the learned Judge said the following.

“In *Mati v Minister of Justice, Police and Prisons, Ciskei* 1988 (3) SA 750 (C) Claasens J exhaustively considered the authorities dealing with the interpretation of the phrase ‘proceedings shall be brought’. I respectfully concur with his interpretation that proceedings are brought by means of the issue of the summons or application and that service thereof is not a requirement.”

In *Mati’s* case, with reference *inter alia* to *Labuschagne v Minister of Justice* 1967 (2) SA 575 (A), the learned Judge held that under both the Ciskei Police Act which contemplated action being “brought”, and the South African Police Act which contemplated action being “commenced”, what was required to be done within a stipulated period was the issue of summons. The learned Judge also made the observation (at page 754) that he could see no reason to differentiate between the meaning of the words “commence”, “institute”, or “bring”, when used in such contexts.

[7] The learned judges deciding *Jazz Cellular* and *Shoprite Checkers* adopted the conclusion in *Mati’s* case without discussing the fact that in their respective cases the contexts in which the words concerned were employed were not on all fours with the contexts considered in *Mati*.

[8] It is long established that some words will bear different meanings depending on the context in which and purpose for which they are employed. To my mind the verb “institute”, when used in connection with civil proceedings, may convey merely that the requisite court process is issued; or on the other hand, that the process is not only issued but also served upon the person against whom the proceedings are being instituted. If a fixed time is laid down (statutorily or otherwise) for the institution of proceedings in a context in which a requirement of service is feasible, and the aim of the provision or requirement would be defeated if the process were not to be served within the allotted time, the word “institute” in that context might signify the need to join the defendant or respondent in the litigation by formally notifying the defendant of the claim made on it, thereby setting in motion the defendant’s access to court for the purpose of dealing with the claim. In the case of an action, the issue of a summons is the necessary first step in engaging the court as the arbiter of the proposed claim. In that sense it qualifies as the “institution of action”. But the mere issue of the summons does not “set [proceedings] in motion” (another meaning of the word “institute” given in the second edition of the Oxford South African Concise Dictionary). A consideration of our Rules and practice regulating civil proceedings which involve defendants or respondents illustrates that they are set in motion – the regulation of the adjudicative process starts and then moves ahead – when there is notification to the party against whom the claim is to be made, that being achieved through service. See *Marine and*

*Trade Insurance Co. Ltd v Reddinger* 1966 (2) SA 407 (A) at 413D where Wessels JA put the matter succinctly.

“Although an action is commenced when the summons is issued the defendant is not involved in litigation until service has been effected, because it is only at that stage that a formal claim is made upon him.”

[28] In the current matter, the applicant was ordered to institute action within 30 days of the order.<sup>1</sup> The combined summons (action) was issued by the registrar on 6 October 2020.<sup>2</sup> In light of the authorities referred to above, which suggest that action is instituted when the summons is issued, it would appear that the applicant complied with the timeframe set out in the order.

[29] In *Matsapa Trading 562 CC v Gebuza and others* 2013 JDR 2507 (ECM), Griffiths J was similarly tasked with determining whether or not action was instituted timeously following a court order/judgment by Cossie AJ. Briefly, in terms of the order, the first respondent had to institute action within 30 days of the court order. From the facts of the matter, service of the summons was effected two days after the 30-day period stipulated in the order.

[30] In determining the matter, Griffiths J stated that the answer as to whether or not action was instituted timeously lay in the correct interpretation of the order given by Cossie AJ. In *Administrator, Cape, and another v Ntshwaqela and others* 1990 (1) SA 705 (A) at 715F-H, Nicholas AJA stated:

‘...the Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention.’<sup>3</sup>

[31] Griffiths J indicated that if Cossie AJ ‘intended service to be an element of the act of instituting the action, one would have expected her to have expressed

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<sup>1</sup> A day in terms of Tribunal Rule 3, ‘shall mean any day other than Saturday, Sunday or Public Holiday and only days that shall be included in the computation of any time expressed in days prescribed by these Rules or fixed by any order of the Tribunal’.

<sup>2</sup> See annexure “GP3” page 27.1 of the application.

<sup>3</sup> Also see AC Cilliers et al *Herbstein and Van Winsen: The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa* 5 ed (2009) at 936.

this in her order'. Thus, Griffiths J was of the view that to institute action was to issue summons out of the registrar's office.

[32] In her order dated 4 September 2020, specifically paragraphs 2 and 3, Modiba J has not expressly mentioned that action should be instituted and served within 30 days. Considering the reasoning by Griffiths J above, it can be assumed that service was not intended to be an element of the act of instituting the action. (My emphasis.)

### **Application of Uniform rules to Tribunal matters**

[33] I return to the applicant's argument that Tribunal rule 14 does not make provision for the condonation of non-compliance with the time fixed by an order of the Tribunal, and that a solution to this is to be found in Tribunal rule 28 and Uniform rule 27. This argument is rejected by the second respondent who maintains that Tribunal rule 28 provides for instances where a procedural situation arises, and the Tribunal rules are silent on the conduct of proceedings.

[34] In *The Special Investigating Unit (SIU) and Others v Lekabe* [2021] ZAST 40, Siwendu J said the following in relation to Rule 28(1) of the Tribunal Rules: '[25] It merits restating once more that the Tribunal has the same status as the High Court.

...

[26] The rule renders, the Uniform rules applicable to the Tribunal where there is a *lacuna* in its rules. The provision does so without the conditions and or standard contended by the defendant.

...

[31] When read in their proper context, it is clear that the Tribunal rules envisage that a hybrid approach would be adopted, where there is a *lacuna* in the Tribunal rules. Given that the status of the Tribunal is that of a High Court, despite its own rules, the uniform rules are intended to be supplementary and or complementary to the Tribunal rules. . . ' (Footnote omitted.)

[35] I turn to the application seeking the revival of the rule *nisi* of 24 November 2020. The second respondent correctly contends that Rule 27(4) is not

applicable given that the rule was not discharged by default of appearance by the applicant as it is common cause that the applicant was present when the rule was declared discharged.

[36] However, the applicant submits that Rules 27(1) and (2) cater for the situation extant herein. The applicants need merely to demonstrate good cause upon application.

[37] According to D E van Loggerenberg et al *Erasmus: Superior Court Practice* (2021) at 323-324,<sup>4</sup> the courts have refrained from formulating an exhaustive definition or list of what constitutes 'good cause'. Two principle requirements have, however, been identified:

- (a) The applicant should file an affidavit satisfactorily explaining the delay; and
- (b) The applicant should satisfy the court that he has a bona fide defence.

[38] Regarding the explanation for delay, it should be:

' . . .sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motives. A full and reasonable explanation, which covers the entire period of delay, must be given. If there has been a long delay, the court should require the party in default to satisfy the court that the relief sought should be granted, especially in a case where the applicant is the *dominus litis*. It is not sufficient for the applicant to show that condonation will not result in prejudice to the other party. An applicant for relief under this rule must show good cause; the question of prejudice does not arise if it is unable to do so. The court will refuse to grant the application where there has been a reckless or intentional disregard of the rules of court, or the court is convinced that the applicant does not seriously intend to proceed.'<sup>5</sup> (Footnotes omitted.)

[39] In *Himelsein Super Rich CC and another* 1998 (1) SA 929 (W):

'The applicant applied in a Local Division for the setting aside of an attachment made to confirm jurisdiction. The applicant was a former South African resident, now living in California. The respondents brought an application to attach his interest in certain

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<sup>4</sup> RS-17.

<sup>5</sup> Erasmus: Superior Court Practice at 324.

payments arising from an agreement with a South African company. An order attaching the applicant's interest in the payments to confirm jurisdiction was granted by the Court on 3 December 1996, with the proviso that the attachment would lapse should the respondents not institute the action within 30 days of the granting of the order. The respondents issued summons against the applicant two days later, but only managed to serve the summons on the applicant on 9 February 1997, 21 days after the expiry of the stipulated period. The applicant contended that in the circumstances the attachment had lapsed. The respondents disputed this, and in any event brought a counter-application for an extension of the time allowed so as to cover the 9 February service.'

[40] In this case the 30-day period was prescribed by an order of court. As was found in *Himelsein*.<sup>6</sup>

'The 30-day period was "prescribed...by an order of Court". Rule 27 entails not only that this period can be extended after its lapse, but that "the results of expiry" of the period on 20 January 1997 may be recalled, varied or cancelled. Those "results" include the lapse of the attachment. But the respondents make an overwhelming case for condonation of their failure to serve the process on *Himelsein* by 20 January. Their depositions show that they acted with expedition and persistence, and that the period allowed simply proved too short.'

[41] Cameron J made the following finding in *Himelsein*:<sup>7</sup>

'Did the order of 3 December 1996 lapse and can it be revived?'

Mr *Fine*, who appeared for *Himelsein*, contended that the order of 3 December contained a "built-in self-destruct clause". It was, he argued, incapable of extension once its terms had not been complied with. Mr *Medalie*, who appeared for the respondents, countered this by submitting that the order, "taken in its context", entailed that the action was "instituted" merely by issue of summons. Thereafter, the order conferred permission on the respondents to proceed by service on *Himelsein* in the manner specified, namely personally, whether at the address mentioned or elsewhere in the United States. On Mr *Medalie's* reading, the respondents thus "instituted" the action within 30 days. Alternatively, if service was required within that period, the respondents' inability to comply should be retrospectively condoned.

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<sup>6</sup> *Himelsein* at 933.

<sup>7</sup> *Ibid* at 932-933.

I shall assume that *Himelsein's* contention that the order automatically lapsed on 20 January in the absence of service is correct; and that the respondents' contention that "institute" the action should be amended to read "commence by issue of summons" is wrong. The provisions of Rule 27 seem to me nevertheless to govern the issue. Rule 27(1) empowers the Court on good cause shown to make an order extending or abridging

". . . any time prescribed by these Rules or by an order of Court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever . . .".

Rule 27(2) expressly provides that:

"Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the Court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these Rules."

The 30-day period was "prescribed...by an order of Court". Rule 27 entails not only that this period can be extended after its lapse, but that "the results of the expiry" of the period on 20 January 1997 may be recalled, varied or cancelled. Those "results" include the lapse of the attachment. . . .

...

I accordingly conclude that the Court is empowered to grant, and that the respondents are entitled to be given, a retrospective extension of the 30-day period for service of the process on *Himelsein*, as well as a concomitant order that the lapse of the attachment be cancelled.<sup>8</sup> (my emphasis)

[42] The second respondent referred to the case of *Melane v Sanlam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F in support for its submission that in addition to the explanation for the lateness of compliance, the prospects of success have to be demonstrated, which he aver that the applicant has failed to do. The following *dicta* from *Melane*<sup>9</sup> are relevant:

'Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are

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<sup>8</sup> See also *Erasmus: Superior Court Practice* at 327.

<sup>9</sup> *Melane* at 532.

interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation...What is needed is an objective conspectus of all the facts.'

[43] Further, the second respondent contends that there was patent non-compliance with Rule 23 of the Tribunal rules. This rule provides:

'The preservation order shall be applied for only after or simultaneous with the institution of the main application or action proceedings in the Tribunal, or where there is an application or action proceedings pending in the High Court.'

[44] In this regard, the second respondent points out that the applicants approached the Tribunal on an *ex parte* basis when action had not yet been instituted prior or simultaneously with the application for the preservation order. Ergo, the applicants are not entitled to the order they now seek. I was then referred to the decision in *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and others, National Director of Public Prosecutions and another v Mulaudzi*,<sup>10</sup> where the Supreme Court of Appeal faced with a condonation application for a lapsed right of appeal and a request for its revival confirmed once again that:

'It has been pointed out that the court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration.'

[45] The applicant's submission is that the second respondent's contentions on the issue of the requirements of Rule 23 of the Tribunal rules are without merit. They submit that the second respondent conflates the requirements for the revival of a rule *nisi* with the requirements that the applicants should show cause why the rule *nisi* should not be made final. They assert that all that this court is required to do in an application for the revival of the rule *nisi* is to determine whether good cause has been demonstrated by the applicants.

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<sup>10</sup> *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and others, National Director of Public Prosecutions and another v Mulaudzi* [2017] ZASCA 88; [2017] 3 All SA 520; 2017 (6) SA 90 (SCA).

Further, that the question whether the rule *nisi* ought to have been granted must be left for decision by the court which determines whether the rule *nisi* must be confirmed or discharged.

[46] During the preparation of judgment, I directed both parties to address me, via supplementary heads of argument, on the issue of whether the rule *nisi* had in fact lapsed for failure to comply with the terms of Modiba J's order. I am grateful for the responses received from counsel representing each of the party. Both parties concede that the order did not lapse. The applicant refers to various authorities in support thereof.<sup>11</sup> The applicant however contends, in view of these authorities, that the order did not lapse and that there is no need to persist with the revival application. The second respondent correctly submits that there is an order by Modiba J, that the issue for determination herein is not the correctness of the order declaring the rule to have lapsed but whether the rule should be revived, in which case, they stand by their earlier argument that Rule 23(3) of the Tribunal Rules militates against the applicant succeeding in the main proceedings if the rule is revived.

[47] In this case, the parties have exchanged the relevant affidavits, and the matter is ready to be set down for hearing on whether the rule should be confirmed or discharged. My view is that the applicant has shown good cause for the revival of the rule in accordance with the provisions of Rule 27(2) of the Uniform Rules, irrespective of whether I am right or wrong on my interpretation of the order of Modiba J. There was clearly no mala fide on their part in failing to serve timeously. The applicants have attached a copy of the summons which sets out their case against the second respondent. Further, given that this matter is already enrolled for hearing on the issue of whether the rule has to be confirmed or discharged, I am of the view that the court dealing with this will be in a better position to consider the second respondent's submission in respect of Rule 23(3), which issue was only raised in argument.

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<sup>11</sup> *The Seaspan Grouse Seaspan Holdco 1 Ltd and others v MS Mare Tracer Schiffahrts and another* 2019 (4) SA 483 (SCA); *Marine and Trade Insurance Co Ltd v Reddinger* 1966 (2) SA 407 (A); *MV Jute Express v Owners of the Cargo lately Laden on board the MV Jute Express* 1992 (3) SA 9 (A).

[48] In the circumstances, I make the following order:

1. The rule *nisi* which was declared to have lapsed is cancelled. The rule *nisi* is revived and extended until confirmed or discharged.
2. The second respondent is directed to pay the costs of this application.
3. The applicant is directed to pay the costs relating to the application to file a supplementary affidavit.



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**JUDGE K. PILLAY**  
**MEMBER OF THE SPECIAL TRIBUNAL**

**APPEARENCES**

Counsel for the Applicants: H.O.R. Modais SC / P. Loselo

Attorney for the Applicants: State Attorneys Pretoria

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Attorney for the Second Respondent: TBN Attorneys

Date of Judgment: 14 July 2022

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 11H00 on 14 July 2022.