

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 40205/2014

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

A handwritten signature in dark ink, appearing to read "E. Schryff", is written over the text of the list.

Date: 21 April 2022E van der Schyff

In the matter between:

CITY OF JOHANNESBURG

APPLICANT

and

BRAVO GROUP MANUFACTURING (PTY) LTD

RESPONDENT

JUDGMENT

Van der Schyff J

- [1] This is an application for leave to appeal the judgment and order handed down on 15 February 2022. The application was brought late and condonation is sought for the late filing of the application. The applicant (also referred to as the applicant-defendant) submits that while the application for leave to appeal had to be filed on

or before 8 March 2022, it was only issued on 15 March 2022. The deponent to the affidavit filed in support of the condonation application, the applicant's attorney of record, ascribes the four-day delay to circumstances beyond the applicant's control. The deponent relates that counsel was instructed on 3 March 2022 to consider the order granted on 15 February 2022. Counsel was, however, involved in a trial in the Labour Court which was enrolled from 7 to 11 March 2022. The applicant consulted with his legal team on 12 March 2022 and the application for leave to appeal was subsequently filed. Due to the fact that the delay of 4 days is not excessive, and that the respondent was not prejudiced because it was well informed of the applicant's dilemma and the intended steps to take the matter forward, the applicant seeks that the late filing of the application for leave to appeal be condoned. The applicant submits that it has good prospects of success in the application for leave to appeal.

- [2] The respondent (also referred to as the respondent-plaintiff) filed a notice of opposition wherein it gave notice of its intention to oppose the condonation application. The respondent did not file an answering affidavit but counsel submitted that the applicant failed to make out a case for the condonation sought.

- [3] It is trite that in applications for condonation, a court must consider the reasons tendered as to why there was no compliance with time limits, as well as an applicant's prospects of success. Where an applicant fails to tender what can be considered as good reasons for non-compliance, it might be overseen where the applicant makes out a case that it has good prospects of success. Where the delay was minimal, and where a respondent did not show that it is prejudiced by the delay, I am of the view that the constitutional principle of access to justice should be afforded substantial weight in the consideration as to whether condonation should be granted. So much more, when it is public funds that are at stake.

- [4] The adjudication of both the application for leave to appeal as the condonation application ultimately revolves around the question as to whether the applicant made out a case for the primary relief sought, and that is for leave to appeal to be granted. It is in both parties' interest that the matter is finalised rather sooner than later. Against this background I grant condonation for the late filing of the application for

leave to appeal. The merits of the application for leave to appeal now need to be considered.

- [5] The background to the main application, as is evident from the founding and answering affidavits that were considered, are set out in the judgment handed down and need not be dealt with again.
- [6] The applicant premises its application for leave to appeal on the argument that because default judgment was granted by Basson J, after the applicant-defendant was barred from filing a plea, there is no trial pending and the interlocutory request for further particulars should not have been entertained. I already dealt with the unique nature of the respondent-plaintiff's claim before this court. It suffices to refer to the dictum of Solomon J in the matter of *Krige v Van Dijk's Executors*:¹

'The real object of the action in the court below was to obtain payment from the defendant of the money in his hands belonging to the estate of the late JH van Dijk, which he was employed by the plaintiff, the executors, to administer on their behalf. The prayer for the rendering of an account was merely a means to an end, that end being to ascertain the amount of the defendant's indebtedness.'

- [7] In the present matter sufficient accounting has not taken place and there has not been debate. As a result, the determination of the amount payable has not been achieved. A court must now conduct an inquiry and make a finding. The matter need thus proceed to trial, whether by default or otherwise.
- [8] Rule 21(2) provides as follows:
- '(2) **After the close of pleadings** any party may, not less than twenty days before trial, deliver a notice requesting only such further particulars as are strictly necessary to enable him to prepare for trial. Such request shall be complied with within ten days after receipt thereof.'

¹ 1918 AD 110 at 117.

Where the defendant did not act subsequent to receipt of a notice of bar pleadings closed. The fact that a party is barred, however, does not remove it as a party to the litigation. Although the defendant is barred from filing a plea or from proceeding with an application to compel against the plaintiff, the plaintiff is not barred from requesting further particulars as far as it is necessary to enable it to prepare for trial. A defendant cannot derail or prevent the conclusion of the litigation because it is barred from pleading.

- [9] Counsel for the applicant-defendant submits that I erred in coming to the conclusion that there was a pending case with 'an alive *lis*' between the parties. The mere nature of the claim belies this contention. Counsel likewise submitted that I erred in finding that there was non-compliance with the Basson J order, without any facts relating to the steps taken between the parties after granting the order. The correspondence attached to the respondent-plaintiff's founding affidavit underscores the reality that a pre-trial occurred between the parties on 16 March 2021 and that it was agreed at said pre-trial that the respondent-plaintiff's attorney would provide the applicant-defendant's attorney with the requests for further particulars dated 25 November 2015 and 10 May 2016 respectively. The applicant-defendant did not claim in the answering affidavit that it complied with the Basson J order, that it provided the respondent-plaintiff with the particulars requested, that the matter was settled or that payment was made to the respondent-plaintiff. The correspondence attached to the founding affidavit belies the claim that there was no indication of the steps taken by the parties subsequent to the granting of the order by Basson J.
- [10] I am of the view that the relief granted on 15 February 2022 is interlocutory in nature. It is trite that the granting or refusal of an order for further particulars is not appealable on the basis that it is interlocutory both in effect and in form.
- [11] The applicant did not make out a case that there is any prospect of success on appeal. There are no conflicting judgments on the points and I do not share the applicant's view that novel and intricate legal questions underpin this application for leave to appeal.

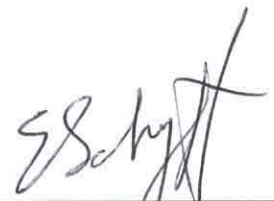
- [12] The respondent seeks a costs order *de bonis propriis* against the applicant's attorney and counsel, jointly and severally, the one paying the other to be absolved. The circumstances do not justify the granting of a punitive costs order.

In the result, the following order is granted:

- 1. The application for condonation is granted;**
- 2. The application for leave to appeal is dismissed with costs.**

ORDER

In the result, the following order is granted:



E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the applicant:	Adv. Sithole
Instructed by:	Madhlopa & Tenga Incorporated
Counsel for the respondent:	Adv. CD Roux
Instructed by:	RC Christie Incorporated
Date of the hearing:	7 April 2022
Date of judgment:	21 April 2022