



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2020/29803

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



DATE: 29 May 2025

In the matter between:

REDEC SERVICES (PTY) LTD
ENGELBRECHT, SCHALK WILLEM BURGER
ASSNESS, LIRAN BARUCH

First Applicant
Second Applicant
Third Applicant

And

KANSAI PLASCON (PTY) LTD

Respondent

In re:

KANSAI PLASCON (PTY) LTD

Plaintiff

And

REDEC SERVICES (PTY) LTD

First Defendant

ENGELBRECHT, SCHALK WILLEM BURGER

Second Defendant

ASSNESS, LIRAN BARUCH

Third Defendant

**JUDGMENT:
APPLICATION FOR LEAVE TO APPEAL**

H M VILJOEN AJ

INTRODUCTION

[1] This is an application by the defendants¹ for leave to appeal to the Supreme Court of Appeal, alternatively to the Full Bench of this Court, against my entire judgment of 18 February 2025.

[2] On 3 February 2025, I heard five applications arising from the action between the parties. In my judgment, I granted an order striking out the defendants' defence. This sanction was imposed as a direct consequence of their failure to comply with a prior court order dated 7 September 2022 ("the compelling

¹ Parties are referred to as cited in the action.

order"). That order directed them to file heads of argument in respect of the plaintiff's application for summary judgment and the plaintiff's conjoined application for condonation for the late filing of that summary judgment application.

- [3] As a result of the defence being struck out, the plaintiff's claim became undefended. I consequently granted judgment in favour of the plaintiff for the sum claimed as sought in the second and third prayers of the application to strike out.
- [4] It is important to clarify that the judgment granted was consequential upon the striking out of the defence, and was not a determination of the summary judgment application itself, which, along with other pending applications, became moot in light of the striking out.
- [5] The defendants' principal ground for seeking leave to appeal is their assertion that I erred in entertaining the application to strike out their defence before the plaintiff's application for condonation regarding its late summary judgment application had been decided. They contend that until such condonation was granted, the summary judgment application was not properly before the Court, and therefore, they were not obliged to file heads of argument thereon, and should not have faced the sanction of their defence being struck out.
- [6] An important aspect of the proceedings on 3 February 2025, when the consolidated applications were heard, is that the defendants had filed heads of argument only in respect of their own applications for leave to amend their plea. They did not file the heads of argument concerning the plaintiff's summary judgment or condonation applications as stipulated in the compelling

order of 7 September 2022, nor did they file any affidavit opposing the striking out application to explain their disregard of the compelling order. At the hearing, the defendants submitted that their intention to amend their plea – and the asserted need for those amendment applications to be considered first – effectively nullified their obligations under the prior court order.

THE TEST FOR LEAVE TO APPEAL AND NATURE OF DISCRETION

APPEALED AGAINST

- [7] The governing test for leave to appeal is set out in Section 17(1)(a) of the Superior Courts Act 10 of 2013. Leave may only be given where the judge concerned is of the opinion that *"the appeal would have a reasonable prospect of success; or there is some other compelling reason why the appeal should be heard"*. As noted in *Mont Chevaux Trust (IT 2012/28) v Goosen & 18 Others*:²

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion... The use of the word 'would' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

- [8] The discretion to strike out a defence due to non-compliance with rules or court orders falls into the category of matters *"so essentially for determination by the court of first instance that it would ordinarily be inappropriate for a Court of appeal to substitute its exercise of the discretionary power for the exercise*

² 2014 JDR 2325 (LCC) at para [5]

thereof decided on by the court of first instance".³ This principle limits appellate interference. The defendants do not dispute the discretionary nature of my order.

- [9] It is well-established that an appellate court's power to interfere with the exercise of such a discretion by a lower court is circumscribed. As stated in *Ex parte Neethling and Others*,⁴ and *Rex v Zackey*,⁵ an appellate court does not interfere merely because it might have exercised the discretion differently. Interference is only justified if the court *a quo* exercised its discretion capriciously, upon a wrong principle, failed to bring an unbiased judgment to bear on the question, or did not act for substantial reasons; in essence, if a judicial discretion was not exercised.⁶

SUMMARY OF APPLICANTS' GROUNDS FOR LEAVE TO APPEAL

- [10] The defendants seek leave to appeal on multiple grounds. They contend that I fundamentally erred in striking out their defence and consequently granting judgment in favour of the Plaintiff. Their principal submissions include:

10.1. That the plaintiff's application for condonation for the late filing of its summary judgment application should have been determined first. Until condonation was granted, they argue, the summary judgment application was not properly before me, and thus no obligation arose

³ *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd and Another* 1989 (4) SA 31 (T) at 36C

⁴ 1951 (4) SA 331 (A) at 335D-E

⁵ 1945 AD 506 at 511-513

⁶ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another* 2015 (5) SA 245 (CC) at [88]

for them to file heads of argument in respect thereof (the "condonation first" argument).

- 10.2. That I failed to consider or determine their own pending applications for leave to amend their plea. They submit that their defence was not "finalised" or "complete" due to these pending amendments, and it was therefore premature and incorrect to strike out the defence before these amendment applications were adjudicated.
- 10.3. That my finding that their explanation for non-compliance with the compelling order to file heads – specifically their submission at the hearing that their intention to amend their plea "overtook" the compelling order – was unconvincing, constituted an error.
- 10.4. That I erred in finding them dilatory and failed to properly consider alleged dilatoriness on the part of the plaintiff, particularly its delay of nearly two-and-a-half years in bringing the strike-out application after the compelling order was granted.
- 10.5. That I misinterpreted the effect of the compelling order of 7 September 2022, which they argue was not an automatic entitlement for the plaintiff to have their defence struck out.

[11] They further contend that the outcome prejudiced their constitutional rights to a fair hearing and to have their case properly ventilated.

ANALYSIS OF GROUNDS ADVANCED

[12] Having summarised the principal grounds upon which the defendants seek leave to appeal, I turn now to consider whether these grounds, individually or collectively, meet the requisite threshold for the granting of such leave.

[13] **The Right to be Heard and Timeous Exercise of Rights:** The right to be heard is a fundamental tenet of our legal system. However, this right is not absolute or unconditional. It does not equate to an entitlement to be heard at any time of a party's choosing or in a manner that disregards the Rules of Court, Court Orders, and the orderly progression of litigation. Litigants are obliged to avail themselves of their rights and opportunities to present their arguments and defences in a timeous and procedurally compliant manner. A failure to do so, as is evident here, carries consequences.

[14] **Failure to Formally Explain Non-Compliance in the Strike-Out Application:** A point of considerable significance, emphasised by the plaintiff, is the defendants' failure to deliver a substantive answering affidavit in the strike-out application itself. It argued that if no such affidavit was filed, or if it failed to articulate the defences now raised, then the explanations proffered for their non-compliance with the compelling order (such as the "condonation first" argument or the argument that their amendments "overtook" the order) were not formally before me as their pleaded defence to the strike-out application at the time that application was heard and decided. I agree. The absence of a formal, affidavit-based explanation at the critical juncture renders their current arguments for leave to appeal largely *ex post facto* justifications, and more importantly, raises nothing on which to assess their *bona fides*.

- [15] **Contradictory Litigation Postures and Impact on *Bona Fides*:** The argument presented by the defendants on 3 February 2025 – that their intention to amend their plea and the need for their amendment applications to be heard first "overtook" the prior compelling order – is fundamentally at odds with the "condonation first" argument now forming the main ground for this leave to appeal application.
- [16] If their operative reason for not filing heads of argument for the plaintiff's summary judgment and condonation applications was that their *own amendment applications took precedence* and needed to be resolved first, this directly contradicts the assertion that their non-compliance was justified because the plaintiff's condonation application was pending. These are two distinct, and mutually exclusive, justifications for their failure to comply with the compelling order of 7 September 2022.
- [17] This shift of primary justification significantly impacts the assessment of the *bona fides* and soundness of the "condonation first" argument. It strongly suggests that the "condonation first" point was not the genuine, primary legal shield upon which they relied when their non-compliance was squarely before the Court. My finding that no satisfactory explanation was tendered for this non-compliance reflects the inadequacy of the explanation(s) actually proffered at the hearing.
- [18] **Failure to Utilise Available and More Nuanced Procedural Options:** The compelling order of 7 September 2022 required the defendants to file heads for the plaintiff's summary judgment and condonation applications. Even if they believed their amendments needed to be heard first, or that the summary

judgment was premature pending condonation, nothing prevented them from filing heads of argument. At a minimum, they could have addressed the plaintiff's condonation application, which they had opposed, and explained their position on the remaining applications. Their choice to file heads at the very last minute only for their own amendment applications, while completely ignoring the compelling order concerning the plaintiff's applications, demonstrates a selective and wilful disregard for a specific part of a court order, not a principled stand based on the plaintiff's pending condonation.

- [19] **Prior Opportunities to Assert a Coherent Defence:** The defendants had several earlier junctures to formally and substantively raise a consistent legal defence for their escalating non-compliance. Their failure to do so, culminating in an argument at the hearing that their amendments "overtook" the order which contradicts their current primary ground for appeal, further weakens their position.

- [20] **The Defendants' Focus on Plaintiff's Procedural Lapses:** The defendants' attempt to deflect from their own non-compliance by focusing on the plaintiff's earlier procedural misstep (the late summary judgment filing) does not assist them. The plaintiff's need for condonation was a distinct issue. It did not absolve the defendants of their duty to obey a subsequent, direct court order aimed at progressing the hearing of, amongst other things, that very condonation application.

- [21] **Critique of Specific Assertions in Defendants' Grounds for Appeal:** The defendants, in their attempt to establish error, have advanced certain

submissions which are based on incorrect factual premises and flawed legal reasoning.

[22] One such notable submission is the assertion that:⁷

"The learned Judge further erred in finding that the applicants' failure to file heads due to the intention to amend the plea, was unconvincing. The learned Judge failed to consider that there was no application before him to compel the applicants' compliance, nor was there any summary judgment application properly before him, which necessitated any heads being filed by the applicants, despite the order to compel, and, as such, it is submitted that the applicants' behaviour was indeed correct."

[23] This statement is untenable:

23.1. An intention to amend a plea, or an argument that such an intention "overtook" a court order, is not a legally sound justification for disobeying that order.⁸ A party's unilateral intention or pending application to amend its pleadings cannot, as a matter of law, suspend or nullify a pre-existing, specific, and peremptory court order directed at that party. To hold otherwise would permit litigants to bypass court orders at will merely by signalling an intention to amend, thereby creating procedural uncertainty and undermining the authority of the court.

23.2. The assertion that there was "*no application...to compel...compliance*" before me at the hearing of 3 February 2025 (in the context of the strike-out for non-compliance with a prior compelling order) is factually

⁷ Paragraph 4.16

⁸ See *Leask v East Cape Forest (Pty) Ltd* 2008 JDR 1316 (E) at 9

baseless. The strike-out application was predicated entirely on the defendants' failure to comply with the explicit court order of 7 September 2022, which did compel them to file heads of argument.

23.3. The claim that the summary judgment application was not "*properly before [me]...despite the order to compel*" misunderstands the binding nature of court orders. An order stands until set aside; the defendants never sought to set aside the compelling order. Furthermore, that order also pertained to the plaintiff's condonation application.

23.4. The conclusion that the "*applicants' behaviour was indeed correct*" is unsustainable given their direct failure to comply with a court order, a failure they attempt to justify with flawed premises. Reliance on such assertions further diminishes any reasonable prospect of success on appeal.

[24] Argument Regarding "Incomplete Defence" Due to Pending

Amendments: The defendants further contend, as a ground for appeal, that I erred in striking out their defence when there was a pending application to amend such defence, arguing that their defence "*had not at that stage been finalised, and it was therefore premature and incorrect... to strike out the Applicants' defence.*" This submission is misconceived. The striking out of the defence was not predicated on an assessment of the substantive merits or completeness of the plea as it stood or as it might potentially be amended. Rather, the sanction was imposed due to a distinct procedural default: the defendants' failure to comply with the compelling order to file heads of argument for the plaintiff's summary judgment and condonation applications.

A party's pending application to amend its plea does not create an immunity against sanctions for non-compliance with other unrelated court orders or rules of procedure. The orderly progression of litigation requires adherence to all court directives, and a party cannot unilaterally suspend its obligations under one order by pointing to its own aspirations to amend its pleadings for a different purpose. The argument that the defence was "incomplete" or "not finalised" is therefore not a valid legal justification for the non-compliance which led to the striking out.

- [25] **The Court's Discretion, Governing Legal Principles, and the Explanation for Non-Compliance:** The decision to strike out a defence is discretionary. As established in *Wanson (supra)* and supported by *Leask v East Cape Forest (Pty) Ltd*,⁹ and *Millu v City of Johannesburg Metropolitan Municipality and another*,¹⁰ contumacy is not the sole ground for the imposition of a such a sanction. A history of non-compliance, dilatoriness, and the failure to provide a satisfactory explanation for disobeying a court order – especially where the explanation offered is legally untenable – can justify striking out a defence. The principle from *Chetty v Baker McKenzie*,¹¹ that in the absence of a full and reasonable explanation for a material default, prospects of success are immaterial, is also relevant by analogy. My original decision was grounded in the lack of a satisfactory explanation for non-compliance.

- [26] **The Interests of Justice:** The defendants invoke the "interests of justice" as a standard for granting leave to appeal. While the interests of justice are

⁹ 2008 JDR 1316 (E)

¹⁰ 2024 JDR 1329 (GJ)

¹¹ (2022) 43 ILJ 1599 (LAC) at [10] and [29]

indeed paramount, they encompass not only the rights of the defendants but also those of the plaintiff and the integrity of the judicial process. The interests of justice require litigants to comply with court orders, to participate in proceedings meaningfully and timeously, and to ensure finality in litigation. Allowing an appeal based on shifting justifications for clear non-compliance with court orders, particularly where no formal explanation was tendered in the primary proceedings, would not serve the broader interests of justice. Indeed, the interests of justice are better served by ensuring that litigation is conducted efficiently, that limited court resources are effectively utilised, that court orders are respected, and that finality is achieved where a party has, through its own conduct and lack of satisfactory explanation for defaults, effectively forfeited its right to further contest the merits.

CONCLUSION ON APPLICATION FOR LEAVE TO APPEAL

- [27] The defendants' conduct at the hearing of 3 February 2025, specifically filing heads of argument only for their own amendment applications and arguing that their intention to amend "overtook" the compelling order, significantly undermines their current primary reliance on the "condonation first" argument. The explanation actually offered at the hearing for non-compliance with the compelling order was, and remains, unconvincing.
- [28] The contradictory postures adopted by the defendants, their failure to avail themselves of more appropriate procedural responses, their reliance on flawed assertions, and the stringent test for appellate interference with a discretionary order of this nature, collectively demonstrate a lack of reasonable

prospects that an appellate court would find my exercise of discretion to strike out the defence to be improper.

[29] In these circumstances, the defendants have not established that their appeal *would* have a reasonable prospect of success.

[30] No other compelling reasons for the appeal to be heard have been demonstrated.

ORDER

[31] The application for leave to appeal is dismissed with costs.



H M Viljoen

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Delivered: This judgment was prepared and authored by the 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 for hand-down is deemed to be 29 May 2025.

Date of hearing: 23 May 2025

Date of judgment: 29 May 2025

Appearances:

Attorneys for the defendants: Darryl Furman & Associates

Counsel for the defendants: Adv. N Riley

Attorneys for the plaintiff: AD Hertzberg Attorneys

Counsel for the plaintiff: Adv. L Hollander