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

[redacted]

DATE: 18 February 2025

In the matter between:

KANSAI PLASCON (PTY) LTD	Plaintiff
And	
REDEC SERVICES (PTY) LTD	First Defendant
ENGELBRECHT, SCHALK WILLEM BURGER	Second Defendant
ASSNESS, LIRAN BARUCH	Third Defendant

JUDGMENT

H M VILJOEN A J

INTRODUCTION

[1] In this case, five applications arising from an action by the plaintiff, Kansai Plascon, against the defendants, Redec Services (Pty) Ltd, Engelbrecht, and Assness are before me. Kansai Plascon's claim originates from a credit facility granted to Redec Services (Pty) Ltd, secured by unlimited suretyships from Engelbrecht and Assness.

[2] The applications before me are:

2.1. Summary judgment by Kansai Plascon,

2.2. Condonation for late filing of summary judgment by Kansai Plascon,

2.3. Striking out of the defendants' defence based on non-compliance with court order by Kansai Plascon,

2.4. First application for leave to amend plea by the defendants, and

2.5. Second application for leave to amend plea by defendants.

[3] The striking out application is potentially dispositive of the entire matter, as its success would render the remaining applications moot. If the defendants' defence is struck, judgment would likely follow in favour of Kansai Plascon, effectively achieving the same outcome as a successful summary judgment application. Therefore, I will begin by considering this application.

THE STRIKING OUT OF A DEFENCE: GENERAL PRINCIPLES

[4] A court possesses inherent jurisdiction to safeguard the integrity of its process.[1] It is well-established that the court has the power to strike out a claim or defence in the exercise of this jurisdiction. The exercise of this drastic power is discretionary. This discretion must be exercised judicially but is not limited to instances of contumacy.[2] The exercise of this discretion is fact specific.[3]

[5] The court's general power to strike out is expressly embodied in several rules of court, both of general and of specific application. Examples are Rule 21(4), 35(7) and 30A. These Rules provide remedies for non-compliance with rules, requests, notices, or directions.

[6] The Practice Manual of this Division in force during May 2022 precluded the set down of an opposed application until all parties thereto had filed heads of argument.

[7] Recognising that this requirement left one party at the mercy of the other, the Practice Manual afforded a compliant party a remedy to compel the non-compliant party to file heads of argument. The remedy is cast in the mould of Rule 35(7). Paragraph 9.8.2(12) entitled the compliant party could enrol the matter provisionally whilst simultaneously applying for an order directing the non-compliant party to file heads of argument within 3 days of such order.

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1 *Millu v City of Johannesburg Metropolitan Municipality and another* 2024 JDR 1329 (GJ) at [17]
2 at 280C
3 *Millu supra* at [23]

Failing compliance, the defaulting party's claim or defence could upon application be struck out.

Case Law

[8] Three cases illustrate the courts' approach to applications to strike out aberrant litigant's claims or defences: *The Wanson Company of South Africa (Pty) Ltd v Establissements Wanson Construction de Material Thermieque Societe Anonyme,*[4] *Leask v East Cape Forest (Pty) Ltd,*[5] and *Millu v City of Johannesburg Metropolitan Municipality and another*.[6]

[9] Across these cases, courts consider factors such as the gravity of the non-compliance, reasons for non-compliance, prejudice to the parties, interests of justice, and contumacy when deciding whether to strike out a defence.

[10] *Millu* concerns non-compliance with the same provisions of the Practice Manual as raised in this matter. Therein, the defendant, the City of Johannesburg, displayed a pattern of delay and non-compliance. The Deputy Judge President of this Division had occasion to remark:

> *"In this case, however, in my view, the only reasonable inference to draw from the facts is that there has been an egregious contempt of an order of this court. Moreover, a contempt which is calculated not only to stimy [sic] the adversary by inordinate delay, but also constitutes an abuse of the court process. Delay has characterised the City's conduct from the beginning of the litigation. In particular, the elapse of a period of over 5 months in the face of an order court to file the heads of argument and still not file the heads is especially egregious. Moreover, there is no explanation and, in particular,*

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4 1976 (1) SA 275 (T)
5 2008 JDR 1316 (E)
6 2024 JDR 1329 (GJ)

no condonation application, nor, indeed, even the tender of a condonation application in regard to the non-compliance with the order of court."[7]

And

"It is argued that a strike out of the defence is inappropriate because the opportunity existed for the applicant to set down the matter on the opposed motion roll in the absence of the City's heads of argument. The intellectual premise for this contention is obscure. It ignores the fact of non-compliance with an order of the court. This argument of the City, as do the other contentions dealt with hereafter, wholly fails to grasp the gravity of the manifest defiance of the court order. In this case the critical issue is not a mere failure to comply, it is the pernicious expectation of impunity with which the City has defied the order of court."[8]

THE DEFENDANTS' CONDUCT

[11] The defendants' conduct in this litigation has been marked by a persistent pattern of dilatoriness, as evidenced by the following chronology.

[12] After being served with summons in October 2020, the defendants filed a notice of intention to defend on 6 November 2020. Following a notice of bar on 18 February 2021, the defendants raised an exception to the particulars of claim as disclosing no cause of action on 26 February 2021. The exception was a day late. It precipitated an amendment to the particulars of claim. A second notice of bar, dated 5 July 2021, was required before the defendants' plea was served on 13 July 2021, again a date late. Although Kansai Plascon in both instances opted not to assert that the defendants were *ipso facto* barred, the defendants' tardiness foreshadowed their subsequent conduct.

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7 At [16]
8 At [19]

[13] On 10 September 2021, Kansai Plascon launched an application for summary judgment and, and some weeks thereafter, an application for condonation for the late filing of the summary judgment application. The condonation application explains that the delay was the result of Kansai Plascon's attorney, Mr Kane, suffering post-Covid-19 complications, resulting in him being incapacitated until 16 August 2021. Significantly, Mr Kane attempted to reach an agreement with the defendants' attorney to avoid the need for the condonation application. However, despite several follow-up emails by the former, the latter never provided a definitive response to the request.

[14] The defendants did not immediately oppose either the application for summary judgment or the application for condonation. The applications were set down on the unopposed roll of 27 January 2022. The defendants received notification of the set down on 15 October 2021. However, they maintained silence. Only on 11 January 2022 did they file an answering affidavit to the condonation application. They offered no answer to the summary judgment application, nor did they explain their failure to engage with its merits. There was no indication that they intended amending their plea. The result of the belated answering affidavit was that the applications for summary judgment and condonation were removed from the roll.

[15] It was suggested by the defendants in argument that the removal of the matter from the roll was because the parties had not agreed on the simultaneous hearing of the applications. It was, so it was argued, the defendants' position that the condonation application should be finalised before they answered to the summary judgment application. I could find no contention anywhere in the

papers that the defendants contemplated separate hearings of these applications. It appears to be an afterthought designed to explain the defendants' failure to set out a defence to the summary judgment application.

[16] Be that as it may, enrolling the applications on the opposed roll, required, in terms of the provisions of the Practice Manual of this Division in force at the time, heads of argument from both parties. Kansai Plascon filed theirs on 30 May 2022. The defendants never filed any.

[17] Consequently, Kansai Plascon obtained a court order on 7 September 2022, compelling the defendants to file heads of argument within three days. This order was granted on an unopposed basis. In a blatant disregard for the court's authority, the defendants failed to comply with the order.

[18] The defendants' counsel argued that their intention to amend their plea, communicated in a notice filed on 21 September 2022, justified their non-compliance, suggesting that the order had been overtaken by the proposed amendment. A party cannot unilaterally undo a court order, except when abandoning an order, they themselves obtained. Compliance was the defendants' only acceptable response to the court order.

[19] In addition, the defendants' justification is contradictory. If they insisted on separating the condonation application from the summary judgment application, requesting that the former be heard first, they ought to have complied with the order at least to the extent of addressing the condonation application. Their subsequent attempt to use a proposed amendment to their plea as justification for not filing heads of argument at all is therefore illogical and disingenuous.

[20] The plaintiff filed updated heads of argument in August 2024 and a draft practice note in January 2025; the defendants delayed filing their practice note and heads of argument until just days before the hearing. Their heads of argument focused solely on their applications to amend, requesting a postponement of all the other applications, including the crucial application to strike out their defence. (The defendants' heads of argument, eventually filed on 27 January 2025, did not address the striking out application at all.)

[21] To my mind, the probabilities favour the inference that the defendants are engaged in a deliberate attempt to manipulate the court process for their own advantage. Their conduct has not only prejudiced the plaintiff by causing significant delays and increasing costs but has also undermined the efficient administration of justice and the authority of the court.

APPLYING THE FACTS TO THE PRINCIPLES

[22] To assess the appropriateness of striking out the defendants' defence in this case, we need to apply the principles from *Millu v City of Johannesburg Metropolitan Municipality* to the facts at hand.

Gravity of Non-Compliance:

[23] The defendants' non-compliance is not merely persistent but also significant in its nature. Their repeated failure to meet deadlines, including the late filing of their plea and their failure timeously to file heads of argument, demonstrates a disregard for the court's timelines and the efficient administration of justice. More seriously, they have ignored a court order to file heads of argument, disrupting the orderly progression of the case and showing disrespect for the

court's authority. Their last-minute attempts to amend their plea, instead of complying with court orders and addressing the merits of the case, further demonstrate a deliberate strategy to hinder the proceedings. This pattern of non-compliance has significantly delayed the adjudication of this matter, causing substantial prejudice to the plaintiff and wasting valuable court resources.

Reasons for Non-Compliance

[24] The defendants have offered no compelling explanation for their persistent non-compliance. Their attempt to justify their failure to file heads of argument based on their intention to amend their plea is unconvincing. This argument is fundamentally flawed, as the proposed amendment is irrelevant to the defendants' obligation to comply with the court order. Furthermore, their sudden desire to amend, with no prior indication of this intention in their earlier answering affidavit or any attempt to bring this to the attention of the court hearing the application to compel, raises serious questions about their motives. It suggests an opportunistic attempt to avoid the consequences of their non-compliance rather than a genuine need to revise their pleadings. In truth, the defendants have not taken a single proactive step to bring the matter to finalisation, leaving even the enrolment of their applications to amend to the initiative of the plaintiff.

[25] The defendants have not demonstrated any remorse for their conduct or taken any steps to rectify the situation, such as applying for condonation. Their actions suggest a deliberate strategy of delay and avoidance rather than a genuine attempt to engage with the merits of the case.

[26] The defendants argue that the plaintiff contributed to the delays in the proceedings. They point to instances where the plaintiff objected to their proposed amendments only on the last day of the allowed period and periods where the plaintiff was allegedly inactive. Whilst it cannot be gainsaid that the plaintiff could arguably have acted more expeditiously in certain respects, this argument does not excuse the defendants' own failures to comply with court orders and rules. The plaintiff's conduct, even if it contributed to some delays, does not relieve the defendants of their obligation to comply with the court's instructions. Furthermore, the defendants have not provided any specific evidence to support their insinuation that the plaintiff's actions were deliberately dilatory or intended to obstruct the proceedings.

Prejudice to the Plaintiff:

[27] The defendants' non-compliance has caused significant prejudice to the plaintiff. The delays have resulted in increased costs and prevented the plaintiff from obtaining a timely resolution of the dispute. The plaintiff could rightfully feel that its confidence in the judicial process is undermined.

Interests of Justice:

[28] Striking out the defence would serve the broader interests of justice. It would promote fairness by ensuring that the plaintiff is not further prejudiced by the defendants' dilatory tactics. It would uphold the integrity of the court process by demonstrating that non-compliance with court orders and rules will have consequences. It would also deter similar dilatory tactics in the future, encouraging litigants to engage meaningfully with the legal process and respect the court's authority. Furthermore, striking out the defence would bring

this protracted litigation to a timely conclusion, promoting the principle of finality in legal disputes.

Adequacy of Respondent's Engagement:

[29] The defendants have not engaged meaningfully with the plaintiff's case. Instead of addressing the plaintiff's application for summary judgment, they focused solely on procedural manoeuvres and last-minute attempts to amend their plea. They have consistently avoided engaging with the merits of the dispute, suggesting an intention to evade accountability and delay the proceedings. Their conduct throughout this litigation demonstrates a lack of respect for the court process and a disregard for the plaintiff's rights."

[30] Considering all these factors, the defendants' conduct aligns with the type of behaviour that the court condemned in *Millu*.

CONCLUSION

[31] Considering the defendants' persistent non-compliance, their lack of reasonable explanation, the prejudice caused to the plaintiff, and the need to uphold the integrity of the court process, I find that striking out their defence is the appropriate remedy. This action is consistent with the principles of fairness, efficiency, and the integrity of the judicial process.

[32] Having arrived at this conclusion, it is unnecessary for me to make any findings in relation to the application for summary judgment, the condonation application or either of the defendants' applications for leave to amend.[9]

[33] I make the following order:

1. The defendants' defence is struck out.

2. Judgment is granted in favour of the plaintiff, against the defendants jointly and severally, for payment of the sum of R6,630,784.44 plus interest thereon at a rate of 24% *per annum*, compounded monthly, from 1 May 2020 to date of payment.

3. The defendants jointly and severally are ordered to pay the costs of the action, including any previously reserved costs, on an attorney and client scale.

[redacted]

H M Viljoen

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Delivered: This judgement 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 18 February 2025.

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[9] The first application for leave to amend was abandoned during argument, with a tender of costs.

Date of hearing: 3 February 2025

Date of judgment: 18 February 2025

Appearances:

Attorneys for the plaintiff: AD Hertzberg Attorneys

Counsel for the plaintiff: Adv. L Hollander

Attorneys for the defendants: Darryl Furman & Associates

Counsel for the defendants: Adv. N Riley