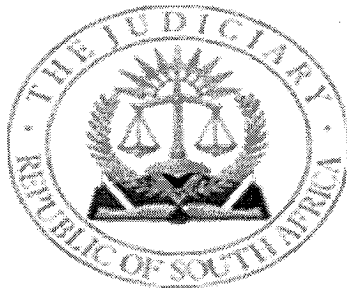


REPUBLIC OF SOUTH AFRICA



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

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

CASE NO: A3071/2018

29/10/18

Date

ML TWALA

In the matter between:

**SOWETO STRUCTURAL STEEL
ENGINEERING (PTY) LTD**

APELLANT

AND

TRADE PROPERTY VENTURES NO.14 CC

RESPONDENT

JUDGMENT

TWALA J

- [1] This is an appeal against the judgment and order of the Magistrate Court sitting at Springs delivered on the 9th of February 2018 which condoned the late filing of the respondent's plea and its counter claim.
- [2] The central issue in this appeal is whether the Magistrate has exercised its discretion judicially when it condoned the late filing of the respondent's plea and counter claim after they were barred from doing so.
- [3] It is common cause that the appellant has instituted summons proceedings against the respondent and the respondent failed to file its plea and counter claim within the prescribed time frames. It is further not in dispute that the appellant barred the respondent from pleading which bar galvanised the respondent to bring an application for condonation for the late filing of its plea and counter claim. It is not in dispute that the application for condonation is preceded by a number of other interlocutory applications between the parties.
- [4] The critical question which begs to be asked is whether the order of the magistrate condoning the late filing of the respondent's plea and counter has the effect of a final order in the matter.
- [5] Section 83 (b) of the Magistrate's Court Act, 32 of 1944 provides as follows:

“Appeal from magistrate's court

Subject to the provisions of section 82, a party to any civil suit or proceedings in a court may appeal to the provincial or local division of the Supreme Court having jurisdiction to hear the appeal against –

(a)

(b) *Any rule or order made in such suit or proceeding and having the effect of a final judgment, including any order under Chapter IX and any order as to costs:*

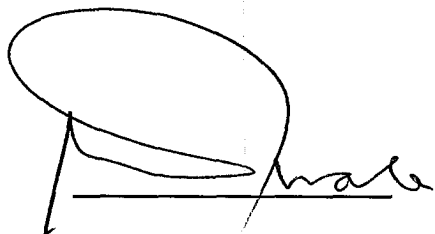
(c)

- [6] Every court has a discretion which it exercises in the execution of its functions. However, the court must exercise its discretion reasonably and judicially. It is not competent of the appeal court to interfere with the exercise of the discretion of another court unless it is patently clear that the exercise of the discretion was unreasonable and not judicially.
- [7] Counsel for the appellant contends that the magistrate did not exercise its discretion judicially by granting condonation for the late filing of the plea and counter when the founding papers of the respondent did not meet the requirements set out for condonation applications. It is contended further that the respondents should have applied for the upliftment of the bar instead of applying for condonation for late filing of its plea and counter claim.
- [8] I agree that the application for condonation by the respondent did not deal with the issue of the delay in detail as required. However, this is exactly where the discretion of the court becomes relevant. In my view, when a court entertains an application for condonation, it does not only confine itself in the papers before it, but look at the whole matter at that point and find a balance which will serve the interest of justice and exercise its discretion along that path. An application for condonation is meant to correct certain shortfalls of a party in its handling of its case especially where there is non-compliance with the rules of court.

- [9] In the present case the parties have been engaged in numerous interlocutory applications which have caused inordinate delays in the hearing of the main issues in the matter. It is undesirable that the finality of a matter should be unnecessarily delayed by side issues. In the result, the magistrate correctly exercised its discretion, in the interest of justice as it appears on the record, to grant condonation even though the respondent's papers did not meet the requirements set as a principle in condonation applications. In my view, there is no prejudice to be suffered by the appellant in this regard.
- [10] The *audi alteram partem* rule is a fundamental principle of our law which is enshrined under the bill of rights in the constitution of the Republic of South Africa Act, 108 of 1996 for which the courts have been enjoined to observe at all times. The removal of the bar, in my view, by way of application to the court, would have had the similar result of allowing the parties an opportunity to ventilate the issues at the trial of the matter. It is my respectful view therefore that the magistrate exercised its discretion reasonable and judicially under the circumstances and the appeal falls to be dismissed on this ground.
- [11] On the other hand, I agree with the submission of counsel for the respondent that that the judgment of the magistrate appealed against is not a final judgment for it does not go to the merits or main issues of the matter between the parties. The judgment is on an interlocutory application which opens the door for the respondent to plead to the issues in the main action and bring its counter claim. The ineluctable conclusion one comes to in this case is that the judgment is not of a final nature and therefore it is not appealable. In the result, I am of the view that the appeal falls to be dismissed on this ground as well.

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

The appeal is dismissed with costs.



TWALA J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

I agree.



MATSEMALA AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 16 October 2018

Date of Judgment: 29 October 2018

For the Appellant: ADV. D.Z KELA

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**For the Respondent: ADV. H.P WEST
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