

**REPUBLIC OF SOUTH AFRICA**



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

Case Number: 49557/2021

|                        |                                 |
|------------------------|---------------------------------|
| (1)                    | REPORTABLE: NO                  |
| (2)                    | OF INTEREST TO OTHER JUDGES: NO |
| <b>7 February 2024</b> | _____                           |
| DATE                   | SIGNATURE                       |

In the matter between:

**GAUTENG DEPARTMENT OF INFRASTRUCTURE  
DEVELOPMENT**

First Applicant

**ZYLEC INVESTMENTS (PTY) LTD**

Second Applicant

and

**THEMBA CONSULTANTS (PTY) LTD**

Respondent

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**JUDGMENT**

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[1] The first applicant sought an application in terms of Rule 27 on the following terms:

- “1. That the delay on the part of the applicant in instituting this application be condoned.
2. That the bar against the first applicant be hereby removed.
3. That the time frames for filing of [a] plea be hereby extended.
4. That the first applicant be directed to file its plea within 15 days of judgment.
5. That costs be costs in the cause.”

The respondent opposed the application.

[2] The background to the application is as follows. The second applicant appointed the respondent to provide a range of building environment consulting services, including structural engineering consulting services in relation to the refurbishment of the Hillbrow Hospital Precinct. The second applicant does not have such services. It, therefore, subcontracted the respondent to attend to this service later in 2016. The services commenced in 2017. The respondent appointed Leanka Property Holdings as its project manager and agent. The respondent was required to perform additional services namely the detailed condition assessment of MacKenzie Building and Superintendent House. The service was rendered and paid for. The service for detailed assessment was extended to all buildings forming part of the Hillbrow Hospital Precinct. The agreed rate was the amount of R 8 266 183. 40. The respondent submitted its invoice to the second applicant to be submitted to the first applicant. The invoice was not paid. The respondent is claiming for the amount it believes the first respondent has been enriched by its services rendered in the amount of R9 506 110. 91 plus interest on the aforementioned amount.

[3] The summons was served on the first applicant on 5 November 2021 and on the second applicant on 4 November 2021. The state attorney delivered a notice of intention to defend on behalf of the first applicant on 22 February 2022. According to the first applicant, briefing counsel was delayed due to the new briefing process introduced. The respondent brought an application for default judgment on 9 June 2022. This was opposed. The first applicants' attorneys were informed at the time that the notice of bar was being delivered. The first applicant's attorneys were unaware of the application. The service was

on the state attorney as appears from the record. The notice indicates service on the agreed service address; however, there is no proof of service on the agreed service address.

- [4] The first applicant contends it always intended to defend the respondent's claim, and it is not in wilful default and will be adversely affected through no fault of its own if not allowed to file its plea. Moreover, the first applicant indicates that it has good cause and if allowed to file a plea it intends to raise several pleas.
- [5] The first applicant intends to raise a plea of prescription in terms of section 11(d) of the Prescription Act 68 of 1969 in view of the respondent's debt arising in August 2017 and the summons being issued on 14 October 2021 and served on 5 November 2021. It contends the statutory prescription period for the debt had already lapsed.
- [6] It also intends to raise a further special plea in terms of non-compliance with section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, which requires that no creditor may recover a debt by of legal proceedings unless it has given notice to the organ of state in writing of the intention to recover the debt. Such notice must be within six months from the date such debt became due. The respondent failed to give such notice.
- [7] The respondent has instituted proceedings against the second applicant under case number 142/2019. Thus, the first applicant intends to raise a plea of *lis pendens*. It contends that the issues relate to the same cause of action and are between the same parties, relating to the same set of facts as the present matter and have not been disposed of. The aforementioned matter was postponed *sine die* and requires certification.
- [8] The first applicant also intends to raise an exception that the respondent's claim does disclose a cause of action and is not founded in contract. It claims the respondent does not claim a breach of contract, specific performance or damages. The respondent's claim is based on the express contract between

the second applicant and the respondent wherein the second applicant subcontracted the respondent in a contract between the first applicant and the second applicant. The contract relied upon is not attached. Consequently, the first applicant avers that the pleadings are vague and embarrassing.

- [9] The first applicant contends that it will be prejudiced if the default judgment is heard without removing the bar as it will result in severe harm to the first applicant, who is entitled to a right to a fair trial in terms of the Constitution. In contrast, the respondent will not suffer any prejudice if the application is heard and the application is granted, and the respondent is compensated with an appropriate costs order in due course.
- [10] The respondent opposed the application to lift the bar and pointed out that the first respondent was in wilful default. Whilst the summons was served on 5 November 2021, the notice of intention to defend was due on 3 December 2021, was dated 14 February 2022 and only filed on 18 February 2022. The first applicant failed to furnish an explanation for this delay. There is no explanation why instructions were not given for the 11-week period from 5 November 2021 to 14 February 2022. The plea was due by 11 March 2022. The respondent contends furthermore that the explanation furnished, that counsel could not be briefed timeously, was nonsensical. This was not communicated to the respondent's attorneys, and an indulgence was not sought. The details of the actions taken to brief counsel are not furnished and it is suggested that an attorney with right of appearance in the office of the State Attorney could have drafted and delivered the plea.
- [11] The respondent stated it waited a month to serve the notice of bar, which the first applicant signed and stamped upon receipt. It was thus disingenuous to suggest that it had no knowledge of receipt. It ignored the notice, causing inconvenience and prejudice to the respondent, which has been the first applicant's modus operandi since 2018. The first applicant's defence of prescription has no merit as the invoice relied upon is dated 8 November 2018, whilst the summons was served on 5 November 2021, which falls within the three-year period provided in the Prescription Act 68 of 1969. The invoice was

issued in accordance with the first applicant's instructions of 7 November 2018. The respondent suggests the first applicant may have misread the particulars of claim when it referred to the date of 28 July 2018. It also contends the same applies in relation to the notice in terms of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, as the letter is attached to the summons as an Annexure marked "PC7.2".

[12] The respondent denies that the defence of *lis alibi pendens* is available to the first applicant as a defence as the action referred to is an end. Moreover, it was based on a separate cause of action, namely the respondent's contract with the second applicant against whom no relief is sought in the present action. It also contends that its action against the first applicant in the present action is based on unjust enrichment and is a delictual action and not a contractual claim. The first applicant was not a party to the order in the action under case number 142/2019. The respondent maintains that the first applicant failed to appreciate that the respondent pleaded in its particulars of claim that the first applicant was unjustly enriched as a result of the respondent's labour tendered in terms of the contract between the respondent and the second applicant the copy which was attached as PC1, PC2 and PC3. The first applicant was once again unaware of the contents of the summons and the attachments.

[13] The respondent contends, on the contrary, that any prejudice that is present is applicable to the respondent who is a small business and is at risk of going out of business as a result of the first applicant failing to pay the respondent whilst enjoying the benefits of its labour.

[14] With regard to the decision in *Ferris v First Rand*, in condoning the lateness of the first applicant's application, I have considered the reasons for its failure to file the notice to defend timeously and am satisfied with the reasons furnished. The lateness is not the only consideration according to *Ferris*; the interests of justice and the applicant's prospects of success, as well as the importance of the issues to be decided, are also considerations. The first applicant's explanation that the procurement policy made it difficult to enlist the service of counsel and the huge work load of the State Attorney are a reasonable

explanation that there had not been a reckless and intentional disregard for the rules of court.

[15] I have also noted that the parties agreed to service by email, and there is an indication that there was service electronically as agreed, but no proof of such service is attached.

[16] Counsel for the respondent submitted that the first applicant's application should be rejected out of hand and the prejudice the respondent will suffer as a small business must be met with a punitive costs order. I cannot conclude that the first applicant is in wilful default under the above circumstances. The respondent's claim in contract is against the second applicant and it sues the first applicant for unjust enrichment. To the extent that the claim in case number 142/2019 is still pending the importance of the issues in that matter are relevant to the present matter and the first applicant should be permitted to properly proceed with its defence in this action as it is in the interests of justice. Any prejudice which may arise may be justly compensated by a costs order at the appropriate time.

#### ORDER

[17] Consequently, I grant the following order:

1. The delay in instituting this application is hereby condoned;
2. The notice of bar against the first applicant is hereby removed;
3. The time frames for the first applicant's filing of its plea have been extended;
4. The first applicant is hereby directed to file its plea within 15 days of this order;
5. The costs shall be costs in the cause.

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**SC Mia**  
**JUDGE OF THE HIGH COURT**  
**JOHANNESBURG**

For the Applicant:

Adv. F Magano  
Instructed by Nochumsohn & Teper  
Attorneys

For the Respondent:

Adv. M Nowitz  
Instructed by State Attorney

Heard: 08 August 2023

Delivered: 07 February 2024