



**In the High Court of South Africa  
(Western Cape Division, Cape Town)**

**Case Number: 8049/2019**

In the matter between:

**THE CITY OF CAPE TOWN**

Plaintiff

**And**

**ICT-WORKS PROPRIETARY LIMITED**

Defendant

**Date of hearing: 19 April 2023**

**Date of Judgment: 28 April 2023**

**Before: The Honourable Ms Acting Justice Pangarker**

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**JUDGMENT DELIVERED THIS 28<sup>TH</sup> DAY OF APRIL 2023**

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**PANGARKER, AJ**

**Introduction**

[1] On 10 May 2022, Goliath DJP (as she then was) delivered a judgment pursuant to the hearing of an exception taken by the defendant against the plaintiff's Particulars of Claim. At paragraph 43 of the judgment, the learned Judge granted the following order (the Goliath order):

*"43.1 The exception is upheld with costs.*

*43.2 Plaintiff is given leave to amend the particulars of claim by way of notice of amendment within 30 days of the date of this order.*

43.3 *Should the Plaintiff fail to amend the particulars of claim within the time stipulating in this order, the defendant is granted leave to set the matter down for an order striking out the Plaintiff's claim.*

43.4 *The Plaintiff is ordered to pay the costs of the exception."*

[2] Thus, the plaintiff had 30 days from date of granting of the order to amend its Particulars of Claim by way of a notice of amendment and that failing such compliance, the defendant was granted leave to set the matter down for an order striking out the plaintiff's claim. The plaintiff instituted its damages claim against the defendant in May 2019 and it is based on the defendant's breach of contract in relation to the design, supply and development of the City of Cape Town's "My City" bus fare and maintenance system. The parties had contracted with each other in February 2011 and the plaintiff pleads that the defendant failed to carry out the work in a proper and workmanlike fashion.

[3] The plaintiff failed to comply with the 30-day period as required by paragraph 43.2 of the Goliath order and such failure precipitated the two applications before me: the defendant's application to strike out the plaintiff's claim and the plaintiff's counter application for condonation for non-compliance with the 30-day time limitation. This period would have lapsed on 22 June 2022, meaning that the plaintiff was required to amend its Particulars of Claim by such date. The amendment was delivered on 22 July 2022.

### **Relief sought**

[4] In its striking out application the defendant applies for the dismissal of the plaintiff's claim, and in the alternative, for the claim to be struck out with costs. When proceedings commenced on 19 April 2023, the defendant's counsel advised that his client was not proceeding to seek a dismissal of the claim but persisted with the application to strike out. In its counter application, the plaintiff seeks condonation for the late delivery of its amendment and an order that the defendant pays the costs of the application in the event that it is opposed. The parties are referred to as plaintiff and defendant in this judgment. It was agreed that the condonation application would be argued first.

### **The defendant's striking out application**

[5] The defendant's attorney deposed to an affidavit in support of the application to strike out. The affidavit recites the history of the matter to the extent that the Summons was issued in May 2019 and that the action was defended. Subsequently, in June 2019, the defendant delivered a notice to remove the cause of complaint which was followed by the delivery of an exception in July 2019 as the plaintiff had failed to remove the cause of complaint.

[6] The affidavit then refers to Goliath DJP's order and that the exception was upheld with costs and a copy of the judgment is attached to the striking out application. The affidavit confirms that the 30-day period lapsed on 22 June 2022 and that the plaintiff had failed to amend its Particulars of Claim in accordance with the order.

### **The plaintiff's condonation application**

[7] As with the striking out application, the plaintiff's attorney is the deponent to the affidavit in support of condonation. The attorney remarks that the 30 day time period afforded to amend its pleading was not "*ungenerous*"<sup>1</sup>. The attorney explains that in order to effect the relevant amendments to the Particulars of Claim, it was necessary to obtain instructions to determine whether, in light of the judgment, the action should still be pursued and if so, to consult with City officials extensively and the external engineer, Telematics. The consultations occurred on, 3, 24 and 29 June 2022 respectively.

[8] In addition to the above, the attorney states that the claim is relatively complex, that the tender document is voluminous, that the amendment required careful consideration of the judgment and further investigation into the factual background and legal issues arising from it. A further challenge was that information related to the claim was in the hands of the defendant which still operated the transport management system of "My City" on an outsourced basis.

[9] At paragraph 11 of the affidavit, the attorney explains that the matter is also complicated as it relates to a pending matter in this Division under case number 6582/2020. I point out that this particular issue forming part of the explanation for delay was eventually abandoned during argument and accordingly I do not intend to address it further.

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<sup>1</sup> Par 7, Record, p2

[10] It is thus stated on behalf of the plaintiff that the delay in complying with the 30-day period was due to the following factors:

10.1 Certain City officials were on leave;

10.2 It was necessary to liaise with Telematics to obtain historical information and documents which were not available on the City's records; and

10.3 After the Goliath judgment, the parties became engaged in settlement discussions which ultimately proved unsuccessful.

[11] On 23 June 2022, a day after the lapse of the 30 days, the plaintiff's attorney corresponded with the defendant's attorney advising that the plaintiff awaited certain instructions from the City and would endeavour to deliver the amendment by 28 June 2022<sup>2</sup>. The attorney had followed up with the relevant officials regarding the outstanding documents so that the amendment could be finalised. He explains that incomplete information was received from Telematics. Accordingly, therefore, the plaintiff's attorney had requested the outstanding information from the relevant sources

[12] Further correspondence followed on 8 July 2022, and once again, the plaintiff's attorney informed his opponent that he was in the process of finalising the amendment<sup>3</sup>. On 15 July 2022, the defendant's attorney reiterated the Goliath order, emphasising that it had not been complied with, and the plaintiff was accordingly

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<sup>2</sup> Annexure AA1

<sup>3</sup> Annexure AA2

advised that the defendant was proceeding to enrol an application to strike out the plaintiff's claim. This correspondence was followed on 18 July 2022 by the plaintiff's attorney who advised in writing that he still awaits final instructions from the City to complete the amendment, which he was unable to obtain as certain City officials were on leave. Furthermore, the external engineers and historical information were not readily available. The correspondence concludes by indicating that the City's instructions were that the outstanding information and instructions would be made available during the course of that week and that the notice of amendment would be delivered by 22 July 2022.

### **The plaintiff's submissions**

[13] Counsel for the plaintiff submitted that the amendments to the Particulars of Claim are substantive and runs to hundreds of pages. He admits that the City could have put something up before the 30-day deadline but it did not do so as it took the Goliath judgment and the learned Judge's findings regarding excipiability of the pleadings, seriously. It required of the City to investigate the evidence it had and consider the steps to be taken to attend to the amendments as set out in the judgment. Counsel submits that the amendment, following on from the judgment, runs to 235 pages.

[14] I am asked to take account of the prospects of success in that the question must be asked whether the amendment does what the Goliath judgment says it must do. To this extent, the plaintiff submits that the defendant takes no issue with the amendments and that the latter's opposition does not address the amendments at

all. It is further submitted that the defendant does not attack the amendments on the basis of excipiability and that the only issue relates to the lateness of delivery thereof and the reasons provided for such delay.

[15] The amendments, should condonation be granted, would mean that the plaintiff's claim is increased to R38million and further substantive changes would take effect in respect of the Particulars of Claim. Counsel has further submitted that regard must be had to the extent of the City's non-compliance with the order, which is limited to a further month (thirty) days after the 22 June 2022 deadline. The plaintiff's counsel has conceded that while the reasonable explanation for his client's delay is not a model of perfection, and that the latter can be criticized, the delay is nonetheless explained in the application, showing that the City is by no means *mala fide* in seeking condonation.

[16] The further submissions by the plaintiff are that the Court should be mindful that the order relates to a procedural step or requirement, and it not a substantive order. In support of its case, the plaintiff relies on **Finch v Finch**<sup>4</sup> where the question arose whether a plaintiff's failure to have a *rule nisi* endorsed in terms of section 25(2) (a) of the now repealed Supreme Court Act<sup>5</sup>, was capable of condonation by the Court. The High Court condoned the non-compliance, holding that there must be a "*good and sufficient foundation*"<sup>6</sup> for the exercise of its discretion

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<sup>4</sup> 1963(3) SA 594 (N),

<sup>5</sup> 59 of 1959

<sup>6</sup> 1963(3) SA 594 (N) at 604

to condone non-compliance with s25 (2). The further submission is that the materiality of the breach is relevant.

[17] As to the Defendant's view that the Plascon-Evans rule applies, the plaintiff's submission is that because the condonation application is interlocutory, the reliance on the aforesaid principle is incorrect. Similarly, there can be no request to refer the issues to oral evidence. The plaintiff relies on Wilson v Die Afrikaanse Pers Publikasies (Edms) Bpk<sup>7</sup> and on Paribas Asia Ltd and Others v Liang and Others<sup>8</sup> as authority for holding that striking out a claim or defense is a drastic step, and should only be resorted to in instances where there is contumacy by the other party. It is thus argued that there is no basis for stating that the plaintiff's explanations are false, and that its actions were deliberate. Thus, the plaintiff seeks condonation in respect of non-compliance with the Goliath order, dismissal of the striking out application and costs as per paragraph 52 of its Heads of Argument.

#### **The defendant's opposition to the condonation application**

[18] In the answering affidavit to the counter application, the defendant's attorney makes the averment that the City's non-compliance with the Court order was wilful, that it cannot be said that the City was unaware of the order, nor can it be said that the City was unaware of what was required of it in terms thereof. It is pertinently argued that the City chose not to comply with the Goliath order. The attorney avers that the plaintiff's explanation for non-compliance relies on factors which indicate that

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<sup>7</sup> 1971(3) SA 455 (T)

<sup>8</sup> 1987(2) SA 491 (C)



it was not convenient for it to comply with the order.

[19] Furthermore, it is contended that given that the Summons was issued in May 2019, the plaintiff had sufficient time to determine what its position was and how to formulate its case, as well as what necessary evidence it required against the defendant. Despite this, the Particulars of Claim were materially defective. Subsequent to the judgment on the irregular step by Kusevitsky J in August 2021, the City's stance was to maintain that its case against the plaintiff was good. Furthermore, the plaintiff had an additional opportunity to consider its position against the defendant. It is emphasized that despite the plaintiff's attorney's concession that the 30-day period was not ungenerous, the plaintiff nonetheless failed to comply with the Goliath order and now sought condonation for its wilful misconduct.

[20] At paragraph 22 of the answering affidavit, the Defendant makes the point that it is not in the interests of justice for the Court to exercise its discretion in favour of the City by granting condonation. In this regard, it is advanced that the defendant is prejudiced by the City's conduct, and cannot bear the financial burden of the plaintiff's approach to its flawed case. It is submitted that the City, as an organ of State, is held to a higher standard than ordinary citizens, and in circumstances where the City flouts the Court order, the Court must hold it accountable for its actions.

[21] I am reminded that the City is seeking an indulgence. The submission on

behalf of the Defendant is that the non-compliance with the Court order should be viewed in a more serious light than non-compliance with the Rules or procedure. It is argued that the explanation for delay is inadequate and unreasonable, and that there are periods of time which the City does not explain.

[22] The defendant takes issue with the Plaintiff's explanation that it took three weeks to consider a judgment on an exception. In addition, the complaint is that the consultations with City officials only occurred in June, after the order was granted. The City is thus criticized for not acting promptly following the judgment, more specifically that the last two consultations occurred at the end of June, after the lapse of the 30-day period. As to the explanation of having to consult with Telematics, the defendant points out that this engineer had always been readily at the disposal of the City and was the engineer at the time of the institution of the Plaintiff's action. The further complaint is that the information required is not specified.

[23] The defendant attacks the City's explanation that the former had information relevant to it pursuing the amendment, and it is submitted that the plaintiff never requested any information from the defendant at any stage. There is also no evidence that legal steps were taken in order to obtain such information. I point out that this basis for condonation was eventually abandoned during argument. The defendant furthermore complains that the City officials who were presumably on leave are not named and no indication is provided as to when they were on leave and why they are essential for the finalization of the amendment. It is also pointed out that none of these officials have provided any confirmatory affidavits in the

circumstances. Accordingly, it is argued that this Court is not in a position to scrutinize the acceptability of the City's assertion that officials were on leave.

[24] As to the explanation that the parties engaged in settlement negotiations, the defendant admits same but it is stated that the parties had already engaged in such negotiations prior to the judgment of Goliath DJP. On this aspect, the argument is that notwithstanding settlement negotiations, the City was obliged to amend its Particulars of Claim in line with the order. The defendant's view is that the City should have approached the Court to seek an extension of the deadline referred to in terms of paragraph 43.2 of the order before the expiry of 30 days.

[25] On the question of prejudice, the defendant states that it is prejudiced by the botched attempt to prosecute the plaintiff's claim. As time goes by and the matter continues, the defendant remains defamed as a result of the averments in the pleading and the action hanging over its head. The defendant is a profitable business and is required to spend hours gathering supporting evidence and historical facts in order to defend itself against the City's weak case, which is in the public domain. I am asked to be mindful that were I to grant condonation, it would result in the plaintiff obtaining another bite at the cherry when it had failed to comply with an order of Court and that this would not serve the interests of justice. The defendant argues that the confirmatory affidavit of the City's senior legal advisor, Ms. Markram, takes the matter no further.

[26] Furthermore, it is submitted that the City is able to litigate luxuriously using

public funds, while the defendant has to carry the costs which were awarded on the ordinary scale, leaving the defendant out of pocket at the end of the day. The submission is made that the City should have withdrawn its action and started afresh. The defendant seeks an order dismissing the counter-application with costs and granting the striking out application with costs.

### **The defendant's submissions**

[27] The defendant's counsel handed up a further note on oral argument, in addition to his Heads of Argument. I must state that the Heads of Argument amount to a regurgitation of the defendant's answering affidavit, but for the references and discussion of authorities. Counsel submits that the defendant could not condone the plaintiff's non-compliance and that the breach of the order is thus willful. In addition, there is an absence of a clear, full and frank explanation for the plaintiff's delay. It is submitted that organs of State such as the plaintiff, are held to a higher standard when it comes to compliance with Court orders<sup>9</sup>. The argument goes that if the explanation does not pass muster, then there is no need to deal with the rest of the issues in respect of condonation.

[28] The defendant's counsel submits that no reason is advanced for the failure to approach the Court to seek an extension of the 30 days nor why the consultations with the officials and engineers only occurred in June, and the defendant was never requested to provide information in order for the plaintiff to have attended to the amendments.

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<sup>9</sup> See MEC for Health, Province of Eastern Cape NO and Another v Kirkland Investments (Pty) Ltd t/a Eye & Laser Institute 2014(3) SA 219 (SCA)

[29] As for Ms Markram's confirmatory affidavit, it does not address the issues regarding officials on leave and falls short of what is stated in **Drift Supersand v Mogale City Local Government**<sup>10</sup>. As regards the test for condonation, counsel submitted that **Wilson** was overruled by the Full Bench in **Wanson Company of South Africa (Pty) Ltd v Etablissements Wanson Construction De Material Thermieque Societe Anonyme**<sup>11</sup>, which held that contumacy was not the only reason for striking out a defense.

[30] The defendant denies that it wishes the claim to be struck out because it is reluctant to plead. The argument is that its failure to address the amendments is through no reluctance to plead but due to there being no amendment to consider. Counsel, though conceding that the Plascon-Evans is not material in the determination of the application, nonetheless submitted that the striking out application and the condonation application sought final relief. It is further argued that the defendant is prejudiced by the serious allegations which the plaintiff makes in its pleadings. It is submitted that the defendant's reputation is tarnished, and that breach of a Court order cannot be remedied by a costs order.

[31] In reply plaintiff's counsel emphasized that the test for condonation is as set out in **Du Plooy v Anwes Motors (Edms) Bpk**<sup>12</sup> and emphasized that the defendant does not attack the amendments to the plaintiff's pleadings. It was further submitted that the Court order allows for amendments and the only issue is the plaintiff's lateness; furthermore, that the order envisaged a further step in the event of the

<sup>10</sup> [2017]4 All SA 624 (SCA) paras 31 and 32

<sup>11</sup> 1976(1) SA 275 (T)

<sup>12</sup> 1983(4) SA 212 (O)

plaintiff's non-compliance, albeit, a striking out application, where the plaintiff's explanation for its would be considered. Counsel also disagrees that the applications are for final relief.

### **Discussion**

[32] The Court order requires of the plaintiff to amend its Particulars of Claim by delivering its Notice of Amendment within 30 days of the order being granted. In the absence of such compliance, a further procedure is indeed envisaged in paragraph 43.3 of the Goliath order in that the defendant was granted leave to apply to strike out the plaintiff's claim. Having regard to the exception judgment, it is evident from paragraph 37 and following, that the learned Goliath DJP found that:

- 32.1 The plaintiff's annexure "POC3" to the Particulars of Claim does not deal with defects and the like and thus the Particulars of Claim lack averments necessary to support the allegation that the defendant was in breach of the parties' agreement;
- 32.2 The material facts necessary to establish the contractual basis to support the employer's (the City) claim was not properly pleaded;
- 32.3 The plaintiff failed to plead termination of mediation (as a first step in dispute resolution); and
- 32.4 The plaintiff failed to sustain a cause of action in support of the loss suffered as a result of breach of the parties' contract.

[33] Thus, the plaintiff was required to remedy its pleading in respect of the substantive defects which the Court found in its Particulars of Claim. Before

addressing the condonation issue, it behooves me to remark that the Notice of Amendment appends Annexure "A" which is the the Amended Particulars of Claim together with annexures relied, on to wit, "POC1-A; "POC2"; "POC2A"; "POC4A" and "POC4B". The Amended Particulars of Claim amount to 40 pages, and the annexures as referred to above, to 189 pages. A quick perusal of "POC1-A", the FIDIC Conditions of Contract for Plan-and Design Build 1<sup>st</sup> Edition, which comprises part of the parties' contract, shows that it relates to the plaintiff's IRT bus fare system, and that substantive amendments are made to it. In addition, and without making any findings on the correctness or excipiablity of the amendments, my observations are that the plaintiff certainly addresses the findings made by the learned Judge in the exception judgment, by making amendments to paragraphs 3.3, 3.4, 7, 8 and 10 of the Particulars of Claim. The further amendments relate to the quantum of the claim, and alternative claims. Thus, I agree with the plaintiff's counsel that the amendments seek to address the specific complaints raised in the exception judgment, and they are by no means inconsequential or minor.

[34] As a matter of completeness, and having regard to the submissions of both parties, I note that the Plascon-Evans argument is seemingly not relied upon and the plaintiff's reliance on a pending case 6582/2020, was abandoned. Furthermore, the plaintiff conceded, correctly so in my view, that it did not comply with the 30-day time period allowed to amend the pleadings and that the City can be criticized for the delay and jumping into action (by way of correspondence), a day after the deadline had expired. In addition, the averment that the defendant had information which the plaintiff considered necessary for the amendments, was also a non-issue or abandoned.

[35] It is important to note that the plaintiff's condonation application does not relate to non-compliance with the Uniform Rules of Court. The non-compliance relates to its failure to act in accordance with paragraph 43.2 of the Goliath order. To this extent, I agree with the defendant's counsel that the conduct is egregious. I furthermore agree with the submission that Court orders are required to be complied with and must be obeyed<sup>13</sup>. In this regard, section 165(5) of the Constitution of South Africa 1996, makes orders of Court binding on all persons and organs of State to whom such orders apply. I am further in agreement that organs of State are held to a higher degree of accountability and duty to respect the law<sup>14</sup>. The higher standard and duty to obey Court orders derives from section 165(4) of the Constitution which states that:

***"165. Judicial authority***

4. *Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."*

[36] The defendant's argument, which refers to seriousness or disobedience of a Court order by an organ of State, concludes that in the context of this matter, the City's breach of the Goliath order, warrants a striking out of the plaintiff's claim. In my view, this conclusion is not as straightforward as the defendant proposes.

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<sup>13</sup> Pheko and Others v Ekurhuleni City 2015(5) SA 600 (CC) para26-27

<sup>14</sup> Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019(4) SA 331 (CC) paragraph 60; MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd 2014(3) SA 481 (CC paragraph 82



[37] I turn then to the next issue which is whether non-compliance with a Court order may be condoned. The starting point is that the applications before me do not fall under contempt of Court proceedings, even accepting that the plaintiff failed to comply with paragraph 43.2 of the Goliath order. It would seem that counsel are ultimately in agreement that non-compliance with a Court order may be condoned but such agreements notwithstanding, the consideration of condonation for such non-compliance warrants my consideration.

[38] I was referred to certain authorities on which the plaintiff relies in support of the submission that condonation for non-compliance with a Court order may be granted. In **Paribas** (*supra*), the Court held that the answering affidavit of the respondent's attorney, which replied to the applicant's interrogatories pursuant to an earlier order granting the applicants leave to administer interrogatories, did not comply with the said order. It is evident from the facts of **Paribas** that the respondents had taken steps to comply with the order, albeit not correctly or as required. The High Court faced with the applicant's striking out application, found that it would be inappropriate in the circumstances of that matter to dismiss the respondent's actions<sup>15</sup>. In **Cilibia v Cilibia**<sup>16</sup>, the High Court dealt with a contempt of Court application. The respondent was previously ordered to file an answering affidavit by a certain date and failed to do so. The High Court granted condonation for such non-compliance, having regard to the nature of the proceedings and the serious consequences that a finding in favour of the applicant would have for the respondent<sup>17</sup>.

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<sup>15</sup> Paribas (*supra*) at 499

<sup>16</sup> [2022] ZAFSJC 132

<sup>17</sup> At paragraph 15 of the judgment

[39] Having regard to the parties' submissions and authorities, I conclude that there can be no doubt that a party is entitled to apply for condonation for its non-compliance with a Court order. In the context of this matter and the order granted on 10 May 2022, a further procedural step (striking out application) was envisaged and in my view, there is nothing in the Goliath judgment or order which would preclude the plaintiff from applying for condonation in the event of its non-compliance with paragraph 43.2 thereof. In the circumstances, I am thus satisfied that the plaintiff is entitled to apply for condonation for its non-compliance.

[40] I hold the view that a discussion on condonation in this matter should be preceded by a consideration of the nature of the order and the extent of non-compliance thereof. In this regard, I am more inclined to find favour with the plaintiff's submission in that the nature of paragraph 43.2 of the Goliath order is procedural and time-related, and not substantive. Thus, what was required of the plaintiff was to act positively by delivery of a Notice of Amendment within 30 days of the granting of the order. Thus, accepting that in relation to the plaintiff, the order and non-compliance are time-related, I find that that the views by the learned Heher, JA in **Uitenhage Transitional Local Council v South African Revenue Service**<sup>18</sup> are apt;

*“[6] One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be*

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<sup>18</sup> 2004(1) SA 292(SCA)

*furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out." (my emphasis)*

[41] Whist Heher, JA in **Uitenhage** considered condonation for non-compliance within in the context of the Rules of the Supreme Court of Appeal relating to the prosecution of appeals, the Judge of Appeal's comments regarding time-related non-compliance are applicable to the plaintiff's non-compliance in this matter. Having regard to the additional authorities provided by the parties, the further general guidelines provided by the higher Courts regarding explanations for delays and non-compliance may be summarized as follows:

41.1 A full explanation for the non-compliance must be provided and it must be reasonable<sup>19</sup>;

41.2 The explanation for delay must cover the entire period of the delay<sup>20</sup>;

41.3 The standard for consideration of a condonation application is the interests of justice<sup>21</sup>.

[42] Turning to the Court's discretion to grant condonation, it is trite that the discretion is a wide discretion, having regard to the facts and circumstances of the matter. Turning to the explanation for delay in this matter, I point out that there is no explanation provided by the plaintiff's attorney in his founding affidavit as to why,

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<sup>19</sup> Grootboom v National Prosecuting Authority and Another 2014(2) SA 68 (CC) paragraph 23; Von Abo v President of the Republic of South Africa 2009 (5) SA 345 (CC paragraph 20; see also Siber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) 353

<sup>20</sup> Van Wyk v Unitas Hospital 2008(2) SA 472 (CC)

<sup>21</sup> Brummer v Gorfil Brothers Investments (Pty) Ltd and Others 2000(2) SA 837(CC); eThekweni Municipality v Ingonyama Trust 2014(3) SA 240 (CC)

realizing that the 30-day deadline was approaching, the Court was not approached to seek an extension of the time period. That being the case, the defendant's criticism in this regard is thus justified, so too its questioning of the lateness with which the plaintiff's attorney communicated his client's challenges for the first time, which only occurred a day after the 30-day period had lapsed. Most certainly, when I consider the yardstick and guidelines in Uitenhage and other authorities referred to herein, the plaintiff's explanation does not cover the entire period of the delay as from the granting of the order nor does it explain why the plaintiff's attorney only communicated with his opponent for the first time, a day after the lapse of the 30 days.

[43] In this regard, certainly the plaintiff's attorney fails to indicate how soon after 10 May 2022, contact was first made with officials and the engineer, and when information was requested from them for the first time in order to attend to the amendments. The question is whether such failure clouds the explanation for delay and non-compliance to the extent that the counter-application should be refused? The defendant has approached the counter-application in a manner where it has broken down each explanation for the delay and in my view, categorized it as five excuses for non-compliance with the order. While I can appreciate the defendant's opposition to the request for condonation, I am of the view that the explanation should rather be considered holistically, as opposed to in a piecemeal fashion, and within the context of the exception judgment, the extent of the amendments to the pleadings and the interests of justice.

[44] Despite the shortcomings in the explanation and absence of dates, it is nonetheless so that the plaintiff (through its attorney), kept the defendant abreast of the difficulties and challenges it was experiencing in obtaining instructions regarding the amendment. I gather from the correspondence between the parties', that instructions were not finalized by 28 June 2022 as the plaintiff's attorney was still awaiting same at 8 July 2022. A further, more detailed update followed on 18 July 2022, setting out that the delays were due to officials being on leave, awaiting instructions, the external engineer not being readily available and historical information and documents not being readily accessible and available in the City's records.

[45] In my view, the plaintiff's explanation regarding incomplete information, the delay in obtaining documents and instructions, and the difficulties experienced in securing consultations with the external engineer, is at the very least sufficiently full. Furthermore, the plaintiff was required to effect substantial changes to its pleadings and Annexures in light of the findings in the exception judgment and this is explained in the founding affidavit to the condonation application. Given the complexity of the claim and the parties' agreement relied upon by the plaintiff, it would be more than reasonable to expect that the City would need to consult with various personnel and its external engineer in order to consider which parts of its claim required attention and subsequent changes. Having regard to the explanation tendered, I hold the view that the extent of the obstacles faced by the plaintiff, which led to the delay and non-compliance with paragraph 43.2, are clearly described and with sufficient detail to give me an idea of the plaintiff's challenges, even if I discount the reference to unnamed officials being on leave.

[46] While it was been argued that the plaintiff has not provided a day-by-day account of its delay subsequent to the granting of the order as referred to in **Von Abo**<sup>22</sup> (*supra*), and notwithstanding such justified criticism, what is provided is certainly a reasonable explanation for delay. Absent a day-by day explanation for such delay, what I do see is an explanation in the affidavit, confirmed by the attached correspondence, which supports the view that not only was the plaintiff experiencing difficulties in obtaining instructions, consulting and procuring information and documents, but it needed to seriously consider the findings related to the shortcomings in its pleadings, and had to attend to it. It is also apparent that the fact that the plaintiff was afforded 30 days to remedy the defects in the pleadings shows that the Court hearing the exception must also have considered that the amendments would be numerous or substantial. Thus, the further explanation that the plaintiff needed to consider its position and whether it would pursue the action in light of Goliath DJP's findings, is in my view, neither far-fetched nor indicative of any *mala fides* on the plaintiff's part.

[47] The defendant has argued that the plaintiff's failure to identify which of its officials were on leave, when they were on leave and the absence of confirmatory affidavits of these officials, is fatal. Certainly, Ms Markram's affidavit takes the matter no further and would fall in that category of confirmatory affidavits referred to in paragraph 31 of **Driftsand**<sup>23</sup> (*supra*) whereby the statement in the affidavit amounts to hearsay and has little or no cogency. One may ask whether the affidavits of officials on leave would be crucial to the plaintiff's case for condonation? In my view, the absence of these officials is but one of the grounds or bases upon which the

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<sup>22</sup> At paragraph 20

<sup>23</sup> At paragraph 31

plaintiff states that it could not consult timeously and therefore there was a delay in attending to the amendment. Absent such confirmatory or explanatory affidavits from these officials, the other reasons for delay still remain, so in my view, the failure to attach the officials' affidavits is not fatal to the application. Furthermore, the defendant sought to pass off the plaintiff's additional explanation for the delay, being the parties' settlement negotiations after the Goliath judgment as being of no consequence, yet does not deny that there were settlement negotiations after the judgment. I am of the view that this additional factor weighs in favour of an ultimate finding that the plaintiff's explanation for delay, notwithstanding shortcomings pointed out in the opposing papers, is sufficiently full and reasonable.

[48] There is the question as to whether the plaintiff's explanation is littered with contrived excuses, as suggested by the defendant. Firstly, the defendant is not entitled to know the content of consultations between the plaintiff's attorney with City officials amount to in view of the attorney and client privilege, and aside from making sweeping statements about contrived excuses, such contention is not supported by contrary facts indicated in the answering affidavit. In the context of the claims, the pleadings and amendment thereto, and the parties' contractual relationship, the submission that the plaintiff's explanation is contrived, does not hold.

[49] On the issue of prejudice to the defendant were I to grant condonation, I certainly appreciate that the latter faces a massive claim of R38 million which it needs to contend with since issue of the Summons four years ago. However, where I disagree, is that the prejudice resulting from the non-compliance with the order,

stretches over the four-year period. Furthermore, the reliance on **Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd and Others as Amici Curiae)**<sup>24</sup> as support for the contention that the defendant is prejudiced by bad publicity as a result of the pending action, is misguided. **Media 24** dealt with a defamation claim by a company arising from an article published in a newspaper circulated country wide. The action in this commercial matter relates to a damages claim arising out of an alleged breach of contract so the argument about bad publicity in my view, cannot hold. I must also point out that the suggestion that the defendant was out of pocket because of party and party costs awards granted in two previous applications is not sufficient reason for me to hold that there is continued prejudice to the defendant in this matter. Those applications were granted in the defendant's favour and costs followed the result. Accordingly, I am inclined to agree with the plaintiff that the prejudice to the defendant is limited to the City's non-compliance with the Goliath order and in this regard, the delay which the defendant was subjected to was a month or 30 days, as the Notice of Amendment was delivered on 22 July 2022. The prejudice is thus limited to a time-related delay.

[50] Having considered the application and submissions, I find that there is simply no merit in the argument that the City has acted in bad faith and that its explanation for delay is *mala fide*. The explanation is most certainly not a model of perfection, and it has its shortcomings as described above, but it is sufficiently full enough for me to assess the plaintiff's motives and conduct, which I accept to be that it heeded the warnings of the Goliath order and after consultations and delays, attended to make numerous amendments to its pleadings.

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<sup>24</sup> 2011 (5) SA 329 (SCA) at paragraph 17



[51] The further important factor which the defendant should be mindful of is the interest of justice standard<sup>25</sup>. Given the large claim of R38 million, the efforts made in respect of substantial amendments to the pleadings, the defendant's silence on the amendments and the fact that parties should be given an opportunity to have their disputes aired in Court, I am accordingly satisfied that the interests of justice would be served if condonation is granted for non-compliance with paragraph 43.2 of the order. I must also remark that I am not persuaded by the argument that the plaintiff should simply have withdrawn its claim and started afresh: it would seem that on the one hand, the defendant wants to urge the plaintiff to proceed with the matter yet also wishes that the action would be withdrawn, and this cannot be. Furthermore, there is no suggestion that the amended Particulars of Claim, albeit that they are late, are in any way excipiable.

[52] The effect of granting the condonation would be that the striking out application would be dismissed. In any event, having regard to **Wanson** (*supra*), this is not a matter where it can be said that the plaintiff recklessly embarked on its claim which it did not have a hope in proving or that its pleadings are inadequate.

[53] As to the argument regarding organs of State, I agree that they are held to a higher standard. However, the submissions by plaintiff that the authorities such as **Kirkland** and **Pheko** (*supra*), upon which the defendant relies, relate to PAJA and review applications, and that this matter relates to a commercial dispute, are

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<sup>25</sup> See Brummer

accepted. In my view, to simply refuse condonation because the City failed to comply with the order, and does not present a perfect explanation for its default, and thus to strike out the City's claim, would be to elevate the procedural and time-related non-compliance with the order, above the interests of justice standard. In the circumstances and as a result of all the above findings, I am inclined to exercise my discretion in favour of the plaintiff and grant condonation for its failure to comply with paragraph 43.2 of the Goliath order.

[54] In conclusion, this is a matter where the defendant could not consent to condonation and was forced to enroll a striking out application. The costs orders below reflect this conclusion and the plaintiff's request regarding costs during its argument. In view of the above findings, it is hence not necessary to deal with the remaining issues raised in the matter. In the result, I grant the following order:

1. The counter-application (condonation) is granted.
2. The striking out application is dismissed.
3. The defendant shall pay the plaintiff's costs arising from its opposition to the counter-application (condonation application).
4. The plaintiff shall pay the defendant's costs of the striking out application.