**IN THE REPUBLIC OF SOUTH AFRICA**

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

**CASE NO: 40975/2016**

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

6 JUNE 2022

SIGNATURE DATE

In the matter between:

**THE MINISTER OF SAFETY AND SECURITY** Applicant/Defendant

and

**UNDERWRITERS AT LLOYD'S OF LONDON** Respondent/Plaintiff

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**J U D G M E N T - LEAVE TO APPEAL**

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**LE ROUX AJ**

**INTRODUCTION**

[1] This is an application for leave to appeal against the judgment and order of this Court, dated 25 March 2022, which ordered that:

1.1. Non-compliance with the time periods in rule 28 by the plaintiff in the filing of its notice of objection to the defendant's notice of intention to amend its plea is condoned;

1.2. Any other non-compliance with time periods in rule 30(2)(b) and (c) by the parties is condoned;

1.3. Defendant's notice of intention to amend dated 17 September 2021 constitutes an irregular step and is set aside;

1.4. Leave to amend as contemplated in the proposed new paragraphs 11.1, 16.2. 16.3 and 16.4 of the defendant's notice of intention to amend dated 17 September 2021 is denied since the amendments impermissibly withdraw admissions made by the defendant in its notice of intention to amend of 7 October 2019 and/or paragraph 6 of the defendant's pretrial admissions of 25 September 2019; and

1.5. Costs of both parties' applications to be paid by the defendant on an attorney and client scale, including the costs of two counsel.

[2] The detailed factual and procedural background set out in the judgment against which leave to appeal is sought is not repeated in this decision, for brevity's sake.

## THE TEST FOR LEAVE TO APPEAL

[3] The relevant test for leave to appeal required by section 17(1)(a)(i) of the Superior Courts Act, No 10 of 2013, is whether I am of the opinion that the appeal would have a reasonable prospect of success. This test is more stringent than the former test for leave to appeal which required only a view that there was a reasonable prospect that the court might come to a different conclusion.[1]

## THE MERITS OF THE APPLICATION FOR LEAVE TO APPEAL

[4] The applicant for leave to appeal, the Defendant in the main action, contends that there are four grounds of appeal in respect of which the Court erred and on the basis of which leave to appeal to the Full Bench ought to be granted. I address each in turn below.

## FIRST GROUND OF APPEAL

[5] The first ground of appeal targets the first and second orders which granted condonation to the Plaintiff for non-compliance with the time periods specified in Rules 28, 30 and 30A of the High Court Rules when it filed its objection to the Defendant's notice of intention to amend its plea three days late. This ground of appeal also targets the Plaintiff's Rule 30(2) notice for being out of time and which the Defendant contends was barred by it having taken a further step in the cause.

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[1] *S v Smith* 2012 (a) SACR 567 (SCA) at para 7

[6] The Defendant contends that the Court ought to have found that:

6.1. the provisions of Rule 28 and 30 are peremptory;

6.2. the Plaintiff did not comply with the rules;

6.3. the notices were out of time;

6.4. in the absence of an application for condonation the court cannot grant condonation; and

6.5. the Plaintiff requested abridgement i.e. the shortening of certain timeframes and there was no application for condonation for non-compliance with the provisions of Rules 28 and 30.

[7] The judgment against which leave to appeal is sought found on two alternative bases that the objections were timeously made by the Plaintiff. The Court exercised its wide discretion to condone non-compliance with the time limits imposed by the Rules. These powers are very wide and it may make any order it deems fit. The discretion must, of course, be exercised judicially and following consideration of the circumstances of the particular case and with a view to what is fair to all parties. This includes a consideration of whether prejudice arises from the non-compliance at issue.

[8] The defendant contends that leave to appeal ought to be granted on the "unprecedented" finding that correspondence from the plaintiff's attorney to the defendant's attorney "constituted compliance with sub-rules 28(2) and (3)". But this was not the Court's finding. The Court considered the consistency of the grounds of objection contained in the correspondence with the notice that was delivered to be part of the reasons to condone the 3-day period of non-

compliance with the 10-day time limit that applies to the delivery of the latter. The Court merely recorded the plaintiff's argument that the correspondence satisfied the Rule's requirements that the objections be "written" and "clearly and concisely state the grounds upon which the objection is founded."

[9] The defendant further alleges that the plaintiff's application to condone the abridgment of time periods is distinct from an application for condonation, but this is a distinction without a difference. The plaintiff sought condonation of the 3-day period beyond the 10-day statutory period and provided the Court with its explanation for its conduct (that it considered its correspondence adequate compliance with the Rule). The fact that the Court did not make its ultimate finding on the basis of those arguments alone does not render the application defective.

[10] Accordingly, given that the circumstances here included the prompt objection by the plaintiff to the defendant's indicated amendment on the basis that it amounted to an improper withdrawal of admission, its repetition of the same grounds of objection in a consistent manner between the correspondence that followed and the formal notice delivered, and the lack of prejudice alleged, I am satisfied that another court would not come to a different conclusion on the relief granted in the first two orders.

**SECOND GROUND OF APPEAL**

[11] The second ground of appeal targets the Court's third and fourth orders which follow on its finding that the Defendant's intended amendment was tantamount to the withdrawal of an admission, that an amendment should not be allowed in

the circumstances and that the Defendant did not provide a satisfactory and reasonable explanation for the amendment or withdrawal of the admissions.

[12] The defendant contends that the Court lacked a factual or legal basis to find that the explanation was unsatisfactory or unreasonable. The defendant further contends that the Court ought to have granted leave to amend to the defendant on the basis that:

12.1. On the uncontradicted factual evidence of Mr Nel, the defendant's attorney on this matter, the Defendant merely admitted that the findings in the judgment of Bam J, were made in as much as same were covered by the Judgment. The factual correctness of the findings were never admitted;

12.2. Mr Nel is the only person that can give a factual exposition of what the Defendant intended to convey when making the admissions concerned. Mr Strachan, the Plaintiff's attorney, can with respect on no conceivable basis have personal knowledge of the instructions Mr Nel received or gave to counsel;

12.3. That the Plaintiff's extensive or expansive interpretation of the admission is with respect legally untenable;

12.4. It was only admitted by the Defendant that Bam J made those findings as reflected in the said judgment, as a denial of the contents of the judgment by Bam J would have been spurious;

12.5. Mr Nel disputed that the shortened duration of the trial was a result of the admissions.

[13] However, these contentions do not address the Court's various stated reasons for granting the relief set out in the third and fourth orders. The Court considered the detailed "preface" to the request for admissions, the clearly stated reason for the admissions that were sought, the expressed desire to shorten the trial by limiting the factual issues in dispute, the desired confirmation of earlier admissions made in evidence at the criminal trial regarding the complicity of Officers Lekola and Khubeka in the robbery, the plain language used to introduce the specific admissions sought and the inconsistency of all of these elements with the defendant's contention that it sought to merely admit the contents of Bam J's judgment. All of these factors underpinned the Court's finding that admissions were made that the amendment sought to withdraw.

[14] The Court's analysis of the explanation afforded by the defendant is similarly cogent. The defendant insists that it did not offer several explanations for its conduct when the record demonstrates that the opposite occurred. The defendant challenged the interpretation of the admissions, contended they were made in error and that they were made without instructions. These alternative explanations are irreconcilable with its stance in this application and in the underlying application that it never made, or intended to make, the admissions themselves.

[15] The Court therefore correctly applied the tests in motion proceedings set out in caselaw relied upon by the defendant which permits a court to reject an explanation that is farfetched, clearly untenable, uncreditworthy or palpably

implausible. The fact that only Mr Nel placed a version before the Court on these issues does not assist the defendant in light of the Court's evaluation of that version against the pleadings and correspondence in the record.

[16] Accordingly, I am satisfied that another Court would not come to a different conclusion on the basis for the third and fourth orders.

**THIRD GROUND OF APPEAL**

[17] The third ground of appeal targets the dismissal of the application for leave to withdraw the admissions and traverses similar terrain as the second ground. The defendant also contends that the Court ignored the fact that the defendant's attorney requested the plaintiff to indicate "whether it agrees with Defendant's view regarding the admissions" in a letter it sent following a pre-trial held on 15th September 2021. The defendant contends that this letter raises the question "on the probabilities, why the Defendant would have raised this issue if it did not suspect that there was a difference of interpretation regarding the admissions."

[18] However, the letter relied upon does not assist the defendant as it contends. The first relevant piece of correspondence is the letter from the plaintiff's attorneys to the defendant dated 23 September 2021 that records

> "As regards your proposed amendment, I am concerned that you may still not grasp two fundamental points we raised at the pre-trial about your first notice to amend, and which apply equally to the second notice to amend. The first point was that certain of the proposed amendments

very clearly amount to attempts to retract several admissions previously made by your client. The second was that your notice contains an obvious error. Both these points suggested to us that you were in the dark over the current state of the pleadings, which had to be urgently resolved."

[19] The defendant's first response to this letter, dated 27 September 2021, does not address this paragraph of the plaintiff's letter.

[20] The defendant responds again, in the letter relied upon for its submission on this ground of appeal, dated 29 September 2021, stating:

> "Writer has consulted with counsel regarding the status and evidential value of earlier admissions made by the parties, more specifically the defendant, in respect of the findings in the judgment of Bam J. Defendant holds the view that the effect of the admissions are merely that Bam J made the findings in his judgment and that certain admissions were made by some of the accused, however the factual correctness of the findings were not admitted and the parties in this litigation are not bound by the findings of Bam J to the effect that such findings are the correct factual position. We request you as a matter of urgency to indicate whether the plaintiff agrees with the defendant's view in this regard."

[21] It therefore is not the defendant that raised the issue of the meaning of the admissions made, but rather the plaintiff. This means that the probabilities do not support the defendant as contended for in this application.

[22] The defendant next contends that the Court ought not to have considered the prejudice to the future conduct of the matter that arises if the admissions are withdrawn and the trial becomes protracted due to the multiplication of the number of issues at trial. However, prejudice or injustice to an opponent is a relevant consideration when permitting amendments. See e.g. *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W). This was not an error warranting the granting of leave to appeal on the third and fourth orders. I am of the opinion that there is no reasonable prospect that the court might come to a different conclusion on this ground.

**FOURTH GROUND OF APPEAL**

[23] The final ground of appeal targets the costs order.

23.1. First, appeals regarding costs orders alone are discouraged.

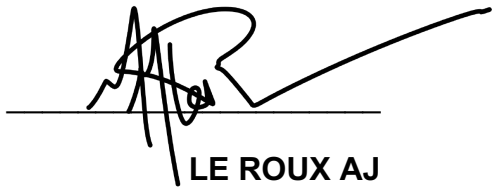
23.2. Second, a Court enjoys a wide discretion to impose a costs order on the attorney and client scale to indicate its disapproval with the conduct of a party in litigation. That discretion must be exercised judicially and to ensure fairness to all sides. The circumstances in each case, the conduct of the parties and the issues to be weighed all produce a costs order that should be fair and just between the parties. The defendant was unsuccessful in its application because the Court found that it could not have made the admissions now sought to be withdrawn in error given the plain language of the admissions. There is no reasonable prospect that another court might come to a different conclusion in light of the record of the conduct of the litigation that would be before it.

**ORDER**

[24] I therefore order that:

24.1. Leave to appeal to the Full Bench of this Division is denied; and

24.2. The costs of the application for the leave to appeal are to be paid by the defendant, such costs to include the costs consequent upon the employment of two counsel.



**LE ROUX AJ**

Acting Judge of the High Court
Gauteng Division, Pretoria

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 6 June 2022 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 17 February 2022.

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| DATE OF HEARING: | 1 JUNE 2022 |
| DATE OF JUDGMENT: | 6 JUNE 2022 |
| COUNSEL FOR THE APPLICANT/DEFENDANT: | MMW VAN ZYL SC |
| COUNSEL FOR THE RESPONDENT/PLAINTIFF: | M KRIEGLER SC<br>A KOLLOORI |