Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

CASE NO: 20011/2022

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

06/12/2023 DATE

_____
SIGNATURE

In the matter between:

BANK OF TAIWAN INCORPORATED IN REPUBLIC OF CHINA t/a BANK OF TAIWAN SOUTH AFRICAN BRANCH Applicant
(Registration No 2000/014015/10)

and

LI FENG TEXTILES (PTY) LIMITED First Respondent
(Registration No 2002/004197/07)

NAI-CHIANG WANG Second Respondent
(Identity No […])

JUI CHANG WANG Third Respondent
(Identity No […])

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA Fourth Respondent
(Registration No 1940/014201/31)

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL AGAINST JUDGMENT DELIVERED IN THE ABOVE MATTER IN THE UNOPPOSED MOTION COURT ON 27 JULY 2023

S. VAN NIEUWENHUIZEN AJ

[1] I heard this matter on 27 July 2023 in the unopposed motion court and gave judgment in favour of the Applicant ("the Bank"). It is desirable that the background of the matter be set out before I deal with the grounds for leave to appeal.

[2] For the sake of convenience, the First to Third Respondents will collectively be referred to as Textiles (being the Applicants for leave to appeal) or by name depending on the context. The Applicant (who is the Respondent in the application for leave to appeal) will simply be referred to as "the Bank".

Background

[3] The matter was originally on the roll for 27 July 2022 but then withdrawn from the roll on 18 June 2022. A Notice under Rule 6(5)(D)(iii) was thereafter delivered by Textiles raising certain aspects pertaining to the affidavit by one Lynn Huoh deposed to on 6 June 2022. This gave rise to a hearing of the matter on 24 March 2023 as an opposed motion before Opperman J who dismissed the legal points raised (as amended) with costs on the attorney and client scale and postponed the hearing of the matter on the merits *sine die*.

[4] In addition, Textiles was ordered to file answering affidavits, if any, by 12 June 2023. The Bank was ordered to file it's replying affidavit, if any, by 26 June 2023. It was also ordered to file its supplementary heads, if any, by 10 July 2023 and Textiles were to file supplementary heads, by 24 July 2023.

[5] Paragraph 7 of Opperman J's order specifically provided that, should Textiles fail to file an answering affidavit by 12 June 2023, the matter may be enrolled on the unopposed motion roll. Should Textiles fail to file supplementary heads of argument by 24 July 2023 the matter may be enrolled on the opposed motion roll for hearing.

[6] On 12 June 2023, an unsigned statement was filed on behalf of N-C Wang. It appears as if same was accompanied by an email addressed by Textiles' attorneys to the Bank's attorneys to the effect that J.C. Wang who is the father of N-C Wang is gravely ill in Taiwan and that he was at the time attending to his father at his sickbed and would get to an Embassy as soon as possible to have an unsigned affidavit (sic) attached to the email, signed. The email was accompanied by the unsigned statement referred to above for filing. The email also indicated that the unsigned version of the statement would be uploaded on Caselines.

[7] I specifically refer to the "unsigned statement" because the references to an "unsigned affidavit" are misnomers. An affidavit commissioned by the South African Embassy in Taiwan was ultimately uploaded on

Caselines on 15 June 2023 and also served on the Bank's attorney on the same date. In paragraph 6 of the affidavit condonation is sought for the late filing thereof. This affidavit was not accompanied by a notice of application for condonation.

[8] On 20 June 2023, Textiles' attorney filed a confirmatory affidavit to the effect that, to the extent that the N-C Wang's affidavit refers to him, he confirms the contents thereof. This affidavit was also not accompanied by an application for the late filing thereof.

[9] On 27 July 2023, the Bank's legal representative applied for judgment and, although Textiles were out of time, their representative appeared and made reference to the answering affidavit part of which sets out grounds for condonation. Given the fact that there was no formal notice of application for condonation in terms of Rule 6 of the Uniform Rules of Court or even an oral application from the bar and that the Bank's legal representative objected to the admissibility of the affidavit absent an application for condonation, I refused to grant such condonation and granted default judgment in favour of the Bank against Textiles (the first, second and third respondents), jointly and severally, the one paying the other to be absolved, in the following terms:

9.1 payment of the sum of R11,710,869.57;

9.2 payment of contractual interest in the amount of R1,243,887.57 (for the period ending 31 March 2022);

(the sum of claims 1 and 2 (being R12,954,757.14), hereafter referred to as the "**quantified contractual debt**");

9.3 payment of interest at the prime rate plus 3%, calculated daily, on the amount of R12,954,757.14 from 31 March 2022 to date of final repayment;

9.4 interest on the quantified contractual debt at the prescribed rate *a tempore mora* as from the date of demand to date of final payment;

9.5 the mortgaged property under bond number 000009211/2014, being Erf 610 Lanseria Ext 26, Township, Registration Division J.Q, City of Johannesburg, Gauteng is declared executable; and

9.6 costs on the attorney and client scale.

[10] Hereafter I was requested to furnish reasons for my judgment which reasons were supplied on 8 August 2023.

[11] It is against the above order that Textiles seek leave to appeal.

[12] The aforesaid application was heard on 7 November 2023 and on 16 November 2023. Mr Silver who appeared for Textiles raised several aspects in the application for leave to appeal and during the course of the hearing sought leave to expand the grounds for leave to appeal.

[13] The original application for leave to appeal contained the following grounds:

> "1, The Learned Judge erred in finding that the First to Third Respondent (collectively hereinafter referred to as the "the Respondents") did not show 'good cause', within the precepts of Rule 27, as to why the 3 (three) day late filing of their answering affidavit should not be condoned, when, as a matter of fact, the late filing of such affidavit was not only explained in the answering affidavit so delivered, but also in the correspondence before court, thereby not giving effect to the wide discretion which it has in terms of the leading authority in this regard, being Du Plooy v Anwes Motors (Edms) Bpk 1984 (4) SA 213 (0).
>
> 2. In the above regard, the Learned Judge failed to take cognisance of the fact that the Respondents did on the date on which their answering fell due as per the order of the Honourable Mr Justice Opperman J of 24 May 2023 ("the Opperman Order"), being 12 June 2023, deliver an unsigned copy of the affidavit, thereby allowing the representatives of the Applicant to deal with the matter, deliver their replying affidavit, if needs be, and file supplementary heads in terms of the Opperman order, all which they failed to do.
>
> 3. The Learned Judge failed, consequent upon a finding that condonation should not be granted for the late filing of the Respondents' answering affidavit, to properly apply his mind in coming to a decision that in the absence of condonation, the matter should be treated as an unopposed matter, and to grant judgment in the main application without considering the merits of the main application, alternatively, not allowing counsel to argue the matter as an ordinary opposed application.
>
> 4. The Respondents had a right to be heard for the sake of procedural fairness and for the court to have adhered to the

audi alteram partem principle. Consequently, the court was not called upon to evaluate the merits of the Respondents' opposition, which was, with respect, erroneous.

5. The Learned Judge erred in its finding or remark that the Respondents, when they became aware that the Applicant's legal representatives had set the matter down on the unopposed roll, should have launched both formal postponement and condonation application in the circumstances where the matter should never have been on the unopposed roll in the first place.

6. The Learned Judge in coming to his finding, failed to take cognisance of the fact the Applicant, itself, failed to adhere to the Opperman order by failing to deliver its supplementary heads by 10 July 2023, which consequently lead to the Respondents never to be prompted to deliver their own heads of argument by 24 July 2023. The latter being circumstances which the Learned Judge erroneously utilised for justifying that the matter is indeed unopposed, when it is/was not.

6.(sic) To the extent that the Learned Judge was not inclined to make a finding in favour of the Respondents with regard to condonation for the late filing of their answering affidavit, the Learned Judge ought not have granted the order in the main application, but should have made an order that the Respondents should deliver a formal condonation application, on notice to the Applicant, within a stated time period, with an adverse costs order if needs be, in which case, the Respondents' opposition in the main application was still capable of being heard.

7. For these reasons, the Respondents submit that the proposed appeal has reasonable prospects of success.

8. It is thus in the interest of justice that an appeal is allowed, as is contemplated in section 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013."

[14] The application for leave to appeal was set down for 7 November 2023 at 09h00, but not finalised due to an application to expand the grounds relied upon for the application for leave to appeal by Mr Silver coupled with a case raised by his opponent, Ms Butler, which arose from one of the authorities relied upon by Mr Silver. I granted leave that the grounds of appeal may be expanded.

[15] The hearing of the application for leave to appeal was postponed to 16 November 2023 and on 13 November 2023 the expanded application for leave to appeal was served on the Bank's attorneys.

[16] The expanded application for leave to appeal reads as follows:

> "1The Honourable Acting Judge erred in not granting the respondents condonation for the late filing of their answering affidavit. Further, the Honourable Acting Judge erred:
>
> 1.1. in finding that it was necessary or was a requirement for the answering affidavit to be accompanied by a formal notice of application for condonation in terms of Rule 6 of the Uniform Rules of Court, alternatively he erred in that the respondents' failure to file a notice of application for condonation would elevate form over substance and thus defeating the interests of justice. The applicant was not prejudiced by such failure: it was in possession of the answering affidavit for some 6 weeks prior to the hearing; it did not act in terms of Rule 30 or 30A of the Uniform Rules of Court and it did not put up any evidence of prejudice;
>
> 1.2. in not considering the contents of the answering affidavit alternatively treating the answering affidavit as *pro non scripto;*
>
> 1.3. in not exercising his discretion to condone the late filing of the answering affidavit. He ought to have found that the late filing of the answering affidavit (being 3 days late) did not prejudice the applicant alternatively if there was prejudice, it could be cured by a postponement of the application and an appropriate costs order (in any event, if a postponement was granted, interest would accrue should judgment ultimately be granted in favour of the applicant). The respondents were denied the right to a fair hearing as prescribed in section 34 of the Constitution.
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> 2. The Honourable Acting Judge erred in not finding that:
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> 2.1. clause 4.1 of the second loan agreement (Caselines 003-39) contained a suspensive condition;
>
> 2.2. the applicant bore an onus to allege/plead and prove the fulfilment of the suspensive condition;
>
> 2.3. the applicant neither alleged/pleaded nor proved the fulfilment of the suspensive condition;

2.4. the second loan agreement was thus inchoate and never came into existence. There could be no breach and the respondents had no obligation to make payment in terms of that agreement;

2.5. the applicant had not established a cause of action in respect of the claim founded on the second loan agreement (and no claim was made out based on unjustified enrichment);

accordingly, the applicant's claim pursuant to the second loan agreement could not and should not have been sustained.

3. The Honourable Acting Judge erred in finding that the applicant had proved the amounts and interest charges claimed. Further, the Honourable Acting Judge erred in that he:

3.1. ought to have found that the applicant's case in respect of the amounts claimed was premised on a certificate of balance (the certificate);

3.2. ought to have found that the applicant did not allege/plead the clause/s in the – and on which – loan agreement/s, mortgage bond/s or suretyship/s the applicant relied in respect of the certificate;

3.3. ought to have found that the applicant neither alleged/pleaded nor proved that the certificate complied with the certificate clause in the loan agreements and/or mortgage bonds and/or suretyships. In particular, the certificate was required to be signed by a manager or administrator of the applicant in respect of the loan agreements and mortgage bonds and, in respect of the suretyships, by a manager of the applicant. The Honourable Acting Judge ought to have found that the certificate was not signed and thus no valid certificate was put up;

3.4. ought to have found that the applicant neither alleged/pleaded nor proved that a penalty was a term of any loan agreement and/or mortgage bond and/or suretyship. Accordingly, no case was made out for a claim in respect of a penalty;

3.5. ought to have found that the applicant neither alleged/pleaded nor proved the amount of the penalty and how it was calculated/determined. Accordingly, no case was made out for the amount in respect of a penalty;

3.6. ought to have found that the applicant neither alleged/pleaded nor proved "contractual interest", Accordingly, no case was made out for "contractual interest";

3.7. ought to have found that if a case was made out for "contractual interest", that interest had already been included in the amount claimed in paragraph 1 of the notice of motion (and granted in

paragraph 1 of the Court Order). This is evident from the applicant's own calculation, namely annexures BT1, BT3 and BT4. Accordingly, in respect of paragraph 3 of the Court Order, the Honourable Acting Judge erred in that he ought to have found that the applicant duplicated its claims for interest alternatively claimed interest twice on the same alleged debt, which is unlawful and/or impermissible;

3.8. granted an order, namely paragraph 3 of the Court Order, that is vague and/or non-sensical. The name of the institution whose prime rate is the relevant prime rate is not stated in the Court Order. The applicant neither alleged/pleaded nor proved interest at the rate granted in paragraph 3 of the Court Order and it did not allege/plead the name of the institution whose prime rate is the relevant rate;

3.9. granted an order, namely paragraphs 3 and 4 of the Court Order, which is a duplication of interest (although the rates of interest differ), which is unlawful and/or impermissible."

[17] In my view, the order (albeit vague given the absence of the institution whose prime rate would be applicable) is not appealable. Textiles have only their attorney to blame for the failure to file the condonation application under cover of a notice of application as is required in terms of Uniform Rule 6 (11). Their legal representative could also have made such an application from the bar but never did so. How the right to a fair hearing is affected when no application for condonation is forthcoming or for that matter any other legal argument is put forward to oppose default judgment, is beyond me.

[18] In the circumstances, I ignored the affidavit and treated the matter as an application for default judgment. Ms Butler appearing for the Bank of Taiwan made it clear that she objected to the application for condonation even being argued in the absence of a notice of application.

Conclusion

[19] The obvious remedy is an application for rescission and not an application for leave to appeal. Mr Silver for the Applicants for leave to appeal tried to maintain the position that his clients were not in default. This is only true to the extent that their legal representative did not formally withdraw from the matter or leave the court. She did not seek condonation for the late filing of the answering affidavit once Ms Butler objected to the court having regard thereto. Thereafter to the best of my recollection the legal representative for the applicants made no further submissions. For all practical purposes the applicants for leave to appeal was thereafter unrepresented. No other arguments were raised against the application for default judgment at all.

[20] I am of the view that sections 16(1) and 17(1) of the Superior Courts Act 13 of 2013 apply. Section 16(1) makes it clear that an appeal lies only against "decisions". Leave to appeal may only be given under the following circumstances:

> "(*1*) *Leave to appeal may only be given where the judge or judges concerned are of the opinion that –*
>
> *(a) (i) the appeal would have a reasonable prospect of success; or*
>
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
>
> *(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and*

> *(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the genuine issues between the parties.*"

[21] The decision in Pitelli v Everton Gardens Projects CC[1] seems to be in point. The SCA had to consider whether or not a decision made by default was appealable. In that matter, the court a quo was called to decide on an unopposed application for payment. The application was set down for hearing on 22 June 2020. On 21 June 2007, the appellant filed an application for postponement to enable him to consider certain documents requested (and provided) in terms of Rule 35 for purposes of filing an answering affidavit. On the day of the hearing, counsel for the appellant argued the postponement application, which was dismissed. After the dismissal thereof, counsel for the appellant withdrew based on the fact that he had no instructions to pursue the matter. Judgment was granted in favour of the creditor.

[22] The SCA had to consider whether the judgment granted was appealable and found as follows, per Nugent JA (the other judges concurring), in para 27:

> *"An order is not final for the purposes of an appeal merely because it takes effect, unless it is set aside. It is final when the proceedings of the court of first instance are complete and that court is not capable of revisiting the order. That leads one ineluctably to the conclusion that an order that is*

[1] 2010 (5) SA 171 (SCA).

taken in the absence of a party is ordinarily not appealable (perhaps there might be cases in which it is appealable, but for the moment I cannot think of one). It is not appealable because such an order is capable of being rescinded by the court that granted it, and it is thus not final in its effect. In some cases an order that is granted in the absence of a party might be rescindable under rule 42(1)(a), and if it is not covered by that rule, as Van der Merwe J correctly found, it is in any event capable of being rescinded under the common law."

[23] Although Textiles' legal representative did not withdraw, her further presence had no effect. No submissions on any legal or factual issues were forthcoming after I refused to take the answering affidavit into account in the absence of a notice of application for condonation.

[24] As far as the application for leave to appeal on the expanded grounds is concerned, I am also of the view that it has no merit. Once it is clear that my judgment was given by default these expanded grounds, to the extent that they may have any merit, can be raised in an application for rescission. These issues were not raised by Textiles' legal representative and are not even raised in Textiles' answering affidavit. In any event it appears to me that irrespective of the suspensive conditions the loans were advanced.

[25] I am fortified in my view that the default judgment is one in the true sense of the word by the decision in Ferreira's (Pty)Ltd v Naidoo and another,[2] where De Villiers AJ listed examples obtained by default and included at p 209 paragraph 17(v) in his list the following:

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[2] 2022(1) SA 201(G.J.)

"*Prepare an answering affidavit late and appear at the hearing seeking a postponement and/or leave to place the answering affidavit before the court. If such relief is refused, and judgment is granted on the applicant's papers only, it is still a judgment by default in at least one meaning of the term, default of a party placing its version before the court."*

[26] Ms Butler for the Bank formulated the argument on its behalf succinctly as follows:

"*The main issue that the Applicants face, is that they are appealing a judgement which was never made- the ultimate outcome that the Applicants seek, is for condonation to be granted. The court a quo did not dismiss their condonation application – the court a quo did not consider it, as it was ruled that there was no proper condonation application before it*."

[27] I should point out that I refused to grant the application for condonation given the absence of an application for condonation. In the latter sense it is correct that I did not dismiss the application for condonation either. Had it been placed properly before the court I would have dealt with it.

[28] In the circumstances, the application for leave to appeal should fail.

[29] Hence, I make the following order:

1 The Application for leave to appeal is dismissed with costs.

_____

S. VAN NIEUWENHUIZEN AJ
ACTING JUDGE OF THE HIGH COURT

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To: **The Registrar of the above Honourable Court**

Judgment handed down on: 6 December 2023

Date Reserved: !6 November 2023