IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

15/12/17

CASE NO: A113/2017

In the matter between:

VUYISILE WILDIN SOFE **APPELLANT**

and

PANOS KANELLAKOPOULOS **RESPONDENT**

JUDGMENT

THOBANE AJ,

Introduction

[1] This appeal lies against an order of the Court *a quo*, granting summary judgment against the appellant (defendant in the Court *a quo*) in favour of the respondent (plaintiff in the Court *a quo*) for payment of the sum of R120 000-00, interest thereon at the rate of 9% and costs on an attorney and client scale.

Condonation

[2] Before us is also an application for condonation of the failure of the appellant to file a Power of Attorney, the record on appeal as well as to apply for the date of hearing of the appeal. The appellant therefore seeks reinstatement of the lapsed appeal. The application is opposed by the respondent. Although the application for condonation as well as the appeal were heard at the same time, it is with the condonation application that I deal with first.

[3] The appellant gives the following explanation for the failure to timeously prosecute the appeal;

> 3.1. That summary judgment was granted on 5 August 2016. Ten days later, on 10 August 2016, the appellant's attorney of record delivered a Rule 51(1) notice requesting the magistrate's reasons;

3.2. On 15 August 2016 the appellant gave his attorneys a formal instruction to proceed with the appeal. On 24 August 2016 the digital transcribers informed the appellant's legal representatives that the proceedings were not mechanically recorded;

3.3. On 6 September 2016 the Notice of Appeal was served and filed, followed by a letter from the magistrate, on 12 September 2016 stating that the record of proceedings had been traced and was ready for collection;

3.4. On 10 October 2016 the magistrate provided her reasons. She stated *"I stand by my judgment delivered on 5 August 2016 and I have nothing further to add thereto. Herewith is a transcribed record of the judgment enclosed.";*

3.5. The appellant was able to consult with his legal representatives only on 31 October 2016 on which date a Power of Attorney was signed;

3.6. There was further correspondence in relation to an address within this court's jurisdiction where the transcribed record was to be served;

3.7. The appellant further states that there are good prospects of the appeal and that the respondent stands to suffer no prejudice in the event condonation is granted.

[4] The respondent opposes the application for condonation on various grounds;

4.1. That when the magistrate granted summary judgment she gave comprehensive reasons for it, therefore that it was unnecessary for the appellant to apply for the transcribed record. In any event, it is submitted, where a case is decided on argument, the Practice Directive prohibits the filing of the transcript;

4.2. That the appellant has proffered no explanation for the delay in prosecuting the appeal on time. The respondent further challenges what the appellant submitted was an instruction to his attorney to proceed with the appeal. Respondent states that it is no such thing.

4.3. While admitting the date of signature of the Power of Attorney, the respondent submits that the appellant has advanced no reasons why there was a delay of 21 days after receipt of the transcribed record. The fact that the appellant contends he had employment commitments is not accepted by the respondent.

4.4. That the appeal has no prospects of success. The respondent in making that contention relies on the fact that the appellant has repeated what he stated in the affidavit resisting summary judgment, as a bona fide defence. The respondent

criticizes the appellant for appending his signature on the written agreement and not attacking its terms.

4.5. The respondent in further showing that the appeal has no prospects of success relies on new matter not placed before the court *a quo,* and argues further that he will suffer prejudice in the event condonation is granted in that he is sitting with an undertaking by the appellant to pay the R120 000-00 and that the appellant was raising technical defences.

Legal framework

[5] The principles relating to condonation are well established. They were stated by the Supreme Court Appeal in ***Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others [2013] All SA 251 (SCA); [2013] ZASCA 5,*** thus;

> *"[11] Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice (per Holmes JA in* ***Federated Employers Fire & General***

Insurance Company Limited & another v McKenzie 1969 (3) SA 360 (A) *at 362F-G). . .*

[12] In ***Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA)*** *at paragraph 6 this Court stated: "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 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."*

[13] What calls for some acceptable explanation is not only the delay in the filing of the heads of argument, but also the delay in seeking condonation. An appellant should, whenever it realises that it has not complied with a rule of court, apply for

*condonation without delay (**Commissioner for Inland Revenue v Burger 1956 (4) SA 446 (A)** at 449G-H)."*

[6] In ***Darries v Sheriff, Magistrate Court, Wynberg, and Another 1998 (3) SA 34 (SCA)*** at 40 I - 41D, Plewman JA remarked as follows:

*"Condonation of the non- observance of the Rules of this Court is not a mere formality (see **Meintjies v H D Conbrick (Edms) Bpk 1961 (1) SA 262 (A)** at 263H - 264B; Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 138E - F). In all cases some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. See **Commissioner for Inland Revenue v Burger 1956 (4) SA 446 (A)** at 449F - H; **Meintjies's** case supra at 264B; **Saloojee's** case supra at 138H. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. See **Saloojee's** case supra at 141B-G. In applications of this sort the appellant's*

prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the court to assess the appellant's prospects of success. See ***Meintjies's*** *case supra at 265C-E;* ***Rennie v Kamby Farms (Pty) Ltd 1989 (2) SA 124 (A)*** *at 131E-F;* ***Moraliswani v Mamili 1989 (4) SA 1 (A)*** *at 10E. But appellant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non- observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be."* See also **United Plant Hire (Pty) Ltd 1976 (1) SA 717 AD** at 720 E-G.

[7] In breaking down all the requirements the following come to the fore;

7.1. The degree of non-compliance is neither flagrant nor is it gross. The explanation proffered for the delay is sound. There does not appear to me to be a deliberate attempt to frustrate the respondent in the pursuit of its case.

7.2. Whereas the respondent argued extensively that the merits of its case were strong, and that the appeal had no prospects of success, it must be mentioned that prospects of success though a consideration is but one of the considerations.

7.3. The case is in my view of equal of importance to both parties. The scales do not tilt in favour of one party against the other. An opportunity to properly ventilate the issues, is one that will best serve the interests of the parties and of justice. As part of the evaluation is the question whether the respondent is entitled to a final judgment which would be the result were the condonation application to fail. In light of the drastic nature of summary judgment, were the condonation application to be refused, it would amount to the appellant falling at the first huddle. The result would be a finding that the appeal has effectively lapsed. Such a finding inadvertently would be an affront to justice.

7.4. There are good prospects of success of the appeal. This conclusion is arrived at having, amongst others, considered circumstances under which summary judgment was granted. This includes comments or pronouncements that the magistrate made, which as will appear below, did not fall within his province.

[8] For all the above reasons, condonation is granted and the appeal reinstated.

The appeal

[9] The case mounted by the respondent in the particulars of claim is that on 4 June 2015 and at Klerksdorp, the appellant and the respondent entered into an oral agreement in terms of which the appellant was loaned and paid R120 000-00 by the respondent. On the same day, after the sum of R120 000-00 was advanced, appellant and respondent entered into a written agreement wherein the appellant acknowledged his indebtedness and undertook to pay the loaned amount, free of any interest, before 30 September 2015.

[10] When the applicant defended the action, the respondent launched a summary judgment application which was opposed by the applicant on two grounds, namely;

> 3.1. *In limine* that the agreement was a credit agreement between two private persons and that contrary to what the respondent pleaded in the particulars of claim, the National Credit Act was applicable to the transaction and;
>
> 3.2. That the applicant had a *bona fide* defence to the action in that although the said sum of R120 000-00 was advanced to him it was not intended to be a loan but was meant to be utilized to cover certain expenses. Further that the document

relied upon by the respondent as being an agreement between the parties, was in fact a simulated contract signed for no other purpose other than for bookkeeping at the instance of the respondent's bookkeeper.

[11] In adjudicating the summary judgment application the magistrate took the approach that the National Credit Act did not find application in all credit agreements. The approach, the magistrate reasoned, was founded on the Act itself as well as case law. He based his reasoning on the unreported judgment of ***Oro Africa (Pty) Limited v Currin (13051/2015) [2015] ZAWCHC 203 (17 December 2015)***, and after quoting a dicta from this case, concluded that the agreement between the appellant and respondent was an arms length transaction.

[12] Concerning the defence raised by the appellant, that the sum of R120 000-00 was not a loan, the magistrates took the view that it did not amount to a defence. He reasoned that it did not detract from the fact that the appellant received money and agreed in writing to repay it by a certain date. He then found that the defence did not meet the criteria for resisting summary judgment. He found that the issue raised by the appellant was not triable and therefore that the defence was not *bona fide* and good in law. The magistrate went on to state that the respondent had *"an unanswerable claim"*.

[13] The approach to be adopted in all applications for summary judgment is trite. In ***Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A)*** at 426A, Corbett. JA (as he then was), said the following:

> *"[o]ne of the ways in which a defendant may successfully oppose a claim for summary judgment, is satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed, or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is:*
>
> *1 whether defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it was founded,*
>
> *2 whether on the facts so disclosed, the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law.*
>
> *If satisfied on these matters, the Court must refuse summary judgment either wholly or in part, as the case may be. The word 'fully' as used in the context of the Rule (and its predecessors), have been the cause of some judicial controversy in the past. It connotes, in my view, that while the defendant did not deal exhaustively with the facts*

in the evidence, relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit disclosed a bona fide defence ... At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading."

[14] In ***Joob Joob Investments v Stocks Mavundla Zek 2009 JUNE (5) SA 1 (SCA)***, which the Court *a quo* also relied on, at 12, Navsa, JA, in emphasizing the test as articulated by Corbett JA in ***Maharaj***, noted that this judgment emphasized that there must be an examination of whether firstly there had been sufficient disclosure by the defendant of the nature and grounds of the defence and the fact upon which it was founded, and secondly, that the defence had to be both *bona fide* and good in law. Thus:

"A Court which is satisfied that this threshold has been crossed, is then bound to refuse summary judgment. Corbett, JA also warned against requiring of a defendant the precision apposite to pleadings, however, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor."

[15] The respondent pleaded as follows in relation to the written agreement between the parties;

> *"The cause of action is an incidental credit agreement as defined in the National Credit Act and due to the fact that the Plaintiff does not claim payment of any interest, charges or levies on the amount loaned, the National Credit Act is not applicable to the Plaintiff's cause of action."*

[16] An incidental credit agreement is defined in s 1 of the Act as an:

> *"agreement, irrespective of form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply:*
>
> *(a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or*
>
> *(b) two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable to the account not having been paid by that date."*

[17] I express no opinion about whether or not the respondent is correct in characterizing the agreement as an "incidental credit agreement as defined in the National Credit Act". Suffice to say that on the respondent's pleaded case, it does not seem like goods were supplied or services provided or were to be provided in the future. It also does not appear to me that either or both of the conditions set out in the section apply, namely a fee, charge or interest became payable and also that two prices were quoted with the attendant condition that the lower price would be applicable if payment is made by a particular date and a higher price being payable if payment is not made earlier. If anything, the affidavit resisting summary judgment intimates that the sum of R120 000-00 was advanced and utilized for the procurement of services and goods.

[18] The characterization of the agreement as an incidental agreement, as was the case in the particulars of claim, was taken up with counsel for the respondent during argument before us. He readily conceded that such characterization was wrong. It was pointed out to him that it nevertheless was the case of the respondent before the court *a quo*, a case which the appellant was required to meet.

[19] It is difficult therefore to fathom how the magistrate ended up characterizing the agreement, which is not what the respondent pleaded, as an arms length agreement, apart from the fact that he was referred to the

case of ***Oro Africa***, cited above, which dealt with the final sequestration of one of the parties in that matter, and which, as one of the issues in the matter, dealt with "an arms length agreement". As I understand the point *in limine* raised before the court *a quo,* the agreement that the parties concluded was a credit agreement, (not withstanding the respondent's contention to the contrary). That being the case, and this is what is contained in the affidavit resisting summary judgment, the terms and conditions of the National Credit Act should have been followed. The record does not show with clear particularity, which terms and conditions of the National Credit Act, on the appellant's contentions, were to be followed. What the appellant stated however, is that the transaction was between two private persons.

[20] Once the appellant had raised the point *in limine*, the role of the magistrate, in line with case law cited above, was limited to determining if the defence raised, was fully disclosed and that the nature and grounds thereof clearly set out. In this regard, the magistrate found that the appellant had done sufficiently to meet the threshold. It was in the determination of whether the defence was good in law or whether it was *bona fide*, that the magistrate found that the appellant had fallen short. In finding that the point *in limine,* by implication, was not good in law or was not *bona fide,* the magistrate erred.

[21] With regards to the bona fide defence, the appellant admits that there was a document signed between the parties. This document, it is contended,

was simulated. According to the appellant, the money was advanced to enable him to carry out and fulfill some of his business obligations and that the document was signed for bookkeeping purposes. The magistrate rejected this defence and emphasized that money was advanced and accepted by the appellant who undertook in writing to repay the money by a particular date. The magistrate then found that the issue raised was not triable. I disagree. In my view, the magistrate seems to have adopted a very simplistic approach to the effect that; the respondent handed to the appellant the sum of R120 000-00, the respondent received the money, the respondent signed a document undertaking to pay the amount before a particular date and the appellant failed to pay as undertaken. The over simplistic approach led the magistrate to ignore the fact that all that was required was for her to evaluate if the defence raised, proffered a triable issue. If she had done so she would have found that it does.

[22] I am troubled by the fact that it is not clear from the particulars of claim or from the summary judgment proceedings, whether the respondent based its claim on the oral agreement or the written agreement. I am more troubled by the fact that the terms of the oral agreement were not pleaded, yet they form the foundation of the agreement that was signed subsequent thereto. Nevertheless in argument before us it was submitted that the cause of action rested on the written agreement. All these however are matters for the trial court.

[23] It was argued vigorously before us that the appellant had failed to deal adequately with, in fact, the contention was that the appellant had failed to deal with the written agreement at all. The fact that the appellant had failed to explain why he appended his signature to the document, and had claimed no fraud, was accentuated by the respondent and interpreted to mean that the appellant had aligned himself with the agreement. It was further argued that the defence that the agreement was a simulated agreement was not specifically stipulated as such by the appellant. In this regard it was pointed out that the appellant before the court *a quo* explained in detail circumstances under which he came to sign the agreement. That even though the appellant did not specifically indicate that the agreement was simulated, such an indication was embedded in the explanation that the appellant gave on the circumstances surrounding signature. The contention that the appellant did not, before the court *a quo*, allege simulation is rejected.

[24] The appellant states as follows in the affidavit resisting summary judgment;

> *"5.4. The document signed on 4 June 2015 was to provide the bookkeeper of the applicant with a source document. The cheque was made out in my personal name. The applicant and his bookkeeper confirmed that if the financial statements of the business are audited, the cheque will correspond with this source document to confirm that no irregularities have taken place*

5.5. Therefore the amount of R 120 000-00 paid over to me was never for a loan but to apply for funding for me to buy the applicant's business, which transaction fell through because of the applicant's own indiscrepancies.(sic).

5.6. I once again confirm that the document undersigned was for the applicant's bookkeeping purposes and not for a loan purposes. The applicant's attorney of record together with the bookkeeper is well aware of this."

[25] Having considered the affidavit by the appellant which contained the aforementioned portions, the magistrate concluded that *"the respondent's reasons for failing to pay the loan as contained in his affidavit does not pass muster."* Such a conclusion, in the absence of an explanation of how it is arrived at, falls to be rejected. The magistrate states that the defence of the appellant before the court *a quo* as contained in paragraphs 4.1 to 4.14 does not meet the criteria for resisting summary judgment. A clear reading of the affidavit however shows that the defence of the appellant is encapsulated in paragraph 5 of the affidavit resisting summary judgment. Paragraphs 4.1. to 4.14. comprises background information which seems to have been latched on by the magistrate and ultimately informed the reasoning that signature of the agreement signified that the appellant could not in law challenge the fact that payment and receipt of the money amounted to a non refundable loan.

To the extent that the court *a quo* held that the appellant disclosed no *bona fide* defence, it erred.

[26] The finding by the court below that the particulars of claim and what is contained in the application for summary judgment was "*unanswerable*" was clearly erroneous. Although it is not apparent from the record or was not articulated in argument before us, I take it the magistrate relied on ***Breytenbach vs Fiat S A (Edms) Bpk 1976 (2) (TPD) 226*** at 229E-H, where a *dicta* from another case, where the question of "*unanswerable*" case was debated, was quoted namely, ***Shepstone vs Shepstone 1974 (2) SA 462 (N)***, which reads as follows:

> *"I quote the following passages from the judgment of Miller J, in that case, at p467E-H:*
>
> > *"The Court will not be disposed to grant summary judgment where, giving due consideration to the information before it, it is not persuaded that the Plaintiff has an unanswerable case."*
>
> *That is the first quotation and the second is:*
>
> > *"..... a defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he advances may succeed on trial."*

The respondent submitted in the heads of argument, with reference to ***Breytenbach,*** (supra), that the appellant's averments were bald, vague or

sketchy and that they failed to expand or elaborate. I do not support such characterization as it is not borne out by evidence.

[27] It is my considered view that, before the court below, the appellant had set out its defence with sufficient particularity and completeness in order to comply with the provisions of Rule 32(3)(b) of the Uniform Rules. I am further of the view that the appellant had placed before the court *a quo,* enough to show that it has evidence which, if established at the trial, will constitute a valid defence to the respondent's claim. Consequently, the application for summary judgment ought to have been refused.

Costs

[28] There are two sets of costs to be considered in this matter. The first relates to the question whether or not the application for condonation ought to have been opposed. The respondent argues that there were reasonable grounds to oppose the application for condonation and that the reasons are set out in its opposing affidavit. The second concerns the costs of the appeal.

[29] It is trite that costs are a matter for the discretion of the court. When one considers whether there were sufficient and genuine grounds to oppose the application for condonation, I am constrained to find that in circumstances where the respondent stood to suffer no prejudice, and in

circumstances where the merits of the appeal were much more paramount than the condonation, which had been articulately set out, it was foolhardy for the respondent to oppose the application for condonation. Costs therefore must be awarded against the respondent.

[29] The appellant has been successful in this appeal. There is no reason why an award of costs should not be in his favour.

[30] I therefore make the following order;

1. Condonation is granted and the appeal is reinstated;
2. The Respondent is directed to pay the costs of the condonation application;
3. The appeal succeeds;
4. The respondent is directed to pay the costs of appeal;
5. The order of the magistrate granting summary judgment is set aside and replaced with the following;

   "3.1. The defendant is granted leave to defend the action;

   3.2. The costs shall be costs in the cause."

SA THOBANE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree and it is so ordered

N JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA