

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

69715/2013

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DELETE WHICHEVER CASE NUMBER	
69715/2013	
In the matter between	REPORTABLE: YES/NO.
FIRSTRAND BANK LIMITED	(2) OF INTEREST TO OTHER JUDGES: YES/NO.
	(3) REVISED.
And	Applicant
DATE 13.11.2014	SIGNATURE

MPHO DAVID BALOYI NO

Respondent

**In his representative capacity as Trustee
of the LOMAR FAMILIE TRUST**

13/11/2014

JUDGMENT

MATOJANE J

[1] This is an application for condonation for the late delivery of the plaintiff's application for summary judgment on the same date and time when an application for summary judgment was heard.

[2] The application was placed on an unopposed motion roll for a summary judgment application despite the fact that it was an opposed substantive application for condonation.

[3] In its founding affidavit, applicant states that it attempted to serve the application for summary judgment by hand at the offices of the defendant's attorneys on the 18 December 2013, but the latter's offices were already closed for the festive season. During the afternoon of the same day, the application for summary judgment was faxed to the correct fax number of the Defendant's attorneys, under cover of a letter confirming that proper service of the application was impossible due to the offices having closed.

[4] On Monday 6 January 2014 applicant prepared another bundle of the application for summary judgment, which was served on the

attorneys of the respondent and filed at Court. The application for summary judgment was set down for hearing on 19 February 2014.

[5] On 13 February 2014 the respondent's attorney indicated to the applicant in writing that the application for summary judgment was served out of time and suggested that the application be removed from the roll. Applicant informed the respondent by letter, attaching a service affidavit, that the application was served by fax as the respondent's offices were closed and that the application will proceed on 19 February 2014.

[6] On 17 February 2014 the respondent delivered an affidavit resisting summary judgment raising the defence that the application was served out of time and raised no other defence on the merits of the application.

[7] At the hearing of the application on the 19 February 2014 when the matter was before court for the first time, counsel for the applicant moved for condonation for the late service of the application from the bar which was refused and plaintiff was ordered to bring a substantive application for condonation. Costs were reserved.

[8] The North Gauteng Practice Manual sets out the procedure to be followed where the matter becomes opposed. Paragraph 13.9.2 directs that:

2.1 A party to an opposed motion may apply to the registrar to allocate a date for the hearing of that application in terms of Rule 6(5)(f) of the Uniform Rules of Court only if, in addition:

- (a) the papers have been indexed and paginated; and
- (b) the heads of argument have been served and filed.

2.2 the applicant must serve and file heads of argument within 15 days from date of the completion of the index and the respondent must serve and file heads of argument within 10 days from the date on which the applicant's heads of argument are served...

[9] The applicant has failed to comply with the practice manual and has not exchanged heads with the opposing counsel. On this ground alone, the application stands to be struck from the roll with costs.

Condonation

[10] The defendant's principal objection to the condonation application by the applicant is based on the submission that the application for summary judgment did not comply with Rule 32 (2), which reads as follows:

"The Plaintiff shall within 15 days after the delivery of the notice of the intention to defend, deliver notice of such application accompanied by an affidavit made by himself or herself or by any other person who can swear positively to facts verifying y the cause of action and the amounts, if any, claimed and stating that in his or her opinion there is no bona fide defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay, and if the claim is founded liquid document a copy of the document shall be annexed to such affidavit, and such notice of the application shall state that the application will be set down for hearing on a stated day not being less than 10 days from date of the delivery thereof"

[11] It is common cause that applicant had until Monday 30 December 2013 to deliver an application for summary judgment and had served the application by fax on 18 December 2013. Actual delivery in terms of the Uniform Rules of the application took place on 6 January 2014 , the day on which the offices of the Defendant's attorneys opened and 4 (FOUR) court days later as prescribed by the Rules of Court.

[12] Respondent submitted that because of the exceptional and drastic remedy that Rule 32 provides for, there should be strict compliance with that Rule and submitted that condonation should not be automatically granted as the Rule results in the finalisation of the case and effectively deprives a defendant of the opportunity to state

[13] The respondent complained that the application for condonation of the applicant did not show good cause for condonation in that the application was served in a manner not agreed upon, then by delivering the application out of time, then seeking to cure the defect by filing two "service affidavits", which is not provided for in the rule and without bringing an application for the filing of further affidavits and then bringing an opposed application to the unopposed roll.

[14] The only explanation given by the applicant for its non-compliance with Rule 32(2) is the fact that it had mistakenly believed that the attorneys for the respondent will not raise a technical point and will consent to the service by fax, due to the fact that the Plaintiff had no alternative but to serve the application by fax.

[15] The applicant correctly submitted that such condonation is not merely a formality, but is an indulgence of the Court. In this regard the applicant relied on cases such as *Bill Troskie Motors v Motor Spares Centre (Edms) Bpk* 1980 (2) SA 961 (O) at 962-963; *Breitenbach v Fiat S.A (Edms) Bpk* 1976(2) 226 TPD at 228D-E. Other authorities were also referred to that indicate that the respondent's defence must go to the merits of the application and purely technical defenses are not permitted.

[16] In terms of Rule 27(3) the Court may, on good cause shown, condone any non-compliance with Rules of Court. I cannot accept the applicant's explanation why it had not complied with the Rules. It is not unusual for attorneys offices to be closed on the 18th of December 2013 and that applicant should have taken the festive season into account when it decided to wait until the last moment to make an attempt at serving the application.

[17] It is well recognised that summary judgment is extraordinary remedy and should only be granted in circumstances where the Court has no doubt that the plaintiff has an unanswerable case. Corbett J,

as he then was, in **Arend and Another v Astra Furnishers (Pty) Ltd** 1974 (1)SA 298 (C) at 304F-G.)¹

stated:

"In my view, an important factor to be taken into account by the court in determining how to exercise its discretion, is the consideration that the procedure of summary judgment constitutes an extraordinary and very stringent remedy: it permits a final judgment to be given against a defendant without a trial. It is designed to prevent a plaintiff having to suffer the delay and an additional expense of the trial procedure where the defendant's case is a bogus one or is bad in law and is raised merely for the purpose of delay, but achieving this makes drastic inroads upon the normal right of a defendant to present his case to the Court"

In this matter the application was postponed on 19 February 2014 to enable the applicant to deliver an application for condonation for the late delivery of its application for summary judgment. In my view, the merits of the summary judgment application can only be dealt with once the condonation has been granted.

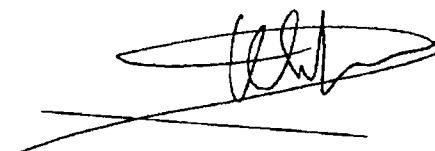
[18] It has also been authoritatively stated that the court has a discretion to refuse summary judgment even if no bona fide defence is disclosed. (van Niekerk, Geyer & Mundell, In their work **Summary Judgment: A Practical Guide**, para 11.2.8; *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004(6) SA 29 (SCA) 34I-35A.)

[19] I am not convinced that this is a matter where I should exercise my discretion to grant summary judgment. By doing so, I would effectively close the doors of the Court to the respondent. In the light of this I believe that I should strike the matter from the roll.

¹ 1974 (1)SA 298 (C) at 304F-G.)

Order

The matter is struck from the roll with costs which includes the reserved costs of the 19th February 2014.

A handwritten signature in black ink, appearing to be 'Matojane J', is written over a horizontal line.

MATOJANE J