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

CASE NO: 71033/2019

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

DATE: 10 March 2021

In the matter between:

NEDBANK LIMITED

APPLICANT/PLAINTIFF

(REGISTRATION NUMBER: [...])

and

GLENDAMERLE HINTERMAIR

RESPONDENT/DEFENDANT

(IDENTITY NUMBER: [...])

JUDGMENT IN RESPECT OF APPLICATION FOR LEAVE TO APPEAL

INTRODUCTION

1. On 16th December 2020, the respondent brought an application for leave to appeal.¹
2. The application for leave to appeal was brought in terms of Section 16 read with Section 17 of the Superior Court Acts, 10 of 2013 (*“the Act”*) in that:
 - 2.1. The appeal has a reasonable prospect of success on the grounds stated herein below;
 - 2.2. There is some other compelling reason why the appeal should be heard on the grounds stated herein below; and
 - 2.3. The decision sought on appeal does not fall within the ambit of Section 16 (2) (a) of the Act.
3. The application for leave to appeal was based on the following grounds;
 - 3.1. The Respondent did not utilise Rule 30 to deal with the merits or substance of the summary judgement at all - the Respondent used Rule 30 to object to the applicant's late filing of its summary judgement application;
 - 3.2. The Court made specific reference to the commentary section of the Uniform Rules which furnishes specific examples of instances where the Rule has found application. One of the instances listed is at paragraph (f) which stipulates that “Notice of intention to defend was irregular or delivered out of time....”
 - 3.3. The commentary to the Uniform Rules thus expressly makes provision for the Rule to be invoked in instances where a Notice has been delivered out of time and thus is not limited to instances relating

to form or non-compliance with the form as found by the Court;

- 3.4. The Respondent's objection to the late filing of the Applicant's application for summary judgement would thus fall squarely within the ambit of this instance stipulated in the commentary to the Uniform Rules and should not have been dismissed. Furthermore, as advised, the Respondent's Rule 30 application did not address the substantive issues in respect of asserting a defence to the summary judgement application and thus the Court erred in making this finding.
- 3.5. In paragraphs 22 and 23 of the judgement, the Court held that insofar as the Respondent had filed her answering affidavit to the applicant's application for condonation for bringing the summary judgement application out of time, the Respondent will not have been afforded the protection of Rule 30 in light of the fact that she has taken further steps when Rule 30 requires a person not to do so to maintain the advantage and protection of the Rule 30.
- 3.6. The Respondent's filing of an answering affidavit to the applicant's condonation application does not constitute a further step taken by the Respondent in advancing her case - the Respondent was simply filing a response to the application which was initiated by the Applicant;
- 3.7. Had the Applicant not filed an answering affidavit to this application, then the condonation application would have remained unopposed and been automatically granted. In fact, in order to rely on the protection afforded by Rule 30, the Respondent could not have filed an answer to the Applicant's summary judgement application, as the Court suggested.
- 3.8. If the Respondent had in fact filed papers opposing the Applicant's application for summary judgement, the Respondent would have taken a further step in response to the late filing, which would have amounted in essence to tacitly condoning the late filing of the

¹ Application for leave to appeal

Applicant's application for summary judgement, thus rendering the Rule 30 application moot.

- 3.9. It was for this specific reason that the Applicant suggested that the Rule 30 application and the Applicant's application for condonation be heard simultaneously first before dealing with the substantive summary judgement application, as both applications in essence dealt with the same subject matter, being the late filing of the Applicant's summary judgement application.
 - 3.10. Accordingly, in these circumstances, the Respondent was well within her rights to invoke Rule 30 to object to the Applicant's summary judgement being filed out of time. Furthermore, in order to invoke the protection of the Rule, she was not permitted to file a substantive answer to the summary judgement application, which in itself would have constituted a further step, making the Rule 30 application entirely superfluous.
 - 3.11. The Court thus should have found that the Respondent was entitled to the protection afforded by Rule 30 and thus upheld the Respondent's Rule 30 application.
4. At paragraph 26, the Court held that it was satisfied that the Applicant had made out a case in respect of the condonation for the summary judgement application. At paragraph 33, the Court held that it was abundantly clear that there was no disregard of the applicable time frames as contained in the Uniform Rules of Court and that the slight degree of lateness combined with the good prospects of success favours the granting of condonation.
 5. The Court erred in approaching the matter on this basis and making the findings referred to, for the following reasons:
 - 5.1. The Applicant's contention that it laboured under the bona fide belief that it was obliged to first file its plea to the defendant's counterclaim, cannot be logically or legally sustained. Firstly, the Applicant is one of

South Africa's major commercial banking institutions, which has a variety of legal firms on its panel. The Applicant is represented in this matter by an established law firm. It is trite law that ignorance of the law is not a valid legal defence;

- 5.2. The Applicant's attorneys should be well-versed with the provisions of Uniform Rule 32(2) (a), which are blatantly clear and unambiguous. They are an established legal firm which has undoubtedly dealt with numerous summary judgement applications and should be *au fait* with the provisions of the Rules by now;
- 5.3. The main objective of the summary judgement procedure is for the court to grant summary judgement for the plaintiff which would dispose of the defendant's entire case if granted - this then begs the logical question of why the Applicant would have thought that it would be a prerequisite for the plaintiff to have first filed its plea to a counterclaim before it would be entitled to institute its summary judgement application. It is the defendant's plea that is in issue or purposes of summary judgement – not the plaintiffs plea to the defendant's counterclaim, which counterclaim in any event would fall away if the summary judgement is granted;
- 5.4. The Court erred in its calculations at paragraph 29 of the judgement. The Respondent's counterclaim was served on 10 June 2020. The Applicant's version is that it had filed its plea to the Respondent's counterclaim in accordance with the 15 day period after the service by the Respondent of its counterclaim as stipulated in Uniform Rule 25;
- 5.5. Accordingly, on the Applicant's own contention and allegedly plausible reason or having filed its summary judgement application late, the Applicant should have filed its plea to the counterclaim by no later than 2 July 2020, being 15 court days from 10 June 2020;
- 5.6. The Applicant in fact filed its plea to the counterclaim only on 4 August 2020 an entire month later. Thus paragraph 29 of the

judgement is incorrect in accepting the Applicant's calculation that the delivery of its plea to the Respondent's counterclaim was done within the 15 day period;

- 5.7. This fact in an of itself points to the disingenuous of the Applicant's contention that it had abided by the time period set out in Uniform Rule 25 first before filing its summary judgement application and clearly evidences a complete disregard of the applicable time frames as contained in the Uniform Rules of Court therefore, even on the Applicant's version, its plea to the Respondent's counterclaim was filedway out of time;
- 5.8. If one has regard to the date upon which the Applicant filed its summary judgement application, being 24 August 2020, this evidences that the Applicant's application was served 52 days late in so far as it should have been served by no later than 2 July 2020 in accordance with the provisions of Uniform Rule 32(2) (a);
- 5.9. Therefore, the Court erred in finding that Applicant has shown good cause for its failure to comply with the provisions of Uniform Rule 32(2)(a) in delivering its summary judgement application outside of the 15 day time period afforded to it to do so and thus its condonation application should not be granted.
- 5.10. As pointed out above, even on the Applicant's own version that it first needed to comply with Uniform Rule 25 before applying for summary judgement, it should have served its plea to the Respondent's counterclaim no later than 2 July 2020 and its summary judgement application, 15 court days later, by 23 July 2020. The Applicant in fact only served its summary judgement application a month later on 24 August 2020.
- 5.11. The Court therefore erred in its finding in paragraph 33 of the judgement that there was only a "slight degree of lateness" and no disregard of the applicable time frames and should have refused the Applicant's condonation application as the Applicant had not shown

good cause for its delay in instituting its summary judgement application.

6. The Court granted the Applicant's summary judgement application in the very same hearing on the basis that the Respondent did not file any papers opposing the summary judgement application.
7. The Court erred in approaching the matter on this basis and making the findings, referred to, for the following reasons:
 - 7.1. As set out in paragraphs 4.3 and 4.5 above, in order to invoke the protection afforded to it under Rule 30, the Respondent could not have filed a substantive answer to the summary judgement application as to do so, would have constituted a further step and rendered the Rule 30 application superfluous;
 - 7.2. The Court thus needed to rule on the Rule 30 and condonation application first and had the Court upheld the Rule 30 application and dismissed the Applicant's condonation application, there would, in any event, have been no need for the Respondent to file an answer to the Applicant's summary judgement application. The summary judgement application would not have been granted and the Applicant would have been required to proceed in the normal course;
 - 7.3. The Court erred in requiring that the Respondent was obliged to file an answer to the summary judgement application in the very same application in which the Court was required to adjudicate upon the Rule 30 application. Thus, it is respectfully submitted that the Court erred in conflating the procedural and substantive elements of the matter and deciding both in the course of the same hearing;
 - 7.4. It is submitted that even if the Court was correct in dismissing the Respondents' Rule 30 application and granting the Applicant condonation for the late filing of its summary judgement application,

the Court should have postponed the hearing of the summary judgement application and afforded the Respondent an opportunity to then file a response to the Applicant's summary judgement application;

- 7.5. As set out above, the Respondent could not have filed a response to the summary judgement application before the Rule 30 application had been duly adjudicated upon. The only instance in which she would have been required to file an answer to the summary judgement application, was if there was no Rule 30 application pending and only the condonation application to be decided upon;
 - 7.6. The Court in deciding to rule upon the substantive summary judgement application in the same hearing as adjudicating upon the Rule 30 application, on the basis that the summary judgement application was unopposed, simply ignored its own finding that the Respondent was not permitted to take a further step by filing an answer to the summary judgement application in order to rely on Rule 30;
 - 7.7. Even if the Court was correct in dismissing the Respondent's Rule 30 application, the Court should have postponed the hearing of the summary judgement application and afforded the Respondent an opportunity to file an answer to the Applicant's summary judgement application, which she then would have been able to do due to the fact that the Rule 30 application was no longer pending and had been dismissed.
8. It is respectfully submitted, in conclusion, that there is a reasonable prospect that another Court will approach the matter on a different basis and will, on appeal, uphold the Respondent's Rule 30 application, alternatively dismiss the Applicants condonation application, with the result that the summary judgement application would not be granted.

9. Alternatively, if another Court agrees with this judgement and dismisses the Respondent's Rule 30 application and upholds the Applicant's application for condonation, the summary judgement application should not have been granted immediately in order to afford the Respondent an opportunity to respond thereto.

SUBMISSION BEFORE COURT

10. The matter was argued before the Court via Microsoft Teams on 25th February 2021.

SUBMISSIONS BY MS MARCUS

11. The arguments which were put forward by Ms Marcus on behalf of the Respondent/Defendant were as follows;
12. That Rule 30 was applicable where notice to defend was delivered out of time which is not confined to the form.
13. That Rule 30 was applicable to an instance where an application for summary judgment was delivered out of time.
14. That the respondent/defendant did not oppose the summary judgment application as this would have amounted to a further step to advance the case to completion.
15. That the respondent/defendant had opposed the application for condonation as it would have remained unopposed.
16. That only Rule 30 and the application for condonation should have been heard by the Honourable Court on 27 October 2020.

17. That the condonation was filed out of time. That the Court erred in its calculation of the delays in filing the summary judgment application at paragraph 29 of the reasons for judgment and that the period of delay amounts to fifty two (52) days. This appears at paragraph 6.8 of the grounds for application for leave to appeal.
18. The Court took issue with Ms Marcus's argument regarding the fact that the Court should have been confined to only hearing the Rule 30 and condonation and should not have dealt with the summary judgment. It was put to Ms Marcus that it was the discretion of the Court to deal with the matters as they appeared before the Court. It was also put to Ms Marcus that the applicant/plaintiff attorneys had notified the respondent/defendant by way of written correspondence, that they intended to proceed with all the applications including the summary judgment at the hearing of the matter. It was apparent from the correspondence between the two parties that the plaintiff/applicant intended the applications including the summary judgment to be dealt with by the Court on the date of the hearing.
19. It was also put to Ms Marcus that the discretion of the Court to deal with the matters as they appeared before the Court is a decision that lies solely within the discretion of the Court and thus a litigant party could not have dictated to the Court as to the manner in which the matters before the Court should be dealt with.
20. Ms Marcus could not make legally sound submissions to rebut the approach of the Court in exercising its discretion.

MR DU PLESSIS' SUBMISSIONS

21. Mr Du Plessis in his submissions also emphasised that the Honourable Court had a discretion to deal with the matter in the manner in which it dealt with the matter. He also indicated that the granting of condonation is within the discretion of the Court and is therefore not appealable.

22. Mr Du Plessis also submitted that the Rule 30 application was filed out of time. It was supposed to have been filed on the 7th of September 2020 but was only filed on the 14th of September 2020. Accordingly, the Rule 30 application had lapsed and therefore there was no proper Rule 30 application before the Court.
23. Mr Du Plessis indicated that the approach to Rule 30 is a two-step approach which has to be followed in terms of the Uniform Rules. The first step is to file a notice and for the actual application for in terms of Rule 30 to be filed within fifteen (15) days after such a notice has been filed.
24. Mr Du Plessis also submitted that the respondent/defendant was warned that the Rule 30 application was an irregular step, however the respondent persisted with the Rule 30 notwithstanding the warning which appeared in the written correspondence between the attorneys of the applicant/plaintiff and the respondent/defendant who was representing herself.
25. This same issue was also raised by the Honourable Court when it put this issue to Ms Marcus. However, her response was that the applicant/plaintiff could not dictate to the respondent/defendant on how to approach its case.
26. Further, it was pointed out by Mr Du Plessis that the applicant/plaintiff was aware that it had brought the summary judgment out of time. However, it cured the lateness of the application for summary judgment by bringing an application for condonation. Mr Du Plessis also indicated that by filing the answering affidavit to oppose the application for condonation, the respondent/defendant has taken a further step which advances the proceedings once stage nearer to completion. He then supported his submission by referring to the commentary in the Uniform Rules which is to the affect that a party takes a further step in the course of filing a declaration, notice of bar, a replication and so forth.
27. Mr Du Plessis also indicated that at the time of the application in October

2020 and even at the time of the hearing of the application for leave to appeal, the respondent/defendant has no *bona fide* defence to the claim by the applicant/plaintiff. Accordingly, Mr Du Plessis submitted that no purpose will be served by granting the respondents/defendant application for leave to appeal, in circumstances where the respondent/defendant had no prospects of success.

28. Mr Du Plessis referred the Honourable Court to Section 16 (2) (a) and 17 (1) (a) and 17 (1) (c) of the Superior Court Act. Section 16 (2) (a) of the Superior Court Act provides as follows;

“When at the the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.”

29. Section 17 (1) (a) provides as follows;

“Leave to appeal may only be given where the Judge or Judges concerned are of the opinion that -

(a) (i) the appeal will have a reasonable prospect of success;

30. Section 17 (1) (c) provides as follows;

“Leave to appeal may only be given where the Judge or Judges concerned are of the opinion that where the decision sought to be appealed does not dispose of all the issues in the case, the appeal will lead to a just and prompt resolution of the real issues between the parties.”

31. The Court concurs wholeheartedly with Mr Du Plessis’s submissions in this matter. It is common cause that the respondent/defendant has no *bona fide* defence to the claim for summary judgment which was brought by the applicant/plaintiff. This remained the case during the hearing of the matter in October 2020 as well as at the time the application for leave to

appeal was brought before the Court on 16th December 2020 and during the hearing of this application on 25th February 2021.

32. As stated in Sections 16 (2)(a)(i) which states the following;

“When the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.”

33. It is indeed the case that granting the respondent/defendant leave to appeal will result in no practical effect or result and on that basis alone the application for leave to appeal ought to be dismissed.
34. It is indeed also the case that if the Court has regard to Section 17 (1) (a) the appeal has no reasonable prospect of success and also if regard is had to Section 17(1) (c) the decisions sought to be appealed does not dispose of all the issues in the case.
35. In this case even if leave to appeal was to be granted in terms of Section 17(1) (c) the issue of the defendant/respondent not having a *bona fide* defence will still remain. The issue regarding whether the Court should have granted condonation to the applicant/plaintiff will not dispose of the matter finally. Ultimately, the issue relating to whether the defendant/respondent has a *bona fide* defence remains the elephant in the room which will remain unresolved even if the respondent/defendant was to be granted leave to appeal.

Conclusion

36. The application for leave to appeal is accordingly dismissed with costs.

TD SENEKE AJ

Acting Judge of the High

Court

Gauteng Division, Pretoria