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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: A068332-2024

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

In the matter between:

LI FENG TEXTILES (PTY) LTD	First Appellant
NAI-CHIANG WANG	Second Appellant
JUI CHANG WANG	Third Appellant

and

BANK OF TAIWAN INCORPORATED IN REPUBLIC OF CHINA (T/A BANK OF TAIWAN SOUTH AFRICA BRANCH)	First Respondent
INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LTD	Second Respondent

JUDGMENT

MAHOSI AJ (Twala J and Raubenheimer AJ concurring)

Introduction

[1] The crisp issue in this appeal is whether the judgment and order of Van Nieuwenhuizen AJ sitting as a Court *a quo* declaring the mortgaged property, being Erf 6[...] L[...] Ext 26, Township, Registration Division J.Q. City of Johannesburg, Gauteng, executable and ordering the first to third appellants to pay R11 710 869.57 plus interest and costs, is appealable. This issue arises against the backdrop of an order granted in an unopposed motion court in the presence of the respondent's counsel, in circumstances where an answering affidavit was filed out of time without any application for condonation.

[2] The appellants unsuccessfully sought leave to appeal from the Court *a quo*. This appeal is with the leave of the Supreme Court of Appeal ("SCA"). Only the first respondent opposed the appeal.

The parties

[3] The first appellant, Li Feng Textiles (Pty) Ltd, is a company duly incorporated in accordance with the company laws of the Republic of South Africa. The second appellant, Nai-Chiang Wang, is a director and shareholder of the first appellant. The third appellant, Jui Chang Wang, is the second appellant's father. Both the second and third appellants bound themselves as sureties for the first appellant's debt in favour of the first respondent.

[4] The first respondent, Bank of Taiwan Incorporated in the Republic of China (t/a Bank of Taiwan South Africa Branch), is a company incorporated in the Republic of China and registered as an external company in the Republic of South Africa. The second respondent, Industrial Development Corporation of South Africa Ltd ("IDC"),

is a state-owned development finance institution incorporated in terms of section 2 of the Industrial Development Corporation Act¹ and is cited as having an interest in the matter as a second mortgage bondholder.

Background facts

[5] The first respondent instituted motion proceedings against the first, second and third appellants (“the appellants”) for the payment of R 11 710 869. 57 with interest and to declare the mortgaged property under mortgage number B000009211/2014 executable. The appellants opposed the relief and filed a notice in terms of Rule 6(5)(d)(iii)² challenging the authority of the first respondent and Lynn Houh, the deponent of the founding affidavit, to institute and prosecute the aforementioned proceedings.

[6] On 24 May 2023, Opperman J issued an order, by agreement between the parties, in the following terms:

- “1. The points of law raised by the first to third respondents in their Rule 6(5)(d)(iii), as amended on 27 January 2023, are dismissed with costs as between attorney and client.
2. The hearing of the merits of the matter is postponed *sine die*.
3. The first to third respondents are ordered to file their answering affidavit, if any, by 12 June 2023.
4. The applicants are to file their replying affidavits, if any, by 26 June 2023.
5. The applicants shall file supplementary heads of arguments by 10 July 2023.
6. The first to third respondents shall file supplementary heads of arguments by 24 July 2023.

¹ Act 22 of 1940, as amended.

² Rule 5(d) reads:

“Any person opposing the grant of an order sought in the notice of motion must-

...

(iii) if he or she intends to raise any question of law only, he or she must deliver notice of his or her intention to do so, within the time stated in the preceding subparagraph, setting forth such question.”

7. Should the first to third respondents fail to file an answering affidavit by 12 June 2023, the matter may be enrolled on the unopposed motion roll.”

[7] The appellants served the first respondent with an unsigned answering “affidavit” on 12 June 2023 and a signed and commissioned one three days later, on 15 June 2023, in which they also sought condonation for its late filing. In response, the first respondent’s legal representatives informed the appellants’ attorneys by email that they were instructed to enrol the main application on an unopposed roll and served the notice of Set Down for 27 July 2023.

[8] Although the appellants’ counsel was present at the hearing on 27 July 2023, the Court *a quo* granted the order on an unopposed basis and refused to condone the late filing of the answering affidavit. Upon request for its reasons, it stated:

“[8] On the 27 July 2023 the applicant’s legal representative applied for judgment and, although the respondents were out of time, their representative appeared and made reference to the affidavit filed in support of an application 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, I refused to grant such condonation and granted judgment in favour of the applicant against the first, second and third respondents, jointly and severally, the one paying the other to be absolved in the following terms...”

[9] It is the above ruling that the appellants seek to appeal and set aside.

Submissions

[10] The appellants submitted that the Court *a quo* erred in failing to consider their answering affidavit, treating it as *pro non scripto* and finding that Rule 6(11)³ of the Uniform Rules required the condonation affidavit to be accompanied by a formal notice. They argued that the Court *a quo* elevated form over substance where there

³ Rule 6(11) reads:

“Notwithstanding the foregoing sub-rules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge.”

was no indication that the first respondent suffered any prejudice as a result of the late filing of the answering affidavit.

[11] The first respondent submitted that the Court *a quo*'s order was not appealable. It denied that the Court elevated form over substance and contended that it was entitled to enrol the main application on an unopposed roll as the appellants failed to file their answering affidavit on the date ordered by Opperman J. Further, the first respondent asserted that the appellants were not denied an opportunity to be heard as they failed to file a notice of condonation application and their counsel failed to move the condonation application from the bar.

Legal framework and analysis

[12] *Pitelli v Everton Gardens Projects CC*⁴ (*Pitelli*) is authority for the proposition that a court order is only appealable once it becomes final. Relying on *Zweni v Minister of Law and Order*⁵, it held:

“[F]or an order to be appealable it must have as one of its features that the order is final in its effect, by which I mean that it is not susceptible to being revisited by the court that granted it ...”⁶

[13] Regarding what “final” means, the SCA explained that:

"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."⁷

[14] On whether the Court *a quo*'s order was granted in default, the first respondent referred us to the judgment in *Ferreiras (Pty) Ltd v Naidoo and another*⁸ (*Ferreiras*), which had to determine a similar issue and followed a full court decision in *Rainbow Farms (Pty) Ltd v Crockery Gladstone Farm*.⁹ In the latter case, the full

⁴ 2010 (5) SA 171 (SCA).

⁵ 1993 (1) SA 523 (A).

⁶ *Id* at [20].

⁷ *Id* at [27].

⁸ 2022 (1) SA 201 (GJ).

⁹ 2017 JDR 1758 (LP).

Court of the Limpopo Division was faced with an appeal of a judgment in which the Court *a quo*, per Muller J, dismissed an application to rescind a judgment that was granted in default. The judgment sought to be rescinded was granted by Phatudi J after refusing an adjournment and granting judgment in the absence of the answering affidavit. The full Court had to determine, *inter alia*, whether the appellant was in default despite the attendance of its counsel in Court when the judgment was granted and made out a case for rescission. On whether the appellant was in default, the full Court held as follows:

"[10] The Court *a quo* decided that the judgment was not a judgment taken on default of appearance by the appellant. It did so on the basis that the Appellant's Counsel was present in Court when the order was made. The Court *a quo* erred in this regard. This matter was an application and the presence or absence of a party can only be determined by whether the party has submitted affidavits or not. The presence of the actual party and/or Counsel in Court is irrelevant to that issue. In the absence of any affidavits (bearing in mind that there is no option available for the party to testify at such a hearing) it is logical to conclude that the party is in default of appearance when the order was made notwithstanding that, counsel may have been in Court.

[11] In my view where opposing papers have not been filed this is a "default" even if the respondent in the matter or his legal representative is present in Court. See *Morris v Autoquip (Pty) Ltd* 1985 (4) SA 398 (WLD); *First Nation Bank of SA v Myburg and Another* 2002 (4) SA 176 (CPA).

[12] The question of what is meant by "default" was considered in *Katritsis v De Macedo* 1966 (1) SA 613 (A). In this matter the Appellate Division (as it was then) held that "default" which then as is the case now is not defined in the Rules or the Act, meant a default in relation to filing the necessary documents required by the rules in opposition to the claim. In *casu* the judgment was granted in the absence of an opposing affidavit by the appellant and was therefore default judgement even if it was not a default in a sense of absence of the party."

[15] The full Court set aside Phatudi J's judgment and directed the respondent to file its answering affidavit to the main application. On appeal to the SCA, the appeal suffered a similar fate. That Court said:

“On the test articulated by this Court in *Zweni v The Minister of Law and Order* 1993 (1) SA 523 (A), the order is not appealable if it has the following attributes (a) not final in effect and is open to alteration by the court below; (b) not definitive of the rights of the parties; and (c) does not have the effect of disposing of a substantial portion of the relief claimed See also *SA Informal Traders Forum v City of Johannesburg* 2014 (4) SA 971 (CC).”¹⁰

[16] Before us, the first respondent's counsel conceded that by ignoring the answering affidavit, the Court *a quo* did not consider the merits concerning condonation. It refused to grant condonation because of a technicality, there being “no formal notice of application for condonation in terms of Rule 6 of the Uniform Rules of Court”. Consequently, an order was granted only on the respondent's papers without the appellants' version.

[17] Although the Court *a quo* stated in its reasons for an order that it “refused” to grant the condonation, no such order was recorded. It is, therefore, apparent that the Court *a quo* had no regard to the answering affidavit the appellants sought to place before it. In light of the aforementioned authorities, Court *a quo*’s order is not appealable. Consequently, the appeal must be dismissed and the costs must follow the result.

[18] Accordingly, the following order is made:

Order

1. The appeal is dismissed with costs on scale B.

D. MAHOSI J
ACTING JUDGE OF THE HIGH COURT

¹⁰ *Crockery Gladstone Farm v Rainbow Farms (Pty) Ltd* [2019] ZASCA 61, at para 4.

Heard: 20 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives through email. The date for hand-down is deemed to be 24 December 2024.

Appearances

For the appellants: Advocate M.D. Silver

Instructed by: Chen & Lin Incorporated Attorneys

For the first respondent: Advocate L. Meintjes

Instructed by: Rothman Phahlamohlaka Incorporated Attorneys