

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

Case Number: 2022/027021

DELETE WHICHEVER IS NOT APPLICABLE

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

Date: **19 March 2025** Signature: 

In the matter between:

NEDBANK LIMITED

Plaintiff / Applicant

and

MBULELO SIMON NTSHANGASE

Defendant / Respondent

JUDGMENT

STYLIANOU, AJ :

1. This is an application for summary judgment wherein the applicant (“the plaintiff”) seeks summary judgment against the respondent (“the defendant”).
2. The parties have agreed that the summary judgment application should be postponed as it is not ripe for hearing.

3. In essence, the summary judgment application cannot proceed because a condonation application brought by the plaintiff for the late-filing of its application for summary judgment, is not ready to be heard.
4. Unfortunately, the parties cannot agree on who should pay the wasted costs occasioned by the postponement.
5. The matter was allocated to the opposed motion roll for the week of 10 March 2025, however, the court file was not accessible on CaseLines until shortly before the commencement of the motion week. This notwithstanding, the matter was allocated for hearing once it became available on CaseLines.
6. Mr Cohen, who appeared for the defendant maintained that the wasted costs occasioned by the postponement should be borne by the plaintiff.
7. Mr Cohen submitted that it was due to the plaintiff's conduct that the matter was not ripe for hearing, specifically:
 - 7.1. that the summary judgment application was out of time, and that the condonation application that the plaintiff was required to bring had not been finalised before the summary judgment application was enrolled; and
 - 7.2. that the matter had not been properly loaded onto CaseLines as required by this Court's practice; and

7.3. that the plaintiff did not call for a pre-hearing conference for the purposes of drawing up a joint practice note.

8. The defendant maintains that for all these reasons, the matter could not proceed and the wasted costs of the postponement should be borne by the plaintiff.

The Condonation Application

9. The plaintiff concedes that it issued its application for summary judgment outside the time-period specified in Rule 32 of the Uniform Rules of Court.

10. On 25 April 2024, the plaintiff filed an application for condonation for the late delivery of its application for summary judgment.

11. Some nine months later (on 17 January 2025) the plaintiff filed a notice of set down of the summary judgment application for the week of 10 March 2025. At this stage of the proceedings, there was no notice of opposition or answering affidavit to the condonation application.

12. The notice of opposition to the condonation application was only filed on 17 February 2025 almost ten months after the condonation application was filed.

13. The answering affidavit was thereafter filed by the defendant on 19 February 2025.

14. A replying affidavit was filed by the plaintiff on 5 March 2025 – a few days before the summary judgment was due to be heard.

15. From the above time-line, it seems clear that the filing of the notice to oppose and the answering affidavit to the condonation application so close to the hearing date of the summary judgment application was the reason why the matter was not ripe for hearing.

16. In seeking to address this issue, the defendant relied upon Rule 6(11) which provides:

(11) Notwithstanding the foregoing subrules, 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.

17. The defendant submits that the time periods for the exchange of affidavits set out in Rule 6(5) do not apply to interlocutory applications (such as the condonation application) and that the defendant could not be criticised for only filing its answering affidavit some ten months after the condonation application had been launched.

18. In the matter of ***Gisman Mining and Engineering Co (Pty) Ltd (in liquidation) v LTA Earthworks (Pty) Ltd*** 1977 (4) SA 25 (W), McEwan J said at 27H – 28 A as follows:

“It does seem to me, however, that, whatever the correct reading of Rule 6 (11) may be, it cannot mean that in an interlocutory matter the applicant has unlimited time to file a replying affidavit. If the correct position is that there is no Rule defining exactly the time within which affidavits must be filed, then in my view the Rule should at least be read to mean that they must be filed within a reasonable time. prima facie, in my view, a reasonable time would certainly not be longer than the time prescribed in terms of Rule 6 (5) (e), unless there were some special circumstances applying.

19. Erasmus, Superior Court Practice at p.6-50 says:

“The provisions of the rules relating to the time for filing answering and replying affidavits do not apply to interlocutory applications. Further affidavits in interlocutory applications must be filed within a reasonable time; prima facie in the absence of special circumstances, this would not be longer than the times prescribed in terms of rule 6(5).”

20. Hence, whereas there are indeed no time periods specified in rule 6(11) for the exchange of affidavits in interlocutory applications, it does not mean that a litigant can sit back indefinitely before it decides whether to oppose and whether to file an answering affidavit. Clearly, ten months is an unreasonable period.

21. Mr Cohen further argued that the plaintiff should have enrolled the condonation application on the interlocutory roll before the summary judgment application was set down. The defendant argued that it was the failure to do this that has necessitated the postponement of the summary judgment application.
22. Presumably, had the plaintiff sought to have the condonation application heard earlier, the defendant would have been compelled to act sooner and would not have waited so long to file its answering affidavit. Had condonation been granted, it would have meant that the summary judgment application could have gone ahead without hindrance.
23. Mr McTurk, who appeared for the plaintiff, submitted that it was preferable for the condonation application to be heard at the same time as the summary judgment application and not separately beforehand. He submitted that the condonation application and the summary judgment application could conveniently be heard and considered together since, in considering whether to grant condonation, one of the factors that a Court takes into account must be the plaintiff's prospects of success. (See: ***Federated Employers Fire & General Insurance Company Limited & another v McKenzie*** 1969 (3) SA 360 (A) at 362F–G.)
24. This would involve an analysis of the defence raised by the defendant and whether it disclosed a *bona fide* defence. There would be an inverse relationship between the plaintiff's prospects of success and the defendant's *bona fide* defence. The better the defendant's defence, the worse the plaintiff's prospects of success on summary judgment and vice versa. If the court hearing the condonation application finds that no *bona fide* defence is made out, it may be more inclined to grant

condonation – which would mean that a subsequent court (the summary judgment court) would reconsider the question of whether a *bona fide* defence is made out by the defendant.

25. Of course, if a *bona fide* defence is made out, the court hearing the condonation application would in all likelihood refuse to condone the late-filing of the summary judgment application and the summary judgment application would end there.

26. There is therefore some merit in Mr McTurk's submission that it would be convenient for one Court to consider both the condonation application and the summary judgment application. However, one should not discount the influence that the other elements of a condonation application (such as the reason for the default) would have on the granting of such an application. Condonation obviously does not depend solely upon the prospects of success.

27. Having said that, there is also merit to Mr Cohen's submission that the condonation application (with all its constituent elements) should be heard first and that the plaintiff was remiss in not seeking to enrol it earlier.

28. It seems to me that the parties are equally to blame for not ensuring that the condonation application was either disposed of beforehand, or ready to be heard together with the summary judgment application.

Was the matter loaded onto CaseLines?

29. The defendant maintains that the matter was not loaded onto CaseLines and accordingly, the matter was not ripe for hearing.

30. During argument, counsel for the defendant demonstrated to the Court, by directing the Court to interrogate the “Audit” function on the CaseLines platform, that the file in this matter was created on CaseLines on 21 April 2023 at 10:27.

31. In the absence of expert testimony on how CaseLines works and how files are “*pulled through*” from the “Court Online” system to the CaseLines system, I am not prepared to make a finding on whether or not the matter was created in 2023 and whose fault it was that it could not be found on CaseLines at the time that the Court was allocating its matters for hearing.

32. Nothing further need be said about this issue.

There was no Joint Practice Note

33. The defendant also complains that the plaintiff did not call for a conference to draw up a joint practice note.

34. This was denied by the plaintiff who referred to correspondence dated 19 June 2024 loaded onto CaseLines wherein the defendant’s attorneys were invited to comment on a proposed joint practice note. The response from the defendant’s attorneys was that they did not agree to the draft joint practice note, which they deemed to be premature in any event.

35. A further letter from the plaintiff's attorneys dated 13 September 2024 called for three dates convenient to the defendant's attorneys to hold a formal pre-trial conference. There was no response to this letter.

36. There can therefore be no criticism of the plaintiff for absence of a joint practice note.

37. Ultimately, the matter was not ripe for hearing because the condonation application was not ready to be heard. There had been no time for the filing of heads or argument on the opposed condonation application.

38. As I indicate above, I am of the view that the parties are equally to blame for this and accordingly, there should be no order as to costs.

39. In the circumstances, I order as follows:

- a. The summary judgment application is postponed *sine die*, no order as to costs.



X STYLIANOU, AJ
Acting Judge of the Hight Court

Heard: 12 March 2025
Judgment delivered: 19 March 2025

Appearances:

For Applicant: Adv RG Cohen
Instructed by: Glynnis Cohen Attorneys

For Respondents: Adv S McTurk
Instructed by: UMS Attorneys