IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO. 167/2025
Not reportable

In the matter between:

FIRSTRAND BANK LIMITED
t/a WESBANK
(Registration No. 1929/0001225/06) **PLAINTIFF**

and

ADGE INVESTMENTS (PTY) LTD **DEFENDANT**

Coram: Rugunanan J

ORDER

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1. Condonation for the late delivery of the application for summary judgment is refused.
2. The application for summary judgment is dismissed with costs.

3. The costs shall be on the scale as between attorney and client.

JUDGMENT

Rugunanan J

[1] Plaintiff, a registered credit provider under the National Credit Act[1] (the Act) instituted action against defendant, a consumer defined as a juristic person under the Act, allegedly for a repudiation and breach by defendant of its obligations under a written instalment sale agreement concluded on 6 June 2024 (the agreement) in respect of a mobile self-loading cement mixer[2] which plaintiff financed for construction purposes (the asset).

[2] Since the principal debt/cost for the asset inclusive of initiation and other service-related fees amounted to R941 902.20, and is thus a large agreement, the Act does not apply.

[3] The agreement expressly conferred upon plaintiff the right of cancellation in the event defendant failed to comply with its terms, such failure, as is alleged in the particulars of claim includes inter alia, failure to pay punctually the agreed instalments when due. The agreement, in addition, obliged defendant to keep the asset in its possession and control at all times.

[4] In circumstances in which defendant experienced operational challenges with the asset, including failed attempts to resolve issues with plaintiff and the supplier, Sino Plant (Sino), from whom the asset was purchased, defendant

[1] Act 34 of 2005.
[2] Described in the particulars of claim as a 2024 Default Mixer 3000L OTR Self-loading (4x4) with serial number CNU23008203.

notified plaintiff on 11 December 2024 that it repudiated the agreement. Following the repudiation, plaintiff cancelled the agreement such as was effected in writing on 13 December 2024, the letter stating unequivocally:

'Our client … accepts the repudiation of the instalment sale agreement, which our client regards as going to the root of the [agreement] and accordingly regards the [agreement] as cancelled.

[5] Prior to the institution of the action on 23 January 2025, defendant referred a dispute/complaint to the Office of the National Financial Ombud Scheme (the Ombud), details of which are not immediately apparent on the papers, but as far as can be gleaned, concern a number of 'issues' such as the hydraulic malfunctioning of the asset and plaintiff's alleged rebuff, as 'legal owner and titleholder'[3] to be of assistance to the defendant.

[6] In a notice of motion delivered on 7 October 2025, plaintiff notified defendant that application for summary judgment will be made, and orders will be sought for: confirmation of cancellation of the agreement, return of the asset, postponement of plaintiff's claim for damages to be determined, plus interest, attorney client costs of suit, and collection commission.

[7] Although no specific prayer is included in the notice of motion, plaintiff, in addition, sought condonation for the late delivery of the application, such relief being moved from the bar.

[8] The ostensible basis for condonation is that the 'the late filing of the application for summary judgment is in terms of an express agreement' between the parties.

[3] Clause 4.2 of the installment sale agreement.

[9] Uniform rule 32(2)*(a)* stipulates that 'within 15 days after the date of the delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.'

[10] Defendant delivered its plea on 25 March 2025. Same incorporated a special plea, defendant contending that the institution of legal proceedings was premature pending resolution of the dispute/complaint referred to the Ombud, and that a third party 'has possession of the asset through and by authorization [sic] of the plaintiff.'

[11] Adverting to the rule, and reckoned in accordance with the prescribed interval, defendant maintains that the period for delivery of the application would have lapsed on 16 April 2025. On 14 April 2025, some two days before expiry of the interval, plaintiff, presumably having considered the special plea, communicated to defendant as follows:

> 'Our office is prepared to continue to pend the litigation herein to allow an opportunity for the Ombud to make a ruling … We are only prepared to hold over litigation subject thereto that [the] dies be put on hold, specifically the right of the plaintiff to bring an application for summary judgment in future …'

[12] In its response, defendant stated:

> '[W]e have obtained instructions herein, and holding off the dies in the aforementioned litigious proceedings is in order, pending the adjudication of the matter at the office of the Ombud.'

[13] On the papers, indubitably, the request to 'hold over' was at plaintiff's instance, there being no indication to the contrary. The request interceded two days before expiry of the interval prescribed in the rule leaving it open to infer only that the remaining two days would be held over for delivery of the application. Put otherwise, the indication is that the application would be

delivered no later than two days of the Ombud ruling. If this construct is incorrect, it is of greater consequence to point out that plaintiff did not seek agreement that the prescribed interval in its entirety would commence afresh once the ruling became available. Nor can it be suggested that defendant (tacitly) acquiesced to 'holding off the dies' indefinitely.

[14] Incumbent on seeking the indulgence, it was plaintiff's duty to unambiguously clarify the extent thereof.

[15] It is common cause that defendant's complaint was dismissed on 11 June 2025. The decision was communicated in a terse email advising, in summary, that the institution of the action precludes intervention by the Ombud. It is also common cause that the summary judgment application was delivered on 7 October 2025, some four months after 11 June 2025. This is well beyond the assumed two days of the prescribed period, or the entire period itself – the delay baldly ascribed to an agreement between the parties, which explanation plaintiff's counsel correctly conceded is poor on the condonation issue.

[16] Condonation will not be had for the mere asking. It is an indulgence. The party seeking it must furnish a reasonable explanation sufficiently full[4] covering the entire period[5] to enable the court to understand their conduct and motives for the delay occasioning non-compliance. The task is fact specific. Plaintiff has not done this. Its affidavit does not detail reasons traversing the length of delay until delivery of the application and inspires no confidence that plaintiff litigates responsibly. The rationale for summary judgment proceedings is impeccable. Because it is intended to prevent delay in adjudicating certain causes of action,

[4] *Silber v Ozen Wholesalers (Pty) Ltd* 1954 SA 345 (A) at 353A; see also the commentary in Van Loggerenberg, *Superior Court Practice* Vol 2 at D1-323 to D1-324 [Service 21, 2023] and the cases referred to.

[5] *Van Dyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at 477E-F and Van Loggerenberg *supra* at D1-324.

it requires a high degree of strict compliance. Plaintiff's affidavit bears no semblance of an appreciation thereof.

[17] The length of the delay is by no means insignificant and the scant explanation falls short of the requirements of rule 27 which enjoins an applicant for condonation to show good cause for its failure to comply with the rules of court. In determining good cause the court has a wide discretion which, seen as a whole, must, in principle, be exercised with regard to the merits of the matter,[6] or prospects of success (summarily dealt with in what follows hereafter).

[18] Tritely, summary judgment is a remedy that should be resorted to and accorded only where a plaintiff can establish its claim clearly and the defendant fails to set up a bona fide defence.[7]

[19] A condition precedent to an application for summary judgment is that the application shall be based on one or more of the claims listed in rule 32(1), namely: a liquid document, a liquidated amount in money, delivery of specified movable property, or ejectment.

[20] Rule 32(1)*(c)* read with sub-rule (2)*(a)* permits a plaintiff, within the prescribed period after the defendant has delivered a plea, to apply for summary judgment for delivery of specified movable property. Applied to the present case, the principle is that summary judgment should be granted if plaintiff has clearly demonstrated that it has a claim for delivery of the asset.

[21] Turning to the agreement, defendant was obliged during its tenure to keep the asset in its possession and under its control at all times. The agreement has

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[6] Van Loggerenberg *supra* at D1-322

[7] See Van Loggerenberg *supra* at D1-383 [Service 21, 2023] and the cases referred to.

been cancelled and the asset is no longer in defendant's possession. It was returned to Sino (the exact date not mentioned but ostensibly before institution of the action, as far as can be ascertained on defendant's version). According to plaintiff, the return of the asset to Sino conflicted with the express terms of the agreement, and constituted an alienation by defendant. This is compounded by the circumstance that defendant previously refused to sign a notice of voluntary surrender that would have enabled plaintiff to retrieve the asset. To the contrary, in its plea and in its answering affidavit, defendant avers that the return of the asset to Sino occurred 'through and by authorization [sic] of the plaintiff', and on plaintiff's 'instruction'. Absent a deviation in the answering affidavit to the pleaded defence, defendant's stance is not a manifestation of a lack of bona fides.[8] It is evident that there is an extant dispute of fact that cannot be resolved solely on the affidavits.

[22] Plaintiff's counsel submitted that summary judgment is competent for the reason that the agreement was cancelled, and had defendant signed off on the notice, the extant proceedings would have been unnecessary. Unless summary judgment is granted, so the argument went, plaintiff would suffer a potential financial loss. The interests of justice therefore necessitated overlooking plaintiff's indiscretion on the condonation issue and to grant summary judgment to avoid its exposure to such loss.[9]

[23] On both parties' versions the agreement has come to an end in circumstances where plaintiff remains the owner of the asset. The prayer for confirmation of cancellation of the agreement is unnecessary since judicial cancellation is not in issue. Such a prayer, in any event, amounts to seeking a

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[8] See *Firstrand Bank Limited t/a Wesbank v Sayelo (Pty) Ltd t/a Giani Dy Cleaners and Laundry* [2024] ZAGPPHC 1282 (29 November 2024) para 27.
[9] *Firstrand Bank Limited t/a Wesbank v Sayelo (Pty) Ltd t/a Giani Dy Cleaners and Laundry* supra paras 31-32.

declaratory order which is not permissible in terms of rule 32.[10] The matter, however, turns essentially on the status quo regarding possession of the asset. That is the only *lis* at this stage between plaintiff and defendant.

[24] The hard facts are that the agreement has been cancelled extra-judicially and defendant does not have possession or control of the asset. An order directing defendant to restore possession to plaintiff may not have practical effect since it is a well-known principle that a court will only grant relief that is capable of enforcement, and where relief cannot be enforced that is good reason for refusing it.[11] Elemental to this is a dispute of fact on whether defendant unilaterally alienated the asset, or whether possession was rendered to Sino at plaintiff's instance.

[25] The absence of defendant's possession of the asset and the dispute of fact raises doubt – more specifically a triable issue about whether plaintiff has clearly established its claim for return or delivery and diminishes prospects of success for obtaining summary judgment.

[26] In the circumstances the discretion to refuse summary judgment is invoked.[12]

[27] Defendant sought costs on a punitive scale. Plaintiff's laggard handling of the matter is ample justification.

[28] In the result the following order issues:

1. Condonation for the late delivery of the application for summary judgment is refused.

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[10] *Alphera Financial Services v Kolanisi* (11947/2020) [2021] ZAWCHC 78 (29 April 2021) para 5.
[11] *Mansell v Mansell* 1953 (3) SA 716 NPD at 721E.
[12] *Alphera Financial Services v Kolanisi* para 7.

2. The application for summary judgment is dismissed with costs.

3. The costs shall be on the scale as between attorney and client.

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JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: *M Somandi*, Owen Huxtable Attorneys, Makhanda Tel: 046-622 2694, (Ref. D J vd Merwe)

For the Defendant: *C Van Douw*, Cheyenne Van Douw Attorneys, Rosebank Tel: 011-759 4215, c/o AG Law Attorneys Inc., Makhanda, Tel: 046-004 0025 (Ref. AG/004/25)

Date heard: 13 November 2025.

Date delivered: 17 March 2026.