IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 633/18

REPORTABLE:

OF INTEREST TO OTHER JUDGES:

REVISED

01/03/2023

In the matter between:

FIRST NATIONAL BANK A DIVISION OF FIRST BANK LIMITED (Registration Number: 1929/001225/06)	Applicant
and	
MMD FITMENT CENTRE CC (Registration Number: 2003/053509/23	First Respondent
MALCOLM NATHAN **(ID NO: [....])**	Second Respondent
MARK ANTHONY PRETORIUS (ID **NO: [....])**	Third Respondent

IN RE:

FIRST NATIONAL BANK A DIVISION OF FIRST BANK LIMITED (Registration Number: 1929/001225/06)	Plaintiff
and	
MMD FITMENT CENTRE CC (Registration Number: 2003/053509/23	First Defendant
MALCOLM NATHAN **(ID NO: [....])**	Second Defendant
MARK ANTHONY PRETORIUS **(ID NO: [....])**	Third Defendant

JUDGMENT

MBONGWE J:

INTRODUCTION:

[1] This is an opposed application wherein the applicant seeks summary judgment against the second respondent only and an order that the first and third respondents be held jointly and severally liable with the second respondent for payment of the amount of R157, 521.74 claimed by the applicant against all three respondents jointly and severally in the main action.

THE FACTS

[2] The applicant issued summons on 09 January 2018 against the respondents, jointly and severally the one paying the others to be absolved, for payment of the sum of R157 521.74 plus interest at 15.25% per annum calculated from 8 November 2017 to date of payment (both days inclusive) and costs. The amount is the balance of an overdraft facility the applicant had advanced to the first respondent at the instance of the second respondent. The second and third respondents were members of the first respondent at the time the written loan agreement was concluded and had signed as sureties for the overdraft facility. The loaned amount plus interest was to have been fully repaid on or before the 29 November 2017.

[3] Only the second respondent filed an appearance to defend the applicant's action by notice dated and filed on 02 February 2018. No further exchange of pleadings occurred between the parties until on 09 February 2022, that is, four years and one week later, when the applicant' attorneys emailed the plaintiff's declaration to the second respondent's attorneys. This was followed by the filling of a notice of bar on 11 March 2022 as a result of non-response by the second respondent's attorneys.

[4] The second respondent filed a special plea and a plea on 07 April 2022. On the same day the applicant served and filed the present application for summary judgment against the second respondent with a prayer that the first and third respondents be held jointly and severally liable with the second respondent, the one paying the others to be absolved.

THE SPECIAL PLEA

[5] In the special plea the second respondent raised as his defence the common law principle of superannuation as well as prejudice premised on the applicant's inordinately delay of over four years in the prosecution of its claim. With regard to prejudice, the second respondent alleged that the first

respondent was at its final stages of deregistration, that the third respondent has since passed on and that he no longer had access to documents and evidence relating to the loan agreement with the applicant.

[6] On the 11 May 2022 the applicant filed and served the final notice of set down of the hearing of the application for summary judgment. In response the second respondent filed a Rule 30 (2) notice contending that the application for summary judgment was an irregular step. He further contended that the applicant's entitlement to summary judgment had lapsed in terms of the old Rule 32 of the Uniform rules of Court, adding that the applicant was not entitled to rely on the amended Rule 32, which came into operation on 01 July 2019, to bring the application for summary judgement.

[7] The basis for the second respondent's contention was that the applicant had not brought the application for summary judgment within the period of 15 days stipulated in the old Rule 32 calculated from the date of the second respondent's entry of appearance to defend, being 01 February 2018. The second respondent contended that the applicant had forfeited its entitlement to apply for and seek summary judgment in the circumstances.

ANALYSIS

[8] From its plea, the second respondent does not dispute the applicant's claim. It merely bemoans the applicant's inaction for a period of four years to proceed with the prosecution of the claim resulting in the alleged prejudice referred to above.

THE DELAY

[9] In an affidavit deposed to by the applicant's attorney and attached to the declaration, it is stated, in a purported explanation for the inordinate

delay, that the applicant's file could not be attended to as it had not been diarised since the departure of the person who had been dealing with the applicant's claim from the applicant's attorneys' firm. It was further contended that the delay could have been averted had the second respondent filed further papers subsequent to his entry of appearance to defend. As the *litis dominis,* the applicant was in charge of the progression of its claim. It is disingenuous for the applicant's attorney to seek to apportion blame for his firm's internal act of negligence. Nothing, but the negligence had prevented the applicant from pursuing the matter further in terms of the rules.

[10] Stemming from the pleadings and arguments presented in court, it is apparent that there is no dispute with regard to the applicant's substantive claim. Importantly, despite the substantive application for summary judgment, the second respondent has failed to file an answering affidavit in opposition of the application. Technically, therefore, this application for summary judgment, save in respect of arguments on the point(s) of law, is unopposed.

ARGUMENTS ON THE POINT OF LAW

[11] The second respondent's contention that the applicant had lost its entitlement to summary judgement in terms of the old Rule 32 when it failed to apply for same within the 15 days stipulated in the rule and the submission that the applicant was not entitled, four years later, to seek to rely on the subsequently amended Rule 32 to bring the application for summary judgment, in my view, have merit. It is on the basis thereof that the second respondent sought the dismissal of the application for summary judgment.

[12] The applicant argued that as the declaration and the respondent's plea were filed after the commencement of the amended Rule 32, and that it was entitled and in fact obliged to seek summary judgment in terms of the

amended Rule 32.

[13] The applicant's entitlement to summary judgment arose when the second respondent filed its appearance to defend on 01 February 2018. The applicant had 15 days from that date to bring the application for summary judgment in terms of the old Rule 32. Its failure to do so timeously was due to the negligent failure to diarise the applicant's file at the offices of its attorneys. The application for summary judgment ought to have been launched early in March 2018 when the old Rule 32 was still in operation. It is impermissible for the applicant to seek to derive a benefit from its inordinate delay and seek to rely on the amendment of Rule 32 which came into operation on 01 July 2019, more than four years after the applicant's entitlement to summary judgment had lapsed. The applicant was bound by the provisions of the old Rule 32 and had to seek and be successful in an application for the condonation to set the platform for the hearing of the summary judgment hearing.

REQUIREMENTS FOR CONDONATION

[14] It is trite that a party who for whatever reason has failed to comply with the time frame provided for in the rules, a court order or directive is obliged to seek the indulgence of the court in an application for the condonation of the delay. To succeed the applicant has to explain the delay. Good cause for the delay, the period of delay; the prospect of success in an appeal and the absence of prejudice to the other party are amongst the factors the court considers in determining whether to grant condonation.

[15] An application for condonation must set out justifiable reasons for non-compliance. In *Melane v Sanlam Insurace Co Ltd1962* (4) SA 531 (A) at C-F, Holmes JA stated the principle thus:

"In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the fact and, in essence, is a matter of fairness to both sides. Among the fact usually relevant are the degree of lateness, the explanation thereof, the prospect of success, and the importance of the case. Ordinarily these facts are interrelated,· they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion..."

[16] In *Foster v Stewart Scott Inc.* (1997) n18 ILJ 367 (LAC) at para 369, Froneman J stated the principle in the following terms:

"It is well settled that in considering applications for condonation the court has a discretion, to be exercised judicially upon a consideration of all the fact. Relevant considerations may include the degree of non-compliance with rules, the explanation thereof, the prospect of success on appeal, the importance of the case, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the other. A slight delay and a good explanation for the delay may help to compensate for prospect of success which are not strong. Conversely, very good prospect of success on appeal may compensate for an otherwise perhaps inadequate explanation and long delay. See, in general, Erasmus Superior Court Practice at 360- 399A."

[17] While the factors for consideration in a condonation application are inter-related, a reasonable explanation for the delay coupled with a good prospect of success may enhance the chances of the success of the

application for condonation; a weak explanation, but good prospect of success and the importance of the case will allow for the granting of an application for condonation. The court is clothed with wide discretionary powers which it exercises judicially in the valuation of the relevant factors in the particular matter. The interests of justice underpin the court's exercise of its discretionary powers. A good explanation without prospect of success on the merits warrants a refusal of condonation.

[18] The court may grant condonation despite a poor explanation of the delay where doing so will be in the interests of justice. This will be the situation where an appellant seeks an erroneous judgment and order set aside, but had failed to comply with the time frames provided for the lodging and prosecution of the appeal. The interests of justice will necessitate the granting of the condonation in order for the court to set aside the impugned judgment and orders.

[19] The absence of prejudice on the other party is also a factor considered, particularly where the prejudice may not be cured by an order of costs. In *National Union of Mine Workers v Council for Mineral Technology* [1998] ZALAC at 211 0- 212 at para 10, the court stated the legal position thus:

> *"The approach is that the court has a discretion, to be exercised judicially upon a consideration of all the fact, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospect of success and the importance of the case. These facts are interrelated,· they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong*

prospect of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for delay, the prospects of success are immaterial, and without prospect of success, no matter how good the explanation for the delay, an application for condonation should be refused."

[20] I find in the present matter that the explanation of the delay of over four years by the applicant's attorney to locate the plaintiff's file was unreasonably long and, if anything, points to negligence. Besides, as the applicant's entitlement to bring an application for summary judgment arose and lapsed when the old Rule 32 was still in operation, the absence of an application for condonation of the late filing of the application for summary judgment is fatal. Summary judgment must consequently be refused.

CONCLUSION

[21] The second respondent has not filed an answering affidavit resisting summary judgment. It has, however, successfully argued the point of law regarding the applicant's lapsed right to summary judgment. The second respondent had already pleaded when it filed the Rule 30(2) notice. By filling the special plea and plea to the applicant's declaration the second respondent had taken a further step and could no longer, in terms of Rule 34, rely on the irregularity of the application for summary judgment. However, having pleaded and raised defences, the second respondent is entitled to be heard in a trial, in my view. For the reasons given above, the application for summary judgment stands to be dismissed.

COSTS

[22] The second respondent has succeeded in this hearing and is,

therefore, entitled to costs.

ORDER

[23] Resulting from the findings and conclusion in this judgment, the following order is made:

1. The application for summary judgment is dismissed.

2. The applicant is ordered to pay the costs.

MPN MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA.

APPEARANCES

For the Applicant	Adv L A Pretorius 012 111 0414 / 082 634 4845 lindap@law.co.za
For the second Respondent	Adv J Isakow 082 580 2009 jon@jiattorneys.com

JUDGMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES ON 01/03/2023