

SOUTH AFRICA / JUDGMENT

Khiba v Nel and Another, Tyabazayo v Nel and Another, Tyabazayo v Nel and Another (2765/2016, 2497/2016, 3316/2016) [2017] ZAECGHC 47 (11 April 2017)

[2017] ZAECGHC 47

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M.J Lowe

CASE / FILE NUMBER

2765/2016, 2497/2016, 3316/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: 2765/2016

Date

heard:

16

March 2017

Date

delivered:

11

April 2017

In

the matter between:

BONGANI
BETHWELL KHIBA
Applicant
and
MAGISTRATE
NEL, KING WILLIAMS
TOWN
First
Respondent
CAPITEC
BANK
LTD
Second
Respondent
CASE
NO: 2497/2016
ANDISWA
ASHLEIGH TYABAZAYO
Applicant
MAGISTRATE
NEL, KING WILLIAMS TOWN
First
Respondent
CASE
NO: 3316/2016

JUDGMENT

LOWE, J

Introduction:

- [1] The three matters referred to above can be dealt with in the same judgment as, although there are differences in the facts relevant to each as will appear hereafter, the general principles upon which I decide the matters are common to all.
- [2] I will set out the central facts relevant to each matter in due course. Firstly however it is necessary to briefly summarise

the issues raised in support of the alleged reviewable irregularities in these matters and the response thereto for Second Respondent.

- [3] It should first be set out, however, that in each of these matters Applicant brings review proceedings, seeking to set aside the order given in each by a Magistrate in the specific Magistrates' Court applicable. This is brought in terms of the provisions of Sections 21/22 of the Superior Courts Act 10 of 2013 (the SC Act) which affords a High Court the jurisdiction to review the proceedings of Magistrates' Courts within its area of jurisdiction on specified grounds. In general, if a complaint is perceived relevant to the result of the proceedings of

the Magistrates' Court, the appropriate remedy is by way of appeal but if the method of the proceedings is attacked, the remedy is to bring the matter on review.

- [4] More specifically section 22 (1) (c) of the SC Act provides that the grounds upon which the proceedings of any Magistrates' Court may be brought under review before a High Court include "gross irregularity in the proceedings". In these matters, each of the Applicants contend that in giving judgment against them, the relevant Magistrate committed various

gross irregularities in the proceedings and accordingly they fall to be set aside on review. It would also appear that there is an argument based on lack of jurisdiction referring to section 22 (a) of the SC Act with reference to sections 26 – 32 of the Magistrates' Court Act. This later aspect can be dismissed summarily as was pointed out in argument, as it is simply not applicable to a matter such as this with reference to *Smith v Finbond*

[2017] ZACGHC 4.

- [5] In respect of the alleged gross irregularities these fall to be decided on whether any established irregularity is indeed gross enough to justify the review or whether viewed cumulatively this was the case. Put otherwise, as was argued, this is essentially whether the irregularity or irregularities reviewed cumulatively are sufficient to establish an unfair outcome.
- [6] The irregularities complained of in each matter center around compliance with the procedures required in the Magistrates' Court for the granting of default judgment. This also arises due to the incorporation of requirements provided for in the National Credit Act 34 of 2005 (the NCA). Having regard to complaints made inter alia of non-compliance with the requirements of section 129 of the NCA, Applicants aver failure to deliver this notice, claiming that the notice was delivered only with the letter of demand. The Applicants, as referred to hereafter, appear to avoid the issue as to whether they in fact received the notices or not. There is no denial of receipt as I understand the papers, but rather an attack on the process.
- [7] It was argued for Second Respondent that Applicant's submissions relevant to the posting of the Section 129 notices in all the matters seem to arise from a misreading of the relevant jurisprudence on the subject. *Sebola and Another v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC) and *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC). In summary the agreements between the parties contemplated posting of the notices with a deeming provision relevant to receipt. *Kubyana* allows for this particular method of delivery of a Section 129 notice – this not necessarily by registered post; there is no denial of the receipt of such notices, the argument advanced simply arising from the Magistrate's Court record in each instance.
- [8] As to the letters of demand referred to in sections 57 and 58 of the Magistrates' Court Act, with which issue is joined by

Applicants, Second Respondent argued that the said letters set out the nature and amounts of the claims and were delivered at the same time as a duplicate of the Section 129 notices. Clearly these two must be read together which, argued Second Respondent, was

substantial compliance with the rules in relation to the letters in compliance with the NCA.

- [9] As to the absence of an affidavit as referred to in the Act and Rules, this is to be such as to contain such evidence as is necessary to establish that all requirements have been complied with. It was argued that whilst there was the absence of such affidavit that it was the practice of the attorneys to deliver the original contractual documents with the request for judgment and that there was nothing in the evidence which disturbed the conclusion that on the balance of probabilities this had happened. It was argued that the affidavit was only required to substantiate that all requirements had been complied with to the satisfaction of the court and that it was apparent from the documents filed that this was indeed the case, the affidavit being mere surplusage.
- [10] It would seem to me that *prima facie* and in the context of what follows, there is merit in Second Respondent's arguments summarised above in this regard, alternatively relevant to the abovementioned complaints such irregularities, as have been established, even viewed cumulatively, do not constitute a gross irregularity for the purposes of review.
- [11] In respect of the allegation that reckless credit was granted, I need not comment further hereon, this being in essence a matter which would have to be considered on appeal and not on review. In any event Second Respondent put up a detailed case demonstrating that a credit assessment was indeed conducted as is required and that there was no evidence that the assessment was such as to fall within the ambit of section 80 (1) (b) of the NCA.
- [12] It would seem that these three matters are effectively what may be described as test cases for other matters of similar nature which are waiting in the wings. A review of many of the recent judgments referred to in argument in this Division, indicate that both by way of review and by way of appeal in respect of applications to rescind default judgments, similar matters are being brought to this Court in some considerable number.

Review:

- [13] A gross irregularity in civil proceedings in the Magistrates' Court comprises an irregular act or omission by the presiding

Judicial Officer in respect of the proceedings of so gross a nature that it was calculated to prejudice the aggrieved litigant and upon proof of which the High Court would set aside such proceedings unless satisfied that the litigant had in fact not suffered any prejudice. *Magistrate Pangaker v Botha* 2014 (1) SA 503 (SCA) at 509 B-D.

- [14] I should make it clear immediately that a High Court on review will not interfere if no "substantial wrong was done to Applicant". *Hip Hop Clothing Manufacturing CC v Wagener and Another* 1996

- (4) SA 222 (CPD) at 230A-C; Building Improvements Finance Co Limited (Pty) Limited v Additional Magistrate, Johannesburg, and Another 1978 (4) SA 790 at 793 A-B where the following appears: “It is an established principle that the court will not set aside proceedings on review if it is satisfied that no substantial wrong

was done to the applicant, i.e. that the irregularity was not likely to prejudice the applicant.”

- [15] The onus of proof in such review proceedings is that Applicant must first prove the existence of the irregularity, and that it was so gross that it was calculated to prejudice him/her, and, only if he/she discharges that onus, then his/her adversary or opponent must satisfy the court that he/she in fact suffered no prejudice. *Hip-Hop Clothing (supra)* at 230 D-E.
- [16] In each of these matters there was a judgment by consent against each Applicant in the Magistrate’s Court together with a costs order in respect of credit agreements concluded between Applicant in each case and Second Respondent bank. In each, after a very considerable delay, which goes largely unexplained, the Applicants apply on review on the basis of alleged gross irregularity to set those judgments aside. In each matter, as will appear hereafter, there was considerable delay in the bringing of the application.

Delay in Review:

- [17] The principles applicable to delay in bringing review proceedings were set out in *Gqwetha v Transkei Development Corporations Ltd and Others*

[2006] 3 All SA 245 (SCA) as follows:

“The attitude of our courts when faced with the issue of delay in matters of this nature is neatly captured by Brand JA in Associated Institutions Pension Fund v Van Zyl 2005 (2) SA 302 (SCA) [also reported at [2004] 4 All SA 133 (SCA) – Ed] at 321 as follows :

“[46]. . . It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The effect is that, in a sense, delay would ‘validate’ the invalid administrative action (see eg Oudekraal Estates (Pty) Ltd v City of Cape Town and others 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1 at Para [27]). The raison d’être of the rule is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent.

Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions

(see eg *Wolgroeiërs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41).

- [47] The scope and content of the rule has been the subject of investigation in two decisions of this Court. They are the *Wolgroeiërs* case and *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en ’n ander* 1986

(2) SA 57 (A). As appears from these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:

- (a) Was there an unreasonable delay?
- (b) If so, should the delay in all the circumstances be condoned?

(See Wolgroeiers at 39C–D.)

[48] The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case (see eg Setsokosane at 86G). The investigation into the reasonableness of the delay has nothing to do with the Court’s discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (see Setsokosane at 86E–F).”

[18] In *Asla Construction v Buffalo City Municipality* [2017] ZASCA23 (24 March 2017) the court held, in a somewhat different context relating to the 180 day limitation in PAJA reviews, the following:

“[11] The manner in which the discretion to extend the statutory time period should be exercised, was described in Camps Bay Ratepayers’ and Residents’ Association & another v Harrison & another

[2010] ZASCA 3; 2010 (2) All SA 519 (SCA) Para 54, in the following terms:

‘And the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success.’ [My emphasis.]

[12] Although a consideration of the prospects of success of the application for review requires an examination of its merits, this does not encompass their determination. In *Beweging vir Christelik-Volkseie Onderwys v Minister of Education* [2012] ZASCA 45; 2012 (2) All SA 462 (SCA) paras 42–44, the proposition that a court is required to decide the merits before considering whether the application for review was brought out of time or after undue delay and, if so, whether or not to condone the defect, was rejected. Thereafter, in *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] ZASCA 148; 2013 (4) All SA 639 (SCA) paras 22, 26 and 43, it was decided that a court was compelled to deal with the delay rule before examining the merits of

the review application, because in the absence of an extension the court had no authority to entertain the review application. The court there concluded that because an extension of the 180 day period was not justified, it followed that it was not authorised to enter into the merits of the

review application. However, in *South African National Roads Agency Limited v Cape Town City* [2016] ZASCA 122; 2016 (4) All SA 332 (SCA); 2017 (1) SA 468 para 81, a submission based upon this decision, namely that the question of delay had to be dealt with before the merits of the review could be entertained, was answered as follows:

‘It is true that . . . this court considered it important to settle the court's jurisdiction to entertain the merits of the matter by first having regard to the question of delay. However, it cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictates that the delay should be condoned. It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious.’

[13] A full and proper determination of the merits of the review application was accordingly dependent upon a finding that the Respondent's failure had to be condoned. As stated in *Opposition to Urban Tolling Alliance supra*, Para 26:

‘Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been "validated" by the delay . . . ’

It was thus impermissible for the court a quo to have entered into and decided the merits of the review application without having first decided the merits of the condonation application.

[18] The rationale for the rule that an application for the review of an administrative decision should be launched without undue delay is predicated upon a desire to avoid prejudice to those who may be affected by the impugned decision. As was said in *Gqwetha v Transkei Development Corporation Ltd & others* 2006 (2) SA 603 (SCA) paras 22-24, the rule is based upon two principles namely, that ‘the failure to bring a review within a reasonable time may cause prejudice to the respondent . . . and . . . there is a public interest element in the finality of administrative

decisions and the exercise of administrative functions . . . Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the Respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight. Whether there has been undue delay entails a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances including any explanation that is offered for the delay. ‘ . . A material fact to be taken into account in making that value judgment – bearing in mind the rationale for the rule – is the nature of the challenged decision. Not all decisions have the same potential for prejudice to result from their

being set aside.’

A consideration of the consequences of setting a decision aside and any resultant prejudice, was said to be an important consideration (paras 33-34):

‘ . . . [D]elay cannot be evaluated in a vacuum but only relative to the challenged decision, and particularly with the potential for prejudice in mind. ’

In the exercise of the discretion to condone an unreasonable delay, the prospect of the challenged decision being set aside is not:

‘a material consideration in the absence of an evaluation of what the consequences of setting the decision aside are likely to be . . . ’

[19] I now refer to the central facts of each matter against the background set out above.

TYABAZAYO: 3316/2016:

[20] In this matter Applicant seeks the review and setting aside of the First Respondent’s order made on 13 November 2012 in terms of which First Respondent granted judgment against Applicant in the sum of R2 756.99 together with interest, the judgment debt to be paid in monthly instalments of R500.00, the first payment to be made on 31 December 2012.

[21] The judgment was given on the basis of a signed consent thereto.

[22] Referring to certain irregularities that were alleged to exist in the obtaining of the order, Applicant simply says that on 22 April 2016 (that is more than three years after the judgment was granted) she instructed her attorneys to assist as she alleged that she was prejudiced “with the listing against my profile and as a result of the judgment, which I now believe to be unlawful.”.

[23] As a purported explanation for the delay the deponent says that in the “recent months” leading up to the application the “abuse of emoluments attachment orders and the judgments granted” was discussed in social media and by members of the public who had been assisted by her attorneys to investigate unlawful emolument

attachment orders, as she puts it. She does not explain any further, what social media platform she refers to or which clients and members of the public, or how she came into contact with same. She does not say how this led to her instructing her attorneys or why she would have gone to them, absent any thought that there was an irregularity which she disavows. In short there is an extraordinarily short explanation relevant to the delay or even when prior to her having instructing her attorneys, she first became aware of the possibility that there may be an irregularity.

[24] Nowhere does she suggest what benefit will flow from having this judgment set aside, in the absence of a defence to the merits, (there being no such defence contended for) or what cognizable prejudice would flow in the absence of rescission.

[25] On what might be described as technical grounds, the papers then set out a case for argument that a study of the court documents reflects that the order and judgment should not have been granted at all. She describes these as “procedural aspects”. She raises what she contends are issues relevant to the calculation of the judgment debt, she saying that it is not clear how this was calculated.

[26] In the founding papers nowhere does she explain the delay between judgment and her approaching her attorneys, or why she in fact

approached the attorneys on 22 April 2016 to give them instructions?

[27] Applicant’s replying affidavit is deposed to not by Applicant but by Applicant’s attorney, he claiming that the facts deposed to are within his personal knowledge. There is an admission that the sum of R2 984.71 was borrowed by Applicant, and much of the reply simply constitutes argument.

[28] In opposing the review Second Respondent points out that as at 18 October 2012 Applicant was indebted to Second Respondent in the sum of R2 765.99, the original sum borrowed having been advanced on 6 April 2012. It is pointed out that Applicant paid only one instalment in reduction of the indebtedness and then defaulted on the loan. There is no dispute concerning the loan agreement or default, although it appears that Applicant at the end of the day overpaid on the loan in the sum of R1 521.63 (this arising from overpayment after judgment), Second Respondent tendering to pay this amount to Applicant, she having as a consequence of the judgment to repay the debt in full.

[29] Second Respondent points out that a review must be brought within a reasonable time and that there is prejudice to Second Respondent

arising from the administration of the contract, it being for example impossible to identify who the agent was who served the Section 129 notice, and even if this could be established, memory must be in doubt having regard to the lengthy passage of time. Prejudice is claimed arising from the need to revisit a debt incurred many years ago which had been completely repaid, Second Respondent provide credit to several million such debtors and is obliged to establish its solvency in the fulfilment of the requirements of the Banking Act applicable to it in this regard from time to time. It is alleged, and cannot be denied, that should a review of this nature, years later, be successful this would impact negatively on the position of Second Respondent, as also open the floodgates for debtors to bring applications, such as the present, many years after judgment had been given. This would have an impact on the entire credit industry and the cost of credit.

[30] Second Respondent points out quite correctly, that there is no defence on the merits of the claim in respect of the loan upon which Applicant defaulted, but only technical complaints as to compliance with the relevant legislation in recovering payment on default and unspecified complaints relevant to the calculation of the capital and interest.

- [31] Interestingly, and whilst Applicant takes issue with the so-called purported Section 129 notice and claims not to have been afforded her rights in this regard she fails to deny delivery of a Section 129 notice prior to her signing the consent, this being significant having regard to the fact that attached to the documents was a proof of posting of the notice to Applicant's residential address. This seems to be a tactical avoiding of the issue.
- [32] It is to be particularly noted that Applicant does not contest the capital claim or put up any defence on the merits to the recovery of the debt, and would have no defence to a further action to recover the debt, if the review was successful. Whether or not there are procedural irregularities, one is met in this application with the complete failure to put up any defence on the merits, the failure to adequately explain the delay, and effectively a failure to meet Second Respondent's allegation of considerable prejudice were the default judgment to be set aside at this time.

TYABAZAYO: 2497/2016

- [33] This matter is very similar to the above. The original loan which formed the subject matter of the action was granted to Applicant on 16 April 2012 in the sum of R22 180.42. Judgment was granted on 13 November 2012 in the sum of R25 190.02. Applicant had defaulted on her payments in terms of the loan. Her default occurred after 15 May 2012.
- [34] In an attempted explanation for the delay in bringing the review, as in the previous matter, and practically word for word the identical
- allegations are made having regard to knowledge via social media and to members of the public assisted by Applicant's attorneys, she instructing, she said, her attorneys on 3 February 2016, this after they concluded their "investigation".
- [35] Just as in the previous matter there is no better or fuller explanation, she maintaining that before she defaulted, which she admits, she had paid an amount of R1 679.89 on the credit agreement. Whilst raising the same complaints as in the previous matter she says that the entire judgment was contra bonis mores, but fails entirely to put up any defence to the merits of the claim in default of payment.
- [36] Second Respondent points out that an emoluments order of R1 000.00 per month issued, this less than the instalment amount which she agreed to pay, and as at February 2016 Applicant had reduced the indebtedness to Second Respondent to R12 731.91. Second Respondent contends that there is no prejudice to Applicant in the circumstances nor, as is pointed out, is there any defence to the merits put up were the judgment to be set aside and proceedings commenced afresh.
- [37] For the rest, Second Respondent takes much the same points and issues referred to above and particularly alleges that Applicant has sustained no prejudice, whilst were the review to succeed, there would be very considerable prejudice to Second Respondent for the same reasons as already set out above.

[38] Just as in the previous matter, the Replying Affidavit is deposed to by Applicant's attorney of record. In neither case is there any explanation as to why the attorney deposes to the affidavit bar his saying he has personal knowledge thereof. The reply again takes the matter no further.

KHIBA: 2765/2016:

[39] In this matter the cause of debt was similar to the others being a loan in the sum of R20 000.00. The loan was concluded on 24 December 2010 with instalments of R1 000.00 per month. Applicant paid certain of the instalments thereon but defaulted, he says on 30 May 2013. Similar to the matters above judgment was given against Applicant on 18 September 2014 in the sum of R12 468.60. An emoluments order of R1 000.00 per month was given and as at 1 December 2016 Applicant had reduced his indebtedness to Second Respondent to R1 156.31.

[40] The review application was brought on 30 May 2016.

[41] Similar to the above two matters, and in substantially identical terms the Applicant refers to the social media contact and members of the public assisted by his attorneys and giving no other explanation for the delay, (similarly as I have already set out

above), and on 8 February 2016 instructed his attorneys after they concluded their "investigation".

[42] Again similar to the other two matters he suggests no defence on the merits to the claim which was based on his default, relying only on technical defences to the recovery of the debt as to process. As in the other two matters he is not able to set out, nor does he attempt to do so, what real benefit there would be for him in this matter if the judgment were to be set aside in the circumstances, there being no defence to the merits.

[43] Second Respondent takes the same points as previously adverted to, particularly relating to the delay in bringing the review and the prejudice which would be caused to it were the review to be granted. It adverts further to the lack of explanation for that delay and that there is no defence put up on the merits.

[44] Again similar to the above two matters, the same attorney replies purporting to rely on his personal knowledge the replying affidavit

being again argumentative and taking the matter no further.

The Technical Issues:

General:

[45] In each of the above three matters, one pauses to consider why the individual Applicants, after the lengthy delay, and even if advised

as to certain technical irregularities, would seek to set aside the judgments concerned. In the absence of any cognizable defence on the merits, and there is none, this would be in the face of the inevitable obtaining of a successful judgment in due course. It was not suggested in argument for Applicants, that the position is otherwise or that there is some substantial benefit in this regard which would adhere to them. It would also seem, even if successful, that it was inevitable that Applicants, even if being awarded their costs, would at the end of the day not achieve any cognizable benefit, on the contrary, and in all probability, would end up out-of-pocket once the attorney-client portion of their fees had been paid. There is no reasonable explanation for this on the papers, nor as I understood it was any such explanation convincingly put up in argument for Applicants.

[46] In essence, and against the above background, it falls to be decided firstly whether or not, in the circumstances of the reviews as set out whether before needing to turn to the merits of the technical issues raised and finally determine same, the review has been bought with such delay as to warrant it being dismissed for that reason alone, and secondly but associated therewith the consequence of the limited explanation for that delay. There is also to be added to this whether such a review could in any event conceptually succeed assuming merit in the technical points, in the absence of it having been demonstrated that there is some substantial wrong done to the Applicants in all the circumstances set out above. Put otherwise, that the alleged irregularities are not likely to substantially prejudice the Applicants. The onus falls on Applicants to prove the existence of the irregularity and that this was so gross that it was calculated to prejudice them.

[47] This issue can be determined, in my view, prior to a final determination of the merits of the so-called gross irregularities, it being important to settle the court's jurisdiction to entertain the merits of the matter by first having regard to the question of delay. This does not however require a clinical excision of the merits of the impugned decision which are certainly relevant to the circumstances of the case and to condonation. Nevertheless, it seems to me on the basis of the authorities referred to above, that this court has no authority to entertain the review application at all if it is held that an unreasonable time has elapsed prior to the bringing of the review. Whether or not the decision was unlawful in such circumstances no longer matters, the decision having been "validated" by the delay. As pointed out above it is a long-standing rule that a court has the power to refuse a review application if the aggrieved party has been guilty of unreasonable delay in initiating same. This in the sense of a validation of invalid action.

[48] I consider the two questions was there an unreasonable delay and if so should the delay in all the circumstances be condoned further below.

[49] There can be no doubt whatsoever that taking into account the relevant factors referred to above, against the legal position, there was an unreasonable delay in these matters. I conclude this after considering all the facts and circumstances set out fully above and the material put up for consideration in the affidavits. In each matter the default judgments were given many years ago, and in circumstances where such delay would cause considerable prejudice to Second Respondent as a bank in the context of the statutory

regulations applicable thereto. There is balanced against this seemingly no prejudice of any real nature to the Applicants who have no defence to the claim on the merits, and in respect of which the review itself, even if granted, would give little final relief or benefit. Secondly the question arises whether that delay should in all the circumstances be condoned in these matters. In my view, in this context the failure of the Applicants to put up any defence on the merits to the default on the loans, is a substantial factor to be taken into account. There is, put otherwise, little or no prejudice to Applicants by their reliance on what may be described essentially as technical issues surrounding the enforcement of the loans. Against this must be balanced the extensive prejudice put up by Second Respondent in its affidavits which Applicant was effectively unable to meet.

[50] In the circumstances, that can be no question in my view that there has been a grossly unreasonable delay in this matter, which moreover goes almost entirely unexplained, and further that the delay should not be condoned.

[51] It is unnecessary, in the circumstances, to finally determine the technical issues relied upon and adverted to generally above,

although I have carefully considered same as part of the factual matter relevant to my decision.

[52] There is, however, a remaining matter upon which I must comment. There is a second ground from which the Applicants would in any event, in my view, fail. As already pointed out the onus of establishing not only the irregularity for which they contend but that it was so gross that it was calculated to prejudice them which means, in my assessment of the principles, that this must equate to facts which demonstrate a substantial wrong, falls on Applicants.

[53] Absent any defence on the merits to the default of payment and the claim, and in the circumstances that Second Respondent would simply proceed afresh achieving much the same result in due course, there can be no question of substantial wrong being demonstrated, even were the technical points taken correct, which on an overall consideration of the matter I doubt, although it is not necessary to rule thereon finally for the purposes of this matter.

[54] In the circumstances, the applications fall to be dismissed on one or other of the grounds referred to above .

[55] This brings me to the question of costs. The applications having failed, there is no reason why the usual costs order, at least, should eventuate, Respondent to be awarded the costs. In each instance Second Respondent seeks a costs order on the scale as between

attorney and client. Second Respondent in argument contended that this matter should be laid at the door of the attorneys representing

Applicants. It was suggested in argument that the said attorneys were “conducting a business bringing these applications”. It was indeed suggested in argument, strongly on behalf of Second Respondent that it would be appropriate for me to issue a rule requiring the said attorneys to give reasons as to why they should not be ordered to pay the costs *de bonis propriis* on a punitive scale.

[56] It was suggested in argument that these matters have been “created” by the attorneys and driven by them.

[57] I have given this careful thought, in the light of the allegations made in the papers and advanced in argument. There seems to me *prima facie* to be no reasonable argument advanced, on the present papers before me, which would in any circumstances suggest why Applicants would bring applications for review of orders such as those given in these matters, in the circumstances thereof, having regard to the quantum of the judgments and the fact that in each instance Applicants have made substantial inroads as to repayment, and are unable to demonstrate any reason why in due course judgment in the full sum outstanding together with interest thereon would in any event not be given.

[58] A good example is the first matter to which I adverted on the facts where the initial loan was a mere R2 984.71 which has been fully

repaid.

[59] It would seem to me, that there is some merit in the argument made that the review applications, brought in the circumstances and at the stage they were, might well be categorized as vexatious, and are what might also be described as an abuse of the process. In the circumstances, I can see no reason why there should not be an order for costs on the scale as between attorney and client. As I do not know the full facts, and it would be wrong at the time to even attempt to pronounce thereon let alone give a *prima facie* view, as to the involvement of the attorneys along the lines argued by Second Respondent, I am of the mind to issue a rule *nisi* in respect of Applicant’s attorneys to show cause why they should not be joined as a party to the proceedings; and secondly why they should not be called upon to pay the costs in this matter *de bonis propriis* on the scale as between attorney and client.

[60] In the circumstances the following order issues:

1. The three applications in case numbers 2765/2016, 2497/2016 and 3316/2016 are individually dismissed with costs on the scale as between attorney and client;

2. The attorneys for Applicants in each matter, being N J Du Plessis and Associates Inc., are required to show cause on affidavit by 29 April 2017 why: they should not be joined as a party to the proceedings; and why they should not pay the costs of all three of these matters *de bonis propriis* on the scale as between attorney and client.

M.J LOWE

JUDGE OF THE HIGH COURT

Obo the Applicant:

Ms N Makaula

Instructed by:

Huxtable Attorneys

22 Somerset Street

Grahamstown

Obo of Second Respondent: Adv. Paterson SC

Instructed by: Neville Borman & Botha Attorneys

22 Hill Street

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