REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: CA 305/12

IN THE MATTER BETWEEN:

MINISTER OF SAFETY & SECURITY **APPELLANT/DEFENDANT**

AND

JOHAN GEORGE **RESPONDENT/PLAINTIFF**

Coram: **Alkema J & Lowe J**

Date Heard: **1 March 2013**

Date Delivered:

Nature of matter: Appeal is against the whole of the Magistrate's order in respect of his refusal of condonation for the late bringing of the rescission application and the consequent dismissal of that application.The decision taken on appeal was that of a claim for damages arising from wrongful arrest, malicious proceedings and assault.

Order: Order refusing condonation is set aside –
The application for condonation of the late filing of the rescission application is granted.
The application for rescission is refused.
Appellant ordered to pay the costs

JUDGMENT

LOWE, J:

[1] This is an appeal against an order of the Graaff Reinett magistrate dismissing appellant's application for condonation for the late filing of an application to set aside the default judgment given in respondent's favour in a damages claim on the 12 January 2011. The magistrate consequently finding that the application for rescission fell away.

[2] In summary the notice of appeal alleges that the magistrate erred:

2.1 In accepting in evidence certain documents handed up from the bar;

2.2 In accepting the said documents without affording respondent's legal representative the opportunity to properly prove the said documents before court by way of affidavit;

2.3 In not affording the appellant's the opportunity to investigate these documents;

2.4 In relying upon same and refusing to grant condonation for the late bringing of the application;

2.5 In not granting the appellant a fair hearing.

[3] The appeal is against the whole of the Magistrate's order in respect of his refusal of condonation for the late bringing of the rescission application and the consequent dismissal of that application. In any event Counsel in the appeal agreed that it would be appropriate and correct for this Court to deal with both the

condonation and rescission matter if condonation were refused, and that it was unnecessary to refer the matter back to the Magistrate in that event.

[4] It is necessary to set out the background to this appeal more fully.

[5] On 24 July 2009 respondent/plaintiff gave written notice to appellant of his intention to claim damages. On 5 October 2009 the Minister gave instruction to the State Attorney relevant to the matter. On the 2 November 2010 respondent as plaintiff issued summons in the magistrates court Graaff Reinett claiming damages arising from wrongful arrest, malicious proceedings and assault.

[6] On the 10 November 2010 the summons was served upon appellant (defendant in the action) by service upon a Mrs Dercksen at the office of the Minister.

[7] In the absence of a notice of intention to defend having been filed, and on the 12 January 2011, respondent moved an application for default judgment in the Graaff Reinett Court which was granted on the same day after evidence had been heard.

[8] Although respondent, subsequent to default judgment having been granted, addressed no fewer than five facsimiles to "the Minister" and four registered items, monthly between the period 13 January 2011 to 10 August 2011, it appears from the affidavit in support of the application for summary judgment (drawn by the State Attorney Mr Potgieter) that appellant in fact only became aware of the judgment for the first time having been informed thereof by the State Attorney on 31 August 2011. This fact cannot be disputed on the appropriate test set out in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 184 (3) SA 623 (A) at 634 – 635**, although

respondent points to the facsimiles and letters referred to above (copies of which are not annexed to the papers such as to indicate to what address or facsimile number these were addressed and no proof that they were received), and alleges reckless conduct. Apart from referring to the fact that the facsimile and emails may have or should have come to appellant's notice, it cannot seriously be contested that factually, (and however inexcusable this may have been) that the Minister only had actual knowledge of the default judgment for the first time on 31 August 2011.

[9] On 10 June 2011 the Port Elizabeth State Attorney advised the Minister that summons had not yet been received.

[10] Having become aware of the default judgment on 31 August 2011, the appellant, represented by the State Attorney, received instructions to brief counsel on 3 October 2011. Counsel was briefed on 4 October 2011, consulted on 12 October 2011 and the rescission application was then drafted, founding affidavits signed on 20 October 2011 and issued and served on 28 October 2011.

[11] This raises two issues:

11.1 Whether condonation ought to have been granted by the magistrate for the late bringing of the rescission application (by virtue of Rule 49 of the Rules of the Magistrates Court such an application may be brought within twenty days after obtaining knowledge of the judgment relevant);

11.2 Whether, in the event of condonation being granted, rescission of the said judgment should follow.

[12] Rule 60 (5) of the Rules, provides that any time limit prescribed in the Rules (except Rule 51 (3) and (6)) may be extended by the court at any time, whether before or after the expiry period referred to, in the absence of consent of the opposite party, on application and on such terms as to costs and otherwise as it may deem fit.

[13] Contrary to the Magistrate's reasoning, the delay in this matter relevant to condonation, is not to be calculated from 12 January 2011 but on the factual findings made above, from 31 August 2011. It must on the papers be accepted that factually appellant only became aware of the default judgment on that latter date. The twenty day period for bringing a rescission application refers to court days, and in this instance the application should have been brought before 30 September 2011, being thus some twenty days out of time. In so finding I am aware that Rule 49(2) states that it will be presumed that appellant had knowledge of the default judgment 10 days after it was granted, unless appellant proves otherwise. I find that the appellant has on the papers sufficiently rebutted this presumption.

[14] Rule 60 (5) confers a discretion upon the court to relax the time limits, this discretion must be judicially exercised in accordance with the established rules of law and practice and on judicial grounds for substantial reasons and not capriciously. See. **Mopican Construction CC v Van Jaarsveld and Heyns 2004 (3) SA 2150 (T) at 219 F – G; Evander Caterers (Pty) Ltd v Potgieter 1970 (3) SA 312 (T) at 315.**

[15] This requires an assessment of the adequacy and acceptability of the explanation for the non-compliance with the prescribed time limit.

[16] An applicant for condonation must show sufficient cause as to why the court should allow him to cure his default. This can be shown by giving a satisfactory explanation for the delay and it is not necessary for the applicant, in order to succeed, to satisfy the court that he has a good defence. See **Evander Caterers (supra); Duncan t/a San Sails v Herbore Investments (Pty) Ltd 1974 (2) SA 214 (T)**.

[17] If the explanation for the delay is not sufficient, it is suggested that other considerations may become relevant, for example:

17.1 Whether the application is *bona fide* in the sense that the party seeking condonation is anxious to contest the matter;

17.2 Applicant believes that he has a good defence to the action (as defendant);

17.3 the issue as to whether to afford such relief would cause damage or injury to the respondent that cannot be remedied by an order as to payment of costs.

[18] In this matter it is not only clear that there is prima facie a potentially viable defence to the action, but also that the application for condonation is not *mala fide.* I am satisfied on the papers that the defendant has a real belief in the justice of his

defence which is not being put up simply to delay the plaintiff in obtaining judgment on his claim.

[19] The reason for the delay in applying for rescission, (subsequent to 31 August 2011), demonstrates that the State Attorney after becoming aware of the judgment acted immediately, there being however some delay relevant to the administrative process in the engagement of counsel, some further delay due to the unavailability of counsel, and the need to consult and draft the affidavits. In essence this is well explained and against the general background of the matter is such as to warrant the giving of condonation having regard to the period of the delay.

[20] It must be remembered, that in respect of condonation it is not the date of judgment to the date of application for condonation that is relevant, but only the period from 31 August 2011 (the date of appellant's knowledge).

[21] The magistrate erred in his approach to condonation, confusing the elements relevant to the setting aside of the judgment by default with those relevant to condonation, this enabling this court to intervene.

[22] Having regard to the explanation given for the delay in launching the application for rescission, as dealt with above, and having regard to the requirements of Rule 60 (5), it is in any event clear that the magistrate erred in this regard, and that condonation ought to have been granted.

[23] I should mention, specifically, in this regard, that the admission by the magistrate of the letters and facsimiles dispatched by respondent to appellant relevant to notification of the default judgment (during argument), in the face of opposition by appellant, was wholly impermissible and out of order.

[24] The matter should have been resolved only on the affidavits and their annexures as were before the court, unless a postponement was sought and granted in order to allow respondent to place these before the court and appellant an opportunity of dealing therewith on affidavit.

[25] It is not open to parties or a magistrate (in the absence of agreement by all) to take documents from the bar, more especially where these are objected to by one of the parties, the application is to be determined on the affidavits and their annexures (or lack thereof).

[26] This having been said however, in my view sufficient was before the magistrate in any event in this regard in the affidavit made by attorney Bouwer to establish that these facsimiles and letters (notifying of default judgment) were indeed sent to the Minister, and there is no suggestion, on the papers, that they were not received in that no replying affidavit was filed by appellant stating as much. Counsel for respondent contended that there was insufficient put up in this regard to enable a reply to be drafted. I do not agree. If indeed the relevant files and records of appellant had been perused and if no such emails or letters were discovered therein this could have been fully set out.

[27] This is however irrelevant to the condonation application as it cannot be said that whatever became of the faxs and letters, these factually came to the attention of the appellant prior to 31 August 2011. Accordingly, the time limit commenced to run in respect of condonation on 31 August 2011.

[28] In as much as I find that condonation ought to have been granted by the magistrate, it is necessary to go further and consider the question of whether or not, had condonation been granted, the rescission application should have been successful.

[29] Having regard to the contents of the affidavits in the application and the judgment of the magistrate, it would seem that this court is in as good a position as the magistrate would have been to consider the rescission application, and that it would be wasteful of costs and unnecessary to refer the matter back to the magistrate. In any event the magistrate correctly dealt with and summarised the relevant issues in this regard and correctly concluded that there was no reasonable explanation tendered for the delay.

[30] A rescission application may be granted on good cause shown or, if a court is satisfied, that there is good reason to do so.

[31] Rule 49 (3) requires of a defendant applying for rescission of judgment to set out on affidavit the reasons for his absence or default and the grounds of the defendant's defence to the claim. It must be remembered that the period of default which is to be explained is that between service of summons and the giving of default judgment, in this matter the period between 10 November 2010 and 13 January 2011.

Mr Koekemoer for respondent suggested that one could in addition look at subsequent history but could refer to no authority in this regard relevant to rescission of default judgment, and on the findings I make in this matter, it is unnecessary to consider this any further.

[32] Our courts have always being reluctant to define the phrase "good cause". In **Silber v Ozen Wholesalers s (Pty) Ltd 1954 (2) SA 345 (A) at 352 G** the court held that good cause includes, but is not limited to, the existence of a substantial defence. The court declined to make the phrase the subject of further definition but held that the defendant must at least furnish an explanation for his default sufficiently full to enable the court to understand how it really came about and to assess his conduct and motives.

[33] The affidavit must disclose not only the existence of a substantial defence but, in addition, of a *bona fide* desire to raise the defence in the event of the judgment being rescinded. See **RGS Properties (Pty) v Ethekweni Municipality 2012 (6) SA 572 (KZD) at 575 G to 576 C**.

[34] As to a defence it is not necessary to show a probability of success it being sufficient to show a *prima facie* case or the existence of an issue which is fit for trial.

[35] The *bona fide* requirement means no more nor less than that the application must be made with the intention of enabling the applicant to put his case before the court and not for example an improper motive, such as delay. See **Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd 1980 (4) SA 573 (W) at 575 H**.

[36] Apart from the fact that a court may rescind a judgment upon good cause shown, it may also do so if satisfied that there is "good reason" to do so (Rule 49 (1)). This is important in as much as if there is good reason to do so a judgment may be rescinded even if "good cause" is not demonstrated. See **Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd 2000 (2) SA 107 (C) at 1013 A – C and 1013 E – G**.

[37] The court held in **Phillips** (supra) that the "good reason" provision merely affords the jurisdictional power to a court to grant an application for rescission of judgment in a case where "good cause" is not shown by the applicant, if it is appropriate to do so. Put otherwise notwithstanding fatal deficiencies in the applicants papers, the court could still *mero motu* grant the application if the interests of justice merit the granting thereof.

[38] In **Wright v Westelike Provinsie Kelders Bpk 2001 (4) SA 1165 (c) at 1181 H** it was held that this provision does not lower the threshold for success in obtaining the rescission of judgments and that the Obiter remarks of Van Reenen J concerning "a less stringent criterion" should not be construed otherwise (at 1 – 13 E – G in **Phillips** supra). What is clear that the court has a wide discretionary power to be exercised on the peculiar aspects of the case. Conduct is a relevant criteria, to be judged with other relevant matter. A poor explanation may be compensated by a good defence (**Wright (supra) at 1181 B – F**).

[39] The introduction of the phrase "good reason to do so" in 1997 clearly widens the basis upon which the discretion may be exercised.

[40] I am in agreement with Binns-Ward AJ (as he then was) in **Wright (at 118 H – I)** that this does not however lower the threshold for success. The court may in other words grant rescission where applicant has failed to show "good cause," and for reasons other than those relevant to good cause that establish that in the interests of justice rescission should nevertheless be granted – and only in exceptional cases.

[41] This would be so as to do justice between the parties. **Buckle V Kotze 2000 (1) SA 453 (W) at 457 and Mnandi Property6 Development CC v Beimore Development CC 1999 (4) SA 462 (W) at 466**.

[42] The onus falls on the applicant pursuing "good cause" to furnish an explanation for his default sufficiently full to enable the court to understand how it really came about and to assess his conduct and motives. See **Cavalinias v Claude Neon Lights SA Ltd 1965 (2) SA 649 (T) at 651 C - D.**

[43] In summary, and leaving aside the issue of "wilful default" (which is not relevant on the facts of this matter), in an application for rescission on the basis of "good cause" it is necessary for the appellant to show, in order to succeed:

43.1 That he had a reasonable explanation for his default (during the period referred to above);

43.2 That the application was *bona fide* and not made with the intention of delaying plaintiffs claim;

43.3 That he has *bona fide* defence to the plaintiffs claim in the sense discussed above.

[44] In this matter, and whilst appellant's *bona fides* are not to be questioned and even though it appears that as defendant he *prima facie* has a good defence, the question arises as to whether a reasonable explanation for his default has been furnished.

[45] The negligent nature of a defendants default is one of the various considerations which the courts will take into account in the exercise of their discretion to determine whether or not good cause has being shown. See **De Witts Autobody Repairs (Pty) Ltd v Fedden Insurance Company Ltd 1994 (4) SA 705 (E) at 708 G.**

[46] As pointed out in **Wright** (supra) at [62] an applicant who is grossly negligent is highly unlikely to be able to show "good cause," that having regard to the criteria referred to in Rule 49 (3).

[47] In this matter, appellant falls far short of giving a reasonable explanation of his default and is unable to rebut the fact that the failure to enter a notice of appearance to defend, after service of summons occurred, was not as a result of a "system failure" as is alleged, but due to negligent or inadequate attention by the persons responsible for

insuring that the summons (after service) followed the correct and already established route to the appropriate person, together with an instruction to the state attorney to enter notice of appearance to defend. The state attorney alleges that due to "maladministration" (in the administration of the appellant), the summons was not sent to the relevant department at appellants head office. It is alleged that a system has now been implemented to insure that the "oversight" does not again occur. (In fact we are told from the Bar that Section 2(2) of the State Liability Act now requires service of all summons against the State also to be served on the State Attorney, which should now remedy or at least reduce the opportunity for default.)

[48] This, in my view, is an entirely inadequate explanation of the default, and does not satisfy the requirement of reasonableness in respect thereof. The question arises as to whether appellant's affidavits in fact disclose an explanation at all. The State Attorney, (apart from referring to maladministration and system failure which is alleged not to be due to inexcusable inefficiency) is quite correctly unable to take the matter any further. He is obliged to refer to supporting affidavits in this regard. Relevant to the reason for the delay he refers to the affidavits of Captain Deliwe (a Captain in the office of the Commissioner Loss Management, Civil Claims SAPS, Graaff-Reinet being responsible for civil claims) and Mrs Groenewald, (a Senior Legal Administrative Official : Litigation, Legal Services, Pretoria.)

[49] The affidavit of Deliwe states (at paragraph 14) that Mrs Dercksen (who was served with the summons) sent this to "our Provincial Office" in King William's Town via telefax immediately "upon receipt". This is hearsay as there is no Dercksen supporting affidavit. He goes on to say that he corresponded with Colonel Mbeki at

the King William's Town Provincial Office who "alleged" (so it is said) that he did not receive the summons. This is further hearsay, there being no affidavit from Colonel Mbeki. Daliwe continues saying that "our office" did not receive same, it being unclear what office this is, Graaff-Reinet or King William's Town. Groenewald says that the head office file was requested from "Loss Management" but that neither the summons nor fax transmissions were in the file.

[50] To which Loss Management office she refers is unclear, there being no affidavit from Dercksen or the King William's Town office. The manner in which the summons was dealt with, in fact, is not placed properly before the Court on affidavit. Mrs Groenewald goes on to say that the front page of the summons shows that this was "hand delivered" to Loss Management on 11 November 2011. What this means is not clearly explained nor is it clear to which office is referred. This is especially so having regard to the hearsay allegations referring to Dercksen and Colonel Mbeki. In short there is essentially no explanation at all put up for the delay and an extremely unclear and on occasions inadmissible attempt thereat. To judge on this that a reasonable explanation has been put up in this regard, is simply not possible at all. In fact what is put up points to grossly negligent conduct of those responsible for handling the summons.

[51] As I have already said it was not the system that failed, but the people operating the system, nor am I in agreement with the State Attorney's assertion that there was no inexcusable inefficiency on the part of the minster's administration.

[52] On the basis of the affidavits put up the alleged onerous work pressure on the minister's administration is not a reasonable excuse nor was this, as is alleged, "inadvertent failure of the system".

[53] The "evidence" surrounding what happened is contradictory and confusing and not a proper or adequate explanation for the delay, if an explanation at all. This demonstrates a considerable and gross failure to follow the proper procedure and it would seem a persistent failure to monitor or follow up even in the face of correspondence from the State Attorney enquiring whether summons had been served. This occurred on 10 June 2011 when the State Attorney advised the Minister that summons had not been served (the State Attorney understandably being under the impression that this was the case) notwithstanding that summons had been served in fact many months previously.

[54] The attempted explanation, (if it can be so called), of Mrs Groenewald takes the matter no further in this regard.

[55] This all fails to demonstrate "good cause" for rescission, nor is there "good reason" to do so demonstrated. Were it otherwise it would be necessary to grant rescission in matters against the state simply whenever an employee failed to act timeously for no good reason and in the absence of explanation as to how this had occurred.

[56] In considering whether having regard to the exigencies of justice "good reason" exists to rescind this judgment, notwithstanding a total failure to put up any

real explanation, I find that this is not justified in this matter which is not disclosed to be an exceptional case meeting the criteria that the interests of justice of the case warrants same. Whilst I am mindful that defendant has put up a *prima facie* defence as set out above this on its own in this matter is insufficient to warrant the relief sought. Were it otherwise in every case where a good defence is put up and in the absence of any or where a highly suspect explanation is put up – the count would be bound to rescind the judgment. This is clearly not the law and it would be incorrect to do so.

[57] The Court has no discretion to grant rescission in the absence of good cause being shown or there being good reason to do so and Counsel for appellant could refer to no authority to contradict this proposition.

[58] In the result, the requirements applicable to rescission of default judgments are not satisfied in this matter and such rescission falls to be refused.

[59] The following order issues:

59.1 The appeal succeeds.

59.2 The magistrate's order refusing condonation is set aside and replaced with the following order:

"1. The application for condonation of the late filing of the rescission application is granted.

2. The application for rescission is refused."

59.3 Appellant is to pay the respondent's costs in the appeal;

59.4 A copy of this order is to served on the office of the Director General: Department of Justice and Constitutional Development, Pretoria, and be brought to the attention of the Director General personally.

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M.J. LOWE
JUDGE OF THE HIGH COURT

ALKEMA J:

I have read the judgment prepared by my Brother Lowe J, and I respectfully agree with his reasoning and his conclusion.

I nevertheless wish to add the following.

This type of application, namely where a State Department simply ignores a summons served on it through administrative negligence, and then attempts to remedy its negligence by applying for the rescission of the judgment, seems to be on the increase in our courts. Up until now, courts have leaned backwards to come to the assistance of State Departments in order to allow them to put their house in order and sort out the administrative shortcomings. This time has now run out. Courts are obliged to

apply the law and can no longer be sympathetic to negligent conduct in the administration of State Departments. As this case shows, such negligence can be a great expense to the State (read: the taxpayer), because claims are paid out which should ordinarily not have been paid.

We trust that the necessary administrative measures will be put in place to prevent a recurrence of this nature in the future.

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S. ALKEMA
JUDGE OF THE HIGH COURT

Obo the Appellant/Plaintiff:	G. Wolamarans
Instructed by:	Whitesides 53 African Street Grahamstown 6140
Obo the Respondent/Defendant:	J.R. Koekemoer
Instructed by:	Nolte Smit Attorneys 115 High Street Grahamstown 6140 (046 - 6227209)