REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR352/14

In the matter between:

Hugh William Mathie Appellant

And

Ruijter Stevens Properties (Pty) Ltd Respondent

ORDER

The appeal is dismissed with costs.

JUDGMENT

SEEGOBIN J:

[1] This is an appeal against the refusal by the additional magistrate, Mr T. Govender, of the Magistrate's Court, Stanger, to rescind a judgment by

default obtained by the respondent against the appellant on 28 August 2012[1]. The appellant is the applicant in the rescission application and the defendant in the action instituted against him by the plaintiff. I shall for convenience refer to the parties as plaintiff and defendant.

FACTUAL BACKGROUND

[2] The plaintiff is a company. In terms of a written agreement of lease which was concluded in April 2009, the plaintiff leased certain premises to the defendant at the Ballito Business Park. The defendants chosen *domicilium* address for purposes of the lease agreement was Shop 1, The Circle, Douglas Crow Drive, Ballito[2]. On 23 April 2012 and out of the Magistrate's Court, Stanger, the plaintiff sued the defendant for certain arrear rental in an amount of R68 172,32[3].

[3] The summons was served on 2 May 2012 at an address referred to in the return as "Liquor City, Ballito". The return of service records that the defendant was no longer at the given address, namely Shop 1A, The Circle[4]. This is the *domicilium* address referred to above.

[1] Record, page 180.
[2] Agreement of Lease, pages 5-17 of record.
[3] Summons, pages 1-4 of record.
[4] Return of service, page 18 of record.

[4] With no appearance to defend being filed by the defendant, the plaintiff applied for and was granted judgment by default on 28 August 2012[5]. On 26 November 2012 there was a failed attempt to serve a writ of execution on the defendant's premises. It is common cause that the execution of the writ was not pursued with. Despite this the defendant launched an urgent *ex parte* application on 11 December 2012 for an order staying the execution of the writ pending an application for rescission to be instituted. The application was opposed by the plaintiff[6]. The reason proffered by the defendant for not instituting an application for rescission was that he was experiencing difficulty in uplifting his file from the offices of his former attorneys.

[5] It is common cause that the rescission application was only instituted on 21 January 2013[7]. This was well out of the 20 day period prescribed by Rule 49(1) and (2) of the Magistrate's Court Rules. It is also common cause that the application was not accompanied by an application for condonation. When the matter was initially argued on 17 May 2013, the defendant's attorney sought to rely on a so-called moratorium and/or practice directive of that court which precluded practitioners (in that court) from filing any processes between 16 December and 15 January. From the record it is not precisely clear what this moratorium entailed. It was accepted however, that in terms of Rule 13(1) of

[5] Record, page 22.
[6] Record, pages 23-56.
[7] Record, pages 57-113.

the Magistrate's Court Rules, the days between 16 December and 15 January should not be counted for the purpose of delivery of an appearance to defend only. This did not include other processes. The effect of this was that the defendant was out of time for the filing of his rescission application and as such an application for condonation was required. The matter was then adjourned to enable the defendant to bring such an application which was duly done. The plaintiff no doubt opposed that application as well[8].

[6] The rescission application as well as the application for condonation were fully argued before the learned magistrate. Needless to say in terms of a written judgment delivered on 25 March 2014, the learned magistrate refused the application for rescission with costs. It is against that decision which the defendant appeals.

BASIC LEGAL PRINCIPLES

[7] Before considering whether the learned magistrate was correct in finding that the defendant had failed to make out a proper case for rescission, it is perhaps convenient to remind practitioners of certain basic legal principles that govern rescission applications as well as applications for condonation.

[8] Record, pages 114-159.

RECISSION

[8] I deal firstly with applications for recission. Jones J in *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co. Ltd*[9] set out the position as follows:

> "Applications for rescission of judgment are governed by s 36(1) of the Magistrates' Courts Act 32 of 1944, which provides that
>
> > '*(t)*he court may, upon application by any person affected thereby . . . rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted'.
>
> The procedure is regulated by Magistrates' Courts Rules 49(1) and (2), which provide as follows:
>
> > '(1) A party to proceedings in which a default judgment has been given may within 20 days after the judgment has come to his knowledge apply to court upon notice to the other party to set aside such judgment and the court may upon good cause shown and, save where leave has been given to defend as a *pro deo* litigant in terms of Rule 53, provided the applicant has furnished to the respondent security for the costs of the default judgment plus an amount of R200 as security for the costs of the application, set aside the default judgment on such terms as it may deem fit: Provided that the respondent may by consent in writing lodged with the clerk of the court waive compliance with the requirement of security.
> >
> > (2) Such application shall be on affidavit which shall briefly set forth the reasons for his absence or default of delivery of a notice of intention to defend or of a plea, and the grounds of defence to the action or proceedings in which the judgment was given.'
>
> Rule 49(7) has been repealed. This was the Rule restricting the magistrate's discretion by laying down that a judgment cannot be rescinded if the defendant against whom it was taken was in wilful default *(Silber v Ozen Wholesalers (Pty) Ltd*1954 (2) SA 345 (A)). In view of the repeal, the wilful or negligent or blameless nature of the defendant's default now becomes one of the various considerations which the courts

[9] 1994(4) SA 705 ECD.

will take into account in the exercise of their discretion to determine whether or not good cause is shown.

The general approach of the courts to applications for rescission was restated by Smalberger J, as he then was, in the case of *HDS Construction (Pty) Ltd v Wait*1979 (2) SA 298 (E) at 300F-301C in the following terms:

> 'In *Grant v Plumbers (Pty) Ltd*1949 (2) SA 470 (O) Brink J, in dealing with a similar provision, held (at 476) that in order to show good cause an applicant should comply with the following requirements:
> *(a)* He must give a reasonable explanation of his default;
> *(b)* his application must be made *bona fide*;
> *(c)* he must show that he has a *bona fide* defence to the plaintiff's claim.

It is not disputed that the defendant's application is *bona fide* and that he has shown that he has a *bona fide* defence to the plaintiff's claim. What is in issue is whether he has given a reasonable explanation for his default.

In determining whether or not good cause has been shown, and more particularly in the present matter, whether the defendant has given a reasonable explanation for his default, the Court is given a wide discretion in terms of Rule 31(2)*(b)*. When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words *(Cairns' Executors v Gaarn* 1912 AD 181 at 186; *Silber v Ozen Wholesalers (Pty) Ltd*1954 (2) SA 345 (A) at 352-3). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances. While it was said in *Grant's* case that a Court should not come to the assistance of a defendant whose default was wilful or due to gross negligence, I agree with the view of Howard J in the case of *Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd*1975 (1) SA 612 (D) at 615, that while a Court may well decline to grant relief where the default has been wilful or due to gross negligence it cannot be accepted

> ‘that the absence of gross negligence in relation to the default is an essential criterion, or an absolute prerequisite, for the granting of relief under Rule 31(2)*(b)*’.

It is but a factor to be considered in the overall determination of whether good cause has been shown although it will obviously weigh heavily against the applicant for relief. The above does not in my view detract in any way from the decision in this Court in *Vincolette v Calvert*1974 (4) SA 275 (E).'

In *Zealand v Milborough*1991 (4) SA 836 (SE), I cited and applied the above passage at 837H-838D, and added the comment that

> 'a measure of flexibility is required in the exercise of the Court's discretion. An apparently good defence may compensate for a poor explanation (Harms *Civil Procedure in the Supreme Court* 313 (K6)), and *vice versa*.'"

[9] A further factor to be borne in mind is that a magistrate’s decision not to rescind lies within the discretion of that magistrate. A court of appeal is accordingly not at liberty to upset such a decision merely because it thinks that it would have probably come to a different conclusion on the facts. It should be pointed out, however, that a magistrate is bound to exercise his discretion judicially in light of the considerations set out above, and any other considerations which might be relevant.

CONDONATION

[10] In *Darries v Sheriff, Magistrate's Court, Wynberg and Another*[10] Plewman JA observed that the number of petitions for condonation of failure to comply with the rules of that court (SCA) was a matter of grave concern. Regrettably, that trend continues both in the High Courts and the Magistrate's Courts as evidenced by the number of reported decisions in which the issue has been dealt with. In my view, many practitioners continue to believe that condonation is a mere formality. There is a growing trend, particularly with appeals in this court, for practitioners to apply for condonation on the most flimsy of grounds. What is even more concerning is that in most cases such applications are made at the very last minute. In most cases as well, the non-compliance with the rules or directions of a court occur as a result of tardiness on the part of practitioners and not the litigants themselves.

[11] It is trite that condonation of the non-observance of the rules of court is not a mere formality. In *Darries, supra,* Plewman JA set out the applicable principles as follows:

> "I will content myself with referring, for present purposes, only to factors which the circumstances of this case suggest should be repeated. Condonation of the non-observance of the Rules of this Court is not a mere formality (see Meintjies v H D Combrinck (Edms) Bpk 1961 (1) SA 262 (A) at 263H--264B; Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 138E--F). In all cases some acceptable explanation, not only of, for example, the delay in noting an

[10] 1998(3) SA 34 SCA.

appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. See *Commissioner for Inland Revenue v Burger*1956 (4) SA 446 (A) at 449F--H; *Meintjies's* case *supra* at 264B; *Saloojee's* case *supra* at 138H. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. See *Saloojee's* case *supra* at 141B--G. In applications of this sort the appellant's prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. See *Meintjies's* case *supra* at 265C--E; *Rennie v Kamby Farms (Pty) Ltd*1989 (2) SA 124 (A) at 131E--F; *Moraliswani v Mamili*1989 (4) SA 1 (A) at 10E. But appellant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be. See *Ferreira v Ntshingila*1990 (4) SA 271 (A) at 281J--282A; *Moraliswani v Mamili (supra* at 10F); *Rennie v Kamby Farms (Pty) Ltd (supra* at 131H); *Blumenthal and Another v Thomson NO and Another*1994 (2) SA 118 (A) at 121I--122B."

[12] The non –observance of court rules is not confined to the lower courts and High Courts. It is a problem that rears its head every so often even in the Constitutional Court. However, in addition to the factors referred to above, the test in that court for determining whether condonation should be granted or refused is the interests of justice. The factors generally considered by that court

were restated recently by Madlanga J in *Turnbull-Jackson v Hibiscus Coast Municipality*[11] as follows:

"[23] In this Court the test for determining whether condonation should be granted or refused is the interests of justice. Factors that the Court weighs in that enquiry include: the length of the delay; the explanation for, or cause of, the delay; the prospects of success for the party seeking condonation; the importance of the issues that the matter raises; the prejudice to the other party or parties; and the effect of the delay on the administration of justice. It should be noted that although the existence of prospects of success in favour of the party seeking condonation is not decisive, it is a weighty factor in favour of granting condonation.

[24] This Court has in the past cautioned against non-compliance with its rules and directions. The words of Bosielo AJ bear repetition:

> "I need to remind practitioners and litigants that the rules and courts' directions serve a necessary purpose. Their primary aim is to ensure that the business of our courts is run effectively and efficiently. Invariably this will lead to the orderly management of our courts' rolls, which in turn will bring about the expeditious disposal of cases in the most cost-effective manner. This is particularly important given the ever-increasing costs of litigation, which if left unchecked will make access to justice too expensive."

[25] The explanation given by the applicant's Counsel is unsatisfactory. Where non-compliance with the rules or directions is as a result of the fault of a litigant's legal representative, certain considerations come into the equation. Before I deal with them, let me emphasise that an application for condonation is not a mere formality. This is true whether it is the litigant, the legal representative or both who are at fault. The test remains the same: is it in the interests of justice to grant condonation?"

[11] 2014(11) BCLR 1310 (CC).

[13] In deciding whether condonation should be granted or not, courts have a wide discretion which must be exercised judicially having regard to the facts of each case. In each case the question is whether good or sufficient cause has been shown for the relief sought. Good cause requires that the application must be *bona fide*[12]. Wilful default or gross negligence will often preclude a finding of good cause. Good cause also includes but is not limited to the existence of a substantial defence[13].

THE APPEAL

[14] The essential issue in this appeal is whether the learned magistrate exercised his discretion correctly in refusing the rescission application. The judgment of the learned magistrate was attacked on three (3) levels. The *first* was that he erred in finding that the defendant had conceded that he brought the rescission application out of time and that a moratorium relating to the *dies non* was not available to the defendant. The *second* was that the learned magistrate erred in finding that the defendant had failed to establish a *prima facie* case with a *bona fide* defence which disclosed a triable issue. The *third* was that the court *a quo* in the exercise of its discretion, failed to take into account all three factors namely, the period of the delay, the explanation for the delay and good cause[14].

[12] TLE (Pty) Ltd v The Master of the High Court and Others 2012(2) SA 502 (GSJ) at [12].
[13] Securiforce CC v Ruiters 2012(4) SA 252 (NCK) at [12].
[14] Defendant's Heads of Argument.

[15] As far as the issue of the so-called moratorium is concerned, the defendant failed to put up any cogent evidence to satisfy the learned magistrate that such a moratorium was in existence and that it went beyond the *dies non* referred to in Rule 13(1) of the Magistrate's Court Rules. Had such a moratorium been in place, I have no doubt that the learned magistrate, who presides in those courts, would have agreed with the defendant's attorneys when the issue was first raised on 17 May 2013. Mr Pillay who appeared on behalf of the plaintiff in the court *a quo* and on appeal, assured us that no such moratorium was in place at the time. In any event, whatever the 'misunderstanding' or 'confusion' in the mind of the defendant's attorney insofar as this moratorium is concerned, the defendant nonetheless accepted that he was out of time for the filing of his rescission application.

[16] Since the second and third grounds advanced by the defendant are inter-related, I intend dealing with them as one. In considering whether the defendant was entitled to an order rescinding the judgment, the learned magistrate was duty bound to have regard to all the information that was placed before him. He considered correctly, in my view, that the application for condonation could not be determined in isolation without the defense of the defendant being considered simultaneously. This was no doubt necessary to decide whether the application was *bona fide* and whether a *bona fide* defence had been disclosed.

[17] Bearing in mind that the relationship between the plaintiff and defendant was governed by a written agreement of lease which contained a non-variation clause, the defence put up by the defendant involved an oral arrangement which the defendant allegedly had with a third party by the name of one Du Preez. He averred that during the first quarter of 2007 he and Du Preez shared equally in the profits of a business trading as 'Hugh Mathie Beds' which conducted business from the Ballito Business Park. However, in view of the fact that the defendant's credit rating was bad, there was an oral arrangement between him and Du Preez that the latter would employ him but that between them it was understood that they would share in the profits.

[18] The defendant went on to aver that despite this arrangement, and when it came to starting the present business at the Ballito premises (which is the subject matter of the lease), Du Preez refused to sign the lease agreement. The plaintiff overlooked the defendant's negative credit rating and was prepared to have him as a tenant. He avers that it was as a result of 'brinkmanship' on the part of Du Preez that he was forced into this situation so as to avoid any delay in opening their doors at the Ballito branch.

[19] The defendant goes on to explain that the plaintiff was aware of the arrangement that existed between him and Du Preez. He accordingly avers that the plaintiff is claiming against him incorrectly when the real culprit is in fact

Du Preez. In support of his contentions in this regard, the defendant states that he obtained the plaintiff's written consent to apply for a Telkom service line to be installed at the premises, he also applied for a credit card machine facility and paid the electricity deposit in the sum of R2 500.00. This was all done because of the arrangement he had with Du Preez and of which the plaintiff was aware. The upshot of his defence was that the plaintiff had agreed to release him from the lease agreement and to look to Du Preez for the due fulfilment of the obligations flowing therefrom. The plaintiff's case on the other hand was that at all material times his dealings were with the defendant and not with Du Preez.

[20] Inasmuch as the defendant seeks to lay blame on Du Preez for the predicament in which he finds himself, there is nothing on the record to show what steps, if any, were taken by him to join Du Preez to the action. Additionally, none of the documents put up by the defendant establish any proof, even at a *prima facie* level, that Du Preez was part and parcel of the arrangement alleged by the defendant. In these circumstances it is not surprising, in my view, that the learned magistrate was not persuaded that a *bona fide* defence had been established on the papers. In my view, the learned magistrate correctly found that the defendant, as a reasonable businessman, ought to have appreciated the ramifications of concluding agreements and the concomitant obligations that flow therefrom. The defendant clearly failed to do

so. The defense put up was a spurious one in the circumstances. Not even the documents put up by the defendant went far enough to support the allegations he made[15]. The learned magistrate, correctly concluded, that the defendant had no prospects of success of establishing this defence if the matter were to proceed to trial.

[21] In all the circumstances, I am not persuaded that the reasoning of the learned magistrate can be faulted in any way. Nor can I find that he failed to exercise his discretion judicially. It follows, in my view, that the appeal cannot succeed and must be dismissed.

ORDER

The order I propose is the following:

The appeal is dismissed with costs.

_____

_____ I agree

CHILI J

[15] Annexures "HM1", "HM2", "HM3", "HM4", "HM5" and "HM11", record pages 68-73.

Date of Hearing	:	25 May 2015
Date of Judgment	:	11 June 2015
Counsel for Appellant	:	Mr AC Escott-Watson
Instructed by	:	Laurie C Smith Inc. (Ref: Mr Horton/Gen/R255)
		c/o Venns Attorneys (Ref: LBagley/es/41144743)
		Tel: 033 355 3100
Counsel for Respondent	:	Mr G Pillay
Instructed by	:	Godfrey & Associates (Ref:GN Pillay/LR/R298)
		Tel: 032 945 3000
		c/o Shamola Dasrath & Associates