IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 5868/2022P

In the matter between:

SURANDRA RAMJUTHAN	**APPLICANT**
and	
CMH FINANCE	**1st RESPONDENT**
PRAGASEN NAIDOO	**2nd RESPONDENT**
BIDVEST BIRCHMORES (PTY) Ltd	**3rd RESPONDENT**

ORDER

The following order is made:

1. Condonation application is refused.
2. The rescission application is hereby dismissed.
3. The applicant is ordered to pay costs of suit

JUDGMENT

Ntlokwana AJ

Introduction

[1] On 19 November 2022, the first respondent obtained a court order against the applicant, cancelling the credit agreement between the applicant and the first respondent and directing that the motor vehicle be returned to the first respondent. This court order was because of a summary judgment application which was granted in the absence of the applicant.

[2] The applicant has now brought a rescission application to rescind the court order obtained in the summary judgment application. Due to the late filing of the rescission application, the applicant is also applying for condonation thereof.

[3] The second and third respondent, whilst cited herein, due to their interest in the matter, there is no relief sought against them.

Background

[4] The applicant is an erstwhile client of the first respondent, who on 31 March 2018, entered into a credit agreement for the purchase of a vehicle, with a monthly instalment payment of R4 492.51.

[5] The applicant fell behind on his monthly instalments, the first respondent issued summons on 10 May 2022, claiming, amongst others, confirmation of the cancellation of the agreement and the return of the motor vehicle. The summons was served to the applicant's chosen address on 13 May 2022, and his daughter received the summons on behalf of the applicant.

[6] On receipt of the summons, the applicant secured the services of legal representatives, SB Mkhize Attorneys Inc. (SBM) who filed the notice of intention to defend on 30 May 2022, and the plea was subsequently filed on or about 19 July 2022.

[7] Prior to issuing the summons, on or about 31 May 2021, the applicant made an application for debt review. Despite the debt review, the first respondent did not receive a payment from the applicant. On 22 April 2022, the first respondent sent notice to terminate the debt review to the applicant, the debt counsellor (the second respondent), and to the National Credit Regulator after a period of 60 business days had lapsed. The termination complied with section 86(10) of the National Credit Act

34 of 2005. Once the debt review was cancelled, the first respondent alleged that it was entitled to enforce its rights in terms of the agreement, by cancelling the agreement and seeking an order for the return of the vehicle.

[8] Indeed, after the applicant's plea was filed, the first applicant lodged a summary judgment application on 11 August 2022, set down to be heard on 19 October 2022. The summary judgment was served to SBM via email on 11 October 2022. In the email, SBM was advised that the summary judgment application was set down on the motion court roll for 19 October 2022. On the same day, the applicant's attorneys confirmed receipt of the summary judgment via email.

[9] On 19 October 2022, the applicant did not oppose the summary judgement. The court granted the order sought, confirming the cancellation of the agreement and the return of the vehicle.

[10] On 10 November 2022, a warrant of delivery for the vehicle was issued. and on 19 November 2022 the sheriff served the warrant of delivery on the applicant. As per the warrant of delivery, the vehicle was returned to the first respondent. The first respondent has since sold the vehicle to a third party.

[11] Following the repossession of the vehicle, the applicant lodged a rescission application on 17 February 2023.

Condonation

[12] The first respondent alleges that the applicant, in his affidavit, whilst seeking relief for condonation for the late delivery of the rescission application, has made no factual basis for the court to consider as grounds for the relief sought.

[13] In this regard, the first respondent has raised a point in limine seeking a dismissal of the rescission application for failure to set out a basis for condonation. The applicant acknowledged that he found out about the summary judgement application and the subsequent court order on or about 10 November 2022 when he was served with a copy of the warrant of delivery. At the time, he says he was unemployed and had limited financial resources available, and consequently, was

unable to secure legal representation. There is no explanation as to whether SBM were no longer available as no notice of withdrawal as the applicant's attorneys, nor was a termination of mandate filed. The applicant, submitted, was only able to attend to the rescission application after he had secured the services of his current attorneys of record. This is from the reason tendered in the applicant's founding papers as an explanation for the late delivery of the rescission application.

[14] The applicant denies that he was served with the summons and thus he was not aware of the action. According to the applicant, he got to know about the action on or about 8 July 2022 when a notice of bar was received by SBM, requesting the applicant to file a plea. The plea was filed by SBM on or about 21 July 2022.

[15] After the plea was served to the first respondent, the first respondent lodged the summary judgement application. The applicant claims that he was never personally served with the copy of the application for summary judgement, thus was not aware of same when it was heard in court on 19 October 2022, when an order for summary judgement was obtained.

[16] The applicant further claims that, as his debt was still under debt review, the second respondent, who was the debt counsellor, should have been served with the summary judgement application. Due to non-service to the applicant and to the second respondent, the summary judgement was obtained in both their absence, thus the said court order was erroneously sought and/or erroneously granted in his absence, as provided for in rule 42(1)*(a)* of the Uniform Rules of Court.

[17] Whilst the applicant had also claimed for the suspension of the warrant of delivery, applicant's counsel correctly conceded that, as the vehicle in question had been sold in the interim, such relief had become moot. Thus, what remains for consideration is condonation for late delivery of the rescission application, as well as the merits of the rescission application of the summary judgement order.

[18] In its quest for the dismissal of the rescission application due to the applicant's failure to make out a case for condonation, the first respondent stated that, the applicant came to know about the judgement on 10 November 2022, when the vehicle

was removed from his possession, in terms of the warranty of removal. The 20 days upon which the applicant should have brought the rescission application, expired on 8 December 2022. The applicant lodged the rescission application on 17 February 2023, according to the first respondent, this is just more than 2 months late, and there is no satisfactory explanation for the delay.

[19] The first respondent, submitted that the applicant's allegation that he was unemployed and thus could not afford nor obtain legal representation at the time when the warrant of delivery was served, falls short of the required satisfactory basis upon which this honourable court should grant condonation. In support of this submission, the first respondent pointed out that SBM were still the applicant's attorneys on record when the warrant of delivery was served to the applicant. Thus, according to first respondent, the applicant's averment that he could not afford legal representation must fail.

[20] On rescission of the judgement, the applicant alleges that the judgement was both erroneously sought and granted in his absence. In support of this assertion, the applicant alleges the summons and application for summary judgement were not served on him and accordingly did not come to his attention. Further, that the second respondent was not joined in the proceedings. In response, the first respondent submitted that both the summons and the application for summary judgement were properly served. The applicant's daughter received the summons at the applicant's chosen service address, and the summary judgement application was served to SBM, as such, the service cannot be faulted as a basis for the rescission application.

[21] On the issue of non-joinder of the second respondent, the first respondent submitted that, the second respondent was the debt counsellor. At the time of issuing the summons, the application for debt review was terminated and notices were served in terms of section 86(10) of the National Credit Act, thus no error occurred when the first respondent did not join the second respondent.

[22] The applicant did not reply to the first respondent's answering papers and neither heads of argument were filed.

Issues

[23] There are two issues to be determined, the first, being whether condonation should be granted for the late filing of the rescission application and secondly, whether the applicant has made out a case for rescission of the summary judgement granted on 19 October 2022.

Legal principles

[24] According to rule 27(3) of the Uniform Rules, the court may on good cause shown, condone any non-compliance with the rules. The sub-rule requires the applicant to show good cause. It has been held that on good cause shown, the court has a wide discretion[1] which in principle must be exercised with due regard to the merits of the matter as a whole.[2]

[25] Whereas the courts have refrained from formulating an exhaustive definition of what constitutes good cause, two principal requirements have emerged for favourable exercise of the court's discretion.[3] The first requirement is that the applicant should file an affidavit explaining the delay. In *Silber v Ozen Wholesalers (Pty) Ltd*[4] it was held that the explanation of the delay or default must be sufficiently satisfactory to enable the court to understand how the delay came about for the court to access the applicant's conduct and motives. The applicant is required to provide a full and reasonable explanation for the entire period of the delay.[5] Where the applicant has been reckless in pursuit of the matter or displayed or showed intentional disregard of the rules of court or the court is convinced that, the applicant has no serious intention to proceed other than to delay the opposite party's claims, the court will refuse to grant the condonation application.[6]

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[1] *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 216H – 217A.
[2] *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) paras 7-8.
[3] *Dalhouzie v Bruwer* 1970 (4) SA 566 (C) at 571F – 572C (*Dalhouzie*).
[4] *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A.
[5] *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as amicus curiae)* 2008 (2) SA 472 (CC) para 22 (*Van Wyk*); see also *Ingosstrakh v Global Aviation Investments (Pty) Ltd and others* [2021] ZASCA 69; 2021 (6) SA 352 (SCA) para 21 (*Ingosstrakh*).
[6] *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd and others* 2000 (3) SA 87 (W) para 15; *Smith NO v Brummer NO and another Smith, NO v Brummer* 1954 (3) SA 352 (O) at 358A.

[26] The second requirement is that the applicant should establish to the satisfaction of the court that he has a bona fide defence, the factual basis which if proved, would constitute a defence.[7]

[27] Further to the above, prejudice is also a consideration to be taken into account, in that, the grant of indulgence must not prejudice the other party, in a way where neither costs nor postponement would compensate for the indulgence.[8]

[28] Relying on the provisions rule 42(1)*(a)*, the applicant claims that the judgement was both erroneously sought and granted in his absence. In *Zuma v Secretary of the Judicial Commission of Inquiry*,[9] the Constitutional Court held that the sub-rule provided for two separate requirements, that a party had to be absent and that the error had to be committed by the court. Further, the words 'granted in the absence of any party affected thereby' existed to protect litigants whose presence had been precluded and not those who had been afforded procedurally regular judicial process but opted to be absent.[10]

Analysis on condonation

[29] The applicant by his own admission, received the summary judgement order on 10 November 2022 when he was served with the warrant of delivery. From this date, the applicant had 20 days to file his rescission application, thus, 8 December 2022 was the cut-off date to lodge a rescission application, which was ultimately launched on 17 February 2023. The filing therefore was more than two months late.

[30] In explaining the reason for the delay, the applicant stated that, due to being unemployed, with limited resources, he was unable to secure legal representation, it was only after he secured the services of the current attorneys was he able to lodge the rescission application. This explanation presupposes that the applicant had no legal representation. The first respondent correctly pointed out that the explanation that the application was launched late due to the applicant being unable to afford legal

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[7] *Dalhouzie*.
[8] *Dalhouzie* at 572D.
[9] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and others* 2021 (11) BCLR 1263 (CC) (*Zuma*).
[10] *Zuma* paras 56-57.

representation when the warrant of delivery was served, must fail on the basis that, SBM was still on record as the applicant's attorneys. Even when the current attorneys lodged the rescission application, SBM were still on record as the applicant's attorneys as they haven't withdrawn yet.

[31 In seeking condonation, the applicant is required to explain the delay sufficiently to enable the court to decide as to whether a full and reasonable explanation has been provided for the entire period of the delay, including any circumstances, which prevailed preventing the applicant from lodging the application during the period of the delay.[11]

[32] The applicant has not explained why SBM, being his attorneys on record when he got to know about the order granted on summary judgement, were not able to prepare and lodge the rescission application, as they were still on record as his attorneys. There is no explanation as to when the current attorneys were instructed to lodge the rescission application. An assertion that, as soon as the applicant secured the services of the current attorneys, the said current attorneys undertook to establish when the summary judgement was granted is certainly not the envisaged full satisfactory explanation of the entire period of the delay.[12] There is therefore no sufficient satisfactory explanation made out for the entire period of the delay.

[33] Apart from providing a satisfactory explanation, the applicant is required to place before the court a sufficient factual basis for establishing that he has a bona fide defence, which if proved would constitute defence.[13] In his claim for rescission, the applicant alleges that, he was never served with the summary judgement application personally, nor was he served with the summons commencing the action. He therefore had no knowledge of the summary judgement proceedings. Further, the applicant submitted that the summary judgement application and the summons should have been served to the second respondent, a debt counsellor, as the dispute was under debt review. It was on this basis that, the applicant submitted that the summary

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[11] *Silber v Ozen.*
[12] *Van Wyk* para 22 and *Ingosstrakh* para 21.
[13] *Dalhouzie.*

judgement granted on 19 October 2022 was both erroneously sought and/or granted in his absence.

[34] This is disputed by the first respondent, stating that, the sheriff properly served summons on the applicant's daughter, Samantha, on 13 May 2022 at the applicant's chosen address. Thereafter on 30 May 2022, a notice of intention to defend was filed by SBM instructed by the applicant on or about 27 May 2022. The first respondent argued that if the applicant's assertion that he has never had sight of the papers in the main action was to be believed, there is no explanation how SBM were appointed and on whose instructions were they able to deliver the notice of intention to defend on behalf of the applicant. The allegation by the applicant that he got to know about the main action on 8 July 2022 when SBM received a notice of bar, is therefore false, argued the first respondent.

[35] Similarly, that the applicant only got to know about the summary judgement application when the warrant of delivery was served on him on 10 November 2022, is a misdirection. The summary judgement application was served to SBM by email on 11 August 2022. SBM acknowledged receipt thereof by an email on the same date. The applicant's counsel correctly conceded that, that was proper service of the summary judgement application on the applicant, thus there was no need for personal service to the applicant. The first respondent argued that the applicant had brought the rescission application without following up with SBM on the conduct of the matter. I agree with this submission, had the applicant followed up with SBM, he would have been told of the developments leading up to the granting of the summary judgement. The applicant did not file a replying affidavit to rebut the first respondent's averments.

[36] In *Junkeepersad v Solomon*[14] it was stated that 'factors which usually weigh with a court in considering an application for condonation include the degree of non-compliance, the explanation therefor and an applicant's prospects of success on the merits.' The applicant is required to be scrupulously accurate in his explanation statement for his lack of promptitude in launching the rescission application on

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[14] *Junkeeparsad v Solomon and another* [2021] ZAGPJHC 48 para 7.

summary judgement. This he has failed to do. The Constitutional Court in *Ferris v FirstRand Bank*[15] held that,

'lateness is not the only consideration in determining whether condonation may be granted. It held further that the test for condonation is whether it is in the interests of justice to grant it. As the interests-of-justice test is a requirement for condonation and granting leave to appeal, there is an overlap between these enquiries. For both enquiries, an applicant's prospects of success and the importance of the issue to be determined are relevant factors.' (footnotes omitted)

[37] The applicant has failed to establish good cause as there are no prospects of success on the merits of the matter. Service of the summary judgement application was effected properly, the debt review process was terminated by way of termination notices, one of which was served to the second respondent, thus the second respondent has no interest in the matter, and consequently, there was no need to serve on the second respondent.

[38] There is no merit on the applicant's claim that the summary judgement was erroneously sought and/or erroneously granted in his absence, neither is there merit on the claim that the applicant was never served with summons. These are just delaying tactics to resist the finalisation of the matter with the intention to delay the first respondent's claim. A look into the applicant's plea filed in the main action shows that there is no defence against the first respondent's claim as the applicant has pleaded that he had been paying reduced instalments through the debt counsellor, as he was no longer employed. This assertion is disputed by the first respondent stating that, there applicant's plea does not set out a defence which is valid in law on the basis that the debt review order had been dismissed, and at no stage did the first respondent agree to reduce payment. The first respondent further stated that such was not necessary as the debt review was terminated at the time when the summons was lodged.

[39] The applicant has failed to make out a case for condonation, thus the application should be refused. During the hearing, first respondent's counsel was

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[15] *Ferris and another v FirstRand Bank Ltd* [2013] ZACC 46; 2014 (3) SA 39 (CC) para 10.

emphatic that, if the court were to conclude that condonation is refused, the matter should be dismissed with costs for failure to make out a case for condonation.

Costs

[40] It is trite law that the costs shall follow the event, of course with the discretion of the court. The first respondent has been successful in opposing the matter and there is no reason to deprive the first respondent of the cost of suite as prayed in its answering affidavit as well as on the submissions made by counsel to dismiss the application with costs if the condonation is not granted.

Order

[41] The following order is made:

1. Condonation application is refused.
2. The rescission application is hereby dismissed.
3. The applicant is ordered to pay costs of suit.

Ntlokwana AJ

APPEARANCE DETAILS:

For the Applicant:	BC Houson
Instructed by:	Keowan Reddy Incorporated
For the 1st Respondent:	~~Undertone~~ Anderton
Instructed by:	Allen Attorneys Inc
Matter heard on:	7 November 2023
Judgment delivered on:	8 March 2024