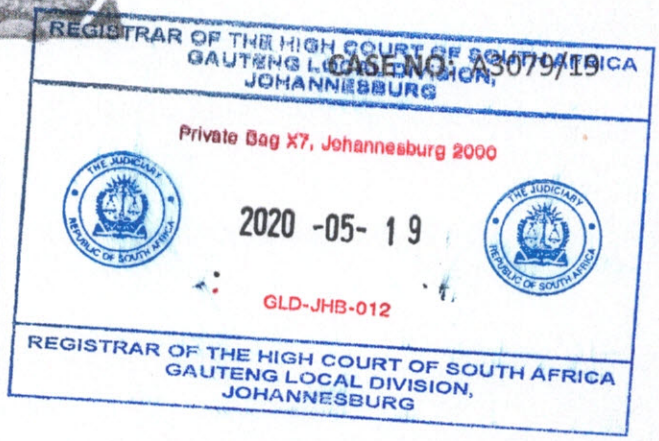
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG



(1) Reportable :- No
(2) Of interest to other Judges:- No
(3) Revised:-Yes

Date: 20/05/ 2020

In the matter between:

MANSINGH 006 T/A FOUR CORNER LIQUOR STORE Appellant

and

JOSE LUIS DA LUZ First Respondent
MANUEL AGOSTINHO LUZ Second Respondent
THE SHERRIF, HALFWAY HOUSE Third Respondent

J U D G M E N T

(Handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 20 May 2020.)

MAIER-FRAWLEY J:

1. This appeal lies against the whole of the judgment and order granted by Magistrate Jansen in the Alexandra Magistrates' court on 10 July 2019, in which he dismissed, with costs,[1] an application for rescission of judgment that was brought by the appellant (as applicant in the court *a quo*).

2. The salient grounds of appeal[2] were that the court *a quo* erred, in:

   2.1. dismissing the appellant's application for rescission of a default judgment (default judgment having been entered on 9 April 2019), in terms of which it ordered that the appellant be ejected from the leased premises being Shop 5, Alex Metro Centre, 30-31 Third Street, Wynberg ('the leased premises');

   2.2. finding that the appellant failed to make out a proper case for rescission despite the fact that it was common cause between the parties that the first and second respondents ('respondents') had obtained judgment in the absence of the appellant;

   2.3. granting judgment against the appellant despite the fact that the respondents had admitted in their papers that they were paid by the appellant after the 'issue'[3] of summons on 18 May 2018 and were therefore not in default of payment of the monthly rental on 9 April 2019 (date of default judgment) alternatively, on the date of judgment dismissing the rescission application (10 July 2019);

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[1] Costs were granted on an attorney and client scale.

[2] As a determination of the summarized main grounds will be dispositive of the appeal, it will not be necessary to deal with the plethora of ancillary complaints made in the notice of appeal.

[3] The reference to the issuing of summons is incorrect – the respondents' alleged that payment was made only after *service* of summons.

2.4. failing to take account that the lease agreement between the parties had not been validly cancelled by the respondents and was therefore still binding between the parties.

3. The third respondent took no part and played no role in the appeal proceedings. For that reason, a reference to 'the respondents' in the judgement comprises a reference to only the first and second respondents.

4. The legal representatives of both parties agreed to the determination of the matter on paper, as envisaged in section 19(a) of the Superior Courts Act 10 of 2013.

5. The appellant seeks condonation for its default in prosecuting the appeal timeously, caused by its failure to timeously apply for the assignment of a date for the hearing of the appeal. The outcome of such application has a direct bearing on whether or not the appeal, which is deemed to have lapsed, has indeed lapsed.

Condonation

6. The appellant applies for condonation for its late delivery of an application to the registrar of this court for the assignment of a date for the hearing of the appeal. The application is opposed. The respondents delivered an answering affidavit in the matter; however, the appellant chose not to deliver a replying affidavit. In so far as allegations in the answering affidavit have not been disputed or refuted, they stand as uncontroverted facts.

7. It is common cause between the parties that the appellant failed to comply with the Rules of this court in prosecuting its appeal, in that its application for a date for the hearing of the appeal was not timeously made. In terms of the Rules, the appellant ought to have applied for a date of hearing of the appeal on 18 September 2019 but only did so on 26 November 2019.

8. In terms of section 84 of the Magistrates' Courts Act 32 of 1944, an appeal from the Magistrate's Court to the High Court 'shall be brought within the period and in the manner prescribed by the rules; but the court of appeal may in any case extend such period.' Such an appeal is governed by two sets of rules: Rule 51[4] of the Magistrates' Courts Rules, which regulates the noting of an appeal,[5] and Rule 50 of the Uniform Rules of Court, which regulates the prosecution of such appeal.

9. In terms of Rule 50(1) of the Uniform Rules: *"An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed."*[6]

10. In terms of Uniform rule 50(5)(a), upon receipt of the application, the registrar 'shall forthwith assign a date of hearing...provided that the registrar shall not assign a date of hearing until the provisions of subrule 7(a), (b), and (c) have been complied with.' In terms of Uniform rule 50(7)(a), the applicant 'shall

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[4] In terms of Rule 51(9) of the magistrates' courts rules, "*A party noting an appeal ... shall prosecute the same within such time as may be prescribed by rule of the court of appeal and, in default of such prosecution, the appeal or cross-appeal shall be deemed to have lapsed, unless the court of appeal shall see fit to make an order to the contrary.*"

[5] In terms of rule 51(4) of the Magistrates' Courts Rules, an appeal is noted by the delivery of a notice of appeal and, unless the court of appeal otherwise orders, by giving security for the respondent's costs of appeal to the amount of R1,000.00.

[6] See too: *Hall v Van Tonder* 1980 (1) 908 (C) at 910.

In terms of Rule 50(4)(a) of the Uniform Rules, the appellant is, *inter alia,* required, within 40 days of noting the appeal, to apply to the registrar in writing on notice to all other parties for the assignment of a date for the hearing of the appeal.

Subrule 4(b) allows the respondent to apply for a hearing date if the appellant does not do so, but must do so within the 60 day period prescribed in subrule 1.

In terms of subrule (4)(c), an appeal is deemed to have been duly prosecuted upon receipt by the registrar of the application for assignment of a date for the hearing of the appeal from the appellant or respondent, as the case may be.

simultaneously with the lodging of the application for a date for the hearing of the appeal... lodge with the registrar two copies of the record...'. Subrules 7(b) and 7(c) prescribe how the record is to be presented and what it must contain.

11. The appellant noted the appeal on 23 July 2019. He was thus required, in terms of Uniform rule 50(4)(a), to apply to the Registrar of this Court for the assignment of a date of hearing of the appeal, within 40 days of noting the appeal. In terms of the rules, and, as was common cause between the parties, the application for a date of hearing had to be delivered by 18 September 2019. The application was however only served on the respondents' attorneys on 26 November 2019[7] and was thus approximately two months late.

12. As is evident from the provisions of section 84 of the Magistrates' Courts Act 32 of 1944 (read with rule 51(9)[8] of the magistrates' courts rules), the court of appeal retains a discretion to condone any non-compliance with the time periods provided in the rules (and extend time periods), on good cause shown. It is an established principle that in all cases of time limitation, whether statutory or in terms of the rules of court, the High Court has an inherent right to grant condonation where principles of justice and fair play demand it and where the reasons for non-compliance with the time limits have been explained to the satisfaction of the court.[9] The court enjoys a wide discretion, which is to be exercised judicially upon a consideration of all the facts. In essence, it is a question of fairness to both sides. Relevant considerations may include the degree of non-compliance with the rules, the explanation therefor, the prospects of success on appeal, the importance of the

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[7] Uniform rule 50(1)(4)(a) read with subrule (c), the appeal is deemed to have been duly prosecuted upon receipt by the registrar of the application for the assignment of a date for the hearing of the appeal, which application is to be made "*with notice to all other* parties' within 40 days of noting the appeal.

[8] Quoted in fn 4 above.

[9] See: Erasmus (Van Loggerenberg), Superior Court Practice, 2nd ed, at D1-670, fn 1 for authorities therein cited.

case, the respondent's interest in the finality of the judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.[10]

13. The appellant tendered the following explanation for the extent and cause of the delay: that it was 'impossible' to meet the deadline of 18 September 2019 *'because the court recording was misplaced by the magistrate court'* and that *'from the 17 July I was always following up with the transcribers as to how far are they transcribing the record. (sic) I received the transcribed record on the 18 October 2019 from the transcribers. The application for assignment was delayed due to the Court's delay in giving transcribers audio recording of the proceedings timeously despite noting the appeal in time'*. The appellant alleges that he managed to file the record on the 4 November 2019 and that his application was *'therefore late by almost 1 (one) month and 16 (sixteen) days, which I regard as not excessive'*. It is immediately apparent from the aforestated explanation that that the appellant has misconceived the date from which the delay in applying for a date of hearing is to be adjudged.[11] Moreover, if the applicant obtained the record of the proceedings from the transcribers on the 18 October 2018, it begs the question as to why the application for the assignment of a hearing date was only delivered on the 26 November 2019? The delay in this regard was neither addressed nor explained by the appellant in his founding affidavit. In so far as the appellant alleges that 'from

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[10] See: *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 720E-G; *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

In *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as amicus Curiae* 2008 (2) SA 472 at 477A-B ('Van Wyk'), the Constitutional Court put it thus:
"...the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends upon the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success." (own emphasis). The court went on to say, aAt 477E, that the applicant for condonation must give a 'full explanation for the delay which must not only cover the entire period of the delay but must also be reasonable.'

[11] See: para 11 of the judgment read with fn 7 above.

the 17 July 2019' it followed up with the transcribers to ascertain the progress made by the transcribers in transcribing the record, I bear in mind what was stated in *Unitrans Fuel and Chemical (Pty) Ltd v Dove-Co Carriers CC* [12] concerning that which an appellant is required to address in his founding papers. The appellant's affidavit in support of condonation unquestionably fell dismally short of these requirements in the present case. The applicant provided no details of the attempts that were allegedly made in 'following up' with the transcribers, whether written or telephonic, or the dates on which such attempts were made. In short, it failed to provide any substantiating evidence in support of its averments.

14. As to the effect of the delay, the appellant alleges that he would suffer *'serious prejudice if condonation is not granted in that it will be the end of the matter. The Respondent will not suffer any prejudice because they will have an opportunity to argue their case in court.'* The respondents, on the other hand, allege that they have been severely prejudiced by the appellant's failure to prosecute the appeal timeously, such conduct being consistent with how the appellant had conducted itself throughout the course of the proceedings conducted in the lower and High court, both prior to and after the entry of default judgment on 9 April 2019. To this end, the respondents aver that the appellant launched various unmeritorious applications, one of which was dismissed because the appellant failed to attend court for the hearing thereof and another pursuant to the appellant's withdrawal thereof without explanation and 'on a whim'.[13] The respondents accordingly

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[12] *Unitrans Fuel and Chemical (Pty) Ltd v Dove-Co Carriers CC* 2010 (5) SA340 (GSJ) at 344F-G and 345A-B ('Unitrans Fuel'). There, the Full Court of this division directed that High Courts should in future require that (a) the entire period of the delay be thoroughly explained, regardless of the length of the delay; and (b) where the delay was occasioned by transcribers contracted to the Department of Justice failing to make records available timeously, that applicants must show: (i) that they were not at fault, and (ii) what attempts were made at compelling the transcribers to provide the transcripts, including, but not limited to, the bringing of an application to court compelling compliance.

[13] Default judgment was granted pursuant to the appellant having failed to deliver his plea after receipt of a notice of bar that was served on his erstwhile attorneys of record and who were representing him at the time; thereafter, the appellant launched 3 separate applications, all of which were dismissed: the first application for the urgent stay of an ejectment order was dismissed after the appellant failed to attend at court for the hearing thereof; the second application for rescission of default judgment was dismissed on its merits; the third application was an urgent application which was launched in

submit that the appellant's conduct evidences 'a deliberate and calculated ploy, aimed at frustrating the respondents' rights and forcing the respondents' to incur legal costs unnecessarily and suffer financial prejudice.' It is not in dispute that the appellant was lawfully ejected from the leased premises as long ago as 7 May 2019.

15. As appears from annexure "NO1" to the answering affidavit, the appellant was warned, in a letter addressed to it by the respondents' attorneys on 27 November 2019, that its failure to prosecute the appeal timeously had resulted in the appeal having lapsed. The present application for condonation was issued two weeks later, on 12 December 2019, and was not delivered at the time that the application for the assignment of a date for the hearing of the appeal was made on 26 November 2019, as ought reasonably to have occurred. No explanation was given by the appellant for its delay in this regard.

16. As to the prospects of success on appeal, the appellant baldly submits that the court *a quo* dismissed the appellant's application for rescission *'without considering the proper principle for rescission'* and that *'based on the above facts'* the appellant enjoys reasonable prospects of success. I agree with the respondent's contention that a fully reasoned judgement, supported by authorities, was given by the learned magistrate as to why the application for rescission of judgment had to fail. Chief amongst the reasons provided, was that the appellant failed to show good cause for the rescission of default judgment, because he failed to set out a bona fide or *prima facie* defence.[14] Based on the undisputed facts, it was found that the respondents had established that the appellant was in default of its obligations to pay rent timeously or in full under the lease agreement extant between the

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this court for the stay of the warrant of ejectment that was issued pursuant to the entry of default judgment against the appellant, which was also dismissed.

[14] A *prima facie* defence in the sense of setting out averments which, if established at trial, would entitle the appellant to the relief asked for in the rescission application.

parties.[15] That finding was undoubtedly correct, given that the appellant did not dispute, in the rescission application before the court *a quo,* that: (i) the respondents' reconciliation pertaining to the appellant's account evidenced that rental was consistently paid not in full and also late , i.e., after the first business day of the month, and (ii) the arrear amount owing up to and including May 2018 in the sum of R23,136.35 was only paid after service of the summons – a fact that would seem to be a clear acknowledgment by the appellant that it was indeed in arrears with its instalments at the time that the summons was issued and (iii) the appellant had not attached 'one piece of evidence'[16] to its founding affidavit to evidence payment of its monthly rental in accordance with the lease agreement between the parties. Of further significance is the fact that the appellant did not, in its founding affidavit, allege payment of any of the instalments on due date which were said by the respondents to have not been paid in full or which were paid late. Generally speaking, one would have expected such a statement to have been made in order to establish a *bona fide* defence.

17. In the rescission application before the court *a quo,* the appellant baldly alleged that it had never defaulted in its rental obligations and was thus not in breach of the terms of the lease agreement. The respondents alleged that the appellant had defaulted on its obligation to pay the rental on due date and in full, as required under the lease agreement, and that as at May 2018, the appellant was in arrears in the sum of R23,136.35. Consequently, so the respondents pleaded (in claim B of their particulars of claim) and as was alleged in the rescission application, they duly cancelled the agreement, alternatively, the agreement was cancelled by service of the particulars of claim. On appeal, the appellant persists in its allegation that it never defaulted on its rental payments but also argues that the lease agreement was not validly cancelled. The court *a quo* found that the respondents had

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[15] Under the lease agreement extant between the parties, the appellant was obliged to pay rent in the sum of R23,000.00 monthly in advance, on the first business day of every month, free of deduction or set-off and was not entitled, *inter alia,* to withhold payment of rent for any reason whatsoever.

[16] Per the court *a quo's* judgment at para 11.10.

exercised their right to cancel the agreement by way of summons issued against the appellant.[17] In terms of clause 29 of the lease, which I quote in relevant part:

" 29. Should the tenant:

1. Fail to make any payment which it is obliged by this agreement to make *by the due date therefore;*

The Landlord shall be entitled to :

B. Cancel this lease agreement and eject the Tenant..."

18. On a reading of the agreement in this matter, it seems to me that there is little doubt that a failure to pay the instalments on due date would be regarded as a material breach of the agreement.

19. In *North Vaal Mineral Co. Ltd v Lovasz* 1961(3) SA 604 (T) at 606C, the contractual term styled a *lex commissoria* was discussed. There the following was said:

" *Clause 9 is a lex commissoria (in the widest sense of a stipulation conferring a right to cancel upon a breach of the contract to which it is appended, whether it is a contract of sale or any other contract). It confers a right (viz to cancel) upon the fulfillment of a condition. The investigation whether the right to cancel came into existence is purely an investigation whether the condition, as emerging from the language of the contract (a question of interpretation), has in fact been fulfilled (Rautenbach v Venner* 1928 TPD 26)."

20. As was pointed out by Gamble J in *GPC Developments CC and Others v Uys:*[18]

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[17] Para 11.18 of the court *a* quo's judgment.

[18] *GPC Developments CC and Others v Uys* (A71/2017) [2017] ZAWCHC 80; [2017] 4 All SA 14 (WCC) (15 August 2017) at paras 34-35.

The language of clause 29 of the lease agreement *in casu* was clear and unambiguous, requiring no interpretation by a court. It was not in any event contended by either of the parties in any of the proceedings that the clause required interpretation by court.

The learned author, Kerr, in his work entitled 'The principles of the Law of Contract', 6th ed at p 619, puts it thus: "*When promptness of performance is a matter of major performance and the contract mentions a moment of time at which or by which performance is due the law is clear:...the aggrieved party may cancel the contract if performance is not rendered at or before the specified moment of*

" [34] The term *"lex commissoria"* has acquired a somewhat flexible meaning in our law of contract. Van der Merwe et all[19], with reference to *inter alia* Nel v Cloete,[20] observe that the phrase denotes, primarily, a term which permits a contracting party to resile from an agreement on the ground of delay, but that it has also acquired a wider and more general meaning, *viz*, a stipulation conferring the right to cancel an agreement on the basis of any recognised form of breach. Such a term may include a right on the part of the creditor to claim forfeiture of amounts already received, but it is not limited to that right. [21]

[35] Christie[22] provides the following useful synopsis in regard to a *lex commissoria*:

> *"The contract may explicitly state that if one party fails to perform a particular obligation by a specified time the other party is entitled to cancel the contract. In a lease where the landlord is given the right to cancel for non-payment of rent, such a provision it is usually called a forfeiture clause, and in a contract of sale where the seller is given the right to cancel for non-payment of the purchase price, a lex commissoria, but either description may be used in respect of any type of contract. Such clauses are valid and enforceable strictly according to their terms, and the court has no equitable jurisdiction to relieve a debtor from the automatic forfeiture resulting from such a clause..."*

21. The summons was served on the appellant before it made payment of the accumulated arrears, which, at the time of issue of the summons amounted to R23,136.35. It is clear from the summons that the respondents gave notice in their particulars of claim of their election to cancel the agreement. They cancelled the agreement as a consequence of the appellant's default before issue of summons, and, if not, at least as at the time of service of the summons on the appellant, and in either instance, at a time when the appellant was admittedly in arrears. By the time that the rescission application was argued in the court *a quo*, the undisputed

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time, Cancellation takes place simpliciter: neither a notice of intention to cancel nor a conditional notice of cancellation is necessary."

[19] Contract, General Principles (4th ed) at 299 fn126

[20] 1972(2) SA 150 (A) at 160.

[21] Baines Motors v Piek 1955 (1) SA 534 (A) at 542 – 7. At 547C, the court stated that '*When the purchaser has made default, the seller can elect whether or not he is going to put the lex commissoria into operation (D.18.3.3). Once he has exercised his option he cannot resile from that election (D.18.3.6.7; Voet [18.3.3])*'

[22] *Op cit* 599

facts were that the arrears had accumulated to an amount of R71,883.03. In my view, the respondents' validly cancelled the agreement before receipt of payment of the amount of the arrears claimed in the summons. The respondents were thus procedurally entitled to seek the ejectment of the appellant under clause 29 of the agreement, which they duly did by way of Claim B in their summons.

22. When the appellant remained in default of filing its plea after the expiry of the time period stipulated in a Notice of Bar, which was served on the appellant's attorneys of record in the court *a quo,* the appellant became *ipso facto* barred from filing a plea. The respondents, as they were entitled to do, lodged a request for default judgment to the clerk of the court in terms of Rule 12(1)(b)(1)[23] of the Magistrates'Courts Rules, without notice to the appellant.

23. The court *a quo* found that the appellant had failed to show that his default in filing a plea was not wilful. On 13 October 2018, the Appellant's representative, Sudhirsingh Rampalsingh Mansingh ('Mansingh') had sent an email to the respondents' attorneys of record, advising *inter alia*, to *'kindly send all correspondence directly to me and not to Mr Mothibe as he is not my attorney any longer'* (own emphasis).

24. On 6 November 2018, the Respondents' attorneys of record replied to Mansingh advising him, *inter alia*, that *'Should your attorneys have withdrawn they are requested to provide a formal notice of withdrawal, failing which further documents would be served upon them, as required by the rules of Court'*. It was not disputed by the appellant that Mansingh had failed to respond to this email. Mansingh was the deponent to the appellant's founding affidavit and ought to have responded to the said email, if he did not agree with the contents thereof.

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[23] The subrule provides that the plaintiff may lodge with the registrar or clerk of the court a *request* in writing for judgment. (The plaintiff need not bring an application as such, which would ordinarily require that notice be given to the opposite party thereof).

25. Accordingly, seeing as the appellant's attorneys of record had not withdrawn as the appellant's attorneys of record in the proceedings as such, and given the appellant had specified, in its notice of intention to defend, the address of his attorneys of record where it would accept service of *inter alia,* process and notices (as envisaged in Rule 13(4)(a)(b) of the Magistrates' courts rules) the respondents were procedurally entitled to serve a Notice of Bar on the Appellant's then attorneys of record, as Mansingh had been notified. It did not behove Mansingh thereafter to contend that the appellant could escape the consequences of the barring just because he had indicated that 'correspondence' emanating from the respondents' attorneys should be sent directly to him. In any event, the Notice of Bar did not constitute 'correspondence'[24] in the sense generally understood by ordinary persons. In so far as the appellant sought to lay blame on his erstwhile attorneys of record for failing to respond to the Notice of Bar, the caution sounded by the Appellate Division (as it then was known) in *Saloojee v Minister of Community Development* 1965(2) SA 135(A) at 141 B-H is apposite. There, the following was said:

"(I)t has not at anytime been that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. (Cf. Hepworths Ltd v Thornloe and Clarkson Ltd., 1922 T.P.D. 336*; Kingsborough Town Council v Thirlwell and Another,* 1957 (4) SA 533 *(N)). A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his*

[24] Correspondence is defined in the Cambridge English dictionary as 'communication by means of letters or email'. See: https://dictionary.cambridge.org/dictionary/english/correspondence.

attorney (cf. Regal v African Superslate (Pty.) Ltd., supra at p. 23 i.f.) and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself." (own emphasis)

26. The Appellant failed to indicate, in its application for rescission of judgment, what steps it had taken to ensure that its plea was filed timeously. The summons had, after all, informed the appellant that it was required to file a plea after entry of appearance to defend, within a prescribed period of time. Moreover, the appellant had been specifically informed by the respondents that documents would be served on the appellant's attorneys in the absence of receipt by them of a notice of withdrawal as the appellant's attorneys of record in the matter. Having studied the judgment of the court *a quo*, I am of the view that the learned magistrate's conclusion that the appellant had failed to provide a reasonable justification for its default, was correct or, stated another way, I am unable to find that he was clearly wrong. For all the reasons given, I cannot find that the appellant enjoys reasonable prospects of success on appeal.

27. All being said and done, the appellant's application for condonation was sparse in detail. Reliance was placed on numerous unsubstantiated allegations that were lacking in factual foundation. Whilst I accept that the appeal is of importance to the appellant, it is also of equal importance to the respondents to obtain finality of judgment, given that the appellant was ejected from the leased premises a considerable period of time ago. Having considered the matter in the light of all the relevant facts and circumstances, including relevant authorities, I cannot but conclude, for all the reasons given, that the appellant has failed to satisfy the requirements for condonation as, *inter alia,* enunciated in Van Wyk and Unitrans Fuel *supra.*[25] In my view, it would not be in the interests of justice for the late

[25] Id fn 10 above.

prosecution of the appeal to be condoned. This carries the consequence that the appeal has lapsed.

28. The general rule is that costs follow the result. I can see no reason to depart therefrom. The application for condonation involved a reading of the appeal record and a consideration by the court (and each of the parties) of the arguments proffered by each of them in relation to the merits of the appeal. The respondents submit that the Appellant has failed to set out proper reasons for the absence of its default in applying for the assignment of a date for the hearing of the appeal, or to set out the basis for the bald allegation that the appeal carries reasonable prospects of success. The respondents gave notice in their heads of argument that they would be seeking a special costs order in the event that the appeal was dismissed, based on the contention that 'this is a frivolous appeal which should be dismissed with costs on the attorney and client scale, both because that is the scale which is allowed by the lease agreement and because the Appellant should be penalised for its conduct in pursuing this matter.' The appellant proffered no counter arguments thereto. As the merits of the appeal were considered for purposes of a determination of the condonation application, the respondents' submission carries some force. The appeal lacked merit and the delay in prosecuting it was not properly explained. The respondents have thus far been put to great financial expense in defending unmeritorious proceedings pertaining to the appellant's eviction from the leased premises. The present application is no exception. The respondents should not be out of pocket in relation to their opposition.

29. Accordingly, the following order is made:

1. The application for condonation for the late prosecution of the appeal is dismissed with costs on the scale as between attorney and client.

A. Maier-Frawley
(Electronically signed)
MAIER-FRAWLEY J

I agree:

L. Grenfell
(Electronically signed)

GRENFELL AJ

Hearing: 6 May 2020. (The matter was determined on the papers in terms of section 19(a) of the Superior Courts Act 10 of 2013 pursuant to the set-down of the matter for hearing on 6 May 2020.)

Judgment delivered 20 May 2020

APPEARANCES:

Counsel for Applicant:	Adv. MC Mavunda (heads of argument) Adv A. Baloyi (practise note)
Attorneys for Applicant	Amiraj Bauchoo Attorneys
Attorney for first and second Respondents:	Mr D. Wainstein (heads of argument) Harris Hadal Inc attorneys