IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 2019/35217

(1) REPORTABLE: **YES**

(2) OF INTEREST TO OTHER JUDGES: **YES**

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L.J. DU BRUYN **13 APRIL 2021**

In the matter between:

CHRISTOFFEL BOTHA t/a TAX CONSULTING SA Applicant / Plaintiff

and

CHRISTOPHER JAMES MCLURE RENWICK Respondent / Defendant

JUDGMENT

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[1] This is an opposed belated application for security under rule 47 and an opposed application for condonation of the lateness. For the sake of convenience, the parties are referred to as they are cited in the action under the above case number. Thus, the Applicant is referred to as the Plaintiff and the Respondent is referred to as the Defendant. Where documents are quoted in which the parties are referred to differently, such references are changed to the Plaintiff and the Defendant respectively.

The relevant history of the litigation between the parties

[2] The litigation between the parties that is relevant to this application started with an application by the Plaintiff for leave to sue the Defendant by edictal citation. That application was granted on 29 January 2020.

[3] The Plaintiff served a summons on the Defendant by email on 12 February 2020. The Defendant filed a notice of intention to defend and a plea on 25 February 2020.

[4] The Plaintiff launched a summary judgment application and alleges that it was served on the Defendant on 16 March 2020. The Plaintiff also alleges that the set down in respect of the hearing of the summary judgment application was served on the Defendant by email on 20 March 2020 and on 28 April 2020. The Defendant admits that the Plaintiff's attorney sent the summary judgment application to him by email during March 2020. He denies, however, having received any of the notices of set down in respect of that application. Summary judgment was granted against the Defendant on 18 May 2020 on an unopposed basis.

[5] On 10 July 2020, the Defendant served an application for rescission of the judgment granted against him. The parties' legal representatives confirmed at the hearing of the present applications that the Plaintiff filed his answering affidavit in the rescission application on 11 August 2020 and the Defendant his replying affidavit on 19 August 2020. The rescission application is still pending.

[6] On 4 August 2020, the Plaintiff's attorney addressed a letter of demand to the Defendant's attorney. The purpose of that letter was to demand from the Defendant security for the Plaintiff's costs in respect of the rescission application as well as all future litigation. It reads as follows in relevant part:

> "2. We address this letter to you in terms of Rule 47(1) of the Uniform Rules of the High Court.
>
> 3. We confirm that as per [the Defendant's] founding affidavit he is residing overseas.
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> 4. We are advised that [the Defendant] does not own immovable property in South Africa. We are further advised that [the Plaintiff] has been receiving letters from various creditors of [the Defendant], which we enclose hereto. We are of the view that this is indicative of the fact that [the Defendant] does not intend to honour his debts incurred in South Africa.
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> 5. Given [the Defendant's] financial position in South Africa, any costs granted by the court in favour of [the Plaintiff] in respect of the application for rescission or any future litigation will be difficult as well as costly for [the Plaintiff] to recover.
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> 6. In the circumstances, [the Plaintiff] demands that [the Defendant] furnishes security for [the Plaintiff's] costs in respect of the rescission application as well as all future litigation. In this regard, we estimate that the costs for the rescission application alone will amount to R100 000.00.
>
> 7. We demand that [the Defendant] make payment of the amount of R100 000.00 into our trust account within 7 days from delivery hereof, failing which we intend to apply to court for an order that security in the aforementioned amount be given and that all proceedings be stayed until such order is complied with."

[7] The Defendant's attorney replied to the letter of demand on 18 August 2020. The reply reads as follows in relevant part:

> "3. Kindly note that we have consulted with [the Defendant] in respect of your request to furnish security, and have obtained instructions in the following:
>
> 3.1. That [the Defendant] shall not furnish security for [the Plaintiff's] costs in respect of the application;
>
> 3.2. That in the event [the Plaintiff] launches an application in respect of security for costs, such an application shall be opposed."

[8] The Plaintiff served the security application and the condonation application on 27 August 2020.

<u>The condonation application</u>

[9] Rules 47(1) and (3) provide as follows:

> "(1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which security is claimed, and the amount demanded.
>
> (2) …
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> (3) If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with."

[10] Rule 47 does not prescribe a specific period within which an application for security is to be brought.[1] The jurisprudence developed in respect of applications for security under rule 47 serves as a useful guide in this regard. In *Magida v Minister of Police* 1987 (1) SA 1 (A) the Appellate Division held that normally an application for the furnishing of security for costs should be brought against a *peregrinus* before *litis contestatio*.[2] The Supreme Court of Appeal held in *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV and Another v Honig* 2012 (1) SA 247 (SCA) that, as a general rule, a party is expected to apply expeditiously for security under rule 47.[3]

[11] The language employed in rule 47(1) is peremptory. That is clear from the use of the word "shall". Thus, the contemplated notice must be delivered as soon as practicable after the commencement of proceedings. In *Agro Dip (Pty) Ltd v Fedgen Insurance Co Ltd* 1998 (1) SA 182 (W) it was submitted on behalf of the plaintiff that there were special circumstances in the light of which the plaintiff should not be ordered to furnish security.[4] One of the alleged special circumstances[5] was the bringing of the application for security at a late stage of the proceedings.[6] It was held that –

> "[t]he failure of an applicant to bring an application for security as soon as practicable after commencement of proceedings may … in appropriate circumstances constitute a special circumstance in the light of which a court may refuse to exercise its discretion to require security …"[7]

[12] It is clear from the *dicta* in the *Magida*, *Honig* and *Agro Dip* cases that the failure of an applicant to bring an application for security as soon as practicable after the commencement of proceedings is a relevant feature that is to be considered by a court when exercising its judicial discretion in deciding an application for security under rule 47. The presence of this feature is, however, not to be regarded as a special circumstance that justifies a decision not to order security. The Supreme Court of Appeal held as follows in *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA):

> "The reason why Hugo J refused to grant an order appear at 364B–E of his judgment. A convenient starting point for discussion is the reference towards the end of the passage to 'special circumstances that justify a decision not to order security'. The learned Judge probably had in mind a line of cases commencing with *Fraser v Lampert NO* (*supra*) in which a Full Court of the Transvaal held that
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> > 'a defendant or respondent should not be deprived of this benefit unless special circumstances exist'
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> (*per* Malan J at 115B).

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1 *South African Iron and Steel Corporation Ltd v Abdulnabi* 1989 (2) SA 224 (T) at 236D.
2 *Magida v Minister of Police* 1987 (1) SA 1 (A) at 13J to 14A.
3 *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV and Another v Honig* 2012 (1) SA 247 (SCA) at paragraph [14].
4 *Agro Dip (Pty) Ltd v Fedgen Insurance Co Ltd* 1998 (1) SA 182 (W) at 186G.
5 *Agro Dip supra* at 187C.
6 *Agro Dip supra* at 189E.
7 *Agro Dip supra* at 189H–I.

> (See, for example, also *Trust Bank van Afrika Bpk v Lief and Another* 1963 (4) SA 752 (T) at 754H *ad fin*; *Cometal-Mometal SARL v Corliana Enterprises (Pty) Ltd* 1981 (4) SA 662 (W) at 663F–G).
>
> In my judgment, this is not how an application for security should be approached. Because a Court should not fetter its own discretion in any manner and particularly not by adopting an approach which brooks of no departure except in special circumstances, it must decide each case upon a consideration of all the relevant features, without adopting a predisposition either in favour of or against granting security. (Compare *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1)* 1997 (4) SA 908 (W) at 919G–H; *Wallace NO v Rooibos Tea Control Board* 1989 (1) SA 137 (C) at 144B–D.)"[8]

[13] The letter of demand was delivered on 4 August 2020, more than three weeks after the Defendant had served the rescission application on 10 July 2020. In addition, the Plaintiff brought the security application after *litis contestatio* in the rescission application. *Litis contestatio* in the rescission application occurred on 19 August 2020. The security application was brought on 27 August 2020. The Plaintiff admits in his founding affidavit that he delayed bringing the security application. That is why he applies for condonation. It is therefore not necessary for a finding that the Plaintiff did not bring the security application as soon as practicable after the commencement of the rescission application.

[14] The Plaintiff seeks condonation of his delay bringing the security application. With reference to the letter of demand, the Plaintiff contends that his attorney demanded security in writing in terms of rule 47(1) from the Defendant's attorney on 4 August 2020. I assume, without making a finding in this regard, that the letter of demand constituted delivery by the Plaintiff of a notice as contemplated in rule 47(1). The founding affidavit reads as follows in relevant part:

> "29. [My attorney] initially received a response [to the letter of demand] from the [Defendant's] attorney on 11 August 2020 that they were seeking instructions in respect of the aspect of security from the [Defendant]. … As alluded to above, it was only on 18 August 2020 that I received the [Defendant's] response refusing security.
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> 30. Upon receipt of the [Defendant's] refusal to provide security [my attorney] was immediately instructed to prepare this application.
>
> 31. Furthermore, I am frequently travelling to and from George where my family lives and from where I operate a satellite office. It is extremely difficult for me while travelling to provide my attorney of record with instructions and to find a commissioner of oaths to sign the founding affidavit.
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> 32. In light of the above, I submit that the delay in launching this application is not … unnecessarily lengthy and furthermore was not wilful.
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> 33. I am advised that a delay in launching this application is not necessarily fatal, more so in light of there not being any prejudice occasioned to the [Defendant].
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> 34. In light of the above, I respectfully seek condonation for the late filing of this application."

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[8] *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1045G–1046A.

[15] The Plaintiff does not indicate whether he applies for condonation under rule 27 or if he is relying upon this court's inherent power to regulate its own process. It is submitted by the author of *Erasmus Superior Court Practice* that rule 27 does not affect the inherent power of the High Court to protect and regulate its own process.[9] This creates the impression that it would be competent for this court to decide the condonation application under rule 27 or by invoking its inherent power to regulate its own process. However, a court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. In *Systems Applications Consultants (Pty) Ltd t/a Securinfo v Systems Applications Products AG and Others* [2020] ZASCA 81 (2 July 2020) the appellant, with reference to rule 47, argued that where there is a *lacuna* in the rules of court, section 173 of the Constitution should be invoked so as to ensure that proceedings are fair. The Supreme Court of Appeal held that –

> "[s]ection 173 recognises the inherent power that superior courts have to regulate their own processes. The Constitutional Court in *Molaudzi v The State*[10] stated as follows in relation to the application of s 173 of the Constitution:
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> > '... This inherent power to regulate process, does not apply to substantive rights but rather to adjectival or procedural rights. A court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. A court will, in appropriate cases, be entitled to fashion a remedy to enable it to do justice between the parties. ...'
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> Although the foregoing *dicta* were expressed in a criminal law context, they are unquestionably equally apposite in the context of civil proceedings, given that the Constitution, as the supreme law, applies to all areas of the law."[11]

[16] Rule 27 provides a mechanism with adequate procedures to deal with the condonation application. There is no need in the circumstances of this case to invoke this court's inherent power to regulate its own process.

[17] Rule 27 provides as follows in relevant part:

> "(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.
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> (2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these Rules.

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9 D.E. van Loggerenberg. *Erasmus Superior Court Practice*. Second edition. Volume 1, A1–49 (service issue 13, 2020).

10 *Molaudzi v The State* [2015] ZACC 20; 2015 (2) SACR 341 (CC) at paragraph [33].

11 *Systems Applications Consultants (Pty) Ltd t/a Securinfo v Systems Applications Products AG and Others* [2020] ZASCA 81 (2 July 2020) at paragraph [21].

> (3) The court may, on good cause shown, condone any non-compliance with these Rules."

[18] The courts have consistently refrained from framing an exhaustive definition of what would constitute "good cause". The Appellate Division held in *Cairn's Executors v Gaarn* 1912 AD 181 that –

> "[a]ny attempt to do so would merely hamper the exercise of a discretion which the rules have purposely made very extensive, and which it is highly desirable not to abridge."[12]

[19] In *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) the Appellate Division held as follows with reference to the case of *Cairn's Executors*:

> "The meaning of 'good cause' in the present sub-rule, like that of the practically synonymous expression 'sufficient cause' which was considered by this Court in *Cairn's Executors v. Gaarn*, 1912 A.D. 181, should not lightly be made the subject of further definition. For to do so may inconveniently interfere with the application of the provision to cases not at present in contemplation. There are many decisions in which the same or similar expressions have been applied in the granting or refusal of different kinds of procedural relief. It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives."[13]

[20] *Evander Caterers (Pty) Ltd v Potgieter* 1970 (3) SA 312 (T) was an appeal against the judgment of a magistrate refusing to extend the period within which the defendant may have applied for the rescission of a default judgment obtained against him by the plaintiff.[14] The court referred to the judgment in *Silber* and held that –

> "[g]ood cause has actually to be proved as opposed to being alleged, such good cause including, but not being limited to, … that a defendant must at least furnish an explanation of his default sufficiently full to enable the court to understand how it really came about and to assess his conduct and motives".[15]

[21] The *dictum* in the *Silber* case was more recently referred to in this Division in *Buckle v Kotze* 2000 (1) SA 453 (W), which was an appeal against the order of a magistrate in an application for rescission of judgment:[16]

> "In order to satisfy the requirement of good cause 'the defendant must at least furnish an explanation of his default sufficiently full to enable the court to understand how it really came about and to assess his conduct and motives'".[17]

[22] A further requirement for "good cause" was described in *Nedcor Investment Bank Ltd v Visser NO and Others* 2002 (4) SA 588 (T):

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12 *Cairn's Executors v Gaarn* 1912 AD 181 at 186.
13 *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352H–353A.
14 *Evander Caterers (Pty) Ltd v Potgieter* 1970 (3) SA 312 (T) at 312E–F.
15 *Evander Caterers supra* at 315D.
16 *Buckle v Kotze* 2000 (1) SA 453 (W) at 455I–J.
17 *Buckle supra* at 457C.

> "The plaintiff is seeking an indulgence to condone its lack of compliance with the time period of ten days stipulated in Rule 28(4). Rule 27(3) requires 'good cause' to be shown by the plaintiff. This gives the Court wide discretion. (*Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 216H–217A.) The requirements are, first, that the plaintiff should at least tender an explanation for its default to enable the Court to understand how it occurred. (*Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A.) Secondly, it is for the plaintiff to satisfy the Court that its explanation is *bona fide* and not patently unfounded."[18]

[23] The Constitutional Court considered an application for condonation of the late filing of an application for leave to appeal[19] in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC). The court held as follows in respect of the explanation that must be given by an applicant for condonation:

> "An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable."[20]

[24] The requirements that must be met by an applicant in an application for condonation under rule 27 were considered in *Ford v Groenewald* 1977 (4) SA 224 (T). The Court held as follows:[21]

> "Under rule 27 a court may lift a bar where an applicant shows good cause. Our Courts have refused to lay down an all-encompassing definition of what would constitute 'good cause'. (*Silber* v. *Ozen Wholesalers* (*Pty.*) *Ltd.*, 1954 (2) S.A. 345 (A.D.) at p. 352-3; *Saraiva Construction* (*Pty.*) *Ltd.* v. *Zululand Electrical and Engineering Wholesalers* (*Pty.*) *Ltd.*, 1975 (1) S.A. 612 (D) at p. 614.) Further, as remarked by Steyn, J. in *Van Aswegen* v. *Kruger*, 1974 (3) S.A. 204 (O) at p. 205, where the Court must exercise a discretion it is neither appropriate nor wise to lay down strict and rigid requirements that must be complied with and that would unnecessarily limit the Court's discretion to lift a bar. It does, however, seem from the authorities (and I again rely on the last mentioned judgment) that two main requirements exist that must be complied with in this type of application. First, an applicant that applies to a Court for such an indulgence must provide a reasonable explanation under oath for his non-compliance with the Court Rules. Second, the applicant's affidavit must show that he has a *bona fide* defence in the action. As far as the first requirement is concerned, an explanation must be furnished that is sufficiently full to enable the Court to understand how the default really came about, and to assess the applicant's conduct and motives. (*Silber* v. *Ozen Wholesalers* (*Pty.*) *Ltd.*, *supra*.) As far as the second requirement is concerned, … it is expected of an applicant for the lifting of a bar that he should set out facts or make allegations that, if proved, would constitute a defence. (*Textile House* (*Pty.*) *Ltd.* v. *Silvestri*, 1960 (4) S.A. 800 (W); *Dalhouzie* v. *Bruwer*, 1970 (4) S.A. 566 (C) at p. 572-575; *Broadley*, *N.O.* v. *Stevenson*, 1973 (1) S.A. 585 (R); *Van Aswegen* v. *Kruger*, *supra*.) That defence does not, however, have to be set out in detail in the supporting affidavit; it would be sufficient to set it out briefly. In my opinion, the following principles as laid down by Colman, J. in *Breytenbach* v. *Fiat S.A.* (*Pty.*) *Ltd.*, 1976 (2) S.A. 226 (T), regarding what must be proved by a defendant against whom an application for summary judgment is brought, are also applicable in this matter:
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> > 'It will suffice, it seems to me, if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing . . . (T)he statement of material facts (must) be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim . . . (I)f the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute

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18 *Nedcor Investment Bank Ltd v Visser NO and Others* 2002 (4) SA 588 (T) at 591G–H.

19 *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at paragraph [1].

20 *Van Wyk supra* at paragraph [22].

21 I translated the Afrikaans portions of the judgment.

> material for the Court to consider in relation to the requirement of *bona fides* . . . All that is required is that the defendant's defence be not set out so baldly, vaguely or laconically that the Court, with due regard to all the circumstances, receives the impression that the defendant has, or may have, dishonestly sought to avoid the dangers inherent in the presentation of a fuller or clearer version of the defence which he claims to have.'

(At p. 228-229.) In *Broadley*, *N.O.* v. *Stevenson*, *supra*, Davies, J. (at p. 587) stated the position regarding the Rhodesian Rule on the lifting of a bar, which rule requires 'an affidavit of merits and other sufficient grounds', as follows:

> '(W)hat is required is that the defendant should set out briefly his defence and the facts on which he relies for that defence, so that the Court can form some opinion of its merits. In my view, it is not sufficient for a defendant to state simply what his defence is; he must also set out briefly the facts on which he relies for his defence. It is obviously unnecessary for him to go into the matter in detail. As was pointed out by Young, J., in *Gordon*'s case, *supra*, it is open to the plaintiff to dispute the fact alleged, in which event it may be necessary for the defendant, in a replying affidavit, to deal in more detail with his allegations of fact.'"[22]

[25] In *Marais v Aldridge and Others* 1976 (1) SA 746 (T) the court, with reference to *The Master v Zick* 1958 (2) SA 539 (T), held that there was no prejudice to the applicant by virtue of the non-compliance with the relevant rule.[23] In *Zick*'s case, the court held as follows:

> "The present case is, in my opinion, one where the *dictum* in *Foster* v. *Carlis and Houthakker*, 1924 T.P.D. 247 at p. 252, is properly applicable:
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> > '. . . the Court is entitled to overlook in proper cases an irregularity in procedure which does not work any substantial prejudice to the other party.'"[24]

[26] Condonation of the non-compliance with the rules of this court is not a mere formality. This principle was stated in the following terms in *Chasen v Ritter* 1992 (4) SA 323 (SE):

> "There is, of course, always the safeguard that the applicant must show good cause, because condonation is not automatic but in the discretion of the Court."[25]

[27] The following guiding principles can be distilled from the judgments quoted above in respect of applications under rule 27 for condonation of non-compliance with the rules of this court:

[a] The court has a discretion in considering applications for condonation.

[b] Condonation of the non-compliance with a rule is not a mere formality.

[c] The applicant must show good cause. Good cause has been held to entail five requirements:

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22 *Ford v Groenewald* 1977 (4) SA 224 (T) at 225E–226H.
23 *Marais v Aldridge and Others* 1976 (1) SA 746 (T) at 752C.
24 *Master v Zick* 1958 (2) SA 539 (T) at 543A.
25 *Chasen v Ritter* 1992 (4) SA 323 (SE) at 329I.

[i] The applicant must furnish an explanation of the default sufficiently full to enable the court to understand how it really came about, and to assess the applicant's conduct and motives.

[ii] The applicant must satisfy the court that the explanation of the default is reasonable, *bona fide* and not patently unfounded.

[iii] The applicant's explanation of the default must cover the entire period of the delay.

[iv] The applicant's claim or defence, as the case may be, and the facts upon which the applicant relies for such claim or defence must be set out briefly, yet sufficiently full to persuade the Court that what is alleged, if proved, will constitute a well-founded claim or *bona fide* defence.

[v] The court is entitled to overlook, in proper cases, non-compliance with its rules which does not work any substantial prejudice to the other party.

[28] When the Plaintiff's evidence is analysed, the explanation he furnishes of his delay bringing the security application is vague, superficial and unconvincing. He states that his attorney only received the Defendant's response refusing security on 18 August 2020. He adds that his travelling to and from George made it extremely difficult for him to provide his attorney with instructions and to find a commissioner of oaths to sign the founding affidavit. These bald and vague statements do not furnish an explanation of the Plaintiff's delay that is sufficiently full to enable this court to understand how it really came about, and to assess the Plaintiff's conduct and motives.

[29] In pointing out that his attorney only received the Defendant's response refusing security on 18 August 2020, the Plaintiff does not mention his delay in delivering the letter of demand. There was a delay of more than three weeks between the service of the rescission application on 10 July 2020 and the delivery of the letter of demand on 4 August 2020. The only explanation furnished of that delay is that the Plaintiff's travelling to and from George made it extremely difficult for him to provide his attorney with instructions and to find a commissioner of oaths to sign the founding affidavit.

[30] The Plaintiff does not explain why his travelling to and from George allegedly made it extremely difficult for him to provide his attorney with instructions. The Plaintiff furnishes no explanation of when, during the period relevant to the bringing of the security

application, he was in George and when he was elsewhere. No explanation is furnished by the Plaintiff as to why he could not, for example, provide instructions to his attorney telephonically, by email or in a virtual meeting.

[31] The Plaintiff also does not explain why his travelling to and from George allegedly made it extremely difficult for him to find a commissioner of oaths to sign the founding affidavit. No reasons are furnished for the Plaintiff's alleged difficulty. The Plaintiff furnishes no explanation of any attempts he might have made to find a commissioner of oaths, either in George or anywhere else, and why such attempts were unsuccessful.

[32] The Plaintiff has not taken this court into his confidence regarding his allegations that his travelling to and from George made it extremely difficult for him to provide his attorney with instructions and to find a commissioner of oaths to sign the founding affidavit. This makes it impossible for this court to understand how the Plaintiff's default really came about, and to assess the Plaintiff's conduct and motives. This court is left with the impression that the Plaintiff has dishonestly sought to avoid the dangers inherent in the presentation of a fuller or clearer version of his allegations.

[33] The Defendant served the rescission application on 10 July 2020 and the Plaintiff filed his answering affidavit in that application on 11 August 2020. When these facts are considered carefully, it raises questions about the reasonableness and *bona fides* of the Plaintiff's explanation that his travelling to and from George made it extremely difficult for him to provide his attorney with instructions and to find a commissioner of oaths to sign the founding affidavit. Taking into account what is set out below, the Plaintiff has failed to prove that his explanation has any basis in fact. To that extent, I am not satisfied that the Plaintiff's explanation is reasonable, *bona fide* and not patently unfounded.

[34] The Plaintiff's answering affidavit in the rescission application is an elaborate document. In it, the Plaintiff raises two points *in limine* and deals with the history of the matter in twelve paragraphs. He also provides comprehensive *ad seriatim* answers to the allegations contained in the Defendant's founding affidavit in the rescission application. These answers include detailed allegations under separate headings, namely "Willful Default & Lack of *Bona Fides*", "No Reasonable Explanation for the Default", "No *Bona Fide* Defence" and "The Common Law".

[35] The first point *in limine* raised by the Plaintiff in his answering affidavit in the rescission application is that that application should be dismissed on the basis that the Defendant's founding affidavit was not sufficiently authenticated as contemplated in rule 63. The

second point *in limine* is that the rescission application should be dismissed because it was not brought within twenty days after the Defendant had obtained knowledge of the judgment granted against him as contemplated in rule 31(2)(*b*). The Plaintiff states at the outset of his answering affidavit in the rescission application that, where he makes submissions of law, he does so on the advice of his legal representatives. This statement, in conjunction with the specific references to rules 31(2)(*b*) and 63, prove that the Plaintiff probably consulted his legal representatives, including his attorney, for purposes of raising the two points *in limine* in his answering affidavit in the rescission application. As stated, that affidavit was filed on 11 August 2020. Thus, it would have been drafted between the service of the rescission application on 10 July 2020 and 11 August 2020. This leads to the conclusion on a balance of probabilities that the Plaintiff, contrary to what he states, was able to give instructions to his attorney without difficulty during the period relevant to the bringing of the security application.

[36] It seems improbable that the Plaintiff would have arranged allegations in his answering affidavit in the rescission application under headings such as "Willful Default & Lack of *Bona Fides*", "No Reasonable Explanation for the Default", "No *Bona Fide* Defence" and "The Common Law" without having consulted his legal representatives, including his attorney. This fortifies the conclusion that the Plaintiff, on a balance of probabilities, was able to give instructions to his attorney without difficulty during the period relevant to the bringing of the security application. Upon considering the probabilities as they emerge from the above analysis of the evidence, the Plaintiff has failed to satisfy this court that the explanation of his delay bringing the security application is reasonable, *bona fide* and not patently unfounded.

[37] The Plaintiff sets out his claim for security in the notice of motion and his founding affidavit. He also sets out the facts upon which he relies in his claim for security sufficiently full to persuade this Court that what is alleged, if proved, would constitute a well-founded claim. The Plaintiff's good prospects of success, however, are not sufficient to show good cause. It is apposite to apply the weighting principle laid down by the Appellate Division in considering an application for condonation of non-compliance with one of its rules in *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A):

> "These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong."[26]

[26] *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720G.

[38] Applying the weighting principle, this court may not consider any of the requirements for good cause, set out above, in isolation in deciding an application under rule 27 for condonation of non-compliance with its rules. The Plaintiff's prospects of success in the security application is but one of the factors relevant to the exercise of the court's discretion. Those factors include whether or not the Plaintiff has furnished a sufficiently full explanation of his delay bringing the security application. The Plaintiff has not. In addition, the Plaintiff has failed to satisfy this court that the explanation of his delay bringing the security application is reasonable, *bona fide* and not patently unfounded. In *United Plant Hire*'s case the court stated, as an example of the application of the weighting principle, that a slight delay and a good explanation may help to compensate for prospects of success which are not strong.[27] It seems to me, along similar lines, that the Plaintiff's failure to furnish a sufficiently full explanation of his default in conjunction with his failure to satisfy this court that his explanation is reasonable, *bona fide* and not patently unfounded, militate against condonation on the basis of the Plaintiff's good prospects of success.

[39] The Plaintiff states that his delay bringing the security application is not fatal because it has not resulted in prejudice to the Defendant. As held in *Foster*'s case, this court is entitled to overlook, in proper cases, non-compliance with its rules which does not work any substantial prejudice to the other party.[28] The Defendant denies the Plaintiff's allegation that the delay bringing the security application did not work any prejudice to the Defendant. The Defendant does not, however, allege any prejudice suffered by him. I am satisfied that the Plaintiff's delay bringing the security application has not worked any substantial prejudice to the Defendant. Yet, the question remains whether this is a proper case to overlook the Plaintiff's non-compliance on the basis that it does not work any substantial prejudice to the Defendant. The weighting principle should also be applied to determine this question. As with his good prospects of success, it seems to me that the Plaintiff's failure to furnish a sufficiently full explanation of his default in conjunction with his failure to satisfy this court that his explanation is reasonable, *bona fide* and not patently unfounded, militate against condonation on the basis of the delay not having worked substantial prejudice to the Defendant.

[40] Does a combination of the Plaintiff's good prospects of success and the absence of substantial prejudice to the Defendant compensate for the Plaintiff's failure to furnish a sufficiently full explanation of his default and the Plaintiff's failure to satisfy this court that

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[27] *United Plant Hire supra* at 720G.
[28] *Foster v Carlis and Houthakker* 1924 TPD 247 at 252.

his explanation is reasonable, *bona fide* and not patently unfounded? In my view, they do not in the circumstances of this case. This court places a high premium on the honesty of litigants. It is also important to this court that litigants should take the court into their confidence. The Plaintiff has failed in both these respects. With regard to the Plaintiff's honesty, this court cannot, in the exercise of its discretion, disregard its impression that the Plaintiff has dishonestly sought to avoid the dangers inherent in the presentation of a fuller or clearer version of his allegations. The Plaintiff has also failed to satisfy this court that the explanation of his delay bringing the security application is reasonable, *bona fide* and not patently unfounded. As far as the Plaintiff's failure to take this court into his confidence is concerned, the exercise of this court's discretion is influenced negatively by the Plaintiff's furnishing of an insufficient explanation of his delay bringing the security application. Therefore, in applying the weighting principle in the exercise of this court's discretion, the Plaintiff's good prospects of success and the absence of substantial prejudice to the Defendant do not compensate for the Plaintiff's failure to furnish a sufficiently full explanation of his default and the Plaintiff's failure to satisfy this court that his explanation is reasonable, *bona fide* and not patently unfounded.

[41] Counsel for the Plaintiff argued that there had not been an inordinate delay by the Plaintiff. Rule 27 requires an applicant for condonation to show good cause. The Plaintiff has failed to show good cause, which includes his failure to furnish a sufficiently full explanation of his delay bringing the security application. Applying the weighting principle, I find that the Plaintiff's failure to furnish a sufficiently full explanation of his delay bringing the security application militates against condonation on the basis that there had not been an inordinate delay. In any event, I am not convinced that the delay of more than three weeks between the service of the rescission application on 10 July 2020 and the delivery of the letter of demand on 4 August 2020 was not inordinate. The Plaintiff knew that the Defendant is a *peregrinus* as long ago as January 2020 when he was granted leave to sue the Defendant by edictal citation. In addition, the Defendant's status as a *peregrinus* is clear from the first paragraph of his founding affidavit in the rescission application. This means that the Plaintiff was in a position to deliver a notice contemplated in rule 47(1) immediately after the commencement of proceedings in the rescission application. In the absence of a sufficiently full explanation of his delay by the Plaintiff, this delay of more than three weeks is, in the view I take of the circumstances of this matter, inordinate.

[42] I was referred by counsel for the Plaintiff to the judgment in *Francis & Graham Ltd v East African Disposal Co Ltd* 1950 (3) SA 502 (N). It was argued on behalf of the Plaintiff that the delay should not operate as a bar to this application. The matter of *Francis & Graham* was decided under a previous rule that governed the provision of security for costs, namely Order XIV, Rule 1 of the Natal Rules of Court. That rule, in terms similar to rule 47(1), provided for the service of a notice "as soon as practicable after the commencement of proceedings". The court held, *inter alia*, as follows:

> "In the case of *The British America Assurance Co v Moretti* (1) (1936, C.P.D. 497) CENTLIVRES, J., considered a contention that because a long time had elapsed since the defendant could have made an application for security for costs, he was therefore out of Court. He said:
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> > 'In the case of *Lagesen v Electric Lamps Regenerators Limited* (1914, W.L.D. 76) it was laid down that although it is desirable that an application by a defendant for security as to costs should be made promptly, promptness is not essential. In that matter Mr. Justice CURLEWIS dealt with the case of *Oaten v Bentwich and Lichtenstein*, which had been decided by Mr. Justice MASON, and which suggested that, unless a defendant asked the Court promptly for an order for security as to costs, the Court should not grant such an order. Mr. Justice CURLEWIS said this: 'Though there is much to be said for the suggestion that a defendant must demand security for his costs promptly, I am not disposed to hold that because the applicant did not demand security for his claim in reconvention at the same time as he demanded security for his costs, he is thereby debarred from making the present application. If the applicant has a right to demand security for his claim in reconvention, I do not see how a delay on his part can deprive him of his right, unless the circumstances are such that the Court comes to the conclusion that he has waived that right.' That principle seems to be applicable to a case like this one where the defendant asks for security when he is sued by a person who he alleges to be a *peregrinus*.'
>
> With respect, I agree with this reasoning, for it seems to me that to insist in every case upon immediate demand for security for costs, and to regard delay as necessarily fatal, regardless of whether or not the circumstances indicate a waiver by the applicant, or give rise to an estoppel against him, is to erect a supposed rule of practice into an empty fetish divorced from the realities of the situation and from principle. Nor does it seem to me that Order XIV, Rule 1 of the Rules of this Court, when properly construed, sanctions any such practice. It may be, I would suppose, that a waiver is possibly to be spelled out of delay in demanding security, or that circumstances give rise to an estoppel. But nothing like this is shown to exist here …"[29]

[43] Besides the obvious observation that the case of *Francis & Graham* was decided before rule 47 came into effect, it also predates the cases of *Magida* and *Honig*. As set out above, it was held in the latter cases that normally an application for the furnishing of security for costs should be brought against a *peregrinus* before *litis contestatio*[30] and, as a general rule, a party is expected to apply expeditiously for security under rule 47.[31]

[44] It is clear from the judgment in *Francis & Graham* and the cases referred to there that circumstances could arise in which delay to demand security or to apply for it could cause a court to refuse granting an order for security. This is in line with the purpose of an application for condonation under rule 27. A court considers whether good cause has

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[29] *Francis & Graham Ltd v East African Disposal Co Ltd* 1950 (3) SA 502 (N) at 505E–506A.
[30] *Magida supra* at 13J to 14A.
[31] *Honig supra* at paragraph [14].

been shown to justify an order condoning non-compliance with rule 47. If good cause is not shown, the court may refuse to grant condonation. If condonation is not granted, the court may also refuse granting an order for security.

[45] Delay in demanding or applying for security is not necessarily fatal regardless of the circumstances. Rule 27(3) provides that a court may, on good cause shown, condone any non-compliance with its rules. If the applicant shows good cause, the court may grant condonation for non-compliance with its rules. The delay in demanding or applying for security will then not be fatal to the application for security. Accordingly, by insisting on the Plaintiff showing good cause for his delay bringing the security application, this court is not, to use the words of Selke J in *Francis & Graham*'s case, erecting "a supposed rule of practice into an empty fetish divorced from the realities of the situation and from principle".

[46] The Plaintiff has failed to show good cause as contemplated in rule 27. The Plaintiff has failed to furnish an explanation of his delay bringing the security application that is sufficiently full to enable this court to understand how it really came about, and to assess the Plaintiff's conduct and motives. The Plaintiff has also failed to satisfy this court that his explanation is reasonable, *bona fide* and not patently unfounded. In exercising my discretion, I have had due regard to all the factors mentioned in this judgment. Applying the weighting principle, I have come to the conclusion that, in all the circumstances, the condonation application should not succeed.

[47] With reference to the *dicta* in the cases of *Magida*, *Shepstone & Wylie* and *Honig*, the failure of an applicant to bring an application for security as soon as practicable after the commencement of proceedings is but one of the factors relevant to the exercise of a court's judicial discretion in deciding an application for security under rule 47. In light of this it might be argued that, despite dismissing the condonation application, this court ought to consider the merits of the security application. Without making a finding as to whether or not it is necessary for this court to consider the merits of the security application despite dismissing the condonation application, I now deal with the merits of the security application.

[48] In the case of *Magida*, the Appellate Division set out the preferred approach to an application for security:

> "[I]t must be left to the judicial discretion of the Court by having due regard to the particular circumstances of the case as well as considerations of equity and fairness to both the

> *incola* and the *peregrinus* to decide whether the latter should be compelled to furnish, or be absolved from furnishing, security for costs."[32]

[49] The same approach was adopted by the Supreme Court of Appeal in the case of *Shepstone & Wylie*:

> "Because a Court should not fetter its own discretion in any manner and particularly not by adopting an approach which brooks of no departure except in special circumstances, it must decide each case upon a consideration of all the relevant features, without adopting a predisposition either in favour of or against granting security. (Compare *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1)* 1997 (4) SA 908 (W) at 919G–H; *Wallace NO v Rooibos Tea Control Board* 1989 (1) SA 137 (C) at 144B–D.)"[33]

[50] It is clear from the *dicta* in the cases of *Magida* and *Shepstone & Wylie* that this court has a judicial discretion to decide whether a *peregrinus* should be compelled to furnish, or be absolved from furnishing, security for costs. This court must exercise its judicial discretion by having due regard to the particular circumstances of each case as well as considerations of equity and fairness to both the *incola* and the *peregrinus*.

[51] The Plaintiff has good prospects of success in the security application. Those prospects must be considered against the backdrop of the Plaintiff's delay in bringing the security application. It was only brought after *litis contestatio* in the rescission application. The *dicta* in the cases of *Magida* and *Honig* stand firm that normally an application for the furnishing of security for costs should be brought against a *peregrinus* before *litis contestatio*[34] and, as a general rule, a party is expected to apply expeditiously for security under rule 47.[35] The question is whether the Plaintiff has made out a case for this court to deviate from the norm and general rule expressed in *Magida*'s and *Honig*'s cases.

[52] In deciding this question, this court has regard thereto that the Plaintiff has good prospects of success in the security application and that his delay in bringing that application did not work substantial prejudice to the Defendant. This court also has regard to the Plaintiff's failure to furnish an explanation of his delay bringing the security application that is sufficiently full to enable this court to understand how it really came about, and to assess the Plaintiff's conduct and motives. A further factor this court takes in consideration is the Plaintiff's failure to satisfy this court that his explanation is reasonable, *bona fide* and not patently unfounded.

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32 *Magida supra* at 14E.
33 *Shepstone & Wylie supra* at 1045G–1046A.
34 *Magida supra* at 13J to 14A.
35 *Honig supra* at paragraph [14].

[53] In exercising my judicial discretion to decide whether the Defendant should be compelled to furnish, or be absolved from furnishing, security for costs, I have had due regard to the particular circumstances of this case as set out in this judgment. I have come to the conclusion that, in all the circumstances, the security application should not succeed. This conclusion is supported by my consideration of equity and fairness in this case. It may be argued that the Plaintiff will suffer injustice if no security is ordered and he is ultimately unable to recover his costs from the Defendant in the event of the latter being unsuccessful in the litigation between the parties.[36] Compelling as this argument might seem, it is not persuasive. The Plaintiff was the author of his own misfortune when he failed to furnish a sufficiently full explanation of his delay bringing the security application and failed to satisfy this court that his explanation is reasonable, *bona fide* and not patently unfounded.

[54] In the result the following order is made:

1. The condonation application is dismissed.

2. The security application is dismissed.

3. The Plaintiff is to pay the Defendant's costs.

This judgment is handed down electronically by uploading it on CaseLines.

L.J. du Bruyn
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Date heard:	11 February 2021
Judgment delivered:	13 April 2021
For the Applicant / Plaintiff:	C. Gibson briefed by Joshua Apfel Attorneys
For the Respondent / Defendant:	J. Moorcroft (Attorney) of Burger Huyser Attorneys

[36] *Shepstone & Wylie supra* at 1046A–D.