REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

15/12/2016
CASE NO: A465/2016
Reportable: No
Of interest to other judges: No

In the matter between:

SALJEE YUNUS APPELLANT

and

CLAUDIO DA MATA RESPONDENT

JUDGMENT

MALI J

INTRODUCTION

[1] The appellant appeals against the refusal of the Senior Magistrate of EkuRhuleni, Mrs M Froneman to condone the late filing of the appellant's rescission application. The application in question was in respect of the default judgment granted against the appellant on 24 May 2011.

[2] On 30 June 2014 the appellant filed a notice of motion praying for an order for condonation and rescission of the default judgement. **vide** page 95 of the record of appeal. On 10 March 2016 the learned Magistrate dismissed the application for condonation without attending the merits of the recession application.

FACTUAL BACKGROUND

[3] It is common cause that the parties entered into a lease agreement on 28 January 2010. The agreement provided for attorney and client costs in the event of litigation between the parties.

[4] The appellant chose […] Kaydale as his *domicilium* address. On 15 April 2011 the summons were issued and served the appellant at *domicilium* address. The appellant failed to enter appearance to defend and the default judgment was granted against him on 24 May 2011. Warrant of execution was issued on 24 July 2012 and interpleader proceedings were instituted and the determination thereof was on 11 January 2012.

[5] On 23 May 2014 an application for rescission of default judgment was enrolled, but later withdrawn by the appellant on 6 June 2014. The reasons for withdrawal of same is that it was defective. It is common cause that all that was required was a corrected notice of motion incorporating appropriate prayers. The application for default judgment was later enrolled on 30 June 2014 more than 20 days after the appellant first became aware of the judgment.

LAW

[6] Rule 49 (2) of the Magistrate's Court Rules states:

"Rescission and variation of judgments

49. (1) A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for

a rescission or variation of the judgment and the court may, upon good cause shown, or if it is satisfied that there is good reason to do so, *rescind or vary the default judgment on such terms as it deems fit: Provided that the 20 days' period shall not be applicable to a request for rescission or variation of judgment brought in terms of subrule (5).*

(2) It will be presumed that the applicant had knowledge of the default judgment 10 days after the date on which it was granted, unless the applicant proves otherwise.

(3) Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim.

(4) Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who does not wish to defend the proceedings, the applicant must satisfy the court that he or she was not in wilful default and that the judgment was satisfied, or arrangements were made to satisfy the judgment, within a reasonable time after it came to his or her knowledge.

(5) (a) Where a plaintiff in whose favour a default judgment was granted has agreed in writing that the judgment be rescinded or varied, either the plaintiff or the defendant against whom the judgment was granted, or any other person affected by such judgment, may, by notice to all parties to the proceedings, apply to the court for the rescission or variation of the default judgment, which application shall be accompanied by written proof of the plaintiffs consent to the rescission or variation.

(b)An application referred to in paragraph (a) may be made at any time after the plaintiff has agreed in writing to the rescission or variation of the judgment.

(6) Where an application for rescission or variation of a default judgment is made by any person other than an applicant referred to in subrule (3), (4) or (5), the application must be supported by an affidavit setting out the reasons why the applicant seeks rescission or variation of the judgment.

(7) All applications for rescission or variation of judgment other than a *default judgment must be brought on notice to all parties, supported by an affidavit setting out the grounds on which the applicant seeks the rescission or variation; and the court may rescind or vary such judgment if it is satisfied that there is good reason to do so.*

(8) Where the rescission or variation of a judgment is sought on the ground that it is void aborigine or was obtained by fraud or mistake, the application must be served and filed within one year after the applicant first had knowledge of such voidness, fraud or mistake.

(9) A magistrate who of his or her own accord corrects errors in a *judgment in terms of section 6(1)(c) of the Act shall, in writing, advise the parties of the correction."*

[7] It is trite that condonation of the non-observance of the rules of court is not a mere formality. It is also trite that wilful default is normally fatal In Darries v Sheriff, Magistrate' Court, Wynberg and Another 1998 (3) SA 35 SCA, Plewman JA observed that the number of petitions for condonation of failure to comply with the rules of that court (SCA) was a matter for grave concern.

[8] Plewman JA set out the applicable principles as follows:

"I will content myself with referring, for present purposes, only to factors which the circumstances of this case suggest should be repeated. Condonation of the non-observance of the Rules of this Court is not a mere formality (see Meintjies v H 0 Combrinck (Edms) Bpk 1961 (1) SA 262 (A) at 263H--264B; Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 138E--F). In all cases some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, *any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. See Commissioner for Inland Revenue v Burger1956 (4) SA 446 (A) at 449F--H; Meintjies's case supra at 2648; Saloojee's case supra at 138H. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. See Saloojee's* case *supra at 141B--G. In applications of this sort the appellant's prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. See Meintjies's case supra at 265C--E; Rennie v Kamby Farms (Pfy) Ltd1989 (2) SA 124 (A) at 131E-F; Moraliswani v Mamili1989 (4)* SA *1 (A) at 10E. But appellant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such* as *to render the application for condonation obviously unworthy of consideration. Where non- observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be. See Ferreira v Ntshingila1990 (4) SA 271 (A) at 281J--282A; Moraliswani v Mamili (supra at 10F); Rennie v Kamby Farms (Pfy) Ltd (supra at 131H); Blumenthal and Another v Thomson NO and Another1994 (2) SA 118 (A) at 1211--122B."*

"Wilful default or gross negligence will often preclude a *finding of good cause.*

Good cause also includes but is not limited to the existence of a *substantial defence*[1]*."*[2]

THE APPEAL

[9] The gravamen of the appellant is that the learned magistrate erred in finding that he was aware of the judgment on 29 August 2011, alternatively on 14 May 2013.

[1OJ The judgment was attacked because in determining the degree of lateness in filing the application for recission, she reasoned that it
would be highly improbable that the appellant was not aware of the judgment despite his communication with Mr Etsebeth, the respondent's attorney. The submission made on behalf of the appellant is that the magistrate used a wrong standard as motion court proceedings are not designed to determine probabilities.

[11] It was further argued that the learned Magistrate finding that the appellant was wilful in his lateness did not deter her from considering the prospects of success, prejudice to either party and the importance of the case.

[12] The learned Magistrate's observations regarding to the probabilities are based on facts which were before her. On 29 August 2011 the appellant attended a meeting with respondent's attorneys in respect of release of the attached goods per the warrant of execution of June 2012. On 30 August 2011. The respondent's attorneys addressed a letter to him stating the terms of release. The itemised statement of account was attached to the letter. The said statement of account make reference to judgment costs.

[13] The said correspondence is one of the basis for the learned magistrate to reach the conclusion that the appellant was aware of the judgment as early as 29 August 2011.

[14] The appellant denied ever receiving the said correspondence. The strange thing about the appellant's denial is that the same letter he denies he attached to his founding affidavit. During the appeal it was argued that the letter made reference to the property

[1] Securiforce CC v Ruiters 2012(4) SA 252 (NCK) at [12].

of the close corporation ("CC"), because the warrant of execution was enforced against the CC. The appellant is a member of the CC. it is irrelevant whether the assets belonged to the CC or not.

[15] What is of importance is on 29 August 2011 he knew that the assets were attached because of the judgment taken against him in his personal capacity. The interpleader action was later concluded.

[16] Furthermore the letter of 14 May 2013 relied upon by the learned Magistrate is said to have created an impression that the respondent were still going to institute the action against the appellant. This contention cannot be accepted, on the background of series of events preceding the said letter. The events in question include *inter alia* the warrant of execution and interpleader proceedings.

[17] Because of the fatality of wilful default the Magistrate correctly exercised her discretion by not limiting the determination to the causes of default.

CONCLUSION

[18] In all the circumstances, the court is not persuaded that the reasoning of the learned magistrate can be faulted in any manner. Furthermore we cannot find that she did not exercise her discretion judicially. Having regard to the above the appeal cannot succeed and must be dismissed.

ORDER

[19] In the result I propose the following:

[20] The appeal is dismissed with costs, costs to be on an attorney and client scale.

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N.P. MALI

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[2] Mathie v Ruijter Stevens Properties (Pty) Ltd (AR352/14) [20151 ZAKZPHC 30 (11 June 2015)

JUDGE OF THE HIGH COURT

I AGREE

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T. D. VILAKAZI
ACTING JUDGE OF THE HIGH COURT

Counsel for the Appellant:	Advocate Bezuidenhout
Instructed by:	CHRIS LIEBENBER ATTORNEYS
Counsel for the Respondent:	Advocate West
Instructed by:	LOCKETTS ATTORNEYS
Date of Hearing:	9 December 2016
Date of Judgment:	15 December 2016