IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR 94/2017

In the matter between:

BWK PROJECT MANAGEMENT CIVILS CC Appellant

and

SLICE INVESTMENTS (PTY) LTD Respondent

ORDER

Having considered the matter and after hearing counsel, the following order is made:

1. The appellant's application for condonation is refused.
2. The appellant is to pay the respondent's cost.

APPEAL JUDGMENT

Delivered: 12 October 2018

MASIPA J (MARKS AJ CONCURRING)

Introduction

[1] The appellant appeals against the judgment of the court a quo handed down in the Ntuzuma Magistrate's Court on 20 April 2016, wherein the appellant's

rescission applications in respect of three matters under case numbers 1793/2015, 1984/2015 and 2707/2015 were dismissed. The appellant failed to prosecute the appeal within 60 days as prescribed in the Rules of Court and the appeal lapsed. Subsequent thereto, the appellant filed a condonation application which is opposed by the respondent.

The facts

[2] The parties in this matter concluded a lease agreement during April 2015, approximately three months prior to the appellant taking occupation. Subsequent to the signing of the agreement, the appellant contends that its financial position underwent an adverse change and it became clear to it that occupying the respondent's premises would worsen its financial standing. As such, Bongani Khuluse, a member of the appellant instructed his personal assistant, Zanele Chiliza to advise the leasing agent Chantal Williams of JHI Properties that the appellant would not be taking occupation of the premises. According to Khuluse, Williams replied and mentioned that she would revert once she had spoken to the respondent. There is a dispute as to whether the respondent failed to reply to the appellant's request. The appellant contends that thereafter there was no correspondence from Williams or the respondent as a result of which, Khuluse assumed that the respondent had by its conduct, accepted the appellant's cancellation of the lease agreement. Consequently, the appellant did not take occupation of the premises.

[3] Khuluse contended that the respondent had a duty to respond to the appellant's cancellation notice. The respondent contended that it responded to the appellant's letter on 9 June 2015, advising that it was holding the appellant to the lease. This letter was sent to Chiliza's e-mail address, the one that was used to send the purported cancellation letter. According to the respondent, it was made clear to the appellant that the respondent had a discretion whether or not to accept the cancellation and further, that the appellant did not have a right to unilaterally terminate the lease agreement. Khuluse also contended that prior to the institution of legal action, the respondent did not place the appellant in mora contrary to the provisions of the lease agreement. The respondent avers that the letter it wrote to the appellant on 9 June 2015 placed it in mora.

[4] Khuluse further contended that the respondent had since 2005, not taken any steps to mitigate its losses. The respondent denied that it did not take any action to mitigate the loss and stated that it instructed its agents to market the property. It was also contended that the respondent was aware that the appellant was represented by attorneys Morris Fuller Williams Inc. but did not inform them of its intended action. The respondent denied that it had a duty to notify the appellant's attorneys of any intended action.

[5] Summonses were served at the appellant's registered address since the appellant had not taken occupation of the leased premises. The address used is also Khuluse's residence as was apparent from the CIPC search conducted by the respondent. The sheriff's returns stated that the summonses were served by affixing which was the only possible manner of service. As there was no notice of intention to defend, the respondent applied for default judgments which were granted. Khuluse contended that the appellant did not conduct business at the address where the summonses were served and was therefore unaware of them. He further contended that the letter sent by the respondent was emailed to the appellant's secretary and was not brought to his attention.

[6] The court a quo, in determining whether or not to rescind its decision, looked at whether the explanation for the default was sufficient. Having considered the application, the court a quo found that the appellant had not provided a reason why the summonses, which were served at its registered office, were not brought to its attention. The court noted that three different summonses were served at the registered address which was Khuluse's residence and concluded that the explanation provided by the appellant was unsatisfactory.

[7] As regards the contention that the appellant had not received the respondent's letter, the court a quo found that the inefficiency of the appellant's office as a result of the secretary failing to bring the notice to Khuluse's attention could not be levelled at the respondent's door. The court a quo was satisfied that the respondent took necessary steps to mitigate its loss. In view of this, the rescission application was dismissed with costs. It is this dismissal which led to this appeal.

The issues

[8] At issue in this appeal is whether or not this appeal should be reinstated on the strength of the condonation application and should condonation be granted, whether the court a quo erred when it refused the appellant's application for rescission?

The condonation

[9] On 21 February 2017, the appellant applied for condonation for the late delivery of the record and for the reinstatement of the appeal. The judgment against which the appeal lies was handed down by the court a quo on 20 April 2016 and a written judgment was received by the appellant on 14 July 2016. It is common cause that the appellant's notice of appeal was delivered on 15 August 2016. In terms of rule 49(6) of the Uniform Rules of Court, an appellant shall within sixty days after delivery of a notice of appeal, make written application to the registrar for a hearing date of such appeal. Where no such application is made, the appeal is deemed to have lapsed. Rule 49(6)*(b)* provides for the reinstatement of such an appeal on good cause shown.

[10] Simultaneously with the application for a hearing date, rule 49(7) requires an appellant to file with the registrar, three copies of the record of appeal and to furnish two copies to the respondent. Alternatively, the written request for a hearing date may be accompanied by a written agreement between the parties that the record will be handed in late, or the request is delivered with an affidavit setting out that the record will be filed later with a condonation application. The appellant did not comply with this rule.

[11] It is settled law that in determining whether to grant condonation for non-compliance with the Uniform Rules of Court, good cause must be shown. In determining whether a litigant has shown good cause, a court must consider all the relevant factors including a consideration of the degree of lateness, the explanation for the delay, the prospects of success and prejudice. See *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532B-E; *Mathibela v S* (714/2017) [2017] ZASCA 162 (27 November 2017). These factors are not individually decisive as set out *in Concrete 2000 (Pty) Ltd v Lorenzo Builders CC t/a Creative Designs & others*

[2014] 2 All SA 81 (KZD) para 38. In *F v Minister of Safety and Security & others* 2012 (1) SA 536 (CC) para 28, it was held that condonation will be granted if it is in the interests of justice and there appears to be reasonable prospects of success on appeal.

[12] A condonation application should of necessity, set out briefly and concisely crucial information to enable the court to assess the prospects of success. See *Mulaudzi v Old Mutual Life Insurance Company Limited & others* 2017 (6) SA 90 (SCA) para 34. In *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein & others* 1985 (4) SA 773 (A) at 789C-D, it was pointed out that courts are bound to assess an applicant's prospects of success as one of the relevant factors in the exercise of its discretion unless cumulatively, all relevant factors are such as to render the application for condonation unworthy to consider.

The degree of lateness

[13] The appellant contends that the appeal record was due on or before 7 November 2016 and was not filed as required by the Rules. Apparent from the facts set out above, the degree of lateness for the prosecution of the appeal is approximately 82 days late. The appeal record was due on 7 November 2016 and when this was not filed, the appeal lapsed on the same day. The appellant's attorney was aware as at 10 November 2016 that the appeal lapsed. The lateness is excessive in the circumstances of this case.

The explanation for the lateness

[14] The explanation tendered in this regard was by Chantel Schutzler of the appellant's attorneys. Her explanation was that the failure to comply with the provisions of rule 46(7) relating to the filing of the record was as a result of a miscommunication between herself and one Shanan Tylor, an associate in the firm. Schutzler avers that upon receiving the written judgment and on her instructions, Tylor delivered a notice of appeal and returned the file to Schutzler. Pursuant to this, Schutzler instructed Tylor to take the necessary steps to prosecute the appeal which included compiling the record of appeal and believed that Tylor was attending to this.

[15] According to Schutzler, when she enquired on the status of the appeal on 10 November 2016, she discovered that Tylor had not taken further steps to prosecute

the appeal and it was established that the appeal had lapsed. On 11 November 2016, Schutzler and Tylor contacted Document Exchange, who collected the documents on 14 November 2016 for delivery at Appeal Document Services for the preparation of the appeal record on an urgent basis. The appeal record was initially received by the appellant's attorneys on 22 December 2016. There were a few amendments required on the record with the result that the complete compilation was received on 26 January 2017. Tylor filed a confirmatory affidavit in this regard.

[16] The appellant's attorneys communicated with the respondent's attorneys on 24 November 2016 advising that they would be applying for condonation as the appeal had lapsed due to their failure to deliver the record. Despite being aware of this, there was no condonation application filed until 21 February 2017 when the record was filed together with a condonation application. This was approximately 60 days late. Service was only effected on the respondent's attorneys on 2 March 2017. According to Schutzler, the delay in lodging the appeal record was not inordinate and it would be unduly harsh for the court to refuse condonation and to refuse the appellant the right to appeal on the basis of a miscommunication between Tylor and herself.

[17] The respondent's answering affidavit was filed on 25 April 2017. Tamara Botha, the deponent to the respondent's affidavit averred that as at 15 August 2016, the appellant was in receipt of the transcribed record which it had received on 14 July 2016. In view of this, the appellant was in a position to file the appeal record at any stage after 15 August 2016. The appellant had 60 court days (approximately three months) after noting the appeal to prosecute it. This meant that the appellant had up until 7 November 2016 to prosecute the appeal.

[18] Botha attributed the delay to a lack of diligence or laxity, alternatively ignorance of the rules of court and appeal procedures on the part of the appellant's attorneys. Having realised that the appeal had lapsed on 10 November 2016 which was only three days late, the appellant's attorneys could have compiled the record and ensured that it was served and filed immediately. Botha contends that it was not necessary for the appellant's attorneys to employ the services of Appeal Document Services in view of the lateness and the need for the record to be filed urgently. The appellant's attorneys ought to have undertaken the task themselves. It was also

peculiar that the record was initially released on 22 December 2016 and payment was only made when the record was returned for corrections.

[19] The appellant, in its replying affidavit deposed to by Tylor, which was served and filed on 11 May 2017, raises in limine, the fact that the respondent's answering affidavit opposing the appellant's condonation application was substantially out of time with no condonation application, which rendered it to be improperly before the court. This point was however not pursued by Mr *Boulle* who appeared for the appellant during argument. Tylor denied any lack of diligence on their part and mentioned that she had corresponded with Appeal Document Services from 11 November 2016 and throughout the month of November 2016, three emails in December 2016, one email from Appeal Document services for payment on 26 January 2017 and a reply to that email from the appellant's attorneys on 6 February 2017.

[20] According to Mr *Boulle*, there was a miscommunication between the appellant's attorneys as to who was responsible to pursue the appeal which led to a delay in the preparation of the record, resulting in, the appeal lapsing. He conceded that they could have perhaps conducted the matter better but argued that that there was no suggestion by the respondent that there was any negligence. What the respondent was contending was that the two attorneys were sloppy. It could not however be said that their conduct was unreasonable. Mr *Anderton* for the respondent submitted in light of the urgent need to transcribe the record, and considering that all the relevant records were in the possession of the appellant's attorneys since August 2016, they ought to have prepared the record themselves. Despite this, the appellant's attorneys instructed Appeal Document Services to transcribe the record which took a further three months to prepare the record.

[21] The explanation for the delay provided by both Schutzler and Tylor is highly inadequate. They became aware that the appeal lapsed three days after its lapsing on 10 November 2016 which meant that they needed to act in haste in dealing with the matter. They however conducted the matter as if everything was normal and they still had all the time to deal with the matter like they did. Since they had all the relevant documents, nothing stopped them from compiling the record themselves but

they elected to leave the matter in the hands of an external party. They also failed to ensure that they had the necessary funds to pay for the record which resulted in a further delay of another month from 26 January 2017 to 21 February 2017.

[22] Schutzler and Tylor would have been aware that the record had to be filed within 60 court days but were seemingly not concerned. They disregarded the provisions of Uniform rule 49(6) since upon realising that the appeal had lapsed, they did not file a request for a hearing date with an affidavit explaining that the record would be filed later with a condonation application. They could have even done so on 24 November 2016 when they informed the respondent's attorney about the lapsing of the appeal. The appellant's had numerous opportunities to curtail the delay in the filing of the record but for reasons known only to them failed to do so.

Prospects of success

[23] Schutzler averred that the appellant's prospects of success are good since it was clear that the summonses were served at a *domicilium* address identified in the lease agreement when the respondent knew that the appellant had not taken occupation of the leased premises. She contended therefore that the appellant could clearly not have been in default. This is denied by the respondent who contended that the summonses were not served at the address nominated in the lease agreement but at the appellant's registered address which was identified in the CIPC documents after the respondent conducted a search. The respondent contended that such service amounts to proper service in terms of Magistrates' courts rule 9.

[24] The appellant set out its defences in the main action as being that the termination of the lease before commencement date was lawful since its obligation to pay rent and other charges under the lease had not commenced. Secondly, that the respondent had an obligation to communicate its election to enforce the terms of the lease and could not have relied on the *domicilium* clause in the lease agreement. Further, that the respondent had an obligation to mitigate its loss and whether this was done was an issue which could best be resolved through evidence at trial.

[25] The respondent averred that the appellant failed to demonstrate good cause for the reinstatement of the lapsed appeal due to the excessive delay and an unacceptable explanation. Botha contended that the appellant failed to satisfy the

court that there is sufficient excuse for its non-compliance with the rules. There was no merit in the appellant's defence since it was not entitled to cancel the lease which was binding on it despite the commencement date not having been reached. The respondent informed the appellant that it was holding the appellant to the agreement by sending a letter by way of registered post to the *domicilium* address and by email on 9 June 2015. The appellant concedes that the email address used was that of the secretary to the principal member of the appellant.

[26] The respondent contends that the onus to prove that the respondent failed to take steps to mitigate its loss rests with the appellant. In any event, it averred that it only sought arrear rental for the months of July to September 2015, being a period of four months instead of seeking rental for the entire lease period, alternatively until a new tenant was secured during mid-2006.

[27] It is common cause that in respect of the prospects of success in this matter, the appellant must show that its case which was before the court a quo satisfied the requirements for the granting of the rescission application. Magistrates' courts rule 49(1) provides that the court may rescind a judgment granted by default on good cause shown or where it is satisfied that there is good reason to do so. In order to show good cause, the appellant must show that it was not in wilful default, it has a bona fide defence, and the application is not made to delay the finalisation of the respondent's claim.

[28] The appellant's submission in respect of the wilful default is that service was effected at the residential address of its member Mr Khuluse. The manner of service was affixing as appeared in the sheriff's return. A member of the appellant and his wife defended the action under case number 10877/2015. In this regard, it was argued that members of the appellant would have defended the other three actions had they come to their attention. The respondent submitted that the explanation for the default must be sufficiently full to enable the court to understand how it came about. See *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A-B. It argued that the appellant had not provided reason why the summonses in the three matters served at its registered address being the home of Mr Khuluse would not

have come to its attention. It was submitted that even if the court was to find that the default was not wilful, the appellant still had to show that it had a bona fide defence.

[29] Mr *Boulle* submitted that in respect of the bona fide defence, while the appellant initially raised three points of challenge in respect of the merits on the case, being the duty to mitigate, whether the lease can be cancelled before its commencement date and the status of the repudiation letter, it was abandoning the first two and only pursuing the issue of the repudiation letter. He was also raising a new point of law being that if the appellant was able to establish a defence to part of the judgment, then it is entitled to the rescission of the entire judgment. In this regard he relied on *Kavasis v South African Bank of Athens Ltd* 1980 (3) SA 394 (D).

[30] On the issue of the repudiation letter, *Boulle* submitted that having accepted that there was a duty on the respondent to respond to the cancellation, such response was addressed to the *domicilium* address set out in the lease agreement being the leased premises and to an email address. It was not in dispute that Khuluse did not receive the letter. He argued that the email address used was that of the secretary, and there was no right for the respondent to say that the letter was deemed to have been received. Since there was no response by Williams as undertaken, the appellant did not take occupation of the leased premises. He argued that the decision of the court a quo was not correct. While it was not unreasonable that the letter was sent to the secretary, her address was not the registered address.

[31] Contrary to the argument by the appellant, Mr *Anderton* submitted that the appellant had tacitly agreed to the letter being sent to it by way of email when it sent correspondence to the respondent using the same email. This is because the email sent by the appellant called for a response to the cancellation. Since the appellant had not taken occupation of the *domicilium* address, Mr *Anderton* conceded that it made no sense that the letter was posted to this address. It was submitted that Khuluse did not state that his secretary had not received the letter and there was no confirmatory affidavit from her in this regard.

[32] The appellant’s initial point that the respondent had not responded to its cancellation letter is incorrect taking into account the letter of 9 June 2015. According to the appellant, an undertaking had been given that a response to its cancellation

latter would be sent. While Khuluse expected the letter to emanate from Williams, it emanated from the respondent's attorneys. The court a quo found that the email method used to send the letter was competent since it was in response to the letter which the appellant had sent using the same method of communication. It was reasonable for the court a quo to conclude that the letter was sent and received. I say this because save for Khuluse averring that the letter was not brought to his attention, there is nothing to say that it was not received by Chiliza. There is also no affidavit from Chiliza to say whether or not she received it and if she had received it, what she did with it.

[33] Whether or not the appellant had received the respondent's letter cannot determine the issue of the cancellation since according to Khuluse, he was told that a response would be forthcoming. It was therefore necessary that he follow up with Williams when such response was not received. He could not simply assume that the cancellation was accepted from the mere fact that he had not received a response.

[34] The court a quo correctly found that the appellant was in wilful default since the summonses in the three matters were served on three different dates at the appellant's registered address which was Khuluse's home. It was insufficient for him to therefore merely allege that the summonses were not received without providing an explanation why this would occur. This, especially because the fourth summons was served at the same address and received. Notably, the summons which was defended was that issued against Khuluse and his wife in their personal capacities. Since the onus was on the appellant to show that it was not in wilful default, it was not sufficient to simply say the summonses did not come to Khuluse's attention.

[35] On the second issue being that relating to the point of law, *Boulle* conceded that the issue was being raised for the first time in argument before this court. In fact, this appeared for the first time in his supplementary heads of argument which was handed up in court prior to him commencing his argument. The point was never part of the notice of appeal. He argued that there was no unfairness nor was there a suggestion of any prejudice to the respondent. He relied on the decision of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) to support the argument that a new issue can be raised for the first time on appeal.

[36] In para 39 of *Barkhuizen*, the court stated that the raising of a point of law for the first time on appeal is not in itself sufficient reason to refuse to consider it. It went on to say:

'If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point. Unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved. It would similarly be unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial. A party will not be permitted to raise a point not covered in the pleadings if its consideration will result in unfairness to the other party.' (Footnotes omitted)

[37] In *CUSA v Tao Ying Metal Industries & other* 2009 (2) SA 204 (CC) paras 67-68, the court stated that a litigant may not, on appeal, raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible. These principles are subject to one qualification that where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law which would infringe on the principle of legality.

[38] In *Maphango & others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) para 109 the court stated that the rule dealing with whether a court permits a party to raise a point of law is subject to well-known conditions to ensure fairness to all parties. First, the point sought to be raised must be a point of law in the true sense of the word. Second, if not foreshadowed in the pleadings, it must be supported by the established facts in the record. Third, the entertainment of the point must not prejudice the other parties. The purpose of this rule is to give a fair hearing to all parties as entrenched in s 34 of the Constitution.

[39] The issue which was raised for the first time was in respect of the three judgments which were the subject of the rescission before the court a quo. *Boulle* submitted that with regard to case 1793/2015, the quantum claimed included the

deposit payable when the deposit was only due prior to the appellant taking occupation. This meant that the appellant could only breach its obligation in this regard upon taking occupation, which never occurred. In the result, the claim for the deposit was premature and the judgment was higher than it ought to have been in that an amount of R75 236.80 was awarded when it ought to have been R26 236.80, a difference of R46 000. On the issue of interest, there were two scenarios being that if the lease is not cancelled, interest payable will be at prime overdraft rate charged from time to time by ABSA Bank Limited plus 2%. Where however the lease is cancelled and in the event of a breach, interest payable after cancellation would be at the rate of 2% above prime per month. He argued that since the respondent had not cancelled the lease, it was obliged to claim interest at 2% above the ABSA rate. The respondent did not make out a case for the interest granted. These reasons accordingly justified the granting of the rescission.

[40] Mr *Anderton* admitted that the appellant had not taken occupation and that the four main banks charged the same interest rates. He submitted that this court has powers to grant such judgment as it sees fit and can vary or reduce the quantum of the judgment. He submitted further that the issue of the deposit was never raised as a ground of appeal or before the court a quo.

[41] As regards case 1984/2015, the court a quo corrected the amount claimed in respect of arrears *mero motu* and reduced it by R440.61. Secondly, the interest charged was similarly impermissible in the absence of a cancellation. The court a quo however allowed the interest at the prime rate and not the ABSA rate. The appellant alleges that since it has a defence to part of the claim, rescission should be granted. The respondent conceded that the court a quo reduced the amount it had initially awarded under this case number and submitted that the court a quo was empowered to correct its own judgment. *Boulle* argued that it was never raised as an issue that the court a quo can correct its own judgment and that this was being raised for the first time during argument.

[42] Mr *Boulle* argued that this court sitting as a court of appeal does not enjoy the powers of the high court. The court a quo lacked the powers to rewrite its judgment. He submitted that the court a quo was not correcting an error but effecting substantial changes to the judgment. He argued that nothing in the Magistrates'

Courts Act 32 of 1944 empowers a magistrate to rescind part of the judgment. If the court a quo could not do this, then this court cannot either.

[43] It was argued that while the high court has powers to rescind judgments in part, such powers did not exist in the court a quo since it is a creature of statute and therefore only possesses those powers set out in the statute. There is no provision in the Magistrates' Courts Rules for a partial rescission of a judgment. It was further argued that as a point of law, rescission must be granted where there exists a partial defence to the claim.

[44] Mr *Anderton* relied on the provisions of rule 49(1) read with rule 49(9) of the Magistrates' Court Rules which provides for a magistrate to correct his own judgment in terms of s 36(1) of the Magistrates' Courts Act. He argued that the court a quo is empowered to set aside part of its judgment and may vary it as it deems fit. In this regard, *Anderton* argued that the provisions were similar to those in the high court which consequently meant that the magistrate's court had similar powers. He relied on *Silky Touch International (Pty) Limited & another v Small Business Development Corporation Limited* [1997] 3 All SA 439 (W) and *Conekt Business Group (Pty) Ltd v Navigator Computer Consultants CC* 2015 (4) SA 103 (GJ) where the court confirmed a magistrate's powers to rescind or vary part of a judgment. In respect of the powers of this court, Mr *Anderton* argued that the appeal court is empowered in terms of s 19*(d)* of the Superior Courts Act 10 of 2013 to render any decision which the circumstances may require.

[45] A reading of Magistrates' courts rule 49(1) and 49(9) and s 36(1) of the Magistrates' Courts Act together with the authorities relied on by Mr *Anderton* leads to a conclusion that indeed partial rescission of judgment is possible. There is of course a condition to this as set out by these authorities being that the judgment must be capable of being divided. See *Makhafola v Scania Finance Southern Africa (Pty) Limited* [2016] JOL 36329 (GJ) and *Conekt Business Group (Pty) Ltd v Navigator Computer Consultants CC, In re: Navigator Computer Consultants CC v Conekt Business Group (Pty) Ltd* [2018] JOL 39795 (GJ). It was therefore competent for the court a quo to correct its judgment in respect of arrears under case 1984/2015.

[46] In respect of case 2707/2015, Mr *Boulle* submitted that the claim was for the months of September and October 2015 relating to rates in the form of bank charges which were not pleaded. The claim also included interest on arrear rental at 11.25% and 11.5% while these could only be claimed at ABSA Bank prime rate plus 2%. Mr *Boulle* argued that there were no supporting documents dealing with the applicable ABSA Bank rate. Therefore, the respondent was not entitled to judgment for these amounts. It was submitted that these factors evidence the presence of a defence by the appellant and in the result, the rescission should be granted.

[47] On the issue of the interest awarded by the court a quo under case number 2707/2015, again Mr *Anderton* argued that this issue was raised for the first time during argument. In any event, the respondent would not take issue to the amount being reduced by R384. He argued that part of the legal fees were charged prior to the default judgment in the amount of approximately R12 000. An amount of approximately R2 707 could be deducted which deduction was acceptable to the respondent. Mr *Anderton* submitted that the appellant had failed to establish that it had a bona fide defence to the judgment. He asked for the appeal to be dismissed with costs on an attorney and client scale.

[48] Mr *Boulle* submitted that these issues arose from the respondent's documents and did not occasion any surprise or prejudice as set out in *Barkhuizen*. In reply, Mr *Anderton* argued that the issues raised by Mr *Boulle* were not issues of law but were findings of fact. In view of the nature of the application which was before the court a quo, it was necessary that these new points be set out in the notice of appeal to afford the court a quo opportunity to deal with them.

[49] Mr *Anderton* argued that the issue raised was a factual issue and not an issue of law. He argued that the interest issue raised was in any event a non-issue since there was a link in the prime rate of interest used by the four big banks. Mr *Anderton* submitted that the fact that *Boulle* never argued that the appellant was not liable for the rental, rates, taxes, parking and interest as claimed and that the argument was restricted to the quantum of such claims confirmed that it had no bona fide defence on the merits. The court a quo was therefore correct to find that the prospects of success were so remote that it could not be said that a bona fide defence existed. Mr *Anderton* argued that consequently, it would be improper and against the interests of

justice to grant the rescission. He submitted that in the absence of a bona fide defence on the merits and a poor explanation for the delay, condonation for the late prosecution of the appeal ought to be refused and the appeal dismissed with costs. Alternatively, the court may grant such judgment as it deems fit in respect of the three cases which were the subject matter of the rescission application. He submitted that the costs of the appeal should be borne by the appellant on the scale between attorney and client as provided in the lease.

[50] The question whether a new issue can be raised for the first time on appeal has been answered by numerous the authorities referred to above. This can however only occur where such issues are issues of law. A determination must therefore be made whether the issue raised is an issue of law or fact. The issues referred to by Mr *Boulle* relating to the charging of rent deposit and the agreed or prescribed rate of interest are factual issues and not issues of law. The issue relating to whether the court a quo can correct its own judgment is a quasi-legal issue which in my view does not qualify for the test set out in *Maphango*. Consequently, I am of the view that while raising new issues may be permissible in so far as these are issues of law, the issues raised by Mr *Boulle* do not qualify. I am of the view that in order to minimise the prejudice, if any, to be suffered by one of the parties where new issues of law are raised on appeal, these should be raised in the notice of appeal and not during argument which would result in taking the other party by surprise. The respondent was afforded opportunity to file supplementary heads of argument to remove any potential prejudice in this case.

[51] The respondent conceded that there are certain errors in the default judgments granted by the court a quo. Since I have found that the court a quo has authority to correct its judgments, nothing prevents the parties from approaching the court a quo for this purpose.

[52] It is apparent that the court a quo considered the matter adequately guided by relevant applicable principles relating to rescission applications and was satisfied that there were was no good cause shown. It was therefore reasonable for the court a quo to conclude that the appellant was in wilful default taking into consideration what has been said above. In my opinion, the appellant has failed to show that it has any prospects of success for the granting of condonation.

[53] In respect of the prejudice, the appellant's conduct of the matter is the likely cause of any prejudice it will suffer as a result of the refusal of this application. The respondent on the other hand has been severely prejudiced by the delay in bringing this matter to finality. It initially suffered prejudice when the appellant wrongfully cancelled the contract, as it is apparent from the facts that no rental was paid until after sometime when a new tenant was found. The respondent then applied for default judgment which was then challenged by the appellant and when the rescission was refused in July 2016, it had to endure a further delay by the noting of the appeal which then lapsed due to the appellant's attorney's conduct.

[54] Having considered the matter, I find that the appellant has failed to make out a case for the granting of the condonation application. Mr *Anderton* asked that costs be awarded against the appellant on an attorney and client scale. After considering the matter, I see no reason why such a cost order should be awarded.

Order

[55] In the result, I propose the following order:

1. The appellant's application for condonation is refused.
2. The appellant is to pay the respondent's cost.

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MASIPA J

I AGREE

_____

MARKS AJ

DETAILS OF THE HEARING

Appearances:

For The Appellant:	Mr A J Boulle
Instructed by:	Morris Fuller Williams Inc.
For the Respondent:	Mr S P Anderton
Instructed by:	Larson Falconer Hassan Parsee Inc.
Matter heard on:	4 May 2018
Judgment delivered:	___ September 2018