REPUBLIC OF SOUTH AFRICA

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

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

24/07/2019
DATE

SIGNATURE

CASE NO: 9421/2014

In the matter between:

GOLDBERG: ISRAEL	**First Appellant**
HEYNS: RHODA	**Second Appellant**
and	
HEYNS: HILARY RYNETTE	**Respondent**

J U D G M E N T

MATSEMELA AJ

1. This is an appeal against the judgment and the order, by the Learned Magistrate Ms Crafford dated 19 July 2018, handed down in the Magistrates Court for the District of Johannesburg.
2. At the beginning of the hearing the appellants brought an application for condonation for the late noting of the appeal and the court granted condonation and reinstated the appeal.

BACKGROUND

3. During November 2014 the Respondent instituted an action against the Appellants in terms of which the Respondent sought payment of the sum of R125 556.16 together with interest thereon. The Respondent premised the cause of action on a breach of a mandate, alternatively enrichment as against the Second Appellant arising from the transfer of a property to a third party. The Respondent alleged that the purchase price was received by the First Appellant, being the conveyancer, and he paid an amount of R251 112.31 to the Second Appellant. It is alleged in the summons that the said amount of R 251 112.31 included an amount of R 125 556.31 which is the share of the Respondent.

4. This action was defended by the Appellants and the Respondent brought an application for Summary Judgement. The Summary Judgement application was opposed and the Appellants each filed an opposing affidavit, raising three points *in limine*, one being a plea of prescription, as the transfer took place in 2006 and the action was only instituted in 2014, being 8 years later.

5. The Second Appellant, in her opposing affidavit, explained that she and her husband were the owners of the Property in question, and not the Respondent and her ex-husband. This was supported by a search works print out reflecting same.

6. Leave to defend the summary judgment application was granted by the Respondent and accordingly the Appellants filed their plea and counterclaim

and raised two special pleas, one of which was the plea of prescription, and two counterclaims for a money judgement in the amount of R146 000 (Claim A) and R20 000 (Claim B).

7. The Respondent filed a replication to the special plea of prescription and a plea to the counterclaim. Thereafter pleadings closed and on 22 April 2017 the Respondent filed her discovery request and an order compelling the Appellants to discover was granted on 12 September 2017.

8. On 13 December 2017 the Respondent launched an application in terms of Magistrate Court Rule 60(3), being to dismiss the Appellants plea and counterclaim (hereinafter referred as 'the Rule 60(3) Application'). The Appellants complied with the order to discover on 15 January 2018.

9. Thereafter and on 16 January 2018 the Rule 60(3) application was heard in the Johannesburg Magistrate's court and, following an oral application for condonation, the court postponed the matter to afford an opportunity to file a written condonation application.

10. Pursuant thereto and on 2 February 2018, the Appellants launched a formal written application to condone the late filing of their notice to discover and their discovery affidavit ('Discovery Condonation Application'). The matter was to be heard on 8 February 2018 but was postponed for the Respondent to file an answering affidavit, and the Appellants to file a replying affidavit thereafter and the matter would then be heard on 15 March 2018.

11. On 15 March 2018 the matter was heard in the absence of the attorney for the Appellants. The Appellants' defence and counterclaims were dismissed and default judgment was granted against the Appellants ('the 15 March 2018 Court Order ') as there was no appearance by the Appellants due to an error by the attorney erroneously diarizing the court date as 22 March 2018 instead of 15 March 2018. The Appellants attorney arrived at court on 22 March 2018 to discover that the matter had been heard on 15 March 2018.

12. On or about 22 March 2018 the Appellants launched a rescission application in which they requested that the 15 March 2018 Court Order be set aside (hereinafter referred to as 'the First Rescission Application').

13. This application was opposed by the Respondent and an answering affidavit was filed. The Respondent had noted a defect in the application and the Appellants had therefore withdrawn the First Rescission Application. A subsequent rescission application, curing the defect, was brought ('the second rescission application') .

14. This second rescission application was also opposed by the Respondent who filed an answering affidavit. No replying affidavit was filed. The second rescission application was opposed on the basis, amongst other reasons, that it was out of time. Magistrate Crafford dismissed the second rescission application.

ISSUES FOR DETERMINATION

15. Whether the appellants in the court a quo should have made an application for the extension of time in terms of Rule 60(5).

16. Whether the appellants failed to furnish an explanation for the late service and filing of the second rescission application.

17. Whether the appellants' founding affidavit in the second rescisssion application was required to be supported by confirmatory affidavits.

THE LAW ON CONDONATION

18. The courts have a discretion in deciding whether condonation should be granted. Three principal requirements for the favourable exercise of the court's discretion have crystallized out.

19. The first is that the applicant should file an affidavit satisfactorily explaining the delay. In this regard it has been held that the respondent must at least furnish an explanation for his default sufficiently full, to enable the court to understand how it really came about, and to assess his conduct and motives.

20. The second requirement is that the applicant should satisfy the court on oath that he has a bona fide defence or that the applicant/ plaintiff's action is clearly not ill-founded, as the case may be. Regarding this requirement it has been held that the minimum that the applicant must show is that his

defence is not patently unfounded and that it is based upon facts (which must be set out in outline) which, if proven, would constitute a defence.

21. In most of the authorities a third requirement is also laid, namely, that the grant of the indulgence sought must not prejudice the plaintiff (or defendant) in any way that cannot be compensated for by a suitable order as to postponement and cost.

RESCISSION

22. Rule 49 (1) of the Magistrates Court Rules provides as follows:

> '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).'

23. Rule 49 makes it clear that a *bona fide* applicant, dissatisfied with default judgment granted against him can, in the instances set forth in Rule 49, prevail upon the same court which granted default judgment to reconsider its decision instead of taking the default judgment itself on appeal to a higher court. It seems to me that this is exactly what the appellants did when they launched the second rescission application which was dismissed.

GOOD CAUSE SHOWN

24. It is trite that the courts have consistently refrained from attempting to formulate an exhaustive definition of what constitutes 'good cause', because to do so would hamper unnecessarily the exercise of the court's discretion. The court may, on good cause shown, condone any non-compliance with the rules, provided the Applicant satisfies the court that there is absence of prejudice to the other party. In the matter of *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O), he court held that Rule 27 (3) requires "good cause" to be shown. This gives the court a wide discretion which must, in principle, be exercised with regard also to the merits of the matter.

25. Reasons for the default are set out in the Second Rescission Application. It is common cause that the 15 March Court Order was granted in the absence of the Appellants' lawyers. This was due to a mistake on the part of the attorney who had diarised the hearing date incorrectly. I am satisfied that the appellants are not in wilful default.

26. The court a quo held that the appellants had failed to show that they have a valid defence/ valid defences to the respondent's claim. The appellants have raised two defences: The first defence is the lack of ownership of the property by the Respondent. The second is one of prescription. The property was sold by the Second Appellant and her former husband in 2006. The Respondent and her former husband had vacated the property and had knowledge that the sale had occurred. The main action was instituted in 2014, being 8 years later. On the face of it it would therefore appear that

the prescription point, at the very least, has some prospect. Therefore, it can, in my view, be said that there are triable issues.

27. The court a quo when dismissing the second rescission application highlighted the absence of confirmatory affidavits by the second and first appellants dealing with these defences. The confirmatory affidavits were in my view not crucial on the facts of this particular case. A summary judgment application preceded the hearing of the second rescission application and leave to defend was granted by consent.

28. The affidavit resisting summary judgment dealt extensively with the defences and confirmatory affidavits were filed in such application. Although the learned magistrate was quite correct in evaluating the second rescission application on its own merits as a self standing application, she might have had regard to this feature which appeared from the court file itself. This should in no way be viewed as a licence to bring unsubstantiated applications or as condoning or even encouraging tardy work. However, it would appear that a string of errors caused the oversight and compounded the problems faced by the appellants.

29. Rule 23 (8) of the Magistrates Court Rules provides as follows:

> '23(8) If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6)(a), omits to give notice of a time for inspection as provided for in subrule 6(b) or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence.

30. Rule 60 (3) of the Magistrates Rules provides as follows:

> '60(3) Where any order made under subrule (2) is not fully complied with within the time so stated, the court may on application give judgment in the action against the party so in default or may adjourn the application and grant an extension of time for compliance with the order on such terms as to costs and otherwise as may be just.'

31. The court a quo held that the Appellants ought to have brought an application in terms of Rule 60 (5). As set out in the Second Rescission Application, the delay in bringing the second application was due to the withdrawal of the First Rescission Application. This caused the second rescision application to be out of time. The reasons, although not explained expressly, were patently clear: The first rescission application was withdrawn due to some technical difficulty which was remedied in the second rescission application. The first rescission application was brought within the time periods allowed. The second was not. There was no wilful disregard of the rules of court. There was an attempt to align the second rescission application with the rules of court.

32. In *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) the Constitutional Court held that lateness is not the only consideration in determining whether an application for condonation may be granted. It held that the test for condonation is whether it is in the interests of justice to grant it and, in this regard, that an applicant's prospects of success and the importance of the issue to be determined, are also relevant factors. Having read the papers and listened to counsel I am of the view that the appellants have prospects of success in the main action.

33. It was held in *Brumloop v Brumloop* 1972 (1) SA 503 (O) that inasmuch as the court is given a discretion to condone any non-compliance with the rules, so also it has a discretion to waive a requirement thereof.

34. One of the arguments advanced by the appellants was that the order granting the judgment in favour of the respondent and dismissing the appellants' counterclaims, ought to have been rescinded as it was granted in terms of rule 60(3) and ought to have been brought and granted in terms of rule 28(3). During the hearing of the appeal we requested the parties to submit further heads of argument on:

1. whether the reference to 'rules' in Rule 60(1), refers to all the rules contained in the Magistrate's Court Rules, or whether it only refers to the rules contained in Rule 60 itself; and

2. whether a party faced with non-compliance with an application to compel discovery, is confined to the remedy provided for in rule 23(8) or whether it can also rely on rule 60(3).

35. We are most indebted to both counsel for assisting the court in this regard but by virtue of our findings herein, deem it unneccessary to decide on such issues.

36. In light of the legal principles set out above and that there was no prejudice suffered by the Respondent as a result of the delay which could not be

cured by an appropriate costs order, I am of the view that the application for condonation should have been granted.

37. There remains one final aspect: on a general reading of the papers, I am left with the clear impression that the appellants, at all relevant times, had the desire to defend the action and that the rescission application(s) represented a *bona fide* effort to achieve that result. By the same token, I have difficulty in concluding, that this is a proper case for blaming the appellants for mistakes made by their attorney with her diary.

38. The Appellants' attorneys handled this matter in the court *a quo* in a very tardy manner. This conduct justifies an order disallowing some of the costs.

I accordingly grant the following order:

1. The appeal is upheld.

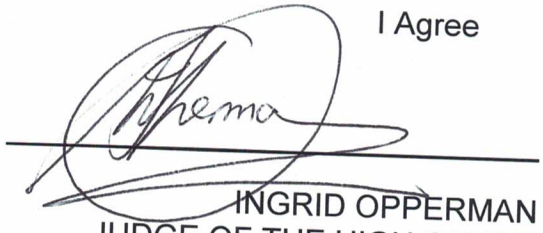
2. The order of the court *a quo* dismissing the appellants' defences and counterclaims and granting judgment against them in favour of the respondent in the amount of R125 556.16 together with interest and costs, is set aside.

3. The appellants are to pay the costs of this appeal jointly and severally, the one paying the other to be absolved.

4. The attorneys of record for the appellants are not to recover any costs from the appellants, for services rendered by them in the prosecution of this appeal or for the first and second rescission applications brought in the court *a quo*. This order shall not preclude the recovery of counsel's fees on appeal from the appellants by the attorneys of record.

MOLEFE MATSEMELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I Agree



INGRID OPPERMAN
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

Counsel for Applicant:	Adv Raquel Carvalheira
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Heard:	30 April 2019
Further Heads of Arguments received by Appellants:	17 May 2019
Further Heads of Arguments received by Respondents:	27May 2019
Judgment delivered:	24 July 2019