

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: AR248/2022

In the matter between:

CATHERINE ANN BOTHA t/a LOLA B

FIRST APPELLANT

(First Defendant/ Respondent in the Court a quo)

STEPHEN CHARLES BOTHA

SECOND APPELLANT

(Second Defendant / Respondent in the Court a quo)

and

WILLMEG INVESTMENTS (PTY) LTD

RESPONDENT

Plaintiff/ Applicant in the Court a quo)

ORDER

1. The late prosecution of the appeal is condoned.
2. No order of costs is made in the application for condonation for the late prosecution of the appeal.

3. The appeal is upheld.

4. The order granting summary judgment with costs is set aside. It is replaced with the following order: **'The summary judgment application is refused. The defendants are granted leave to defend the action. The costs of the application for summary judgment are reserved for determination by the trial court.'**

5. The respondent is ordered to pay the costs of the appeal.

JUDGMENT

Mngadi J (Mathenjwa AJ concurring)

[1] The appellant appeals against the judgment of a magistrate granting summary judgment in favour of the respondents.

[2] The first appellant is Catherine Ann Botha t/a Lola B, a major female businesswoman. The second appellant is Stephan Charise Botha an adult male businessman. The respondent is Willmeg Investments (Pty) Ltd a company duly incorporated and registered in terms of the company laws of the Republic of South Africa.

[3] The respondent instituted an action in the magistrate's court against the appellants claiming R89 669.93 plus interest and costs on attorney and client scale.

[4] The respondent as basis of its claim it claimed that it concluded a lease agreement with the first appellant. The lease agreement was for a period of two (2) years commencing on 1 August 2019 at a rental of R15 000 per month. On 30 April 2020 first appellant repudiated the agreement. The respondent does not accept the repudiation.

[5] The respondent further stated that the first appellant is in breach of the lease agreement for failing to pay the monthly rental and municipal charges as per the statement of account dated August 2020. The respondent addressed to the first appellant a notice of breach on 4 August 2020 demanding payment of R89 669. 93.

[6] The respondent as against the second appellant claimed that he bound himself as surety and co-principal debtor in solarium with first appellant in a surety on 6 June 2019 for the obligations of the first appellant in terms of the lease agreement..

[7] The respondent in its particulars of claim attached the lease agreement, the statement of account, its notice of breach and the deed of surety by the second appellant.

[8] The statement of account shows rental not paid is from the first of April 2020 to the first of August 2020. The notice of breach by a firm of attorneys states: ' on 30 April 2020 you addressed a letter to our client indicating your client's intention to cancel the lease agreement dated 6 June 2019 which letter amount to a repudiation. Our client does not accept your client's repudiation of the agreement. We are instructed that your client is in breach of the agreement for failing to pay the monthly rental and utility account due to our client in terms of the agreement. A copy of our client's monthly statement as at August 2020 is enclosed herewith for ease of reference and your attention is drawn to the

fact that the amount of R89 669.93 is now due owing and payable to our client. Notice is hereby given to your client to make payment of the above amount within the next 7 (seven) days failing which our client will approach the magistrate's court to enforce the agreement against your client and its surety.'

[9] The appellants in their plea admitted the conclusion of the lease agreement but claimed that the lease agreement was invalid since the premises the subject of the lease agreement were not compliant with the National Building Regulations and Building Standards Acts 103 of 1977. Further, pleaded the appellants, the respondent committed breaches of the lease agreement, the first appellant gave the respondent a notice of the breaches on 21 April 2020 and the respondent failed to rectify the breaches then the first appellant cancelled the lease agreement on 30 April 2020.

[10] The respondent then applied for summary judgment. The affidavits in support of the application for summary judgment is deposed to by Mr Kent Robert Knoop (Knoop). Knoop states that he is a joint business rescuer practitioner appointed for the respondent on 9 June 2020. Knoop stated that the allegations that the premises were not compliant with the Nation Building Regulations and Standards Act were factually incorrect and even, if correct, that would not render the lease agreement invalid. Mr Knoop stated that the defences raised by the appellants had no merit and do not constitute an issue fit for trial.

[11] The first appellant in an affidavit opposing the application for summary judgment reiterated the defences raised and the averments made in the plea that the respondent breached the terms of the lease agreement, she gave the respondent notice of the breaches and the respondent failed to rectify the breaches, she then cancelled the lease and vacated the premises before the end of April 2020.

[12] The learned magistrate in the judgment on summary judgment dealt with the points *in limine* raised and dismissed them. The magistrate held that the appellants had not furnished proof that the respondent breached the terms of the lease agreement and therefore there was no issue raised fit for the trial.

[13] In my view, the learned magistrate misdirected himself in requiring the appellants to produce proof of their defence at the stage of a summary judgment application. In addition, it was common cause that the first appellant alleged the breaches of the lease in a formal notice but the respondent did not dispute the alleged breach and did not remedy what was alleged to be the breach. It was also common cause or not disputed that on notice to the respondent the first appellant vacated the premises at the end of April 2020 and she stopped paying rental as from April 2020. Further, it was common cause that the respondent only in August 2020 purported to be rejecting the cancellation of the lease agreement by the first appellant done in April 2020.

[14] The respondent claimed rental for the premises that would have been payable had the first defendant not cancelled the lease agreement and vacated the premises. The issue is whether the cancellation of the lease agreement by the first appellant was lawful or not. It was common cause that it happened. It was an issue fit for trial. If nothing inherently incredible in the defendant's answer which if established would support a defence that is good in law, the court is obliged to dismiss the application for summary judgment. See *Chambers v Jonker* 1952 (4) SA 635 (C). In my view, the appellants disclosed a defence and material facts with sufficient particularity and completeness, which suffices for purposes of opposing the application for summary judgment. See *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426C-D.

[15] The appellants sought condonation for the late prosecution of the appeal, which the respondent opposed. The appellants after the learned magistrate gave

judgment filed a notice of appeal and paid the prescribed security.

[16] The respondent in an answering affidavit to the condonation application stated that in terms of Rules 50 (4) (a) and Rule 50(1) of the Uniform Rules of Court an appellant is required within forty (40) days of noting an appeal to apply to the Registrar for the allocation of a date of hearing of the appeal and to prosecute an appeal within 60 days after noting an appeal, unless so prosecuted the appeal is deemed to have lapsed. It was only on or about 23 August 2022 that the appellants prosecuted the appeal.

[17] The appellants in the application for condonation state that there was miscommunication between their instructing and instructed attorney, which resulted in neither of them timeously prosecuting the appeal. Mr Louw counsel for the appellant argued that the laxity on the part of the appellant's legal representatives should not cause prejudice to the appellants. He argued that the appellants on time gave clear instructions to pursue an appeal. He argued that the respondent as a result of the failure to prosecute the appeal on time suffered no prejudice. It is in the interest of justice to condone the late prosecution of the appeal, he argued.

[18] Mr Pretorius for the respondent argued that for a period of (4) months nothing was done by the appellants to prosecute the appeal. There is no explanation for the failure to prosecute the appeal.

[19] The manner in which the appellant's legal representatives handled the matter is, in my view, shocking. They have completely failed to give a reasonable logical full explanation which cover the entire period for the delay in prosecuting the appeal. It is not only that they did not prosecute the appeal on time, they also failed to apply for condonation for the late prosecution of the appeal on time.

[20] The appellants, in my view, have shown reasonable prospects of success

on appeal as set out above. The cause of the delay was the ineptitude of the appellants' legal representatives. The Respondent has not shown any prejudice to be caused to it if condonation for the failure to prosecute the appeal on time is condoned. I am of the view that it is in the interest of justice to grant condonation for late prosecution of the appeal.

[21] I propose the following order:

1. The late prosecution of the appeal is condoned.
2. No order of costs is made in the application for condonation for the late prosecution of the appeal.
3. The appeal is upheld.
4. The order granting summary judgment with costs is set aside. It is replaced with the following order: **'The summary judgment application is refused. The defendants are granted leave to defend the action. The costs of the application for summary judgment are reserved for determination by the trial court.'**
5. The respondent is ordered to pay the costs of the appeal.

Mngadi, J

I agree.

APPEARANCES

Case Number AR 248/2020

Appellant's represented by Mr Louw

Instructed by Manly Inc.

PRETORIA

Respondent represented by Mr Pretorius

Instructed by Tatham Wilkes Inc.

PIETERMARITZBURG

Date of Hearing 5 May 2023

Date of Judgment 09 June 2023