



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

CASE NO: **AR425/15**

In the matter between:

GLYNN HENMAN

APPELLANT

And

LIBERTY GROUP LIMITED

RESPONDENT

Coram: Kruger et Koen JJ

Heard: 23 May 2016

Delivered: 9 June 2016

ORDER

1. The appeal succeeds/is upheld to the extent that:
 - a. The order of the Court *a quo* refusing condonation is set aside.
 - b. The order of the Court *a quo* in dismissing the application for rescission in respect of claims (A); (B); (C) and (D) is set aside and the judgment in respect of these claims is hereby rescinded.
 - c. The order of the Court *a quo* in dismissing the application for rescission in respect claims (E); (F); (G) and (H) is confirmed.
 - d. Each party is to bear its own costs, including the costs of the appeal.

JUDGMENT

KRUGER J (Koen J concurring):

[1] The appellant seeks an order whereby the Court *a quo*'s decision (a) to refuse condonation for the late filing of the Application for Recission and (b) to refuse the Appellant's Application for Recission, be set aside.

[2] A brief history of the matter follows hereinafter. The Appellant stood surety for the payment of rental in respect of shops 100 and 101 in the Liberty Midlands Mall, Pietermaritzburg. Rentals in respect of both shops 100 and 101 were not paid timeously or at all and the Respondent issued two separate summons against the Appellant in his capacity as surety. The matter before us concerns shop 100 only, the Case No. in the Court *a quo* being 1605/2010. The Appellant, although in possession of the summons, failed to annex same to his founding or replying affidavits. What was annexed was a copy of a summons issued in respect of shop 101, the Case No. in the Court *a quo* being 1606/2010. Mr McIntosh, on behalf of the Appellant, has assured us that apart from the amounts claimed, the particulars of both summons' Case Nos. 1605/2010 and 1606/2010 are identical. In the summons the Respondent sought an order for confirmation of the cancellation of the lease with effect from 19th January 2010; payment of arrear rental and ancillary charges together with interest thereon; and damages for holding over. The summons was served on the Appellant on 1st February 2010. He failed to enter an appearance to defend. As a consequence thereof, on the 12th March 2010 the Respondent applied for judgment by default. Judgment was granted on the 29th March 2010.

[3] It was common cause that the Appellant remained in occupation of the premises until the 27th May 2010. On this day an entity called "Bundeberg Investments CC" ("Bundeberg") entered into a lease agreement with the Respondent and assumed immediate occupation of the premises.

[4] It appears from the record that during February 2010 the Respondent received various payments totalling R115 800,00 from the Appellant. The Appellant

has alleged, and this forms the basis of his rescission application, that after receiving the summons, negotiations commenced between himself, the Respondent and Bundeberg. These negotiations culminated in an agreement, namely that Bundeberg would pay all arrear rentals due by and on behalf of the Appellant and in return Bundeberg would become entitled to “take over” the lease of the premises. Having reached this “agreement” the Appellant formed the opinion that the debt had been settled and did not concern himself further with the matter.

[5] The Appellant has alleged that on the 14th February 2014 he first became aware of the judgment when he received the judgment letter informing him of same. He immediately instructed his attorneys to negotiate with the Respondent’s attorneys. Unfortunately, the Appellant has failed to fully disclose, in detail, what transpired thereafter. He has merely alleged that his attorneys’ negotiations did not yield the desired result and that he was later served with a notice to appear in court in respect of proceedings in terms of Section 65 of the Magistrate’s Court Act. He attended Court on the 26th June 2014 and the matter was adjourned to the 24th July 2014 for purposes of allowing the Respondent to furnish him with certain documentation. The Appellant has further alleged that subsequent negotiations were futile.

[6] A somewhat different picture emerges from the Respondent. It has denied the existence of the “agreement” between itself, the Appellant and Bundeberg, as alleged. It has averred that after the Appellant received the judgment letter, his attorneys requested certain information relating to the Appellant’s indebtedness.

[7] This information was furnished and notwithstanding a demand for a response, none was forthcoming from the Appellant. After the Court appearance of the 26th June 2014 the relevant information requested by the Appellant was once again furnished (on the 2nd July 2014). No response was received from the Appellant. On the 11th August 2014 the Application for Condonation and Rescission was launched. In a judgment handed down on the 30th January 2015, the applications were dismissed with costs.

CONDONATION

[8] It is trite that a Court may, on good cause shown, condone any non-compliance with the rules. What constitutes good cause is to be decided upon the circumstances of each case. Factors which the Court will take into account are, *inter alia*, the degree of non-compliance and the explanation for it; the nature of the case and the prospects of success. The issue is whether or not the Appellant had provided a reasonable explanation for his delay in bringing the application for rescission and whether or not he has shown that he had a *bona fide* defence to their claim – **Burton v Barlow Rand Ltd t/a Barlow Tractor and Machinery Co** and **Burton v Thomas Barlow and Sons (Natal) Ltd** – 1978(4) SA794 (TPD).

[9] In **United Plant Hire (Pty) Ltd v Hills and others** 1976(1) SA 717 (AD) the Court held that “a slight delay and a good explanation may help to compensate for prospects of success which are not strong”. (at 720 G).

[10] In **Uitenhage Transitional Council v South African Revenue Services** 2004(1) SA 292 (SCA) the Court, faced with an application for condonation that lacked particularity, granted the application on the basis that there were good prospects of success.

[11] In *casu*, I am of the view that there are no plausible explanations from the Appellant that explains the delay in launching the application for rescission. It appears from the record that whenever the Appellant received a Court process he was galvanised into action, *albeit* for a short while, and appeared interested. There is no explanation for his inaction from the 6th May 2014 until he received the said notice in terms of Section 65(1) of the Magistrate’s Court Act. There is also no explanation for his inaction for the period 2nd July 2014 (when he once again received a breakdown of the account) until 11th August 2014 and the application was launched.

[12] Guided by the judgment in **Uitenhage Transitional Local Council** (*supra*), I will consider the Appellant’s prospects of success, notwithstanding the lack of particularity and candour in his explanation for the delay.

RECISSION

[13] The Appellant's application for recission as I understand the submissions, are based on two grounds:

- (a) That the judgment was erroneously applied for and granted; and
- (b) That he has a *prima facie* and *bona fide* defence to the Respondent's claim.

[14] In respect of (a) above, the Appellant contends that during February 2010 he paid an amount of "R97 000,00 odd" to the Respondent. He however failed to annex or provide proof of this payment. Nor did he allege precisely when these payments were effected. The Respondent confirmed receipts of payments in the total sum of R115 800,00 during February 2010. This payment, is noted, extinguished the claims as set out in the summons, in prayers (A); (B); (C) and (D) – the arrear rental and ancillary charges. In my view the Respondent, via its attorneys, ought not to have sought judgment against the Appellant in respect of those claims. The Appellant has therefore shown a strong *prima facie* case that the judgment is substantially in excess of his true liability. Accordingly the judgment was erroneously sought and granted.

[15] In respect of the remaining claims – (E); (F); (G) and (H) – as prayed for in the summons, these claims relate to damages for holding over and eviction. The Appellant's defence is that an "agreement" was reached between himself, the Respondent and Bundeberg whereby any arrear rental would be paid for by Bundeberg. In addition thereto he has alleged that a material term of the agreement was that Bundeberg would be entitled to "take over" the lease once it had paid the arrears.

[16] The Appellant has once again failed to provide the necessary particularity relating to the alleged agreement. When was the agreement entered into? Who represented the various parties? Where did the negotiations take place and when? Where was the agreement finalised? The Appellant's affidavits (particularly his replying affidavit when he was aware of these deficiencies) is devoid of these factual issues. It is further noted that Bundeberg – on the Appellant's own version – were not substituted as tenants, thereby "taking over" the Appellant's lease. A new lease agreement was entered into between the Respondent and Bundeberg and the

Appellant was informed of his liability up to the 27th May 2010. The Appellant has also failed to provide particularity or averments of when (if indeed it did) and how much, if any, Bundeberg paid on his behalf. All the documents provided by the Respondent disprove the Appellant's assertions.

[17] Whilst it is noted that the Appellant need only establish a *prima facie* defence, it is however necessary to set out facts, which if established at the trial, would constitute a good defence – **Grant v Plumbers (Pty) Ltd 1949(2) SA 470 (0); Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd 1980(4) SA 573 (W) at 575-6.** The Appellant has failed in this regard. I agree with the submission of the Respondent's counsel that the Appellant's defence is "bald, confused and unsubstantiated". It follows that the appeal in so far as it relates to claims (E); (F); (G) and (H) must fail.

[18] In conclusion I am of the view that the Appellant's application for condonation is saved by the merits in so far as it relates to claims (A); (B); (C) and (D).

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

1. The appeal succeeds/is upheld to the extent that:
 - e. The order of the Court *a quo* refusing condonation is set aside.
 - f. The order of the Court *a quo* in dismissing the application for rescission in respect of claims (A); (B); (C) and (D) is set aside and the judgment in respect of these claims is hereby rescinded.
 - g. The order of the Court *a quo* in dismissing the application for rescission in respect claims (E); (F); (G) and (H) is confirmed.
 - h. Each party is to bear its own costs, including the costs of the appeal.

KRUGER J

I agree

KOEN J

For the Appellant:	K C McIntosh
Appellant's Attorneys:	Tate & Knight Inc
For the Respondent:	M Bingham
Respondent's Attorneys:	Gideon Pretorius Inc