

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape High Court, Kimberley)

Saakno: / Case number: **CA & R 30 / 2011**
Datum verhoor: / Date heard: **20 / 02 / 2012**
Datum gelewer: / Date delivered: **02 / 03 / 2012**

In the appeal of:

MARIUS GELDENHUYS

Appellant

and

THE MINISTER OF CORRECTIONAL SERVICES

Respondent

Coram: Lacock, J et Phatshoane, J

JUDGMENT ON APPEAL

LACOCK, J

[1] The subject of this appeal is the refusal by the magistrate to grant condonation for the late filing of an application for condonation and the rescission of a default judgment granted against the appellant in favour of the respondent in the magistrate's court, Kimberley. The relevant common

cause factual circumstances that led to the appeal can be summarized as follows:

- 1.1 On 24 July 2007 the respondent had a summons issued against the appellant for payment of a sum of R26,997.70 in respect of damages allegedly suffered by reason of the appellant having negligently failed to keep a petrol card in safe custody. The respondent averred that the cause of action arose between 24 and 29 July 2004. At the time the appellant was in the service of the respondent.
- 1.2 On receipt of the summons the appellant immediately handed same to his trade union representative with the request to handle the matter on his behalf.
- 1.3 On 24 May 2010 the appellant was advised by the respondent that judgment had been entered against him in the sum of R39,043.79. This is the date on which the appellant obtained knowledge of the judgment.
- 1.4 The appellant approached the State Attorney on 24 June 2010 with the request to do the necessary to have the judgment rescinded. On 23 August 2010 the appellant had again been requested by the respondent to make arrangements for payment of the judgment

debt. He thereupon again contacted the State Attorney who only then advised him that, by reason of a clash of interest, he can no longer act on his behalf.

1.5 On 8 September 2010 the appellant approached his present attorney, and on 16 September 2010 the application for condonation and rescission was filed.

[2] The magistrate refused condonation and therefore did not deal with the application for rescission.

[3] Condonation for the late filing of the application for rescission was refused on the sole ground that the appellant *"... het 'n dagvaarding gekry, dit by die vakbond gaan indien en vir ongeveer so twee of drie jaar het hy absoluut niks daaraan gedoen nie."* (judgment, p 11, lines 15 to 17). In her Rule 51 reasons, the magistrate again advanced the same reasons for refusing condonation.

"After having read the papers and having heard argument on behalf of both parties, I can find no satisfactory explanation for the applicant's delay in bringing the application on time.

In July 2007, the applicant acted on the claim by passing the summons to a union representative. Since that time until June and September 2010 the applicant made no effort to act on the matter and simply left it.

No reasonable explanation is fully canvassed as to the reason for the delay in bringing a timeous application for rescission. Only after receiving a communication about money that will be deducted from

the applicant's salary did he make an attempt to consult an attorney.

I find that the applicant has recklessly disregarded his obligations namely at the least to enquire during the period from July 2007 to June 2010 about the developments in the matter from his union representative or the plaintiff."

- [4] The magistrate misdirected herself in this respect. What she had to consider for purposes of the application for condonation were the reasons why the application for rescission was not filed timeously and within the period of 20 days since the appellant obtained knowledge of the judgment, as prescribed under magistrate court rule 49. This she failed to do.

We are therefore entitled to consider the application for condonation afresh.

- [5] Adv. Khokho on behalf of the respondent conceded, correctly so in my view, that the reasons advanced for the late filing of the application for rescission do not justify an inference of wilfull disregard of the rules of the magistrate's court. What needs to be considered in an application for condonation is

"... the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice;"

(Federated Employers Insurance Co. v McKenzie, 1969

(3) SA 360 (AD) at 362G.

- 5.1 Although the application for condonation was filed approximately 60 days out of time, the appellant comprehensively explained this delay. He approached the State Attorney for assistance within 3 weeks since the judgment came to his knowledge. Thereafter, and within ten days after being advised that the State Attorney could no longer act on his behalf, he approached his present attorney to assist him. His actions can certainly not be described as unreasonable or inattentive.
- 5.2 The main action appears to be more important to the appellant than to the respondent. The respondent waited for almost 3 years before summons was issued, and then for another year before an (unsuccessful) attempt was made to obtain a judgment by default. Thereafter application for judgment was only made a further one year and almost two months down the line. The appellant from day one denied his liability for the amount claimed.
- 5.3 By reason of the respondent's own lethargy to finalise the matter, it cannot be said that the administration of justice was unnecessarily or unreasonably delayed.

5.4 The prospects of success in having the judgment rescinded favours the appellant as alluded to hereunder.

[6] By reason of the aforesaid the appeal against the refusal of condonation has to succeed.

[7] Counsel for both parties were *ad idem* that, should the appeal on condonation succeed, no purpose will be served to remit the matter to the magistrate to consider the application for rescission since this court has before it all evidence pertaining to that application. I agree.

[8] To succeed in an application for rescission of judgment, an applicant needs to "show good cause" (see Magistrates Court rule 49(1)). No exhaustive definition of the phrase "good cause" had been laid down by the courts, but what is generally expected from an applicant are (a) a reasonable explanation of his default, (b) that his application is made *bona fide*, and (c) that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospects of success.

(Colyn v Tiger Food Industries Ltd v Meadow Feed Mills (Cape), 2003 (6) SA 1 (SCA) at 9E).

[9] Although the appellant may be criticized for not having

made enquiries after he handed the summons to his trade union representative, there is nothing in the papers indicative of an apprehension that the trade union would not have acted in the interests of the appellant. Trade unions are supposed to assist their members, and I do not find the appellant's reliance on that assistance unreasonable. Once it came to his knowledge that judgment had been entered against him, he did act promptly to have the judgment rescinded.

[10] It was not suggested that the application was made *mala fide*. Such a suggestion would have been without merit.

[11] In his founding affidavit the appellant fully disclosed his defence to the action. He explained that, whilst the relevant petrol card was lawfully in his possession, it was stolen from him. He immediately, on discovering the theft, reported same to his seniors, and denied having committed a breach of standard rules or procedures. He further explained that the unauthorized use of the card occurred after the date on which the theft of the card was reported to his seniors. This, so he contended, could have been avoided had his seniors acted with the necessary diligence and care to cancel the card. Therefore, so the appellant averred, the damages suffered as a result of the unauthorized use of the stolen petrol card, cannot be ascribed to any negligence on his

part.

These averments, if proved, would constitute not only a *bona fide* defence to the respondent's claim, but also a *prima facie* successful one.

[12] For these reasons, the judgment should be rescinded.

WHEREFORE THE FOLLOWING ORDER IS MADE:

- 1. THE APPEAL SUCCEEDS WITH COSTS.**
- 2. THE ORDER OF THE COURT A QUO IS SET ASIDE AND IS SUBSTITUTED FOR THE FOLLOWING ORDER:**
 - 2.1 CONDONATION FOR THE LATE FILING OF THE APPLICATION FOR THE RESCISSION OF THE JUDGMENT UNDER CASE NUMBER 6718/2007 IS HEREBY GRANTED.**
 - 2.2 THE JUDGMENT GRANTED BY DEFAULT IN CASE NUMBER 6718/2007 IS HEREBY RESCINDED AND SET ASIDE.**
 - 2.3 THE COSTS OF THE APPLICATION SHALL BE COSTS IN THE CAUSE.**

**HJ LACOCK
JUDGE**

I agree.

**VM PHATSHOANE
JUDGE**

For the Appellant:	Adv. S.L. Erasmus o.i.o Duncan & Rothman
For the Respondent:	Adv. Khokho o.i.o The State Attorney