Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 4327/2017

Before: The Hon. Mr Justice Binns-Ward
Hearing: 22 October 2018
Judgment: 23 October 2018

In the matter between:

GUSTAV ZIEHL t/a GUSTAV ZIEHL MAKELAARS Applicant

and

OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LTD Respondent

Order: The applications for condonation of the applicant's non-compliance with the requirements of rule 31(2)(b) of the Uniform Rules and for rescission of the judgment granted against him in default of an appearance to defend the action are dismissed with costs.

JUDGMENT

BINNS-WARD J:

[1] This is primarily an application in terms of rule 31(2)(b) of the Uniform Rules for the rescission of a judgment granted in favour of the respondent against the applicant in default of an appearance by the latter to defend the action the former had instituted against him. The rule requires that such applications must be brought within 20 (court) days of the defendant having knowledge of the judgment. In the current case the applicant obtained knowledge of the judgment when a writ of execution was served on 4 August 2017. He only launched the application for

rescission more than three months later, on 13 November 2017, well outside the prescribed time limit. He has accordingly also applied for the condonation of his non-compliance that he needs to be given if his rescission application is to be entertained. The respondent opposed both applications.

[2] One of the important considerations in the determination of the application for condonation is the apparent merit or lack thereof, as the case might be, of the applicant's principal application. The inherent overlap of relevant considerations requires that both applications be looked at integrally with due regard to their interrelationship.

[3] In order to succeed it was incumbent on the applicant in both applications to show good or sufficient cause for the relief sought. The concept defies precise definition, but in the given context courts generally expect an applicant to show good cause by (a) giving a reasonable explanation of the default; (b) showing that the application is made bona fide; and (c) showing that there is a bona fide defence to the respondent's claim which prima facie has some prospect of success.[1] Bearing in mind that the court's objective in exercising its pertinent discretion is to give a just result in the peculiar circumstances of the matter, the relative strengths of one aspect of the applicant's case in both applications might compensate for its relative weaknesses in other aspects.[2] A holistic evaluation is indicated.

[4] The action concerned the recovery by the respondent of certain commissions paid to the applicant. The applicant was party to a broking agreement with the respondent in terms of which he was entitled to the payment of commission on certain

---

[1] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* [2003] ZASCA 36; [2003] 2 All SA 113 (SCA) at para. 11 (and the other authority cited there).

[2] Cf. *Wright v Westelike Provinsie Kelders Bpk* 2001 (4) SA 1165 (C), [2001] 4 All SA 581 (C) at paras. 29 and 55-57. See also, for example, *Harris v ABSA Bank Ltd t/a Volkskas* [2002] 3 All SA 215 (T), 2006 (4) SA 527 (T) at para. 10 and *Evander Caterers (Pty) Ltd v Potgieter* 1970 (3) SA 312 (T) at 316-317, where Boshoff J noted '*What will justify a court in exercising its discretion in favour of the party seeking the indulgence must depend entirely on the circumstances of each particular case. If regard is had to the purpose of the Rule, such a party should at least furnish an explanation for the delay which led to the non-compliance with the Rule which in the opinion of the court is sufficient or satisfactory. If the explanation is not sufficient or satisfactory, then other considerations may become relevant and important, namely, whether the application is bona fide in the sense that the party seeking the relief is really anxious to contest the case where he is a defendant and believes that he has a good defence to the action and whether in the circumstances the court can come to his relief without any damage or injury to the plaintiff other than can be remedied by an order as to payment of costs. If the court then comes to the conclusion that the application is a mala fide one, that the defendant really has no belief in the justice of his cause, but that his only object in making the application is to delay the plaintiff in obtaining his just claim, the court clearly should not hesitate to refuse to make any order*'.

of the respondent's financial products that he sold to the public. In terms of their agreement the applicant had a commission account that fell to be credited with commissions due to him and debited when certain commissions paid to him in advance had to be reversed due to the failure or cancellation of the transactions that he had brokered, or the discovery that any commission had been paid incorrectly. The commission account would obviously go into debit if the sum of the reversed commissions at any time exceeded the sum of any new commissions that were still payable to him at the time.

[5] The contract provided that the applicant would be liable to pay the respondent on demand any amount in which his commission account might at any time be in debit. It also provided that the amount of the applicant's indebtedness to the respondent on the commission could be established by means of a certificate signed by any of the respondent's designated functionaries. The effect of such certificate, should litigation ensue, was to afford prima facie proof of the amount of the indebtedness. In the result the onus would be on the applicant to prove that he was not indebted to the respondent in the certified amount. [3]

[6] The effect of the certificate, which was to do away with the need for any further affirmative evidence in support of the quantification of the sum claimed, was also to bring about a situation that any claim supported by such a certificate qualified as 'debt' within the meaning of the phrase 'debt or liquidated demand' in subrule 31(5) of the Uniform Rules. I make this point because, notwithstanding that such an application had not been adumbrated in the papers, the applicant's counsel argued from the bar that the application should actually be treated not as one brought in terms of rule 31(2)(b), but instead as one brought in terms of rule 42(1)(a), which pertains to the rescission of judgments 'erroneously sought or erroneously granted in the absence of any party affected thereby'. The basis for the contention that the judgment had been erroneously sought and/or granted was an argument that the claim had not been in respect of a 'debt or liquidated demand' and therefore not one that the registrar had been empowered to enter judgment for in terms of rule 31(5).

[7] The applicant's counsel relied on the authorities cited in note 7 at page D1-371 [Loose leaf service 5, 2017] of Van Loggerenberg, *Erasmus: Superior Court Practice*

[3] See *Bank of Lisbon International Ltd v Venter and Another* 1990 (4) SA 463 (A) at 481H - 482C, read with *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) at 382 *fin* – 383.

(Juta) in support of the commentators' note that '*It was held that while a claim for an account and debatement thereof can be a "claim for a debt or liquidated demand", a claim for payment of the amount found to be due after debatement of the account is not a debt or liquidated demand*'. The cited judgments that are centrally in point in this connection are *SA Fire & Accident Insurance Co Ltd v Hickman* 1955 (2) SA 131 (C), *Allied Bakeries (Pvt) Ltd v Pitzar* 1962 (1) SA 339 (SR) and *Fatti's Engineering Co Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T).[4] They do not support the proposition that counsel sought to make. In both of the two first mentioned cases the plaintiffs had claimed a statement and debatement of account and payment of the amount determined by such exercise to be due. *Ex facie* the summonses in those matters, the amounts payable by the defendants were expressly unliquidated, hence the need for the accounting and debatement that was sought. *Fatti's Engineering* merely referred with approval to the judgment in *Hickman*. Whether a summons makes out a claim for a debt or constitutes a liquidated demand is something that must be discernible on the face of the pleading. Rule 31(5) would be unworkable if a determination whether the claim was in respect of a debt or liquidated demand were dependant on considerations *dehors* the content of the summons.

[8] The respondent in the current case was not seeking payment of an amount to be determined after a statement and debatement of account. It claimed an amount of money the quantum of which had been established prima facie in terms of a certificate of balance by which the applicant was contractually bound. The claim was for payment of a debt in an amount that on the face of the summons was liquidated. The applicant's belated endeavour to characterise his application as one falling to be disposed of in terms of rule 42 was therefore without merit. I shall accordingly persist in treating of it as an application in terms of rule 31(2)(b).

[9] The respondent sued the applicant for payment of the sum of R1 851 922,76, being the alleged debit balance on his commission account together with interest thereon as from 1 March 2017 to date of payment to be calculated as provided in terms of the brokers' agreement. The quantum of the respondent's claim was supported by a certificate of balance as provided for in terms of the parties' contract signed by a senior administrative specialist in the respondent's Debt Recovery Unit:

[4] Also reported at [1955] 1 All SA 16 (C), [1962] 1 All SA 44 (SR) and [1962] 1 All SA 578 (T), respectively.

Broker Distribution Unit. The certificate was dated 6 March 2017. It had attached to it account statements produced by the respondent in respect of the applicant's commission account as at the last day of each month from November 2016 to February 2017 inclusive. The account statements reflected on an itemised basis how the amount claimed had been made up, cross-referencing in respect of each amount reflected on the accounts (apart from amounts indicated as interest or legal expenses) to an invoice or credit note (*Afr.* 'Faktuur/Kredietnota'), each of which was identified by date and document number.

[10] In terms of the governing broking agreement the applicant was entitled to payment by the respondent of the credit balance in his commission account at least once monthly. He was also entitled to a commission statement, which could be furnished to him electronically, reflecting how the commission and/or fees had been calculated. The applicant has testified that he is 74 years of age and is still working because he is unable to afford 'the luxury' of retiring. It is inherently probable therefore that he would have kept a close eye on his commission statements on at least a monthly basis. As will be evident from what I shall describe presently, he would have examined his commission statements not only with regard to business that he had conducted personally, but also with an interest in the business that others had done selling the respondent's products using his commission code so that he could effect the 70/30 commission-sharing agreement applicable in such cases.

[11] In his supporting affidavit, the applicant points out that the broking agreement does not expressly provide that he was entitled to a commission statement in respect of commission reversals and submits that this 'creates an unfair and undesirable practice'. There is, however, no substance in the applicant's construction of the relevant clauses of the contract. Whilst the express provisions might have been usefully amplified for the sake of clarity, a proper construction of the agreement clearly imputes a tacit provision for the furnishing of a commission statement when a debit is made. The system of commission statements is after all no more than one of periodic reporting on the status of a running account. The accounts attached to the respondent's summons provide real evidence of how the system of commission statements worked. (That the applicant sought to make the point detracted from his case. It gave the impression of someone desperately looking for defences, instead of clearly advancing those that he might actually have.)

[12] The contract imposed an obligation on the applicant to direct the respondent's attention to any error in the commission statements provided or made electronically available to him. In the event of his failure to do so in writing within 30 days of the availability of the statements, he was contractually deemed to have accepted the commission statements as correct. The obvious implication of this provision was an acceptance by the parties thereto that the applicant would maintain his own records so as to be able to verify or challenge, as the case might be, the commission statements rendered to him by the respondent. (The keeping of such records would in any event be a matter of sound business practice, and something that he would have been obliged to do in terms of the income tax legislation.) The summons alleged (in paragraphs 9 and 10 of the particulars of claim) that –

> 9. The commission statements produced by the plaintiff in respect of the commission account, up to and including the statement for January 2017, were duly made available by the plaintiff to the defendant together with the invoices/credit notes referred to therein.
>
> 10. The defendant did not at any time report any error in any such commission statement to the plaintiff.

[13] The summons was served on the applicant on 10 March 2017. The applicant was already aware well before then, however, that there were problems with his commission account. He avers that the summons came as 'a bolt out of the blue' because he had been engaged in trying to resolve the issues with the respondent's management.

[14] In this regard the applicant explained in his supporting affidavit that at the suggestion of a certain Ms Karin Koegelenberg, a broker consultant employed at Halcypix (Pty) Ltd, a business enfranchised by the respondent to provide service and support to independent financial advisors like the applicant, he had agreed to assist certain unregistered persons to market the respondent's products using his broker code on a commission sharing basis. He averred that the arrangement had been that he would pay these so-called 'sub-brokers' 70% of the commission earned in respect of the business generated by them, whilst he would retain the balance.

[15] The applicant has conceded, as he had to, that quite apart from the statutory contraventions that attended this arrangement,[5] it had also been in breach of his contractual obligations to the respondent.[6] He would not have been entitled to the payment of commission on business written in breach of the relevant provisions of his broking agreement.[7] Accordingly any payments that he had received in this connection were reversible by the respondent in terms of clause 19.1.1 of the agreement.

[16] It is evident if regard is had to the information on annexure PC4 to the respondent's particulars of claim, which the applicant has not disputed, that the calculation of the respondent's claim is predicated on the reversal of certain credits to his commission account post August 2015. It is evident if one compares the information on annexure PC4 to that reflected on the copies of the monthly commission statements annexed as part of annexure PC5 to the particulars of claim that the detail of the reversals was to be found in the invoices identified by date and

---

[5] The so-called 'sub-brokers' had not been appointed or authorised to act as financial service providers or representatives in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 ('FAIS').

[6] In terms of clauses 6 and 7 of the applicant's contract with the respondent, he was responsible for ensuring that the particulars of any sales person operating on his commission account were notified to the respondent and he was forbidden to permit any such person to market the respondent's products until the respondent had allocated him or her a sales person's sub-code on the applicant's commission account.

[7] Clause 6 of the agreement set forth the following pertinent provisions in sub-clauses 6.1, 6.3 and 6.4, respectively ('die Makelaar' refers to the applicant and 'OMMV' to the respondent):

6.1 *Die Makelaar moet ten opsigte van elke verkoopspersoon, OMMV se standaardvorm 'Besonderhede van Verkoopspersoon' voltooi sodra die verkoopspersoon deur die Makelaar in diens geneem of aangestel word.* (Eng. The broker must complete OMMV's standard form "Particulars of Salesperson" in respect of every salesperson as soon as the salesperson is taken into employment or appointed by the broker.)

6.3 *Die Makelaar mag nie toelaat dat 'n verkoopspersoon finansiële dienste ten opsigte van die produkte lewer nie tensy en totdat OMMV 'n verkoopspersoon-subkode aan sodanige verkoopspersoon toegwys het ingevolge klousule 7.2:* (Eng. The broker may not permit a salesperson to provide financial services in respect of the products unless and until OMMV has allocated a salesperson-subcode to such salesperson in terms of clause 7.2.)

6.4 *OMMV mag nie vergoeding aan die Makelaar betaal nie ten opsigte van aansoeke wat deur 'n verkoopspersoon voorgestel is:*

6.4.1 *indien die vereistes van klousule 6.1 nie nagekom is nie;*

6.4.2 *indien OMMV geweier het om 'n verkoopspersoon-subkode aan sodanige verkoopsperoon uit te reik;*

6.4.3 *wie se aanstelling deur die Makelaar beëindig is; of*

6.4.4 *wie ingevolge FAIS verbied of verhinder word om finansiële dienste te lewer.* (Eng. OMMV may not pay any remuneration to the broker in respect of applications presented by a salesperson:

6.4.1 if the requirements of clause 6.2 have not been complied with; or

6.4.2 if OMMV has declined to issue such salesperson with a salesperson-subcode

6.4.3 whose appointment has been terminated by the broker; or

6.4.4 who is forbidden or restricted in terms of FAIS from providing financial services.)

document number on the commission statements. The indications on the evidence are that the relevant debits probably constitute the reversal of commissions paid in respect of business written irregularly by certain 'sub-brokers' whom the applicant had irregularly allowed to use his commission code. The applicant averred that he had relied on Ms Koegelenberg to ensure that the required formalities were complied with, but, as pointed out by the respondent, it was not open to the applicant to raise any failure of his expectations in that regard against the respondent's entitlement to reverse the commission payments. He put himself at risk by breaching his contract with the respondent and allowing others to use his commission code.

[17] It would appear that the respondent picked up problems arising out of the applicant's aforementioned unlawful conduct in or about October 2016, and that the applicant had been informed accordingly at the time. It is common ground that a meeting was convened at the respondent's offices on 2 November 2016 to discuss the irregularities that had been discovered at that stage in connection with four affected policies that had been written under the applicant's commission code. The meeting was attended by the regional manager of Old Mutual Franchises, Mr Jonathan Perumal (who deposed to the respondent's principal opposing affidavit in the applications), Mr Brent Small, a forensic investigator in the respondent's employ, Mr Andries Snyman, the manager of Halypix, and Ms Koegelenberg.

[18] The applicant attached to his supporting affidavit a copy of an email that he sent to Mr Perumal after the meeting. The gist of the email is that the applicant undertook to regularise the registration and training of the 'sub-brokers'. Inconsistently, with what he described in his affidavit about commission sharing, the applicant stated in his email to Perumal that '*Ek doen dit slegs om hulle te help en nie vir my eie gewin nie. Na 30 jaar in die bedryf, is dit my misie (sic) om ander mense te help en hulle 'n kans te gee op sukses in die lewe*'.[8]

[19] The applicant's commission account was frozen as a consequence of the irregularities that had been discovered. It appears that he sought to investigate the position and resolve the matter with the respondent. In this regard he attached to his supporting affidavit a copy of an email to Mr Perumal, dated 2 December 2016, in which he reported that he was making efforts at progress in this regard. His email did

[8] 'I only did it to help them and not for my own profit. After 30 years in the industry, it is my mission to help others, and to give them a chance at success in life.' (My translation.)

not make any complaint that he was being hampered by a lack of access to his commission account or the documents therein referred to.

[20] It appears that Perumal scheduled a meeting with the applicant for 13 December 2016, but subsequently cancelled it, indicating that it would be held instead in the new year. The applicant wrote to Perumal enquiring when the postponed meeting would be rescheduled. His email, dated 6 January 2017, informed Perumal that he wished to clear the matter up with the relevant parties very urgently '*ten einde alle ongerymhede (sic) asook knelpunte uit die weg te ruim*'.[9] Once again, there was no indication by the applicant in his email that he was being prejudiced by being unable to access the information on his commission account. This is significant because the applicant had, on 3 January 2017, received correspondence from the respondent reportedly informing him that his commission account was in debit in the sum of just over R389 000. He did not attach a copy of this correspondence to his application, so the court is not able to tell whether, or how, the aforementioned information was supported by corroborative detail. The court does, however, take notice that in his email, sent three days after he had been informed about the debit balance on his commission account, the applicant did not complain about the absence of the information he would require to be able to understand it.

[21] The respondent thereafter addressed a letter of demand to the applicant, dated 23 January 2017, in which he was informed that he was indebted to the respondent on his commission account in the sum of R1 189 835,26 as at 15 November 2016. The letter stated '*With regard to details of the debit balance, you would have been contacted by your branch, Old Mutual Consultant and/or obtained the necessary information via your Gateway Internet Statement*'. A copy of the letter of demand was later annexed to the summons.

[22] In his apparent response to the letter of demand – an email to Mr Perumal, dated 30 January 2017, a copy of which was attached to his supporting affidavit in the current applications – the applicant requested the reactivation of his broker's code '*sodat ons kan vasstel of daar enige onreëlmatigheid plaasgevind het en ons instaat te stel om van die polisse te herstel en kontak te kan maak met die kliënte. Indien daar enige een van die verteenwoordigers wat deur my geregistreer is, betrokke was by*

[9] '… to clear all irregularities and obstacles out of the way'. (My translation.)

onreëlmatigheid, hulle dadelik te rapporteer en te skraap by die FSB. Ek kan alleenlik die polisse herstel indien my kode geaktiveer is en ons kan kontak maak met die kliënte. Ons kan die hele situasie omdraai deur die kliënte te besoek en polisse herstel'.[10] There was no mention or complaint by the applicant in the email that he was unable to access his commission statements via 'The Gateway' as indicated in the letter of demand.

[23] It is evident that no response being forthcoming from Perumal to his emails, the applicant sought to arrange a meeting with him through the good offices of Mr Andries Snyman of Halcypix; apparently to no avail. Instead, summons was served on him. The trend of events can have left the applicant under no illusion that his attempts to engage with the respondent to that point had made it in any way amenable to holding back from pursuing the legal redress presaged in its 23 January letter of demand.

[24] The applicant stated that upon receipt of the summons he had a meeting '*on or about 14 March 2017*' with the aforementioned Brent Small, the respondent's forensic investigator. He claims (but Small denies) that Small undertook to '*walk over to the legal department and arrange for the legal action to be stayed pending the finalisation of Old Mutual's investigation*'. The applicant sought to explain his failure to enter an appearance to defend on the grounds of Small's (disputed) indication that the proceedings would be stayed and his belief that judgment would not be taken against him whilst he was in the process of co-operating with Small in the investigation of the irregularities.

[25] It is evident, however, from an email by the applicant to Mr Perumal, dated 22 March, that the applicant had subsequently had a telephone conversation with Perumal on 17 March, in which it appears he again pressed his request for a meeting. The following statement in his 22 March email strikes me as inconsistent with any belief by him that his alleged exchange with Small on or about 14 March had resulted in a stay of the action proceedings: '*Verder sal ek dit hoog op prys stel indien ons die*

---

[10] *'…so that we can determine if any irregularity occurred and put ourselves in a position to reinstate the policies and make contact with the clients. In the event that any of representatives registered by me were involved in any irregularity [we will be able to] report them immediately to the FSB and have them struck off. I can only reinstate the policies if my code is activated and I am able to contact the clients. We can turn the whole situation around by calling on the clients and reinstating the policies.*' (My translation.)

regsaangeleentheid van die Hooggeregshof, soos per aanhangsel, vir eers kan uitstel tot die afhandeling van die ondersoek deur mnr Brent Small'.[11] The applicant makes no mention of any response to his email that might reasonably have led him to understand that his request for a stay of proceedings had been acceded to.

[26] He also omitted any mention in his supporting affidavit of a telephone call that he made to the respondent's attorney on 17 March, or the advice given to him by the attorney that if he disputed the claim he should consult an attorney. In his replying affidavit the applicant claimed, unconvincingly, to have no recollection of the phonecall. In the circumstances the probabilities favour the truth of the respondent's evidence that Small had informed the applicant that he was not able to stop the legal proceedings and that the applicant would have to pursue his request by dealing with Perumal. That would explain why the applicant in point of fact did that; unsuccessfully.

[27] In the context of his telephone conversation with the applicant's attorney and his failure to elicit any favourable response from Perumal to his request for a stay of the proceedings, the applicant must have been acutely conscious of his exposure to having judgment taken against him should he not enter an appearance to defend. His failure to give notice of an intention to defend the claim in those circumstances amounted to a degree of recklessness approaching wilful default.[12]

[28] The applicant's plea for understanding on the basis that he was not versed in legal procedure carries no weight. The content of the summons that was served on him spelled out clearly in language that any literate person would easily comprehend that if he failed to file and serve a notice of intention to defend within the period stated therein judgment as claimed might be given against him without further notice.

[29] No meetings were had with Perumal it would seem. If there had been meetings, the applicant would no doubt have mentioned them.[13] He did say that he

---

[11] '*I should furthermore appreciate it very much if we could hold over the legal proceedings in the High Court, as per the attachment, for the time being until the investigation by Mr Brent Small has been completed.*' (My translation.)

[12] Cf. *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C), 1994 2 All SA 394 (C) for a review of the cases concerning wilfulness in the relevant context.

[13] It does appear from the opposing affidavit deposed to by Perumal that he had a meeting with the applicant sometime in July 2017, but nothing in the papers suggests that anything of relevance transpired at it.

met with Small on 17 May, when he '*provided him with the details of all the sub-brokers*'. He had further contact with Small 'mostly on a weekly basis' thereafter. The applicant gave no indication of the substance of these meetings. He also produced no evidence to suggest that he had pursued the question of obtaining access to his commission statements and the documents to which they cross-referenced.

[30] It appears from his supporting affidavit that the applicant was confronted in early August 2017, just before the service on him of the writ of execution, with a set of 'finalisor declaration forms' used by the 'sub-brokers'. He described these forms as documents that contain 'client information, policy information, including the policy number and commencement date of the policy'. He said that such documents had to be signed by the client, the sub-broker and by himself. He acknowledged that some such documents had been emailed to him for signature by Ms Koegelenberg, but alleged that the number of finalisors presented to him by the respondent's forensic investigator, one James Calitz, substantially exceeded the number that he recalled having signed. He said that he suspected '*that between Koegelenberg and the sub-brokers some fraudulent policies might have been loaded and processed under* [his] *broker code'*. But if there were any policies of which he had no knowledge or was unable to account for, he should have been able to identify them from the list of all the policies that had been issued under his broker's code that had been provided to him by the respondent in March 2017.[14]

[31] The applicant does not contest the respondent's entitlement to have reversed commissions on his commission account. His 'defence', however, is that he has been unable to determine from the summary of transactions on the commission statements attached to the summons 'on what basis the plaintiff has reversed or written back the commission that [had been] credited to [his] commission account'. He averred that he had not been provided with any invoices from which he would be able to determine how the amounts reflected on annexure PC4 to the summons were computed.

[32] I find the applicant's claim to be unable to indicate which of the reversals of commission should not have occurred unconvincing. It is evident on the papers that he was provided with an abundance of information from which he should have been able to make any reconstruction necessary to challenge the extent of his indebtedness

[14] This is evident from the email from Small to the applicant dated 22 March 2017, a copy of which was attached as annexure JP1 to Perumal's opposing affidavit.

to the extent that he was able. His request for the reactivation of his broker code was not to undertake a reconciliation of what was due in terms of his commission account, but to attempt to reinstate certain policies that had lapsed or been cancelled.

[33] Of particular significance is the absence of any evidence that after he had been given the commission statements attached to the summons that he had requested copies of the source documents identified therein. In the absence of any such requests, the applicant's complaint that he did not have access to his commission account from November 2016 – a matter that the respondent has disputed - is feeble to say the least. He also omitted to make any mention in his supporting affidavit that he had on 22 March 2017, apparently in response to a request addressed by him to Brent Small, been furnished with an 'extract of all the policies written under [his] code'. His suggestion in reply that the information was 'insufficient' is implausible. The applicant should have been able to identify from his own records, whether or not he was entitled to commission on the policies so identified,[15] and equally those in respect of which he was not. It is equally apparent that the applicant should have been able to identify any discrepancies between the information supplied to him on a regular basis by Ms Koegelenberg in respect of the policies written by the 'sub-brokers' and that evident from that given to him by Small in March 2017.

[34] But even if I were wrong in this respect, it is notable that there is nothing in the evidence to indicate that the applicant had reverted to Small or anyone else in the respondent's employ for any further information to supplement that which had been provided to him so that he could undertake the required reconciliation. The undertaking of a reconciliation was, after all, the rationale for the moratorium that the applicant alleges he thought he had been afforded by the respondent in the legal proceedings.

[35] The applicant's explanation for his non-compliance with the prescribed time limit left much to be desired. He engaged a firm of attorneys to represent him 'immediately' after he had become aware of the judgment, but subsequently terminated their mandate before any application for rescission had been lodged. He refrained from taking the court into his confidence as to why he dismissed these attorneys. He dismissed the attorneys 'in early September'. The timing coincided

[15] The applicant attached some sample pages from the information supplied to him by Small as annexure GZ18 to his replying affidavit.

more or less with the expiry of the period that had been afforded to him in terms of the subrule to institute the proceedings. He said that in order to minimise legal costs he thereafter tried to make an appointment with Perumal to try to resolve matters. His approach to Perumal was only on 19 September, about a fortnight after the expiry of the time limit for applying for a rescission of the judgment. He was advised on 20 September that Perumal would not agree to the matter being held over and that he should apply to court by close of business on the same day for rescission if so advised. He said that he approached his current attorneys 'in early October' to apply for rescission of the judgment. He offers no cogent explanation for the delay between then and 13 November 2017, when the application was eventually launched.

[36] It should be apparent from what I have said thus far that I have found the applicant's explanations for his failure to have timeously entered an appearance to defend the action and his omission to apply for rescission of judgment within the prescribed time period very weak and unpersuasive. I have also not been satisfied that he has made out a bona fide defence. I am conscious that in the latter respect the applicant did not have to persuade me that he had good prospects of success in the principal case. It would be sufficient if he were able to present facts that on their face would show that he had a triable case.[16] He seems to concede on his papers that he has been unable to do that, but sought to explain that his failure to do so should be understood in the context of a failure by the respondent to have sufficiently accounted to him for the reversals. For the reasons already canvassed I am unpersuaded by the applicant's allegation that he has been hamstrung by a lack of information from being able to calculate the amount. The applicant has given him the accounting that he was contractually entitled to, and more. In the circumstances the applicant's failure to assert a factual basis to disturb the effect of the certificate of balance on which the respondent relied means that he has failed to show that he has a bona fide defence to the claim.

[37] I have given some thought to the appropriate order to be made in the context of my decision to refuse the application for non-compliance with the time limit prescribed in subrule 31(2)(b). I considered whether, having refused condonation, it

[16] Cf. e.g. *Hassim Hardware v Fab Tanks* [2017] ZASCA 145 (13 October 2017) at para. 12, with reference to *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 573 (W) at 575H–576A.

might not be appropriate merely to strike the rescission application from the roll because in a sense a refusal of condonation denoted that the court did not have to engage with it. Upon reflection, I have decided against that course and determined rather that an order should be made dismissing both applications. I arrived at that conclusion because the uncondoned failure to comply with the subrule affords a basis in itself for the dismissal of the rescission application, and also because a differentiated result in two applications that I identified at the outset required adjudication integrally would be artificial. Moreover, a striking off order carries with it the suggestion that the matter might be re-enrolled, whereas the intended result, premised on my overall assessment of both applications, is finality.

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

> The applications for condonation of the applicant's non-compliance with the requirements of rule 31(2)(b) of the Uniform Rules and for rescission of the judgment granted against him in default of an appearance to defend the action are dismissed with costs.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicant's counsel:	M. Neser
Applicant's attorneys:	Von Lieres Cooper Barlow & Hangone Cape Town
Respondent's counsel:	A.G. Christians
Respondent's attorneys:	Fairbridges Wertheim Becker Cape Town