IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

2016.08.26 _____ _____
DATE **SIGNATURE**

CASE NUMBER: 14080/07

DATE: 26 August 2016

MEC FOR THE DEPARTMENT OF HEALTH,
NORTH WEST PROVINCE — Applicant

V

PUKI REBECCA SARAH KADI — Respondent

JUDGMENT

MABUSE J:

[1] This matter conflates two applications, an application for rescission of a judgment granted by this court in favour of the respondent against the applicant on 4 September 2014; and secondly, an application for condonation for the late filing of the application for rescission. According to the evidence in the papers, the application for rescission is brought in terms of Rule 31 of the

Uniform Rules of Court, and according to the supplementary heads of Mr. da Silva, counsel for the applicant, such an application for rescission is brought in terms of Rule 42. This supplementary heads was only handed to Mr. Pienaar, the respondent's attorney, at the commencement of the matter and as a result Mr. Pienaar had to read them while Mr. da Silva was busy arguing the applicant's case. Out of sheer desperation to bring this matter to finality, Mr. Pienaar did not want to object to the lateness of the supplementary heads of argument.

[2] I will deal first with the application for rescission as set out in the evidence by the deponent and supported by a colleague's evidence before turning to the points raised by Mr. da Silva in his supplementary heads of argument. The respondent issued summons against the applicant for a claim in the amount of R1,907,440.58 for alleged medical negligence which resulted in the death of her son. It is common cause between the parties that the trial of the said action was properly enrolled for hearing on 30 January 2012 by which date it was expected that the parties would be ready for trial. On the said date, the office of the state attorney at Mafikeng sent one of its attorneys, one Mr. Luvuyo Ndunyana ("Ndunyana"), to attend to court. The purpose of his appearance, according to the testimony of Rosetta Mamoka Makhamathe ("Makgamathe"), an attorney of this court who now practises as such in the state attorneys' office in Polokwane after having been relocated from Mafikeng to Polokwane, was to seek a postponement of the matter.

[3] The matter was to be heard before Webster J, now retired. The said Ndunyana appeared before the court and informed the court firstly, that he had been instructed to seek a postponement of the matter and, secondly, that he did not have the right of appearance in the North Gauteng Division of the High Court of South Africa, Pretoria. Webster J informed Ndunyana that under those circumstances, he, Ndunyana would not be permitted to appear before the court. It is contended by the said Makhamathe and supported by the said Ndunyana, also an attorney of this court, and now attached to the Special Investigative Unit in Pretoria that, without establishing what Mdunyana meant when he informed the court that he had no right of appearance, the court

proceeded to hear the matter without the applicant being represented at the hearing. It is furthermore contended by Makhamathe and supported by Ndunyana that the applicant did not enjoy legal representation at the said trial simply due to the mistaken belief by both Ndunyana and the court that he had no right of appearance. In his supplementary heads of argument, Mr. da Silva raised, in terms of Rule 42, what he referred to as the four mistakes that Webster J made in his judgment. One of those four mistakes, he submitted, as the first mistake, relates to Ndunyana's right of appearance. This issue has been fully dealt with in the applicant's main heads of argument which have been crafted by a certain Professor P. Madima (SC).

[4] Because the court had informed Ndunyana that he would not appear for the applicant the matter proceeded on an undefended basis. The respondent's legal representative proceeded to lead evidence to prove the respondent's claim whereafter judgment was reserved. After Webster J had considered the evidence before him, he proceeded to craft a judgment. A written judgment by the said judge was handed down or delivered on the 4th of September 2014. According to the evidence of the applicant's witnesses, a copy of the judgment was only received by the applicant and the office of the state attorney at Mafikeng on 26 February 2015.

[5] The applicant now states that in the light of the provisions of s 3 (4) and s 4 (4) of the Right of Appearance Act 62 of 1995, Ndunyana did in fact have the requisite right to appear before the court; that if the court had enquired from him the date on which he was admitted as an attorney; where he practised his profession and whether he had any right of appearance in the High Court in the Province of his employment, it would have arrived at a different conclusion. On this basis the applicant submits that the absence of the appellant's legal representative was not wilful in the circumstances.

[6] It is the applicant's case, therefore, that the applicant's non-representation, at the hearing of the matter, was a procedural irregularity by Ndunyana and the court's mistaken believe that

Ndunyana had no right of appearance before it. As pointed out earlier, Mr. da Silva also raised this point in his supplementary heads of argument. In support of this submission he referred the court to an authority which he had not cited in his supplementary heads, in which the court had held that an attorney who had been admitted in one province had the right of appearance in another province in this country. He conceded, though, that there was nothing that the court could do after Ndunyana had told it that he had no right of appearance. There was therefore no fault on the part of the court that Ndunyana could not appear before it. The applicant applies for rescission of the judgment on the afore going grounds and contends, in addition, that it has a *bona fide* defence.

[7] Despite what Ndunyana told the court, the application for rescission is opposed by the respondent. The respondent's opposition to both application for rescission and the application for condonation are premised on the answering affidavit deposed to by the respondent herself and supported by the affidavit of one Gerhard Johannes Pienaar ("Pienaar"), her attorney of record. Mr. Pienaar, who appeared in this application for rescission for the respondent, is the same Mr. Pienaar who appeared for the respondent at the trial of the matter on 30 January 2012. The respondent's version regarding the events of 30 January 2012 is as follows. The respondent admits that the matter was on the roll for hearing on 30 January 2012. She adds, however, that when the matter was initially called there was no legal representation for the applicant. The applicant does not dispute this allegation. According to the respondent, even before the matter could commence, her legal representative called a certain advocate Chwaro to enquire about the applicant's representation at the hearing. The said advocate informed him that he had not been briefed for the trial. The reason why the respondent's representative called Mr. Chwaro and enquired from him whether or not he did not have any brief to appear for the applicant in the matter was that the said Mr. Chwaro had been part of the team that was present at the pre-trial conference.

[8] The applicant is unable to dispute the steps that the respondent's attorney took to find out why there was no legal representation for the applicant at the trial. Instead, in its replying affidavit, the applicant concedes that it was not ready to proceed to trial on that date. It is puzzling to this court for a party in one breath to say that it was not ready to proceed with the trial of the matter and to allege in another breath, in his founding affidavit, that *"Had Ndunyana been allowed to be heard, and his application for a postponement refused, Ndunyana would have challenge (sic) the respondent's evidence; lead (sic) the evidence of the applicant's witnesses; and particularly highlighted the importance of the expert evidence and opinion of Dr. Linda M Eskell-Blokland which would have assisted the court in reaching its finding."*

[9] I have several problems with the above testimony. On his own version, the applicant was not ready to proceed with the matter. In the premises it is highly unlikely that its witnesses would have been at court. In fact nowhere in his testimony is it stated that its witnesses were present at court on that particular day. Accordingly there is no truth in the applicant's testimony that, given a chance, it would have led the evidence of its witnesses. Secondly, there was no application for a postponement before the court. Although Ndunyana came to court with the instructions to postpone the case which had been properly enrolled for hearing, there is no evidence in the founding affidavit as to the date on which the applicant became aware that he would not be in a position to proceed with trial on the day of the hearing; no evidence of the steps he took when he realised that he would not be ready to proceed to trial. More importantly, there is no evidence that Ndunyana came to court armed with a substantial application for postponement. There is therefore a paucity of material details in the application. A duty is imposed on a litigant, who seeks the indulgence of the court, to honestly disclose all material facts so as to enable it to assess his conduct and to decide whether to exercise its discretion in his favour.

[10] A postponement is not there for the taking. In terms of our practice, in particular of this division, either of the two parties may, by way of a substantive application and notice to his or her opponent before the trial, or even on the day of the trial, apply to court for a postponement of the matter. It should be borne in mind that the granting of an application for postponement is in the nature of an indulgence and that it lies entirely in the court's discretion to grant or refuse the application. There was no application for a postponement before the trial court and accordingly no reason existed why the trial court could not proceed with the matter. Mr. da Silva also was ready to admit that on 30 January 2012, procedurally nothing prevented the court from proceeding to hear the matter. The other problem that the applicant was faced with is that the matter had been properly enrolled; the respondents' witnesses were present at court and the respondent's legal representative had never been warned in advance that there would be an application for a postponement, if ever there was any.

[11] In her testimony the respondent mentioned that during the tea-break a young man from the state attorney's office Mafikeng came and asked her attorney whether the matter could be postponed. That young man, whom they regarded to be Ndunyana, failed to furnish any reasons why the matter should be postponed. The respondent testified that on her instructions the request directed to her for the postponement of the matter was refused. The respondent's affidavit that Ndunyana only spoke to a legal team during a tea-break has not been refuted by the applicant. At any rate it is not the applicant's testimony that he was present when the matter was allocated to Webster J. in the morning.

[12] According to the respondent, her legal representative drew the attention of the court, after speaking to the said Ndunyana, that there was someone from the state attorney's office in Mafikeng in the courtroom. Seemingly the said Ndunyana told the court that he sought a postponement. There was no such application for postponement before the court. When the court made enquiries, he told the court that he had no right of appearance. This evidence is

admitted by the applicant. The problem I have with the evidence of the applicant is the submission by the applicant that the court should have enquired from Ndunyana about the date of his admission as an attorney, where he practised as an attorney, and whether he had the right of appearance before the court. In my view, there was no duty on the court to do so once Ndunyana himself had told the court that he had no right of appearance. It was incumbent upon him to know that he had a right of appearance. Certainly, the court had to accept his word, considering the fact that he came late to court; he appeared before court to seek a postponement without having prepared any substantial application for a postponement; and he failed to provide the court with any explanation why he told the court that he had no right of appearance or why he himself believed that he had no right of appearance.

[13] There is no reason why the state attorney in Mafikeng did not appoint local correspondents to act on his behalf; and no reason has been furnished still why that office did not brief counsel to appear for the applicant. Ndunyana failed to ask for the matter to be stood down while he sought counsel who would have appeared before the court.

[14] I now turn to the question whether the applicant's attorneys were in wilful default. In her answering affidavit, the respondent, who was duly supported by her witness, states that a copy of the judgment was sent to the applicant's attorneys by telefax on 14 September 2014. The applicant has admitted this evidence. Something disconcerting about this testimony of the applicant is the following. In the founding affidavit, in particular paragraph 3.5 thereof, both Makhamathe and Ndunyana testified that the applicant received a copy of Webster J's written judgment on 26 February 2015 and furthermore that the state attorney's office at Mafikeng received such a copy on 25 February 2015. This evidence cannot be reconciled with the evidence contained in the replying affidavit, in particular, in paragraph 30 in which they admit that the respondent's attorneys faxed a copy of the judgment to the state attorney on 14 September 2014. They have not denied that they received a copy of the relevant judgment on 14 September

2014. In the absence of any explanation from them the conclusion is inescapable that they received a copy of the judgment on the day it was sent to the State Attorney's office on 14 September 2014 and were therefore aware from the said date of the judgment against the respondent. The reason why the judgment was never brought to their attention was never explained. It would appear that the judgment was swallowed somehow in the offices of the state attorney as a consequence of what seems to be inexcusable inefficiency on their part. It is, in my view, difficult to regard this as a reasonable explanation.

[15] Clearly there is a material contradiction that called for an explanation. No explanation has been placed before the court with regard to this material inconsistency. The explanation relates only to the period starting from 25 February 2015. The applicant concedes that the application for rescission was 34 days late. The version of the applicant's attorneys that they became aware of the judgment is, for another reason, not correct because a copy of the respondent's notice of taxation was served on them on 19 September 2014. Clearly the applicant has failed to bring this application for rescission within a reasonable time after it had gained knowledge of it.

[16] Does the applicant have any *bona fide* defence

All that the applicant stated about a *bona fide* defence is contained in the following paragraphs of the founding affidavit:

"29 Had Ndunyana been allowed to be heard and his application for a postponement refused, Ndunyana would have challenge (sic) the respondent's evidence; lead (sic) evidence of the applicant's witnesses; and particularly highlighted the importance of the expert evidence and opinion of Dr. Linda M Eskell-Blokland, which would have assisted the court in far-reaching its finding.

30 I respectfully submit that the applicant has a bona fide defence to the respondent's claim and I verily believe that it carries more than an even chance of success.

31 I accordingly pray that the application for rescission be granted with the appropriate order of this court in the event of opposition."

In my view, the applicant has failed to show that it has any *bona fide* defence. Any *bona fide* defence that the applicant had should have appeared in the founding affidavit. On the other hand the respondent has denied that the applicants had any chance of success on either the merits or the quantum. This is so because there is no basis set out for the allegation that it has a more than even chance of succeeding on the merits of the case. I agree with the respondent's view that if regard is had to the founding affidavit the only aspect that it dealt with is the alleged non-presentation of the applicant at the trial. This allegation, in my view, does not relate to the merits of the case but to a procedural issue. There is no case made out by the applicant that the quantum was wrongly awarded. During his argument, Mr Pienaar told the court that on 30 January 2012, all that the court had to do was to listen to the evidence on quantum. In **Smith v Saambou 2002 (6) S A 346 (SE)**, the court stated that *"Where the applicant has provided a poor explanation for default, a good defence may compensate. In circumstances where the strength of the defence on the merits becomes crucial, the Applicant must furnish sufficient information to satisfy the court that he or she has a good defence.... The court has a wide discretion in evaluating good cause in order to ensure that justice is done."*

[17] It is the respondent's case that she will suffer severe prejudice and irreparable harm if the application is granted. This is so because of the time that has elapsed. All the expert opinions are now out-dated and the trial will have to be heard afresh and the costs will more than ever double. More importantly the respondent's crucial witness, one Dr. Vorster has died. The fact of the death of Dr. Vorster is that, in fact, she will be denied proper redress. Now lately evidence has subsequently sufficed that one, Professor Jacobus Pienaar, who would have been one of the respondent's key witnesses at the trial of the matter, has now emigrated from South Africa to Sweden where he is now attached to the University of Stokholm. This cannot be compensated by any order of cost.

"There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have disastrous effect upon the observance of the Rules of this Court. Consideration ad misericordiam should not be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which failure to comply with the Rules of this Court was due to neglect on the part of the attorney." See **Saloojee and Another v Minister of Community Development 1965 (2) SA 135 [A.D] at p.141B-D.**

[18] On the question of the application for condonation it is the respondent's view that such application should be refused as a result of the applicant's non-compliance with the prescribed time periods of this court and furthermore as a result of an inordinate delay occasioned by the applicant. The applicant has failed to explain in detail why there was such a long delay. In essence, the only dispute in the application relates to the quantum. A litigant should, whenever he realises he has not complied with a Rule of Court, with haste apply for condonation. In the circumstances of this case, I find it difficult to justify condonation unless the applicant has established strong prospects of success.

[19] In his supplementary heads and in support of the application in terms of Rule 42 of the Uniform Rules of Court, Mr. da Silva raised, over and above, Ndunyana's right of appearance, the following aspects as three mistakes that Webster J made in his judgment:

19.1 that on studying the pleadings which have been provided by the respondent, it is clear that the respondent's case in the court *a quo* was based on emotional shock. The claim against the first defendant (the Road Accident Fund) is set out at paragraph 10.3. It is specifically pleaded that the plaintiff experienced pain, shock, trauma, psychiatric and psychological trauma and emotional impact. This was also pleaded in paragraph 21.2 in regard to the alternative claim against the second and third defendants.

19.2 Relying on the law of delict (6th Edition by Neethling, Potgieter, Vorster) where the authorities do not refer to emotional shock but to psychological lessions, and also on **Barnard vs Santam Bpk 1999 (1) SA 202 (SCA)**, Mr. da Silva contended that the respondent did not lead psychiatric evidence in the court *a quo*. There is no merit, in my view, on this point because the respondent herself testified and tendered the relevant evidence.

[20] The third mistake that Mr. da Silva submitted that he discovered was that on studying the pleadings there is no allegation that the second defendant (the applicant) was vicariously liable for the conduct of Mapeka. Even if such allegation was made, it was denied, so he developed his argument. The judgment contains, on p 6, the following:

"Professor Vorster further testified that on the basis of the probability her present condition is linked with the instant of the death of her son."

[21] Finally it is contended that it is clear that the claim with the first defendant, the Road Accident Fund, was settled. The point made by the applicant is that the court *a quo* should have taken this amount into account in determining the amount payable by the applicant. It is submitted that the court *a quo* failed to take the payment by the first defendant into account in determining the amount payable by the applicant.

[22] This, in my view, is no ground for setting aside the judgment which was properly granted. If the applicants are disgruntled by that fact, Rule 42 provides for another manner of correcting orders without having to set aside the judgment granted. In the result I see no merit in this point.

[23] In my view the office of the state attorney dismally failed to act professionally in this matter. The attorney who handled this matter should, in my view, be reported to his or her professional body. The fact is that the matter was at times handled with disregard of the standards expected of

officers of this court by failing to brief counsel for the trial. Ndunyana came to court to seek a postponement, well-knowing that he did not have the right of appearance. He failed to make any alternative arrangement for someone with the right of appearance to argue a postponement or failed to appoint someone to attend trial after the court refused him the right to appear. He failed to bring an application for rescission within a reasonable time. The applicant also failed to comply with the Rules of this Court when it launched its application for leave to appeal. The applicant '*'cannot seek relief on the ground of their attorney's failure to comply with the Rules of Court, because those Rules were designed also to protect the opposing party."* **See De Wet and Others v Western Bank 1979(2) SA 1031 [A.D.] at p.1034D-E.**

[24] I indicated to the parties during the hearing of this application for rescission that I intend directing that copies of all the relevant documents pertaining to this matter be forwarded to the Law Society of the Northern Provinces so that it could conduct an investigation into the conduct of the attorney or the attorneys who handled this matter on behalf of the applicant. State Departments cannot be expected to pay, in addition, costs occasioned by the negligent conduct of its professional staff. The order of costs will therefore be postponed sine die pending a receipt of a report from the Law Society of the Northern Provinces. In the meantime the following order is made:

1. **The applications for rescission of the judgment and for condonation are hereby dismissed.**
2. **The issue regarding costs is postponed sine die pending receipt by this Court of a report from the Law Society of the Northern Provinces.**
3. **It is hereby directed that the Registrar of this Court should forward all the documents relating to the above matter to the Law Society of the Northern Provinces.**
4. **The Law Society of the Northern Provinces is hereby directed to conduct an investigation into the conduct of the attorneys who were handling this matter on**

behalf of the applicant and to submit, thereafter, its findings to the Registrar of the Court as soon as possible.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant:	*Adv. CA da Silva (SC)*
Instructed by:	*The State Attorney*
	c/o State Attorney Pretoria
Counsel for the respondent:	*Adv. SP de la Harpe*
Instructed by:	*Viviers Inc.*
	c/o Potgieter Marais Attorneys
Date Heard:	*25 August 2016*
Date of Judgment:	*26 August 2016*