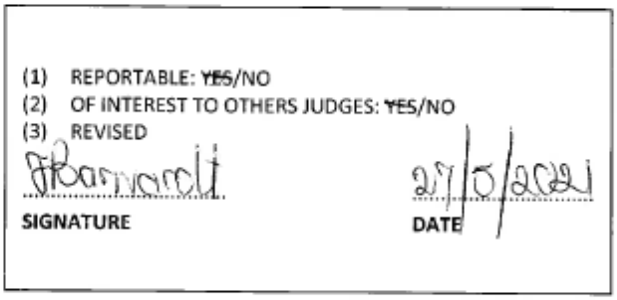
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case nr. 52500/ 2015


(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED
SIGNATURE
27/5/2021
DATE

In the matter between:

ROAD ACCIDENT FUND Applicant/Defendant

And

OLIVE BRENDAN APPLEGATE First Respondent/First Plaintiff

JOANNE HOWARD SWICK Second Respondent/Second Plaintiff

THE DEPUTY – SHERIFF OF PRETORIA EAST Third Respondent

In re

In the matter between:

OLIVE BRENDAN APPLEGATE First Plaintiff / Applicant

JOANNE HOWARD SWICK Second Plaintiff / Applicant

And

THE ROAD ACCIDENT FUND Defendant / Respondent

JUDGMENT

BARNARDT AJ

1.This is an application by the Road Accident Fund for the rescission alternatively variation of an order for interim payment granted in terms of Rule 34A by Sardiwalla AJ on 7 August 2017, on the basis that the order was granted erroneously and incorrect.

2. I will refer to the parties as referred to in the main action, the applicant *in casu* to be the defendant and the first and second respondents to be the first and second plaintiffs.

FACTUAL BACKGROUND

3. The first and second plaintiffs were involved in a motor vehicle accident on 16 September 2013, and they issued summons against the applicant on 7 August 2015.The merits of their claims were conceded on 12 April 2016 and a letter of demand, with all the medical expense vouchers, was forwarded to the defendant on 5 October 2016.

4. On 20 October 2016, a Rule 34A application for interim payment, was issued against the defendant who filed a notice of intention to oppose the application on 12 February 2017. On 20 February 2017, Mokoena AJ granted an order, compelling *inter alia* the defendant to file its answering affidavit on or before 24 February 2017 and the application was provisionally postponed to the opposed motion roll of 7 August 2017.

5. The defendant failed to file its opposing affidavit and on 7 August 2017 Sardiwalla AJ granted the following order:

> "HAVING been addressed by Counsel, having read the documents filed of record and having considered the matter.
>
> IT IS ORDERED THAT
>
> 1. The Respondent is ordered to make an interim payment in the sum of R346 436.34 and $505 779.98 in respect of the First Applicant's past medical expenses; and
>
> 2. The Respondent is ordered to make an interim payment in the sum of R349 306.35 in respect of the Second Applicant's past medical expenses; and
>
> 3. The Respondent is ordered to pay the cost of this application."

6. I pose here to mention that adv. Kgomongwe, on behalf of the defendant in his heads of argument referred to a condonation application for the late filing of the defendant's opposing affidavit in the rule 34A application, which was dismissed and resulted in the application to be disposed of unopposed. However, despite an invitation, during argument, to refer me to the opposing affidavit and condonation application, or to file them even at this late stage, he was unable to do so.

7. In the light of his failure to provide the affidavit and condonation application referred to, the fact that his opponent, adv Roestorf denied that there was a condonation application and especially the fact that no mention of the dismissal of a condonation application is evident from the order granted by Sardiwalla AJ, I accept that the defendant did not file an opposing affidavit and did not bring a condonation application.

8. The defendant, on its own version, tried for the first time in October 2019, 26 months after the order was granted by Sardiwalla AJ, to resolve the 'issue' of the interim payment with the plaintiffs' attorneys of record. No settlement could be reached and this

application for the rescission or variation of the order on 7 August 2017 was issued on 13 December 2019.

9. The defendant made the following offer in a letter dated 13 December 2019, being 26 months after the order was granted.

> "6. We are of the view that your clients are only entitled to the amounts in the offer insofar as medical expenses are concerned, but to show the Fund's bona fides in this regard, the Fund is willing to pay into your trust account, in an interest-bearing account, to the benefit of the successful party in this dispute, the amounts as ordered by the court to be paid. This payment is subject to the following:
>
> 6.1 That you agree to the rescission of the judgment and give a written undertaking, not to pay out this money which is in trust, until the dispute is resolved between the parties as to what the entitlement of your clients are in respect of past medical expenses upon proof thereof.
>
> 6.2 That you will pay back the amount to the fund, which is found by the Court, or by agreement between the parties, that your clients are not entitled to, within 7 days from the finalisation of the dispute relating to the past medical expenses;"

10. The rescission application was opposed and because the plaintiffs' answering affidavit was filed late, a formal condonation application, which was opposed by the defendant, had to be brought. This application was considered and granted by Rabie J on 16 November 2020.

RELIEF CLAIMED

11. As indicated above, the defendant in its notice of motion, applied for the rescission of the interim order "on the basis that the order was granted erroneously and incorrect",

according to the heading of its founding affidavit “in terms of Rule 42 and the Common Law” and according to the purpose of the application, “to ‘correct’ an obviously wrong judgment or order based on incorrect evidence put before court”.

12. On behalf of the defendant it was alleged that the vouchers for past medical expenses, submitted by the plaintiffs in the Rule 34A application, included non-substantiated and factually incorrect vouchers and therefore this court was requested to “exercise its general discretionary power to correct an error in its judgment or order.”.

13. The defendant, in passing, indicated that it always has,” endeavored to settle this issue and has never shield away from accepting liability for past medical expenses, but it has to intervene now, notwithstanding the Court order, in this matter, in the interest of justice and to protect public funds.”

14. The defendant did not apply for condonation for the late bringing of the rescission application, did not address its failure to file its opposing affidavit to the Rule 34A application or provide any reasons for bringing this application 28 months after the order was granted on 7 August 2017. It also opted not to file a replying affidavit after receipt of the plaintiffs’ answering affidavit.

RECISSION IN TERMS OF RULE 42

15. Rule 42(1)(a) of the Uniform Rules of Court provide for the rescission and or variation of an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. An order is erroneously granted if it was legally incompetent for the court to have made such an order, if there was an irregularity in the proceedings or if the court was unaware of facts, if known to it, would have precluded it from a procedural point of view from making the order.

16. A judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously within the meaning of this subrule by reason of facts of which

the court was unaware at the time of granting the judgment. As found by Streicher JA in ***Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd***[1]

> *". . . A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence or a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment."*

17. On behalf of the defendant, reliance was placed on the judgment of Makgoka AJ in the matter of ***Dlamini Construction (Pty) Ltd v Future Logistical Solutions CC***[2] where it was found that the applicant established sufficient cause to rescind the summary judgment. The rescission order in the Dlamini-judgment was however granted in terms of the common law and not in terms of Rule 42(1)(a). Makgoka AJ specifically concluded that the summary judgment was not granted erroneously, and that the application cannot be brought in terms of Rule 42(1)(a).

18. The defendant also referred to ***Rossitter & Others v Nedbank***[3] as authority that it did not have to show good cause to have an erroneously granted order rescinded, but this is only the position if the order was in fact erroneously granted.

19. The defendant *in casu* did not pursue its opposition to the Rule 34A application or timeously raised any defences or objections to the application and therefore it cannot argue that the order was erroneously granted merely because it has a possible defence.

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[1] 2007 (6) SA 87 (SCA) - paragraph 27
[2] Saflii (21429/2006) [2007] ZAGPHC 211 (14 September 2007)
[3] Saflii (96/20140 [2015] ZASCA 196 (1 December 2015)

20 I therefore find that the order granted by Sardiwalla J was not erroneously granted and that a rescission application in terms of Rule 42(1)(a) cannot be successful.

21. Although, the only indication that the defendant is bringing the rescission or variation application in terms of the common law is to be found in the heading of its founding affidavit, I will briefly consider the requirements thereof.

RESCISSION AT COMMON LAW

22. A judgment can be set aside in terms of the common law on the following grounds: Fraud, *justus error*, in certain exceptional circumstances when new documents have been discovered, where judgment had been granted by default, and in the absence between the parties of a valid agreement to support the judgment, on the grounds of *justa cause*.

23. It is assumed that the defendant based his application for rescission at common law on the allegation that this court must 'correct' an obviously wrong judgment or order based on incorrect evidence put before court, and that the plaintiffs, by implication committed fraud or was a party to a non-fraudulent misrepresentation.

24. In ***Rosen and Another v Focus Genius (Pty) Ltd***[4] it was held that,

> "[33] In order to succeed on a claim that a judgment be set aside on the ground of fraud, it is thus necessary for the Applicants to allege and prove the following
>
> 33.1. That the successful litigant was a party to the fraud;
>
> 33.2. That the evidence was in fact incorrect;
>
> 33.3. That it was made fraudulently and with intent to mislead; and

[4] (38436/2012) [2017] ZAGPPHC 304 (11 May 2017)

33.4. That it diverged to such an extent from the true facts which had been placed before the Court, that the Court would have given a judgment other than that which it was induced by the incorrect evidence to give.

33.5. It must be alleged and proved that, but for the fraud, the Court would not have granted the judgment."

The defendant *in casu* did not allege or prove any of the above in its founding affidavit.

25. A rescission application at common law is expected to show 'good cause' for the rescission which includes a) giving a reasonable explanation for the default; b) showing that the application was made bona fide; and c) showing that a *bona fide* defence, which have *prima facie* prospects of success, exists.

26. In matters of this nature, the terms "*sufficient cause*" and "*good cause*", are almost identical or used interchangeably. In ***Vilvanathan and Another v Louw NO***[5] , it was held that:

"*The Appellate Division and the Supreme Court of Appeal have laid down that at common law 'it is clear that in principle and in the long-standing practice of our courts' that there are two 'essential elements of "sufficient cause" for rescission of a judgment by default'.*

These are –

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

[5] 2010 (5) SA 17 (SCA)

(ii) that on the merits (i.e. of the action) such party has a bona fide defence which, prima facie, carries some prospect of success.

Both these elements must be present."

27. As indicated above, the defendant, *in casu,* did not provide any explanation for its default to file its answering affidavit in the rule 34A application, nor any explanation for its failure to bring this rescission application 28 months after the order was granted on 7 August 2017.

28. The defendant was aware of the Rule 34A application, since it filed a notice of intention to oppose, and was granted an opportunity by Mokoena AJ on 20 February 2017 to file its answering affidavit but remained in default and provided no explanation for this failure.

29. The defendant also did not provide an explanation for the period from August 2017 until October 2019 when Mr Fourie visited the offices of the plaintiffs'' attorneys of record to discuss the judgment during round-table discussions. The court is left with no explanation for the default, and I am unable to find in the founding affidavit, or elsewhere, any reasonable or satisfactory explanation of the defendant's default and failure to file its answering affidavit and its failure to bring this application timeously. Which causes me to consider whether the defendant's default was wilful or not.

30. In ***Colyn v Tiger food Industries t/a meadow Feed Mills (Cape)***[6] the following was said about wilful default.

[6] 2003 (6) SA 1 SCA at 9f

> "(a) He (ie the applicant) must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance."

31. While wilful default on the part of the defendant is not a substantive or compulsory ground for refusal of an application for rescission, the reasons for the default remain an essential ingredient of the good cause to be shown and the wilful or negligent nature of the defendant's default is one of the considerations which the court considers in the exercise of its discretion to determine whether good cause is shown.

32. In ***Silber v Ozen Wholesalers (Pty) Ltd***[7], it has been held that the explanation for the default must be sufficiently full to enable the court to understand how it really came about, and to assess the applicant's conduct and motives.

33. Before a person can be said to be in wilful default, the following elements must be shown:

i. knowledge that the action is being brought against him;

ii. a deliberate refraining from entering appearance, though free to do so; and

iii. a certain mental attitude towards the consequences of the default.

34. In ***Markel v Absa Bank Bpk***[8] it was concluded that the true test is whether the default was a deliberate one, ie when a defendant with full knowledge of the circumstances and of the risks attendant on his default freely takes a decision to refrain from taking action.

35. Apart from the defendants' failure to attend to the Rule 34A application, its disregard for its responsibilities towards the public and especially claimants should also be considered.

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[7] 1954 (2) SA 345 (A) at 353A.

[8] 1996 (1) SA 899 (C) at 905C-D

36. The merits of the plaintiffs' claims in the main action were already conceded in April 2016 and it must be accepted that the defendant has considered the matter prior to conceding merits and would have anticipated the plaintiffs' claims for quantum, including their claims for past medical expenses. On behalf of the plaintiffs a request for an interim payment was forwarded to the defendant on 28 July 2016 with no response from the defendant.

37. Even if it is accepted that the defendant was only since 5 October 2016, when the letter of demand was forwarded to it, aware of the plaintiffs' claim for past medical expenses, it opted not to take this court in its confidence by revealing any steps taken to clarify the concerns it had with the past medical expenses of the plaintiffs.

38. It must be deduced, from the bill reviews by Ms Makgobane Welheminah Kolokoto, attached to the defendant's founding affidavit, that she considered the second plaintiff's claim for the first time on 25 October 2018 and the second report regarding the first plaintiff's claim was done on 3 October 2019, without any explanation or correspondence to show that these claims received any attention when they were submitted in 2016.

39. In the light of all the circumstances *in casu*, and absent an explanation to the contrary, I am of the view that the defendant was in wilful default.

40. However, in ***Nedbank Limited v Sipho Albert Mziako*** [9] the Court said:

> *"In deciding whether the reason for the default is reasonable and acceptable the courts usually have regard to whether the applicant was in wilful default or not. Wilful or gross negligence does not necessarily constitute an absolute bar to the grant of rescission; it should rather be a factor, albeit a weighty one, to be taken into account, together with the merits of the*

[9] (1010/09) [2010] ZANWHC 45 (28 December 2010)

> *defence raised to the plaintiff's claim in determining whether sufficient cause for rescission had been shown."*

Therefore, the defence raised by the applicant must also be considered.

41. It is trite law that an applicant in an application for rescission of judgment need only make out a prima facie defence in the sense of setting out averments which, if established at trial, would entitle her or him to the relief asked for. Such an applicant need not deal fully with the merits of the case and produce evidence that shows that the probabilities are in its favour.

42. According to the defence now raised, the amounts claimed in the vouchers which were already submitted to it in October 2016, were non-substantiated and factually incorrect. In this regard the defendant relies on the affidavit of Ms Makgobane Welheminah Kolokoto, a medical assessor employed by the defendant who made general allegations.

43. It is evident from her affidavit that the defence raised by the defendant is at best a provisional defence.

> "The Respondents are only entitled, <u>at this stage</u>, to the amounts in my report, which the Fund, I am advised, tendered.
>
> The Respondent <u>should prove the additional amounts</u> supported by proper substantiating documents and evidence, as the fund is not at liberty and in a position to offer anything more. The claims respectfully <u>seem to be excessive</u>, not corroborated and do not pass the scrutiny of the medical department of the Fund." (my underlining)

44. Considering the provisional, general allegations raised as a defence in circumstances where that defendant had ample time to establish whether the vouchers claimed were in fact incorrect, I am not convinced that the defendant has a *bona fide* defence which, *prima facie,* carries some prospect of success.

45. However, even if the defence raised could be regarded as *prima facie* with some prospects of success, the flagrant disregard by the defendant of the rules, worsened by its failure to tender any explanation compels me to refuse the rescission or variation application.

46. In the matter of ***Grootboom v National Prosecuting Authority and Another*** [10] the Constitutional Court held as follows:

> *"23. It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.*
>
> *50. In this Court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that inquiry include:*
>
> *(a) the length of the delay;*
>
> *(b) the explanation for, or cause for, the delay;*
>
> *(c) the prospects of success for the party seeking condonation;*
>
> *(d) the importance of the issue(s) that the matter raises;*
>
> *(e) the prejudice to the other party or parties; and*
>
> *(f) the effect of the delay on the administration of justice.*

[10] (2014) 1 BLLR 1 (CC).

Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.

51.The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."

47. See also the comments by Opperman J in the ***Rosen and Another v Focus Genius (Pty) Ltd.***[11]

"[24] As I understand the principles to be extracted from these dicta, the fundamental rule remains that an unsatisfactory explanation for the applicant's default cannot be cured by, or be approached more leniently, because she is able to show good prospects of success on the merits. An applicant cannot escape the obligation to provide a satisfactory explanation for her default and rely instead on her prospects of success. The prospects of success will only tip the scales if there is an explanation that meets some basic threshold of acceptability, and the circumstances are such that the

[11] See Footnote 4 supra

doubts that the court has over the sufficiency of the explanation are outweighed by the applicant's strong prospects of success."

47. Considering all circumstances in casu, I conclude that the defendant is not entitled to a rescission or variation of the order of 7 August 2017 at the common law.

PROTECTION OF PUBLIC FUNDS

48. Adv Kgomongwe, on behalf of the defendant, for the first-time during address, argued that this court has a duty to protect public funds and should therefore grant rescission even though the defendant has failed to meet the requirements for rescission in terms of Rule 42(1)(a) or common law.

49. He referred this court to the judgement by Weiner AJA in ***PM obo TM v Road Accident Fund***[12] with reference to the duty of courts in respect of public funds.

> *"[34] The RAF is an organ of state, established in terms of s 2 of the Road Accident Fund Act 56 of 1996 (the Act). It is thus bound to adhere to the basic values and principles governing the public administration under our Constitution. Section 195(1) requires, inter alia, that '[a] high standard of professional ethics must be promoted and maintained'; and that '[e]fficient, economic and effective use of resources must be promoted'*
>
> *[35] In cases involving the disbursement of public funds, judicial scrutiny may be essential. A judge is enjoined to act in terms of s 173 of the Constitution to ensure that there is no abuse of process. Judges in all divisions have expressed concern that in many RAF cases, there is an*

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12 Saflii 91175/20170[2019] ZASCA 97 (18 Junie 2010); 2019 (5) SA 407 (SCA)

> *abuse of process. Settlements are concluded where, for example, the substantial damages agreed to bear no relation to the injuries sustained."*

50. I agree that courts have a duty to protect public funds, but any reliance hereon *in casu* is misplaced. The defendant, being a public entity, failed blatantly to promote and maintain a high standard of professional ethics and efficient economic and effective use of resources and is the author of its own problems. To expect of this court to disregard the rules of law and legal principles, merely to assist the defendant "to protect public funds" will be an abuse of process and cannot be justified.

51. Cognisance should also be taken of the fact that in terms of Subrule 10 of Rule 34A a court may, in granting a final order, order repayment of the interim payment or part thereof. It is therefore clear that the defendant still can convince the trial court of its allegations that the vouchers are incorrect and or unsubstantiated.

COSTS

52. On behalf of the plaintiffs I was requested to grant a punitive cost order against the defendant. It is an accepted legal principle that costs ordinarily follow the result and a successful party is therefore entitled to his or her costs.

53. The general rule is that costs follow the event, which is a starting point. The guiding principle is that costs are awarded to a successful party to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation.

54. In ***Nel, Appellant v Waterberg Landbouwerkers Kooperatiewe Vereniging Respondent***[13], the following was stated in relation to costs on an attorney and client scale:

> '*The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising*

[13] 1946 AD 597 at 608

either from the circumstances which give rise to the action from the conduct of the losing party, the court, in a particular case considers it just, by means of such an order, to ensure more effectually that it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation."

55. It is also an accepted legal principle that cost is in the discretion of the court. The basic rules were stated as follows by the Constitutional Court in ***Ferreira v Levin NO and Others***[14]:

> *"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first."*

56. I considered granting a punitive cost award in favour of the plaintiffs, given the history of the delays occasioned by defendant in this matter. However, in the exercise of my judicial discretion, I am not inclined to make a punitive cost order as requested by plaintiffs.

ORDER

1. The application for rescission of the order by Sardiwalla AJ on 7 August 2017 is dismissed

2. The applicant/ defendant is ordered to pay the costs of the application.

[14] [1996] ZACC 27; 1996 (2) SA 621 (CC) at 624B—C (par [3]).

JBarnardt

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ACTING JUDGE JF BARNARDT

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 May 2021.

APPEARANCES

For the applicant: Adv. M Kgomongwe

Instructed by: Sekati-Sekati Inc.

For the respondents: Adv AC Roestorf

Instructed by: Malcolm Lyons & Brivik Inc

Date of hearing: **8 March 2021**

Date of Judgement: 27 May 2021