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

CASE NO: 13183/2015

In the matter between

ROAD ACCIDENT FUND APPLICANT

AND

MCDONNELL JOHANNA ELIZABETH RESPONDENT

In re:

MCDONNELL JOHANNA ELIZABETH PLAINTIFF

AND

ROAD ACCIDENT FUND DEFENDANT

Date of hearing: 23 February 2022
Date of Judgment: 09 June 2022 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

[1] This is an opposed application wherein the applicant (RAF) sought an order rescinding and setting aside an order made on 7 December 2020. The application

was based on the common law and the applicant sought that the common law be developed in accordance with the provisions of section 39(2) and section 173 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) (the Constitution). The applicant's case was that the inherent power of the court as envisaged in section 173 of the Constitution extended to rescission proceedings in appropriate circumstances, where serious injustice would otherwise result, and that this was such a case.

[2] The basis of the opposition was that the real purpose of the application was an attempt to revisit the merits of the respondent's claims. The merits had been pronounced upon and no appeal had been lodged. The respondent's case was that the application constituted a second attempt to appeal the order granted, which was not only impermissible, but was an abuse of process.

[3] The issue is whether a judgment granted on 7 December 2020 where RAF elected not to participate in judicial proceedings, stood to be rescinded. The condonation application is granted.

[4] The applicant used to constitute a panel of attorneys to assist in litigation in the event of claims not settled. In November 2019, the applicant did not extend the tenure of its panel of attorneys as part of its strategy to reduce costs. According to the applicant, this was after an observation that the costs associated with these panels were too high and detracted from the main focus and object of its core mandate, which was to pay for reasonable compensation to victims of motor vehicle accidents. The new model was to ensure that there would be more funds available to compensate the ever-growing number of claimants who were victims of motor vehicle accidents.

[5] The applicant alleged that it had noted that the courts had begun exercising a greater duty and judicial oversight to ensure that awards were fair, reasonable and justifiable on the facts. The applicant alleged that the short-term consequence of the change of strategy was that the applicant was not represented at court in disputed matters which proceeded to litigation. The applicant's employees were not officers of the court and did not have the statutory mandate or other authority to make

representations in court. The claims that the employees handled were not limited to the province where the employee was found in the administration of the claims. According to the applicant, it was practically impossible for the employees to attend court proceedings.

[6] The respondent was injured in a motor vehicle accident on 3 December 2011. The injuries sustained were in dispute. The applicant's case was that the respondent sustained a whiplash type injury, was not hospitalized and spent a week at home recovering from the injury and thereafter she returned to work. According to the applicant the Health Professions Council of South Africa determined that the whiplash injury sustained by the respondent was not 'serious' and therefore the respondent did not qualify for general damages. The applicant's case was that the respondent managed to go back and fulfil her employment duties after the accident. The case is further that she even resigned from her job to start her own consultancy which remunerated her better than her pre-accident employment. According to the applicant, the respondent was physically able to continue with her pre-accident work. It seems to be conceded however, that she needed the correct ergonomic set up of her work environment to reduce the strain on her neck and surrounding areas.

[7] The respondent obtained a Bachelor's Degree in Natural Science, a Master's Degree in Natural Science, a Certificate in Environmental Management and completed a course in Applied Economics and an Environmental Economics Executive Course. At the time of the accident, she was employed as a Deputy Director African Programme at South **South** North Projects (Africa) and remained in the position until her resignation in 2013. After her resignation she became a self-employed consultant.

[8] The respondent's case was that she sustained blunt trauma to the head, face and right shoulder and had a cervical spine extension trauma. She was admitted to hospital and discharged on the same day after treatment. On 4 December 2011 she was treated at Umhlanga Hospital which treatment included pharmacological pain management. On 23 July 2013 she underwent surgery following symptoms related to thoracic outlet syndrome. The surgery involved the removal of her first rib but she still suffered with related pain post-operatively. She presented with a pain disorder

which was permanent in her life. The quality of her life had been significantly and permanently compromised by the injury and some 30% of her energy was consumed in managing her pain.

[9] The projection on the respondent's future business and earnings growth and the impact of factors like market needs, competition, economic climate and others for purposes of properly quantifying the claim for loss of earnings or earning capacity was in dispute. The nature of the disputes led to the procurement of a number of medico-legal reports from various experts. In some instances the parties procured joint minutes between the experts. The dispute also remained as to general damages, the nature and the extent of the limitations that the injuries caused on travel, work and income. As a consequence, the quantum of the claim remained in dispute. Attempts at settlement were not successful. The matter was properly set down for trial on 7 December 2020 and both parties were aware of the set down. When the presiding judge noted the absence of representation for the applicant, she caused the claim handlers to be contacted and invited, but the attempts did not produce any representation.

[10] The applicant was absent and the judgment was made in default. The respondent, her employer at the time of the accident, the physiotherapist and the actuary testified. The expert opinions of her occupational therapist and the industrial psychologist were tendered into evidence. Having considered the papers and the evidence and having heard the respondent's counsel, Magona AJ made the order against the applicant in favour of the respondent. The order included payment of R6 754 879-33 and the rand equivalent of 353-41 British pounds, an undertaking by the applicant to compensate the respondent for future medical costs in respect of the injuries, taxed or agreed costs including costs attendant upon obtaining payment of the capital amount, qualifying expenses of identified expert witnesses, costs of counsel, interest on the capital amount 14 days after the date of the order and on the costs 14 days after the date of taxation or agreement of the costs. The respondent was declared a necessary witness and entitled to reimbursements of her travelling and accommodation costs in respect of attending consultations with experts and to attend trial.

[11] The applicant cancelled the legal panels and as a result its previous attorneys had to withdraw from the record. The applicant alleged that it was simply unable to appoint another firm of attorneys. This inability is unexplained. Furthermore, the applicant relied on its claim handlers to administer the claim, who the applicant knew, were not registered by the Legal Practitioners' Council and could not accordingly represent the applicant in court. The applicant was aware of the set down, and elected not to be represented at the hearing. The applicant's own case is that the rescission is applied for, primarily, because the quantum is in excess of R5 million, and because of the quantum the Chief Operating Officer is not prepared to sign off on the payment.

[12] The applicant alleged that its liabilities continue to grow under a restrained economy and that although it showed a surplus in the financial year ending March 2021, it still has an accumulated deficit and actuarial liability of billions of rands. It not managed properly, its finances may collapse, which will undermine the object of the RAF Act. This will threaten the constitutional rights of persons that suffer injuries and death pursuant to the driving of motor vehicles including their dependents. It is against this background that the applicant brought this application in the public interest as envisaged in section 38(d) of the Constitution. The alleged that it is also motivated in this application, by the need to be assisted by the courts to manage and fulfil its objects and to pay fair and reasonable compensation, determined by a fair legal process.

[13] In *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) it was said:

"Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted in absentia, into one erroneously granted."

In *Lodhi 2 Properties Investments CC v Bondev Developments* 2007 (6) SA 87 at para 27 it was said:

“[27] Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court which grants a judgment by default like the judgment we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defense: 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 give notice of an intention to defende, 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 on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.”

[14] At para 103 the court continued as follows in the *Zuma* matter:
“If our law, through the doctrine of peremption, expressly prohibits litigants from acquiescing in a court’s decision and then later challenging that same decision, it would fly in the face of the interests of justice for a party to be allowed to wilfully refuse to participate in litigation and then expect the opportunity to re-open the case when it suits them. It is simply not in the interests of justice to tolerate this manner of litigious vacillation. After all, that is why peremption has crystallised as a principle of our law, …”
Earlier on in the judgment the court had said from para 101:
“[101] It is trite that the doctrine of peremption finds application across our legal landscape. The doctrine tells us that “[p]eremption is a waiver of one’s constitutional right to appeal in a way that leaves no shred of reasonable doubt about the losing party’s self-resignation to the unfavourable order that could otherwise be appealed against”.[77] The principle that underlies this doctrine is that “no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed, to blow hot and cold, to approbate and reprobate”.[78] Notwithstanding this, our law does allow for some flexibility where policy considerations exist that militate against the enforcement of peremption. [79] Although the doctrine has its origin in appeals, the doctrine and its principles do apply equally in the case of rescission.

[102] I have reservations about extending the application of the doctrine of peremption to the present circumstances, where the alleged acquiescence occurred before the judgment was finalised. It is not wholly fair to state that Mr Zuma acquiesced in the judgment by acting in a manner synonymous with an intention to abide by it. In fact, as soon as the judgment was handed down, he made every effort to counter it.

[103] Nevertheless, the underlying principles of peremption do resonate."

[15] The applicant brought this application under the common law. In *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764I – 765F it was said:

"The appellant's claim for rescission of the judgment confirming its rule *nisi* cannot be brought under Rule 31(2)(b) or Rule 42(1), but must be considered in terms of the common law, which empowers the Court to rescind a judgment obtained on default of appearance, provided sufficient cause therefor has been shown. (See *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042 and *Childerly Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163.) The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. (See *Cairn's Executors v Gaarn* 1912 AD 181 at 186 *per* Innes JA.) But it is clear that in principle and in the long –standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:

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

(ii) That on the merits such party has a *bona fide* defence which, *prima facie,* carries some prospect of success. (*De Wet's* case *supra* at 1042; *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A); *Smith NO v Brummer NO and Another; Smith NO v Brummer* 1954 (3) SA 352 (O) at 357-8)

It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default

other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

[16] Noting the challenge, the applicant asked this court to consider using its powers as envisaged in section 173 of the Constitution. Section 173 of the Constitution reads as follows:
"Inherent power
173 The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own processes, and to develop the common law, taking into account the interests of justice."

[17] It seems to me that the applicant's Executives exaggerated their importance, so much so that they elevate their views and their designed processes to be above the judicial system or Judiciary of the Republic or at least a court order. During the period 14 December 2020 and 29 March 2021 the applicant's employees fed the claim into what is called "requested not yet paid system [RNYP]", which appears to be one of the electronic applications on the applicant's payment processing systems. It is alleged to be "a system of checks and balances introduced to avoid fruitless and wasteful expenditure and to ensure that the award made in respect of any claim is fair and reasonable".

[18] The applicant did not earnestly attend to the litigation in this matter and did not regard the 7th December 2020 as a date to intensely and seriously engage the respondent in its dispute with her before Magona AJ. The RNYP system, this court was told, requires compilation of a report, detailing the make-up of the award and the factors and evidence that supports such an award. The system also requires the assessment and consent of different executive strata to ensure that the award is fair and reasonable. The system may be a good instrument in the strategy to significantly reduce litigation costs and as a tool to encourage settlement of claims without the necessity of litigation where it is avoidable. It can however not be competition, if not some review, assessment and monitoring system for the courts, in disputed claims, on what is a fair and reasonable award. RAF cannot be players and off-the-field

audio-visual referee in the same game. RAF cannot be allowed to play hide when they are served with court processes, and expect the applicant to join in the game and play seek when the order is against RAF.

[19] RAF terminated the mandate of its attorneys and elected not to be legally represented, instead choosing to deal directly with claimants and their attorneys in this matter. The cosmetics of suspending claim handlers for not attending the hearing, when RAF itself said in the papers before the court that such claim handlers have no mandate to attend and represent RAF at the courts, is simply meant to improve the appearance of the Executives, but does not undo the hideous face of a decision not to earnestly engage with such a big claim before the courts through representatives who by law could intelligibly add value to the administration of justice. In my view, the assessment, evaluation and monitoring of claims, are all internal milestones within a system which require skills and structures, and should happen as soon as a claim is lodged and not after judgment. Most importantly where summons have already been issued, such processes must give due regard to court processes served on RAF.

[20] At para 99, it was said in *Zuma:*

“[99] The Commission, HSF and CASAC all persuasively demonstrated that any development of the grounds of rescission would have profoundly detrimental effects on legal certainty and the rule of law. I too, cannot see how it would be in the interests of justice for this Court to expand the definition of “error” to provide for any allegation of unconstitutionality. We must ponder the possible outcomes of doing so carefully, for if we do not, this Court might soon find itself inundated with similarly unmeritorious applications, all raising any number of allegations of unconstitutionality. Lest we wish to invite every litigant who has enjoyed their day in this Court, but nevertheless found themselves with an order against them, to approach us again armed with a so-called rescission application that would have us reconsider the merits of their case, it is sagacious to entertain this matter no further. The principles of finality and legal certainty lie at the heart of this case, and I fear that significant damage has already been done to these principles.”

[21] Disputed claims are determined in an adversarial litigation. Judicial oversight includes some element of being inquisitorial, however, our adjudication system even where it has tenets of an enquiry persists with adjudication of unsettled claims by way of evidence. RAF introduced its own style of engaging with our adversarial system of litigation, and was comfortable to pursue their case where for all intents and purposes its employees made representations to the courts. The judicial officer, in this case, invited RAF and it did not come. RAF has a duty to properly, competently and expeditiously evaluate claims and settle them where possible. Where there is a dispute, it is no better than any litigant and deserve no specially demarcated lanes of due process different from other litigants. Because of large volumes of RAF matters, courts have developed mechanisms to process the disputed claims. However RAF cannot, beyond these mechanisms, begin to write its own laws.

[22] There is no basis to convert our law of rescission to a new purpose and to especially construct new principles which will start to exist, simply to accommodate RAF's failure to attend court and, effectively represented, to deal with a disputed claim of an amount of more than R5 million. The fact that RAF is an organ of State exercising public power and performing a public function, whose main object is to ameliorate the plight of victims rendered vulnerable by modern accidents, was no license to disregard a court process. The efficient, effective and economical administration of its resources includes that Executives of RAF should acknowledge its shortcomings and allow RAF to be led by professionals where RAF's own competencies run short. Whilst measures to camp fraud, corruption and inflated awards are welcome, they cannot be a legitimate excuse to disregard our courts.

[23] Development inherently includes growth and advancement. It is different from resurrection. The law of rescission require no development under the circumstances. It does not offend section 39(2) of the Constituion, in my view. In essence, the applicant require that its defence, before Magona AJ made the order by default, be restored to life in circumstances where it chose its own processes at the expense of judicial processes. The interests of justice require that those called upon to answer a case, present themselves and answer the case at the appropriate court which called them. This enhances effectiveness, efficiency, certainty and finality of issues

between parties. The needs of a changing society do not present a contrary view to these factors, which are at the heart of the rationale behind the exception provided by a rescission.

[24]The thinking of the RAF on finality of its claims through judicial pronouncements is very worrisome. It simply wants to have the last word, even after a court order. Paragraph 82 of its Heads of Argument reads:
“82. In this context, the applicant submits that the common law should be developed to allow the applicant greater latitude in applications for rescission, even in circumstances where there has been some degree of judicial oversight in the determination of the compensation payable to a claimant.”
Simply put, the common law should be developed to allow that it should only be when RAF accepts compensation payable to a claimant, that a court order becomes final. RAF pleads for a revolving door where it can circle claimants around the axis, in our courts, where it simply disregards its obligation to attend court to have the issues determined after hearing evidence.

[25] The default was self-constructed. The ‘deliberate mistake’ of not attending court was grounded on some stubborn, militant and ill-advised misdirection. The cosmetic make-up by Senior Counsel in an attempt to cover it up notwithstanding, it cannot please the court, such that it is condoned under the guise of a ‘Constitutional development of the common law’. Courts cannot tolerate even the slightest impression, especially from those seized with the administration of public funds, that there is a constitutionally guaranteed right to plain stupidity. The message should be clear and unequivocal, no one disregards our laws and then creatively seek to rewrite the legal prescripts to have a time of carefree fun in litigation, especially with the lives of the injured and vulnerable.

[26] For these reasons I make the following order:
1. The application is dismissed.
2. The applicant to pay the costs on attorney and client scale, such costs to include the costs of two counsel.

DM THULARE

JUDGE OF THE HIGH COURT