

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

.....
SIGNATURE

.....
DATE

Case No: 2015/07489

In the matter between:

ROAD ACCIDENT FUND

Applicant

And

JOEL MOHALE obo OLWETHU KOKETSO MOHALE

Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 7 December 2022

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] The Respondent's minor child Olwethu Koketso (*the child*) was a passenger in a motor vehicle which was involved in a collision on the 7th of September 2013. The child sustained severe injuries.

[2] On the 27th of February 2015 action was instituted against the Applicant (*the RAF*). When the matter was trial ready it was set down to be heard on the 28th of July 2020 for the determination of the child's claim in respect of future loss of earnings. The merits and the other heads of damages had previously been settled.

[3] On 30 July 2020 Acting Judge Ally heard the matter and delivered his judgment on 18 September 2020 in which he granted judgment in favour of the child in the amount of R4 443 912 (*the judgment*). The RAF was neither represented by a legal representative nor an official during such hearing but the RAF was aware that the matter was on the roll and was proceeding. More about this feature later.

[4] This is an application by the RAF for the rescission of the judgment.

Common cause facts or facts which are undisputed

[5] At the time of the set down of the trial (and to date hereof), the RAF was represented by attorneys Maodi Inc. who remain on record, who have not formally withdrawn and who did not appear for the RAF at the hearing on 20 July 2020 (*Maodi Inc*).

[6] On the 8th of June 2020 a notice of set down for the hearing on 28 July 2020 (*the notice of set down*) had been served on Maodi Inc by e-mail and a read receipt was received by the respondent's attorneys (*Mathopo Attorneys*)¹.

¹ The Registrar had notified Mathopo Attorneys of the trial date on 3 June 2020. The bundle of correspondence at Caselines 009-1 to 009-23 was incorporated by reference into the answering affidavit.

[7] The RAF's manager Ms Linda Cilliers (*'Ms Cilliers'*) was e-mailed on 1 July 2020 and advised of the trial date of 28 July 2020. Significantly, Mr Mathopo on behalf of the respondent expressly advised Ms Cilliers that Maodi Inc no longer responded to his e-mails and he requested guidance as to how the matter should proceed. He also communicated that the matter was proceeding on one head of damages only being 'future loss of earnings', that the other heads of damages had been settled and that the matter had been certified trial ready. Pontsho Rapanyane (*'Mr Rapanyane'*) of the RAF was also copied in on such e-mail.

[8] The correspondence of 3 July 2020 reveals that Mr Mathopo had a telephonic discussion with Mr Rapanyane on that very day and mentioned in that conversation that the hearing of the trial was coming up 28 July 2020.

[9] On 14 July 2020 Mr Mathopo sent a letter to both Ms Cilliers and Mr Rapanyane in which he recorded, amongst other facts, the set down of the trial for 28 July 2020, that he had reserved the respondent's experts to testify at the trial and that the trial was ready to proceed.

[10] A week later and on 21 July 2020, Mr Mathopo e-mailed a host of representatives of the RAF reminding them of the imminent trial. He also e-mailed them all the relevant court bundles including the respondent's medico-legal reports and requested co-operation in compiling the joint practice note, which was to be filed on 23 July 2020.

[11] It is clear from the correspondence that from 1 July 2020 until 21 July 2020, Mathopo attorneys engaged in discussions with the RAF's senior managers, claim handlers and senior claims handlers regarding the imminent matter.

[12] The judgment of Acting Judge Ally records that on 28 July 2020 he had requested the respondent's counsel to liaise with officials of the RAF, that the matter had stood down for an offer to be considered but that it had been rejected.

[13] On the resumption of the trial on 30 July 2020, Ms Cilliers was contacted by Acting Judge Ally's clerk as the court wanted to satisfy itself that the RAF was aware that the matter was proceeding.

The basis of the rescission application and the condonation application

[14] Four reasons were advanced for the rescission: (1) The RAF and its panel of attorneys were embroiled in litigation about the extension of its service level agreement/s and the attorneys refused to hand over their files. This conduct, so the RAF contended, resulted in them not being able to deal with the matter and they did not know that the matter was on the roll. (2) This matter was dealt with by officials of the RAF (not named) who were suspended (placed on special leave) due to the manner in which this file was dealt with. Mr Donald Sibiya (*'Mr Sibiya'*), a representative of the RAF, was only made aware of this judgment on 8 September 2021. (3) Maodi Inc. did not inform the RAF of the trial date and Maodi Inc only told the RAF on 28 July 2020 when the matter was called, this resulted in a hurried settlement proposal being made. (4) The RAF contended that the legal team representing the child had a duty not only to lead the child's case, but that they were also obliged to disclose and deal with the differences in the opinions of the RAF's expert reports which were in their possession, and this they had allegedly failed to discharge.

Litigation History

[15] Maria Rambauli (*'Ms Rambauli'*), the RAF's acting chief operations officer at the time, appointed as such from 1 October 2020, deposed to both the founding

affidavit in this rescission application and to an application for the suspension of the judgment pursuant to a warrant of execution having been issued on the 12th of August 2021, pending the outcome of this rescission application and certain other ancillary relief (*the urgent application*).

[16] The urgent application came before me in urgent court on 21 October 2021 and I made the following order:

1. The Applicant is to make an interim payment in the sum of **R2 100 000** (two million one hundred thousand rand) in respect of the First Respondent's claim for past and future loss of earning, by no later than **Friday, 29th October 2021**. The interim payment will be paid into the First Respondent's attorney's trust account set out below:-.....
2. The Applicant is to serve upon the First Respondent's attorneys an application for rescission or an application for leave to appeal the judgement granted by the Honourable Acting Justice Ally dated **18th September 2020**, by no later than the **5th of November 2021**.
3. The writ of execution issued on **12th August 2021**, pursuant to the judgment of the Honourable Acting Justice Ally dated **18th September 2020** is suspended, pending the finalization of the Applicant's rescission application or the application for leave to appeal.
4. In the event that the Applicant fails to make payment of the interim amount in terms of paragraph 1 hereof or deliver the rescission application or the application for leave to appeal by **5th November 2021**, the First Respondent may proceed with the execution of the judgment of the Honourable Acting Justice Ally dated **18th September 2020**.
5. The Applicant is directed to pay the First Respondent's costs incurred in the application enrolled for hearing on **21st October 2021**, on the attorney and own client scale as taxed or agreed upon. (the order contained the amount and dates in bold)

[17] The amount of R2 100 000 represented the admitted amount ie the amount tendered by the RAF during the period 28 July 2020 to 30 July 2020 but rejected. In the heads of argument filed in support of the rescission application by the RAF, it was submitted that judgment ought to have been granted in the amount of R3 822 273.80. It will be recalled that judgment was granted in the amount of R4 443 912. This rescission thus concerns the amount of R621 638.20.

Discussion

[18] Against the aforementioned background, the RAF approaches this Court to rescind the judgment on the basis that same was erroneously granted in its absence as contemplated in rule Rule 42(1)(a) of the Uniform Rules of Court or that it should be rescinded in terms of the common law.

Rule 42(1)(a)

[19] Rule 42(1)(a) provides that a judgment “*may*” be rescinded on the basis that the judgment was erroneously sought or “*erroneously granted in the absence of any party affected thereby*”. Two requirements must be met. First, there must be a factual error in the judgment of which the court was unaware at the time of the judgment or order. Second, that error must be such that had it been known at the time, it would have precluded the court from granting the judgment².

[20] The mere existence of a defence - whether good or bad, is not an error in the judgment. A court which grants an order in the absence of a Defendant does not do so on the basis that they have no defence. It does so because the Plaintiff is entitled to judgment on the basis that the notice of the hearing was given to the Defendant and the matter was not defended.³

² *Daniel vs President of Republic of South Africa and Another*, 2013 (11) BCLR 1241 (CC)

³ *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd*, 2007 (6) SA 87 (SCA) at para [27]

[21] Crucially, relevant to this matter, Rule 42(1)(a) exists to protect litigants whose presence was precluded, not those whose absence was elected.⁴

[22] The RAF explains its failure to attend the trial as follows: -

‘ A copy of the notice of set down was served on the [RAF]'s erstwhile attorneys of record TJ Maodi Attorneys who at the time despite still being on record, failed to inform the [RAF] of the matter being on the trial roll and only on the trial date did the [RAF] receive communication from their erstwhile attorneys that the matter is before court and that an offer was urgently sought in respect of the loss of earnings.’

[23] The summary of undisputed facts recorded earlier in this judgment demonstrates that this version is an incomplete picture of what had actually occurred. More egregious is the fact that Ms Rambauli was aware, even before the launching of this rescission application, of the communications between the RAF's officials and Mathopo attorneys during the period 1 July 2020 to 21 July 2020 as the correspondence bundle formed part of the answering affidavit in the urgent application. Throughout the correspondence the RAF's officials were reminded of the trial date.

[24] An offer was made between 28 July 2020 and 30 July 2020 which was rejected. There was not even a request by the RAF for a postponement of the trial let alone a substantive application for such relief.

[25] The only plausible inference to draw from these facts is that the RAF elected not to participate during the trial. That election binds it.⁵ The judgment was accordingly not erroneously granted in its absence. It was granted on the strength of the court being satisfied that notice of the trial had been given to the RAF, that the RAF knew that the trial was running (this is why the RAF put together an offer at the

⁴ *Zuma vs Secretary of the State Capture Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State*, 2021 (11) BCLR 1263 (CC)

⁵ *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd*, 2007 (6) SA 87 (SCA) at para [27]

last minute) and the trial Judge took steps to ensure that the RAF was informed of the trial proceeding. There can be little doubt that the RAF made a deliberate decision not to appear at the trial. There is nothing erroneous about the court having granted the relief it did in the light of these facts.

[26] The sole basis upon which the RAF contends to have a *bona fide* defence is that Acting Judge Ally allegedly failed to have regard to the report of the RAF's Educational Psychologist. Whether he was obliged to have done so, I express no view. However, he did have regard to it. That much is evident from paragraphs [11] to [19] of the judgment itself.

[27] No evidence was withheld from the court and no evidence before the court, was not considered.

[28] In any event, if there were grounds for attacking the merits of the judgment as opposed to the way in which the default judgement was obtained the proper procedure would have been to have applied for leave to appeal the judgment and not to have applied for rescission thereof.

The common law

[29] In terms of the common law, an applicant must show "good cause" to have a judgment rescinded. Good cause comprises of two elements: a reasonable and acceptable explanation for the default and reasonable prospects of success on the merits⁶.

[30] The RAF gave no explanation for its failure to have attended the trial. Since it cannot provide any explanation, let alone a reasonable and acceptable explanation, the rescission application must fail. In addition, the RAF's prospects of success on the merits are slim.

Condonation

⁶ *Chetty v Law Society, Transvaal*, 1985 (2) SA 756 (A)

[31] The RAF seeks condonation for the late filing of the rescission application. I have dealt with the substance of the application and on this score the application should fail. However, I would in any event not grant condonation for the late filing of the rescission application for the following reasons: An application based on Rule 42(1) and the common law, is to be brought within a reasonable period of time. The general principle, which is now well established, is that once a court has duly pronounced a final judgment or order it has itself no authority to correct, alter or supplement it. There are, however, exceptions to that rule, amongst them being that, provided the court is approached within a reasonable time of its pronouncing a judgment or an order, it may correct, alter or supplement its own judgment or order, see *Firestone South Africa (Pty) Ltd v Gentiruco AG*⁷.

[32] What would be considered a reasonable time, would depend upon the facts of each case.⁸ In *Roopnarain*⁹, the court order was served on Mr Roopnarain personally on the 6th October 1970, but he only launched his application for rescission on the 26th March 1971, some five months later. The court at page 391 A-B held as follows:

‘In any event even if Roopnarain’s attorneys and counsel were to some extent to blame for the delay in seeking rescission, he himself is not absolved as the delay in this case is so unreasonably long as to be inexcusable.’

[33] In *Gqwetha v Transkei Development Corporation Ltd and Others*¹⁰, a decision dealing with review proceedings and delays in that context, Mpati DP referred with approval to the principles formulated in *Associated Institutions Pension Fund and Others v Van Zyl and Others*,¹¹ in which Brand JA confirmed that the investigation

⁷ 1977 (4) SA 298 (A) at 306 H

⁸ *Roopnarain v Kalamapathy and Another* 1975 (3) SA 387 (D)

⁹ Footnote 8 *supra*

¹⁰ 2006 (2) SA 603 (SCA)

¹¹ 2005 (2) SA 302 (SCA) at para [46]

into the reasonableness of a delay has nothing to do with a court's discretion to condone the delay. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of the case, the delay was reasonable. Although this includes a value judgment it should not be equated with the judicial discretion involved in whether the delay should be condoned. The first enquiry is therefore to consider whether the delay was reasonable, which involves an investigation into the facts and this includes a value judgment. The second enquiry is to consider whether the delay (having determined that it is unreasonable) should be condoned which involves the exercise of a judicial discretion.

[34] As a starting point, the 20 day period provided for in rule 31(2)(b) of the Uniform Rules of Court should be taken as an indication of what might be reasonable.¹² Such time period is of course not prescriptive and what is reasonable will depend on the circumstances of the case.¹³

[35] Mr Mathopo explained in his answering affidavit opposing the rescission application that shortly after the delivery of the judgment on 18 September 2020, his offices served the judgment and order on the offices of the RAF. He has since misplaced such communications but the probabilities are overwhelmingly in his favour that he had done so as the order was the very purpose of the entire litigation. Be that as it may, he explained that a few weeks after the judgment had been delivered, he became aware of litigation between the RAF and the Legal Practice Council ('LPC') and others in which the RAF had sought a grace period of 180 days from date of granting of compensation orders to making payment of such judgment debts. He had decided to await the outcome of that litigation before proceeding with

¹² *Gisman Mining and Engineering Co (Pty) Ltd (In Liquidation) v LTA Earthworks (Pty) Ltd*, 1977 (4) SA 25 (W) at 27.

¹³ *Promedia Drukkers & Uitgewers (Eiendoms) Beperk v Kaimowitz & Others* 1996 (4) SA 411 (C) at 421 F-H.

execution steps. The judgment in the LPC matter was delivered on 16 March 2021 and the RAF was successful although the order was not retrospective in effect and thus had no effect on the judgment in issue.

[36] On 23 April 2021, Mr Mathopo addressed a demand to the claims handler of the RAF of the matter under consideration. On the 20th of August 2021, the RAF's assets were attached and on 8 September 2021, one Mr Sibiya contacted Mr Mathopo to discuss the matter. Mr Mathopo responded on 13 September 2021, forwarding the judgment and the reports (again).

[37] The RAF must have foreseen that a judgment would be granted on 30 July 2020. At best for it, it did not know (on 30 July 2020) for how much the judgment was going to be for (which is of no consequence in an evaluation of the RAF's conduct in relation to a rescission application). After receipt of the judgment in September 2020, it gained knowledge of the actual amount and the terms of the order. However, ignoring all of the foregoing, it got knowledge of the judgment on 23 April 2021, at the latest.

[38] The RAF has not explained why it did nothing about the judgment until the eve of the sale in execution which the sheriff had arranged for 20 October 2021. This is a delay from 30 September 2020 (worst case scenario) or from 23 April 2021 (best case scenario) until 21 June 2021 when the urgent application was launched (best case scenario) and 30 October 2021 when the rescission application was launched (worst case scenario). The RAF must provide an explanation for the entire period of its delay which is 13 months (at worst) or 6 months (at best). It has not done so.

[39] I find that the delay in launching the rescission application was unreasonable. I would not exercise my discretion in favour of the RAF in granting condonation for this unreasonable delay for a host of reasons and circumstances some of which have

been documented above. What I find most egregious is the fact that this litigation was persisted with as against a child under circumstances where the wrong procedure was pursued (if there is an error in the judgment as opposed to the way in which the default judgement was obtained which I have not found). At best for the RAF if there is merit to its criticism of the judgment the appeal procedure should have been followed. Adding to the troubling nature of the RAF's conduct is that it made wild and unsubstantiated accusations against senior practitioners. The rights of the child victim were disregarded by the RAF in this process.

Unfounded accusations.

[40] In *Madzunye and Another v Road Accident Fund*¹⁴, Maya JA (as she then was) reiterated the RAF's responsibilities by stressing that its officials are to administer the funds it collects from the public with integrity and efficiency.

[41] The allegations which underpinned the urgent application were that the legal team for the child did not disclose to Acting Judge Ally that the RAF had filed an expert opinion by an educational psychologist regarding the child's pre-accident potential. This was wrong in that they had disclosed this, but in any event, there was no dispute amongst the experts on the child's pre-accident potential. The allegation was further made that the judgment was based on incomplete information. This too was wrong.

[42] The allegations made and persisted with in this application were made recklessly having regard to the fact that Mr Sibiya had been given access to the Caselines file prior to the launching of the urgent application and could see what had been placed before Acting Judge Ally. More problematic though is the fact that all representatives were in possession of Acting Judge Ally's judgment and the assertions in the affidavit are contradicted by the content of the judgment itself. To

¹⁴ 2007 (1) SA 165 (SCA) at para [17]

suggest that Acting Judge Ally was misled is completely unfounded and indeed scandalous.

[43] All of this was drawn to the attention of those responsible for the litigation but crucially also to the attention of the deponent to both affidavits being Ms Rambauli. Both counsel and Mr Mathopo's integrity were brought into question and the incorrect basis was persisted with despite the correct facts being drawn to Ms Rambauli's attention.

[44] Professional reputations are hard-won commodities requiring daily maintenance and investment. If attacks on a practitioner's professionalism are warranted then the practitioner should suffer the consequences. However, to persist with accusations of lack of professionalism or worse in the face of clear evidence to the contrary is in itself unprofessional for if there is one duty higher than all else in a professional person's practice it is to honour the truth. Persisting in what one knows to be untrue should carry with it its own consequences.

[45] Attorney client costs were awarded against the RAF in the urgent application. Such costs were not sought in the opposition to this the RAF's rescission application. I considered a costs *de boniis propriis* order against Ms Rambauli but decided against it as that would undermine the attainment of finality and would simply involve further delays, dealing with issues of joinder and the like. However, I intend referring this judgment to the Chief Executive Officer of the RAF to consider (or to refer this judgment and the matter to the appropriate department to do so) whether disciplinary proceedings should be initiated against Ms Rambauli having regard to the conduct highlighted herein.

Conclusion

[46] The RAF, if anything, ought to have appealed the judgment of Acting Judge Ally if it held the view that he had erred in the merits of the judgment. The appeal route was contemplated in my order dated 21 October 2021. The RAF doggedly persisted with a rescission application which was self-evidently still born.

[47] The judgment was not erroneously granted and certainly not in the RAF's absence as contemplated in terms of rule 42(1)(a). The RAF was not precluded from attending the trial. It elected not to do so.

[48] The attitude and approach of the RAF is particularly disconcerting having regard to the fact that it relates to injuries sustained by a child.

Order

[49] I accordingly grant the following order:

49.1.1. The application for condonation for the late filing of the rescission application is refused.

49.1.2. The application for rescission of the judgment of Acting Judge Ally is refused.

49.1.3. The applicant is to pay the costs of this application.

49.1.4. The respondent's attorneys of record are to ensure that a copy of this judgment is made available to the Chief Executive Officer of the RAF and to Ms Rambauli.

I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the applicant (the RAF): Mr Mdlovu

Instructed by: State Attorney, Johannesburg

Counsel for the respondent: Mr T Mathopo

Instructed by: Mathopo Attorneys

Date of hearing: 3 November 2022

Date of judgment: 7 December 2022