REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case no: 40162/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

_____ _____
DATE SIGNATURE

In the matter between:

HALSTEAD MICHAEL ROBERT **Plaintiff**

and

THE MEC FOR PUBLIC TRANSPORT AND ROAD INFRASTRUCTURE OF THE GAUTENG DEPARTMENT **Defendant**

This judgment has been delivered ex tempore in court 11F on 31 July 2023 at the Gauteng Division of the High Court of South Africa, Johannesburg, and is transcribed on 3 August 2023. It is uploaded to the caselines file and emailed to the parties.

J U D G M E N T

SUTHERLAND DJP:

[1] This is a truly awful case.

[2] Before me is an application for rescission. The plaintiff is an individual who was injured in a motor car accident on a provincial road. It is his case that the sole cause of the accident was that of the defendant, the Department of Public Transport of the Province of Gauteng, in regard to its roadbuilding activities.

[3] A judgment by default, on the question of liability, was obtained by the plaintiff on 30 August 2021. That order is the subject matter of the application for rescission.

[4] I do not intend to burden this ex tempore judgment with a full catalogue of the procedural missteps on the part of the defendant and its attorney, the state attorney, Johannesburg, which are patent and are common cause.

[5] The critical issue in the immediate controversy derives from the following particular events.

On 30 August 2021, the case came before Acting Justice Segal, who was asked to grant default judgment in the absence of the notice of opposition to the claim Before her was placed the evidence of two experts concerning the road, substantiating the claim by the plaintiff. There was, *ipso facto*, not only no opposition to oppose, but no plea, and thus no indication before her of what the defence might have been, and self-evidently, nothing whatsoever to contradict the evidence which was adduced before her.

[6] Why was the defendant not represented at this hearing and why was the defendant, in any event, not before the Court on the back of a notice of opposition?

[7] Prior to these events, an order by consent had been secured, to separate the question of liability and quantum. At the time the matter came before Acting Justice Segal on 30 August 2021, the only leg of the case that she had to decide upon was the defendant's liability; ie, was the defendant negligent and therefore liable for whatever quantum of damages the plaintiff might have sustained.

[8] It was obviously incumbent on the plaintiff to notify the defendant's attorneys that such application for default judgment was being sought. It is common cause that such notice was given on the 5th of August by e-mail, and delivery by hand on 6 August 2021. Thus, there is no doubt that the defendant's attorneys, and by implication, the defendant, was aware that three weeks hence, there was going to be an application for default judgment.

[9] A notice of set down was similarly served on the defendant's attorneys, the state attorney, and nothing happened. Thus, in terms of the rules of the Court, and in terms of our practice, the plaintiff behaved perfectly appropriately in seeking a default judgment.

[10] The judgment reads as follows,

> "The question of liability is decided in favour of the plaintiff against the defendant, who is ordered to pay one hundred percent of such damages as the applicant may prove. The defendant shall pay the costs of suit on the party and party scale."

[11] Subsequent to that, several events occured, but contribute only peripherally to the immediate controversy and the decision which I have to make in this hearing. Given that the judgment was given under those circumstances, it is necessarily a high bar that the defendant would have to clear in order to demonstrate a reasonable explanation for not opposing.

[12] An affidavit supporting the rescission application has been filed. That affidavit is bereft of any proper explanation for the events between the dates that I have cited, 5 August 2021 and 30 August 2021. It must therefore follow that whatever excuses there may be, and whatever degree of latitude might be afforded to a party for not responding to the application or the notice of set down,anevaluation can only take place on the basis of the facts placed before me. There are no relevant facts placed before me. Therefore, not merely is there no reasonable explanation, there is no explanation at all.

[13] There are other issues which bear mention in passing, which reflect on the absence of an appropriate response to the service of set down.

[14] The events described took place during the time that the Covid pandemic was prevailing in our country, and there is a suggestion, more forcibly made elsewhere, that the office of the State Attorney, was to some degree, if not entirely, paralysed by lockdown provisions. That is what I am told. I am given no detail, I am not told who was unable to work, what systems were dysfunctional, or what remedial action was taken. Indeed, all I am given is a bold sweeping generalisation. Given the fact that, in this Division, throughout the whole of the Covid pandemic, this Court continued to operate, and hundreds of firms of attorneys in Johannesburg continued to operate, albeit under very difficult circumstances, it is insufficient to place before me a generalised

statement that Covid interfered with the workings of the office, when it is clear that hundreds of other attorneys were able to function during that time.

[15] At a later stage, a plea was filed. Astoundingly, this plea did not confine itself to the quantum leg, which remained the only *lis* now open to the defendant to defend, but also addressed the liability leg which had been the subject matter of the default judgment. This step was plainly incorrect. After an exchange between the parties' respective counsel, by consent, that part of the plea, in regard to liability, was struck out. What is staggering, is that plea was filed at all on the liability leg, instead of addressing at once the need for a rescission. Indeed, the rescission application came much, much later. The circumstances which might explain that are not placed before me.

[16] Lastly, what is glaringly obvious and is omitted from the rescission affidavit, is any indication of what the defence of the defendant might be to the allegation of negligence. Considering that before the default judgment Court on 30 August 2021, the reports of two experts had been adduced, and this rescission application is being heard in July 2023, it is apparent that no effort whatsoever has been made by the defendant to address the allegations of negligence by either considering those reports and seeking countervailing advice, or any other investigation. That an investigation was contemplated is clear, because it is common cause that an inspection was sought by the state attorney of the spot where the collision took

place. Whether that, in fact, took place, and what followed from it, I have been told nothing.

[17] Thus, what we have before me is an absence of any defence of the merits of the claim as regards to liability. What has been advanced to support the rescission application are two points, both of which are bad.

[18] The first point is that there was a failure to serve the summons in 2019 on the State Attorney, at the same time that the summons was served on the defendant. It is common cause that the summons was indeed served on the defendant. The applicant has not only drawn to my attention, but notified the defendant at once of the decision in the case of *Minister of Police and others v Molokwane*, 2022 JDR 1956 (SCA). This judgment deals with precisely the point of whether or not the failure to serve a summons on the State Attorney in terms of section 2(2) of the State Liability Act 20 of 1957, but nevertheless a summons is served on the organ of state invalidates the summons. The judgment disposes of the point, saying that it would be a mechanical nonsense to interpret the State Liability Act in such a fashion.

[20] The point raised in the rescission affidavit is therefore bad. It is made worse by the fact that, after that event, of which the complaint is raised so belatedly, there have been dozens of further steps taken, which would constitute a waiver against raising such a point. At the critical time during March to August of 2021, the State Attorney was fully apprised and engaged

with the matter, and the absence of action, as I have alluded to, is not explained in this affidavit.

[21] The only other point advanced, is that the particulars of claim are excipiable on the grounds that they are inadequate, given the provisions of rule 18(4) of the Uniform Rules of Court. It is true that the particulars are lean, and indeed, it may well be, - I make no decision, I simply mention that as a prospect - that some criticism of the pleadings would be valid. But that would have resulted in nothing more than an order directing the plaintiff to amplify its pleadings. It certainly would not have led to the dismissal of the action.

[22] Therefore, in the context of the rescission application, it is an unhelpful point to raise, even if it had been raised at an earlier time. Curiously, the inappropriate plea on the liability, which was struck out, to which I have alluded, raises no points of excipiability, suggesting that there was no difficulty in pleading to those allegations, albeit that from a procedural point of view, it was inappropriate to have done filed a plea.

[23] All of these circumstances are deeply regrettable, and more so, because what is at stake is an organ of state which is being sued for damages, who will derive the funds for which it is liable to pay, if any, from the people themselves.

[24] The disgraceful way in which this matter has been conducted by the State Attorney warrants investigation, and I shall be causing a report to be made to the Minister of Justice about how this case has indeed been conducted.

[25] However, notwithstanding my instincts to protect the public purse from inappropriate expenditure, the legal principles, as I understand them, do not confer on me the powers of Father Christmas. I cannot rescue the un-rescuable.

[26] There is no merit in this rescission application, and it is all the more disgraceful that it is the public interest that is prejudiced by the neglect, not only of the State Attorney, but I can infer, from the defendant itself. The people of South Africa are ill-served by public servants who, in spending other people's money, do not take proper care of how to deal with their responsibilities. Such people who are responsible for this degree of dereliction ought not to be in office.

[27] I come now to the question of costs. In the circumstances which I have described, the application for rescission is outrageous. It is little more than a delaying tactic. There are many instances that one can draw on to infer that the conduct on the part of the defendant and its attorney has been little more than simply to kick the can down the road, to avoid having to engage with the merits of this matter.

[28] Thus, I am driven by those circumstances to dismiss the application for rescission and in respect of the

costs, it seems that the contention advanced on behalf of the applicant, that the costs should be on a punitive scale, is wholly appropriate.

[29] It is for these reasons that I make the following order:

(1) The application for rescission is DISMISSED.

(2) The defendant shall bear the applicant's costs on the attorney and client scale, including the cost of two counsel.

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Roland Sutherland
Deputy Judge President, Gauteng Division, Johannesburg.

Heard: 31 July 2023
Judgment: 31 July 2023

Appearances:

For the Plaintiff:
Adv Dewaal
With him, Adv K Nigrini and Adv B Joseph
Instructed by A C Rooseboom

For the Defendant:
Adv M Ramili SC
With Him, Adv Z Nxumalo
Instructed by Office of the State Attorney