

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: 35926/17

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

2022

.....

In the matter between: -

ROAD ACCIDENT FUND

APPLICANT

AND

DHEKISWE JANET NGOBENI obo PHELELA

RESPONDENT

JUDGMENT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines.

The date and time for the hand down is deemed on 18 November 2022.

1. The woes of the Road Accident Fund ('the RAF'), whether it be financial or administrative, are well known within the legal fraternity, and probably beyond. They are well documented in several cases that have been handed down in the recent past. Although their exact details are irrelevant, they are easily found by way of a cursory search. In this division, at least, these have also been one of the reasons for an entire revamp of the trial practice directives relating to matters in which the RAF is involved. This particular matter is symptomatic of these challenges the RAF has had to contend with recently. They have blighted the road accident litigation landscape like the bubonic plague of old¹ and, no doubt left a trail of destruction in the wake.
2. The RAF has brought an application in terms of which it seeks an order rescinding and setting aside part of a court order granted against it by this court on 3 August 2020. An order for general damages was made, as well as one for future loss of earnings and earning capacity. It seeks only to rescind that portion of the order relating to future loss of earnings and earning capacity. This particular application includes relief to condone the fact that it was brought some two years after the judgement. Whether there was any merit in the application to condone the date on which this application was launched is debatable, but in order to deal with the merits of the application I have decided to accept the request to condone such conduct. For the reasons which follow, I dismiss the application.
3. The court order was granted by way of a default judgment in respect of a claim which was instituted by the respondent ('Ngobeni').
4. The application is based upon the provisions of uniform rule 42 and section 173 of the constitution of the Republic of South Africa, 108 of 1996 ('the constitution') and the common law.

¹ To adapt a phrase of Justice Harms in *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons and Another* [2002] ZASCA 142 para 6

5. The order was granted on 31 July 2020 and Ngobeni was represented by Advocates S Güldenpfennig (SC) and E de Lange. The order is prefaced by the customary introduction that the presiding judge had read the papers filed of record and had heard counsel in this regard.
6. I deal, briefly, with the history of this matter. The dates to which I refer appear from Ngobeni's chronology of events filed on 29 August 2022². It was never contended that this chronology is incorrect.
7. The collision which gave rise to the claim happened on 14 June 2015 and a summons was served on 29 May 2017. The various trial procedures took place and on 12 November 2019 the matter was certified as being ready for trial and the RAF was directed to file its expert reports by 28 February 2020. On 22 April 2020 a pre-trial was held and according to the chronology of events. There were various attempts by Ngobeni to the RAF to request it to participate in the preparation for trial and a settlement process. These requests seemed to have fallen, largely, on barren ground.
8. The trial date, I was advised was 27 July 2020 and on 30 July the matter was allocated to Justice Baqwa. I was told, from the bar, by counsel representing Ngobeni that on that particular day there was an offer to settle from the RAF which was rejected. On 30 July 2020 Ngobeni furnished the RAF with its heads of argument. On 31 July 2020 Justice Baqwa made the order to which I referred earlier and in respect of which this application relates. It was in the absence of the RAF.
9. Subsequent to that, there were various requests for payment and certain undertakings were made by an official from the RAF, Mr Dirk Laurie ('Laurie'). This was followed by a writ of attachment on the RAF's Absa bank account and two applications for a stay of execution of that process. The second of which culminated in an order handed down on 11 April 2022 by Judge Molefe in terms of which, *inter alia*, the order of

² CaseLines reference item 104

Justice Baqwa was suspended pending the finalisation of a rescission application to be instituted within 20 days of the date of this order. Paragraph 7 of that order by Justice Molefe³ indicated that 'costs of this application are reserved'. I heard no argument from either party on this particular aspect, an issue which also only dawned upon me whilst I was preparing my judgment and after I had reserved my judgment. I requested counsel to provide with a written note on what I should do with the reserved costs and I have taken their submissions into account. The costs of that application will follow this one.

10. The application for rescission was then instituted on 10 May 2022.
11. The founding affidavit of the RAF is deposed to by Laurie, a person who describes himself as a 'senior claims handler in the employ of' the RAF and the person that was charged with the administration of this particular claim.
12. The affidavit contains very little issues of fact. This is not a criticism but, essentially, is as a result of the nature of the application. It deals, to a certain extent, with the role that the RAF plays in South Africa and the reason why the RAF was unrepresented at court on the day of the hearing.
13. Terse and honest the reasons certainly are. Probably noble too, it but exacerbates the difficulty of the RAF in this matter, rather than ameliorates it.
14. The judgments to which I have referred to earlier, in all probability, have had the effect of courts being more vigilant than ever prior to granting orders, either by default or by consent, in matters relating to the RAF. This seems to me to be conceded by the RAF.

15. **The essence of the RAF's case lies in paragraphs 13 and 14 of the founding affidavit. They read as follows:**

13.1 As a result of this change of focus, the applicant analysed the costs associated with having its own panel of attorneys and found that these costs were too high and detracted from the main focus and object of the applicant, to pay for unreasonable compensation to victims of motor vehicle accidents.

13.2 In November 2019, the applicant did not extend the tenure of its panel of attorneys. The strategy was in line with the policy of reducing costs so that more money would be available for distribution for victims of motor vehicle accidents.

13.3 The policy and strategy were also implemented with the knowledge that the courts, utilising section 173 of the constitution, had begun exercising a greater duty in judicial oversight to ensure that any award was fair and reasonable and justifiable on the facts.

14.

14.1 The short-term consequence of this policy and strategy is that the applicant is not represented at court, should the matter proceed to litigation. The applicant is relying upon the judicial oversight of the courts in ensuring that fair and reasonable compensation is made.

14.2 Further, the applicant's employees are not officers of the court and do not have the statutory mandate or other authority to make any representation at court.

14.3 The applicant's employees have approximately 800 active claims each at any given time. These claims are not limited to the province in which the employee may find herself and it is practically impossible for the employees to attend court proceedings and simultaneously administer the claims.

14.4 At the time that this matter was heard the applicant had not yet implemented the system whereby state attorneys are used for RAF claims for trials.

14.5 Consequently, the non-attendance by the applicant at any court proceedings is not willful or an abuse of the process nor is it aimed at frustrating the fair, reasonable, and just settlement of any claim. It is for this reason that the applicant has paid a portion of the claim, which was fair, reasonable and statutorily compliant⁴.

16. **Whilst I accept the submission by Mr Rip that this matter stands on a different footing to the matter of *Zuma v Secretary of the Judicial***

⁴ I mention that, according to the chronology of events, an interim payment of R1 000 000.00 had been made

*Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the public sector including organs of state and Others*⁵ in that the conduct of the RAF was not of a contemptuous nature, it seems to me that on a proper reading of paragraphs 13 and 14 of the founding affidavit, nevertheless, leads one to the ineluctable conclusion that there was still a deliberate policy decision not to attend court. That decision, it seems, was not directed at this particular matter but rather at matters in general for the reasons dealt with in the founding affidavit.

17. Nevertheless, the RAF had decided, for better or worse, not to attend court and to rely on the judicial oversight of the courts to ensure that matters were properly considered and that considered orders were granted. If that were the policy, there must be many matters in this court and, as a matter of fact, throughout South Africa that have suffered a similar fate as this one.
18. During Mr Rip's argument I asked him what I should make of the judgment referred to by counsel for Ngobeni. It is a judgment of the Supreme Court of Appeal in *Lodhi 2 Property Investments CC v Bondev Developments*⁶ where it is stated:

'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 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 is 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 the erroneous judgment'.

5 [2021] ZACC 28

6 2007 (6) SA 87 at para 27

19. Mr Rip then indicated that this particular judgment has the effect that the RAF can no longer rely on the provisions of rule 42 and that the case is now confined to the common law. He invited me, because of the provisions of section 173 of the constitution, to extend the common law, if necessary, in order to cater for the particular exigencies of the RAF and the difficulties which it was experiencing at that particular time. Upon pressing him further what exactly he meant in this regard and whether he contended that the RAF should be treated differently to other litigants insofar as applications for rescissions are concerned, he confirmed that this was his submission. He conceded that if the RAF were an 'ordinary litigant'⁷, then there would be no proper case for a rescission of the judgment.
20. I cannot find myself to be persuaded by this submission. Not only am I bound by precedent as to what the requirements are, at common law, for rescissions of judgment, in my view it will also lead to enormous uncertainty if different requirements exist for rescissions for different organisations. The flood gates would open. In my view, the RAF should be treated as every other litigant. I do not believe that this matter warrants any development of the common law in this regard to cater for the administrative challenges the RAF has been confronted with.
21. Whilst I prefer not to use the rather strong language in the matter of *The Road Accident Fund v Joanna Elizabeth McDonnell*⁸, granting a rescission in this matter may well encourage the development of an environment where the RAF would be less than vigilant in handling the claims which it receives, and applications for rescission might become the order of the day, stretching the scarce legal resources even closer to breaking point. Whilst I have a measure of sympathy for the individual claims handlers at the RAF, who may or may not be blameless in the administrative quagmire the RAF currently finds itself in, an equally

⁷ And by that I understood him to mean, someone other than the RAF which fulfills this particular public role in South African society; the proverbial Joe Soap off the street, to borrow a colloquialism

⁸ Western Cape Division, Cape Town, case no 13183/2015

persuasive consideration is that it is also in the interests of justice that the claims of needy individuals who have a good claim should be finalised swiftly and efficiently. Just as it is of the utmost of importance that the RAF, which deals with public funds, should ensure the proper expenditure thereof, it is also of fundamental importance to the administration of justice that the general public can take comfort in the fact that a meritorious claim will be efficiently settled and, more importantly, that court orders properly obtained are obeyed. Any situation which fosters an environment that court orders are not to be complied with swiftly should, for the integrity of the court system and administration of justice, be avoided. This is such an instance where it is now the best part of seven years since the accident, and two years after the court order, and the plaintiff has yet to receive payment in full.

22. I do not believe that the RAF, under the common law, has made out a case for rescission, I was referred to the matter of *Vilvanathan and Another v Louw N.O.*⁹ which provides 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
 - (ii) that on the merits (i.e. of the action) such party has a bona fide defence for which, prima facie, carries a prospect of success.
- Both of these elements must be present'.

23. As mentioned earlier, honest and frank as the explanation might be, it is not, I believe a reasonable and acceptable explanation. There is also a part of me that feels uncomfortable where a party has stated, after being aware of the set-down date, that it will leave the matter to the oversight of the courts later wishes, as it were, to second guess that oversight.

9 2010 (5) SA 17 (SCA)

This is more so under circumstances where on its own version it contends that the courts are currently more vigilant on these aspects.

24. Not only does that have a bearing upon whether or not the explanation is a reasonable and acceptable one, but it also in my view affects the reasonable prospects of success. On face value, argument was presented to Justice Baqwa on the evidence available to the court and on that evidence an order was granted. For a period of time some assurances were made by the RAF, represented by Laurie, that the monies will be paid, only for there to be a change of heart a considerable time later. It is this same Laurie that has deposed to the founding affidavit in support of the rescission. He has done his credibility no favours and this places a further question mark on the prospects of success.
25. It is also my view, although I express no final judgment in this regard, that the correct procedure would probably have been to appeal the order of Justice Baqwa. Mr Rip argued that, because the RAF was not present in court, an appeal would be the incorrect procedure. I am not convinced that this is the correct reasoning. The matter is clearly a final order. But I mention this only in passing.
26. I was also urged by counsel for Ngobeni to award a punitive costs order in this regard because of the conduct of the RAF and its officials. It was, indeed, a compelling argument and I was tempted to do so. In the end I decided, in my discretion, not to do so. I am mindful of the administrative challenges which the RAF is currently experiencing and the teething process it is probably going through in this regard. I will exercise my discretion against such an order.

Order

Consequently, I make the following order:

[27] The application is dismissed with costs, which, are to include the reserved costs of Justice Molefe;

[28] In both such instances costs are to be the costs of two counsel, where so employed.

REINARD MICHAU

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 14 November 2022

Date of judgment: 18 November 2022

Appearance

On behalf of the Applicants

Adv CM Rip

Instructed by

S Eloff

Malatji & Co

Email: seloff@mcinc.africa

On behalf of the Respondent

Adv JF Grobler SC

Adv W Coetzee

Instructed by

Kmalao Inc.

Email: kmalaoinc@gmail.com

