IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 86236/2016

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

DATE: 8 October 2022

Peter Lazarus
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SIGNATURE

In the matter between:

THE ROAD ACCIDENT FUND **APPLICANT / DEFENDANT**

and

ADV CALYN D'ALTON obo S[redacted] F[redacted] **RESPONDENT / PLAINTIFF**

JUDGMENT

LAZARUS AJ

1. This is an application for the rescission of a judgment granted by Mali J on 10 February 2021 against the Road Accident Fund ("RAF") for monies claimed for the lifelong ongoing support of Miss S[redacted] F[redacted].

2. Miss F[redacted] is a minor who suffers from Down Syndrome, a profound mental disability that will require her to have special care throughout her life.

3. The starting point for this judgment is section 28(2) of the Constitution, which states that a child's best interests are of paramount importance in every matter concerning that child.

FACTUAL BACKGROUND

4. Miss F[redacted]'s mother was killed in a motor vehicle accident on 4 May 2013. The whereabouts of her father are unknown. Her maternal grandmother, Mrs E[redacted] F[redacted] ("the grandmother") currently takes care of Miss F[redacted]. The grandmother appears to be an unsophisticated woman who does not understand much of the court process.

5. On 26 November 2014, the grandmother, acting on behalf of Miss F[redacted] and on the advice of O Joubert Attorneys in Pretoria, instituted an action out of the Gauteng Division, Pretoria against the applicant for damages for loss of support ("the Gauteng matter").

6. In due course, the parties reached an agreement insofar as the merits are concerned and a court order reflecting that the defendant is 100% liable for the plaintiff's proven or agreed damages was duly issued by Ledwaba J on 20 September 2016. All aspects relating to the quantum were postponed *sine die*.

7. Meanwhile, on 7 March 2016, the grandmother, again acting on behalf of Miss F[redacted] but this time on the advice of W.T. Mnqadi & Associates attorneys in Mthatha, instituted an action out of the Eastern Cape Local Division, Mthatha against the applicant for damages for loss of support ("the Eastern Cape matter").

8. Judgment was apparently granted by the Eastern Cape Local Division on 24 May 2019 in favour of Miss F[redacted] in the amount of R 1 478 840.00 in terms of a settlement reached between the parties. I say "apparently" because only a draft order has been uploaded onto Caselines, which order has not been signed by a judge or stamped by the Registrar. According to the applicant, the amount of R 1 478 840.00 has already been paid to the grandmother in terms of the court order.

9. Returning to the Gauteng matter, after a number of thwarted attempts at setting the matter down for trial, Mali J was finally allocated to hear the matter on 8 February 2021.

10. The applicant (as defendant) did not appoint counsel or an attorney with right of appearance to appear on that day. Instead, an employee of the applicant, Ms Rangata (who did not have right of appearance) was instructed to appear and request a postponement of the matter. There is a dispute between the parties as to whether Ms Rangata actually requested a postponement or not, but in any event, Mali J correctly informed Ms Rangata that she was not entitled to appear as she did not have right of appearance and was accordingly only permitted to observe the proceedings.

11. Mali J stood the matter down until the following week and the proceedings resumed on 16 February 2021. On that day, no-one, including Ms Rangata, appeared for the applicant. Respondent's counsel telephoned Ms Rangata, who informed her that she was too busy to attend court and that the senior claims handler had requested Ms Rangata to request respondent's counsel to send the applicant a copy of the court order.

12. After hearing the respondent's counsel, Mali J granted judgment in favour of Miss F[redacted] in the amount of R 2 555 199.00 together with certain ancillary relief. Mali J made provision for the award made in the Eastern Cape matter as follows:

> *6.1 The Defendant is ordered to provide the trustees, Sanlam on/or before 12 March 2021 with proof that the funds awarded in the Eastern Cape High Court, Grahamstown under case number*

775/ 2016 have been invested and applied to the benefit of the minor child, S[redacted] F[redacted].

6.2 Upon receipt of the aforementioned proof, which shall be to the satisfaction of the trustees and case manager, the trustees shall be authorized to set off that sum against the value of the sum awarded by Mali J.

6.3 Should the Defendant fail to furnish the trustees with the necessary proof, the full sum, as set out in paragraph 1.1 hereinabove, shall be due owing and payable to the Plaintiff.

REQUIREMENTS FOR RESCISSION

13. The applicant applies for rescission on the basis of the common law, alternatively Rule 42.

14. Rule 42 is not applicable to the facts of this case. The purpose of Rule 42 is to correct expeditiously an obviously wrong judgment or order. It caters for mistakes in proceedings, such as the existence of a fact that the judge was not aware of that would have changed the judge's mind about granting the order if the judge was aware of it. Mali J did not erroneously grant an order due to a mistake in proceedings.

15. A rescission in terms of the common law requires the demonstration of good or sufficient cause. This requires meeting three separate requirements. First, the applicant must provide a reasonable explanation for the default. Second, the applicant must show that the application was made *bona fide*.

Third, the applicant must demonstrate a *bona fide* defence, which *prima facie* has some prospects of success.[1] To succeed in an application for rescission, an applicant must satisfy all three requirements.

16. In providing a reasonable explanation for the default, an applicant must demonstrate that the default was not wilful; i.e., intentional or deliberate.

APPLICATION OF THE LAW TO THE FACTS

17. The applicant admits that by January 2021 it knew the respondent was not interested in further discussions and was adamant that the trial proceed in February. At that point the applicant should have briefed counsel or an attorney with right of appearance to represent it in court. Instead, it elected to send Ms Rangata to court to request a postponement. This it did, knowing full well that Ms Rangata did not have right of appearance. Ms Rangata also knew full well that she had not yet been admitted and was thus not entitled to appear in the High Court. While it may be excusable for a layman not to know who is and who is not entitled to appear in the High Court, the same cannot be said of the applicant or a person who is about to be admitted as an attorney with right of appearance – such as Ms Rangata.

18. Furthermore, the applicant was well aware that the respondent was not in agreement with their proposal that the matter be postponed. The applicant

[1] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at [11].*

must therefore reasonably have known that a substantive application for postponement would have to be brought and that it would need to be argued in court.

19. But the applicant's default does not end there. At the hearing on 8 February 2021, Mali J explained to Ms Rangata that she was not entitled to appear as she did not have right of appearance. Mali J then stood the matter down until the following week and the proceedings resumed on 16 February 2021.

20. The applicant accordingly had a week in which to brief counsel or an attorney with right of appearance to attend to the matter when it resumed on 16 February. The applicant, however, did not avail itself of this opportunity.

21. As a result, when the matter resumed on 16 February 2021, there was no appearance for the applicant. The respondent's counsel telephoned Ms Rangata to inquire whether the applicant was aware that the matter was proceeding on that day. Ms Rangata responded that she was too busy to attend court.

22. It is the response of the applicant's senior claims handler that was provided to the respondent's counsel, however, that is the most telling. That response was to request the respondent's counsel to send the applicant a copy of the court order. This response clearly indicates that the applicant was aware

that judgment may be granted against it and had reconciled itself to this eventuality.

23. I am accordingly of the view that the applicant was in wilful default of appearance and has no good reason to offer in explanation.

24. Since the applicant has not satisfied the first requirement for rescission, there is no need to consider the other two requirements. The application for rescission must be dismissed.

25. Returning to the best interests of Miss F[redacted], the respondent points out that the expert reports prepared for the Gauteng matter more accurately reflect the real cost of caring for Miss F[redacted] for the duration of her life than was agreed upon and made an order of court in the Eastern Cape matter. The respondent further points out that Mali J's provision for the establishment of a trust and the appointment of a case manager provide much more comprehensively for Miss F[redacted]'s future care than the order that was granted by agreement in the Eastern Cape matter. The applicant presents no evidence as to why the amount agreed upon and made an order in the Easter Cape matter is a better and more accurate amount than that ordered by Mali J in the Gauteng matter. The applicant has no answer to the respondent's contention that the difficulties that usually arise when two orders are granted in respect of the same cause of action, do not arise in the present matter as a result of Mali J's order regarding set-off. Therefore, even if the applicant had demonstrated good or sufficient cause for

rescission (which it has not done), there would be no purpose served by granting a rescission application and referring the matter back to the trial court for another trial.

COSTS

26. Ordinarily costs follow the result. Since the applicant has not been successful in its application for rescission, I see no reason why I should not order costs against the applicant.

27. The respondent has prayed for costs on the attorney and client scale. While there is merit in this request given the applicant's wilful default in regard to appearance at the trial, the fact that there was a prior judgment given by another court in respect of the same parties and the same cause of action, clouds the culpability of the applicant in the context of the matter as a whole. This, in my view, militates against the grant of a punitive costs order.

ORDER:

The application for rescission is dismissed with costs.

Peter Lazarus

LAZARUS AJ

ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION PRETORIA

For the Applicants: Adv C. Shongwe
Instructed by Mashiane, Moodley & Monama Inc

For the Respondents: Adv L. Schreuder
Instructed by O. Joubert Attorneys

Date of hearing: 18 October 2021
Date of Judgment: 8 October 2022