



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 99426/15

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| (1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED |
|--|

DATE

SIGNATURE

In the matter between:

ROAD ACCIDENT FUND

Applicant

AND

NICOLAAS CLAUDIUS GEY VAN PITTIUS

Respondent

In re

NICOLAAS CLAUDIUS GEY VAN PITTIUS

Plaintiff

AND

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MADIBA AJ:

A. Introduction

[1] This is an application for an order rescinding the default judgment granted on the 17 September 2020. The application is brought in terms of the common law and alternatively in terms of Rule 42(1) of the Uniform Rules of Court on the grounds that the order was erroneously granted. The applicant seeks a costs order in the event the application is opposed. The respondent opposes the application for rescission on the basis that the applicant failed to make out a case in terms of the common law as its application was not made bona fide. It is further contended that the applicant did not comply with the provisions of Rule 42(1) as no bona fide defence was raised by the applicant.

Factual Background

[2] The respondent was involved in a motor collision on the 6 February 2015. He was a passenger when the collision caused by the negligent driving of an insured driver occurred at the time of the accident. The respondent was self-employed operating a motor spare business. As a result of the injuries sustained in the aforesaid collision, the respondent could not cope with the demanding workload of his business and had to liquidate it and sought an alternative employment. He was ultimately employed by his father who had a similar business in a less demanding position. The respondent suffered the following injuries: fractured legs and ankle, fractured hand and head injury. A claim for damages was instituted as a result of injuries sustained.

[3] The merits were settled in favour of the respondent together with the general damages. An undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 as amended was provided to the respondent by the applicant. The issues regarding past medical expenses and past and future loss of earnings incurred by the respondent, remained unresolved. Various experts were consulted by the parties herein and sought opinions regarding the injuries sustained by the respondent. During 2 September the applicant

made an offer for settlement in respect of the respondent's past and future loss of earnings. The respondent rejected the applicant's offer.

- [4] The court was accordingly approached to decide on the disputed issues aforementioned. The applicant was ordered to pay the respondent the sum of R 106 317.61 for past medical expenses and R 4 720 000.00 in respect of the respondent's loss of earnings.
- [5] The applicant consequently seeks relief to rescind the above orders as granted.

Issues to be determined

The issues to be decided are:

- a. Whether the applicant has satisfied the requirements for an order for rescission in terms of Common law.
- b. In the alternative, whether the requirements as per Rule 42 have been met by the applicant.

Legal principles finding applications

The applicant avers that the default judgment was erroneously sought and granted as he has good defences to the respondent's claim.

Rule 42 of the Rules of Court

Rule 42(1) provides as follows:

"The court may in addition to any other powers it may have, mero motu or upon application of any party affected, rescind or vary:

- a) *An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
- b) *An order or judgment in which there is an ambiguity or a patent error or*

omission but only to the effect of such ambiguity, error or omission;

- c) *An order or Judgment granted as a result of a mistake common to the parties.”*

In Monama and Another v Nedbank Limited 41092/16 [2020] ZAGPPHC 70 at 18 and 19 the Court referred to Rule 42(1)(a) as follows:

*“Generally speaking a Judgment is erroneously granted if there existed at the time of its issue, a fact of which the Court was unaware, which would have precluded the granting of the Judgment and which would have induced the Court, if aware of it, not to grant the Judgment. An order is also erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for the court to have such an order.” **See also Bakoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 466 (ECD) at 471 E-1.***

In terms of Rule 42(1) the applicant needs not show good cause. It is expected of the applicant to show that the order or Judgment was erroneously sought or erroneously granted to persuade the court to vary or rescind the particular order.

Common law

The application for rescission of Judgment in terms of the common law may be brought on the following grounds:

- a) Fraud
- b) *lustus error*
- c) Discovery of new documents only in exceptional circumstances
- d) Where the default Judgment was granted by default

[6] In **Naidoo v Matlala NO 2021(1) SATS 143 at 152 H-1.** The court stated that in order for the default Judgment to be set aside, the applicant has to satisfy the common law elements and must show that sufficient cause for rescission exists.

The following elements were identified as sufficient:

The applicant must give a reasonable explanation which is acceptable for his default, he must show that his application is made bona fide and then on the merits, he has a bona fide defence which prima facie carries some prospect of success. See also **Tiger Foods Industries Ltd t/a Meadow Food Mills(Cape) 2003 (6) SCA [2003] 2 ALL SA 113 par 11, Chetty v Law Society, Transvaal 1985 2 SA 756 A at 764 I-765 D.**

Applicant's Contentions

- [7] The applicant contends that the respondent failed to make out a case for loss of earnings in his particulars of claim. It is averred by the applicant that what the respondent did was to merely allege that the respondent was still employed and suffered loss of earnings due to injuries sustained in the said accident. The applicant further submitted that the report by the industrial psychologist on behalf of the respondent, is not sufficient as it failed to establish the sequelae between the injuries and the closure of the respondent's business. The applicant contended that at the time when the default Judgment order was granted, the applicant had no legal representation.
- [8] According to the applicant, the respondent failed to plead material facts in support of his claim and merely pleaded a conclusion without pleading the facts. The court is said to have granted the order erroneously as the respondent failed to establish its case on his pleadings. The applicant submitted that it has established a bona fide defence.

Respondent's Argument

- [9] The respondent's argument is that the applicant failed to provide a reasonable and acceptable explanation for the default. It is submitted by the respondent that the applicant through its senior claims officer and claim handler together with the applicants were at all material times part of the proceedings that led

to the order being granted. In actual fact as submitted by the respondent, neither the representatives of the applicant and respondent were present when the order was granted as the matter was dealt with on papers with the full knowledge of the parties herein. The respondent argues that the applicant does not disclose why it took thirteen months after the order was granted for the applicant to launch an application to rescind the said order.

[10] It is submitted by the respondent that the application lacks bona fides on the part of the applicant. The application failed to take this to court in, its confidence by not disclosing that it indeed made an offer to respondent for the past medical expenses. The applicant seeks to also rescind the order for both past medical expenses and loss of earnings despite the said offer made.

[11] The fact that the applicant made an unqualified offer for the for the loss of earnings suffered by the respondent, for the application to now distance itself from the said order speaks volumes about the application's bona fides so argued the respondent. The respondent submitted that it set out material facts in his particulars of claim contrary to what the applicant alleged in its submissions. It is averred by the respondent that the applicant failed to except to the alleged defective particulars of claim and the applicant cannot be heard to raising such allegation only in its heads of argument. The respondent argues that the applicant failed to establish sufficient cause for the rescission of the order so granted and its purpose is to delay the conclusion of this matter.

Analysis

[12] It is the applicant's submission that the order it seeks was granted erroneously as the respondent was not entitled to future loss of earnings in the sum of R 4 720 000,00. The applicant alleges that it is in the interest of justice to rescind the said order as it has a duty to protect public funds.

The assertion that the default order was granted in the absence of the applicant and its legal representatives in my view, cannot be sustained. The

papers in this matter reveal that the applicant was at all material times represented by its senior claims officer and a claims handler. Both parties in this matter were made aware that their matter will be decided on court papers presented and requested submissions if any. A draft order pertaining to the order was also sought from the applicant and the respondents. It is noteworthy that both parties never indicated their objections that the matter be finalized on paper.

[13] In their absence the order was uploaded on the Caselines and applicant's attorneys were invited and made aware of the court's order. The applicant's explanation that he eventually become aware of the order after it appointed its current attorney is not convincing. The applicant should have become aware of the order as it was uploaded on the 9 October 2020 and its officials were already invited to Caseline during 3 August 2020.

[14] It is expected of the applicant that it should have sought the relief to rescind the order within a reasonable time after the said order was granted. The applicant took a period in excess of thirteen months to approach the court with a rescission application.

[15] The court in **Cipla Medpro (Pty) Ltd v Lundbeck A/S and Another case number 89/5576** (unreported) held that the delay of eighteen months and thirteen months were sufficient to dismiss the rescission application concerned on the basis of delay. There is no reasonable and acceptable explanation clarifying what actually transpired within thirteen months taken by the applicant to institute the rescission application. I am not satisfied that the application was launched within a reasonable time and that the explanation tendered is reasonable and acceptable.

[16] The applicant made an offer regarding the issue of past medical expenses which terms reasonably could not be disclosed before the Judgment. An unqualified offer for loss of earnings were also tendered by the applicant. The terms of which did not satisfy the respondent. Despite having made an offer for past medical expenses the applicant failed to disclose this fact. It now

seeks to rescind even the order for past medical expenses.

- [17] For the reasons unknown, the applicant omitted to disclose that its own expert Professor JH Buitenbach an Industrial Psychologist, accepted that the respondent's earning capacity was a sum of R 30 000 per month at the time of the accident and as such it was used as a basis for the respondent's pre-accident calculation. The applicant's orthopaedic (expert) Dr Mashaba opined that the injuries sustained by the respondent have an impact on his earning capacity.
- [18] It is apparent from the above that the applicant had not been candid and its application falls short in showing that the application is made bona fide. The assertion that the respondent failed to set out material facts to support a claim for loss of earning capacity, cannot be supported. The facts as alleged by the respondent, more specifically his particulars of claim, do indeed disclose a cause of action contrary to the allegations by the applicant. I find that the applicant did not succeed in showing that it has a bona fide defence which prima facie has some prospect of success. See **Naidoo and Another v Matlala NO and Others 2012 (1) SA 145 GNP at 152 H-1.**
- [19] It is common cause that both parties appointed experts for their opinion regarding the injuries sustained by the respondent. The respondent and applicant both appointed *inter alia* the following experts: the orthopaedic surgeon, occupational therapist, industrial psychologists. The respondent appointed Munroe actuaries who did the calculations for loss of earnings and future loss of earnings based on the reports together with the addendum filed by the respondent's aforementioned experts.
- [20] However, the applicant's industrial psychologist did not file the addendum and joint minutes. The trial court accordingly considered the reports by experts filed as the core evidence in conjunction with other relevant court papers filed on record.
- [21] Both experts appointed by the parties seem to all agree that the respondent

ought to be compensated for the injuries sustained. The issue herein appears to be the fact that the applicant disputes the amount that was ordered to be paid to the respondent. In my view, the disputed amount is the reason for the launching of the rescission application. The attack on the trial court that it erred on the facts and evidence in this matter is not supported by any evidence. The applicant's averment in this regard cannot in my view constitute a *bona fide* defence. If indeed the applicant feels so strong about his averment above, it should have taken appropriate steps and not the application process.

[22] I find that the trial court order granted on the 17 September 2020 is legally competent and that there are no defects in the particulars of claim which could have precluded the court granting the Judgment, Consequently I hold that the trial court did not erroneously grant the order.

Costs

[23] The respondent has requested a cost order against the applicant based in its application for rescission of Judgment in terms of the common law and alternatively in terms of Rule 42(1). It is generally accepted that costs follow the result. A successful party is therefore entitled to his or her costs. In ***Ferreira v Levin NO and Others 1996 (2) SA 621 (CC) at 624 B-C par [3]*** the court held that the award of costs unless expressly otherwise enacted, is in the discretion of the court. The facts of each and every case are to be considered by the court when exercising its discretion and has to be fair and just to all parties.

After considering all the facts in this application, the costs are to be awarded to the respondent.

I therefore make the following order:

1. The application for rescission of the default Judgment is dismissed.

2. The applicant is ordered to pay costs.

S.S. MADIBA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

HEARD ON : 8 MARCH 2022
FOR THE APPLICANT : MS. N MHLONGO (ATTORNEY)
INSTRUCTED BY : STATE ATTORNEY

FOR THE RESPONDENT : ADV. J BISSCHOFF
INSTRUCTED BY : KRITZINGER ATTORNEYS
DATE OF JUDGMENT : 26 MAY 2022