IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 21919/2021

DATE: 10-11-2023

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: / NO.
(3) REVISED.
DATE: 15 JANUARY 2024

SIGNATURE

In the matter between

ROAD ACCIDENT FUND Plaintiff

and

ANDREW EWIN DE VILLIERS Defendant

J U D G M E N T

DAVIS, J:

In this rescission application, the order under consideration was granted three months short of two years ago, that is on 8 February 2022. The rescission application itself has caused a further delay of the implementation of an order which has still not yet been complied with, despite only one aspect of it being attacked. In order not to further contribute to that delay, the Court shall render an *ex-tempore*

judgment.

The procedural history is in summary the following (and in summarising that history I shall refer to the parties as in the main proceedings): The plaintiff is a natural person and he was involved in a motor vehicle accident on 12 July 2019.

Pursuant thereto a claim was submitted to the defendant, being the Road Accident Fund (hereafter the RAF) by way of the delivery of an RAF1 form on 4 November 2020. When the matter could not be resolved pursuant to the lodgement of the claim, action was instituted on 4 May 2021 and the summons was served on 11 May 2021.

The RAF failed to deliver an intention to defend and consequently of course also failed to deliver a plea. The plaintiff approached the Court for judicial authorisation to proceed by way of default judgment and this Court granted such authorisation on 1 September 2021.

The order granting such authorisation was served on the RAF on 9 September 2021. Still there was no response forthcoming. Thereafter the plaintiff on 26 October 2021 gave notice to the RAF that the matter would be enrolled for

hearing as a default judgment trial matter on 8 February 2022.

On that date the RAF was still absent, both in appearance and in respect of any other procedural step and this Court then granted an order in favour of the plaintiff. The order indicated that the RAF was held 100% liable for the plaintiff's damages sustained pursuant to the motor vehicle accident.

10

The RAF was ordered to pay R1 495 959 in respect of past and future loss of income and a further R800 000 in respect of general damages. Costs of suit, with certain particulars, were also ordered. In addition, an order was granted for the payment of R1 013 448 in respect of future medical expenses.

These medical expenses had been calculated in accordance with the opinions expressed by experts employed
20 by the plaintiff and thereafter actuarially calculated by way of an actuarial report which also formed part of the papers before the Court granting the default judgment.

In addition thereto, the plaintiff submitted heads of argument wherein reference was made to the fact that a

plaintiff cannot as of right claim an undertaking as provided for in terms of Section 17(4)(a) of the RAF Act, unless the RAF has elected to provide such an undertaking in lieu of a payment in respect of future medical expenses.

Reference was made to case law confirming this and well-knowing this situation, the Court granted the monetary order for future medical expenses. The relevance of this is the following: in the present rescission application the RAF has no qualm with the remainder of the order as granted, save for the order in respect of future medical expenses.

The order for payment for future medical expenses is therefore which is sought to be rescinded and set aside. As an alternative to a setting aside *simpliciter*, the RAF suggests that the order be varied or substituted by an order incorporating a direction to deliver an undertaking in terms of aforesaid Section 17(4)(a).

The law regarding rescissions of judgment is trite. An applicant seeking such a rescission must indicate and explain sufficiently how it came about that the order was granted by default and that such an applicant was not in wilful default. In addition thereto, such an applicant must disclose a *bona fide* defence.

The RAF and its deponent are, if one has regard to the founding affidavit, well aware of these requirements. In paragraph 35 of the founding affidavit the RAF's deponent expressly states that she has been advised that in order for her to show good cause for rescission, it was incumbent upon her to show that the RAF's default was not wilful.

She has dismally failed to do so and the affidavit, although it refers to service of the summons on 11 May 2021, is devoid of any explanation why an appearance to defend had not been entered.

Apart from that, there is no attempt to even deal with the other instances of service which subsequently took place, which must have alerted the RAF that the matter was going to proceed by way of a default judgment.

The deponent simply refers to those instances as historical facts, without tendering any explanation for the RAF’s failure to react thereto. No apology for these omission have been tendered and the RAF has not made any attempt at seeking condonation for what conduct this Court has repeatedly in various judgments labelled a serial and repetitive litigation delinquency on the part of the RAF.

The RAF has simply not gotten out of the blocks, let alone cross the hurdle of this requirement for a rescission of judgment, neither in terms of Rule 31 or Rule 42, insofar as the RAF attempts to rely on the latter, which also requires an application to be made without delay.

Regarding the issue of a *bona fide* defence, the RAF's deponent states in paragraphs 28 and 29 of the founding affidavit that it has become the norm, according to her, that an undertaking is tendered in every matter where liability is proven against the RAF. Even if that might have been correct, it was not tendered in this instance.

The deponent further claims that the fact that this Court has granted orders for the furnishing of an undertaking, in what she calls "thousands of cases" where such an undertaking had not expressly been tendered, confirms that this was a standard practice. This statement was made on oath by the RAF's deponent on 5 April 2023.

By the time of the deposing of the affidavit any doubts as to this alleged practice or the notoriety of the furnishing of undertakings, have sufficiently and finally been dealt with in a decision by a full court of this Division in the

matter of *Knoetze* (on behalf of *Malinga*) v *the Road Accident Fund and various amici curiae intervening* [2022] ZAGPPHC 819 (2 November 2022).

In that judgment, from paragraph 16 thereof, the issues as to whether there was at the time a standard practice in place regarding the RAF's election of furnishing section 17(4)(a) undertakings or whether such a practice was so notorious that a Court could take judicial notice thereof or whether such an alleged practice could have been considered as a blanket election have all been dealt with and rejected.

The rejection can be found in paragraph 24 of the judgment where the various permutations and indications that an alleged blanket election (up to that time) was not so sufficiently in place that a Court could take judicial notice thereof, were expressly dealt with.

In paragraph 27 of that judgment the court noted a formal undertaking made in open court on behalf of the CEO of the RAF that a blanket election would henceforth be applicable and that courts could from that date on take judicial notice thereof.

In fact, Adv Mullins SC who appeared on behalf of the RAF in the full court matter, tendered on behalf of the CEO that a publication would be furnished to all and sundry and in particular the legal profession, confirming what had been said in open court. To this Court's knowledge, so far such a publication had not yet taken place.

But there can be no doubt that the RAF, who the deponent represents in this application, was aware of that judgment and was aware of that position and was aware of the rejection of what the deponent now subsequently tendered on 5 April 2023 in her affidavit as a purported defence at the time that the default judgment had been granted.

It is clear that the purported defence is not in accordance with the Act, the existing law at the time and the confirmation thereof by the full court of this Division. Accordingly, the application for rescission also fails the requirement to disclose a *bona fide* defence.

Regarding the issue of costs, the summary set out above indicates that the RAF has yet again been delinquent; not only in the failure to defend the plaintiff's action, but also in the failure to in any meaningful way contribute to the

finalisation of the litigation.

The RAF has further been in default of launching its rescission application timeously, which was only prompted by demands that it comply with the court order. It is no use for the deponent to say that she personally only became aware of the judgment at a certain date. The RAF as the defendant had been made aware of the order long ago and had the RAF been mindful of launching a rescission application, it should and could have been done timeously.

A further indication of the lack of attention to time periods and requirements imposed by the Rules of this Court to facilitate a proper hearing of matters, is that the deponent even in her affidavit explaining why the application was late, does not even complete the paragraphs wherein the calculation of dates had been made. In fact, the paragraph wherein she would have indicated what the initial date for launching of the application would have been, has been left blank.

In considering the issue of costs, the Court has a wide discretion and it is not necessary for purposes of this *ex tempore* judgment to set out the requirements or factors to be evaluated when a punitive cost order is considered.

That has sufficiently been done, in particular in the minority judgment in the Constitutional Court in *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC).

In the present matter initially cost *de bonis propriis* was sought, but Adv de Beer acting for the plaintiff indicated that his instructions were no longer to persist therewith, but indeed to persist only with a request for costs on the attorney and client scale.

One should also take into account that what the RAF actually attempted to do by way of its application, was a seeking of an indulgence for non-compliance with time periods regarding its rescission application. Its rescission application itself was by its nature an application to excuse a party for its own default.

If one adds thereto the delays occasioned in the prosecution of the present application, then I have no hesitation in finding that this is an appropriate matter where the plaintiff, having already secured an order to which he was entitled to, should not be out of pocket for any portion of the costs incurred and that it is an appropriate matter where

a court should display its displeasure to a party who comes to court without explaining its previous default and without any discernable defence.

Accordingly, the order is as follows: the application is dismissed with costs, such costs to be on the scale as between attorney and client.

10

……

DAVIS, J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATE OF JUDGMENT DELIVERED: 10 NOVEMBER 2023