

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 31389-2019

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

DATE: 14 June 2024

SIGNATURE OF JUDGE: [...]

In the matter between:

ROAD ACCIDENT FUND

APPLICANT

and

JABULANI JANROOI MGNUNI

RESPONDENT

JUDGMENT

COWEN J

1. The applicant, the Road Accident Fund (the RAF), applies to rescind two orders of this Court granted by default: an order granted on 11 March 2022 striking the RAF's defence to an action against it (the striking order), and an order granted on 22 August 2022 (the merits order). The merits order holds the RAF liable for 100% of the proven or agreed damages of the plaintiff and directs it, *inter alia*, to pay the defendant R546 873.00 in damages comprising past loss of income, future loss of earnings and general damages. The RAF seeks this Court's leave to defend the action and further relief contingent on the grant of the rescission.
2. The Court awarded the damages in respect of a motor vehicle accident which took place in November 2018. The defendant, Mr Jabulani Janrooi Mnguni, issued summons on 16 May 2019 and the RAF initially delivered documents to defend the action, including a notice of intention to defend, a plea and other notices.
3. At that stage, the RAF was represented by a panel of attorneys but the mandate of the attorney in question was terminated when, at a point, the RAF stopped using the panel. However, at no stage did the attorney on record, a Van Zyl Le Roux Inc, deliver a notice of withdrawal. The attorney also failed to return the files to the RAF. In the result, Mr Mnguni's attorneys, then Slabbert and Slabbert Attorneys, understandably, continued to deliver notices and court papers

accordingly, but there was no response. Specifically, there was no response to an application to compel compliance with the pre-trial process set out in Rule 37, to attend a pre-trial and sign the minutes. In circumstances where the RAF was unresponsive, Mr Mnguni's attorneys ultimately secured the striking order on 11 March 2022 followed by the merits order on 25 August 2022.

4. The rescission application was instituted in terms of Rule 31 alternatively Rule 42(1) alternatively the common law, but during the hearing, Ms Magata's submissions focused only on Rule 42(1)(a), dealing with rescission of orders or judgments erroneously sought or erroneously granted in the absence of a party.¹

5. The circumstances in which the RAF seeks to rescind the striking order and the default order are related to the COVID pandemic. The RAF explains that during the restrictive lockdown periods in COVID, it was not considered an essential service and accordingly, although the South African courts were operational, the RAF was operating on limited capacity from June 2020 with only a limited number of employees having access to computer systems from their homes. The RAF appears to have adopted an approach whereby those able to work would attend to trial matters. They were not authorised to defend summonses, attend pre-trial meetings or deal with discovery. Although the COVID restrictions eased up and the RAF was able to open its doors, it still had limited capacity, employees worked on a rotational basis and those with comorbidities were excluded from returning physically to work. The RAF contends that in these circumstances the many

¹ The Constitutional Court dealt with the Rule recently in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28; [2021 \(11\) BCLR 1263 \(CC\)](#)

default judgments obtained against it during this period were not of its own making but a result of COVID related restrictions.

6. The national state of disaster, we are reminded, was only lifted in April 2022 after which the Courts and businesses were fully functioning. Restrictions were, however, not extensive during the latter parts of the pandemic. The RAF explains nonetheless that it was still picking up the pieces from the pandemic for some time, as well as the consequences of the 'unhappy ending' of its relationship with its previous panel of attorneys. The RAF has, in these circumstances, been reviewing cases where the Courts granted default judgment against it and in some matters is approaching the Court to rescind its judgments and orders.

7. According to Mr Mnguni's affidavit submitted in terms of section 19(f) of the Road Accident Fund Act 56 of 1996, the accident took place on 6 November 2018, when, driving on a gravel road, Mr Mnguni entered a curve in the road and swerved to avoid a white bakkie travelling from the opposite direction in his lane of travel. The RAF says that it has a *bona fide* defence to the action which only became apparent to it at the time that the Court heard the default application. More specifically, it became apparent to the RAF that there is another claim lodged in respect of the same accident, although in that claim the same accident is alleged to have occurred on 7 November 2018.

8. When all the information is considered, Mr Mnguni is alleged to have concealed important related information from the Court about the accident, which information was drawn to its attention on the day of the hearing, being 25 August 2022. The RAF explains that it could not previously draw a link between the two accidents precisely because Mr Mnguni is said to have withheld key information including the correct date of the accident, his own registration number and the registration number of the other vehicle involved in the accident. These details apparently appear from an accident report from which a wholly different version about what happened appears and which suggests that in fact it was Mr Mnguni who caused the accident by overtaking another vehicle on the curve of the gravel road when it was not safe to do so.

9. The RAF contends that the information was contained in the accident report attached to the claim documents. However, that is squarely disputed on affidavit and is not born out by the information before the Court. The RAF further contends that the information was squarely brought to the attention of Mr Mnguni's attorneys the morning of the trial, when settlement discussions were ensuing and the relevant documents were set to them. More specifically when the RAF declined to make a settlement offer. I accept on the affidavits that this in fact occurred. The pertinent factual allegations are merely noted and what is disputed – as defamatory – is the suggestion that there was any misrepresentation. Rather, what is apparent is that Mr Mnguni and his attorneys adopted the attitude that the matter should proceed as the RAF's defence had been struck out, which would have included any dispute about whether the

insured driver was himself negligent or that his negligence contributed to the accident.

10. On the affidavits, I accept that Mr Mnguni's attorneys were aware when requesting default judgment that there was a parallel claim by the insured driver and that the version advanced therein suggested, rather, negligence on the part of Mr Mnguni. The question is whether a judgment obtained on those circumstances was erroneously sought. In my view it was not as the plaintiff had duly complied with the requisite process and the defence of the RAF had been struck out. Moreover, that did not mean that the RAF was wholly denied access to court and could not participate in the proceedings in any way.² It could, for example, have approached the Court to request a postponement. It could also have appeared at the hearing, cross examined witnesses and argued the merits of the case including quantum, although it was not then open to it to lead evidence or advance facts not put in evidence by the plaintiff. The RAF says that it could not at that time have arranged representation but what is notably absent from the affidavit is how it came about that the claims could only be linked at such a late stage and I am unable to conclude on the evidence before me that that was any fault of Mr Mnguni or his attorneys. Rather, it appears that the RAF only appreciated the position due to inefficiencies in its own systems.

11. In these circumstances, I am unable to conclude that the judgment was 'erroneously sought' in the absence of the RAF.

² *TPR obo PMM v RAF* [2024] ZAGPPHC 387.

12. There are other reasons I am unable to grant a rescission.

13. The first applies irrespective of the legal basis for the rescission and concerns what I regard to be an unreasonable delay in bringing the rescission application after the RAF learnt of the judgment. It was brought ten months after the date of the merits order in circumstances, where according to the RAF, it had known about the alleged misrepresentation and the default order since then. That is a long time to delay yet there is no adequate explanation for it. On the information to hand, the RAF ought, immediately to have sought to instruct an attorney to attend Court that day, failing which, promptly to attend to the rescission process. But that did not happen. On 1 November 2022, Mr Mnguni followed up on payment. Still nothing was done. The December / January recess then came and went. It was only in January 2023 that the RAF referred the matter to an internal rescission committee, scheduled for 19 January 2023. At that meeting a decision was taken to apply to rescind the matter but there was yet a further delay. An opinion was apparently obtained from the State Attorney, received on 23 March 2023. It took a further three months to institute the application. By that time, the bill of costs in the matter had been settled.

14. The second concerns the explanation for default and arises inasmuch as the RAF relied, at least on the papers, on the common law grounds for rescission³ or Rule 31. It concerns the explanation for default. In short, I am unpersuaded on the facts of this case that the RAF can rely on COVID for the position it found itself in.

³ At common law, an applicant for rescission must show a reasonable and satisfactory explanation for the default and that there is a *bona fide* defence that carries some prospects of success. See *Zuma*, supra para 71.

It is true that COVID disrupted all of our lives, and there will be cases where the related circumstances may justify rescission, but this is a case that ensued for the most part after the most restrictive conditions were lifted. Moreover, the Courts were functioning and the RAF itself was able to function albeit not on full steam. The hearing in this case took place some time after the disaster was lifted. With this in mind, what is notably absent from the RAF's papers is an adequate explanation of timing and why the link was only discovered when it was.

15. I have concluded that the application must be dismissed, with costs on a party and party scale. There is no warrant in this case for making any special order pursuant to the new Rule 67A(3)(c).⁴

16. I make the following order:

16.1 The application for rescission is dismissed with costs on a party and party scale.

[...]

S COWEN

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

⁴ *Mashava v Enaex Africa (Pty) Ltd* [2024] ZAGPJHC 387.

For Applicant: Adv P B Rangata instructed by the State Attorney,
Pretoria

For Respondent: Adv P van der Schyf instructed by Slabbert &
Slabbert Attorneys.

Date heard: 13 May 2024

Date of Judgment: 14 June 2024