

REPORTABLE



IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case No:638/2020

In the matter between:

FIDELITY SECURITY SERVICES (PTY) LTD

Applicant

and

THEMBILE HAPPYBOY GABA

Respondent

In re:

THEMBILE HAPPYBOY GABA

Plaintiff

And

FIDELITY SECURITY SERVICES (PTY) LTD

Defendant

JUDGMENT

Govindjee AJ:

Background

[1] This is an application for the rescission and setting aside of a default judgment granted in favour of the respondent on 1 September 2020. The respondent, a policeman, was shot in the shoulder by a security officer acting in the course and scope of his employment with the applicant. The applicant is a national provider of security services and has an extensive branch office network throughout South Africa, employing approximately 60 000 security officers. Its legal department is based at the company's head office and all litigation is dealt with centrally.

[2] The respondent issued a summons which was received by the applicant's legal department shortly before the onset of the Covid-19 national lockdown. He obtained default judgment in the amount of R1,1 million on 1 September 2020.¹ The applicant's group legal adviser apparently only became aware of the judgment on 2 December 2020, when a Sheriff served a warrant of execution at the defendant's Gqeberha branch office.

Rule 42(1)(a)

[3] The applicant seeks to rescind the judgment in terms of Rule 42(1)(a) of the Uniform Rules of Court ('the Rules'), alternatively in terms of Rule 31 or in terms of the common law. Its primary submission in respect of Rule 42 is that:

¹ Given the judgment in *Economic Freedom Fighters and Others v Manuel and Others* [2020] ZASCA 172, it must be added that detailed annexures pertaining to quantum of damages accompanied the summons, and that the application for default judgment included an actuarial report which accompanied the respondent's detailed submission regarding his injuries. That notice of motion also alerted the court to the claim being illiquid. This point has not been addressed whatsoever by counsel and it must be assumed that the court considered that there were special circumstances to permit proof by affidavit for purposes of granting default judgment.

‘There are additional facts and issues of law which were not brought to the Court’s attention when the application for default judgment was heard; and had the Court been aware of these additional facts and issues of law, the Court would (in all probability), not have granted default judgment against the application...’

[4] The ‘facts’ which the court was allegedly unaware relate to the respondent’s possible claim in terms of the **Compensation for Occupational Injuries and Diseases Act**² (‘COIDA’).³ From this, the applicant concludes that the respondent cannot recover from the applicant as damages that which he is entitled to claim from the COIDA Compensation Fund.⁴

[5] Rule 42(1)(a) provides that:

‘The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.’

² Act 130 of 1993.

³ Section 36 of COIDA provides as follows: ‘(1) If an occupational injury or disease in respect of which compensation is payable, was caused in circumstances resulting in some person other than the employer of the employee concerned (in this section referred to as the “third party”) being liable for damages in respect of such injury or disease –

- a) The employee may claim compensation in terms of this Act and may also institute action for damages in a court of law against the third party; and
- b) The Director-General or the employer by whom compensation is payable may institute action in a court of law against the third party for the recovery of compensation that he is obliged to pay in terms of this Act.

(2) In awarding damages in an action referred to in subsection (1) (a) the court shall have regard to the compensation paid in terms of this Act.

(3) In an action referred to in subsection (1) (b) the amount recoverable shall not exceed the amount of damages, if any, which in the opinion of the court would have been awarded to the employee but for this Act.

(4) ...’

⁴ The applicant placed reliance on *Sasol Synthetic Fuels (Pty) Ltd & Others v Lambert & Others* 2002 (2) SA 21 (SCA) and *Road Accident Fund v Maphiri* 2004 (2) SA 258 (SCA) in support of this submission.

[6] The purpose of the rule is to grant the court a discretion 'to correct expeditiously an obviously wrong judgment or order'.⁵ It follows that the court does not have a discretion to set aside an order in terms of the subrule where one of the jurisdictional facts contained in paragraphs (a)-(c) of the subrule does not exist.⁶ The following principles are relevant:⁷

- The rule caters for a mistake in the proceedings;
- The mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment;
- A judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment;
- The error may arise either in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court; and
- The applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)(b).

[7] It has been suggested, in general terms, that a judgment is erroneously granted if there existed at the time of its issue *a fact of which the court was unaware*,

⁵ *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471E-F.

⁶ The trend by the courts over the years is apparently not to give a more extended application to the rule to include all kinds of mistakes or irregularities: *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 7E.

⁷ *Kgomo v Standard Bank of South Africa* 2016 (2) SA 184 (GP) at 187F-188C.

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.⁸ The subrule clearly does not cover orders wrongly granted.⁹ It has been held that a judgment to which a party is procedurally entitled in the absence of the defendant cannot be said to have been granted erroneously within the meaning of this subrule by reason of facts of which the court was unaware at the time of granting the judgment.¹⁰

[8] In **Colyn**, the SCA considered an appeal against the dismissal of an application for rescission of an order for summary judgment, both in terms of Rule 42(1)(a) and the common law. Papers in the summary judgment application were erroneously not forwarded to the Belville office of the attorney attending to the matter, and summary judgment was obtained by default. It was accepted that the defendant wanted to defend the action and would have done so if the application had been brought to the attention of his attorney.

[9] The SCA confirmed that the rule caters for mistake and that rescission or variation does not follow automatically upon proof of mistake. Courts have a discretion to be exercised judicially.¹¹ Being a Rule of Court, the ambit is entirely procedural and confined by its wording and context to the rescission or variation of

⁸ *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 510D-G.

⁹ *Seale v Van Rooyen NO; Provincial Government, North West Province v Van Rooyen NO* 2008 (4) SA 43 (SCA) at 52B-C. As Cloete JA held in that matter, 'The submission by counsel representing the TYC that the rule should be interpreted, "because of its plain and grammatical meaning", as covering orders wrongly granted, is inconsistent with the interpretation given to the rule in numerous cases, has not a shred of authority to support it and requires no further consideration...' (references omitted).

¹⁰ *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at 94E.

¹¹ At para 5.

an order erroneously sought or erroneously granted in the absence of an affected party.¹²

[10] The court relied upon *De Wet and Others v Western Bank Ltd*¹³ in confirming that the filing error in the office of the Cape Town attorneys was not a mistake in the proceedings. It could therefore not be held that the order was erroneously sought by the plaintiff or erroneously granted by the judge.¹⁴ The same reasoning applies in this case. The COIDA point does not constitute a 'fact' of which the court was unaware at the time judgment was granted. It is probably best described as a subsequently disclosed defence which was not known or raised at the time of default judgment, and which is not a basis for claiming that the judgment was erroneously granted. Even if that point did constitute a 'fact', the respondent was procedurally entitled to the default judgment and that judgment cannot be set aside on this basis. As the *Colyn* scenario demonstrates, the circumstances that resulted in the granting of default judgment are insufficient to establish that there is a mistake in the proceedings that resulted in the judgment being erroneously sought or granted.

Rule 31(2)(b) and the common law claims

[11] Rule 31(2)(b) provides that 'a defendant may within 20 days after acquiring knowledge of a default judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit'. The phrase 'good cause' defies comprehensive definition, involving the exercise of a judicial discretion and requiring

¹² At para 7.

¹³ 1979 (2) SA 1031 (A).

¹⁴ *Colyn supra* at para 9.

a flexible approach. Broad principles of justice and fairness must be appreciated by the court, which must consider all the relevant facts and circumstances of the case as a whole.¹⁵

[12] The more specific requirements for an application for rescission under this subrule have been stated to be as follows:¹⁶

- The applicant must give a reasonable explanation of his default;
- The default should not be wilful or due to gross negligence;
- The application must be *bona fide* and not made with the intention of merely delaying the plaintiff's claim;
- A *bona fide* defence to the plaintiff's claim must be shown. It is generally sufficient if the applicant makes out a *prima facie* defence, carrying some prospect of success, in the sense of setting out averments which, if established at the trial, would entitle the applicant to the relief sought. The applicant need not deal fully with the merits of the case and produce evidence that the probabilities are actually in its favour.

[13] These requirements are akin to the common law principle that a judgment granted by default can be set aside.¹⁷ The court have interpreted these requirements in a number of cases. It has been held, for example, that the explanation for the default must be sufficiently full to enable the court to understand how it really came

¹⁵ *Scholtz and another v Merryweather and others* 2014 (6) SA 90 (WCC) at para 12.

¹⁶ *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476-7.

¹⁷ See *Colyn supra* at 9C. In *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 300, the court explained the reasons for not attempting to exhaustively define words such as 'good cause' and 'sufficient cause'. The applicant's heads of arguments utilises the latter term to support its application in terms of the common law, and the former for its reliance on rule 31(2)(b), correctly submitting that the phrases are synonymous and interchangeable: *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352H-353A.

about, and to assess the applicant's conduct and motives. An applicant will not be in wilful default if its default is due to a mistake or non-compliance with the rules, on its own part or that of its legal representative.¹⁸ Where the applicant has provided a poor explanation for default, a good defence may compensate.¹⁹ A *bona fide* defence has to be established before rescission is granted, meaning that the defendant must honestly intend to place before a court a set of facts which, if true, will constitute a defence.²⁰ It remains the court's task to consider all the relevant facts and circumstances applicable, and to exercise a judicial discretion following the application of a flexible approach centred on the principles of justice and fairness. In respect of the two core requirements of prospects of success and explanation of default, the Appellate Division (as it then was) has held as follows:²¹

'It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits...'

[14] I have no difficulty in accepting that the applicant is not in wilful default. The application has also not been made with the intention of merely delaying the

¹⁸ *O' Reilly v Montgomery* 1923 (2) PH L21 (CPD).

¹⁹ *Carolus v Saambou Bank Ltd; Smith v Saambou Bank Ltd* 2002 (6) SA 346 (SE) at 349B-C.

²⁰ *Saphula v Nedcor Bank Ltd* 1999 (2) SA 76 (W) at 79C-D.

²¹ *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) as cited in *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC) at 350D.

respondent's claim. The applicant's explanation of the default is, however, unsatisfactory, and ultimately amounts to seeking reliance on the Covid-19 pandemic to explain its conduct. The time to enter an appearance to defence expired prior to the commencement of the country's lockdown and default judgment was obtained some five months later (on 2 September 2020). The applicant also failed to deal with the matter at all until 2 December 2020 when it became aware of the default judgment. This is almost nine months after summons was served. The applicant was an essential service provider operating during the lockdown and the proffered explanation about how the summons 'fell through the cracks' is extremely vague. As the court held in **Colyn**:²²

"I have reservations about accepting that the defendant's explanation of the default is satisfactory. I have no doubt that he wanted to defend the action throughout and that it was not his fault that the summary judgment application was not brought to his attention. But the reason why it was not brought to his attention is not explained at all. The documents were swallowed up somehow in the offices of his attorneys as a result of what appears to be inexcusable inefficiency on their part. It is difficult to regard this as a *reasonable* explanation...Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a *bona fide* defence which has not merely some prospect, *but a good prospect of success* (*Melane v Santam Insurance Co Ltd*).'²² (Own emphasis).

²² *Colyn supra* at para 12, with reference to *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A).

[15] The assessment of the explanation of the default affects what the court would expect to find in the papers in respect of the prospects of success. Had the explanation for the delay been a good one, even slim prospects of success on the merits may have sufficed. The explanation being as it is, something more (namely, good prospects) is required.

[16] There is no doubt that in appropriate cases 'an unsatisfactory explanation furnished by an applicant for rescission may well be compensated for by good prospects of success on the merits.'²³ The court in **Melane** in fact made reference to 'strong prospects' being required in circumstances where the delay was lengthy.²⁴ Nevertheless, it is true that the applicant is not expected to deal fully with the merits of the case and produce evidence that the probabilities are actually in its favour. The key issue for consideration is whether the applicant has been able to put up a *bona fide* defence to the claim *which has good prospects of success*.²⁵ In determining whether good or sufficient cause has been shown, a court should not look at the adequacy or otherwise of the explanation of default or failure in isolation. Instead, the explanation must be considered in the light of the nature of the defence and in the light of all the facts and circumstances of the case as a whole.²⁶

[17] Cases such as **Scholtz and another v Merryweather and others**²⁷ confirm that it is not necessarily the function of the court to apply too detailed an analysis of the available evidence. Instead, the version put up in the founding affidavit forms the

²³ *Fick supra* at 351C para 89.

²⁴ At 532E: 'Or the importance of the issue and strong prospects of success may tend to compensate for a long delay.'

²⁵ *Colyn supra* at para 13. Also see *Fick supra* at para 89.

²⁶ *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at para 10.

²⁷ *Supra* at para 34.

primary basis for considering whether a *prima facie* defence to the respondent's claim for damages has been made out, with good prospects of success. The court's function is to perform a balancing act and to evaluate all of the relevant facts before it in order that justice can be done between the parties.²⁸ In particular, the adequacy or otherwise of the explanation of the default or failure, whether good, bad or indifferent, must not be viewed in isolation. Instead, it must be considered together with the nature of the defence and in the light of all the facts and circumstances of the case as a whole.²⁹

[18] The applicant relies on lack of wrongfulness, suggesting in its founding affidavit that the intention to assault anyone was absent. In addition, 'the plaintiff...without justifiable cause and without identifying himself / themselves, forced open the door of the guard hut, (which is private property) and which guard hut was lawfully occupied by the security officers at the time.' Believing themselves to be under attack by robbers or criminals, one of the security officers discharged a gunshot. In the alternative, it suggests that it will plead that the court should order an apportionment of damages based on contributory negligence.

[19] While there is a dispute on the papers as to whether the respondent identified himself prior to entering the guard hut, it is important that a criminal court has already found the applicant employee's conduct in the shooting to be negligent beyond reasonable doubt.³⁰ That employee has not favoured the court with an affidavit

²⁸ *Scholtz supra* at para 101.

²⁹ *Harris supra* at para 10.

³⁰ A copy of the case docket forming part of the papers suggests that the applicant's employee was charged with attempted murder, convicted of negligent use of a firearm and sentenced to five years imprisonment, suspended for three years. The applicant does not deny this but initially suggested that this information constituted irrelevant hearsay evidence. An application to strike out was not launched and Mr Mooij, correctly

regarding his version of events. There is also nothing on the papers from the other security officer that was in the hut at the time. It is not disputed that the employee was acting in the course and scope of his employment with the applicant at the time, and such conduct must, in addition, be considered to be *prima facie* wrongful. The other elements for delictual liability have not been raised. As to the suggestion that the respondent was himself negligent (and, presumably, acted wrongfully), no real basis for this has been set out in the application. There is also no case on the papers suggesting that the order was excessive and that the quantum of damages should be considered afresh.³¹ To the extent that there may have been some negligence on the part of the respondent, no explanation has been provided as to how this might affect the applicant's liability to the respondent given that the respondent avers that the judgment is for an amount less than the full damages suffered. While none of these facts are *per se* decisive in terms of whether or not the application for rescission should succeed, they are factors to be considered when this court exercises its general discretion in relation to the relief now claimed, and in particular in determining whether good prospects have been demonstrated.³²

[20] In **Scholtz**, for example, the defence offered by the applicant was completely different to the version of the respondent. The matter also related to injuries caused. Similar to the argument in this matter, the applicant claimed that he acted in self-defence in response to an unlawful attack on him by the respondent, and, as in this case, wished to advance that argument if permitted to file a plea. The court in that case noted that the applicant sought rescission in order to vindicate his right to a fair

in my view, did not persist with that line during argument. There is no information from the applicant on the papers explaining the circumstances that resulted in this conviction.

³¹ See *Scholtz supra* at par 98.

³² See *Scholtz supra* at para 35, in that case the emphasis being to determine the bona fides of the applicant.

public hearing, which accords with the provisions of s 34 of the Constitution of the Republic of South Africa, 1996. A similar argument may have been advanced in this case. In exercising its discretion in **Scholtz**, the court emphasised the importance of considering issues of prejudice.³³ Despite the applicant in that case having tendered the respondent's costs in the rescission application and future costs in respect of the hearings on the merits and quantum, backed by a suretyship, the prejudice to the respondent was considered to outweigh the prejudice to the applicant,³⁴ and the court ultimately dismissed the application for rescission.³⁵ In doing so, it remarked that the applicant had '...a long way to go to persuade a court that he was not responsible for Merryweather's injuries – whether intentionally or negligently' and that this '...may account for his manifest indifference throughout'. The same may be said upon a conspectus of the papers in this matter.

[21] The applicant's other submission, at least on the papers, is that the plaintiff's claim lies against the Compensation Fund, seemingly exclusively, alternatively that it can, '...in terms of section 36(2) and 36(3) of the Act, only be held liable for such damages as the plaintiff would not legally have been able to recover from the Fund...'

[22] While Mr Mooij SC did not place much emphasis on this during argument, it remains one of the reasons advanced for the rescission application. The suggestion seems to be that the respondent was duty bound to proceed with and complete a Compensation Fund claim prior to securing a judgment for damages from a third

³³ At para 84 *et seq.*

³⁴ At para 96.

³⁵ At para 119.

party, so that the former amount could be deducted from the latter. What people in the position of the respondent should do when a compensation claim is delayed by the Compensation Fund for more than three years, for purposes of avoiding prescription in their damages claim, is unanswered. Perhaps more importantly, that interpretation is unsupported by the present wording of section 36 of COIDA, by decided cases or academic commentary.

[23] In **Sasol**, the SCA considered whether payments made in terms of COIDA to a widow and dependent children in consequence of the death in a workplace accident of their husband or father had to be deducted from their delictual claims for damages against two defendants. The following principles or points emerge from the judgment in this matter:

- Section 36(2) of the 1993 Act read differently at the time of the deceased's death in this matter: 'In awarding damages in an action referred to in ss (1)(a) the court shall have regard to *the amount to which the employee is entitled* in terms of this Act' (emphasis added).³⁶
- Prior to COIDA, section 8(1) of the **Workmen's Compensation Act, 1941**³⁷ ('the 1941 Act') provided that when a court awarded damages it '...shall, in estimating the damages, *have regard to the amount which that person will be liable to pay* to the commissioner or the employer concerned under the provisions of para (b)' (own emphasis). The intention was clearly for compensation claims to be finalised expeditiously and then to be deducted from the damages awarded. In

³⁶ See s 13 of the Compensation for Occupational Injuries and Diseases Amendment Act, 1997 (Act 61 of 1997).

³⁷ Act 30 of 1941.

addition, the court should ensure that workers would be entitled to no more than their full common-law damages in cases where a 'third party' was involved. In other words, compensation (normally obtainable from the Fund) plus damages (from the third party responsible for the injury) should not exceed the full amount of common-law damages.³⁸ The intention was presumably to avoid the injured worker being able to 'double-dip' in terms of the total damages receivable, a principle that was seemingly maintained when section 36 was enacted (and amended).³⁹

[24] Further clarification is obtainable from the judgments of Harms JA and Mthiyane JA in **Road Accident Fund v Maphiri**.⁴⁰

- 'Compensation' is not the same as 'damages', as evinced by the wording of section 36;
- The Act is 'not for the benefit of third parties...who are liable in delict; it is for the benefit of the employee and the employer, and 'premiums' have to be paid for this 'insurance';
- The starting point of any litigation under section 36 is a determination of the third party's liability (also referred to as 'common-law liability', which equates to 'delictual liability');
- Section 36 does not increase the liability of a third party. Where a third party is involved the employee may be entitled, in the form of compensation plus damages, to the amount of his / her full common-

³⁸ *Sasol supra* at para 10.

³⁹ *Sasol supra* at para 12.

⁴⁰ 2004 (2) SA 258 (SCA) at para 14 *et seq*. This case dealt with apportioned loss in circumstances where the plaintiff was entitled to COIDA compensation and damages from the Road Accident Fund ('RAF').

law damages, but no more. The 'third party' may be liable to the employee and the employer or commissioner taken together for the full amount of common-law damages, but no more.

- The principle against double-dipping is reiterated: 'I cannot see any reason why the Legislature should have intended that a person, wholly innocent of fault himself, having a valid and available cause of action against a third party for damages so as to be entitled to claim from that third party for all the damage whatsoever that he has suffered and will suffer in future in consequence of his injuries, should receive more than the sum which represents that damage merely because he is a workman who, as such, is entitled to claim a sum of money from the Commissioner in respect of such injuries.'⁴¹
- Under the previous dispensation, compensation fell to be deducted from the total amount of the common-law damages, even if the employee chose to claim a lesser sum.⁴²
- Significantly, '...it should be pointed that s 36 in 1997 underwent some amendments which may either be substantive or merely cosmetic. In the past the amount which the Commissioner would have been liable for had to be deducted from the employee's claim; now it is the amount actually paid...at least that is what is said.'⁴³

[25] One of the objects of both the 1941 Act and COIDA is to allow the employee to claim both compensation (from the Compensation Fund, in terms of legislation) and damages (from a third party).⁴⁴ There is, however, no compulsion on an

⁴¹ *Wille and Another v Yorkshire Insurance Co Ltd* 1962 (1) SA 183 (D) at 186D-187B.

⁴² *Klaas v Union and South West Africa Ins Co Ltd* 1981 (4) SA 562 (A) at 587B-C.

⁴³ Harms JA went on to note, *obiter*, that that subsections (4) and (1)(b) conveyed a contrary intention.

⁴⁴ See the judgment of Mthiyane JA in *Maphiri supra* at para 28(b).

employee to do so, and an employee may elect not to claim compensation, in which case the Director-General (or employer by whom *compensation* is payable, in exceptional cases) would have no right to claim from the third party.⁴⁵

[26] Following the 1997 amendment of COIDA, it appears to be clear that a further object is to oblige a court considering an employee's claim for damages against a third party to deduct the 'compensation paid' in terms of COIDA.⁴⁶ There was no 'compensation paid' at the time that default judgment was granted (and to date that remains the position). Had the Compensation Commissioner already made payment to the respondent and sought to recover what had been paid (whether by intervention in the respondent's case against the applicant or by separate action), 'the Commissioner cannot get more than what the employee is entitled to recover from the third party'.

[27] This interpretation is consistent with a number of the principles previously cited. Compensation, when paid, would be deducted from a plaintiff's total claim or 'aggregate damages'.⁴⁷ The third party's liability should never be increased beyond the aggregate amount of its common-law liability to the employee and an employee injured in circumstances where he or she had a claim for compensation and damages should not obtain any sum that exceeds the aggregate of his or her common-law damages.⁴⁸ A third party completely liable for damages suffered by an employee acting in the course and scope of his or her employment is not prejudiced

⁴⁵ *Maasberg v Springs Mines Ltd* 1944 TPD 1 13, as cited in MP Olivier 'Social Security: Core Elements' in Faris (ed) *LAWSA: Social Security: Core Elements* (vol 13(3)) (2nd Ed) at para 133.

⁴⁶ *Maphiri supra* at para 28(c), read in the context of the 1997 amendment to COIDA.

⁴⁷ *Maphiri supra* at para 29.

⁴⁸ *Ibid*. Also see the example cited by Mthiyane JA at paras 32 and 33, noting that the Commissioner could recover any compensation already paid from a liable third party, so that the third party remained liable for the full amount of damages in such cases (but not more).

by that employee failing to submit a compensation fund claim and (only) claiming damages. That is the effect of section 36(1)(a) of COIDA: ‘...the employee *may* claim compensation in terms of this act and *may* also institute action for damages in a court of law against the third party.’ (Own emphasis). In such a scenario the Director-General of the Department of Labour is simply saved the trouble of instituting action against the third party for the recovery of compensation that may otherwise have been payable in terms of COIDA.⁴⁹ As it is common cause that no compensation has been paid in this matter to date, the provisions of section 36(2) of COIDA are inapplicable and the court did not need to have regard to the possibility of compensation being payable in future. Reliance on the potential COIDA claim as a basis for rescission is accordingly misplaced. Nevertheless, it is important for the officials of the Compensation Fund to be aware of the default judgment obtained by the respondent in this matter, so that this may be taken into account should a compensation claim be processed in future. In the circumstances a copy of this judgment should be sent to the Compensation Fund.

[28] On the whole, the facts in this matter demonstrate that the prospects of success on the merits is not strong. That is not to say that there are no such prospects whatsoever, leading to the conclusion that there is no *bona fide* defence. I accept Mr Mooij’s submissions that, if proven, the applicant has put forward a possible defence to the claim that resulted in the default judgment. As already indicated, however, that is not the only hurdle to be overcome by the applicant given the circumstances of the matter in its entirety. I have, for example, also considered the respondent’s interest in finality, and the broader notion of prejudice, which the

⁴⁹ Section 36(1)(b) of COIDA.

court in **Melane** advised should not be overlooked.⁵⁰ In considering all the facts and circumstances applicable, it must be concluded that the applicant has not shown good or sufficient cause warranting the exercise of the court's discretion to rescind the default judgment. The applicant is ultimately the author of its own problems in this regard, and it would be inequitable to visit the respondent with the prejudice and inconvenience flowing from such conduct.⁵¹ In the final analysis, the interests of justice would, in my view, not be served by granting rescission in this instance.

Order

1. The application for rescission is dismissed with costs.
2. The Registrar is directed to send a copy of this judgment per registered mail to the Director-General of the Department of Labour and the Compensation Commissioner appointed in terms of section 2(1)(a) of the Compensation for Occupational Injuries and Diseases Act, 1993.

A. GOVINDJEE
ACTING JUDGE OF THE HIGH COURT

⁵⁰ *Melane supra* at 532E and 532H.

⁵¹ See the remarks of Melamet J, cited with approval in *De Wet and others v Western Bank Ltd supra* at 1044D.

Appearances:

Obo the Applicant: *Adv A. Mooij*

Instructed by: *Blake Bester De Wet & Jordaan Inc c/o JGS, 173
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Obo the Respondent: *Adv E. Crouse S.C*

Instructed by: *Howard Collen, 11a Shirley Street, Newton Park,
Port Elizabeth*

Heard: *20 May 2021*

Delivered: *27 May 2021*