

REPUBLIC OF SOUTH AFRICA



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

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

A handwritten signature in black ink, appearing to be "S. J. M.", is written over a horizontal line.

5 June 2023

Case No: 35862/2022

In the matter between:

ROAD ACCIDENT FUND

Applicant

and

CLOETE OCCUPATIONAL THERAPIST CC

Respondent

JUDGMENT

SK HASSIM AJ

1. This is an opposed application for the rescission of a default judgment (“the judgment”) granted against the applicant on 10 August 2021 in an action brought by the respondent under case no 56423/20 for payment for services rendered.

2. The applicant's founding affidavit does not disclose whether the application is brought in terms of rule 31(2)(b), rule 42(1)(a) or the common law. It is however asserted in the applicant's counsel's heads of argument that the application is brought under rule 42 and/or the common law. It is expressly stated in the heads of argument that the applicant is not applying for the rescission of the judgment under rule 31(2).
3. Additionally, the founding affidavit does not identify in what respect the judgment was erroneously sought or granted, and there is no factual foundation for the argument in the applicant's counsel's heads of argument that the judgment was erroneously granted. In any event I find no error that renders the judgment susceptible to rescission under rule 42(1)(a). I am not satisfied that the applicant has made out a case for the judgment having been erroneously sought or granted.
4. There is no dispute that on 30 August 2021¹ the respondent's attorneys notified the applicant of the judgment and provided a copy of the court order to it.
5. On 5 July 2022, the applicant launched an application in which it sought firstly on an urgent basis the stay of a writ of execution ("the writ") and secondly for the rescission of the judgment. The application was therefore brought more than ten months after the applicant had knowledge of the judgment. The applicant seeks condonation for the delay in bringing the application for the rescission of the judgment. The question is therefore whether the applicant has demonstrated good

¹ Letter dated 27 August 2021.

cause for the delay to be condoned. The requirements for condonation are trite, and it is not necessary to repeat them.

6. The time allowed in rule 31(2)(b) for applying for the rescission of a default judgment is a guide to what would constitute a reasonable period of time within which to apply for the rescission of a default judgment under the common law as well as under rule 42(1).² The delay between the applicant being informed of the default judgment, and the application for the rescission of the judgment being delivered was ten months. This is far more than the twenty days allowed in rule 31(2)(b). The applicant has advanced no reasons why in the circumstances of this particular case a reasonable period would have been more than twenty days.
7. I am not satisfied that the applicant has provided a full, satisfactory, and reasonable explanation which covers the entire period of the delay.³ A brief narrative of key events demonstrates this. What it also demonstrates is that the applicant was not only dilatory in the extreme but that the default was wilful.
 - 7.1. The summons in the action was served on 5 November 2020. The applicant failed to enter an appearance to defend the action.
 - 7.2. An application for default judgment was served on 23 April 2021 and the notice of set down enrolling the default judgment for hearing on 10 August 2021 was served on 2 August 2021.

² Basson NO and another v Orcrest Properties (Pty) Ltd and two related matters [2016] 4 All SA 368 (WCC) par 38.

³ SA Express Ltd v Bagport (Pty) 2020 (5) SA 404 (SCA) par 34. Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others 2021 (6) SA 352 (SCA) at par 21.

- 7.3. Default judgment for R132 887.43 together with interest and costs was granted ⁴on 10 August 2021.
- 7.4. On 30 August 2021⁵ the respondent's attorneys notified the applicant in a hand delivered letter to the applicant's offices that a judgment by default had been granted against the applicant. A copy of the court order was attached to the letter.
- 7.5. On 7 March 2022, 180 days having lapsed since the applicant was informed of the default judgment, the respondent's attorneys hand delivered a letter dated 3 March 2022 to the applicant's offices demanding payment.
- 7.6. The last-mentioned letter appears to have elicited a phone call on the same day from one Mr Adams from the applicant's offices in Menlyn who requested copies of all the documents in the matter. This was the first communication from the applicant since the summons was served.
- 7.7. On 11 March 2022, the applicant's attorneys were instructed to defend the action.
- 7.8. A notice of intention to defend the action was served on 15 March 2022,
- 7.9. On 17 March 2022, the respondent's attorneys notified the applicant's attorneys that the notice of intention to defend was irregular because default judgement had been granted. They were alerted that the recourse

⁴ The amount claimed in the summons was R564 561.07.

⁵ The letter is dated 27 August 2021.

was an application for the rescission of the default judgment.

Approximately two months passed without a response.

- 7.10. The writ was issued on 9 May 2022.
- 7.11. On 10 May 2022, the respondent's attorneys called in writing for payment within 5 days failing which the Sheriff would be instructed to give effect to the writ which was attached to the letter. This resulted in correspondence from the applicant's attorneys on 12 May 2022.
- 7.12. Not only was nothing done to challenge the judgment after it had come to the applicant's attention, the applicant paid claims/invoices after the judgment had been granted. It is worth noting that some were paid after the summons had been served.⁶ and two were paid on 11 May 2022 which was a day after the writ was sent to the applicant's attorneys.
8. Save for making payments after judgment the applicant remained otherwise supine. It was in a slumber from 30 August 2021. It was bestirred on 7 March 2022 when the respondent demanded payment. By the time the applicant instructed attorneys on 11 March 2022 to enter an appearance to defend, approximately sixteen (16) months had passed since the summons had been served. The instruction to enter an appearance to defend the action was given to the applicant's attorneys full knowing since 30 August 2021 that judgment had been granted on 11 August 2021.

⁶ One on 13 November 2020 and the other on 22 July 2021.

9. Nowhere in its papers does the applicant explain its six month inertia from 30 August 2021 to 7 March 2022. This is not a case where the explanation is unsatisfactory; there is no explanation whatsoever why the applicant was paralysed or what it did in its paralysed state. It took no steps to rescind the judgment between 30 August 2021 and 7 March 2022. In fact, the applicant makes no mention whatsoever of this period in its papers. It is established law that an applicant for condonation must explain its failure to comply with stipulated time frames. Where an applicant fails to give any explanation, it has failed to show good cause. This in my view is fatal to the application for condonation and for this reason alone it falls to be dismissed.
10. As far as the subsequent delays are concerned, the applicant alleges that over the period March-April 2022 it was busy collating records and information from its regional offices regarding which of the respondent's invoices were paid, which though received, were not paid, whether the applicant had instructed the respondent to prepare the expert report for which payment was sought, whether the reports had been timeously submitted as per the service level agreement entered into between the applicant and respondent, and whether the applicant had imposed a financial penalty for the late delivery of reports by the respondent. To me this means that the source of the information and documentation was the regional offices. However later the applicant alleges that "after soliciting the information [it] had to deal with different Regions and claims and invoices submitted to them... most regions had to attend to the claims and invoices to confirm if the expert reports were compiled and submitted to the applicant." It

defies logic why after having received the information from the regional offices there was still the need to deal with the different regions and for the regions to carry out the exercise which should have been conducted when they were collating documents and information requested by the applicant. I reject this explanation. It seems contrived.

11. I hold the same view on the explanation that the delay was the result of the applicant having to consult with its attorneys after the information and documentation had been collated and the invoices were perused and studied against the amount stated in the summons and or sought in the court order/or the writ.⁷ The applicant does not explain why it had to consult with its attorneys to determine whether the invoices for which the respondent had sought payment were paid or not. This information was peculiarly within its knowledge. Either the invoices were paid or not paid. And if they were not paid there must have been a reason for this. I am prepared to accept that in those cases where invoices had not been paid because the applicant was of the view that it could justifiably withhold payment, it would have to consult with its attorneys on whether in law its failure or refusal to pay was justifiable. But the applicant does not say this.
12. The applicant explained that when it came to paying the experts, in some instances they were paid by the applicant directly and in other instances by the attorneys on the applicant's panel of attorneys who were defending claims for compensation for bodily injuries on behalf of the applicant. The applicant seeks to attribute the delay in applying for the rescission of the judgment to the failure of its erstwhile

⁷ Loosely repeating the words in the founding affidavit.

attorneys to handover files to the applicant after their mandates had been terminated. The failure by the applicant's attorneys to handover the files, according to the applicant, resulted in it becoming impossible to confirm whether the respondent's invoices had been paid or not.

13. In my view, in the case of those payments made by the applicant directly to the respondent, the applicant did not need the erstwhile attorneys' files. It was only in those cases where it had no record of the respondent being paid that the applicant may have been hampered by an erstwhile attorney's failure to handover a file. The applicant should have been candid which invoices, if any, fell under the latter category.
14. The founding affidavit is silent on what the applicant did between the end of April and 11 May 2022 when the respondent's attorneys sent the writ to the applicant's attorneys. On the following day (12 May 2022) the applicant's attorneys wrote a letter to the respondent's attorneys in which it set out which claims had been paid, and which had not. A reasonable inference is that this letter was a reaction to the letter of 11 May 2022. It is not evident from the papers when the application to stay the writ and for the rescission of the judgment was served. It was issued on 5 July 2022. There is an unexplained hiatus between 12 May 2022 and 5 July 2022.
15. A litigant who seeks condonation has the burden of furnishing an explanation for its default sufficiently fully so that a court may understand how it came about and assess the litigant's conduct and motives. The applicant has failed to acquit itself of this burden. Firstly, there is no explanation at all for the applicant's failure to

bring an application for the rescission of the judgment between 30 August 2021 and 11 March 2022 in circumstances when it was aware of the judgment. Not only did the applicant not apply for the rescission of the judgment, it paid a portion of the judgment debt. Secondly, the explanation for the delay over the period March 2022 and April 2022 lacks sufficient detail for the court to assess how it came about. On the applicant's version the process of sourcing and collating information and documents from the regional office took some six weeks. The applicant should have explained why the exercise of sourcing and collating information from its own records (albeit that information had to be obtained from regional offices) could not be completed earlier. I am not able to find that the explanation given is reasonable. Thirdly, there is no explanation why the applicant did not apply for the rescission of the judgment after it had completed sourcing and collating information in April until the writ of execution was sent to its attorneys. What is also glaringly absent is an explanation why the applicant waited until 5 July 2022 before delivering the application for the rescission of the judgment. In my view not only was the applicant indifferent to the consequences of its default but that its default was deliberate; it had full knowledge of the circumstances and the risks attendant on its failure to apply for the rescission of the judgment, and freely decided not to do so.⁸ Its default was therefore wilful. This entitles a court to refuse condonation.⁹

⁸ Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd 1994 (3) SA 801 (C) at 804G-805B.

⁹ Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd 1975 (1) SA 612 (D) at 615.

16. Lest I have erred in my approach that condonation falls to be refused because the applicant has not explained, fully explained, or satisfactorily explained its default in timeously applying for the rescission of the judgment or, that its default was wilful, I consider whether the applicant has disclosed a *bona fide* defence to the unsatisfied portion of the respondent's claim, in other words the outstanding portion of the judgment debt.
17. Between the time the summons was served and the application for the rescission of the judgment was brought, the applicant paid a considerable portion of the amount claimed in the summons. It also paid after the judgment was granted, claims that were the subject matter of the judgment. Additionally, it made payments after it was brought to its attorneys' attention that a writ of execution had been authorised and issued by the Registrar. According to the respondent after these payments are deducted from the judgment debt an amount of R57 335.14 is owing.
18. The *causa* for the judgment debt were service level agreements entered into between the parties for Pretoria, Johannesburg, Cape Town, Port Elizabeth, and the KwaZulu Natal province. None of the service level agreements are part of the court record. The action was instituted under a different case number from the case number under which the rescission of judgment application is brought. While the summons and particulars of claim are attached to the founding affidavit none of the annexures to the particular of claim are attached to the applicant's papers. It emerges on a conspectus of the evidence that the respondent had entered into service level agreements for different geographical regions in terms of which it,

as an expert witness for the applicant in the area of occupational therapy, prepared medico legal reports.

19. The applicant avers in its founding affidavit that as far as the unpaid invoices (claims) for the KwaZulu Natal province are concerned, they total R88 015.44. This is more than what the respondent contends the outstanding judgment debt is.¹⁰ Be that as it may, the applicant asserts that the respondent is not entitled to payment because it had submitted the medico legal reports “out of the expected timeframes”¹¹ with the result that its claims for payment were struck by the penalty imposed in clause 6 of the service level agreement for the KZN province. The applicant has elected to attach only those pages of the service level agreement which contain clauses 5 to 8.¹² In terms of clause 6.3.1, if the respondent failed to deliver a report “within the agreed timelines”, a penalty of 5% per day for every day that the report remains outstanding would apply to the amount reflected on the invoice for that report. However, the “agreed timelines” do not appear in clauses 5 to 8, nor does the applicant disclose in its papers what the agreed timeline was and when the report/s was/were provided. The fact that this information appears in the applicant’s counsel’s heads of argument does not remedy the lacuna in the applicant’s papers. I am not satisfied that the applicant has demonstrated that it has a bona fide defence to the respondent’s claim regarding the claims/invoices relating to the KZN province.

¹⁰ Namely, R57 335.14.

¹¹ FA para 18.2

¹² Which appear on p 5 and 6 of what is seemingly an agreement consisting of 31 pages.

20. As far as the invoices for the Port Elizabeth, Cape Town, and Pretoria regions are concerned, the applicant avers in the founding affidavit that these have been paid and that some if not most of those for Johannesburg have been paid. The onus rests on the applicant to show that it has paid the invoices for the Pretoria region. The onus does not rest on the respondent to provide the breakdown of the invoices that were paid and those that were not as the applicant argues in its papers. The applicant has misconceived the onus, the onus rests on the debtor to prove that the debt has been paid.
21. The payments made by the respondent after the summons was served, go to show that the applicant had no defence to the claims paid. As far as the outstanding portion of the judgment debt is concerned it relates to the claims for the KwaZulu Natal province and the Pretoria region. The applicant has not set out sufficient facts that would constitute a defence to the unpaid portion of the judgment debt.
22. The applicant has failed to show good cause for condoning its failure to apply for the rescission of the judgment within a reasonable period of time. The application for condonation is therefore refused. Consequently, it is unnecessary to separately consider the application for the rescission of the judgment.
23. The respondent seeks attorney client costs. In my view punitive costs are warranted. The applicant has not disputed that the summons was served at its offices. However, no reason is given for its failure to timeously defend the action. This together with its failure to timeously apply for the rescission of the judgment and its persistent failure to react to the procedural and other steps taken by the

respondent, unfortunately, in this case paints a picture of a litigant who has disdain for the court and its processes.

24. The respondent has incurred legal costs in defending an unmeritorious application for the rescission of the judgment and its attempt to settle the application on the basis that the applicant pays the costs of the action, was rebuffed. I find no compelling reason for the respondent to be out of pocket in the matter of its own attorney client costs.¹³

25. In the circumstances the following order is made:

- (a) The application is dismissed.
- (b) The applicant is to pay the costs of the application on the attorney client scale.



S K HASSIM AJ

Acting Judge: Gauteng Division, Pretoria
(electronic signature appended)

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 5 June 2023.

Date of Hearing: 8 March 2023

Applicant's Counsel: Adv KK Maputla

Respondent's Counsel Adv HP Wessels

¹³ Cf Ward v Sulzer 1973 (3) 701 (A) at 706H; Ex Parte Controlled Investments (Pty) Ltd 1948 (2) SA 339 (T) at 343