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

CASE NO: 50025/2020

1) REPORTABLE: NO

2) OF INTEREST TO OTHER JUDGES: NO

3) REVISED.

DATE :11 July 2023

SIGNATURE

In the matter between:

**THE MEMBER OF THE EXECUTIVE
COUNCIL, GAUTENG DEPARTMENT OF
ROADS AND TRANSPORT**

Applicant

And

F[...] A[...]

First Respondent

M[...] A[...]

Second Respondent

R[...] A[...]

Third Respondent

JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL / UPLOADING ON CASELINES. THE DATE OF HAND DOWN SHALL BE DEEMED TO BE 11 JULY 2023

BAM J

A. Introduction

1. This is an opposed application for rescission of a default judgement granted by this court, per Vuma AJ, on 8 September 2021. The application is brought in terms of Rule 42 (1), alternatively, Rule 31 (2) (b) and in terms of Rule 27 to uplift the bar placed on the applicant in respect of filing its plea.

B. Parties

2. The applicant is the Member of the Executive Council responsible for Roads and Transport in Gauteng Province. The applicant's address is cited as 4[...] C[...] Street, Johannesburg, Gauteng. The first respondent is F[...] A [...], an adult female born on 3 September 1981, who resides at 5[...] L[...] Street, Pietermaritzburg. The second respondent is M[...] A [...], an adult female born on 31 July 2002 and daughter of the first respondent. The third respondent is R[...] A [...], a boy born on 11 September 2011, the first respondent's son. The second and third respondents reside with the first respondent.

C. Background

3. The background facts may be summarised as follows: The respondents brought a claim for delictual damages in the amount of R 13 772 000.00 against the applicant, arising out of a motor vehicle accident in which the driver, who is alleged to have been the husband of the first respondent, and father to the second and third respondents was killed. It is also alleged in the particulars of claim that a third child lost his life in the same accident. The amount claimed is made up of general damages, future medical expenses, past and future loss of income, and loss of support.

4. In their particulars of claim, the respondents alleged that on 30 March 2019, they were travelling in a vehicle driven by the deceased, along the Provincial Road described as R101, between Pretoria and Johannesburg. Somewhere around the vicinity of Trichardt Road intersection, it is claimed that the road had an unexpected sharp bend to the right merging into a single lane. The layout of the road created an impression that it continued straight in the direction of a dead end and without warning it deviated to the right. It is claimed that the deceased, in the absence of road signs, drove straight and as a consequence, the vehicle rolled a number of times, killing the deceased and the third child and left the respondents injured. The respondents alleged that the applicant, as the Member of the Executive responsible for maintaining roads was negligent in that it, inter alia, created a false road and failed to warn motorists and other road users of the danger.

D. The Law

5. Rule 31 (2) (b), which deals with rescission of default judgement reads:

‘A defendant may within 20 days after he has knowledge of such 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 to it seems meet.’

6. Our courts have shied away from defining good cause. They have however, provided basic principles from which courts may infer good cause. In *Grant v Plumbers*, the court alluded to the following:

“(a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.

(b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.

(c) He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.”¹

7. In *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* (102/09) [2010] ZASCA 28; 2010 (9) BCLR 911 (SCA) ; [2010] 4 All SA 54 (SCA) (25 March 2010), paragraph 4, it was said that

¹ 1949(2) SA 470 (TPD) at 476.

‘...It is trite that in terms of the common law, an applicant, in order to be successful in an application for rescission, is required to show good cause. Generally, an applicant will establish good cause by giving a reasonable explanation for his or her default and by showing that he or she has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success.’

8. In *Steenkamp and Others v Edcon Limited*:

‘The principle is firmly established in our law that where time limits are set, whether statutory or in terms of the rules of court, a court has an inherent discretion to grant condonation where the interests of justice demand it and where the reasons for non-compliance with the time limits have been explained to the satisfaction of the court. In *Grootboom* this Court held that

“[i]t is axiomatic that condoning a party's non-compliance with the rules of court or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation.”²

E. Merits

9. The undisputed facts reveal that the summons was served on 7 October 2020 and the Notice of intention to defend was filed on 20 October 2020. The applicant was placed under bar on 20 November 2020. The application for default judgement together with the Notice of Set Down was served on the applicant via email on 26 May 2021 and by sheriff on 27 May 2021. The court order was served upon the applicant on 13 September, and the affidavit to the

² (CCT29/18) [2019] ZACC 17; 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC) (30 April 2019), paragraph 26.

present application was deposited to on 11 October 2021 while the respondents' notice to oppose was filed on 18 September.

Good cause

10. The applicant's founding affidavit was deposited to by a Mr Mosito, a senior attorney in the State Attorney's office. Mr Mosito explains that the application was filed during the height of the COVID restrictions with most staff operating from home. Mr Mosito further says he had not received any communication from the respondents. In their answering affidavit, the respondents dealt with the timeline from the time the applicant had filed its Notice of Intention to Defend and detailed their efforts in prompting the applicant to file its Plea. In this regard, the respondents referred to several e-mails and telephone calls made to the State attorney, including e-mails directed to Mr Mosito, using the designated e-mail address furnished by him. For the record, Mr Mosito denied having received e-mails from the respondents' attorneys. The respondents submit that the applicant simply ignored their efforts and did nothing.

11. The respondents further pointed to the absence of necessary detail in the founding affidavit including the applicant's failure to fully account for its default. It urged the court to refuse the rescission. It is indeed correct that the application was launched when the country was under lock down due to the restrictions placed to manage the spread of COVID. Having said that, the explanation fails to properly account for default and this includes the entire

period of the default, from the time the applicant filed its Notice of Intention to Defend.

12. To illustrate the point, Mr Mosito does not say whether the e-mail service had stopped completely at the State Attorney nor does he state whether the personnel at the State Attorney had no access to computers. It is unacceptable that the court is left to figure out on its own the real reasons the rules were not adhered to. The applicant has been very conservative in explaining the default. This is just one part of the onus that the applicant must discharge. I now proceed to look at whether the applicants have a *bona fide* defence.

Bona fide defence

13. The applicant says that an inspection *in loco* conducted in the presence of the respondents' attorneys established that the accident occurred in Thaba Tshwane, in Pretoria, where the presence of road signage was confirmed. It further says there was no admissible evidence before the court and the default judgment was granted on the basis of newspaper articles. Finally, the applicant submits, correctly so, that the respondents are precluded from claiming damages arising from the driving of a motor vehicle directly from it and that their claim lies with the Road Accident Fund (RAF), which was established precisely for that purpose. Section 17 (1) of the Road Accident Fund Act³, deals with the fund's liability. It provides:

³ 56 of 1996.

‘The Fund or an agent shall-

(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;

(b) ... be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee....’

14. The point was made clear in *Septoo obo Septoo and Another v Road Accident Fund*:

‘The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles....[6] In *Aetna Insurance Co v Minister of Justice* this Court said that the purpose of motor vehicle insurance legislation was to remedy the evil ‘that members of the public who are injured, and the dependants of those who are killed, through the negligent driving of motor vehicles may find themselves without redress against the wrongdoer. If the driver of the motor vehicle or his master is without means and is uninsured, the person who has been injured or his dependants, if he has been killed,

are in fact remediless and are compelled to bear the loss themselves. To remedy that evil, the Act provides a system of compulsory insurance.”⁴

F. Discussion and Conclusion

15. While I readily agree that the applicant’s affidavit is seriously lacking in explaining the default, the *ratio* in *Septoo* with regard to where the respondents’ claim lies, is decisive of the matter. It is to the Fund that the respondents should have looked to for compensation for their damages, not the applicant. The State has created full a machinery dealing with the establishment, financing, and administering the Fund through fuel levies solely for the purpose of compensating victims of road accidents who may have a claim for injuries or death arising from negligent driving of motor vehicles. On this basis, I am inclined to allow the rescission so that the applicant has the opportunity to put its case before the court. It is also clear to me that the details pertaining to liability appear to be way too contentious and the applicant must be allowed to defend the case.

16. On the question of prejudice, one cannot gainsay the financial prejudice that the respondents have been put through. Firstly, they have had to contend with legal costs in applying for default judgement. Secondly, it is more than four years since the day of the accident and they still have no answer to their claim. They will now be compelled to go back to the starting line and place their case afresh before the court. The law says the applicant must show good cause, which requires a cogent explanation for the default and

⁴ (058/2017) [2017] ZASCA 164 (29 November 2017), paragraphs 3, 6.

demonstration of a bona fide defence. Although a bona fide defence with prospects of success may shore up a poor or weak account for the default, a poor account or explanation for the default may be considered by the court when exercising its discretion on the question of costs. I am persuaded that in allowing the rescission an appropriate cost order will be an effective tool to place the parties in the position they were before the default judgement was granted. The respondents should not be left out of pocket because of conduct that cannot even be properly explained by its own author.

G. Order

17. The application for rescission succeeds and the order granted by this court on 8 September 2021 is hereby set aside.

17.1 The applicant must pay the respondents' costs on a scale between attorney and client.

NN BAM

JUDGE OF THE HIGH

COURT,PRETORIA

Date of Hearing: 08 May 2023

Date of Judgement: 11 July 2023

Appearances:

Applicant's Counsel: Adv M Vimbi

Instructed by:

State Attorney, Pretoria

Respondents 'Counsel:

Adv F Ras SC

Adv A Ras

Instructed by:

Johan Oberholzer & Co

c/o Dyason Inc

Pretoria