



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

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES/no

DATE: 14 JUNE 2021

SIGNATURE:

CASE NO.:40210/20

In the matter between:

**ALEXANDER FORBES INSURANCE
COMPANY LIMITED**

Applicant/Defendant

And

LUVU CINGO

Respondent/Plaintiff

JUDGMENT

MKANSI AJ

1. Introduction.

Insurance claim. Plaintiff took a short-term insurance policy with Applicant in terms of which Applicant undertook, for consideration of premiums, to indemnify Respondent in the event of loss or damage. Respondent paid premiums and the insurance took effect. During the course of the cover Respondent was involved in a single vehicle accident from which the vehicle was damaged.

2. Summary

- 2.1. The defendant was served with summons via sheriff on 17 September 2020. The summons was served at defendant's legal department on the head of legal, named Fiona Rollason. Fiona sends the summons to the email address of a claims handler, MAE HLALELE, for appointment of an attorney to defend the claim. The service of the summons took place after completion of the acquisition of defendant by Momentum Insurance. As a result of the acquisition the email addresses of employees, including the email address of claims handler, who was meant to handle the summons and instruct an attorney to defend the summons, had changed. The email address of the claims handler to which the head of legal transmitted the summons had been changed and a new email address had been allocated to the claims handler. Fiona was not aware that the claims handler's address had changed. As a result, the summons did not reach the claims handler. Defendant stated that a judgment was subsequently granted by my sister TLHAPI J on 26 January 2021. The default judgment was served on the defendant on 29 January 2021. The application for rescission in terms of rule 31(2)(b) was issued and served upon plaintiff on 16 February 2021. The defendant states that it was not in wilful default in that the head of legal was under an impression that the summons received the necessary attention. Defendant further indicated it did not renounce its defence, and had a serious intention of proceeding with the case and would have done so had it not been for the mistake in the chain of command.
- 2.2. Defendant further indicates that it has a bona fide defence against plaintiff's claim in that Plaintiff breached the terms of the insurance agreement entered into between plaintiff and defendant as follows:
 - 2.2.1. Plaintiff failed to give complete and truthful information;
 - 2.2.2. plaintiff failed to take reasonable care to prevent loss, damage and accident;

- 2.3. Defendant allege that plaintiff breached the above in that (a) he was unwilling to provide true and correct information relating to the collision that occurred; and (b) he drove at an excessive speed whilst being under the influence of alcohol.
- 2.4. The defendant did not attach a copy of the insurance document upon which the terms of the insurance could be referred, to assess a bona fide defence.
- 2.5. The plaintiff disputes: (a) that he was under the influence of alcohol; (b) that he drove at an excessive speed; and (c) that he did not furnish the defendant with a complete and truthful information.
- 2.6. Plaintiff also opposes the application on basis that:
 - (a) It is misguided as it ought to have been brought in terms of rule 42 of the uniform rules; and
 - (b) That it was not granted on 26 January 2021 as indicated in the Notice of Motion.
- 2.7. Defendant requested leave of the court to amend the application from one brought under rule 31(2)(b) to one under the auspices of rule 42(1)(a) and tendered costs for the amendment.
- 2.8. Counsel for the Plaintiff on the other hand opposed the application to amend and stated that the application before court was irregular and cannot be cured by an amendment. He stated that the only step available to the defendant was to remove the application and instituted one *de novo*.
- 2.9. After hearing the parties on the aspect of amendment, I granted the leave to amend and the application was accordingly amended. The application for rescission shall, in the premisses, be considered under rule 42. If the application is not successful under this rule, it shall be evaluated under the common law auspices.
- 2.10. Before I commence with the application itself, I will deal with the Plaintiff's point relating to the error of Defendant to accurately describe the default judgment to be rescinded by the court. The plaintiff pointed out that the

default judgment was not granted on 26 January 2021, but was granted on 21 January 2021. He further indicated that the date appearing on the court stamp is the date on which the registrar appended its stamp. The order indeed indicates that the matter appeared before TLHAPI J on 21 January 2021 as reflected on the order. I find that the order to be rescinded has been sufficiently described for me to identify it as the subject of the rescission application.

2.11. The court has jurisdiction to hear application for rescissions brought to it under rule 31(2)(b), rule 42(1) and even to rescind judgment under common law. In considering an application for rescission, the court has to have regard to the provisions of the respective rules or common law considerations pertinent to the application. It is noteworthy to indicate that the court does not have jurisdiction to consider rescission of judgment under rule 31(2)(b) for a default judgment granted by a court.

2.12. The application for rescission is thus dealt with under Rule 42(1). It is upon the defendant to prove existence of the grounds listed in Rule 42(1) to succeed with the application under this rule. Rule 42(1) provides as follows:

“(1) The court may, in addition to any other powers it may have, mero motu or upon application of any party affected, rescind or vary:

- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
- (b) An order or judgment in which there is an ambiguity, or patent error or omission, but only to the extent of such ambiguity, error or omission;*
- (c) An order or judgment granted as the result of a mistake common to the parties.”*

2.13. I find that none of these grounds exist in the applicant application. Rescission cannot, therefore, be granted under rule 42¹

2.14. As I have already indicated, the court is not confined to rule 31(2)(b) and rule 42(1) of the uniform rules of court, but the court has inherent power to rescind default judgments².

¹ De Wet v Wester bank Ltd 1979 (2) SA 1031 (A) at 1038-1039.

² Msane v Bertie Williams (pty)ltd 1962 (1) SA 910 (D) at 912C

- 2.15. I will first take a look at the following elements in considering whether sufficient cause exist for me to rescind the judgment under common law.
- (1) The party seeking relief must present a reasonable and acceptable explanation for default, and
 - (2) That on the merits that party has a *bona fide* defence which, prima facie, carries some prospect or probability of success.
- 2.16. In determining the first element I will look into circumstances that led to the granting of the default judgment. The applicant indicates that it received the summons but the summons was not defended because of the logistical engagements that it was involved in following its acquisition by momentum Insurance.
- 2.17. I find that the period within which the application for rescission was brought is not lengthy and was acted upon promptly as soon as the default judgment was brought to the attention of the defendant.
- 2.18. I, however find that if the defendant had an intention to defend the action it had a good opportunity to do so, and could have done so on the following basis.
- 2.18.1. Defendant, as a company which has regard to its insured members on daily basis, could have put systems in place to ensure that there is continuity in service to its members, even under circumstances of a merger of acquisition.
 - 2.18.2. Defendant is an insurance company whose duty is, primarily to honour insurance obligations upon occurrence of an insured event, (*pacta sunt servanda*).
 - 2.18.3. In the event of repudiation of a claim, it shall have valid grounds to do so.
 - 2.18.4. In the event that it is served with summons and intend to defend, it shall respect the court processes by promptly acting upon such summons.
 - 2.18.5. The summons was received by a head of legal who appreciates the exigency of a summons. Her task being to oversee a proper functioning of the legal department, including compliance by claims handlers in instructing attorneys where repudiated claims are to be defended, should have seen to it that the summons has successfully

departed from her control to receive further attention. She failed to follow up with the claims handler within the period of entry of intention to defend and any subsequent time until default judgment was granted.

- 2.18.6. The defendant, being aware of the consequences of failure to abide by the court rules, did not give due regard to the court rules and was accordingly, grossly negligent in handling the summons.
- 2.18.7. The defendant does not have any person to blame but itself.
- 2.18.8. I accordingly find that the defendant does not present a *reasonable and acceptable explanation for default* as set out in paragraph 2.18 hereinabove.
- 2.19. In respect of the second element of the evaluation, being “*that on the merits that party has a bona fide defence which, prima facie, carries some prospect or probability of success*”. Counsel for the plaintiff argued that defendant does not have any basis for its allegation that plaintiff drove the vehicle under the influence of alcohol; does not have basis that plaintiff drove at an excessive speed; he further indicated that the quantum of the claim was properly evaluated by the court and a report was submitted in the evaluation of quantum; that the claim amount was accordingly reduced to reflect a fair and reasonable amount of defendant’s liability.
- 2.20. I find that the defence alleged by the defendant does not, on the face it, *carry any prospect or probability of success [my emphasis]*.
- 2.21. I, accordingly, hereby dismiss the application with costs.

MKANSI
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Heard on: 07 JUNE 2021

Decided on: 14 JUNE 2021

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 June 2021.

Appearances:

For the Applicant: Adv RM VENTER

(Instructed by Klagsburn Edelstein Bosman du Plessis INC .)

For the Respondent: Adv. L MGVETYANA

(Instructed by Cingo Attorneys.)