



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 14742/2008

In the matter between:

MANLINE (PTY) LTD

Plaintiff/Respondent

and

SIBUSISO EMMANUEL NHLANHLA MTSHALI

Defendant/Applicant

Coram: Koen J

Heard: 22 November 2017

Delivered: 20 December 2017

ORDER

- (a) The default judgments granted by this Honourable Court on 7 October 2014 and 14 April 2016 under case No.14742/08 are hereby rescinded.
- (b) The Plaintiff's costs of opposition to the Application for rescission are to be paid by the Defendant.

(c) No further orders as to costs are made.

J U D G M E N T

KOEN J

INTRODUCTION AND BACKGROUND

[1] Arising from a motor collision which occurred when the Plaintiff's¹ vehicle collided with the rear of a stationary vehicle of the Defendant, the Plaintiff instituted an action against the Defendant for payment of the amount of R413 233.18, interest and costs. When the trial in the action came before Ndlovu J, the issue of liability was separated for determination.

[2] The collision occurred on 4 August 2008, the action was instituted on 6 November 2008 and the plea delivered on 12 December 2008. The matter was first enrolled for 28, 29 & 30 October 2009. The driver of the Plaintiff's vehicle was Mr Jabulani Joseph Lukhele. The matter was subsequently adjourned to the 22 of August 2011 when Mr Lukhele's evidence was completed and a second witness Mr David Anthony Nigel Gibb, an accident reconstruction expert, was called by the Plaintiff. That concluded the case for the Plaintiff. The Defendant himself testified, the Defendant's counsel having indicated that the Defendant would testify as a witness and that there would be a second witness, namely the driver of the Defendant's vehicle, Mr Mthethwa. The Defendant's evidence was completed and Mr Mthethwa's evidence in chief was heard on the 24 of August 2011. The trial was then adjourned sine die to allow for the cross examination of Mr Mthethwa.

[3] The matter was subsequently again enrolled on 12 August 2013 for 17 to 19 March 2014 but was removed on the 8 October 2013 and on 29 May

¹ The parties shall be referred to as in the action.

2014 re-enrolled for 6 and 7 October 2014. The notice of set down enrolling the matter for the 17, 18 and 19 March 2014 was served on the Defendant's attorneys C Laurie Smith Incorporated ('Laurie Smith') care of their local correspondent E R Brown Incorporated on 12 August 2013. The notice of set down enrolling the matter for the 6 and 7 October 2014 was likewise set down by way of a notice of set down served by the Plaintiff's attorneys on E R Brown incorporated on the 29 May 2014.

[4] When the matter came before Ndlovu J on 6 October 2014 neither the Defendant nor his attorney, nor the witness Mr Mthethwa attended. The matter stood down and according to an internal memo sent by one A Ganas, who attended the hearing, to one of the partners in the Plaintiff's firm of attorneys, she telephoned the Defendant's attorneys and was advised that Mr Ngcobo who had dealt with the matter had left the firm. She then made contact with Mr Ngcobo who stated that he had handed the file over to Mr Horton of Laurie Smith. Telephonic contact was then made with Mr Horton who stated that he had no knowledge of the file and indicated that their office could not locate their file. An express invitation to brief counsel to appear and apply for an adjournment was refused by Mr Horton.

[5] According to a transcript of the proceedings on that day Ndlovu J granted an order, which he stated was 'is deemed to be on the merits'. He inter alia recorded that:

'The Plaintiff's case is overwhelmingly strong. It is clear that the Defendant's vehicle which had broken down, was indeed at the relevant time and place, parked in the middle of the road, which was at a bend and therefore not visible to oncoming traffic. It was during the night at about 23h00. The Defendant's vehicle was so parked under the following forbidden circumstances. There was no red triangle, traffic triangle placed some 45 metres behind the vehicle. There were no hazard lights flashing or hazard lights on, neither were there park lights. Both the rear chevron signs and rear reflectors were not exposed as these were covered with a huge tarpaulin sheet that was covering the entire truck, being loaded with bags of mealie-meal. Nobody was present at any spot behind the Defendant's vehicle to signal to the oncoming traffic that there was a broken down vehicle ahead ...in those circumstances it was not possible that the Plaintiff's driver could have avoided the collision. On the other hand, the evidence of Mr Mtshali was essentially of a formal nature, as he was not present at the scene of the accident. As stated earlier that the evidence of Mr Mthethwa who was to have been cross-examined today, has decided to stay away, therefore he could not be cross-examined. For that reason his evidence is incomplete and cannot be considered at all.

I may mention incidentally that on this date I was keenly awaiting to hear during the cross-examination of Mr Mthethwa, how he would seek to explain what appeared to be material discrepancies in his evidence, including introduction of new averments which had never been put to the Plaintiff's driver during cross-examination. However, I do not propose any further, as I have said that the evidence of Mr Mthethwa is regarded as pro-non scripto.

I proceeded with the matter on the basis that the Defendant is deemed to have a ban in his defence.'

[6] On 8 October 2014 Ndlovu J, with reliance on Rule 42 (1) (b), amended the order to reflect it as a default judgment and not a final judgment, which, with respect, it more correctly was.

[7] The order granted by Ndlovu J therefore came to be reflected as follows:

'IT IS ORDERED: (by default)

1. Defendant is held liable towards Plaintiff for the damages suffered by Plaintiff, in the amount to be determined, as a result of the collision referred to in the PARTICULARS OF CLAIM and is to pay for such damages to Plaintiff upon it having been determined by the court.
2. Defendant is to pay Plaintiff's costs of the action, including the costs of Plaintiff's expert witness, Mr Gibbs, which shall include the qualifying fees of Mr Gibbs, the costs incurred by Mr Gibbs and the preparation of his report, the costs of consulting with Plaintiff's attorneys and counsel and the costs of appearing at the trial.
3. This matter, as far as the quantum of Plaintiff's claim is concerned be and is hereby adjourned sine die.'

[8] On 11 March 2016 a notice of set down indicating that judgment would be sought for payment of the sum of R413 233.18, interest thereon at the rate of 9% per annum from 12 December 2008 to date of payment, both dates inclusive and costs of suit, including the costs of Plaintiff's expert witness on quantum, Mr Trevor Andrew Rawlins, was served on the Defendant's local correspondent attorneys. On 14 April 2016, Mbatha J. granted default judgment against the Defendant as prayed in that notice of set down.

[9] On the 12 December 2016, the Defendant was phoned by the Sheriff who said that he needed to make a list of the Defendant's assets.

[10] On 18 December 2016 the Defendant attempted to see his previous attorney. He again did so on the 9 January 2017 and was told that his file

might be in storage. The Defendant sent his wife to see Laurie Smith Inc on the 14 January 2017. She likewise was at advised 'that the file could not be located and that they (Laurie Smith Inc) was still going to search for the file from the Archives somewhere in Durban.'

[11] On 4 February 2017 the Defendant met with the Sheriff who repeated what he (the sheriff) had told him previously. The Defendant then consulted his current attorneys of record on 6 February 2017, and was advised that they needed to get copies of the file content in order to be in a position to properly advise him. On the 7 February 2017 the Stanger Sheriff came to the home of the Defendant and attached property. Despite some problems being experienced, copies of the file were eventually obtained by the Defendant's attorneys and a consultation arranged for the 1 March 2017. The Defendant maintains that it was then that he was advised that default judgment had been entered against him on the 7 October 2014. He was also told of the notices of set down served on E R Brown Incorporated on 29 May 2014 setting the matter down for trial on the 6 & 7 October 2014. He however contends that he was not made aware of that notice of set down by Laurie Smith Incorporated and only became aware thereof during the consultation on 1 March 2017.

[12] The Defendant now applies for an order:

1. That the default judgment granted by the Honourable Court dated on the 7 October 2014, under case No. (14742/08), be and is hereby rescinded;
2. That the costs of this application are to be paid by the Respondent only in the event that the Respondent opposes the application;
3. Further and/or alternate relief.

[13] The Defendant has not applied for a rescission of the order granted by Mbatha J on 14 April 2016, presumably on the basis that if the order granted by Ndlovu J was rescinded, the premise upon which the order of Mbatha J was granted would disappear and that judgment would fall away. The existence or validity of a judgment should not, in my respectful view, be left to such vagaries and speculation and in what follows in this judgment I shall

treat the application for rescission, notwithstanding it being silent on that issue, as also an application to rescind the default judgment granted by Mbatha J on 14 April 2016.

REQUIREMENTS FOR RESCISSION

[14] Notwithstanding previous suggestions that the rescission was sought pursuant to the provisions of Rule 31 (2) (b) or possibly Rule 42 (1) (b), in his heads of argument the Defendant has based his application for rescission squarely on the common law with reliance on *Tsatsi v Virgin Active and Another*² and *Colyn v Tigerfood Industries t/a Meadow Feed Mills (Cape)*.³

[15] It is of course trite law that an Applicant for rescission must show good cause by giving a reasonable explanation of his default, by showing that the application is *bona fide*, and by showing that he has a *bona fide* defence to the Plaintiff's claim which *prima facie* has some prospect of success.⁴

A BONA FIDE DEFENCE

[16] Generally a *bone fide* defence is demonstrated by a litigant making 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. It is not necessary that he deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.⁵ The present situation is however somewhat different to the normal application for rescission following upon a default judgment.

[17] In dealing with his defence, in the founding affidavit the Defendant alleges that his 'defence is clearly articulated in the plea which is filed on the 12 of December 2008', a copy whereof is attached.

² 2014/37055) [2017] ZA GPJHC 25 (1 February 2017).

³ 2003 (6) SA1 at 8 and 1031 (A) at 1038 B – G.

⁴ *Grant v Plumbers (Pty) Limited* 1949 (2) SA 470 (O) at 476 and *Chetty v Law Society, Transvaal* 1985 (2) SA 756 A at 764 I – 765.

⁵ *Grant v Plumbers (Pty) Limited (supra)* and *Coetzee v Nedbank* 2011(2) SA 372 (KZD) at 373.

[18] Paragraph [5] of the Plaintiff's particulars of claim had alleged that the negligent driving of the Defendant's employee was the sole cause of the collision, he having been negligent in one or more or all of the following respects:

- '5.1 He failed to avoid a collision, which he could have done had he exercised reasonable care and skill;
- 5.2 He failed to give reasonable consideration to other road users;
- 5.3 He left the vehicle unlit on the road;
- 5.4 He failed to take steps to alert other drivers of his vehicles presence on the road, by the placing of warning triangles behind the truck;
- 5.5 He failed to activate the hazard lights of his vehicle;
- 5.6 He parked his vehicle on the road where it was unsafe and dangerous;
- 5.7 He drove a vehicle on a public road which had not been fitted with reflective tape;
- 5.8 He failed to wave down, or take other steps, to alert other road users of the presence of his vehicle on the road.'

[19] In response to those allegations the Defendant simply pleaded:

'The Defendant denies the allegations made in this paragraph. In amplification of his denial the Defendant avers the following:

- 6.1 On 4 August 2008 at Nongoma, a driver employed by the Defendant was driving the Defendant's truck with registration letters and numbers NT[...];
- 6.2 The Defendant's truck had a break down and the driver pulled to the side of the road and stopped;
- 6.3 The driver of the Defendant's truck activated the warning lights of the vehicle he was driving;
- 6.4 The driver of the Defendant's truck placed warning triangles behind the vehicle to alert other drivers that his vehicle had a break down;
- 6.5 The Defendant's vehicle was well fitted with reflective tape;
- 6.6 The driver of the vehicle with registration letters and number NP 56388 drove that vehicle at an excessive speed and failed to keep a proper look out;
- 6.7 The driver of the vehicle with registration letters and number NP 56388 caused that vehicle to collide with the Defendant's truck despite the Defendant's truck having been fitted with reflective tapes and despite the driver of the Defendant's truck having placed warning triangles behind the truck;
- 6.8 The collision was therefore cause by the negligence of the driver of the vehicle with registration letters and numbers NP 56388;
- 6.9 Any remaining allegations contained in this paragraph and which are inconsistent with the foregoing are denied."

[20] Further in his founding affidavit, the Defendant referred to the fact that: 'the transcript which is in the court file ends on the 23 August 2011. I ask the Honourable Court to read the said transcript as if there are specifically incorporated in this affidavit.'

That is of course a practice to be deprecated. If a litigant wishes to rely on any particular provision then this should be identified in the affidavit. A litigant cannot expect a court to troll through pages of an annexed, or if not annexed a record of proceedings, without indicating on what parts thereof reliance will be placed.

[21] I have nevertheless perused the transcript. Whether the sole cause of the collision was due to the negligence of the Plaintiff's driver (as the plea contends), or whether there might be some apportionment of liability (which is not expressly pleaded but which Mr Mathonsi appearing for the Defendant argued would be competent on the evidence that had been led⁶) cannot and should not be determined on what is contained in the incomplete record. It might be that the Plaintiff's case might eventually turn out to be 'overwhelmingly strong' as Ndlovu J commented, but his various 'findings' were, with respect, premature. Mr Mthethwa's evidence remained incomplete and a defence of contributory negligence succeeding depending on the probative value to be attached to the evidence of Mr Mthethwa in its totality after cross-examination and re-examination, cannot be made at this stage. Suffice it to say that contributory negligence might very well constitute a defence, that a collision with the rear of another vehicle, albeit stationary would *prima facie* suggest negligence or some measure of contributory negligence, but most importantly, that whatever one's impressions might be of the incomplete evidence to date, the possibility of that defence succeeding to a greater or lesser extent, cannot be discounted.

[22] The only issue is really whether in the light of Mr Mthethwa's evidence in chief, it can be said that a defence of contributing negligence although not specifically articulated in the plea, can be said to be not *bona fide*. On what is before me, I cannot discount the *bona fides* of a contributing negligent

⁶ AA Mutual Insurance Association Ltd v Nomeka [1976] 3 All SA 310 (A).

defence, even if a very jaundiced view is taken of the evidence adduced on behalf of the Defendant to date.

REASONABLE EXPLANATION FOR DEFAULT

[23] A *bona fide* defence is however not the only requirement. An Applicant for rescission must also give a reasonable explanation of his default.

[24] In *casu* the Defendant has maintained that he has been *bona fide* throughout and that the reason for his non-attendance was the lack of diligence on the part of his attorneys, Laurie Smith.

[25] Whether an attorney's lack of diligence avails an applicant for rescission (or other relief involving an indulgence) is often a vexed issue. The relationship between a client and attorney is governed by the contract of mandate. It is a special relationship where the attorney acts as the agent of the client and it is a relationship protected also by attorney-client confidentiality. It is in the discretion of the client (not the attorney) whether to waive, and to what extent to waive, any aspect of such attorney-client confidentiality.

[26] In *Saloojee and Another v Minister of Community Development*⁷ Steyn CJ commented as follows:

'In *Regal v African Super Slate (Pty) Limited* 1962 (3) SA 18 AD at p 23, also, this court came to the conclusion that the delay was due entirely to the neglect of the Applicant's attorney, and held that the Attorneys neglect should not, in the circumstances of the case, debar the Applicant, who was himself in no way to blame, from relief. I should point out, however, that it is not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorneys' lack of diligence or the insufficiency of the explanation tendered. To order otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordium* should not be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for

⁷ 1965 (2) SA 135 AD at 141 B - H.

himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are... A litigant, moreover, who knows, as the Applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney... and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked nearly because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case. In these circumstances I would find it difficult to justify condonation unless there are strong prospects of success...'

[27] Mr Mathonsi however referred to the judgment in *HDS Construction*⁸ where a rescission of a default judgment was granted notwithstanding the attorney having failed to file the summary judgment opposing affidavit. Obviously every case must depend on its own facts.

[28] The Defendant states that after the matter was adjourned *sine die* on 24 August 2011 he 'was not contacted by (his) attorney at all'. He went to the offices of Laurie Smith on 18 December 2016 and then again on 9 January 2017, and his wife attended on 14 January 2017. They were advised that the file 'could not be located' and that they 'were still going to search for the file from their archives somewhere in Durban.' It was not said that they had given up hope of ever finding the file.

[29] The statements that the Defendant was not advised by his attorney of the set down dates are made under oath and are not to be lightly discounted. In argument before me the date on which the file could no longer be located was, with reliance on the memo of A Ganath, said to be at a point earlier than 6 October 2014. The notice of set down enrolling the matter for the 6 and 7 October 2014, being annexed to the Defendant's founding affidavit in the

⁸ 1979 (2) SA 298 E at pg. 301.

rescission application, reveals that it was served on the Defendant's local correspondent attorneys on 29 May 2014.

[30] The Defendant, who bears the *onus* throughout to show good cause including a reasonable explanation for his default, does not deal with this notice of set down. In argument, Mr Mathonsi indicated that he did not contend that the notices of set down served on E R Brown Incorporated, the local correspondent attorneys, had not been served as reflected thereon. At best for the Defendant, E R Brown might have failed to transmit the notice of set down, or communicating its import, to Laurie Smith Incorporated, or that Laurie Smith Inc having received such notification, failed to bring it to the attention of the Defendant in the ordinary course.

[31] A further notice of set down of the application for default judgment which came before Mbatha J was served on E R Brown Incorporated on the 11 of March 2016. It would seem improbable that this notice too would either not been sent by E R Browne Incorporated, or its contents communicated by E R Browne Incorporated to Laurie Smith Incorporated, and/or that the notice upon receipt in the offices of Laurie Smith Incorporated would simply be ignored if the file to which it relates could not be located. But it is not necessarily impossible.

[32] Motion proceedings are however not suited to testing probabilities. If the notices of set down or either of them were not received, then a representative of Laurie Smith as the Defendant's agent and attorney could have submitted a verifying affidavit to that effect in support of the application. To the extent that it might infringe upon any attorney client confidentiality the Defendant would be at liberty to waive such privilege (an obstacle the Plaintiff would face if it requested a confirmatory affidavit from the said attorneys as to what it had advised its client). However, if indeed the notices had been received and had been ignored, which might potentially expose Laurie Smith to censure and expose it to a possible damages claims, then it would have been reluctant to commit itself to any particular version.

[33] In the absence of such confirmation, the inevitable question is whether the application is *bona fide* and/or whether the Defendant has discharged the *onus* in regard to the rescission.

[34] I am alive to the prejudice the Plaintiff stands to suffer if the rescission is granted, as the matter cannot simply continue before Ndlovu J, as he has sadly passed away. That is however not a decisive consideration in the circumstances, even although it will entail that the matter would have to commence *de novo* before another court.

[35] Although there are unsatisfactory aspects in the Defendant's application I am not disposed in the exercise of my discretion to close the doors of the court to the Defendant by refusing the rescission. I am however not prepared to grant any costs order in favour of the Defendant even although the application succeeds. Indeed I consider it reasonable for the Plaintiff to have opposed the application and am of the view that the costs of opposition to the application have been incurred reasonably by the Plaintiff.

[36] The order I grant is therefore as follows:

- (a) The default judgments granted by this Honourable Court on 7 October 2014 and 14 April 2016 under case No.14742/08 are hereby rescinded.
 - (b) The Plaintiff's costs of opposition to the Application for rescission are to be paid by the Defendant.
 - (c) No further orders as to costs are made.
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Appearances

For the Plaintiff/Respondent

Instructed by:

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REF: MH BREMNER/Gisela/02L0347/16

C PRETORIUS

TATHAM WILKES INC.

For the Defendant/Applicant:

Instructed by:

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M H MATHONSI

M H MATHONSI & ASSOCIATES