

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4701/2006

In the matter between:-

ROAD ACCIDENT FUND

Applicant

and

M A PHILLIPS

Respondent

HEARD ON: 19 MAY 2011

DELIVERED ON: 23 JUNE 2011

JUDGMENT

H.M. MUSI, JP

Introduction

[1] This application follows upon a claim that was lodged by M/s Maditaba Aaphia Phillips (the respondent herein) with the Road Accident Fund (the applicant) for loss of support for herself and her minor daughter, Matshediso Anna Phillips (the minor child). The claim arises from a motor vehicle accident that occurred on 2 November 2002 near Dewetsdorp, in which Mr. Dikgang Frans Ketso (the deceased) was killed. M/s Phillips claimed that she and the

deceased were married to each other by customary union and that the minor child was the deceased's biological child. Consequently she claimed that the deceased carried a duty of support toward herself and the minor child and that whilst alive he maintained them. I shall henceforth refer to the parties as in the application.

- [2] When the third party claim could not be settled, the respondent issued summons. The applicant defended the action and on 5 June 2007 filed its plea. It is noteworthy that, regarding the averments relating to the existence of the customary union and the paternity of the minor child, the applicant's plea was a bare denial. Subsequent to the filing of its plea, the applicant was called upon to file a discovery affidavit in terms of Rule 35 of the Uniform Rules. What transpired thereafter will emerge shortly. Suffice it to say at this juncture that the applicant failed to discover and this ultimately led to the grant of the default judgment now sought to be rescinded in these proceedings.

The applications

[3] There are, in fact, three applications before me. The first was launched on 3 December 2010 and seeks the following orders:

- “1. That the default judgment granted herein on 5 June 2008 be rescinded;
2. Condonation for the late filing of the Applicant’s Discovery Affidavit;
3. Condonation for the late filing of this application;
4. That the Applicant be granted leave to proceed with this matter on a defended basis;
5. That the Applicant be ordered to pay the costs of this application save in the event of opposition;
6. Further and alternative relief.”

I shall refer to this application as the main application.

[4] The second and third applications were launched on 23 February 2011 and 13 May 2011 and they seek condonation for the late filing, respectively, of the replying affidavit in the main application and a confirmatory affidavit which was mistakenly not annexed to the replying affidavit when the

latter was delivered. Regarding the replying affidavit, the parties had agreed on timeframes for the filing thereof. The applicant failed to comply with the timelines and filed its replying affidavit out of time and when it did file one, a confirmatory affidavit referred to therein was not annexed, hence the application for condonation of the late filing of both affidavits. The replying affidavit was filed two days out of time. In relation to the confirmatory affidavit, when the omission to annex it to the replying affidavit was spotted, the applicant tendered to file same but the respondent refused to accept it.

- [5] Prayer 3 of the main application arises from the fact that the application was launched some two years and six months after the default judgment was granted and clearly condonation for such an inordinately long delay was needed. In this regard, it is noteworthy that the very same application was launched on 31 May 2010, but had to be withdrawn when it became apparent that a wrong order had been targeted. It also suffered from other defects. I was of the view that it will be in the interest of justice that the merits of the main application be canvassed with a view to reaching

finality in the matter and I accordingly granted condonation for the late filing of the application. Prayers 2, 4 and 5 are dependent upon prayer 1 being granted and if it is not, then they will all fall by the wayside.

Condonation

[6] At the outset of the hearing, I broached with Mr. Cilliers, counsel for the respondent, the question of whether there could be any prejudice to the respondent if condonation is granted for the late filing of the replying and confirmatory affidavits and he conceded that there could be none save that there would be costs implications. I accordingly granted condonation. It was important to grant condonation at the outset because the relevant affidavits needed to be properly before me to enable full argument on the main application to proceed.¹

The applicable law

[7] For rescission of a default judgment to be granted under the common law the applicant must show good or sufficient cause. It is trite that this requirement entails two elements.

¹ Compare **WALTLOO MEAT AND CHICKEN SA (PTY) LTD v SILVY LUIS (PTY) LTD AND OTHERS** 2008 (5) SA 461 (TPD).

Firstly, the applicant must give a reasonable and acceptable explanation for the default. Secondly, the applicant must show that it has a *bona fide* defence pointing so some prospects of success on the merits.² Now what led to the default judgment herein being granted is the failure to deliver a discovery affidavit. Although the requirements for rescission of a default judgment should not be conflated with those for condonation, *in casu*, the two issues are interwoven in the sense that an explanation for the failure to deliver the discovery affidavit will hold good for the default judgment. The first question then is whether the applicant has given a reasonable and acceptable explanation for the failure to file the discovery affidavit.

Is there a reasonable explanation?

[8] What emerges from the record is a pathetic story pointing to gross negligence and blunders on the part of the applicant and/or its attorneys.³ Having delivered its plea on 1 June

² See Herbstein and Van Winsen, **The Cicil Practice of the High Courts of South Africa**, 5th Edition by Cilliers, Loots and Nel, Volume 1 at p. 398 and the authorities cited in footnote 170.

³ The applicant's attorneys are Maponya Incorporated of Pretoria, who appointed Symington & De Kok as their Bloemfontein correspondents. There has been no suggestion that Symington & De Kok share any blame for the poor handling of the applicant's case and hence they have not been called upon to explain anything and significantly they have not filed any affidavit in the matter. In this judgment where I refer to the applicant's attorneys, this shall be reference only to Maponya Incorporated.

2007, the applicant was requested by a notice dated 12 June 2007 to deliver its discovery affidavit by 10 July 2007. There was no response and on 26 July 2007 a reminder was issued calling upon the discovery affidavit to be delivered by 22 August 2007. There was no response. On 27 September 2007 the respondent's attorney further called for discovery to be made by 31 October 2007. There was no response and on 28 February 2008 an application was served on the applicant's correspondents to compel discovery. There was still no response and on 17 March 2008 an order was duly granted compelling the applicant to file its discovery affidavit within ten days, meaning that it had to be filed by 2 April 2008. There was still no response from the applicant's attorneys and on 12 May 2008 an application was served on the applicant's Bloemfontein correspondents seeking an order to strike out the applicant's defence. Still there was no response and on 5 June 2008 an order was granted striking out the applicant's defence (as defendant) with costs.

- [9] It will be noted that some twelve months (one year) had elapsed from the date on which the applicant was first requested to make discovery, up to the granting of the order

striking out its defence. And what is the explanation for this? What immediately strikes one as peculiar in this regard is that the applicant's founding affidavit was deposed to by its employee, one Annemarie Hammond, who had no personal knowledge of what transpired in the offices of the applicant's attorneys, where most of the problems in the handling of the case are located. Hence throughout her affidavit, Hammond relies on what M/s Rangata told her. The latter is the attorney who handled the matter in the offices of the applicant's attorneys. One would have expected the attorney to herself deposed to the founding affidavit.

[10] It is apposite to reproduce paragraphs 5.13 – 5.16 of the applicant's founding affidavit:

“5.13 On or about 27 September 2007, Messrs Honey Attorneys forwarded a letter to the Applicant's Correspondent Attorneys in Bloemfontein, Messrs Symington & De Kok, requesting that the Applicant's Discovery Affidavit be served by no later than 31 October 2007. A copy of the letter dated 27 September 2007 is attached hereto marked annexure “I”.

5.14 I was advised by Mrs. Rangata that Messrs Symington &

De Kok reported to her that they sent the letter discussed in paragraph 5.13 above to Messrs Maponya's offices via docex on 28th September 2010 (sic), under cover of a letter dated 28th September 2010 (sic). The court is in this regard, referred to the letter dated 28th September 2007, which is attached hereto marked annexure "12". I was further advised by Mrs. Rangata that the said letter never came to her attention as it was either misfiled or misplaced, and that she only became aware of the letter on 3rd March 2008 when Messrs Symington & De Kok transmitted the letter as well as the Notice of Motion to her offices.

5.15 I note that, together with the letter as discussed in paragraphs 5.13 and 5.14 above, an Application to Compel, set down for 13 March 2008, was attached. A copy of the Notice is attached hereto marked annexure "J". The Court should note that the Notice was served on attorneys Symington de Kok on 26 February 2008 only.

5.16 I was informed by Mrs. Rangata that, as a result of what appears to have been an administrative error on their side, the letter as discussed in paragraph 5.13 and the Notice to Compel as discussed in paragraph 5.15 were misfiled or mislaid and that she was not aware of the letter or the Notice to Compel."

[11] The letter dated 28 September 2007 referred to above,

makes it clear that the applicant's attorneys had been informed by an earlier letter dated 13 August 2007 about the notice to discover, but the deponent to the applicant's founding affidavit says nothing about this, giving the impression that they were only informed of this request to discover for the first time in September 2007. The deponent to the founding affidavit says that M/s Rangata (the attorney handling the matter) only became aware of the letter on 3 March 2008, a copy of which had been faxed to her together with copy of the application to compel, which was set down for 13 March 2008. From this it is evident that she was aware that the application would be heard on 13 March 2008 and this would call for an explanation of what was done to avoid the order to compel being granted. The explanation proffered is that she was awaiting contents of the Road Accident Fund's file to enable her to prepare the requested affidavit. Yet the letter requesting the information was written on 26 March 2008, which is after the application would have been heard. There is no explanation whatsoever what steps were taken to prevent the granting of the orders to compel and to strike out the defence.

[12] It is unnecessary to catalogue further the unacceptable

explanations given for the failure to file the discovery affidavit and failure to forestall the striking out of the applicant's defence. Suffice it to say that the explanations range from administrative chaos in the office of the applicant's attorneys, the pressure of work in that office, the failure of the applicant (Road Accident Fund) to timeously furnish their attorneys with the necessary information and inexperience or ineptitude on the part of some people who were involved in the handling of the matter. In oral argument, M/s Granova, who appeared for the applicant, could not argue with any confidence that the explanation tendered by the applicant was reasonable and acceptable. She made it clear that the only ground upon which she would press for the granting of rescission was the presence of a *bona fide* defence pointing to what she called "strong prospects of success on the merits", an issue to which I now turn.

Is there a *bona fide* defence?

[13] It should be noted that the applicant ultimately filed the discovery affidavit on 19 July 2008, a month after the defence had been struck out. The respondent had in the meantime set down the matter for hearing on 14 October

2008. On that day the applicant was represented at court and the parties reached an agreement in terms of which the applicant conceded full liability for the respondent's claim. The agreement was made an order of court and it reads as follows:

"IT IS ORDERED THAT: (By agreement)

1. Defendant is liable for payment of the plaintiff's full (100%) proven or agreed damages.
2. Defendant is liable for payment of the plaintiff's taxed or agreed party and party costs, on High Court scale, pertaining to the merits trial."

[14] It is noteworthy that this order was not challenged in these proceedings nor was there any attempt to have it set aside or varied. What the applicant seeks is that the order striking out its defence should be set aside so that its defence should be reinstated, thus enabling it to continue to defend the action on the merits. The defence that the applicant wishes to put up, is to the effect that the respondent has no *locus standi* in this matter as the deceased owed her no duty of support because they were not married and also that the deceased was not the biological father of the minor child. In support of

this defence, the applicant annexed to its papers affidavits by the deceased's father and mother in which they deny the existence of any customary union between the deceased and the respondent, as well as denying that the deceased was the biological father of the minor child. In effect, the applicant alleges that the respondent's third party claim is fraudulent.

[15] During the course of oral argument I asked M/s Granova why was such a grave allegation not disclosed in the applicant's plea and she disclosed that when the plea was drawn the applicant had not yet investigated the merits of the claim and hence its plea of a bare denial. It was only on 23 October 2008 that the reports of the applicant's assessors became available and it was then that the true position became known. This would mean that when the applicant accepted liability as per court order dated 14 October 2008, it was not aware of the true position.

[16] However, the applicant did not aver in its papers that it only became aware of the alleged fraud after it had accepted full liability for the respondent's claim and has also not sought a

variation of the court order. In fact, its case was not argued along these lines. Instead, counsel for the appellant argued that, by consenting to the order, the applicant did not thereby concede full liability for the respondent's claim. She referred to the judgment in **KRAWA NO v ROAD ACCIDENT FUND**⁴ and submitted that the issue of whether the deceased had been under a duty of support in relation to the respondent and her child had not been admitted. This implies that to her (counsel for the applicant) the order of 14 October 2008 was irrelevant, which explains why there was no application to set it aside.

- [17] In countering the argument that the court order did not entail admission of full liability for the respondent's claim, Mr. Cilliers pointed out that after the consent order was granted, the matter was again set down for the hearing of evidence on quantum. For the purpose of such hearing a pre-trial conference was held on 12 November 2009 at which the applicant was represented. Counsel referred to paragraph 6 of the pre-trial minutes, which reads as follows:

“Die partye bevestig dat die kwantum van die Eiser se skade die

enigste uitstaande geskilpunt is aangesien die meriete op 14 Oktober 2008 afgehandel is op die basis dat die Verweerder volle aanspreeklikheid aanvaar vir die betaling van die Eiser se ooreengekome of bewese skade.”

Mr. Cilliers submitted that this is confirmation of what the parties had all along accepted, namely, that the order of 14 October 2008 encompassed settlement of all issues relating to the merits, including the *locus standi* of the respondent, and that only quantum remained outstanding. He submitted that this is in line with the decision in **TOLSTRUP NO v KWAPA NO**⁵. Counsel referred in particular to the following passage at 77 F – G:

“An agreement or finding on liability (which is the equivalent of the merits') clearly disposes of everything bar the *quantum* of damages, and hence the willingness to afford the plaintiff interim payments. *Quantum* would not include a consideration of defences on the merits, be they defences raised by way of special plea, such as lack of jurisdiction, *non locus standi* , prescription or the like, or substantive defences such as absence of negligence, mistaken identity, contributory negligence and so on, all of which relate to *whether* damages

are payable. Once that is out of the way, the parties can concern themselves with *how much* is payable.”

[18] Quite clearly **KRAWA** provides no support for the proposition advanced by M/s Granova. In that case, Bloem AJ made it clear that the admission of liability specifically covered everything except quantum. The learned judge found that the issue of whether the deceased, while alive, was under a duty to support the plaintiff, fell within the merits. If there was any doubt in the instant case about what elements were incorporated in the applicant’s acceptance of liability for the respondent’s damages, this was dispelled by paragraph 6 of the pre-trial minutes which recorded that only the quantum of the respondent’s claim was outstanding. Besides, I agree with the dictum in **TOLSTRUP** quoted above, which is not contradicted by **KRAWA**.

[19] I accordingly conclude that the merits in this matter have finally been determined by a court of law and the issue is now *res judicata*. As long as the order of 14 October 2008 stands, a defence on the merits cannot be reopened and is irrelevant. It cannot therefore be said that there is a *bona*

fide defence for the purpose of the application before me. In the premises, sufficient cause has not been shown in this case.

[20] Faced with the difficulty caused by the failure to apply for the setting aside of the order of 14 October 2008 counsel for the applicant submitted, belatedly, that the prayers to the notice of motion were wide enough to include the setting aside of that order and urged me to do so. Unfortunately no case has been made out in the papers for such an order, assuming that it can be granted. In fact, nothing is said about it and when I raised it, counsel for the appellant sidefooted it by raising the rather bizarre argument discussed in para [16], [17] and [18] above.

Conclusion

[21] In conclusion, I wish to state that the possibility that the respondent's claim may be fraudulent, is a worrying one indeed and I note that the respondent did not pertinently deal with the averments contained in the affidavits of the deceased's parents. However, I can find no basis for granting rescission purely because of the possibility that

fraud may have been committed (and it is only a possibility at this stage). Moreover, there are other considerations to be taken into account, the foremost of which is that the applicant had more than ample opportunity to investigate the claim before summons was issued, or at the very least, before filing its plea. I say this because the claim was lodged on 31 October 2005 and a whole year and seven months elapsed before the plea was delivered. Interestingly, by the time that the pre-trial conference was held on 12 November 2009, the applicant was already in possession of its assessors' report. Yet its representative confirmed settlement of the merits at the conference. And it is not as if the applicant will have no remedy if it can prove the alleged fraud.

Costs

[22] Regarding costs, whereas I granted the condonation applied for in respect of the replying and the confirmatory affidavits, this was purely in order to enable full argument to be heard on the main application and not because the applicant had given a reasonable explanation for same. At the same time I think that the respondent acted unreasonably in opposing these two applications and she is not entitled to the costs

thereof.

Order

[23] In the premises, I make the following orders:

1. The main application for rescission is dismissed with costs.
2. No costs order is made in respect of the applications for condonation of the late filing of the replying and the confirmatory affidavits.

H.M. MUSI, JP

On behalf of applicant:

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Instructed by:
Symington & De Kok
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On behalf of respondent:

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