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

CASE NO: 32323/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 02 July 2024

SIGNATURE:

In the matter between:

THE ROAD ACCIDENT FUND

Applicant

And

**NEUNET PROPERTIES (PTY)
LTD T/A SUNSHINE HOSPITAL
(PATIENT: P[...] S[...])**

Respondent

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 02 July 2024.

JUDGMENT

COLLIS J

INTRODUCTION

1] This is an opposed rescission application. On 31 November 2020 Mokose J, granted a default judgment ordering the applicant to make payment, to the respondent, of an amount of R3 160 368.71 (Three Million, One Hundred and Sixty Thousand, Three Hundred and Sixty-Eight Rand, Seventy-One Cents) along with interest and taxed costs of suit.

2] Pursuant thereto, the applicant made payment to the respondent in the amount of R 3 115 412.82, leaving a balance of R 44 955.89 in respect of the capital.

3] The present application is aimed at condoning the late filing of the application for rescission and rescinding or setting the balance of the amount ordered by Mokose J on 31 November 2020.

4] It is common cause that the applicant, made payment of an amount of R2 939 077.06 (two million, nine-hundred and thirty-nine thousand, seventy-seven Rand and six cents) and later a further payment of R176 335.76 (One-Hundred and Seventy-Six Thousand and Three-Hundred and Thirty-Five Rand and Seventy-Six Cents) leaving an outstanding capital amount balance of R 44 955.89 (Forty-Four Thousand, Nine-Hundred and Fifty-Five Rand and Eighty-Nine Cents).

5] It is the enforcement of the balance of the respondent's claim which is sought to be rescinded and set-aside based on the reasons which appear below.

6] The applicant's case is premised in terms of Rule 31(2)(b) and/or Rule 42(1)(a) and the crux of this application on behalf of the applicant is that:

6.1. The respondent's legal representatives had a duty to divulge certain facts to the Court, which facts were detrimental to the respondent's case, to the Honourable Madam Justice Mokose J, since the respondent proceeded unopposed with the default judgment proceedings.

6.2. Had these facts been divulged to the Honourable Madam Justice Mokose J, the default judgment in question was not going to be granted. This is because the respondent brought a delictual or acqulian action and the amount claimed was not liquidated and there was therefore a need to file a damages affidavit in support of the said application for default judgment i.e. to prove that indeed the amounts claimed by the respondents were reasonable and correct as required by Rule 31(2)(a).¹

7] Prior to the launching of the present application, the respondent proceeded to issue a writ of execution on 24 August 2021 in respect of the short payment in the amount of R 221 291.65 together with interest accumulated on the judgment debt in the amount of R 166 850.15.²

8] In an attempt to halt this step taken by the respondent to execute the writ, the applicant approached this Court on an urgent basis to stay the execution of the warrant.

9] This urgent application was settled by agreement between the parties which resulted in the order granted by Budlender AJ. This order provided for interest to be calculated at the rate of 7% on the outstanding amount which amounted to R 133 946.44 and which amount Budlender AJ ordered, had to be paid within seven (7) days of the order. This order the applicant, at the time, had failed to adhere to albeit that it was paid later. The interest amount however remains unpaid.

¹ "31 (2) (a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet.

² Caselines para 5.3 008-8

10] The Budlender AJ, further ordered³ that the applicant had to file its rescission application by no later than 18 January 2022. The applicant however only filed its application on 28 January 2022 without any explanation or grounds for condonation. It is common cause that the applicant only filed this rescission application on 28 January 2022, thus outside of the time period set by Budlender AJ.

BACKGROUND

11] The patient *in casu* was injured in a motor vehicle collision, as a pedestrian, on the 30 July 2019. At the time of the collision the patient was a 7-year-old minor child.

12] As a result of the collision, the patient sustained a head injury-TBI GSC 6/15, a bilateral mandible fracture, laryngeal trauma and a left tib/fib fracture.

13] On the 23 July 2020 the respondent issued a summons to claim from the applicant an amount of R3 160 368.71 for past medical expenses, in terms of section 17(5) of the Act.⁴

14] The respondent sued the applicant in its capacity as a service provider who provided medical services and/or treatment to the patient for the injuries he sustained in the collision.

15] The applicant did not defend the matter and the respondent applied for default judgment and obtained the Court's order on the 31 November 2020.

REQUIREMENTS FOR RESCISSION IN TERMS OF RULE 32(2)(b)

³ Case Lines 008-26 Budlender AJ Court Order – Urgent Court

⁴ See Caselines: 001 – 5 for a copy of the respondent's combined summons.

16] The Uniform Rules of Court provides as follows, regarding the rescission of a judgment or order under Rule 31(2)(b):

“31 Judgment on Confession and by Default

(2)(b) 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.”

17] Thus, in order for an applicant to succeed under this rule the following requirements must be met, namely:”

17.1 The applicant must demonstrate good cause.⁵ This entails that he must show that has prospects of success;⁶

17.2. Existence of a reasonable explanation for his /her default; and

17.3. That the application is bona fide.

18] In *Hassim Hardware v Fab Tanks*⁷ the SCA laid down the test to be met by a party who is seeking to demonstrate good cause as follows:

“[12].....The court may, on good cause shown, set that judgment aside. It is established law that the courts generally require an applicant for rescission of judgment to show good cause by (a) giving a reasonable explanation for the default; (b) showing that his/her/its application for rescission is made bona fide and not made merely with the intention to delay the plaintiff's claim; (c) showing that he/she/it has a bona fide defence to the plaintiff's claim which prima facie

⁵ *Colyn v Tiger Food Industries Ltd t/a Meadow Feedmills* (Cape) 2003 (6) SA 1 (SCA) at par 11; *De Wet and Others v Western Bank Ltd* 1977 (2) SA 1033 (W) At 1042F-1043C; *Van Heerden v Bronkhorst* supra at para 19

⁶ *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 E at 300-301B

⁷[2017] ZASCA 145 (13 October 2017).

has some prospect of success. Regarding the last-mentioned requirement, it is trite law that an applicant for rescission of judgment is not required to illustrate a probability of success, but rather the existence of an issue fit for trial.”

19] In order to assess as to whether the applicant has met the requirements as set out in the rule what has been set out in the founding affidavit is of relevance.

Existence of reasonable explanation for default.

20] This requirement is addressed in paragraphs 32 of the founding affidavit.⁸ Therein, the deponent sets out that the summons was served during the Covid pandemic during which time the offices of the applicant was working on skeleton staff. As such, the service of the summons was not brought to the attention of its staff members timeously which resulted in the respondent taking default judgment against it. Upon learning of the judgment having been obtained, it immediately attended to assess the claimed medical expenses and proceeded to pay the undisputed amount and to engage the applicant on finalizing the matter.

21] The respondent denies that the applicant did not have knowledge of the summons.⁹ It is the respondents’ case that albeit the applicant had failed to defend the summons served on it, on 12 August 2020, the respondent advised the applicant of the pending default judgment application together with the set down of the request for default judgment. Despite having been made aware of this request, the applicant still failed to defend the action or even made an appearance before Court on the date so allocated.

22] In addition to the above, the claims handler was also invited to the electronic profile of the case, and as such, it could not be contended that there was no wilful default on

⁸ Caselines para 32 p 006-17.

⁹ Caselines para 12 p 008-13.

the part of the applicant in defending the action, as the applicant was made aware of the date of hearing and chose not to defend the action instituted by respondent.¹⁰

23] Having regard to what has been alleged in the answering affidavit, the applicant had failed to explain to this Court, why it failed to attend Court, this after the request for default judgment was served on them together with the set down. The replying is silent on these averments made against it by the respondent.

24] Absent any cogent explanation given by it to explain their wilful default, this Court must accept the version given by the respondent on point. Wilful default is a bar to this application,¹¹ and as a result the applicant fails on this leg.

Good cause

25] In addition to the requirement of wilful default the applicant is also required to persuade a Court that good cause exist to rescind the judgment. In this regard the applicant contends that the respondents claim was not a liquidated one, but one damages claim and therefore it ought to have been supported by an affidavit to prove the amount claimed.

26] As mentioned, the respondents' claim for past medical expenses is an unliquidated claim for damages, in respect of which the fairness and reasonableness had to be proven before the court. As the respondent had failed to place before the court a damages affidavit the applicant contends the judgment was erroneously granted as the evidentiary burden had not been discharged by the respondent.¹²

27] It is for the above reason that the applicants' medical department upon reviewing the respondents medical vouchers using the tariff's contemplated in section 17(4B)(a) of

¹⁰ Caselines para 13 p 008-14.

¹¹ Maujean t/a Audio Video Agencies v Standard Bank of SA LTD 1994 (3) SA 801 at 806A

¹² Caselines para 28 p 006-14.

the RAF Act as amended, proceeded to pay only the amount of R 2 939 077.06 of the respondents claim.

28] On behalf of the respondent it was argued, that the applicant has failed to establish good cause for the judgment to be rescinded.

29] In this regard the respondent asserts that the applicant relied on the tariffs by various doctors in its attempt to justify its denial of liability towards respondent and the ICU downgraded to High Care Unit. As such the applicant endeavours to persuade the court that it has a valid and/or bona fide defence to the respondent's claim and that is entitled to rescission of a judgment that was already paid.

30] The applicant, having admitted the reasonableness and correctness of the amounts due to the respondent had paid in terms of some of these invoices and it is on this basis that, no good cause exists, for the judgment to be rescinded.

31] The applicant having paid the respondent a substantial amount on the invoices, it cannot be said that the applicant has disclosed good cause for the judgment having been granted. Differently put, the applicant had acquiesced itself with the relevant judgment and made a substantial payment following the default judgment.

32] In addition to the above two requirements, an applicant relying on the provisions of Rule 32(2)(b) will also be required to approach a court within twenty days of obtaining knowledge of the judgment to apply to have the judgment rescinded, failing which condonation for the late launching of the application needs to be applied for.

33] In *casu*, the applicant merely applied for condonation without addressing the reasons for such condonation in its founding affidavit. The reasons for the delay has only been canvassed in its relying affidavit and absence its case having been made out in its founding affidavit, this court cannot grant the applicant the necessary condonation

for the late launching of the application. Consequently, this requirement had also not been met by the applicant.

REQUIREMENTS FOR RESCISSION IN TERMS OF RULE 42(1)(a)

34] The applicant in addition also applies for rescission of the judgment on the premises of Rul 42(1)(a) of the Rules of Court.

35] Rule 42(1)(a), empowers this Court, to rescind and/or vary, an order or judgments erroneously granted in the absence of any other party affected thereby.¹³

36] The Rule has at its purpose to correct an obviously wrong judgment and/or order and requires proof that the judgment and/or order could not have been lawfully granted, in that it was granted in the absence of a party and that party's rights or interests were affected thereby.¹⁴

37] Therefore, in order to succeed with an application for the rescission and/or variation of a judgment or order on the basis of Rule 42(1)(a), the applicants must demonstrate that: (i) the order was granted in his/her absence; and (ii) that there was an error in the granting of the order. These requirements were affirmed by the Supreme Court of Appeal in *Rossiter & Others v Nedbank*,¹⁵ wherein it quoted from *Bakoven Ltd v GJ Howes* ¹⁶ as follows:

“the law governing the application for rescission under uniform rule 42(1)(a) is trite. The applicant must show that default judgment or order had been sought or erroneously granted. If the default judgment was erroneously sought or granted, a court should, without more, grant an order for rescission. It is not necessary for a party to show good cause under the subrule. Generally, a judgment is

¹³ Rule 42(1)(a)

¹⁴ *Promedia Drukkers & Uitgewers (Edms) Bpk* 1996 [4] SA 411 SCA at 417.

¹⁵ (96/2014)(2015) ZASCA 196 (1 December 2015) at para 15

¹⁶ 1992 (2) SA 466(E) at 471E-H

erroneously granted, if there existed at the time of its issue a fact which the court was unaware of, which would have precluded the granting of the judgment and which would have induced the court, if it aware of it, not to grant the judgment”

38] In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment.¹⁷ An order or judgment is also erroneously granted if there was an irregularity in the proceedings¹⁸ or if it was not legally competent for the court to have made such an order.¹⁹

39] In *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd*²⁰ it was held that a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously within the meaning of this subrule by reason of facts of which the court was unaware at the time of the granting of the judgment (at 94 E) and it cannot be said that the order was granted erroneously in the light of a subsequently disclosed defence (at 95 D – E). Such a defence cannot transform a validly obtained judgment into an erroneous one (at 95 E – F).

40] It is the applicants’ contention that the judgment of Mokose J, ought to be set aside as the respondents’ claim was a claim for damages and it was not supported by an affidavit to support the reasonableness and correctness of the expenses incurred.

41] It was on this basis that the applicant contends, not only that the judgment was erroneously sought but also erroneously granted by the court.

42] In support of the above argument the applicant relied on the decision *Zuma v Secretary of the Commission of Inquiry into allegations of State Capture Corruption and*

¹⁷ *Naidoo v Matlala* NO 2012 (1) SA 143 (GNP) at 153E

¹⁸ *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1038 D

¹⁹ *Athmaram v Singh* 1989 (3) SA 953 (D) at 956 D and 956 I

²⁰ 2007 (6) SA 87 (SCA)

Fraud in the Public Sector including Organs of State and Others ²¹, at para 62, where the Court went on to state the following:

“[62] Ultimately, an applicant seeking to do this must show that the judgment against which they seek a rescission was erroneously granted because there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment.”²²

43] The Constitutional Court in *Daniel v President of the Republic of South Africa*,²³ further held that:

“[6] The applicant is required to show that, but for the error he relies on, this Court could not have granted the impugned order. In other words, the error must be something this Court was not aware of at the time the order was made and which would have precluded the granting of the order in question, had the Court been aware of it.”

44] As previously mentioned, pursuant to the judgment being granted by Mokose J, the respondent proceeded to issue a writ of execution and in response to this, the parties entered into settlement negotiations whereafter the applicant proceeded to pay a substantial amount of the judgment debt with the balance of the judgment debt remaining.

45] In response to the applicants’ case, the respondent had argued that there was no defence before Court at the time of the granting of the order and similarly, there is no defence before Court now.

²¹ 2021 (11) BCLR 1263 (CC)

²² *Nyingwa v Moolman* N.O. 1993 (2) SA 508 (TK) at 510D-G.

²³ 2013 [11] BCLR 1241 (CC)

46] It is the respondents' further contention that the defences relied on by the applicant was at the applicant's disposal at the time that the default judgment was granted and as such it cannot now subsequently be disclosed and relied upon. As the applicant has no prospects of success it should not be permitted to defend the action.

47] The lack of prospect of success has specifically been pleaded in the answering affidavit. In this regard it is the respondent's contention that, the applicant has acquiesced itself with the judgment by paying portions thereof, and as such the applicant cannot bring this rescission application based on the principle of peremption.

48] The test for the principle of peremption has been accepted, by the courts, to be as follows:

48.1. In *Tswelopele Non-Profit Organisation v City of Tshwane* MM ²⁴ the SCA dealt with whether an appeal had been perempted. Cameron JA, articulated peremption as follows: -

"[10] Peremption of the right to challenge a judicial decision occurs when the losing litigant acquiesces in an adverse judgment. But before this can happen, the Court must be satisfied that the loser has acquiesced unequivocally in the judgment. The losing party's conduct must 'point indubitably and necessarily to the conclusion that he does not intend to attack the judgment': so the conduct relied on must be 'unequivocal and must be inconsistent with any intention to appeal' (*Dabner v South African Railways and Harbours* 1920 AD 583 at 594, per Innes CJ)."

48.2. In *SARS v CCMA*²⁵ at paras [26] to [28], the constitutionality of the rule of peremption was, discussed and it was considered whether there are overriding

²⁴ 2007 (6) SA 511 (SCA).

²⁵ 2017 (1) SA 549 (CC).

constitutional considerations that justify the appealability or the non-enforcement of peremption. It was held, inter alia, that: -

“[26] Peremption is a waiver of one's constitutional right to appeal in a way that leaves no shred of reasonable doubt about the losing party's self-resignation to the unfavourable order that could otherwise be appealed against.

[27] The onus to establish peremption would be discharged only when the conduct or communication relied on does 'point indubitably and necessarily to the conclusion' that there has been an abandonment of the right to appeal and a resignation to the unfavourable judgment or order.

[28] The broader policy considerations that would establish peremption are that those litigants who have unreservedly jettisoned their right of appeal must for the sake of finality be held to their choice in the interests of the parties and of justice. But, where the enforcement of that choice would not advance the interests of justice, then that overriding constitutional standard for appealability would have to be accorded its force by purposefully departing from the abundantly clear decision not to appeal.”

49] Based on the aforementioned the applicant had argued the respondent's understanding of, and reliance on, the principle of peremption is incorrect and misplaced for the following reasons:

49.1. First, when one looks at the primary statutory function of the applicant's, it is to assess claims by road accident victims and then compensate them for what it considers fair and reasonable, whether same is in compliance with an order of Court or not. In pursuance of this primary statutory function, the applicant only made interim payments of amounts adding up to R3 115 412.82, leaving an outstanding capital amount of R44 955.89 plus interest, in order to ameliorate any prejudice which might be, and have been, suffered by the respondent

pending finalisation of this matter. Thus, it is clear that there is a portion of an amount which is still outstanding and it is this portion, if not the entire amount, which is a subject of this rescission application.

49.2. Secondly, reliance on this principle based on the fact that the applicant has paid a portion of what it considers to be fair and reasonable compensation to the respondent as a measure of ameliorating any prejudice which might be, and have been, suffered by the respondent pending finalisation of this matter. However, this does not mean that the applicant will be deterred in future to institute a counter-claim should it later find that it has actually paid to the respondent more than what it was supposed to.

49.3. Thirdly, if this Court were to dismiss this application on the basis of the principle of peremption and then, effectively, order payment of the balance amount and interest to the respondent. Then that would have an effect of the principle of peremption being construed to mean that it can be used as a cause of action.

49.4. Fourthly, this principle cannot triumph the applicant's constitutional right to be heard in Court, in the event that this Court finds that the applicant has made a proper case for the rescission of the judgment in question as argued above.

50] Based on the aforementioned, the applicant contends that this ground of justification should not be upheld.

51] In response the argument advanced on behalf of the respondent was as follows:

51.1 It is submitted that applicant's conduct clearly showed that the applicant acquiesced with the judgment and order and that it is not open for the applicant to attack the judgment and order based on the principles of peremption.

51.2 The requirements and principles relating to peremption had been laid down already in 1920 by the Appellate Division in the case of *Dabner v South African Railways and Harbours* ²⁶ the Appellate Division stated as follows in *Dabner*:

“The rule with regard to peremption is well settled and has been enunciated on several occasions by this court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then is held to have acquiesced in it but the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it.”

51.3 The Constitutional Court on more than one occasion confirmed the relevant approach and quoted from the *Dabner* decision in a number of cases.²⁷

52] In *Venmop 275 (Pty) Ltd & Another v Cleverlad Projects (Pty) Ltd & Another*²⁸ it was emphasized that the question of acquiescence, does not involve an enquiry into the subject state of mind of the person alleged to have acquiesced in the judgment but rather it involves a consideration of the objective conduct of such person and the conclusion to be drawn therefrom.

53] The above principle was also confirmed by the Appellate Division in *Gentiruco AG v Firestone SA (Pty) Ltd*²⁹ where the Court stated:

“The right of an unsuccessful litigant to appeal against an adverse judgment or order is set to be perempted if he, by unequivocal conduct inconsistent with an intention to appeal, shows that that he acquiesces in the judgment or order.”

²⁶ 1920 AD 583

²⁷ *South African Revenue Services v Commissioner for Conciliation, Mediation and Arbitration and Others* 2017 (1) SA 549 (CC), par [26]

²⁸ 2016 (1) SA 78 (GJ) para [25] to [26]

²⁹ 1972 (1) SA 589 (A) at 600 A

54] On the common cause and the undisputed facts, it clearly illustrates that the applicant acquiesced to the judgment after the judgment had been granted and made payment of the judgment debt and interest.

55] It is for this reason that the respondent had argued that the rescission of the judgment should be refused.

56] Applying, the principle of peremption and the conduct of the applicant subsequent thereto, I am not persuaded that the judgment should be rescinded on the basis that it was granted in error or sought in error.

COSTS

57] The respondent requested this Court in the event of a dismissal of the application to award a punitive costs order against the applicant. In support of this argument, it referred this Court to a number of decisions for consideration.

58] I am not persuaded that a punitive costs order is merited under the circumstances and in the exercise of my discretion I will not award such.

ORDER

59] Consequently, the following order is made:

59.1 The application for rescission is dismissed with costs.

C.COLLISS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION

APPEARANCES

Counsel for Applicant : Adv.S.S. Maelane

Instructed By : Malatji and Co Attorneys

Counsel for Respondent : Adv. M. Van Rooyen

Instructed By : Kritzinger Attorneys c/o
Podbielski Mhlambi Attorneys

Date of Hearing : 12 February 2024

Date of Judgment : 02 July 2024