



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

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO

CASE NO: 11155/2019

02/07/2024

DATE

[Redacted Signature]

SIGNATURE

In the matter between:

THE ROAD ACCIDENT FUND

Applicant

and

MATHIVHA, F.O.

Respondent

JUDGEMENT

MOGOTSI AJ

Introduction

1. This is an application for the rescission of an order granted by the Honourable Justice Phahlamohlaka AJ on 22 February 2022 and for the respondent to pay the costs of the application if it is opposed, alternatively, the applicant applies for leave to appeal the same. The judgment is attacked because the issue of liability and the amount awarded for past and future loss of earnings were erroneously sought and granted.
2. In terms of Rule 49 (1)(e) of the Uniform Rules of the Court I could not entertain the application for Leave to Appeal because the Judge who heard the matter is still available. I shall, therefore, commence to discuss the application for rescission of judgment.
3. The applicant has tendered to make an interim payment of R 1 000 000 (One million rand) pending a rehearing of the matter should rescission be granted or pending finalization of an appeal should the application for leave to appeal be granted to eliminate any inconvenience insofar as it may be relevant.

Background

4. The Respondent, who at the time of the collision was 28 years of age and is currently 32, instituted action against the Road Accident Fund, claiming damages she suffered due to injuries sustained in a motor vehicle collision on 22 February 2017.
5. It is common cause that save for attending a single Pre-trial Conference; the applicant did very little to further the matter until 25 November 2020, when it was enrolled for trial on both the issues of merits and quantum. On the date mentioned above, the matter was crowded out due to the unavailability of Judges. It was re-enrolled for a hearing on 22 February 2022 when it proceeded in the Applicant's absence and The Honourable AJ Phahlamohlaka granted the following order:
 - 5.1. Defendant was liable to compensate Plaintiff for 100% of her proven or agreed damages resultant from the injuries she sustained as a result of a collision that occurred on 22 February 2017.

- 5.2. The Plaintiff's claim in respect of general damages was separated from the remaining heads of damages in terms of Rule 33(4) and postponed sine die.
- 5.3. An application in terms of Rule 38(2) allowing for the introduction of expert evidence concerning both merits and quantum was granted.
- 5.4. The Defendant was ordered to pay the sum of R 5 024 140.36 (Five million twenty-four thousand one hundred and forty rand and thirty-six cents) in respect of past- and future loss of earnings.

Issues

6. The main issue for determination is whether the applicants have met the requirements in rule 42(1) (a) of the Uniform Rules of Court or common law.

Applicant's Submissions

7. Counsel for the applicant submitted as follows:
 - 7.1. In adjudicating the matter and ultimately granting the Order, the court a quo relied on inadmissible evidence. In this regard, counsel submitted that the report of Mr. Barry Grobbelaar, a reconstruction expert, was not admitted into evidence and if it was, it contains inadmissible hearsay evidence on which the Court could not and should not have relied. Counsel submitted that the respondent did not file her affidavit or give *viva voce* evidence.
 - 7.2. The error committed by the Court a quo was to make a finding that the Applicant was 100% liable for the respondent's injuries and failed to apply apportionment. The contention that the applicant had already, during a Pre-trial held on 5 June 2019, conceded the merits, was erroneous.
 - 7.3. No expert reports were used as evidence on the issue of quantum; alternatively, they were hearsay evidence and should not have been relied upon.
 - 7.4. The premise on which the respondent's case for loss of earnings was based was that she would reach the level of a Senior Claims Handler, and the applicant contends the contrary.

Respondent's submissions

8. Counsel for the respondent submitted as follows:

- 8.1 The evidence the court relied on was introduced in terms of Rule 38 and Rule 38(2).
- 8.2 The content of the pre-trial conference conducted on 5 June 2019 demonstrates that the applicant admitted negligence, and had the onus to prove contributory negligence, which he failed to do.
- 8.3 The applicant's submission on loss of income is based on the advice of a Senior Claims handler who is not an expert in this field.
- 8.4 The application should be dismissed with costs.

Rescission in terms of the Uniform Rules of the Court

9. Rule 42 of the Uniform Rules of Court makes provisions for variation and rescission of orders and provides as follows:
- “Variation and rescission of orders
- (1) The court may, in addition to any other powers it may have, *mero motu* or upon the 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 a patent error or omission, but only to the extent of such ambiguity, error, or submission;
- (c) an order or judgment granted as the result of a mistake common to the parties.
- (2) Any party desiring any relief under this rule shall make an application, therefore, upon notice to all parties whose interest may be affected by any variation sought.
- (3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.”
10. The applicant, relying on rule 42 (1) (a), must show that the order to be rescinded was granted in their absence and was erroneously granted or sought. If the

requirements are met, a Court is merely endowed with a discretion that must be influenced by considerations of fairness and justice and is not compelled to rescind an order.

11. This was re-affirmed in *Zuma v Secretary of Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*¹ (*Zuma*) when the court stated as follows:

“It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with the discretion to rescind its order. The precise wording of rule 42, after all, postulates that a court “may,” not “must,” rescind or vary its order – the rule is merely an “empowering section and does not compel the court” to set aside or rescind anything. This discretion must be exercised judicially.”

12. In interpreting the phrase “absence” in rule 42 (2) (1) (a), the court in the *Zuma* matter articulated as follows:

“the word ‘absence’ in rule 42(1)(a) “exist[s] to protect litigants whose presence was precluded, not those whose absence was elected.”

13. The meaning of erroneously granted was explained in the case of *Bakoven Ltd v GJ Howes (Pty) Ltd*² as follows:

“An order or judgment is ‘erroneously granted’ when the Court commits an ‘error’ in the sense of “a mistake in a matter of law appearing on the proceedings of a Court of record’. It follows that a Court in deciding whether a judgment was ‘erroneously granted’ is, like a Court of Appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31(2)(b) or under the common law, the applicant need not show ‘good cause’ in the sense of an explanation for his default and a bona fide defence (*Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* (supra) at 578F-G; *De Wet (2)* at 777F-G; *Tshabalala and Another v Pierre* 1979 (4) SA 27 (T) at 6

¹ [2021] ZACC 28; 2021 at para 53.

² 1990 (2) SA 446 on page 471E to H.

30C-D). Once the applicant can point to an error in the proceedings, he is, without further ado, entitled to rescission.”

14. To establish good cause, an applicant must provide a reasonable explanation for the default and a *bona fide* defence(s). Regarding the issue of ‘good cause shown’ in an application for rescission, the following dictum in the matter of *Chetty v Law Society, Transvaal*³, is apposite:

“The term ‘sufficient cause’ (or ‘good cause’) defies precise or comprehensive definition, for many and various factors are required to be considered (See *Cairn’s Executors v Gaarn* 1912 AD 181 at 186 per Innes JA.) But it is clear that in principle and the long-standing practice of our courts two essential elements of ‘sufficient cause’ ‘for rescission of a judgment by default’ are:

- (i) that the party seeking relief must present a reasonable and acceptable explanation for his default and
- (ii) that on the merits, such party has a *bona fide* defence which, *prima facie*, carries some prospect of success (*De Wet’s case supra* at 1042; *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 799 (A); *Smith N O v Brummer N O and Another; Smith N O v Brummer* 1954 (3) SA 352 (O) at 357-8).”

Rescission in terms of Common Law

15. In *Zuma*⁴ the Constitutional Court restated the two requirements for the granting of an application for rescission that need to be satisfied under the common law as being the following:

“First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that it has a bona fide defence, which prima facie carries some prospect of success on its merits. Proof of these requirements shows sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.”

Evaluation

³ 1985 (2) SA 756 (A) 1985 (2) SA 765 A.

⁴ *Ibid* F.n. 1 at para 71.

16. I shall commence by examining whether or not the applicant furnished a reasonable and satisfactory reason for its default. The applicant made a conscious decision to terminate the mandate of his Attorney and failed to substitute and put measures in place to ensure that it remains represented. Despite this, the respondent on the other hand patiently and courteously updated the applicant on all the processes they took. This is evident from the series of correspondences dated 26 November 2020 to 28 September 2021 wherein the applicant's claims handler was appraised of the progress of the matter by the respondent. Furthermore, on 14 October 2021, the applicant was informed by the respondent of its intention to enrol the matter for an application to compel the applicant to participate in a pre-trial inquiry as envisaged in Rule 37 of the Uniform Rules of the Court. In addition, Ms Kerry Wiers, a member of the respondents, updated the applicant on the progress of the matter and invited them to participate in the process. Lastly, the senior personnel of the applicant were also appraised of the developments of the matter. The applicant inexplicably elected to ignore all the correspondences. It is against this backdrop that I find that the applicant's absence was by choice, as postulated in the Zuma matter.
17. The Applicant's main attack on the judgment was that the Court dealt with the matter by considering inadmissible hearsay evidence. I carefully perused the record and this submission is without merit because the experts' reports were admitted by virtue of Rule 38 (2) of the Uniform Rules of the Court.
18. I now turn to the issue of whether or not the court a quo erred in finding that the RAF was 100% liable. It should be noted that there is no direct evidence of how the collision took place and the respondent and the Court a quo relied on what was proffered by the plaintiff's expert witness, Mr Grobbelaar, an engineer who attempted to reconstruct how the collision occurred and the pre-trial minutes.
19. Mr Grobbelaar concedes at the outset that no photographs, marks, or notes were taken on the day of the accident. He analysed the Sketch Plan and asserted that it shows a point of impact at the intersection and that the Colt LDV came to rest approximately 20m further east than the impact area. He conceded that considering the damages to the vehicles it does not appear that there was a high speed involved on the part of either of the vehicles.

20. On 5 June 2019, a pre-trial conference was held and the applicant, inter alia, stated as follows:

"Does the Defendant concede merits? If not, the Plaintiff and Defendant should clearly state why the matter cannot be settled.

Plaintiff's reply:

'Plaintiff has received an offer from Defendant formulated on the basis that the insured driver was 50% negligent in causing the collision. The Plaintiff's Attorney has scheduled an appointment with the Plaintiff to discuss the offer and shall respond as soon as possible thereafter. Defendant's reply: See Plaintiff's response supra.

Defendant's insured driver avers that he travelled along Marlborough Drive in an Easterly direction at the intersection of Northway when he collided with Plaintiff's vehicle. The Defendant as such admits that its driver was negligent, but avers that the Plaintiff was contributory negligent and that at least a 50% apportionment should as such be applied against her claim."

21. The above is a concession of negligence by the applicant that the insured driver was 50% negligent and this shifted the onus of proving contributory negligence to the applicant who elected not to participate in the proceedings. In the result, no contributory negligence was proved.
22. The judgment is further attacked on the basis that the court relied on hearsay evidence. On proper reading of the record, this attack is unfounded because all Expect Reports of the respondent were admitted into the record by virtue of Rule 38 (2) of the Uniform Rules of the Court.
23. Regarding the quantification of the claim, the applicant, relies on the opinion of an erstwhile practising advocate who now serves as a Senior Claims Handler of RAF. The court a quo, on the other hand, relied on the expert evidence of the following eight experts: Dr D.A. Birrell, an Orthopaedic Surgeon; Dr M. Mazabow, a Clinical Neuropsychologist; Dr J. du Plessis, a Neurosurgeon; Dr. O. Guy a Speech Language Pathologist and Audiologist, Dr. Shevel a Psychiatrist, Tracy Holtshauzen an Occupational Therapist, E. Noble an Industrial Psychologist and Mr G. Whittaker an Actuary—all who detailed the injuries, sequelae and their effect on the Respondent's career paths in detail. The applicant failed to provide expert evidence to gain these reports.

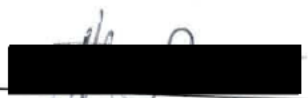
24. On the issue of an unreasonable delay in launching this application it should be noted that on 24 January 2023, the Applicant launched an urgent application to stay the enforcement of a writ of execution issued by the Respondent's Attorneys pending an application for rescission and this application was dismissed on 27 January 2023. Thereafter, it took the Applicant a month to launch this application, and almost a year after the impugned judgment was granted. According to the Applicant, the reason for the delay was that the file was moved between offices. In my view, this is not a plausible explanation for the delay.
25. It is apposite to mention that the impugned Judgment was granted on February 2, 2022. By then, The Applicant had already been declared in default on October 29, 2021, by Vuma AJ, and the Applicant took no steps to remedy the situation. The Applicant was, on numerous occasions, warned of the progress of the matter and encouraged to attend the hearing.
26. Consequently, for all these reasons, the application for rescission of judgment is bound to fail both at common law and in terms of Rule 42 of the Uniform Rules of the Court.

Costs

It is apparent that the applicant adopted a strategy of delaying the payment of the respondent by launching numerous unfounded applications, viz, the urgent application which was dismissed and the current application. The applicant's application is based on frivolous and flimsy reasons. This indicates that the applicant failed to apply his mind to the issues properly or proceeded not caring about the outcome of the matter. The scarcity of judicial resources requires such resources to be utilised appropriately and efficiently. The applicant should appreciate that judicial resources should be employed efficiently and that they should properly consider the matter before pursuing the same rather than using this court to frustrate his clients by subjecting them to unfounded litigation. Consequently, I see no reason why the applicant should not be mulcted with a punitive costs order.

Order

1. The application is dismissed with costs on attorney and client scale.


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

Appearances:

For Applicant: Adv. J Williams SC instructed by State Attorney.

For Respondent: Adv. B Boot and Adv. E Propy instructed by Adams and Adams Attorneys.

Date heard: 30 May 2024

Date of Judgment: 02 July 2024