



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

Case No: 37164/2018

In the matter between:

ROAD ACCIDENT FUND

Applicant

and

MAVUNDA AKANI HOMES

Respondent

DELETE WHICHEVER IS NOT APPLICABLE

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

25/1/24
DATE

SIGNATURE

JUDGMENT

DM LEATHERN, AJ:

[1] The Road Accident Fund seeks rescission of a judgment granted by default by Nyathi J on the 3rd of May 2022 under case number 37164/2018 as well as condonation for the late filing of the rescission application.

[2] The application was launched by way of a notice of motion signed on the 14th day of February 2023.

[3] It is apparent that this is one of many such rescission applications launched by the applicant and one is left with the decided impression that it is merely an application prepared according to a template, as will appear hereinafter. It appears that there are numerous such matters wherein condonation is applied for and that this is in fact inherent in the system which the applicant has chosen to follow regarding litigation in this and other Courts.

THE RESCISSION APPLICATION:

[4] In prayer 2 of the notice of motion, it is indicated that the rescission of the judgment is sought in terms of Rule 42(1)(a) of the Uniform Court Rules. Rule 42(1)(a) relates to the rescission or variation of an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[5] In paragraph 5.2 of the founding affidavit, it is in fact stated that the application is brought in terms of Rule 42(1)(a) alternatively the common law. This is under the heading "NATURE AND PURPOSE OF THE APPLICATION". In paragraph 8.1 of the application under the heading "THE LEGAL BASIS FOR THIS APPLICATION" the submission is made that the Court has inherent jurisdiction under Section 173 of the Constitution and common law to control and regulate its process.

[6] Furthermore, in paragraphs 8.3.2 and 8.3.3 of the founding affidavit it appears that reliance will also be placed on the grounds which are referred to in 021-2

to in RuleS 42(1)(b) and 42(c) although it appears that no case was in fact made out in the founding affidavit to rely on either of these grounds. This reinforces the impression that the present application is merely a "template" application.

[7] The reliance on Section 173 of the Constitution is reinforced by the content of paragraph 8.4 of the founding affidavit which submits that the power of the Court extends to rescission proceedings in appropriate circumstances and the submission is made that this will be the case where serious injustice will otherwise result.

[8] I will consider the submissions made in the affidavits filed in this matter on the basis and the grounds set out hereinbefore. Before doing so I deal briefly with the history of this matter.

[9] The following facts appear from the papers filed:-

[9.1] the respondent was a passenger injured in a motor vehicle accident which took place on the 26th of May 2013 and in which he suffered a head injury and a left eye injury;

[9.2] summons was served according to the applicant on the 30th of May 2018;

[9.3] by way of a notice of intention to amend notice was given of the institution of a special plea of prescription in November 2018 and such amended plea was then filed, although the plea itself it is undated and does not bear a stamp indicating the date of filing;

[9.4] on the 21st of January 2019 a replication was filed dealing with the special plea of prescription wherein reliance was placed on a Supreme Court of Appeal decision dealing with Section 23(3) of the RAF Act;

[9.5] an application for a trial date was filed as far back as July 2018;

[9.6] on the 10th of March 2021 the matter was set down for hearing on the 2nd of June 2021;

[9.7] expert notices were filed on behalf of the respondent in October 2018;

[9.8] the matter was on the roll and before Court on the 2nd of November 2021 whereafter it was postponed apparently for a settlement proposal to be filed but on the 4th of November 2021 the applicant indicated that the claim had prescribed and no tender would be forthcoming;

[9.9] the matter was then set down for hearing on the 3rd of May 2022 on which date judgment was granted.

[9.10] there was no appearance on behalf of the applicant at the trial and judgment was granted by default in its absence.

[10] This was after there had been complete compliance with the obligation to send expert reports through to the applicant and when the applicant was, on its own version, aware of the date of trial.

[11] It is trite that where a Defendant has been given notice of the case against it and given sufficient opportunity to participate, he elects to be absent, this absence does not fall within the scope of the requirement of Rule 42(1)(a) and does not have the effect of turning the order granted *in absentia* into one erroneously granted¹ and that where a Plaintiff is procedurally entitled to judgment in the absence of the Defendant such judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. The Court which grants a judgment by default does not grant the judgment on the basis that the Defendant does not have defence, but on the basis that where the Defendant has been notified of the Plaintiff's claim as required by the Rules and does nothing further to defend the matter, the Plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration if subsequently disclosed and cannot transform a validly obtained judgment into an erroneous judgment². Both of these judgements are discussed in more detail in *Road Accident Fund v McDonnell in re McDonnell v Road Accident Fund*³ as are the consequences thereof. That puts paid to the reliance on rule 46(1)(a).

[12] The requirements for rescission under the common law are equally trite and discussed in the matter of *Road Accident Fund v Olive Brendan*

¹ *Zuma v Secretary of the Judicial Commission of Enquiry into allegations of State Capture, corruption and fraud in the public sector including organs of state & others* (CCT52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) 17 September 2021.

² *Lodhi 2 Properties investments CC v Bondev Developments* 2007(6) SA 87 (SCA) at para 27.

³ (1931 83/2015) [2022] ZAWCHC 116 (9 June 22)

Applegate & Others⁴. I pause to note that the case was in this Court, that the present applicant was again the applicant and should be well aware thereof.

In summary, the requirements are:-

[12.1] a *bona fide* defence; and,

[12.2] good cause, which includes the giving of a reasonable explanation for default, showing that the application was made *bona fide* and showing that a *bona fide* defence which has *prima facie* prospects of success exists.

[13] Accordingly the applicant must present a reasonable and acceptable explanation for his default⁵.

[14] In Colyn v Tiger Food Industries trading as Meadow Feed Mills (Cape)⁶ the Court said that:

“(a) he (i.e. the applicant) must give a reasonable explanation for his default. If it appears his default was wilful or that it was due to gross negligence the Court should not come to his assistance.”

[15] In Silber v Ozen Wholesalers (Pty) Ltd⁷ it was held that the explanation for the default must be sufficiently full to enable the Court to

⁴ Case Number (52500/2015) [2021] ZAGPPHC 345 (27 May 2021)

⁵ Vilvanathan & another v Louw NO 2010 (5) SA 17 (SCA)

⁶ 2003 (6) SA 1 SCA

⁷ 1954 (2) SA 345 (A) at 353 A

understand how it really came about and to assess the applicant's conduct and motives.

[16] Before a person can be said to be in wilful default, the following elements must be shown:-

[16.1] knowledge that the action is being brought against him;

[16.2] a deliberate refraining from entering appearance, though free to do so; and,

[16.3] a certain mental attitude towards consequences of the default.

[17] I turn now to deal with the case made out by the applicant in the light of the above principles.

[18] The founding affidavit is deposed to by one Lizette Wannenburg who states that she is a senior claims officer in the employ of the applicant, employed as such at its Menlyn branch where this claim was first lodged. She furthermore states that she was the senior claims officer responsible for "this matter" in the office of the applicant. Ms Wannenburg goes further to state that:

"the facts contained herein are within my personal knowledge or have been extracted from the available records of the applicant, to which I refer and to which I have access or are otherwise a matter of public record and are true and correct."

She does not however state that she dealt with this matter personally at the relevant times.

[19] Ms Wannenburg goes further in paragraph 7 of her founding affidavit to state that the RAF has endeavoured, in order to save costs, while limited to extensive constraints, to expedite the handling of all litigious matters as and when they are brought to its attention. This was after the applicant in February 2020 sought to move away from its traditional litigation model of having a panel of attorneys to assist in the litigation process. She admits that the adoption of this model has not only affected the proper administration functioning of the fund but also severely affected adherence to the prescribed time frames in matters under litigation which has resulted in many matters involving the applicant going to trial with no legal representation. Ms Wannenburg states that the Courts are relied upon to ensure that proper compensation is granted.

[20] When judgments have been granted, where the applicant was unrepresented and after assessment of the awards granted by the Court, if the applicant is of the opinion that such was unjust, inequitable or erroneously granted or that certain facts or points of law were not fully disclosed to the Court or considered in arriving at the award, the applicant then embarks on a process of appointing legal representation for the process of rescinding orders.

[21] It must immediately be apparent that this process not only inverts the procedure which has been prescribed by law and the manner in which

matters should be disposed of in this Court but that the applicant is also content to follow this process knowing full well that it leads to judgments being granted against it in its absence and by default.

[22] The fact that the applicant is content to do this is also illustrated in paragraphs 12.13 to 12.15 of the founding affidavit where the deponent states that the applicant became aware of the Court order during May 2024 (it appears on 4 May 2022) and immediately referred it to its rescission committee for a decision on whether the order should be rescinded or not in accordance with its internal policies and procedures. A decision in this regard was only made some seven months later on the 8th of December 2022 and the deponent states that this was due to the “operational limitation” relating “to the large number of matters which needs to be considered by the rescission committee”.

[23] On the facts set out hereinbefore, it must be found that the applicant was in wilful default and, if not, then at least grossly negligent. Rescission can and should be refused on this ground alone. The applicant was content to run the risk of judgment being granted against it, as occurs in numerous matters.

[24] The problems which the applicant has both in this application and other applications is furthermore illustrated by the fact that there is no real reason for the default put forward by the claims handler, one Bathabisile Khumalo who dealt with the matter and who corresponded with the respondent's attorneys. There is also no explanation given as to why, when

the matter had previously been on the roll for hearing and postponed for an offer, which was followed by a refusal to make payment and a reliance on prescription, no representatives were appointed by the applicant to litigate the matter and in particular the special plea. This is aggravated by the fact that, as set out in the founding affidavit, on the day that the matter was in Court the applicant's claims officer, notwithstanding the said defence, requested that the matter stand down for the purpose of the applicant obtaining and "possibly" making a settlement offer.

[25] All that remains is to deal briefly with the submission that in terms of Section 173 of the Constitution the Court should extend its powers to rescind judgments, apparently due to the fact that the applicant has certain obligations in terms of the Constitution and its enabling legislation, is unable or not prepared to do so in terms of normal Court procedure and the Court should do so in order to respect, protect, promote and fulfil the Constitutional rights of other claimants against the fund.

[26] Arguments such as these were considered and rejected by Millar J in *Road Accident Fund v Plaatjies & Another in re Plaatjies v Road Accident Fund*⁸ and the Learned Judge concludes with the following in paragraph 20:

"the function of the Court is to determine disputes between claimants and the RAF – it is not to assist the RAF to "manage and fulfil its objects and to pay reasonable compensation". The RAF like any other litigant when the matter is before the Court must

⁸ (72939/2017) [2022] ZAGPHC 540(25) July 2022 at paragraphs 16-20

exercise their rights to dispute any evidence proffered against them and to lead any evidence that would advance their case. The view expressed by the RAF is indicative of an organisation that does not appear to properly appreciate its statutory mandate or how that mandate should be discharged in a Constitutionally compliant manner. It is in effect an abdication of its functions as set out in Section 4(1)(b) of the Act.”

Those findings are equally applicable in the present matter.

[27] The applicant also relied on similar submissions in the matter of Road Accident Fund v Ngobeni obo Phelela⁹. In that matter Michau AJ stated the following in paragraph 20:

“I cannot find myself to be persuaded by this submission. Not only am I bound by precedent as to what the requirements are, at common law, for rescissions of judgment, in my view it will also lead to enormous uncertainty if different requirements exist for rescissions for different organisations. The floodgates would open. In my view the RAF should be treated as every other litigant. I do not believe that this matter warrants any development of the common law in this regard to cater for the administrative challenges the RAF has been confronted with.”

I am fully in agreement with these findings.

⁹ 2022 JDR 3502 (GP)

[28] Michau AJ goes further in paragraph 21 to state the dangers in taking such approach in that the applicant would be less than vigilant in handling the claims which it receives, applications for rescission might become the order of the day, stretching the scarce legal resources even closer to breaking point. He states while there may be sympathy for the individual claim handlers who may or may not be blameless in the administrative quagmire the RAF currently finds it in it is equally persuasive that in the interests of justice claims of needy individuals who have a good claim should be finalised swiftly and efficiently. I again agree with this reasoning.

[29] Accordingly, there is no basis to rescind the judgment relying on Section 173 of the Constitution.

CONDONATION:

[30] Having found that the application for rescission of the judgement should be refused the application for condonation becomes moot. I however deal briefly with the application for condonation.

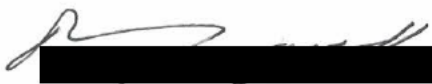
[31] As indicated hereinbefore, I have found that there was never any real prospect of the rescission being granted.

[32] The fact that the procedure followed by the applicant leads to further inevitable delays, in this case a period of eight months before a decision is even made that an application for rescission will be launched, mitigates against such condonation being granted. At the very least one would expect measures to be put in place that either more than

committee be formed or that the committee meets more often. No detail is given in this regard but it cannot be accepted that a further eight month delay is appropriate.

[33] In the premises I make the following order:

1. The application for the rescission of judgment is dismissed.
2. The applicant is to pay the respondent's costs.



DM LEATHERN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 14h00 on the 25th of January 2024.