

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

CASE NO.: 13350/14

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 6 August 2024

E van der Schyff

In the matter between:

The Road Accident Fund

Applicant

and

Schalk Willem Petrus Izaakse N.O.

Respondent

JUDGMENT

Van der Schyff J

Introduction

[1] This is an application for the rescission of a default judgment handed down on 4 June 2021. It is brought in terms of Rule 42(1) of the Uniform Rules of Court, alternatively, the common law. The application is opposed.

[2] The applicant, the Road Accident Fund (RAF), contends that it discontinued the services of its panel of attorneys, and this led to many of its legal matters being in a state of disarray. Many of the law firms refused to return the files they were briefed in, to the RAF. In this matter, RAF contends, the existing attorneys, whose

services were subsequently terminated, were not served with the notice of set down of the matter for trial. Judgment was granted by default on 4 June 2021.

- [3] While the applicant was in the process of 'investigating' the judgment, it noted a discrepancy between the amount claimed and the amount the court ordered it to pay in relation to past medical expenses incurred by the plaintiff in the matter, Ms. Izaakse. At the same time, it came to the applicant's attention that Ms. Izaakse had pre-existing injuries.
- [4] The grounds for the rescission application in terms of Rule 42 are that a notice to amend the amount claimed was only served on the RAF's offices on 3 June 2021, a day before the judgment was handed down. The RAF takes issue with what it typifies as non-compliance with the provisions of Rule 28 as no Rule 28(1) and (5) notices were filed and submits that the amendment was irregular. The RAF also contends that the notice of set down was not served on its former attorneys.
- [5] For rescission in terms of the common law the RAF contends that it became aware of the judgment on 9 June 2021. On 24 June 2021 the Acting Regional Manager advised the applicant's office that the judgment be rescinded since the amounts were inflated. The financial challenges faced by the RAF, which was widely published, caused the RAF to terminate the mandate of its panel of attorneys and as a result the process of litigation has been slower than usual. The RAF was hampered by the inability to fund the rescission application regarding the default judgment which was erroneously granted 'and forced to sit with the orders and approvals until such time as funds became available to brief attorneys and counsel.'
- [6] The respondent's attorney of record deposed to the answering and supplementary answering affidavit. He states that a notice of set down was served on 10 September 2020. A notice of amendment was served on 3 June 2021. The notice was not a notice in terms of Rule 28(1) but if regard is had to the content of the notice, it was a notice in terms of Rule 28(10). The notice informs that the plaintiff intends to apply at the hearing of the matter for an amendment of the amount claim

for past medical expenses of R110 016,13 to R2 688 134.14. The amendment was granted on the day the matter was finalised.

- [7] The respondent contends that no explanation is provided for the inordinate delay in instituting this rescission application.

Discussion

- [8] It was already held by Thulare J in *Road Accident Fund v McDonnell In Re: McDonnell v Road Accident Fund*¹ that the termination of its panel of attorneys cannot be regarded as an acceptable excuse when an application for rescission is considered. *In casu*, however, the RAF contends in its founding affidavit that a notice of set down was not served on its erstwhile attorneys of record. The notice of set down was served electronically on the erstwhile attorneys of record by emailing it to k[...] on 10 September 2020. Tau Phalane Incorporated only withdrew as the RAF's attorneys of record in April 2021. In addition, a Rule 37(2) notice wherein the trial date is clearly reflected, was emailed to the claims handler dealing with this matter on 4 May 2021.

- [9] As for the amendment of the quantum, Rule 28(10) provides a court with a wide discretion to grant a party leave to amend any pleading at any stage before judgment. *In casu*, the defendant, the RAF, has already pleaded. The amendment did not introduce a new cause of action. The defendant failed to appear at trial, despite email correspondence dispatched on the trial date, reminding it of the trial and also providing it with the schedule of medical expenses that the plaintiff intended to present at trial. The schedule of medical vouchers was also uploaded to the 'Caselines' file which the RAF had access to already on 26 May 2021. The amendment was effected to bring the quantum in line with the evidence presented to the court on affidavit.

- [10] The judgment was not erroneously obtained, and Rule 42(1)(a) does not apply.

¹ (13183/2015) [2022] ZAWCHC 116 (9 June 2022).

[11] In *Chetty v Law Society, Transvaal*² the court was faced with an application for rescission in terms of the common law. The court held:

‘But it is clear that in principle and in 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 794 (A); *Smith NO v Brummer NO and Another; Smith NO v Brummer* 1954 (3) SA 352 (O) at 357-8)

It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default.’

[12] The RAF did not only not provide a reasonable and acceptable explanation for its default, but it also failed to show that on the merits, it has a *bona fide* defence. The existence of pre-existing injuries on its own, is neither here, nor there. The only expert evidence on record is the evidence presented by the plaintiff’s expert witnesses. The now-deceased plaintiff was a vulnerable individual before the accident occurred. The *talem qualem* principle thus finds application.

[13] The general principle is that costs follow success. A case is not made out for punitive costs. The respondent employed two counsel. The nature of the application does not justify the employment of two counsel.

ORDER

² 1985 (2) SA 756 (A) 764I-765F.

In the result, the following order is granted:

- 1. The application is dismissed with costs, counsel's cost on Scale B.**

E van der Schyff
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicant:	Mr. L. Lebakeng
Instructed by:	State Attorney
For the respondent:	Adv. D. Keet
Instructed by:	Van Dyk Steenkamp Attorneys Inc.
Date of the hearing:	29 July 2024
Date of judgment:	6 August 2024