



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

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

13/9/2024
Date


Signature

Case no: 46442/21

In the matters between:

ROAD ACCIDENT FUND

APPLICANT

and

EDWARD HENRY KRUGER

RESPONDENT

JUDGMENT

BASSON, J

[1] This is a case, not that dissimilar to the one that served before the court in *Road Accident Fund v Ngobeni obo Phelela*¹ where the court remarked as follows:

“The woes of the Road Accident Fund ('the RAF'), whether it be financial or administrative, are well known within the legal fraternity, and probably beyond. They are well documented in several cases that have been handed down in the recent past. Although their exact details are irrelevant, they are easily found by way of a cursory search. In this division, at least, these have also been one of the reasons for an entire revamp of the trial practice directives relating to matters in which the RAF is involved. This particular matter is symptomatic of these challenges the RAF has had to contend with recently. They have blighted the road accident litigation landscape like the bubonic plague of old and, no doubt left a trail of destruction in the wake.”

[2] In this application, the applicant (the Road Accident Fund – “RAF” – defendant in the action) applies for rescission of the judgment granted by default on 10 May 2023. The RAF also seeks condonation for the late filing of this rescission application in terms of rule 3(2)(b) of the Uniform Rules. On 5 August 2024, this application was dismissed with costs. Here are the reasons for the order.

Introductory remarks

[3] Despite overwhelming evidence that there was proper service on the RAF, not only of the summons and various other processes, but more importantly of the date of the hearing of the application for default judgment on no less than two occasions, the RAF failed to appear and failed to file a notice of intention to defend. This resulted in Kooverjie, J granting the order by default in favour of the respondent (the plaintiff in the action). The RAF now seeks to rescind the default order and judgment but launched its application to rescission 6 months late.

¹ (35926/17) [2022] SAGPPHC 866 (18 November 2022) at par 1.

[4] Where a party fails to defend a matter, particularly in circumstances where such party had ample time to enter an appearance and defend the matter, and had knowledge of the date of the hearing, but elected not to do so, the court will be entitled to grant an order in default. In *Lodhi 2 Properties Investments CC and another v Bondev Developments (Pty) Ltd*² the Supreme Court of Appeal (SCA) explains:

“Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff’s claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that 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 and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.*”³

[5] Before turning to the merits of the condonation application, and more, in particular, the prospects of success in the rescission application (as one of the elements to be considered in an application for condonation), it is necessary to first deal with the point *in limine* raised on behalf of the respondent.

The standing of the deponent

[6] The respondent took issue with the standing of the deponent to depose to the affidavit on behalf of the RAF. The deponent to the founding affidavit states that she is a senior handler in the employ of the RAF. She does not, however, claim that the respondent’s claim was ever allocated to her. The deponent was therefore never directly involved in the respondent’s claim. This is underscored by the fact that the

² 2007 (6) SA 87 (SCA) at para 27.

³ My emphasis.

deponent's name does not appear in any of the numerous emails that were sent to the RAF or replied to by the RAF.

[7] Although I agree with the respondent that the deponent does not have any personal knowledge about the respondent's claim, she is in a position to depose to the inner workings and institutional failures of the RAF.

[8] The deponent admits that the summons and particulars of claim were issued on 14 September 2021 and that service was effected on the RAF on 15 September 2021. She candidly admits that she is unable to "*account for the exact reasons for the missed opportunity, but attribute same to a bona fide oversight due to either, miss filing, a lack of resources and/or capacity with the Fund*".

[9] It is also not denied that the respondent served an application for default on the RAF's offices on 24 August 2022. The deponent admits that the application for default was served on the RAF on 24 August 2024 and that the application was also emailed to the RAF. According to her, this was the first time the RAF "effectively" became aware of the matter. But there is no explanation as to why the RAF did not enter an appearance at that stage. The deponent also does not refer the court to the fact that two notices of set down were served on the RAF. As will be explained, the default judgment application served on two occasions before the court. Both notices of set down were served on the RAF. Apart from claiming that the RAF had a lack of resources, the deponent offers no explanation as to why numerous emails addressed to various employees of the RAF did not prompt the RAF to react and defend the matter. Curiously the deponent is also completely silent about the fact that the State Attorney was involved in the matter and had in fact uploaded an offer of settlement onto Caselines on the eve of the default hearing (10 May 2023).

The application for condonation

[10] Condonation is not there for the mere asking.⁴ A party bringing a condonation application must furnish a reasonable explanation for the delay and must also address

⁴ *Grootboom v National Prosecuting Authority & another* (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013) at para 23.

the prospects of success in the application for which condonation is sought.⁵ Whether it is in the interests of justice to grant condonation must also be considered.

[11] The principles governing the granting of rescission are set out in *Grootboom v National Prosecuting Authority & another*.⁶ I have taken the liberty of quoting extensively from this judgment as the comments made by the Constitutional Court underscore this court's frustration with the manner in which the Rules are disregarded by some litigants:

"The failure by parties to comply with the rules of court or directions is not of recent origin. Non-compliance has bedevilled our courts at various levels for a long time. Even this court has not been spared the irritation and inconvenience flowing from a failure by parties to abide by the rules of this court.

I have read the judgment by my colleague Zondo J. I agree with him that, based on *Brummer* and *Van Wyk*, the standard for considering an application for condonation is the interests of justice. However, the concept "interests of justice" is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasize that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

...

It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for

⁵ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (AD) at 532B-E.

⁶ *Ibid* fn.4 at para 22 - 23 and 32 - 33

the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

I need to remind practitioners and litigants that the rules and courts' directions serve a necessary purpose. Their primary aim is to ensure that the business of our courts is run effectively and efficiently. Invariably this will lead to the orderly management of our courts' rolls, which in turn will bring about the expeditious disposal of cases in the most cost-effective manner. This is particularly important given the ever-increasing costs of litigation, which if left unchecked will make access to justice too expensive.

Recently this court has been inundated with cases where there has been disregard for its directions. In its efforts to arrest this unhealthy trend, the Court has issued many warnings which have gone largely unheeded. This year, on 28 March 2013, this court once again expressed its displeasure in *eThekwini* as follows:

'The conduct of litigants in failing to observe Rules of this Court is unfortunate and should be brought to a halt. This term alone, in eight of the 13 matters set down for hearing, litigants failed to comply with the time limits in the rules and directions issued by the Chief Justice. It is unacceptable that this is the position in spite of the warning issued by this Court in the past. In [*Van Wyk*], this Court warned litigants to stop the trend. The Court said:

"There is now a growing trend for litigants in this court to disregard time limits without seeking condonation. Last term alone, in eight out of ten matters, litigants did not comply with the time limits or the directions setting out the time limits. In some cases litigants either did not apply for condonation at all or if they did, they put up flimsy explanations. This non-compliance with the time limits or the rules of Court resulted in one matter being postponed and the other being struck from the roll. This is undesirable. This practice must be stopped in its tracks."

The statistics referred to above illustrate that the caution was not heeded. The Court cannot continue issuing warnings that are disregarded by litigants. It must find a way of bringing this unacceptable behaviour to a stop. One way that readily presents itself is for the Court to require proper compliance with the rules and refuse condonation where these requirements are not met. Compliance must be demanded even in relation to rules regulating applications for condonation.”

Explanation for the delay in bring the rescission application

[12] Although the RAF concedes that the default order (made on 10 May 2023) came to the attention of the RAF, the RAF took no steps to launch the rescission application. Instead, the deponent tells the court that the RAF then commenced with investigations into the merits of the claim. Who did the investigations and why it was done so late, is not explained. She explains that the investigations were only finalised on 21 June 2023. The matter was then referred to the rescission committee for deliberations and only once the rescission application was recommended, was the matter allocated to the relevant legal representatives on or about 8 June 2023. Counsel was only appointed on 20 September 2023 and a consultation was finalised on 21 September 2023. The RAF submits that it had acted expeditiously given “the limitations on time afforded by internal policies and mandatory procedures”. In respect of the merits, the RAF submits that it has a bona fide defence against the main claim as the amount granted for future loss of earnings is not justified.

[13] Regarding the explanation for the default: The RAF, on its own version, waited about six months before the rescission application was brought but blames it on the fact that it is bound by internal policies and procedures. This explanation is not reasonable enough to excuse the default. All litigants are bound to adhere to and follow the rules of court as they serve a very definite purpose which is, as the Constitutional Court pointed out in *Grootboom*⁷, to ensure that the business of our courts run effectively and smoothly. The RAF is a litigant in this court and is no different from any other litigant. The RAF cannot claim to be afforded any special indulgence simply because it has to adhere to internal policies and procedures. This explanation only

⁷ *Ibid* fn. 4.

reinforces the perception that the RAF is plagued by significant institutional failures, which have become closely associated with RAF litigation in this court.

[14] The respondent, on the other hand, has done everything in his power to bring the order to the attention of the RAF. He, as a litigant in this court, is also entitled to have his matter attended to expeditiously. After the order was granted, and on 29 May 2023, the respondent emailed the court order to the RAF copying in the following persons: Lizette Wannenburg, Mcebisi Makwakwa, Mmabatho Potelo and Maraloe Lightfoot. On the same day, the court order was transmitted to 45A-Order which is an email address elected by the RAF itself to ensure that it has knowledge of unpaid court orders. Despite the urgency and diligence with which the respondent has brought the order to the attention of the RAF (as is, I should add, expected of a litigant), it still took about 6 months before the rescission application was launched.

[15] Having regard to these facts, I am not persuaded that a reasonable and acceptable explanation for the delay has been tendered. Condonation should, therefore, be refused on this basis alone. As already pointed out: the RAF is an ordinary litigant and cannot demand special treatment for its failure to adhere to the rules of court. This was made clear by the court in *Road Accident Fund v McDonnell*:⁸

“There is no basis to convert our law of rescission to a new purpose and to especially construct new principles which will start to exist, simply to accommodate RAF's failure to attend court and, effectively represented, to deal with a disputed claim of an amount of more than R5 million. The fact that RAF is an organ of State exercising public power and performing a public function, whose main object is to ameliorate the plight of victims rendered vulnerable by modern accidents, was no license to disregard a court process. The efficient, effective and economical administration of its resources includes that Executives of RAF should acknowledge its shortcomings and allow RAF to be led by professionals where RAF's own competencies run short. Whilst measures to camp fraud, corruption and

⁸ 2022 JDR 2089 (WCC) at para 22 and 24.

inflated awards are welcome, they cannot be a legitimate excuse to disregard our courts.

...

The thinking of the RAF on finality of its claims through judicial pronouncements is very worrisome. It simply wants to have the last word, even after a court order. Paragraph 82 of its Heads of Argument reads:

'82. In this context, the applicant submits that the common law should be developed to allow the applicant greater latitude in applications for rescission, even in circumstances where there has been some degree of judicial oversight in the determination of the compensation payable to a claimant.'

Simply put, the common law should be developed to allow that it should only be when RAF accepts compensation payable to a claimant, that a court order becomes final. RAF pleads for a revolving door where it can circle claimants around the axis, in our courts, where it simply disregards its obligation to attend court to have the issues determined after hearing evidence."

[16] Although condonation should be refused on this basis alone, I have nonetheless considered the prospects of success in the rescission application (as a consideration in the application for condonation for the late filing of the rescission application). I have concluded that there are no prospects for success, especially given that the RAF's default and the conduct leading up to the default order can only be characterized as either wilful or, at best, grossly negligent.

Events that led to the granting of the default judgment on 10 May 2023

[17] As already pointed out, despite the fact that numerous documents, notices, and processes have been served, by means of the Sheriff and by e-mail (copying in various individuals and the State Attorney), on the RAF, the matter remained undefended. The RAF, as already pointed out, apart from blaming its inaction on poor filing, a lack of resources and/or capacity within the RAF, cannot really offer an explanation as to why

the matter had not been defended despite having had numerous opportunities to do so.

[18] On or about 7 May 2021, the respondent's claim was lodged. This is the date upon which the RAF thus became aware of the matter. This is underscored by the fact that the RAF then allocated a claim number. Once the claim number was allocated, the matter was registered on the system.

[19] Summons was issued on 14 September 2021 and was served on the RAF on 15 September 2021. This is confirmed by the return of service.

[20] In an email dated 11 October 2021 and addressed to the RAF, the RAF was alerted to the fact that the matter had not yet been defended. The respondent afforded the RAF a further indulgence before a default judgment application would be launched. This letter remained unanswered.

[21] On 25 November 2021, a Notice of Motion to have the matter referred to the default trial role was served on the RAF by hand. The same Notice of Motion was also emailed to the RAF on 22 November 2021.

[22] On 28 January 2021, the Notice of Set Down for the Trial Interlocutory Court and the Notice of Motion was served on the RAF by hand. The same Notice of Set Down was also emailed to the RAF's preferred email address.

[23] On 23 February 2022, the Default Referral Motion was enrolled before Makhoba, J who granted leave for the matter to proceed by default. This order by Makhoba, J was served on the RAF on 1 June 2023.

[24] A date was allocated by the Registrar for the default judgment application and the Notice of Set Down for 25 August 2022 (the first hearing date) was served on the RAF by hand. In addition, notices were uploaded onto CaseLines and to which the RAF had access. The RAF offers no explanation of its actions since it received the above Notice of Motion and set down.

[25] The (first) default judgment served before Collis, J on 25 August 2022 but was removed because the respondent's heads of argument was filed late.

[26] A further date was secured for 10 May 2023 (the second default judgment hearing). A Notice of Set Down was served on the RAF by hand on 9 September 2022.

[27] On 14 January 2022, an application was served on the RAF by hand requesting the court to compel the RAF to take a decision on the seriousness of the injuries as per Road Accident Fund Regulation 3. On 16 September 2022, Ally, AJ ordered the RAF to make a decision. On 29 September 2022, this order was served on the RAF by hand. To date the RAF has not complied with this order.

[28] On 13 June 2022, the Notice of Set Down was served on the RAF for an compelling the RAF to take a decision on the seriousness of the injuries as per Road Accident Fund Regulation 3.

[29] There is no explanation as to why the RAF did not react to the second Notice of Set Down for default judgement particularly in light of the fact that on 5 May 2023, the respondent addressed an email to the RAF's Mcebisi Makwakwa and Maralou Lightfoot informing them that the respondent's action was enrolled for default judgement on 10 May 2023. On the same day (5 May 2023), Maralou Lightfoot replied to this email and copied into her reply a certain MMapule Kgaladi, saying that this was her matter ("Your matter. Regards").

[30] On the same day, the respondent again transmitted the same email that clearly states that the respondent's action is enrolled for default judgement on 10 May 2023. This time, the respondent copied the claims handler in, a one MMapule Kgaladi. Attached to this email were all the documents to enable the RAF to make an offer.

[31] On the same day MMapule Kgaladi replied and requested to be invited to CaseLines. She was invited by the respondent to CaseLines on the same day (5 May 2023). After she was invited, the respondent transmitted an email confirming to the said MMapule Kgaladi that she had been invited to CaseLines. The legal

representative from the State Attorney (Mmabatho Potelo) was also invited to CaseLines. The audit report confirms that Mmabatho Potelo in fact accessed Caselines on 8 May 2023. MMapule Kgaladi also replied to the confirmatory email inviting her to CaseLines invitation by saying “thank you”.

[32] On 5 May 2023, MMapule Kgaladi addressed an email to the respondent requesting proof that the respondent was still alive by way of a mortality affidavit and indicated that the RAF cannot tender without same. The required documents were sent to her by email on 8 May 2023.

[33] Also on 5 May 2023, MMapule Kgaladi requested the respondent to send her the reports of the urologist and the neurologist. The reports were transmitted to her via her email on the same day.

[34] On 8 May 2023, the respondent transmitted via email to MMapule Kgaladi the Heads of Arguments, the HPCSA Notice on general damages as well as the Notice of set down.

[35] On 8 May 2023, MMapule Kgaladi requested the respondent to in future deal with Mcebisi Makwakwa who was also copied into the email. The respondent further informed the court that most, if not all, of the correspondence was transmitted to MMapule Kgaladi but also to Maraloe Lightfoot and Lisette Wannenburg.

[36] On the eve of the hearing date, the RAF uploaded its assessors report (titled “Defendant’s Expert Report”) onto CaseLines and also uploaded an offer of settlement. The settlement offer was uploaded by the State Attorney’s Mmabatho Potelo. In this settlement, the RAF proposed to settle the merits, future loss of earnings as well as general damages.

[37] Yet, even at this late stage, the RAF did not attempt to oppose the matter and remained inactive. Moreover, despite the fact that the State Attorney had been on record and had access to Caselines, the RAF inexplicably did not instruct the State Attorney to defend the matter. The irresistible inference is that the RAF chose not to

defend the matter. Moreover, given the numerous emails and notices served on the RAF, it is difficult to argue that the RAF could not have been aware of the hearing date.

[38] A further clear indication that the RAF knew about the hearing date, appears from a RAF document attached to its Founding Affidavit, the so-called *Claims-Investigation-Instruction-Checklist*. The court was informed that this checklist was necessary to instruct the RAF's internal assessors to investigate the merits of the claim. This document was marked Level I-Critical. It was further marked with the following words "trial date is 21 days from the date of instruction". I am in agreement with the submission that the RAF would not have marked it as such if it were not aware of the trial date.

Explanation of the default leading to default judgment granted on 10 May 2023

[39] The RAF's excuse for failing to file a Notice of Intention to Defend and for not attending the hearing — despite receiving proper notice of two default judgment hearings — is unacceptable.

[40] The RAF refers to the following reasons for its default: Firstly, it had decided in February 2020 to terminate the contracts with a panel of attorneys and recall all the files in matters that were allocated to them. The RAF acknowledges that in the early stages of the transition, it was often unrepresented in court. Secondly, a National State of Disaster was declared on 15 March 2020. The RAF explains that at the time it functioned with a skeleton staff basis. This they say "compounded on the already aggravated workload and overall operational logistics the applicant was facing, causing a further backlog of the work, inevitably resulting in numerous pleadings, notices, and correspondences not coming to the attention of the applicant on time or at all". Two points must be made: Firstly, since the RAF terminated the contracts of the panel in 2020, it had three years to get its house in order when the respondent served its claim on the RAF. Secondly, COVID has long gone. It is simply not reasonable to still blame the RAF's inaction on COVID.

[41] The RAF then concludes that it is "reasonable to assume that combined summons did not effectively come to the attention of the relevant delegate/s of the applicant: the copies did not reach the relevant departments for distribution".

Therefore, the RAF contends that it was not in wilful default and that any such default was not due to gross negligence. Instead, it attributes the default to circumstances beyond its control, which led to a bona fide oversight by its staff members.

[42] The explanation is not reasonable. While the oversight regarding the summons might be excusable, the subsequent notification of two default judgment hearings to the RAF, including multiple staff members and the State Attorney, undermines any claim that it was unaware of the default judgment proceedings. Not only did the State Attorney have access to Caselines, it even went as far as to upload an offer of settlement on the eve of the hearing and requested two medico-legal reports. As previously noted, it is perplexing why the State Attorney did not file a Notice of Intention to Defend at that stage, especially since this has now become almost standard practice. If not wilful, at the very least the RAF was grossly negligent in not defending the matter. A further concern is that the deponent to the Founding Affidavit fails to fully inform the court by not explaining that the State Attorney was aware of the hearing but chose not to act, despite having ample remedies available under Rule 19(5) of the Uniform Rules.

[43] The court in *Road Accident Fund v McDonnell*⁹ was faced with similar excuses and rejected it as follows:

“The applicant used to constitute a panel of attorneys to assist in litigation in the event of claims not settled. In November 2019, the applicant did not extend the tenure of its panel of attorneys as part of its strategy to reduce costs. According to the applicant, this was after an observation that the costs associated with these panels were too high and detracted from the main focus and object of its core mandate, which was to pay for reasonable compensation to victims of motor vehicle accidents. The new model was to ensure that there would be more funds available to compensate the ever-growing number of claimants who were victims of motor vehicle accidents.

⁹ *Ibid* fn. 8 at para 4, 5, 11 and 12.

The applicant alleged that it had noted that the courts had begun exercising a greater duty and judicial oversight to ensure that awards were fair, reasonable and justifiable on the facts. The applicant alleged that the short-term consequence of the change of strategy was that the applicant was not represented at court in disputed matters which proceeded to litigation. The applicant's employees were not officers of the court and did not have the statutory mandate or other authority to make representations in court. The claims that the employees handled were not limited to the province where the employee was found in the administration of the claims. According to the applicant, it was practically impossible for the employees to attend court proceedings.

...

The applicant cancelled the legal panels and as a result its previous attorneys had to withdraw from the record. The applicant alleged that it was simply unable to appoint another firm of attorneys. This inability is unexplained. Furthermore, the applicant relied on its claim handlers to administer the claim, who the applicant knew, were not registered by the Legal Practitioners' Council and could not accordingly represent the applicant in court. *The applicant was aware of the set down, and elected not to be represented at the hearing.*¹⁰ The applicant's own case is that the rescission is applied for, primarily, because the quantum is in excess of R5 million, and because of the quantum the Chief Operating Officer is not prepared to sign off on the payment.

The applicant alleged that its liabilities continue to grow under a restrained economy and that although it showed a surplus in the financial year ending March 2021, it still has an accumulated deficit and actuarial liability of billions of rands. It not managed properly, its finances may collapse, which will undermine the object of the RAF Act. This will threaten the constitutional rights of persons that suffer injuries and death pursuant to the driving of motor vehicles including their dependents. It is against this background that the applicant brought this application in the public interest as envisaged in section 38(d) of the Constitution. The alleged that it is also motivated in this application,

¹⁰ My emphasis.

by the need to be assisted by the courts to manage and fulfil its objects and to pay fair and reasonable compensation, determined by a fair legal process.”

[44] Similarly in *Road Accident Fund v Ngobeni obo Phelela*¹¹ the court said the following:

“...Leads one to the ineluctable conclusion that there was still a deliberate policy decision not to attend court. That decision, it seems, was not directed at this particular matter but rather at matters in general for the reasons dealt with in the founding affidavit.”

[45] As already noted, the RAF had ample opportunity to defend the matter. In this regard I agree with the court in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and others*¹² where it held in respect of the effect of a wilful default as follows:

“...Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted *in absentia*, into one erroneously granted.”

[46] It is therefore concluded that the only reasonable conclusion is that the default was either wilful or, at the very least, grossly negligent. The RAF must therefore bear the consequences of this default. See in this regard *Harris v Absa Bank Ltd t/a Volkskas*:¹³

“Before an applicant in a rescission of judgment application can be said to be in 'wilful default' he or she must bear knowledge of the action brought against

¹¹ (35926/17) [2002] SAGPPHC 866 (18 November 2022)

¹² 2021 (11) BCLR 1236 (CC) at para 61.

¹³ 2006 (4) SA 527 (T) at paras 8 and 9.

him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step that would avoid the default and must appreciate the legal consequences of his or her actions.

A decision freely taken to refrain from filing a notice to defend or a plea or from appearing, ordinarily will weigh heavily against an applicant required to establish sufficient cause.”

[47] In light of the fact that this RAF was in wilful default, the rescission application must fail on this basis alone. Again, although it is not necessary to deal with the prospects of success in the action, I have decided, for the sake of completeness, to briefly deal with the prospects of success on the merits. I have come to the conclusion that the RAF has no prospects of success in the action.

Facts placed before the trial court

[48] Regarding the merits: having failed to defend the matter or to enter an appearance, only one version was placed before the court. It is trite that a plaintiff needs to prove only 1% negligence on the side of the insured driver to succeed with a claim against the Fund. The duty thereafter rests on the defendant to aver and to prove contributory negligence. This was not done. Not surprisingly the trial court decided the merits 100% in favour of the plaintiff. It should also be noted that the insured driver has since passed away.

[49] The respondent suffered various serious injuries as a result of the accident and suffered serious *sequelae* as a result thereof. Only the respondent filed medicolegal reports.

[50] I do not intend to refer to all of the reports and will merely gloss over the reports. The orthopaedic surgeon (Dr. Close) notes that the respondent had sustained the following injuries: haemorrhagic contusion to the right side of the brain; unspecified dislocation of the right wrist and hand; displaced left first metatarsal; fracture of the styloid process of the right wrist; a scaphoid injury and severe scrotal injury. It is not in dispute that the respondent currently resides in Canada where he commenced working

in July 2021. He works as a senior principal engineer in the IT field. He works approximately 13 hours per day. The orthopaedic surgeon notes that the respondent complained that he is slow and that he has to give himself breaks due to poor concentration as well as poor endurance of the right shoulder and hand. He struggles with typing on a laptop computer. He is no longer able to manage any handyman tasks independently and no longer participates in any recreational sports and activities (boxing and jujitsu) which has a great impact on his life. The orthopaedic surgeon also notes that the respondent had pain in his cervical spine and thoracolumbar spine. There was still a flattening of the lateral heads of the deltoid muscle on the right compared to the left. An ultrasound obtained in 2022 indicated that the supraspinatus and associated bursa demonstrated signs of impingement deep to the coracoacromial arch. The orthopaedic surgeon also notes that there were post traumatic degenerative changes of the radial carpal joint with subchondral sclerosis, joint space narrowing and irregularity to the articular surface and that post traumatic osteoarthritis of the right wrist was advanced. The orthopaedic surgeon opined that in future, the respondent will have to undergo various surgeries.

[51] The Neurologist, Dr Pillay notes that the respondent complained of poor memory and forgetfulness. Although he manages complex problems at work, he struggles to focus. He also forgets various home activities, anniversaries, dates at work or events that have occurred. Dr Pillay notes that the respondent had sustained a moderate traumatic head injury and has a 17 times higher chance than the general population to develop epilepsy. An injury of this severity is expected to cause significant neurocognitive and psycho organic abnormalities. Dr Pillay opines that the respondent qualified for compensation according to the narrative test if the psychologist confirms significant cognitive or behavioural issues that will limit his employment opportunities. He also notes that provision should be made for treatment of seizures in the future.

[52] The Clinical Psychologist (N Sewpershad) gives a detail account of the numerous psychological fallouts that the respondent suffers from after the accident. I will refer to only a few of them. He has experienced difficulties relating to his colleagues due to marked changes in his personality and verbal interactions. He struggles at work which causes distress as he lacks competitive drive which has negatively affected his

confidence. He lacks endurance and is more easily fatigued. He suffers from headaches and experienced some difficulties in speech in the acute phase after the accident which he describes as word finding difficulties. Whilst this has improved he still lacks confidence in his verbal interaction with others. He displays several features of post-traumatic stress disorder and also displays features of social phobia. Post-morbidly the expert notes that the respondent has retained persistent post head trauma symptoms, including post concussive headaches, random episodes of vertigo, reduced frustration tolerance as well as a decline in neurocognitive functioning. The neuropsychological profile showed impairment in sustained attention, processing speed, verbal memory, initiation, generativity and stimulus boundedness with reduced foresight pointing to subtle decline in executive functioning. She opined that the respondent presented with major depression qualified to be in the severe range. He also presented with several symptoms that would typically be associated with a diagnosis of PTSD and noted that he presented with severe levels of anxiety of the generalised type. He also seems to have developed an avoidance response to social interactions. He also struggled to mediate through his physical pain and suffering and retained significant limitations from the orthopaedic fractures to his dominant hand. The expert concluded that these neuropsychological and neurobehavioral *sequelae* were likely to persist indefinitely.

[53] Regarding his post-morbid functioning it is noted that the profile confirmed that the moderate brain injury had produced significant deficits in sustained attention and memory, difficulty with problem-solving, adapting to novel demands and integration of new abilities. This, taken together with the limited foresight/decline in executive functioning, was likely to restrict further academic and career advancement. The expert confirms that the respondent has suffered a severe loss of amenities with his quality of life being irrevocably being impacted. The extent of the psychological damages suffered was therefore profound. He is therefore psychologically significantly more vulnerable.

[54] The Industrial Psychologist (Ms M Grové) commented on the respondent's post-morbid career postulation and notes that he agrees with the clinical psychologist that the respondent's deficits are likely to restrict further academic and career advancement. The reason for this is that further academic and career advancement

would place greater demands on his cognitive capacity and that he would face more complex interactions and strategic tasks to perform, which he would probably not be able to master given his deficits. This expert opines that the respondent has probably reached his career ceiling in his present position and that it was probable that his career would stagnate at this level. She notes that, while the respondent managed to secure and maintain employment post-morbidly, credence must be given to the fact that he presents with physical cognitive and psychological deficits which will adversely influence his work capacity and ability to fully and equally participate in the open labour market. Specific concerns were raised as to whether the respondent would be able to advance and grow in his career in similar ways pre-morbidly, which if not, would mean that he would stagnate in his current role and hence suffer a future loss of earnings. She opines that, since it is not possible to determine in absolute terms the exact impact given that he is only now entering the next phase of his career, it is recommended that these uncertainties be address by means of a contingency deduction applied to the proposed pre-accident career postulation for the claimant but recommended that early retirement (as indicated by the orthopaedic surgeon) be incorporated in the actuarial calculation.

[55] The RAF claims that it has a *bona fide* defence in that the amount awarded for loss of earnings was too high. More in particular, the RAF claims that the respondent was able to remain in employment and that he was promoted twice. Therefore, so it was submitted, there was no loss of earnings. This contention, however, ignores the expert opinions, the *sequelae* and fallouts that is expected to materialise in future such as the slower career progress, the lower expected career ceiling and the two-year early retirement. The contention on behalf of the RAF that the respondent's post - accident capacity is the same, is also not substantiated by anything on the papers. The fact that the respondent now earns more than he did prior to the accident is not the test. A court must consider how his pre-accident career projection compared to his post-accident career projection over the remainder of the respondent's career span. In this regard counsel on behalf of the respondent confirmed that three scenarios regarding the application of contingencies were placed before the court and that the court, after consideration, accepted the third scenario.

[56] Having regard to the expert opinions, the extent of the injuries suffered by the respondent and the impact it will have on his career progression, I am of the view that the RAF has no prospects of success in successfully defending the matter in the action. Costs should follow the result.

[57] In the event the following order is made:

1. The application is dismissed.
2. The applicant is ordered to pay the cost of this application, including the costs of counsel as well as the costs of GRS Actuarial consulting on a High Court party and party scale C.




JUDGE A.C. BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for the reasons is deemed to be 13 September 2024.

Appearances:

For the Applicant: Adv C Sefahamela

Instructed by: The State Attorney

For the Respondents: Adv FHH Kehrhahn

Instructed by: GSG Attorneys