

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2023/062866

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

8 November 2024

DATE

SIGNATURE

In the matter between:

CARE TOWING & LOGISTICS (PTY) LTD

Applicant

and

HENDRICK JACOBUS VAN DEVENTER

Respondent

JUDGMENT

LAMPRECHT, AJ:

[1] This is an opposed application, in which the applicant seeks rescission of a judgment and order granted by this Court on 4 July 2023. The applicant also seeks condonation, to the extent applicable, for the late filing of the rescission application.

[2] The order was granted pursuant to an urgent application launched by the respondent during June 2023, aimed at the release by the applicant of a Ford

Fiesta motor vehicle, owned by the respondent, and insured by Santam Limited. It is common cause that the motor vehicle was involved in a collision on 1 June 2023, whilst being driven by the respondent. Representatives of the applicant then towed the motor vehicle from the scene of the collision to the applicant's premises.

- [3] The applicant subsequently claimed fees and charges for the towing, storage costs and other fees in respect of the motor vehicle in an amount of R10 200.00, the reasonableness of which fees the respondent disputed. By 8 June 2023, prior to the launching of the urgent application, an amount of R3 600.00 had been paid to the applicant, with security in the form of a payment into the respondent's attorneys' trust account having been tendered by Santam, for the balance of the amount alleged by the applicant to be owing to it at the time.
- [4] The respondent contended, in the urgent application proceedings, that the applicant unreasonably refused to release the motor vehicle despite this tender, necessitating the launching of the urgent application for the release of the motor vehicle.
- [5] It is common cause that the urgent application was served on the applicant's sole director, Mr Moreroa, personally on 30 June 2023. No notice of intention to oppose or answering affidavits were filed and on 4 July 2023 the judgment and order were granted in the absence of any appearance on behalf of the applicant.
- [6] In terms of paragraphs 2 and 3 of the order, the applicant was directed to release the motor vehicle to the respondent's nominated representative within three (3) days of service of the order, failing which the Sheriff was authorised to take possession of the motor vehicle wherever it may be found and to hand possession thereof to the respondent's nominated representative.
- [7] Paragraphs 4 and 5 of the order provided as follows:

"4. The applicant having made payment to the respondent in the amount of R3 600.00 and the balance of the respondent's invoice, being an amount of R6 600.00 having been paid into the applicant's attorneys trust account, shall pay the further storage charges (calculated at R450.00 per day from

8 June 2023 until date upon which this order is granted) into the trust account of the applicant's attorney within five (5) days of the service of this order, to be retained as security pending the final resolution of any legal proceedings to be instituted by the respondent within thirty (30) calendar days of the service of this order, to claim its alleged fees for towing, storage, recovery, administration and security in respect of the vehicle.

5. *Should the respondent fail to institute legal proceedings contemplated in paragraph 4 above within thirty (30) calendar days after the date of service of this order, the amount paid into the trust account of the applicant's attorneys shall be released to the applicant."*

[8] It is common cause that the applicant eventually released the motor vehicle on 1 September 2023. The rescission application was launched on 19 October 2023. It is also common cause that the applicant has, to date, not instituted proceedings claiming any fees alleged to be owing to it.

[9] I am of the view that there was no inordinate delay by the applicant in launching the rescission application, and that the condonation issue is accordingly moot.

[10] Despite having in its notice of motion sought an order for the rescission of the judgment granted on 4 July 2023 in its entirety, the applicant changed tack when filing its replying affidavit. The approach adopted in the replying affidavit was to the effect that the dates in paragraphs 4 and 5 of the order did not cater for the fact that the motor vehicle had only been released on 1 September 2023, and that this should be considered in the context of the costs recoverable by the applicant from the respondent for services rendered. In its heads of argument, it was contended on the applicant's behalf that the 30-calendar day period should be "*extended to enable the Applicant to claim the balance thereof in terms of the Court Order*".

[11] When the matter was argued, the applicant changed tack yet again. Counsel for the applicant contended that the dates in prayers 4 and 5, relating to the institution of proceedings, should be varied to be the date on which any order is made rescinding or varying paragraphs 4 and 5 of the order.

[12] The applicant, additionally, blew hot and cold relating to the basis relied upon for the rescission of the order. Having in its replying affidavit and heads of argument relied on rescission pursuant to Rule 42(1)(a) of the Uniform Rules of Court only, when the matter was argued, reliance was placed on rescission on common law grounds as well.

[13] In the founding affidavit supporting the rescission application, the crux of the applicant's case for rescission was to the following effect:

- a. A tow slip had been completed and signed by the respondent at the scene of the accident on 1 June 2023.
- b. The applicant, having been served with the application at around 09h15 on 30 June 2023, could not timeously get legal advice or secure the services of a legal representative in order to file notice of intention to oppose timeously, and could not get a legal representative within such short notice.
- c. The applicant's absence to the proceedings was caused by the time frames set by the respondent and the failure to file the opposition notice timeously was not of the applicant's wilful doing.
- d. In terms of the terms and conditions of the towing slip, which was not disclosed in the founding affidavit in the urgent application, provision is made for rates to be charged for the services provided and the customer is to effect payment to the company for all amounts due, owing and payable upon presentation of the company's invoice, prior to securing the release of the vehicle.
- e. If the court hearing the urgent application had the benefit of seeing the terms and conditions, it would have come to a different conclusion relating to the release of the motor vehicle, in that the terms and conditions highlight some of the reasons why the motor vehicle was not released, which include the terms relating to non-payment for services rendered.

- f. The order was erroneously granted in the absence of the applicant in that all that the respondent was supposed to do was to pay the amount owed to the applicant as a result of the services rendered.

[14] In terms of Rule 42(1)(a) of the Uniform Rules of Court a court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected thereby, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[15] The words “*granted in the absence of any party affected thereby*” are aimed at protecting litigants whose presence had been precluded and not those who had been afforded procedurally regular judicial process, but opted to be absent. It does not exist to protect litigants whose absence was elected.¹

[16] A judgment to which a plaintiff is procedurally entitled in the absence of the defendant cannot be said to have been granted erroneously as contemplated in the sub-rule in the light of a subsequently disclosed defence.²

[17] It is well-established that an applicant will not, save in exceptional circumstances, be permitted to make out or supplement a case in a replying affidavit.³

[18] At common law a judgment granted by default can *inter alia* be set aside where good or sufficient cause is shown. This generally speaking requires an applicant for rescission to give a reasonable explanation for his default, show that the application is *bona fide* and show that he has a bona fide defence which prima facie carries some prospect of success.⁴

[19] *In casu* the application for rescission fails to pass muster, even on the most charitable approach for the applicant, in several respects:

- a. Firstly, the applicant’s explanation in the founding affidavit as to why the order was granted in its absence, is limited to the aspect relating to the failure to timeously file a notice of intention to oppose on 30 June 2023. No explanation whatsoever was furnished for the failure to appear on 4 July 2023, at which time an attempt could have been made to obtain an extension of time for the filing of answering affidavits. The applicant had

been afforded procedurally regular judicial process, but had opted and elected to be absent. The order accordingly cannot be said to have been granted in the absence of the applicant, within the meaning of Rule 42(1)(a). There is also no reasonable explanation for the default, as required under common law rescission principles.

- b. Secondly, in circumstances where the applicant ultimately sought a variation of paragraphs 4 and 5 of the order, the reliance on conditions contained in the tow slip does not assist the applicant. The terms and conditions contained in the tow slip may notionally have been relevant in the context of the release of the motor vehicle, but cannot on any conceivable basis be said to be relevant to the relief granted in paragraphs 4 and 5 of the order. Paragraphs 4 and 5 of the order deal with the provision of security by the respondent for the applicant's fees, as at the time that the order was granted, subject to the institution of legal proceedings by the applicant within the time period stipulated. The applicant in any event did not contend, in the founding affidavit, that paragraphs 4 and 5 of the order were erroneously sought or erroneously granted in light of the terms and conditions of the tow slip.
- c. Thirdly, the case sought to be made out by the applicant in the replying affidavit falls to be disregarded, in that no exceptional circumstances have been shown to exist, permitting the applicant to make out or supplement its case in the replying affidavit. In any event, the case sought to be made out in the replying affidavit and in the heads of argument, relating to the costs recoverable by the applicant from the respondent for services rendered and to the effect that the 30-calendar day period should be *"extended to enable the Applicant to claim the balance thereof in terms of the Court Order"*, arises from a failure to appreciate the terms and effect of the order. The order did not finally determine the extent of costs recoverable from the respondent. It made provision for the extent of security to be furnished by the respondent, subject to the institution of proceedings by the applicant within the stipulated time.

- d. Fourthly, the contention that the dates in prayers 4 and 5 of the order should be varied to be the date on which any order is made rescinding or varying paragraphs 4 and 5 of the order, had been raised by counsel for the applicant for the first time in argument. Not only was this not the case relied on at any prior stage of the proceedings, but the suggestion that the court should now, retrospectively, impose new conditions relating to the retention of security and the institution of proceedings, some 15 months after the previous order was granted, is patently illogical and without merit. Paragraphs 4 and 5 of the order were in any event not intended to bar the applicant from instituting proceedings after the lapse of the relevant time period. It was aimed at affording the applicant security for a portion of the claim, subject to proceedings being instituted by the applicant within the 30-day time period, which time-period lapsed more than a year ago.

[20] Ultimately, no case has been made out for either the rescission of variation of the order, whether pursuant to rule 42(1)(a) or under common law grounds. The application consequently falls to be dismissed with costs.

[21] Mr Kloek, who appeared on behalf of the respondent, submitted that costs of counsel fall to be awarded on scale A. I am of the view that scale A is appropriate in the circumstances of this matter.

Order

[22] In the premises the application is dismissed with costs, on the party and party scale, with the costs of counsel after 12 April 2024 to be taxed on scale A.



LAMPRECHT, AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing:

21 October 2024

Date of judgment:	8 November 2024
Counsel for the applicant:	Adv A T Raselebana
Instructed by:	Molai Attorneys
Counsel for the respondent:	Adv J W Kloek
Instructed by:	Pierre Krynauw Attorneys

¹ *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* 2021 (11) BCLR 1263 (CC) at [56].

² *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at 95D-E.

³ *Mostert and Others v FirstRand Bank t/a RMB Private Bank and Another* 2018 (4) SA 443 (SCA) par [13].

⁴ *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042F–1043A.