IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

Case number: 4743/2022

In the matter between:

THE ROAD ACCIDENT FUND Applicant

and

SEROKHOANE ADELICE MOHAPI Respondent

In Re:

SEROKHOANE ADELICE MOHAPI Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

CORAM: VAN ZYL, J

HEARD ON: 15 FEBRUARY 2024

DELIVERED ON: 6 AUGUSTUS 2024

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[1] This matter initially served before court on 23 January 2024 and in terms of the notice of motion, the applicant was seeking the following relief:

> "1. Condoning the applicant's non-compliance with the rules ...
>
> 2. That the Judgment issued against the Applicant by Acting Judge Mthimunye be stayed or suspended pending the application for the rescission of judgment granted by this Honourable Court on 1st December 2023 under case number 4743/2022.
>
> 3. That in the event any of the Respondent opposes this application, be ordered to pay costs of this application; alternatively the matter be postponed to Motion roll to enable the Respondent to file its Answering Affidavit." (*sic*)

[2] On 23 January 2024 the application was postponed, by agreement between the parties, to 1 February 2024, with the respondent to file her answering affidavit on or before 29 January 2024, the applicant to file its replying affidavit on or before 30 January 2024 and the costs occasioned by the postponement to be reserved for later adjudication.

[3] On 1 February 2024 it was ordered by agreement between the parties that the matter be postponed to 15 February 2024, with the wasted costs occasioned by the postponement to stand over for later adjudication.

[4] The founding affidavit filed in support of the application, does not correspond with the relief sought in the notice of motion. In terms of

the founding affidavit the aim of the application is to actually rescind the order based on the provisions of Rule 42(1)(c).

[5] On 13 February 2024, two days before the hearing of the application, the applicant filed a notice of intention to amend and a further document titled "Amended Notice of Motion – Rescission of Judgment". In terms of the said amended notice of motion the applicant is seeking condonation for the matter to be heard as one of urgency and secondly rescission of the order.

[6] Attached to the amended notice of motion was a "new" founding affidavit filed in support of the application.

[7] Although the filing of the aforesaid documents was completely irregular, I am willing to accept for purposes of the adjudication of this application that the relief the applicant is seeking is in terms of the so-called amended notice of motion; hence, the rescission of the order of 1 December 2023. I can, however, not accept the new affidavit attached to the amended notice of motion.

Background:

[8] On or about 17 September 2017 the respondent was involved in a motor vehicle collision in which she sustained bodily injuries.

[9] As a result of the collision and the injuries sustained, the respondent submitted a claim to the applicant, which claim was duly submitted on or about 22 October 2018.

[10] The respondent issued summons against the applicant on or about 28 September 2022, which summons was served on the applicant on or about 3 October 2022.

[11] The applicant entered appearance to defend the action and on 8 December 2022 the applicant filed its plea to the respondent's claim. From the pleadings it is evident that the defendant filed a plea, but also a special plea against the respondent's claim for damages with regard to the issue of a "serious injury" as contemplated in section 17(1)(A) of the Road Accident Fund Act, 56 of 1996 ("the Act").

[12] Subsequent to the close of pleadings in the main action on 19 June 2023, the legal representatives for the parties held a pre-trial conference as contemplated in Rule 37. During the said pre-trial the legal representative for the applicant conceded the merits in favour of the respondent. At no stage did the applicant raise the issue of prescription.

[13] In compliance with Rule 37 a minute of the conference of 19 June 2023 was prepared to record the discussion and agreement between the parties. In this minute, the applicant formally conceded the merits and did not raise the issue of prescription. The minute was signed by the applicant's legal representative on or about 20 July 2023.

[14] The matter subsequently served before a judge for a pre-trial conference. The applicant's legal representative was present during these proceedings and agreed that the action was ready for

trial. At the said proceedings the applicant still did not raise the issue of prescription.

[15] Eventually the action was enrolled for hearing on 28 and 29 November and 1 December 2023.

[16] A week before the trial had to commence, the claims handler of the applicant, who is also the deponent to the applicant's founding affidavit, directly made contact with the respondent's attorney of record in order to discuss a settlement of the action. During these discussions reference was made to the quantum of the respondent's claim. The issue of prescription was not raised at any time during the said discussions.

[17] On 28 November 2023 when the trial had to commence, the parties agreed and requested the court to stand the matter down for settlement purposes. The matter stood down until 29 November 2023.

[18] When the matter was called on 29 November 2023 the court was again requested to stand the matter down for the applicant to make settlement proposals. The matter accordingly stood down until 1 December 2023.

[19] On 1 December 2023 at approximately 08:47 the applicant's legal representative forwarded an e-mail to the respondent's attorney of record which contained her instructions to settle the matter. The basis of the settlement proposal was that the applicant offered an amount of R800 000.00 in respect of the respondent's claim for

general damages and that the issue of the respondent's loss of earnings/earning capacity be postponed, with a tender to pay the costs on a party and party scale. A copy of the said e-mail is attached to the answering affidavit as annexure "AA3".

[20] The respondent accepted the offer presented by the applicant.

[21] The parties consequently prepared a draft order which encapsulated the agreement between the parties and it was made an order of court by Mthimunye, AJ. The said order, *inter alia*, contained the following provisions:

1. The applicant is 100% liable for the agreed or proven damages of the respondent resulting from the motor vehicle collision that occurred on 17 September 2017.

2. The applicant is ordered to make payment to the respondent in the amount of R800 000.00 in respect of the respondent`s claim for general damages.

3. The respondent's claim for loss of earning/earning capacity is postponed to 23 and 24 January 2024 for trial.

4. Various costs orders.

[22] It is this order that forms the subject of the present application.

[23] The aforesaid order also made provision for the applicant's liability to pay interest on the said amount if such payment is not made within 180 days from date of the order.

[24] The applicant subsequently launched the present application on 22 January 2024.

[25] In the application the applicant, now for the first time, contends that the respondent's claim had prescribed and is therefore seeking an order rescinding the order in terms of the provisions of Rule 42(1)(c).

Urgency:

[26] In terms of Rule 6(12)(b) in every affidavit filed in support of an urgent application, the applicant must set forth explicitly the circumstances which are averred render the matter urgent and the reasons why the applicant claims that it could not be afforded substantial redress at the hearing in due course.

[27] In the unreported judgment of **East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd** (11/33767) [2011] ZAGPJHC 196 (23 September 2011) the following principles were eloquently set out in respect of Rule 6(12) at paras [6] - [7]:

> "[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims

that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard.

[28] In the founding affidavit there is not an iota of evidence as to why the application is urgent or why the applicant would not be afforded substantial redress at the hearing in due course.

[29] There was an attempt by the applicant in the replying affidavit to advance a reason why the application is urgent and why the applicant claims that it could not be afforded substantial redress at the hearing in due course.

[30] However, the aforesaid attempt to make out a case for urgency in the replying affidavit remains fatal. It is trite that an applicant should make out its case in its founding affidavit. See **<u>My Vote Counts NPC v Speaker of the National Assembly</u>** 2016 (1) SA 132 (CC) at para [177].

[31] All the necessary allegations upon which the applicant relies must appear in his founding affidavit, as it will generally not be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit. See **Mostert v FirstRand Bank Ltd t/a RMB Private Bank** 2018 (4) SA 443 (SCA) at 448 D – E.

[32] In **Brayton Carlswald (Pty) LTD v Brews** 2017 (5) SA 498 (SCA) the principle is stated as follows at para [29]:

> "[29] In my view, there are two insurmountable hurdles in the 'new' version being accepted. First, the general rule in motion proceedings is that an applicant must stand or fall by the averments made out in its founding affidavit. It is not permissible to make out a new case in the replying affidavit."

[33] In my view, the applicant consequently made out no case for urgency.

[34] The appropriate order would therefore be that the application be struck from the roll.

[35] Mr Steenkamp, on behalf of the respondent, indicated during his oral argument that the respondent is no longer opposing the urgency of the application, in order for the application to be adjudicated on its merits.

[36] Despite my finding that the applicant made out no case for urgency, I still have a discretion to in any event adjudicate the merits of the application. In this particular instance I consider it in the interest of justice that I in fact deal with the merits of the application in order for

the application to be finalized, instead thereof that the parties need to come back to court at a later stage with the same application.

Commissioning of the founding affidavit:

[37] *Ex facie* the applicant's founding affidavit it appears that:

1. The deponent signed the affidavit on 18 January 2024 in Bloemfontein.

2. The affidavit was commissioned by the commissioner of oaths on 19 January 2024 in Cape Town.

3. It consequently appears that the deponent to the applicant's founding affidavit did not appear or sign the affidavit in the presence of the commissioner of oaths.

[38] In the Regulations issued in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963, Regulation 3(1) determines that "*the deponent shall sign the declaration in the presence of the commissioner of oaths*".

[39] In the replying affidavit the applicant sets out the following explanation at paragraph 4 thereof:

> "The Fund's Founding affidavit was <u>drafted</u> on the 18th of January 2024 in Bloemfontein and <u>commissioned</u> on the 19th January 2024 in Cape Town. ..." (My emphasis)

[40] In **FirstRand Bank Ltd v Briedenhann** 2022 (5) SA 215 (ECGq) at para [48] the court determined as follows:

> "The authorities referred to earlier make it plain that the Regulations, save where couched in negative terms, are directory. Accordingly, where those regulations have not been followed and adhered to, a court has a discretion in whether or not to admit the affidavit. In such circumstances a court will determine whether there has been substantial compliance with the regulations. That determination is one of fact, having regard to the circumstances of the case."

[41] In the circumstances of this particular matter I will accept the explanation in the replying affidavit, made in response to the relevant averments contained in the answering affidavit, to the effect that the phrase "*dated at Bloemfontein on this 18th January 2024*" and the attestation clause itself form part of the document which was typed in Bloemfontein. It was thereafter sent to Cape Town and signed and commissioned the following day. It is evident from the founding affidavit, read with the totality of the application papers, that the deponent to the founding affidavit is based in Cape Town. I am therefore willing to accept that, on probabilities, he would have signed the affidavit in Cape Town and therefore in the presence of the commissioner of oaths.

[42] In the exercise of my discretion I am consequently willing to admit the affidavit. Once again I consider in the interest of justice that the merits of this application be adjudicated at this stage.

Applicant's defence:

[43] The applicant avers in its founding affidavit that it has a *bona fide* defence which is good in law.

[44] The aforesaid defence entails prescription on the following basis:

1. The respondent's claim is based on a motor vehicle accident that occurred on 17 September 2017.

2. The defendant lodged her claim with the applicant within the prescribed time limit.

3. Section 23(3) of the Act determines that notwithstanding sub-section (1) no claim which has been lodged in terms of Section 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.

4. The summons was served on the applicant on 4 October 2022.

5. The summons was served on the applicant after the claim had prescribed as the five-year time period lapsed on 18 September 2022.

[45] The applicant points out that it extended an offer of R800 000.00 for General Damages to the respondent in error and is barred from making further offers on the claim as it has become prescribed.

[46] The applicant's cause of action is based on the following averments:

"9.10 In terms of Rule 42(1)(c) of the Uniform Rules of the High Court, 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 an order or judgment granted as a result of a mistake common to the parties. (My emphasis)

9.11 In a situation where both parties assumed the correctness of some common fact and the Court basis its judgment thereon, Rule 42(1)(c) provides a remedy where a party subsequently finds those facts to be incorrect. The appellate division held that in order for the appellant to succeed with the application for rescission in terms of this sub-rule, the following two requirements must be satisfied:

(i) There must have been a mistake common to the parties and

(ii) There must be a causative link between the mistake and the grant of the order and the judgment."

[47] With regard to prejudice, the applicant states that it would be prejudiced should the judgment not be rescinded in view of the fact that the applicant is disbursing public funds. In paying compensation the applicant needs to protect the interest of both the fiscus and the Road Accident Fund itself.

[48] On the other hand, it is the applicant's submission that the respondent will not suffer real prejudice should the order be rescinded as the claim had prescribed when summons was issued and therefore the plaintiff was not entitled to the amount granted. According to the applicant any prejudice caused, if any, to the

respondent, can be compensated by an appropriate order as to costs.

Consideration of the legal principles and the merits:

[49] Rule 42(1)(c) determines as follows:

> "(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) ...
>
> (b) ...
>
> (c) An order or judgment granted as a result of a mistake common to the parties."

[50] This rule is the basis of the applicant's application.

[51] Ms Mkhwanazi, on behalf of the applicant, relied on and referred to the judgment of **Tshivhase Royal Council v Tshivhase; Tshivhase v Tshivhase** 1992 (4) SA 852 (A) at 863 where it was held that in order for the applicant to succeed with an application for rescission in terms of this sub-rule the following two requirements must be satisfied:

1. There must have been a mistake common to the parties; and

2. There must be a causative link between the mistake and the grant of the order and the judgment.

[52] Mr Steenkamp referred to the judgment in **<u>Slabbert v MEC for Health and Social Development, Gauteng</u>** (432/2016) [2016] ZASCA 157 (3 October 2016) where the Supreme Court of Appeal had to consider the basis upon which a settlement can be rescinded. It held as follows at paras [7] and [8]:

> "[7] An agreement of compromise creates new rights and obligations as a substantive contract that exists independently from the original cause. The purpose of a compromise is twofold: (a) to bring an end to existing litigation and (b) to prevent or avoid litigation. When a compromise is embodied in an order of court the order brings finality to the *lis* between the parties and it becomes *res judicata*. The court order changes the terms of a settlement agreement to an enforceable court order – through execution or contempt proceedings. Thus, litigation after the consent order will relate to non-compliance with the consent order and not the underlying dispute.
>
> [8] This being said, a *transactio* (compromise) is made by consent between parties and like any contract or order of court made by consent, it may be set aside on the ground that it was fraudulently obtained. It may also be set aside on the ground of *justus* error, 'provided that such error vitiated true consent and did not merely relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise.' A compromise agreement may also be set aside if the parties to the agreement laboured under a common mistake. However, <u>a unilateral mistake on the part of one party that does not flow from a misrepresentation by the other does not allow for the former party to resile from a consent agreement</u>. The question thus is whether one of these grounds exists for the MEC to resile from the compromise agreement." (My emphasis)

[53] In **<u>Erasmus: Superior Court Practice</u>**, D E van Loggerenberg, at RS 23, 2024, D1 Rule 42-30 the learned author deals with Rule 42(1)(c), specifically the part of "*a mistake common to the parties*". He states as follows with reference to applicable authority:

> "This means that both parties are mistaken as to the correctness of certain facts; such a mistake occurs where both parties are of one mind and share the mistake.
>
> ...
>
> A common mistake would cover the case of a judgment entered by consent where the parties consented in *justus error*. It is not sufficient, however, if the error is that of –
>
> (a) one of the parties only: in other words, if a litigant by mistake of himself or his legal advisors abandoned relief to which he is or may be entitled the court has no power to recall or amend the order it has in consequence deliberately made, in the absence of fraud of the other party in the course of the proceedings."

[54 In the judgment of **<u>KR Sibanyoni Transport Services CC v Sheriff, Transvaal High Court</u>** 2006 (4) SA 429 (T) the court stated as follows at para [7]:

> "[7] In *Mudzingwa v Mudzingwa* Gubbay JA (as he then was) said:
>
> 'Furthermore, it is firmly established that a judgment can only be rescinded under the common law on one of the grounds upon which *restitutio in integrum* would be granted, such as fraud or some other just cause, including *justus error*. . . . <u>Certainly a litigant who is himself negligent and the author of his own misfortune will fail in his request for rescission</u>. See *Voet* 2.4.14; *Groenewald v Gracia (Edms) Bpk* <u>1985 (3) SA 968 (T)</u> at 972C - D and G - H.'" (My emphasis)

[55] In **Erasmus: Superior Court Practice**, *supra*, at RS 22, 2023, D1 Rule 22-31 the learned author deals with prescription and states as follows:

> "The court cannot of his own motion take notice of prescription. Section 17(2) of the Prescription Act 68 of 1969 provides that a party to litigation who invokes prescription 'shall do so in a relevant document filed of record in the proceedings'. If prescription is raised in a plea it should be done means of a special plea (i e a peremptory special plea)."

[56] Based on the authority an order granted by consent between the parties can only be rescinded and set aside in limited circumstances, being fraud, *justus error* or in exceptional circumstances due to a common mistake.

[57] The present application is based on a single and unsubstantiated allegation that the order was granted as a result of a mistake common to the parties.

[58] To succeed on this basis, it must be established that the order was granted as a result of a mistake common to the parties. Therefore, both parties must be mistaken as to the correctness of certain facts, sharing the same mistake. **Erasmus: Superior Court Practice**, *supra*, at D1-576A the following is stated:

> "a litigant who is herself mistaken about the relief to which she may be entitled, so that this is abandoned, or who is mistaken due to advice of her legal representative, cannot

succeed on the basis of common mistake in terms of this rule."

[59] The applicant, now for the first time during the whole proceedings, contends that the respondent's claim had prescribed. The applicant had ample opportunity to raise prescription, which it failed to do. Furthermore, the applicant does not take the court into his confidence to explain when and how it came to his knowledge that the claim had allegedly prescribed. Again, the applicant attempted to make allegations in this regard in the replying affidavit, which allegations should have been contained in the founding affidavit.

[60] The applicant's contention that the prescription of the respondent's claim is a mistake common to the parties is therefore misplaced. As quoted from the authorities above, a unilateral mistake is not sufficient for the applicant to obtain a rescission of the order.

[61] The applicant has consequently failed to meet the requirements of Rule 42(1)(c) and the application cannot succeed.

Costs:

[62] There is no reason why costs should not follow the outcome of the application.

[63] With regard to the reserved costs of 23 January 2024 and 1 February 2024, those postponements were part of the process of getting the application ripe for hearing after the applicant approached court on extremely short notice to the respondent. In my view those wasted costs should consequently be costs in the application.

[64] The respondent is seeking a punitive order as to costs.

[65] The applicant approached court on an urgent basis whilst it failed to make out any case for urgency in its founding affidavit. This constitutes an abuse of the court process.

[66] The commissioning of the founding affidavit is defective. Although the applicant provided an explanation in this regard, it should have been done correctly in the first place.

[67] The applicant`s filing of a notice of intention to amend and an amended notice of motion two days before the hearing of the application, even with a new founding affidavit attached thereto, is irregular and improper. The only reason why I accept the amended notice of motion (without the new founding affidavit) is in order not to prejudice the respondent with a further postponement of this matter.

[68] Considering the aforesaid facts and circumstances, I deem it apposite to show my displeasure with the unacceptable manner in which the applicant dealt with his application by granting a punitive costs order.

Order:

[69] The following order is made:

1. The applicant's application to rescind the order, dated 1 December 2023, is dismissed.

2. The applicant is ordered to pay the costs of the application on a scale as between attorney and client, which costs are to include the reserved costs of 23 January 2024 and 1 February 2024.

[redacted]

C. VAN ZYL, J

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