



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

Reportable / Not reportable

Case no. 5370/2022

In the matter between:

ROAD ACCIDENT FUND

Applicant/Defendant

and

KAMOGELO STEPHAN MOILOA

Respondent/Plaintiff

Neutral citation: *Road Accident Fund V Kamogelo Stephan Moiloa (5370/22)*

Coram: T.L. MANYE, AJ

Heard: 20 JUNE 2024

Delivered: 31 OCTOBER 2024

ORDER

1. The application for rescission of judgment is dismissed, with costs.

JUDGMENT

MANYE, AJ

Introduction

[1] The Applicant, Road Accident Fund, approached this Court with an application for rescission of two (2) orders handed down by Opperman J on the 28th of November 2023 and Chesiwe J handed down on the 21st of February 2024.

[2] Opperman J's order of the 28th of November 2023 was handed down and reads as follows:

"It is ordered by agreement between the parties that:

- 1. The defendant is liable for 100% of the plaintiff's proven or agreed damages.*
- 2. The determination of quantum is postponed to the 20th and 21st February 2024 for trial at 09h30.*
- 3. The defendant shall pay the plaintiff's costs on a party and party scale occasioned by the postponement."*

[3] On the 4th of March 2024 the Respondent issued a writ of execution in an amount of R83 024.34 plus interest against the Respondent in respect of the cost order of Opperman J, Court order.

- [4] The Sheriff of Bloemfontein-East was instructed to execute the writ of execution, and/or to proceed to attach certain movable property of the Applicant for the same to be sold at an auction.
- [5] I hasten to reiterate that the Respondent's writ of execution for wasted cost orders occasioned by the postponement on the 28th November 2023 and the following attachment of certain movable properties of the Applicant triggered or caused this rescission application before this Court.
- [6] The Applicant's application is grounded on two (2) grounds namely that the Respondent's claim against the Applicant (subject of settlement agreement between the parties) made an order of Court on the 28th of November 2023, was as a result of a mistake common to the parties in that:
- 6.1 The Respondent had lodged a claim against the Applicant on the 28th of June 2022 to which the Applicant objected to the validity of the claim on the 15th of August 2022.
- 6.2 The Respondent continued to issue summons against the Applicant on the 27th October 2022 and as such, the non-compliance of the objection was not cured before the summons was issued or thereafter during the litigation process itself.
- 6.3 The Applicant further argues that in terms of Section 24(5) of the Road Accident Fund Act 56 of 1996 (*"the Act"*) if the Fund does not, within sixty (60) days of delivery of a claim to it, object to the validity thereof, the claim shall be deemed to be valid in law and in all respects.
- [7] The Applicant further alleges and invokes the provisions of Section 23(1) of the Road Accident Fund that stipulates that a claim shall prescribe upon the expiry of the period of three (3) years from the date upon which the cause of action arose and as such the Respondent's claim has indeed prescribed.
- [8] It is noteworthy to mention that the Respondent's combined summons for his

claim against the Applicant was lodged on the 27th of October 2022.

- [9] The Applicant/Defendant filed its Plea on the 9th of February 2023. It is important to note that the Plea filed did not raise a special plea of prescription nor non-compliance with Section 24(5) of the Road Accident Fund Act 56 of 1996.
- [10] As already stated above the matter came before the Court on trial on the 28th November 2023 to which by agreement between the parties the order was granted in which the Defendant/Applicant was deemed liable for 100% of the Plaintiff's proven or agreed damages. The matter was then postponed to the 20th and 21st of February 2024 for trial on quantum. The Defendant/Applicant was further ordered to pay the Plaintiff's costs on a party and party scale, occasioned by the postponement.
- [11] As already indicated above on the 24th of March 2024 the Respondent issued a writ of execution for an amount of R83 024.34 plus interest against the Applicant/Respondent in respect of merits trial order that the Defendant/Applicant shall pay the Plaintiff's costs on a party and party scale occasioned by the postponement.
- [12] It is for the above that the Applicant/Defendant approach this Court to rescind the Opperman J order dated the 28th of November 2023.

VARIATION AND RESCISSION OF ORDERS:

- [13] Rule 42(1) provides that the Court may, in addition to any other powers it may have, *mero motu* or upon application of any party affected, rescind or vary:
- (a) An order or judgment erroneously sought or erroneously granted in the absence of any other affected party thereby;
 - (b) An order or judgment in which there is an ambiguity, or patent error or

omission, but only to the extent that such ambiguity, error or omission;

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

(2) Any party desiring any relief under this rule shall make application thereupon notice to all parties whose interests may be affected by any variation sought.

(3) The Court shall not make any order rescinding or varying order or judgment unless satisfied that all parties whose interest may be affected have notice of order proposed.

[14] For the Applicant to succeed with the relief sought the Applicant is obligated to show that the settlement agreement had been concluded as a result of a mistaken common to both parties as to the correctness of the merits so conceded by agreement. In ***Tshivhase Royal Council and another v Tshivhase and another***¹ the Court described a mistake common to the parties as envisaged by the rule as a “*common mistake*” as understood in the field of contract, which occurs where both parties are of one mind and share their mistake. The Court further held that where both parties had assumed a state of affairs that turned out to be wrong, the Court was entitled to set aside an order made on the basis of their common mistake.

[15] In *casu*, it cannot be said that there exists a common mistake of fact which vitiate against the settlement agreement. In the present matter the error may be described as being (a) “*unilateral mistake*” in that it was made by the Applicant and its attorneys and through this they induced the Respondent to contract on the terms they did and this is an issue that is fatal to the Applicant’s application. Clearly there is a material mistake by one party to a contract and therefore no actual consensus, and the contract remain valid as the Respondent reasonably relied on the impression that there was consensus.²

¹ 1991 ZASCA 185; 1992 (4) SA 852 (A)

² SW van der Merwe et al: Contract: General Principles 4th Edition (2012) at p. 33

[16] In ***Lodhi 2 Properties v Wondev***³ the Court held “a judgment to which a party is procedurally entitled cannot be considered to be granted erroneously by reason of facts of which the Judge who granted the judgment, as he was entitled to do so, was unaware.”

[17] As already indicated above the grounds raised in this application were never raised at the pleading stage when the Applicant filed its Plea against the Respondent’s claim.

[18] In my view the Applicant has failed to establish or make out a case for the exercise of a discretion to rescind the orders of Opperman J and Chesiwe J.

Order

[19] I accordingly make the following order:

1. The application for rescission of judgment is dismissed, with costs.


T.L. MANYE, AJ

³ [2007] JOL 20028 (SCA) at par 25

APPEARANCES:

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