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

CASE NO: 63528/2017

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

21 January 2025

Judge Dippenaar

In the matter between:

ROAD ACCIDENT FUND

APPLICANT

AND

E M[...] OBO MG M[...]

RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it on the electronic platform. The date and time for hand-down is deemed to be 10h00 on the 21st of JANUARY 2025.

DIPPENAAR J:

[1] The applicant, the RAF, sought the rescission of a default judgement granted by Bokako AJ on 31 May 2023. The judgment pertained to the claim of a minor child, represented by his guardian, arising from injuries sustained in a collision on 7 August 2016. The liability claim had previously been settled at 100% in favour of the respondent during June 2017 and the hearing proceeded on the issues relating to the quantification of the claim. The minor, Mr MG M[...] turned 18 on 1 October 2023 and no longer requires the assistance of his guardian in the litigation.

[2] One of the significant orders granted on 31 May 2023 was an award of R5 812 555 in respect of loss of income. Numerous other ancillary orders were granted as well as costs. The claim for general damages was postponed *sine die* and was to be referred to the HPCSA tribunal for consideration.

[3] The applicant sought condonation for the late delivery of its rescission application and sought rescission under r 42(1)(a) alternatively the common law. Costs were sought in the event of opposition.

[4] The application was opposed on the basis that the applicant had not sufficiently explained the period of the delay, given that the application was only launched some four months after the applicant became aware of the judgment. It was submitted that the founding papers in broad terms only referred to “internal procedures” which resulted in the delays. Despite the challenge to the proper explanation for the delay, the applicant did not deliver any replying affidavit clarifying the issue.

[5] The applicant submitted that a proper case for condonation and rescission was made out. The respondent on the other hand, contended that no proper case for rescission was made out on either basis as the judgment was not erroneously sought or granted and the applicant did not establish any good cause for rescission. It submitted that the applicant was effectively attempting to appeal the judgment of Bokako AJ. It was submitted that the Court took into account all the facts and properly exercised its discretion to grant the respondent judgment in the amount determined, based on a 50%

post morbid contingency. On that basis it was submitted that the application should be dismissed with costs, including the costs of two counsel on Scale C.

[6] The background facts were not contentious. A notice of set down for the trial was served on the applicant on 19 October 2022. The trial date allocated was 30 May 2023. Ms Sibran of the State Attorney ('the state attorney') was appointed to represent the applicant on 10 April 2023.

[7] It was undisputed that the applicant, represented by the state attorney, intended to be present at the hearing and make submissions to the Court based on the plaintiff's expert reports. It was common cause that the state attorney and the respondent's legal representatives had a telephonic discussion on 30 May 2023, during which she was advised that the matter was not on the trial roll due to reasons unknown to the respondent. She was advised by the respondent's representatives that she did not need to attend the hearing on 30 May 2023 as the matter was not on the roll. Shortly thereafter and at about 12h00, she received news that her father had unexpectedly passed away and she left for Kwa Zulu Natal.

[8] At 14h21 that afternoon the state attorney and the applicant's claims handler dealing with the matter, Ms Selesho, received an email with a notice of set down attached reflecting the trial date as 31 May 2023. The claims handler assumed that the state attorney had received the email and would be attending to the matter. It was not disputed that the state attorney did not receive the email in time and was unaware of the fact that the matter was proceeding on 31 May 2023. According to the respondent, his legal representatives attempted to make contact with Ms Sibran, but she could not be contacted. That is not disputed. The matter was enrolled for hearing by the registrar on 31 May 2023 as a result of the error in that office. The matter was allocated to Bokako AJ by the Deputy Judge President, who heard the matter and granted a judgment by default.

[9] A copy of the order of 31 May 2023 was sent to the claims handler on 5 June 2023, on which date the applicant became aware of the judgment. Pursuant to a request from the state attorney and the claims handler to launch a rescission application, the applicant's rescission committee approved the application on 8 June 2023. On 21 June 2023, the state attorney was instructed that she should attend to the rescission application. On 5 July 2023, the state attorney sought consent to instruct counsel in the matter due to the complexities involved. Pursuant to compliance with various policies and procedures, an application to instruct counsel was generated on 30 August 2023, was approved on 8 September 2023. According to the applicant *'the approval to appoint counsel is not a simple one, and unfortunately does not happen overnight. Due to the administration of public funds, there are various policies and procedures that need to be adhered to, as well as various approvals up the chain of command, before an appointment can be made'*. The application was eventually launched on 3 October 2023.

[10] The respondent conceded that the applicant was not in willful default of not attending the hearing of the matter on 31 May 2023, given the state attorney's unexpected bereavement on 30 May 2023. That concession was well made.

[11] It is trite that condonation is not there for the taking but that a proper case must be made out.¹ I agree with the respondent that the grounds advanced in explanation of the applicant's delay were in somewhat flimsy terms and that the full period of the delay was not meticulously explained. Considering the timelines involved, it appears that various of the delays occurred in the offices of the state attorney, which is regrettable. The delays were not however so extensive that it justifies dismissal of the condonation application on this basis alone. It is clear from the uncontested facts that the applicant at all times since becoming aware of the existence of the judgment, intended applying for its rescission.

¹ SA Express Limited v Bagport (Pty) Ltd 2020 (5) SA 404 (SCA)

[12] In considering whether condonation should be granted, it is also necessary to consider whether the applicant has established grounds for rescission. If such grounds are strong, they may compensate for a weak explanation for the delay.

[13] It is well established that a court has a discretion whether to rescind a judgment under r 42, which must be exercised judicially.² Under r 42(1)(a) an applicant must establish that the order was granted in its absence and that it was erroneously sought or granted. The mistake may either be one which appears on the record of the proceedings or one which subsequently becomes apparent from the information made available in the rescission application. A subsequently disclosed defence that was not known or raised at the time of the default judgment cannot lead to a conclusion that the judgment was granted erroneously.³ Under r 42(1)(a) an applicant is not required to illustrate good cause for the rescission.

[14] In the answering papers, deposed to by the respondent's attorney of record, the respondent did not elaborate on what exactly transpired before court on 31 May 2023. It remains unclear whether the court's attention was drawn to the different notices of set down and whether the court was notified that the state attorney intended to appear and oppose the matter at the hearing by presenting argument.

[15] The respondent submitted that it could not be said that the respondent's representatives sought finalisation of the matter in error as the matter was properly enrolled and finalised. According to the respondent, the matter was not on the roll for 30 May 2023 due to an error on the part of the registrar. The re-enrolment of the matter on the roll for 31 May 2023 was with the concurrence of the registrar. The respondent's correspondent attorney and counsel attempted to communicate with Ms Sibran by calling her several times. The deponent states:

² 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 [2021] ZACC 28 para 53.

³ Kgomo and Another v Standard Bank of South Africa and Others 2016 (2) SA 184 (GP)

'It was assumed she was attending to another matter'...The matter thus proceeded on an unopposed basis. This is not an unusual scenario. It often happens because of the understaffing of the State Attorney (and the RAF's policy of not having outside legal representation), the at the State Attorney designated to the matter abandoned ship in favour of another matter. This is apparently a daily occurrence".

[16] These statements are remarkable and not supported by any primary facts. Neither was the source of this 'information' disclosed the affidavit. To deflect from the respondents' duties in the circumstances, it was emphasised that the applicant did not advise the respondent's representatives of Ms Sibran's unavailability. The contention lacks merit. Considering that the reason for her unavailability was not known to any of the parties, and she was herself unaware of the set down for 31 May 2023, it is unclear how the applicant such notification could have occurred.

[17] The respondent's submissions miss the point. In an opposed matter, where the plaintiff is fully aware of the defendant's intention to appear and oppose the granting of a judgment in the terms sought, the respondent's representatives clearly had a duty to ensure that Ms Sibran was actually aware that the matter would proceed to trial the following day. Simply sending an email with a notice of set down was not sufficient, more so as the attempts to make telephonic contact with Ms Sibran were unsuccessful.

[18] The respondent was also clearly obliged to inform the Court of all the relevant facts. The respondent's version was not that the Court was so informed, specifically, that the state attorney was opposing the matter and intended to appear and make submissions on the applicant's behalf. The fact that the applicant had not filed its own expert reports, is irrelevant. The applicant was entitled to make submissions and to be present at the hearing. The respondent's representatives were well aware that the state attorney intended to do so. They should have provided the Court with all those facts. They did not under oath confirm that they had done so.

[19] It does not appear from the papers that the Deputy President who allocated the matter or the Judge allocated to hear the matter was advised that the state attorney intended to appear at the hearing. Had the relevant judges been so advised, the proceedings may well have had a different outcome, specifically the trial proceedings which proceeded before the court on a default judgment basis.

[20] Although the respondent contended that it was not a proper basis to oppose the proceedings to “take potshots” at the expert reports of the respondent, the fact remains that the respondent was deprived of its right to *audi alteram partem*. It was open to the applicant to make submissions based on the respondent’s papers. It would amount to speculation to guess as to what the outcome would have been if those submissions were made. There is nothing to gainsay the applicant’s version that it would have made submissions as to the deficiencies in the respondent’s reports regarding the issue of loss of earnings. A settlement offer had been made which was rejected and the state attorney was armed with an argument as to why the respondent’s claim should not be granted as sought. The failure to advise the trial court of the relevant facts pertaining to opposition is material and of itself justifies the granting of a rescission order.

[21] There are further procedural irregularities apparent from the record. The respondent had sought to amend its particulars of claim shortly before the hearing by way of a notice of amendment delivered on 24 May 2023. That notice was accompanied by amended pages, despite the 10 day period envisaged by r 28 not having expired. The amendment sought to increase the claim for loss of earnings from R5 500 000 to R5 650 000. An earlier notice of amendment was delivered on 23 February 2023, increasing the claim for loss of earnings from R150 000 to R5 500 000 and increasing general damages to R1 million. The amendment was not opposed and the amendment was effected on 9 March 2023 by the delivery of amended pages. It was not contended by the respondent that the later amendment was granted at the commencement of the hearing. The judgment and order of Bokako AJ, similarly does not reflect that any amendment was granted. According to the notice of amendment, the applicant was afforded 10 days to oppose the amendment. The amendment was thus never effected.

The plaintiff's actuarial report presented at the hearing utilised a 40 % post morbid contingency and quantified the loss of earnings at R5 648 462. That actuarial report was only served on the applicant on 25 May 2023, entirely outside the time periods envisaged by R36(9).

[22] It was argued by the respondent that the late amendment brought shortly before the trial was '*neither here nor there*' as the applicant had opted not to deploy any expert calculations at all'. It was contended that there was no indication of any impropriety on the part of the applicant and the judgment was not sought or granted in error, but was granted by the judge after due consideration of the matter and in unique circumstances.

[23] At the hearing, the trial court awarded an amount of R1 812 555.00 as loss of earnings, utilising a 50% post morbid contingency. That amount exceeded the amount claimed by the respondent in his pleadings by more than R300 000 and exceeded the amount calculated by the actuary in his expert report by some R200 000. The respondent argued that this was "technical" and there was no prejudice to the applicant as it was within the ball park claimed and was only '*a few hundred thousand rands*'. The respondent's arguments are in my view untenable.

[24] It is trite that a party is limited to what it has claimed in its pleadings. It is unclear whether the Court's attention was drawn to the recent purported amendment or the fact that it would be granting judgment for an amount exceeding that claimed by the plaintiff. It was incumbent on the respondent's counsel to have done so. The judgment also exceeded the amount contended for in the respondent's expert reports, including that of its actuary. What evidence was placed before the trial court to justify the application of a higher contingency of 50 % was not explained by the respondent. The judgment was thus tainted by a further substantial procedural irregularity. That fortifies my view that the judgment was erroneously sought and erroneously granted.

[25] Considering all the undisputed facts, I am persuaded that the applicant has illustrated that, if the Court had been made aware of all the relevant facts which existed

at the time, it would have resulted in the Court not been inclined to grant the order and that there were irregularities in the proceedings.⁴

[26] The issues pertaining to the notices of set down and the fact that the state attorney was not aware of the set down of the matter for 31 May 2023, is sufficient to grant rescission. The fact that the notice of set down for 31 May 2023 was served on the applicant's claims handler, does not assist the respondent. At the time, the applicant was, to the knowledge of the respondent, legally represented. The respondent should have ensured that as a fact, the enrolment came to the knowledge of Ms Sibran. When the attempts to contact her were unsuccessful, that should have been conveyed to the Court at the hearing. Had all the facts been fully disclosed to the Court, it is most unlikely that the court would have proceeded in the absence of the applicant's attorney of record.

[27] As indicated, there were also other irregularities which occurred. The respondent did not disclose exactly what transpired before Bokako J on 31 May 2023, despite the respondent's attorney of record having been the person best placed in a position to do so.

[28] During the course of argument, the respondent submitted that the applicant was actually attempting to appeal the matter, given the notation in the respondent's resolution for rescission that '*the LOE loss of earnings is overstated...not proven*'. I am not persuaded that the submission is correct. The issues raised, were aimed at illustrating that the applicant had a *bona fide* defence to the respondent's claim. The respondent's view that the applicant should have appealed, is misconceived. Recently Neukircher J In *RAF v P[...] M[...] M[...] obo RM M[...]*,⁵ considered the issue and concluded that a rescission was the correct remedy, albeit in the context of an application under r 30. I am bound by the judgment unless I am of the view that it is

⁴ Promedia Drukkers & Ultgewers (Edms) Bpk v Kaimowitz and Others 1996 (4) SA 411 (C) at 417G

⁵ (18768/2020) [2024] ZAGPPHC 1079 (31 October 2024)

clearly wrong. I am not and respectfully agree with the learned Judge's reasoning and conclusion.

[29] In my view, the applicant has established that the judgment was erroneously sought and erroneously granted in the absence of the applicant as envisaged by r 42(1)(a). It follows that the rescission application must succeed.

[30] I am further persuaded that this conclusion tips the scales in the applicant's favour and that condonation for the late delivery of the rescission application should be granted. Given that conclusion, it is not necessary to consider whether the applicant has established good cause under the common law for rescission to be granted.

[31] The applicant sought costs only in the event of opposition. The respondent in the alternative contended that his opposition was not unreasonable, as it would take four or five years before the matter could proceed to trial again and that he thus should not be mulcted in costs. Although the applicant was tardy in the institution of the application, there are no substantial reasons to deprive it, as successful party, of its costs. The opposition to the application was ill conceived. Costs follow the result.

[32] In the result I grant the following order:

[1] Condonation is granted to the applicant for the late filing of the rescission application;

[2] The order granted on 31 May 2023 under case number 63528/20017 is rescinded and set aside;

[3] The respondent is directed to pay the costs of the rescission application.

EF DIPPENAAR
JUDGE OF THE HIGH COURT
GAUTENG PRETORIA

DATE OF HEARING	: 11 NOVEMBER 2024
DATE OF JUDGMENT	: 21 JANUARY 2025
APPLICANTS' COUNSEL	: Mrs K Sibran Heads of Argument -Adv MP Fourie
APPLICANTS' ATTORNEYS	: State Attorney, Pretoria Mrs K Sibran
RESPONDENT'S COUNSEL	: Adv JO Williams SC (with Adv L Eloff)
RESPONDENT'S ATTORNEYS	: PAS Attorneys, Pretoria Mr TC Stoffberg.