



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

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: ✓
	<u>22 November 2024</u>
SIGNATURE	DATE

CASE NO: 62312-2020

In the matter between:

ROAD ACCIDENT FUND

APPLICANT

and

MAHLODI PAULINE MATHEBE

FIRST RESPONDENT

ORENEILE LUMKA MATHEBE

SECOND RESPONDENT

LESEGO SURPRICE RANGWAKO

THIRD RESPONDENT

TSHOLOFELO OMONTLE MATHEBE

FOURTH RESPONDENT

JUDGMENT

THOBANE AJ,

Introduction

[1] In this application the Road Accident Fund (RAF), seeks to have rescinded an order obtained by default on 2 August 2022. The applicant prays that;

1.1. Condonation for the late filing of the rescission application be granted;

1.2. The judgment obtained by default before Phooko AJ on 2 August 2022, be rescinded;

1.3. Each party to pay its own costs alternatively the respondents to pay the costs if the application is opposed.

[2] The rescission application, purportedly brought in terms of section 173 of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution), Rule 45A and 31(2)(b) read with Rule 42(1)(a) of the Uniform Rules of Court, is opposed by the respondents.

Background and chronology

[3] On or about 4 July 2020 a single vehicle collision occurred at Emalahleni, Mpumalanga Province. The vehicle seemingly overturned. Mziwandile Howard Mathebe (the deceased), who was the driver of the said vehicle died in that collision. The respondents, who are the biological children of the deceased or were financially dependent on him, then launched a claim with the applicant (RAF) for among others past and future loss of support.

[4] On 20 July 2020 the respondents lodged their claims with the RAF. The statutory period of 120 days, within which the RAF was to assess the claim lapsed and when there was no response from the RAF, the respondents approached a legal representative with instructions to issue summons against the RAF.

[5] Summons against the RAF was issued by the registrar of this court on 26 November 2020 and they were served on the RAF on 15 December 2020. The defendant (RAF) failed to enter an appearance to defend the action. The legal representative of the respondents procured services of an Actuary to quantify the respondents' respective claims and prepare a report, which he did.

[6] The respondents, having received the Actuarial Report, gave notice of intention to amend their particulars of claim and subsequently filed and served the amended particulars of claim. They thereafter applied to the registrar for a date of hearing of the default judgment. They were allocated the date of 2 August 2022 and on that day counsel for the respondents obtained judgment by default before Phooko AJ.

[7] On 24 November 2022, the Order, granting default judgment was served by the sheriff on the RAF. I interpose to commend the legal representatives of the respondents in that in respect of all important correspondence, notices or pleadings, they made use of the Sheriff to serve documents on the RAF.

[8] The Order seemed to have jostled the RAF into action in that on 2 December 2022, eight days later, there was correspondence to the respondents' legal

representatives requesting information, in particular the Actuarial Report, which was supplied.

[9] On 16 March 2023 the legal representatives of the respondents received a request to supply banking details as well as proof of tax compliance by them, which information was supplied. On 25 May 2023 the respondents were served with the application for rescission of judgment.

[10] The background and chronology listed above is largely from the point of view of the respondents. In order to complete the picture, what follows below are a few facts from the applicant's perspective.

[11] The applicant asserts that upon receipt of claim documents, the RAF requested further information from the respondents, which information was not forthcoming. In the founding affidavit the applicant gets wrong the date on which the claims were lodged and the date on which the docket (file) was requested. The applicant further denies that default judgment was served on them. A very strange denial given that the application for default judgment was served by the sheriff. The applicant asserts that they became aware of judgment on 17 November 2022 when a copy thereof was e-mailed to the RAF. It is evident however, that the order was served on the RAF by the sheriff.

[12] In December 2022 the applicant requested the merits document and on 10 January 2023 (not 2022 as alleged by the applicant), requested further documents

from the respondents as they had earlier furnished the applicant with illegible documents. The file (of the RAF), was on 16 January 2023 taken for verification where the amounts claimed were to be assessed or evaluated. The amounts claimed were deemed to be high and as a result, in-house as well as external legal advice was sought.

[13] In February 2023 the respondent was advised about the possibility of a rescission application. After the matter was escalated to higher office within the RAF, on 24 February 2023 instructions were given for the appointment of assessors. In March 2023 an instruction came through for the applicant to apply for rescission of judgment. The application was prepared and the notice of motion is dated 18 May 2023.

Condonation

[14] The law relating to condonation is well settled. Condonation cannot be had for the mere asking. Before the court can exercise its discretion, there are few considerations such as to what extent have the rules of this court not been complied with, the explanation, timelines, the importance of the case, interests of the respondent as well as the need to bring finality to litigation. I quote generously what was said in *Mtshali & others v Buffalo Conservation 97 (Pty) Ltd* (250/2017) [2017] ZASCA 127 (29 September 2017) where the following is stated:

“[37] The approach of this court to condonation in circumstances such as the present is well-known. In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* Ponnan JA held that factors relevant to the discretion to grant or refuse condonation include ‘the degree of non-compliance, the explanation therefor, the

importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice'.

[38] In *Darries v Sheriff, Magistrate's Court, Wynberg & Another* these general considerations were fleshed out by Plewman JA when he stated:

'Condonation of the non-observance of the Rules of this Court is not a mere formality. In all cases, some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. In applications of this sort the applicant's prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. But appellant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.'

[39] Reference was made in the passage I have cited above to it being an erroneous assumption that if the cause of the delay in complying with the rules is the conduct of the

appellant's attorney, condonation will be granted. That assumption was dispelled in no uncertain terms in *Saloojee & another NNO v Minister of Community Development*. In that matter the notice of appeal, the record and the condonation application were filed some eight months late. After considering the explanation given for the delay and concluding that it was not even 'remotely satisfactory' Steyn CJ proceeded to hold:

'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.'

[40] While the various factors that have been listed in the cases should be weighed against each other, there are instances in which condonation ought not to be granted even if, for instance, there are reasonable prospects of success on the merits. This was alluded to in the passage that I cited from the *Darries* matter. In *Tshivhase Royal Council & another v Tshivhase & another*; *Tshivhase & another v Tshivhase & another* Nestadt JA said that this court 'has often said that in cases of flagrant breaches of the Rules, especially where there

is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are' and that this applies 'even where the blame lies solely with the attorney.'

[15] The RAF is expected to explain why after being served by the sheriff with summons, they did not bother to defend the action and why subsequently, when they were served with an application for default judgment they elected not to oppose it and instead elected not to attend court when the matter was heard. The closest the applicant comes to giving an explanation is to glibly indicate in the founding affidavit that;

"6.1. In February 2020, RAF sought to adopt a revised litigation model which sought to move away from its traditional litigation model of handling claims by terminating existing contracts with panel of attorneys appointed under a service level agreement (SLA) which was due to expire on 31 May 2020. As a means of implementing the revised model, the RAF demanded that all active files handled on its behalf by its erstwhile Panel of attorneys be returned as is a requirement of the SLA upon expiration of its term;

6.2. The proposed model resulted in lengthy court battles between the RAF and various legal firms which were on the panel. Consequently, the RAF was left faced with a nationwide crisis which not only affected the proper administration functioning of the fund, but also adversely affected adherence to the prescribed time frames in matters under litigation;

6.3. The adoption of this model has been far from being swift and has resulted in many matters involving the Applicant going to trial with no legal representation, despite huge efforts by the Applicant to attempt to settle matters directly with claimant's representatives, as has been the case in this matter;"

[16] While the applicant explains in general terms in the founding affidavit, as briefly set out above, which is essentially what transpired when they decided to terminate Service Level Agreements of their panel attorneys, no explanation is proffered with regards to specifically circumstances surrounding this matter, except to say RAF attempted to settle directly with the respondents' legal representative. Counsel for the applicant also mentioned during argument that sometimes matters are misdiarised and that there was a heavy workload, without specific reference to this matter. Thus, giving some sort of diagnosis for their office. I am afraid without more the statements referred to above in general terms as well as the submissions made in court are of no assistance to this court.

Degree of non-compliance

[17] The respondents' claims were lodged with the RAF on 29 July 2020. The respondents aver that the RAF was indifferent to their claims. The following timelines seem to support such a proposition and the applicant chose not to explain its perceived indifference. The time lines show that; summons was served on 15 December 2020 and no appearance to defend was entered; 2021 came and went by and nothing is said by the applicant even though during that time a notice to amend particulars of claim was served on them and subsequent to that, amended particulars of claim was served; on 2 August 2022 judgment was obtained and was both emailed and served by the sheriff on 24 November 2022. In March 2023 the applicant was well aware of judgment and was contemplating paying while at the same time a decision was made to apply for rescission of judgment. The applicant waited until 25

May 2023, a further 60 days, to serve the application for rescission of judgment on the respondents. Again, the applicant does not proffer an explanation in the founding papers. I am of the view that the degree of noncompliance is extensive and moreover, there is paucity of an explanation for the noncompliance with the rules of this court.

Importance of the case

[18] A case of loss of support, of which this one is, is indubitably an important case for the respondents and I weigh that along the respondents' interest in having a final judgment on the one hand and on the other, what the applicant contends is a case with a constitutional twist to it. It would seem the applicant despite bringing the application for rescission was not too keen to set the matter down and moreover filed documents out of time. During argument counsel for the respondent pointed out that the applicant was, for whatever reason reluctant to set the application down and that it was in fact the legal representatives of the respondents who set the application down, after correspondence with the other side. It was submitted further on behalf of the applicant that the court should treat the applicant differently as a litigant. I disagree, there ought to be equality before the law. It seems to me the applicant was not too keen to bring the matter to finality despite being the party that initiated the application for rescission. Clearly, this case is not so important to the applicant. It is but one of many.

Bona fide defence

[19] One of the considerations, which counsel for the applicant asked the court to look at was the fact that in the applicant's view there exists a good and bona fide

defence which if successful at the trial, and the applicant believes it will, will disentitle the respondents to an order or judgment. It was further submitted that the defence is that the deceased drove while under the influence of liquor as per a report by a toxicologist, lost control of the vehicle and it overturned which meant the collision was a single vehicle collision.

[20] Counsel for the respondents took the view in making submissions, that the evidence is circumstantial in nature as there were no eyewitnesses to the accident and that the applicant was simply employing delaying tactics. Counsel further submitted that the bona fide defence should exist at the time of default not at the time convenient for the applicant to launch a rescission application. He stated that there has not been any identification of errors by the applicant at the time default judgment was sought and obtained. The claim is that of loss of support involving at least one minor child and that there should be at some point finality to litigation as the minor in particular, needs to be taken care of.

[21] Consideration of whether the applicant has a *bona fide* defence is for purposes of assessing whether it has merit and if established at the trial will entitle the applicant to an order. As indicated above, when dealing with the application for condonation, the applicant has not taken the court into confidence and has failed to give the court reasons for the delay on so many issues starting from the service of summons right up until the service of the set down of the application for default judgment. Even though not required by the rules, the respondents served all processes by way of the sheriff. The applicant does not deal with the most basic of issues, such as whether

or not all the notices that were served by the sheriff came to their attention and if so when. The timelines are long and the applicant has failed to give explanations, when they were clearly called for, such as why it took so long for them to take action. The rules of this court were ignored right up until the very end. Despite launching the application for rescission of judgment they did not set it down. It was set down by the respondents. After the respondents filed opposing papers, the applicant filed a replying affidavit as well as heads of argument on Sunday 19 May 2024 a few hours before the date of hearing of this application. In further disregard of the rules, the applicant failed to give an explanation. The respondents are entitled to a final judgment and litigation has to come to an end. The court would clearly be inconvenienced and there would be unnecessary delays in the administration of justice in circumstances where the defence that the applicant relies on has no reasonable prospects of success.

Costs

[22] In the notice of motion the applicant prays that each party should pay its own costs alternatively, that the respondent should pay the costs. The respondents on the other hand seek a punitive costs order on a scale as between attorney and client. Costs are a matter for the discretion of this court, which discretion must be exercised judiciously. That the applicant is seeking a costs order albeit in the alternative, while asking the court to indulge them is very telling indeed. Moreover, there has been a myriad of indiscretions by the applicant. This matter is a classic case where a punitive costs order is warranted.

Order

[23] I therefore make the following order;

1. The application for rescission of judgment is dismissed;
2. The applicant is mulcted with costs on attorney and client scale.



SA THOBANE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

For Applicant: Ms. Kunene,
Instructed by: Office of the State Attorney
Pretoria .
For Respondent: Adv. O Leketi
Instructed by: Molale Pebe Incorporated Attorneys,
Hatfield, Pretoria.

Date of the hearing: 20 May 2024
Date of judgment: 22 November 2024

This judgment was handed down electronically by circulating to the parties' legal representatives by e-mail, by being uploaded to the CaseLines platform of the Gauteng Division and by release to SAFLII. The date and time of hand down is deemed to be 10:00 on 22 November 2024.