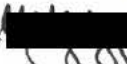


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 752/2015

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO THE JUDGES: YES /NO
(3)	REVISED
DATE: 14/3/2025 SIGNATURE: 	

In the matter between:

ROAD ACCIDENT FUND

APPLICANT

And

MMAINO TOKELO SEKGALA

RESPONDENT

 JUDGEMENT

KGANYAGO J

- [1] The respondent had instituted action against the applicant claiming damages arising out of a motor vehicle collision that occurred on 28th July 2012. The applicant through its erstwhile attorneys defended the respondent's action. On 7th November 2016 merits were settled 100% in favour of the respondent, and the draft order was made an order of court. The respondent proceeded to secure her expert reports which were duly served on the applicant's attorneys. The applicant had not at any stage filed its expert reports. It is common cause that at some stage the applicant had terminated the mandate of its panel of attorneys. In this matter after termination of their erstwhile attorneys, it does not appear that the applicant had appointed any legal representative to represent it.
- [2] The respondent proceeded to apply for a trial date for determination of quantum which set down on several dates wherein on each occasion the matter was postponed at the instant of the applicant. Ultimately the matter was set down for the 8th May 2023. The set down was physically served at the applicant's Menlyn offices on 20th October 2022. On 8th May 2023 when the matter came before me the applicant was in default, and it was allotted to be heard on 9th May 2023. On 9th May 2023 the respondent's counsel relied on its expert's reports which were also duly served on the applicant. I granted a default order against the applicant in the sum of R7 538 609.00.
- [3] The applicant through the Office of the State Attorney Polokwane, has brought a rescission application seeking to rescind the default order granted on 9th May 2023. The applicant's rescission application was filed on 5th September 2023. In the rescission application the applicant is also seeking condonation for late filing of the rescission application. The applicant's rescission application is

brought in terms of rule 42(1)(a) of the Uniform Rules of Court (Rules), and also in terms of common law.

- [4] The applicant's grounds for condonation for late filing of the application for rescission are that (i) it became aware of the default order on 31st May 2023; (ii) the court order was referred to the rescission committee in order to assess the whole claim in order to make a decision whether to rescind or not. The rescission committee came to the conclusion that the award to the plaintiff was an over-payment and recommended that the order should be rescinded; (iii) the claim handler on receiving the report of the rescission committee had to issue instructions for the appointment of the State Attorney Polokwane; (iv) however, the State Attorney due to the workload and time constraint, requested instructions to appoint counsel; (v) quotations were invited from counsel to ensure that a suitable candidate is appointed in accordance with experience and the complexity of the matter; (vi) they waited for 3 quotations, and after counsel was appointed, she had to peruse the documents and apply her mind to the matter, consult with the applicant in order to get a proper version of the matter and instructions; (vii) after consultation, counsel had to assess, consolidate all the information and evidence gathered during consultation and then started drafting the application. The internal procedures were time consuming, and that resulted in the late issuing of the application.
- [5] On the merits of the rescission application, the applicant had stated that it had since terminated the services of its panel of attorneys and as a way of preserving public funds employed State Attorney who are dealing with matters involving the applicant. However, on the date when the matter was heard and the order was granted, no State Attorney was allocated the matter which

resulted in the applicant's non-appearance. The applicant was aware of the trial date and as a result tried to negotiate a settlement with the respondent through her attorneys. The claim handler had tendered an offer in respect of the respondent's loss of earning, but the offer was rejected by the respondent.

[6] The claim handler was hoping that the matter will be settled before the trial date, but that did not happen. When the respondent rejected the offer it was too late brief the State Attorney, and that resulted in respondent's legal representatives proceeding to obtain the court order in the absence of the applicant. It is for these reasons that the applicant was default and failed to appear in court when the matter was heard and the order was granted.

[7] The applicant is having a bona fide substantial legal defence in that the rescission committee and management are of the view that the amount awarded to the respondent is exaggerated and resulted in over-settlement. To cure the over-settlement, the applicant requests that it be afforded an opportunity to appoint its own experts who will assess the respondent's claim, then together with the respondent's appointed experts prepare joint minutes so that a fair and reasonable amount of compensation will be paid to the respondent. At the hearing of the matter, the court only relied on the respondent's unchallenged experts reports since the applicant did not have any experts reports available. The applicant had rejected the respondent's claim in respect of general damages, in that the injuries she had sustained are classified as non-serious injuries.

[8] The applicant will suffer severe prejudice if the court order of 9th May 2023 is not rescinded, in that it was erroneously sought or granted in the absence of the applicant. The order as it stands is a precedent and as such every pupil who

get involved in motor vehicle accident and sustain bodily injuries will rely on the said court order/judgment that he/she is entitled to millions of rand in compensation for loss of income irrespective of whether she would have been employed or not had the accident not occurred. The court is requested to protect public funds held by the applicant against over-settlement in respect of claims by victims of motor vehicle accidents. Granting the rescission application will not be the end of the road for the respondent, but rather justice will be done and the respondent will be compensated in a fair and reasonable amount that is due to her.

- [9] The respondent is opposing the applicant's rescission application. In her answering affidavit, in relation to the applicant's condonation application the respondent has stated that the applicant became aware of the default order on 31st May 2023, but has failed to explain and provide evidence as to the events unfolding from 31st May 2023 until they decide to issue the application in September 2023. The applicant's application is silent as to what caused the delay giving rise to the non-compliance and disrespect of the court rules. The applicant's internal processes should not take precedent over the court rules and procedures. The respondent's case against the applicant commenced during 2013, and the applicant had ample time to finalise the matter, but has failed to do so despite various requests and courtesy shown on them. The applicant became aware of the order on 31st May 2023 which was clearly within the 20 days period within which to bring the application for rescission.

- [10] On the merits of the application, the respondent had submitted that the notice of set down for the 8th May 2023 was served upon the applicant on 20th October 2022. The applicant in its founding affidavit had conceded that it was aware of

the trial date of the 8th May 2023. Despite that the applicant had failed to explain why it failed to attend court on its own or through its attorneys to defend the matter. The applicant's attempt to make a ridiculous offer on the day of trial does not mean that they are excused from attending court. General damages were rejected by the applicant on 5th May 2023 whilst an offer for loss of income was made on 8th May 2023 despite being served with the notice of set down on 20th October 2022. The applicant had terminated its panel of attorneys and undertook to handle the matters internally on its own. Therefore, the applicant cannot raise that as a defence for purposes of this application. The applicant had intentionally failed to attend court to defend itself against the applicant.

[11] The respondent was involved in a motor vehicle accident on 28th July 2012, and lodged her claim against the applicant on 22nd October 2013. Summons was issued on 30th March 2015, and it is more than 10 years that the respondent had waited for justice and finality with her claim against the applicant. The applicant had failed to explain why it did not appoint its experts to assess the respondent for the past 10 years. The respondent denied that the damages awarded to her amounted to over-settlement, but that it was fair and reasonable based on the evidence presented in court. The prejudice suffered by the respondent if the rescission application is granted is greater than the one that the applicant will suffer if rescission application is refused. The applicant was in wilful default, and its rescission application is brought *mala fide* and with the intent to delay the respondent's compensation and finality in the matter.

[12] The applicant has brought its rescission application under both common law and rule 42. The 20 days period which both parties are referring in their papers, would have been applicable if the application was brought in terms of rule 31(2).

In an application for rescission of judgment in terms of rule 42, the applicant must show good cause, which includes giving a reasonable explanation for his/her/its default; show that the application for rescission was brought bona fide; that there is a bona fide defence or a substantial defence against the claim grounding the impugned judgment. In terms of common law, a court has a discretion to grant rescission of judgment where sufficient or good cause has been shown and that the party seeking relief must present a reasonable and acceptable explanation for his/her/its default, and that on merits such party has a bona fide defence which prima facie carries some prospects of success. (See *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*¹).

- [13] An application for rescission of judgment under both rule 42 and common law must be brought within a reasonable time. What reasonable time means depends on the facts of each particular case. The applicant became aware of the default order on 31st May 2023 and its application for rescission was launched and filed on 5th September 2023. The applicant has sufficiently explained the steps it had to take before launching and filing the rescission application, and with that explanation this court is satisfied that its rescission application was brought within a reasonable time.

- [14] In *Chetty v Law Society, Transvaal*² Miller JA said:

"But it is clear that in principle and in the long-standing practice of our Courts two essential elements of sufficient cause for rescission of a judgment by default are:

- (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

¹ 2003 (6) SA 1 (SCA)

² 1985 (2) SA 756 (A) at 765B-D

- (ii) that on the merits such a party has a bona fide defence which, prima facie carries some prospects of success.

It is not sufficient if only one of these two requirements is met, for obvious reasons a party showing no prospects of success on the merits will fail in application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default".

- [15] Rule 42(1) provides that the High Court may in addition to any powers it may have, *mero motu* or upon application of any party affected, rescind or vary an order erroneously sought or granted in the absence of a party thereby. The applicant was served with the set down on 20th October 2022. The applicant has conceded that it was aware of the trial date. The applicant's explanation for its default is that it was negotiating a settlement with respondent's attorneys, and it was hoping that the matter was going to be settled before the trial date. It made an offer to the respondent, and by the time the respondent rejected the offer it was too late for to can brief the Office of The State Attorney. That is the only explanation given by the applicant for its default on 8th May 2023

- [16] The question is whether the explanation by the applicant for its default of 8th May 2023 is reasonable and acceptable. The applicant did not dispute the respondent's version that the applicant had rejected the respondent's general damages on 5th May 2023 and made an offer for the loss of income on 8th May 2023 which was rejected. The offer was made on the date of trial. The applicant was aware that the matter was going on trial well in advance, and did not timeously made any offer to the respondent, and also did not take any initiatives to brief the Office of The State Attorney to attend the matter. It is the applicant who made its offer on the last minute on the date of the trial and did not take any initiatives to send anyone to court to represent it. The applicant did not state what made it to believe that the matter will be settled before the trial date. It

does not appear that the applicant knows or understand what “before trial date” means, as the offer was made on the date of trial. It is therefore not a plausible explanation that by the time the offer was rejected it was too late for it to brief the Office of The State Attorney, whilst it was the applicant who made the offer at the last minute and on the date of trial, whilst it has been aware of the trial date well in advance and was also aware that it has no legal representation since the termination of its panel of attorneys.

- [17] Counsel for the applicant was unable explain why the applicant did not send one of its staff members to come and appear in court, and if need be apply for a postponement. There is no explanation given by the applicant why the offer was only made on 8th May 2023 whilst they were aware of the trial date since 22nd October 2022 and merits were settled as far back as 7th November 2016. In *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*³ Khampepe J said:

“...Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted in *absentia*, into one erroneously granted”

- [18] The applicant in its founding affidavit has merely stated that the order was erroneously granted without substantiating that. The basis upon which the applicant relies on that the order was erroneously granted must be given in detail to enable the court to understand the reasons and be in a position to

³ [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) at para 61

assess the facts placed before it. In *Occupiers, Berea v De Wet*⁴ Mojapelo AJ said:

“...the High Court did not discharge its duty to enquire into all the relevant circumstances. This resulted in the Court being unaware of the essential issues of fact when granting the order. The Court was for instance not aware that there were 180 occupants who were absent when it granted the order. The Court was further not aware that those who purported to confirm the agreement on the side of the applicants had no mandate to bind the absent 180 applicants. The basis for granting the eviction order was that all the parties had consented thereto. The 180 absent applicants had however not consented thereto and were not bound by anybody present in court. The eviction order was thus erroneously granted in the absence of the 180 applicants”.

[19] The basis for proceeding with the matter in the absence of the applicant was that the applicant had been duly served with the set down, and the applicant itself had conceded that it was duly served and was aware of the date of hearing. The applicant has failed in its founding affidavit to mention a single issue of fact that the court was not aware of when granting the default order. Taking into consideration the Zuma case above, and the fact that the applicant has failed to state what essential issues of fact was the court unaware when granting the default order, it can therefore not be said that the order of 9th May 2023 was erroneously granted.

[20] On bona fide defence the applicant had submitted that it had through its rescission committee and management of the view that the amount awarded to the respondent was exaggerated and resulted in over-settlement. The applicant has further submitted that to cure this over-settlement, it be afforded an opportunity to appoint its own experts who will assess the respondent's claim,

⁴ 2017 (5) SA 346 (CC) at 366F to 367A

then together with the respondent's appointed experts prepare joint minutes so that a fair and reasonable amount of compensation will be paid to the applicant.

[21] The respondent on the other hand had submitted that after the merits were settled, the matter was set down for quantum on 11th November 2019, 19th July 2021, 30th July 2021, 20th August 2021, 8th August 2021 and 13th June 2022. The applicant was duly served with the notice of set down for these dates, and on each occasion the matter was postponed at the instant of the applicant as it was unable to settle the matter. The applicant did not dispute this version. The respondent's experts notices and reports were served on the applicant's erstwhile attorneys during 2019. The applicant since 2019 was aware of the respondent's experts reports and what they contained. The applicant was aware of the respondent's actuarial calculations all the time. Yet the applicant has failed to make appointments that the respondent attends to its own experts for them to assess the respondent to determine whether the applicant's experts were exaggerating the respondent's claim. Even counsel for the applicant was unable to explain what prevented the applicant to engage its own experts on receipts of the respondent's experts reports if they were of the view that the respondent claim was being exaggerated.

[22] The respondent on the date of the default judgment, has based its case on the evidence of its own experts which were contained in the experts reports which were unchallenged. Applicant's counsel was unable to state the expertise which the rescission committee and the management had for them to arrive at the conclusion that the respondent's experts' reports have been exaggerated which resulted in over-settlement of the claim. The applicant's counsel was also unable to explain on what informed the applicant to arrive at the conclusion that

the respondent's claim has been exaggerated which resulted in over-settlement.

[23] It seems the applicant does not appreciate that this is an old matter which should have long been finalised. The applicant has failed to take this court into its confidence and state the number of times this matter has been set down for trial, and that on each occasion the matter was postponed at its own instant as it was unable to settle the matter. The applicant had ample opportunity to appoint its own experts since 2016 when merits were settled, or 2019 after receipt of the respondent's expert reports, but has failed to do so without any explanation. The applicant is seeking to appoint its own experts now that a default order has been granted, and they are of the view that the award is exaggerated without laying any basis for that. The suggestion that the claim is exaggerated seems to be just a thump suck as counsel for the applicant was unable to explain the level of expertise which the rescission committee and management had to enable them to counter the applicant's experts reports. In my view, the applicant's bona fide defence looks poor, if not non-existence.

[24] Under common law a judgment can be set aside on the ground of (i) fraud; (ii) *justus error*; (iii) in certain exceptional circumstances when new documents have been discovered; (iv) where judgment has been granted by default; (v) in the absence between the parties of a valid agreement to support the judgment, on the ground of *justa causa*. Except that the judgment against the applicant has been granted by default, the remainder of the requirements is not applicable to the applicant's rescission application. For the applicant to satisfy the requirement of sufficient cause, it must (i) give a reasonable and acceptable explanation for its default; (ii) show that the application is made bona fide; and

(iii) show that on the merits it has a bona fide defence which prima facie carries some prospects of success. The applicant had failed to satisfy these three requirements.

[25] Under the circumstances, either on common law or in terms of rule 42, the applicant has failed to meet the requirements for the setting aside of the default judgment/order granted on 9th May 2023.

[26] In the result the following order is made:

26.1 The applicant's rescission application is dismissed with costs on party and party scale B.



 KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH
 AFRICA, LIMPOPO DIVISION,
 POLOKWANE

APPEARANCES:

Counsel for the applicant	: Adv T Masindi
Instructed by	: State Attorney Polokwane
Counsel for the respondent	: Adv SS Masina
Instructed by	: Komane Attorneys
Date heard	: 5th March 2025
Electronically circulated on	: 14th March 2025