



**HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 40389 /2018

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
25 March 2025	
_____ DATE	_____ SIGNATURE

In the application between:

ROAD ACCIDENT FUND

Applicant/Defendant

and

ROWJEE VIKESH

Respondent/Plaintiff

JUDGMENT

NHARMURAVATE AJ:

Introduction

[1] The Applicant is the Road Accident Fund a juristic person which has brought a rescission application for a default judgment granted by Botha AJ, served to it on the 6th of October 2023. This matter is opposed by the Respondent who is the

Plaintiff in the main action Rowjee Vikesh an adult male medical doctor by profession.

- [2] The rescission application was brought in terms of rule 42(1)(a) but a different argument was presented on the date of hearing of the matter .

BACKGROUND FACTS

- [3] The Respondent was involved in a motor vehicle accident on the 22nd of January 2018 wherein he sustained head and whiplash injuries. Thereafter, he instituted action which was defended by the Applicants. On the 15th of October 2019 the Applicant accepted 50% liability of the Respondent's proven damages. Subsequent to that, the Applicant then defaulted in a number of procedures as provided for in the uniform rules of this court alternatively the practise directives which led to their defence being struck in terms of the court order by Mazibuko AJ on the 27th January 2022. Thereafter the Respondent applied for default of judgment before the Honourable Botha A.J wherein submissions were made thereafter a default judgment was awarded amounting to a of R16 867 642 which was subject to the apportionment of 50%.

- [4] At all material times during the default judgment hearing the Applicant was represented.

- [5] The order was thereafter served on the Road accident Fund on the 6th of October 2023. Subsequent to that a rescission application was filed on the 15 of May 2024 by the Applicant sought in terms of rule 42(1)(a). At the outset, the Applicants sought condonation for the late filling of the rescission application simply because a period of at least 6 months lapsed before same was filed.

CONDONATION

- [6] Mr Ngomana, counsel for the Applicant, argued that the order was served on the 9th of October 2023, within the office of the Applicant. He lamented that there are

protocols and procedures which have to be observed before one can secure an instruction to apply for rescission. These caused delays in one way or the other. He further argued that it was in the interest of justice that condonation be granted regard being had that the Applicant operates on public coffers and it is a state institution which deals with immense litigation. It was not easy for one to obtain an urgent instruction.

[7] He also highlighted that they also needed to secure medico legal experts opinion regarding the application so that they can assess whether the award obtained was fair and reasonable. He concluded that there was no malice in instituting this rescission as the funds core function was to ensure that claimants or victims of the motor vehicle accidents were compensated fairly and reasonably.

[8] Condonation was opposed by the Respondents as the explanation provided for the late filing was unmeritorious.

[9] In *Foster v Stewart Scott Inc*,¹ his Lordship Mr Justice Frowman (as he then was) stated:

"It is well settled that in considering applications for condonation the court has a discretion, to be exercised judicially upon a consideration of all the facts. Relevant considerations may include the degree of non-compliance with the rules, the explanation therefore, the prospects of success on appeal, the importance of a case, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the other. A slight delay and good explanation for the delay may help to compensate for prospects of success which are not strong. Conversely, very good prospects of success on appeal may compensate for an otherwise perhaps inadequate explanation and long delay².

[10] The delay in instituting a rescission application as explained by Mr Ngomana for the Applicant was not satisfactory as it was not substantiated on the papers filed.

¹ (1997) 18 ILJ 367 (LAC) at para 369

² Erasmus Superior Court Practice at 360-366A

There were no specific dates or time frames provided to substantiate the averments made. However, it was my view that condonation be granted in the interest of justice to protect both parties right to a fair and effective court process. Considering the size of the Applicant and the number of litigations and claims it deals with, delays could result. It is also my view that, both parties have a vested interest in the court bringing finality to the matter³.

THE COURT ORDER

[11] Mr Ngomana for the Applicant sought rescission in terms of rule 42(1)(a) on his papers but before his argument, he conceded that the Respondent was correct in alleging that the Applicant was represented during the date when the default judgment was handed down. The drafter of the application was not aware of the Applicant being represented, he discovered this after seeing the answer from the Respondents thereafter he investigated. He also conceded that rule 42(1)(a) under the circumstances was not applicable as the rule provides for an instance where judgment was erroneously sought or erroneously granted in the absence of any party affected thereby.

[12] That ideally should have been the end of the argument by the Applicant as a litigant stands and falls by its papers⁴. However, regard being had to the Applicants heads of argument filed rescission was sought on a different basis which is not permitted in law simply because this amounts to prejudice of the side of the Respondent who has answered a different case to the one represented. However, Mr Ngomana persuaded the court to argue the matter based on rule 42(1)(b).

³ SA Post Office Ltd v CCMA [2012] 1 BLLR 30 (LAC) at para 23, where Waglay DJP (as he was then) stated that:

'In my view, each condonation application must be decided on its own facts bearing in mind the general criteria. While the rules are there to be applied, they are not inflexible but the flexibility is directly linked to and apportioned in accordance with the interests of justice; prejudice; prospects of success; and finally, degree of delay and the explanation thereof. The issue of delay must be viewed in relation to the expedition with which the law expects the principal matter to be resolved'.

⁴ Director of Hospital Services v Mistry 1979(1) SA 626 (A) at 635H-636B

[13] The court order that to the Applicant intends to rescind by the honourable Botha AJ provided as follows:-

“The Defendant shall pay to the Plaintiff the total amount of R 8 433 821.00 (eight million, four hundred and thirty three thousand, eight hundred and twenty one rand only) in respect of loss of earnings with interest calculated from 14 days after date of this order calculates in accordance with the Prescribed Rate of Interest Act of 1975.

[14] *Payments will be made directly to the trust account of the Plaintiff’s attorneys within 180 (hundred and eighty) days from the granting of this order, the details of such trust account being:*

.....”

[15] The above court order is the order that the Applicant seeks to rescind in terms of Rule 42(1)(b) which provides that: *“an order or judgement which there is an ambiguity, or patent error or omission but only to an extent of such ambiguity, error or omission, an ambiguity, or patent error omission”*. This rule has been described as an ambiguity or omission when the judgement granted does not reflect the real intention of the judicial officer pronouncing it, in other words the ambiguous language or the patent error or the omission must be attributed to the court itself.

[16] During argument Mr Ngomana for the Applicant could not point to the ambiguity or the patent error or omission in the court order. In fact he admitted that there was no patent error or ambiguity or omission in the court order. He admitted that the court order was clear and it indeed reflected the real intention of the Judicial Officer who pronounced upon it in October 2023.

[17] This was contrary to the heads of argument written by Mr Ngomana that there was an omission by the Judicial Officer simply because the experts reports of the Neurosurgeon and that of the Industrial Psychologist for the defendant were not considered. However, Mr Ngomana omitted to inform this court that their defence was struck out as far back as the 27th of January 2022 by the Mazibuko

AJ order. This was way before the court order that the Applicants seeks to rescind was ordered.

[18] As rightfully argued by Ms Viljoen for the Respondent since the Applicants defense was struck no attempts were made by the Applicants to reinstate the same. Therefore in my opinion, there was no omission or error when the court order was granted by the Honourable Botha AJ. The Judicial Officer had no obligation to consider the reports filed by the Applicant as the matter was before him as a default judgment application.

[19] Tritely, the Botha AJ order remains effective and enforceable, and was formulated in language that left no doubt on the parties minds especially the Applicant in this instance as to what the order requires to be done. The order was couched in clear terms and its purpose remains readily ascertainable from the language used.

[20] *The position has been held to be as follows that:*

(iii) If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it. In such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it.

.....

(v) If the meaning of the order is, however, clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated⁵.

[21] The concessions made by the Applicant clearly indicate that the rescission sought has no merit and stands to be dismissed with costs.

⁵ Superior Courts Practise comprehension under rule 42(1)(b). See also Trollip JA in *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306–7, and recognized in *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at 12G–H; *Minister of Social Development, Ex parte* 2006 (4) SA 309 (CC) at 318G–319A; *Speaker, National Assembly v Land Access Movement of South Africa* 2019 (6) SA 568 (CC) at 578C. A list of the principal authorities can be found *Vilvanathan v Louw NO* 2010 (5) SA 17 (WCC) at 20F–31G.

COSTS

[22] Ms Viljoen Counsel for the Respondent argued that the Applicants should pay costs on punitive scale in light of their behavior in handling this matter. She highlighted that they instituted the rescission application which they stopped halfway. The Respondents were the first ones to file their heads of argument as far back as July 2024 without the Applicants filing their heads of argument. The Applicants heads of argument were filed very late in January 2025.

[23] Mr Ngomana did not dispute that the Applicant was inexpedient in handling this matter but he attributed this to the fact that they were inundated with work and that internal processes involved in getting an instruction to move forward with the matter were near impossible. He pleaded that there was no malice in the application sought. The application was brought with a genuine belief that it could be successful.

[24] In re Alluvial Creek Ltd Gardiner J⁶ said in the context of punitive costs order:

'Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear'.⁷

[25] Firstly, costs are within the courts discretion and costs on a punitive scale are rarely awarded, these are considered where a litigant has been guilty of dishonesty, fraud, vexatious or malicious litigant in the application. I do not believe that the Applicant was malicious in the application sought. The Application was brought with a firm belief that there was merit in same. The

⁶ 1929 CPD 532 at 535

⁷ Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd 2015(5) SA 38 (SCA).

delays in filling the heads of argument were not demonstrated to be malicious and intentional on the part of the Applicant⁸. Additionally the concessions made by Mr Ngomana clearly demonstrated the Applicant's *bona fides*.

[26] It is therefore, my opinion that normal costs on a party and party scale should be awarded on scale B consideration being had to the nature and the complexity of the matter, inclusive of the quantum involved and the experience held by the Respondents Counsel.

Conclusion

[27] Tritely, costs should follow the results. In the circumstances the following order is made:

1. Condonation is granted .
2. The rescission application is dismissed with costs on a party and party scale inclusive of counsels fees on scale "B".



NHARMURAVATE AJ
Acting Judge of the High Court
Gauteng Division, Johannesburg

Date of Hearing: 05/03/2025

Judgment delivered: 25/03/2025

APPEARANCES:

Counsel for the Applicant	Mr T Ngomana
Attorneys for Applicant	State Attorney(Johannesburg)
Counsel for Respondent	Adv. A. Viljoen
Attorneys Respondent	De Broglia Attorney

⁸ Machett v Pretorious and Others