



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D151/2023

In the matter between:

MOMENTUM INSURE COMPANY LIMITED

APPLICANT

and

VENUGOPAL KUPPAN CHETTY

RESPONDENT

JUDGMENT

P WALLIS AJ

[1] On 24 November 2021 at approximately 23h30 on the M4 northbound and, at or about the Broadway offramp, a Porsche GT3 was involved in a single vehicle accident. The vehicle was at the time being driven by Mr Venugopal Chetty ("the plaintiff") (who was also the registered owner). At the time of the accident the vehicle was insured with the applicant.

[2] The applicant rejected the claim *inter alia* on the basis of a download of the vehicle's telemetry system which was interpreted as recording speeds prior to the accident of 171, 162, 149, 156 and finally 164 kilometres per hour.

In contrast the Plaintiff contended that he was travelling at or under the speed limit, which was agreed to be 100 kilometres per hour.

[3] The rejection of the claim was confirmed through internal appeals and was not set aside by the ombud when the Plaintiff sought the ombud's intervention.

[4] Dissatisfied with the outcome of both the internal claim and the ombud ruling, the Plaintiff instituted action against the applicant on 12 January 2023 by way of a combined summons issued out of this court. There appears to be no dispute that the combined summons was properly served upon the applicant. However, the applicant did not enter an appearance to defend and default judgment was consequently granted on 12 May 2023.

[5] The applicant seeks the rescission of that default judgment and to be granted leave to defend the action.

[6] The case for the applicant has evolved somewhat through the course of the application (as have the substantive and procedural objections to the application on the part of the plaintiff) and for that reason, it is necessary to set them out with some clarity.

The competing contentions

[7] In the founding affidavit, the applicant stated in express terms that the application for rescission was based on rule 31(2)(b) alternatively the common law.

[8] The applicant alleged that the vehicle was being driven at an excessive speed immediately prior to the collision and identified the following three clauses from the insurance policy:

"You must comply with the terms of the policy

Our liability to provide cover, and/or to settle any claim, is conditional upon proper compliance with the provisions of the policy by you and by anyone who may seek cover or benefit from it.

The information you give must be complete and truthful

If you give false information or wrong descriptions, or if you fail to inform us of any relevant information, the result may be that the particular section affected may be rendered voidable (i.e. you may lose your cover under that particular section).

You have a duty to take reasonable care

You must take reasonable care to prevent loss, damage and accidents."

[9] These extracted clauses in what was said to be the policy document were also identified expressly in the rejection letter.

[10] As I understand it, the contention is that if the vehicle was driven at the speeds that are alleged, then the plaintiff placed himself outside the boundaries of the insurance policy (whether by way of intention, recklessness, or simply the express terms of the policy) and additionally by necessary inference filed a claim form containing false information.

[11] In support of the contentions relating to speed, the applicant annexed to its founding affidavit a document known as the "Waidler Investigation Report". That document, it appears to be agreed, is the work product of a company which contends that it has the capacity to download digital data kept in the telemetry systems of motor vehicles, and otherwise to conduct inspections of motor vehicles. No confirmatory affidavit was provided in support of that report.

[12] As regards the reason for default, the applicant set out that it has an internal process that requires that processes served upon its head office (unsurprisingly there appear to be multiple on any given day) are circulated via email from the front desk at which service takes place to various different employees. Those employees are thereafter required to consider the processes made against the applicant and to determine what the next step

should be. It was explained by the applicant that the particular individual concerned with this claim had received two emails at approximately the same time from the front desk staff using the same language to identify that a summons was attached. The position is alleged to have been that the responsible employee assumed these to be duplicate emails and therefore considered only one of them rather than both. Having considered only one of the emails, it is alleged that this particular summons lay unnoticed in the offices of the applicant (and in the relevant email inbox) until a writ of execution was served subsequent to the grant of default judgment.

[13] This relatively straight forward case was met with a counter application (which broadly targeted the striking out of the Waidler Report), and a full-throated defence alleging both that the default was grossly negligent and therefore ought not to be condoned and also that on the merits:

- (a) the policy terms which were alleged did not form of the contract; and
- (b) that (particularly if the Waidler evidence was disallowed) there was no factual basis for a defence.

[14] The submissions in respect of the striking out of the Waidler Report were broadly that: it was hearsay; it was unvalidated expert opinion; the report was confidential in favour of the plaintiff; and that the downloading of data to compile the report was unlawful in that it contravened the Porsche contractual terms.

[15] Faced with this answering affidavit and strike out, the applicant changed tack somewhat in reply to contend that it was an additional ground for rescission under rule 42 that:

- (a) there had been an alleged non-disclosure of a partial payment that (it is agreed) had been made by the applicant to the plaintiff; and
- (b) the quantification of damages was not consistent with the terms of the policy wording.

[16] As regards the hearsay and unconfirmed nature of the Waidler Report, the applicant stated in its reply as follows:

“9.1 I accept that no confirmatory affidavits in respect of the assessor’s report and the Waidler Report were attached to the applicant’s founding affidavit;

9.2 the aforesaid reports were referred to, not as proof of their contents, but in order to contextualise the applicant’s decision to repudiate the respondent’s claim;

9.3 given the nature of these proceedings, it being an application for rescission, the court has a discretion to admit hearsay evidence in the interest of justice;

9.4 in the event of the matter proceeding to trial, the applicant will qualify the relevant witnesses as expert witnesses, deliver the relevant notices and call the witnesses to give *viva voce* evidence;”.

[17] The applicant also explained how it was contended that it was open to the applicant to put forward the Waidler Report notwithstanding the contentions as regards confidentiality and who the client was in respect of the Waidler Report. In short it was disputed that any confidentiality vested in plaintiff and further disputed that the evidence could be excluded by reason of terms of contract with Porsche.

[18] This reply gave rise to a further application to strike out on behalf of the plaintiff.

[19] That application to strike out (which in turn resulted in a cascade of answering and replying affidavits related only to the strike out) sought to strike out those allegations made in support of the rescission in terms of Uniform rule 42 and the further allegations made in support of the reliance upon the Waidler Report.

Rule 42

[20] By reason of the conclusion that I reach in respect of the claim for rescission under Uniform rule 42, it is appropriate (notwithstanding that the submissions were made only in reply), to commence with an examination of Uniform rule 42.

[21] That rule provides for the rescission of *inter alia*:

“An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.”

[22] There is no contention that the other subparagraphs of Uniform rule 42(1) are applicable.

[23] In my view, Uniform rule 42(1) is not available to the applicant.

[24] As the Constitutional Court made clear¹ there are two requirements for a rescission of this form. Firstly, the party seeking the rescission must have been absent, and secondly, the court must have made an error. For the most part, these are to be treated as two distinct requirements.

[25] Importantly however, the Supreme Court of Appeal has identified² that: “...In a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff’s claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.”

¹ *Zuma v Secretary of the Judicial Commissioner of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC) at [57]

² *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA); See also *Centaur Mining South Africa (Pty) Ltd v Cloete Murray NO* [2024] ZASCA 34 (28 March 2024) at [22]

[26] I pause to point out that insofar as it was contended that it was an error to grant judgment in the full amount as opposed to that amount less the prior payment referred to above, The Plaintiff gave instructions for the abandonment of that portion of the default judgment equivalent to the prior payment. In view of the conclusion to which I come in respect of the other grounds for rescission it is unnecessary for me to consider either whether that would have been an error of the form contemplated under Uniform rule 42 or whether the abandonment would have been sufficient to cure the error.

[27] In respect of the other contentions in respect of Rule 42, it is my view that the contentions of the applicant in respect of Uniform rule 42 fall outside the parameters of those forms of judgment which the Supreme Court has indicated may be rescinded pursuant to Uniform rule 42. There appears to me to have been no error of process and what is raised is more properly described as a defence on the merits.

[28] As regards the original grounds for rescission (i.e. those set out in the founding affidavit) the requirements for such a rescission have been summarised as follows:³

- “(a) he (i.e. the applicant) must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence, the court should not come to his assistance;
- (b) his application must be *bona fide* and not made with the intention of merely delaying the plaintiff's claim;
- (c) he must show that he has a *bona fide* defence to plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.”

³ *Erasmus*, Superior Court Practice, Second Edition, D1 – Rule 31 – 11, Service 25, 2024

[29] In my view the first two requirements are sufficiently dealt with by the applicant in the form of the detailed explanation for how it came to be that this particular summons was not defended (i.e. an internal administrative error which is reasonably plausible), together with the evidence that the defence is *bona fide* which manifests in the internal appeals together with the submissions to the ombud. It is apparent from the papers (and I do not seek to be seriously contested) that the applicant has throughout wished to defend its rejection of the claim.

[30] All that remains then is the question of whether there is a *bona fide* defence.

[31] In assessing whether a *bona fide* defence has been raised, the first question is one of law: in other words, if all the facts were established as alleged by the applicant, would that give rise to a defence. Neither party was able to refer to any case, one way or another, in terms of which speeding of the nature alleged would place the insured outside the insurance policy. However, in my own research, I identified at least one judgment⁴ in which it appears that an insurer was successful in resisting a claim for payment in circumstances where the insured had driven recklessly. I have no means of determining whether that judgment was based on an insurance policy consistent with this one but it does seem to me that this is at least some authority for the proposition that reckless driving beyond the permitted speed limit may act to exclude liability on the part of the insurer.

[32] I further have no difficulty with the proposition (at least *prima facie*) that it is a term of an insurance agreement that the insured must take reasonable care to avoid damage, and a further term that the claim form must be honestly compiled. For the purposes of this rescission judgment, it is unnecessary for me to determine whether such terms are express, implied, or tacit (this is a matter of some contestation).

⁴ *Monametsi v Miway Insurance* [2021] ZAGPPHC 478 (22 July 2021)

[33] Having found that there is a notional legal defence available to the applicant, all that remains is to consider whether there are:

"Averments which, if established at the trial, would entitle [the applicant] to the relief asked for."⁵

[34] This enquiry requires a consideration of whether regard can be had to the Waidler Report, and if not, whether it is sufficient simply to allege that the same evidence would be obtainable in the trial.

[35] It would self-evidently have been preferable if confirmatory affidavits had been provided in the name of the technicians that compiled the Waidler Report. Nevertheless, having regard to the preliminary stage of this litigation (and in particular that it is civil litigation where the judgment is not binding upon a further trial court), and further taking into account that the parties appear to have co-operated in obtaining that report in the first instance, I am inclined for the purposes of this rescission, to admit that report into evidence.

[36] I am conscious that the plaintiff contends that the report is unlawfully obtained (primarily because it appears to have been obtained by methods that are contractually precluded by the manufacturer), and that it is confidential where confidentiality has not been waived. It is sufficient to point out that neither a contractual limitation on obtaining evidence, nor confidentiality would necessarily be sufficient grounds (at least *prima facie*) to resist a demand that such a report be discovered, or to resist the introduction of that report in a civil trial.

[37] Having determined that the report is admissible and the legal defence may be raised based on speeding, it follows that evidence has been established which if proved at trial, would constitute a *bona defence*.

⁵ *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 - 7

[38] However, even if I were wrong as to the admissibility of the Waidler Report, I would nonetheless have found that on the uncontroverted and unobjectionable evidence, it has persistently been the position of the applicant that the collision was a consequence of speeding and that there is other evidence relating to the nature of the damages to the vehicle which may conceivably justify such an inference at trial. I would therefore have reached the same conclusion even if I had not admitted the report into evidence.

[39] Having regard to what I have set out above, it appears to me that rescission must follow.

Costs

[40] The parties made contrasting submissions on costs. The applicant submitted that costs should be paid by the plaintiff for the entire rescission application on scale B. In contrast, I understood the plaintiff's submission to be that even if he was unsuccessful in resisting the rescission, he should not be ordered to pay the costs.

[41] There are also the matters of the strike out applications. It will be apparent from what I have set out above, that the strike out in respect of the Waidler Report has not been successful but that is by reason of an exercise of my discretion to admit evidence rather than because the applicant made a comprehensive application for admission in the first instance. In my view the applicant ought prudently, as the plaintiff complains, to have introduced that report together with confirmatory affidavits. The second strike out in relation to the allegedly new case in reply did not need to be considered because, for reasons that I have already set out, the rule 42 was inapposite. However, it is my view that the formalistic strike out approach was not the most appropriate manner in which to deal with the allegedly new case. It might have been considerably simpler to address the contention by way of a short further affidavit for which leave could have been sought under Uniform rule 6(5)(e) or

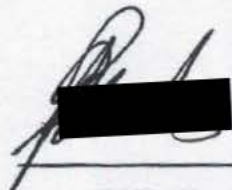
[42] even to confine the complaint to argument.

[42] However, the entire rescission application was occasioned by default on the part of the applicant in filing a notice of intention to defend. The applicant cannot be insulated from the costs of its own default. That being said, having had sight of the founding affidavit, (and well knowing that it had always been the intention of the applicant to defend the proceedings) it would have been more appropriate, in my view, for the plaintiff to consent to the rescission.

[43] Taking all of those considerations into account, and recognising that some of the evidence upon which the *bona fide* defence relies may not be proved in trial, it appears to me to be an appropriate balancing exercise to grant the costs order which I do below.

[44] In the circumstances, I grant the following order:

- (a) the default judgment granted by this court on 12 May 2023 be and is hereby rescinded and set aside;
- (b) the applicant is granted leave to deliver a notice of intention to defend within five (5) days of the granting of this order;
- (c) in respect of costs:
 - (i) the applicant will pay the costs of the application incurred up to the date upon which a notice of intention to oppose the application was delivered;
 - (ii) each party shall bear its own costs in respect of the strike out applications; and
 - (iii) such costs as remain after the preceding two costs orders shall be costs in the cause.


P Wallis AJ

DATE OF HEARING: 14 APRIL 2025

DATE OF JUDGMENT: 17 APRIL 2025

Appearances

Counsel for Applicant:

Advocate D Schaup

Attorneys of Applicant:

Nagesh Maharaj Attorneys

Counsel for Respondent:

Advocate GD Harpur SC

Attorneys for Respondent:

Maraj Inc