

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Case number: 23540/2017
Date of hearing: 30 April 2025
Date delivered: 20 May 2025

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED
20/05/25
DATE SIGNATURE

In the application between:

THE ROAD ACCIDENT FUND

Applicant

and

BN HARMS.E

Respondent

JUDGMENT

SWANEPOEL J:

[1] On 14 October 2021 judgment was granted against the applicant by my brother Van der Westhuizen J, for payment of past medical expenses in the sum of R 223 720 and future loss of earnings of R 6 043 856.90. The notice of motion in this application suggests that the applicant seeks to rescind the entire judgment. However, the founding affidavit has clarified the application; that the applicant only seeks rescission of the judgment insofar as the past medical expenses are concerned. The applicant also seeks condonation for the late filing of the rescission application.

[2] The applicant says that it only became aware of the judgment when the respondent's attorneys enquired about payment of the damages. The applicant does not say when that happened, but, it says, it then commenced with an investigation as to how the judgment had come about. It does say that on 12 February 2022 the applicant received the court order from the respondent's attorney. The rescission application was launched on 21 December 2022. There is no explanation whatsoever for the delay in launching the application, and I would not grant condonation.

[3] However, it is on the merits that the applicant has a more serious problem. It has made the following three allegations in support of its application:

[3.1] That the matter was heard virtually;

[3.2] That the applicant's defence had previously been struck out by Noko AJ;

[3.3] That the applicant was barred from making any submissions to the court;

[4] All three the above submissions are untrue. Firstly, the matter was heard in open court. Secondly, the applicant's defence was never struck out. Thirdly, the applicant was represented at court by a representative of the State Attorney, Ms. N Xegwana. The record shows that the respondent's counsel placed the following on record:

Mr. De Klerk: "The defendant is represented by the State Attorney. The State Attorney is present in court. She informed me just before your Lordship called."

Court: "Is that Mr Rangatha?"

Mr de Klerk: "No M'Lord. It is Ms. or Mrs I do not know Nonkoliseko Xegwana"

Court: "I am not going to try and write it down at this stage."

Mr de Klerk: "She is here to note the judgment. She has no instructions to make any submissions. She has only instructions to note the judgment that Your Lordship hands down."

[5] The applicant contends that it is entitled to rescission in terms of rule 42 (1) (a), alternatively in terms of the common law. It is not. The

judgment was not taken in the absence of the applicant. It was represented at court, and its representative chose not to take part in the proceedings. All three of the averments listed in paragraph 3 above are false. Therefore, there is no basis upon which to rescind the judgment.

[6] The issue of costs remains. The applicant's current representative is Ms. N Kunene. She drafted the application. The deponent in the founding affidavit was one Tonya de Beer. Both of them were responsible for placing averments before court that were false. Consequently, I asked my Registrar to advise both of them to appear at the hearing of the matter, as I was considering making a punitive costs order, *de bonis propriis*. Ms. Kunene appeared, but Ms. de Beer was allegedly leaving for overseas on the day of the hearing.

[7] Having heard Ms. Kunene I provided her with an opportunity to file an affidavit in respect of costs. Ms. Kunene explained that she had drafted the affidavit after receiving a memorandum from the applicant in which the alleged facts were spelled out. She did not know that the application was based on false averments. She also says that Ms. de Beer was merely asked to sign the affidavit, but that she herself did not have knowledge of the facts of the matter.

[8] I find it highly unacceptable that a legal representative would draft an application without confirming the facts for herself, choosing to rely only on a memorandum. Secondly, it is perturbing that a deponent would depose to an affidavit, the contents of which she has no knowledge

whatsoever. The result is that the respondent has been dragged to court to oppose an application based on falsehoods, at his own expense.

[9] Although I cannot express my disapproval of Ms. Kunene and Ms. de Beer's conduct strongly enough, I accept that they were not mala fide. They did not set out to mislead. The falsehoods originated from the applicant, who misrepresented the facts to Ms. Kunene. Therefore, I will not make a costs order de bonis propriis.

[10] The main problem lies with the applicant and its chaotic approach to litigation, of which this application is but one example. During 2020 the applicant terminated the services of its panel attorneys, promising a new system that would dispose of claims efficiently and cost-effectively. In an appeal against an order in terms of section 18 (3) of the Superior Courts Act, 2013¹ the attorneys (respondents in the appeal) argued that it was very possible that the applicant's operating system might collapse if the attorneys' mandate was terminated, with thousands of claimants being irreparably harmed. They warned that many default judgments would result and inflated claims might be successful without proper scrutiny by an attorney. Unfortunately, these warnings were prescient, and now, five years later, the applicant's systems are largely still in chaos. Many cases are heard every day in which the applicant is not represented at court, or if it is represented, then it is often either under bar or its defence has been

¹ The Road Accident Fund and Others v Mabunda Inc and 42 Others (case nos. 15876/20; 17518/20; 18239/20) [2021] 1 ALL SA 255 GP dated 18 August 2020

struck out. Oftentimes, if there is a legal representative at court for the applicant, instructions are not forthcoming from the applicant.

[11] The applicant's failure to deal with cases properly occurs despite the applicant being accommodated on various levels. Once a summons has been served on the applicant, the plaintiff is required to send courtesy letters to the applicant, asking it to enter a defence. If the fund happens to enter a defence, and it does not deliver a plea, the plaintiff must send courtesy letters before it delivers a notice of bar. Before a defence is struck out, the applicant is notified of its failure to comply with the rules, courtesy letters are sent, and an application to compel is delivered, and eventually an application to strike out is delivered. Before such an order is made, the applicant is given multiple opportunities to comply with the rules. Whether the applicant is under bar, whether its defence has been struck out, or it is in default of entering an appearance to defend, I insist on a set-down being served on it, so that the applicant is aware of the default proceedings. None of these courtesies and accommodations are extended to any other litigant, despite which, multiple default judgments are taken against the applicant, on a daily basis.

[12] Notwithstanding the multiple warnings that the applicant receives, I still had 41 unopposed matters on the default roll in the week of 5 May 2025. In 8 of these matters the defence had been struck out, and in 13 matters the applicant was under bar. In 20 cases the applicant had not even noted an appearance to defend. In two cases in which the applicant was under bar, counsel appeared for the applicant and sought a

applicant to efficiently execute its Constitutional mandate requires, in my view, urgent attention.

[16] I will not allow the respondent to be out of pocket as a result of the applicant's dismal failure to function properly. A punitive costs order is appropriate.

[17] I make the following order:

The application is dismissed with costs on the attorney/client scale.



SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

Counsel for the applicant:	Adv. N Kunene
Instructed by:	The State Attorney
Counsel for the respondent:	Adv MCC De Klerk
Instructed by:	Get Nel Inc
Heard on:	30 April 2025
Judgment on:	20 May 2025