REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 42502/13

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

28/7/2016
DATE

SIGNATURE

In the matter between:

ROAD ACCIDENT FUND

Applicant

and

MOKOENA, CECILIA MAPASEKA

Respondent

SUMMARY

Motor vehicle accidents – action against Road Accident Fund – defence of Road Accident Fund struck out for non-compliance with court orders – the negligent, inexplicable and tardiness of attorneys for Road Accident Fund in handling the litigation – failure to proffer reasonable explanation for default and condonation in subsequent rescission application – requirements for

rescission of default, judgment, under the common law not met – application for rescission of default judgment refused with costs on punitive scale.

JUDGMENT

MOSHIDI, J:

INTRODUCTION

[1] This is an opposed application for the rescission of the default judgment granted in favour of the respondent, and her minor children, and against the applicant on 21 November 2014. The application is based on the common law, and on the basis that the applicant has a *bona fide* defence to the respondent's action.

MATTER IN CONTEXT

[2] In putting this matter in proper context from the outset, it is not out of place to recall what was said by the Court in *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141:

> *"There is a limit beyond which a litigant can 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 and misericordiam should not be allowed to become an invitation to laxity. ... 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."

THE FACTUAL BACKGROUND TO THE LITIGATION

[3] The respondent is involved in this matter in her personal capacity as the widow of the late Thabang Mogotsi ("*the deceased*"), and in her representative capacity as the legal guardian of the couples' two minor children, Thabang Mokoena and Bokamoso Mokoena ("*the minor children*").

[4] On 28 November 2011, the deceased sustained fatal injuries in a motor vehicle accident and succumbed to his injuries. As a consequence, the respondent instituted action against the applicant in her said capacity, and on behalf of the minor children, for *inter alia*, loss of support, and her funeral expenses.

ESSENTIAL ALLEGATION IN PARTICULARS OF CLAIM

[5] One of the essential allegations made in the particulars of claim was that at the time of the motor vehicle accident, the deceased was travelling in a Renault Clio motor vehicle, with registration letters and number VJG 239 GP, when he lost control of his vehicle, and overturned. The respondent alleged that she was a passenger in the motor vehicle of the deceased, and that the collision was caused by the negligent driving of an unknown driver who pushed the deceased out of the way, and fled the scene of the collision.

THE LITIGATION

[6] The applicant, upon receipt of the summons, entered an appearance to defend the action, and also filed a plea in March 2014, through attorneys Duduzile Hlebela Inc ("*Hlebela Attorneys*"). The plea was a bare denial of the respondent's claim. The plea was also filed pursuant to a notice of bar having been served by the respondent's attorneys, Motanya Madiba Attorneys.

[7] In March 2014, the applicant's attorneys, Hlebela Attorneys, were served with a discovery notice in terms of Uniform Rule 35(1). This was ignored. On 4 July 2014, (some four months later), the plaintiff's attorneys wrote to Hlebela Attorneys in the following terms:

> "*... We notice that you were served with a Rule 35(1) notice to discover on the 18th March 2014 and to date we have yet to receive your client's discovery affidavit. Kindly furnish us with same, within 5 (five) days from date hereof, failing which we hold instructions to bring an application, compelling your client to comply therewith ...*"

On the same day, Hlebela Attorneys acknowledged receipt of the letter. Despite this acknowledgment, there was no compliance with the request to discover.

[8] As a consequence, on 22 July 2014, respondent's attorneys brought an application to compel discovery. This application was served on Hlebela Attorneys the same day. There was no reaction to the application. On 27 August 2014, the Court granted an order ordering the applicant to discover within five days and to pay the costs. On 10 September 2014, respondent's

attorneys served the order on Hlebela Attorneys. The order was also transmitted to Hlebela Attorneys by email, receipt whereof was acknowledged. Hlebela Attorneys, despite being granted extensions and them giving undertakings to comply with the order, however failed to do so.

[9] In early October 2014, the respondent's attorneys issued an application, dismissing and striking out the applicant's defence in terms of Uniform Rule 35(7). The application was served on Hlebela Attorneys on 2 October 2014. There was no response thereto. On 31 October 2014, the Court granted an order striking out the defence. The order striking out the defence was also served and transmitted to Hlebela Attorneys electronically, and who acknowledged receipt thereof on 13 November 2014.

[10] The applicant's discovery affidavit was only filed on 19 November 2014. By this time, an application for default judgment was already issued, and served on Hlebela Attorneys. At the same time, the latter attorneys were informed of the hearing of the default judgment application on 21 November 2014. On 21 November 2014, the Court granted default judgment in favour of the respondent, and which forms the subject-matter of the present application.

[11] The court order, granting default judgment, was served on Hlebela Attorneys on 28 November 2014 by email and facsimile, followed by personal service on 1 December 2014. Hlebela Attorneys were also requested to effect payment in terms of the default judgment order, failing which a writ of execution against applicant's property would be issued. As there was still no

reaction, the sheriff of the Court executed the warrant by attaching movables of the applicant on 11 December 2014. From the papers, it appears that there were numerous telephonic discussions and correspondence exchanged between the respective attorneys, which was all prompted by the visit of the sheriff to the applicant's premises. In summary, these all indicate that, the validity of the respondent's claim was challenged, with respondent's attorneys disputing such, and Hlebela Attorneys threatening urgent court proceedings, and requesting more documentation from respondent's attorneys. I shall deal in more detail with these exchanges, later below, if necessary. The facts set out in paragraphs [3] to [10] of this judgment above, appear to be largely common cause or not seriously disputed.

THE BASES OF RESCISSION

[12] In the rescission application, and in dealing with the delay in launching the application; its knowledge of the default judgment; that it was not in wilful default, and alleging that it has a *bona fide* defence to the respondent's claim, the applicant made various allegations and contentions, including that the instant application was launched reasonably timeously. The essence of the allegations is that: the applicant first became aware of the default judgment upon the visit of the sheriff at its offices on 11 December 2014; one Smother Mkhonto of Hlebela Attorneys, a qualified assistant ("*Mkhonto*"), proceeded to request from respondent's attorneys, a full set of documentation on 12 December 2014, the respondent's attorneys responded with insufficient documentation, which prompted the senior partner of the firm, Ms Duduzile

Hlebela, despatching a messenger to secure further documents from the court file. I must hasten to observe at the outset, that the respondent's attorneys denied these allegations; the task to procure further documents from the court file was difficult due to the start of the festive season; apparently, it was not unusual for Mkhonto to first request for documents from the respondent's attorneys. He did so by 14 November 2014, as well; in the telephonic discussions, respondent's attorneys omitted to mention the default judgment, or that applicant's discovery affidavit was no longer required; the applicant's attorneys, Hlebela Attorneys, experienced countless problems with incompetent staff, who were either subsequently disciplined or dismissed by the owner of the firm, Ms Duduzile Hlebela, "*for neglecting to give this matter the requisite attention*",[1] and that the applicant was at no stage in wilful default of defending this matter, "*as the applicant simply had no knowledge thereof*".[2]

[13] In regard to the applicant's allegation that it has a *bona fide* defence to the respondent's claim, and in fairness to the applicant, some elaboration is necessary. In paragraphs 47 to 52 of the founding affidavit, the applicant alleged that it now has possession of the crime docket relating to the motor vehicle accident in question, as well as certain observations made by one Constable S W Munyai regarding how the collision occurred, and a statement made by a relative of the deceased, a passenger in the motor vehicle of the deceased, one Tebogo Mogotsi. In short, the latter alleged that the deceased in fact lost control of their motor vehicle and it capsized. Based on these allegations, the applicant asserted that there was no unknown driver or motor

[1] See founding affidavit, para 37, p 13 paginated papers.
[2] See founding affidavit, para 42, p 13 paginated papers.

vehicle involved in the collision as alleged in the particulars of claim.[3] By implication, so the contention proceeded, the deceased was 100% responsible for the collision. Naturally, there are huge difficulties with these allegations which are not contained in the plea, and the surface of which has not been explained at all. As at the hearing of this matter, there was no amendment to the plea. Neither was there a counterclaim against the respondent.

THE RESPONDENT'S OPPOSING PAPERS

[14] There was an opposing affidavit to the rescission. In it, the respondent challenged the granting of rescission on several grounds, most of which were not unexpected. However, in the light of the view I take finally in this matter, it was truly unnecessary to detail the entire opposition to the rescission application. The founding affidavit was commissioned on 23 February 2015 only. The opposing affidavit of the respondent, coupled with the common cause facts, show convincingly that, pursuant to the telephonic discussion on 11 December 2014, Attorney Duduzile Hlebela threatened with urgent court proceedings to stay the writ of execution and to rescind the default judgment, but never did so immediately. She must have been aware already of the default judgment before that. Some two months or more later, the founding affidavit was attested or commissioned.

[3] See founding affidavit, para 52, p 17 paginated papers.

[15] The respondent alleged that overall, the applicant's assertions were untrue, and displayed a blatant disregard for court processes and court orders. To this end, she instructed her attorneys of record to issue contempt of court proceedings. Her attorneys had cooperated fully with the applicant's attorneys throughout the request for certain particulars and documentation. In this regard, she alleged that the applicant's attorneys failed to pay for the cost of copying the requested documentation. Significantly, the applicant's attorneys wrote a letter or email to the respondent's attorneys on 11 December 2014, indicating that their offices would be closed for the festive season from 12 December 2014 to 12 January 2015. The respondent also argued that the assertion of the applicant that its attorneys searched for the court file during the festive season (December 2014), was not supported by any documentary proof. The notice of motion also did not include condonation for the delay in bringing the present application. The respondent described as bizarre and incomprehensible the allegation that the applicant's attorneys' file was at some stage empty with no documents "*due to logistical and administrative deficits*", which if true, pointed to the negligence on their part. The fact that certain staff members who handled this matter at the applicant's attorneys' firm were suspended/dismissed, subsequently, was of no significance to the respondent. The respondent also noted that, despite subsequent revelations by the mysterious police case docket, the factual position is that, the deceased, and father of her two minor children, demised as a direct result of the injuries he sustained in the motor vehicle accident. The opposing affidavit concluded that the present applicant for rescission be dismissed with a punitive costs order of *de bonis propriis* on the attorney and

client scale, since the applicant failed dismally to proffer a reasonable explanation for its tardiness and all defects in launching the application. Indeed, there are other numerous unsatisfactory features in the handling of this matter by the applicant's attorneys. These are on record, and unnecessary to repeat here.

THE REPLYING AFFIDAVIT

[16] The replying affidavit filed by applicant's attorneys, Hlabela Attorneys, on 31 March 2015, compounded matters for the applicant's cause, to say the least. Not only was it defective (blank space in paragraph three),[4] it also made some startling revelations about the incompetent and negligent manner in which the applicant's attorneys handled this matter. For example, in paragraphs 11 and 12 thereof, the following allegations were made:

> "…, *the documents may have been delivered by the respondent's attorneys but it was not brought to the attorney's notice and she had no knowledge thereof; the email address that the respondent's attorneys used is hlebelad@webmail.co.za. This is the main reception email address at Duduzile Hlebela Inc and does not go straight to Ms Hlebela.*"

Paragraph 14 of the replying affidavit, which contended that Ms Hlebela was not aware of the problem that arose due to the negligent manner in which the file was handled in her office until the problem was brought to her notice, was even more damning. The replying affidavit further went on to contend that the confirmatory affidavit of Mkhonto to the founding papers was erroneously

[4] See replying affidavit, para 3, p 206 paginated papers.

excluded. The same applied to the affidavit of Constable S W Munyai.[5] All of these point to inexcusable inefficiency, lackadaisical, inept and negligent conduct on the part of Ms Hlebela, as owner of the law firm, and her staff. I can put it no higher. In any event, negligence on the part of the applicant's attorneys was conceded in closing argument. The point is simply that the replying affidavit was unhelpful to a great extent.

THE LEGAL PRINCIPLES APPLICABLE

[17] I deal with some applicable legal principles. The replying affidavit made it clear that the application for rescission is brought under the common law,[6] and not under Uniform Rules 31(2)(b) or 42(1)(a).

[18] As regards the question whether the conduct of the applicant's attorneys in handling this matter, is justification at all for granting the relief sought, I have already, at the commencement of this judgment, referred to *Saloojee and Another NNO v Minister of Community Development*. In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*,[7] which concerned the question whether default judgment can properly be rescinded in terms of Rule 42(1)(a) of the Uniform Rules of Court, the Court at paragraph [12] said:

> "... *The documents were swallowed up somehow in the offices of his attorneys as a result of what appears to be inexcusable inefficiency on their part. It is difficult to regard this as a reasonable explanation. While Courts are slow to penalise a litigant for his attorneys' inept conduct of litigation, there comes a point where there is no alternative*

[5] See replying affidavit, paras 17 and 19, p 209 paginated papers.
[6] See replying affidavit, para 25, p 212 paginated papers.
[7] 2003 (6) SA 1 (SCA).

but to make the client bear the consequences of negligence of his attorneys ..."

See also *Regal v African Superslate (Pty) Ltd*[8] and *S Mazibuko v Singh.*[9] It is more than plain to me that in the present matter, the conduct of the applicant's attorneys fell far short of the required professional standards.

THE COMMON LAW RESCISSION

[19] The requirements for granting rescission under the common law, have been set out in a line of cases, which are by now settled law. The starting point is that in the present case, the applicant who seeks the relief bore the *onus* of establishing the presence of '*sufficient cause*'. The second consideration, in my view, is that, the respondent, being in possession of a default judgment granted in her and her minor children's favour, which judgment, I was told, has since been satisfied, is entitled, within a reasonable time, after the issue thereof, to know that the last word has been spoken on the subject. See for example, *First National Bank of Southern Africa Ltd v Van Rensburg NO and Others: In re: First National Bank of Southern Africa Ltd v Jurgens and Others.*[10] It is clear that the respondent and her minor children in this case will be severely prejudiced should the judgment be rescinded on the grounds advanced by the applicant.

[20] In *Colyn v Tiger Food Industries Ltd t/a Meadow Feeds Mills (Cape), supra,* the Court held that:

[8] 1962 (3) SA 18 (A).
[9] 1979 (3) SA 258 (W).
[10] 1994 (1) SA 677 (T) at 681E-G.

> *"As to the relief under the common law, an applicant was generally expected to show good cause for the rescission by (a) giving a reasonable explanation of his default; (b) showing that his/her application was made bona fide; and (c) showing that he/she had a bona fide defence to the plaintiff's claim which prima facie has some prospect of success."*[11]

See also *Harris v Absa Bank Ltd t/a Volkskas,*[12] a full court decision.

[21] Whilst mindful of the enormous responsibilities placed on the applicant, and in dealing with public funds under the Road Accident Fund Act 56 of 1996, as amended, I am obliged, based on the above legal principles and facts of this matter, to conclude that: the applicant has not discharged the *onus* on it to provide good cause for rescission in that it did not provide a reasonable explanation for its default; although the facts show that the applicant's attorneys must have been aware of the default judgment prior to 11 December 2014, once the applicant's attorneys, on their version, became aware of the judgment on 11 December 2014, the applicant, in any event, failed to provide a reasonable explanation for its default; the applicant was mendacious in its denial that its attorneys were aware of the judgment before 11 December 2014; to be aware of a default judgment on 11 December 2014, and then proceed to close the offices a day later, until 12 January 2015, in the full knowledge of such an important court order, could never be countenanced by the courts; the launching of the present application on 23 March 2015 only, as the applicant did, and contend thereafter that it was brought within a reasonable time, based on the common law, made no sense at all and it was not reasonable in the circumstances; this was compounded by the absence of

---

[11] *Supra* at para [11] at 9E-F.
[12] 2006 (4) SA 527 (T) at paras [4] to [6].

any condonation application for the delay. In my view, the applicant was "*the author of its own problems, and that it would be inequitable to visit the other party* [respondent] *to the action with the prejudice and inconvenience flowing from such conduct*" (my insertion). See *De Wet and Others v Western Bank Ltd.*[13]

[22] The question of what the police case docket subsequently allegedly revealed about the exact nature of the respondent's claim under the Road Accident Fund Act 56 of 1996, was not helpful at all. It could never present a potential *bona fide* defence. This, for a number of obvious reasons. In the first place, the applicant presented no evidence at all as to when exactly it gained possession of the case docket. Whether this was before the plea or after. The plea was never amended to accord with the alleged contents of the case docket. Nor was there a counterclaim filed against the respondent. Secondly, the manner in which the contents of the case docket were dealt with in both the founding and the replying papers, as indicated above, was by far not a model of perfection and remained unconvincing. There simply was no *bona fide* defence to upset the default judgment. The application for rescission must fail.

CONCLUSION

[23] To sum up. The Court gained the distinct impression that the reason why the applicant's attorneys denied that they had knowledge of the default

[13] 1979 (2) SA 1031 (A).

judgment prior to 11 December 2014, is because they, based on their own neglect of the matter, were unable to provide a reasonable explanation for their failure to take expeditious steps to apply for rescission. In the circumstances of this case, the delay, coupled with the absence of any condonation application, can never be said to be reasonable. The applicant has failed to demonstrate good cause or sufficient cause, and has no *bona fide* defence or reasonable prospects at a trial, whichever way one looks at the case and its circumstances. It was conceded as mentioned before, and indirectly during closing argument, that the sole negligence of the applicant's attorneys caused all these problems for the applicant succeeding in the application. In my view, the concession was well made.

COSTS

[24] I deal briefly with the issue of costs, which is a discretionary matter. There is no doubt that the costs should follow the result. In the heads of argument, the respondent contended, based on '*the inadequacy of the explanation given by the applicant, the costs should be de bonis propriis on the attorney and client scale*'. However, in my judgment, such a scale of costs should not be allowed in this instance. Whilst it is so that the conduct of the applicant's attorneys was exclusively accountable for the mess, the Road Accident Fund in order to protect public funds, and take its chances, as it did with the instant unmeritorious application acted reasonably. It will be just and equitable, in the exercise of my discretion, to order costs to be paid by the applicant on the attorney and client scale only.

ORDER

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

25.1 The application is dismissed with costs.

25.2 The costs shall be on the scale as between attorney and client.

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT	MS N ADAM
INSTRUCTED BY	DUDUZILE HLEBELA INC
COUNSEL FOR THE RESPONDENT	D M MADIBA
INSTRUCTED BY	MOTANYA MADIBA ATTORNEYS
DATE OF HEARING	23 MAY 2016
DATE OF JUDGMENT	28 JULY 2016