

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: 95119/2015

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
DATE	2019/07/25
SIGNATURE	

In the matter between:

The Road Accident Fund

Appellant

And

Christoffel Gerhardus Krog Botha  
Respondent

In re the action between:

Christoffel Gerhardus Krog Botha

Plaintiff

And

The Road Accident Fund

Defendant

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JUDGMENT

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Maumela J.

1. This matter came before court in the opposed motion roll. The Applicant is the Road Accident Fund. In the main matter, the applicant is the defendant.
2. The applicant applies for an order rescinding a judgment by default, granted by this court on the 7<sup>th</sup> Of March 2016.

#### BACKGROUND.

3. This matter arose out of a motor vehicle collision which took place on the 18<sup>th</sup> of December 2012. Action was instituted, based upon the statutory obligation of the Applicant to compensate persons injured in road accidents. The Applicant's application is based on the following:
  - 3.1. That the Applicant was served with a summons, however due to an oversight in the office of its attorneys of record, the summons was not dealt with, and
  - 3.2. While the Applicant was served with an application for Default judgment, the said service was not effected in the correct manner.
4. In the case of *Gumede v Road Accident Fund*, the court stated that in applications for rescission, the court can exercise its discretion, taking into consideration the merits of the matter as a whole<sup>1</sup>.
5. The court has to determine whether good cause was shown for rescission to be ordered. Rule 42 of the Rules of the High Court provides as follows:
  - (1) *The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary;*
    - (a) *An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
    - (b) *An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or*

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<sup>1</sup>. 2007 (6) SA 304, at page 307-E.



omission;

- (c) An order or judgment granted as the result of a mistake common to the parties.
- (2) Any party desiring any relief under this rule shall make application thereof upon notice to all parties whose interests may be affected by any variation sought.
- (3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

6. Rule 31 provides the following:

- (1) (a) Save in actions for relief in terms of the Divorce Act, 1979 (Act 70 of 1979), or nullity of marriage, a defendant may at any time confess in whole or in part the claim contained in the summons.
- (b) Such confession shall be signed by the defendant personally and his signature shall either be witnessed by an attorney acting for him, not being the attorney acting for the plaintiff, or be verified by affidavit.
- (c) Such confession shall then be furnished to the plaintiff, whereupon the plaintiff may apply in writing through the registrar to the judge for judgment according to such confession.
- (2) (a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in a plea, the plaintiff may set the action down as provided default of delivery of notice of intention to defend or of in sub rule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet.
- (b) A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such as to it seems meet.
- (3) Where a plaintiff has been barred from delivering a declaration the defendant may set the action down as provided in sub rule (4) and apply for absolution from the instance or, after adducing evidence, for judgment, the court may make such order thereon as to it seems meet.
- (4) The proceedings referred to in sub rules (2) and (3) shall be set down for hearing upon not less than three days' notice to the party in default: Provided that no notice of set down need be given to any party in default



*of delivery of notice of intention to defend.*

*(5) (a) Whenever a plaintiff is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment.*

*(b) The registrar may-*

*(i) grant judgment as requested;*

*(ii) grant judgment for part of the claim only or on amended terms;*

*(iii) refuse judgment wholly or in part;*

*(vi) postpone the application for judgment on such terms as he or she may consider just;*

*(v) request or receive oral or written submissions;*

*(vi) require that the matter be set down for hearing in open court.*

*Provided that if the application is for an order declaring residential property specially executable, the registrar must refer such application to the court.*

*(c) The registrar shall record any judgment or direction given by him or her.*

*(d) Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after such party has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court.*

*(e) The registrar shall grant judgment for costs in an amount of R200 plus the sheriff's fees if the value of the claim as stated in the summons, apart from any consent to jurisdiction, is within the jurisdiction of the magistrate's court and, in other cases, unless the application for default judgment requires costs to be taxed or the registrar requires a decision on costs from the court, R650 plus the sheriff's fees.*

7. The object of rescinding a judgment is to restore a chance for the party applying for it to air a real dispute. It is trite that an applicant seeking an order for rescission has to show good cause for the default in launching a defence. See *Colyn v Tiger*

Food Industries Ltd. t/a Meadow Feed Mills (Cape)<sup>2</sup>, where the court stated the following: "*In order to succeed and applicant for the rescission of judgment taken against him by default must show good cause.*"

8. In terms of Rule 31(2) (b) an applicant who seeks rescission has to show 'good cause'. In order to prove 'good cause', the applicant has to comply with the following:
  - (a). There should be a reasonable explanation for the Applicant's default to defend the action.
  - (b). The application should be *bona fide* and should not merely serve as a delaying tactic.
  - (c). The applicant should set out the *bona fide* defence. He or she should make out a *prima facie* defence by way of setting out an averment which is established at the trial, would entitle him or her the relief asked for. In that regard the applicant is not required to deal fully with the merits of the case and to produce evidence to prove that the probabilities are in his favour. (see Erasmus: Superior Court Practice at page D1 – 366). It is sufficient if the Applicant shows the existence of an issue which is fit for trial. (See Grant v Pumbers (Pty) Ltd<sup>3</sup>).
9. The Applicant makes the point that there has not been gross negligence on his part. He states that there was no willful default on his part because it was not shown that:
  1. It had knowledge that the action is being brought against it.
  2. It deliberately refrained from entering appearance though it was free to do so and.
  3. It harbored a particular mental attitude towards the consequences of the default.
10. It is a requirement that all of the three elements be established before the applicant can be said to have been in willful default. In this case the applicant provided a detailed account of how it

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<sup>2</sup>. 2003 (6) SA 1 (SCA), at page 11.

<sup>3</sup>. 1049 (2) SA 470 (O), at page 476.



came about that it remained obvious of the fact that the matter is to serve before court on the 7<sup>th</sup> of March 2016, which is the day on which default judgment was granted to the respondent.

11. The Applicant argues that taking into consideration the manner in which the accident took place, there are reasonable prospects for liability to be apportioned or that the respondent be found to have been liable for the collision. The applicant also contends that the application for default judgment was not served in compliance with Rule 4. Rule 4 prescribes the manner in which process of the court is to be served by the Sheriff. To that end, the rule provides that the process should be served on the defendant.
12. In terms of Rule 4 (i) (v); in the case of a corporation or company, service should be by way of delivering a copy to a responsible employee at its registered office or its principal place of business within the court's jurisdiction, or if there be no such employee willing to accept service; by affixing a copy to the main door of such office or place of business, or in any manner provided by the law. The Applicant points out that Rule 4 (i) (d) of the Uniform Rules was not complied with.
13. The court finds that the applicant demonstrated that it was not aware that an application for default judgment is impending against it on the day the Respondent obtained default judgment against it.
14. In the result, the application for rescission stands to be granted and the following order is made:

ORDER.

1. The order granted by Justice Collis on the 7<sup>th</sup> of March 2016 under case number 95119/2015 is rescinded.
2. The applicant's application for condonation for failure to

timeously defend the main application is granted.

3. The Applicants are ordered to pay all wasted costs occasioned by such rescission, including the costs of this application.

A handwritten signature in black ink, appearing to read 'T.A. Maumela', written over a horizontal line.

T.A. Maumela.

Judge of the High Court of South Africa.