

SOUTH AFRICA / JUDGMENT

Road Accident Fund v Hammann-Moosa Inc (32624/22) [2024] ZAGPPHC 1288 (27 November 2024)

[2024] ZAGPPHC 1288

COURT

North Gauteng High Court, Pretoria

BEFORE

H Kooverjie

CASE / FILE NUMBER

32624/22

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: 32624/22

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES / NO

(3)

REVISED

DATE:

27 November 2024

SIGNATURE

In the matter of:-

ROAD

ACCIDENT

FUND

Applicant

VS

HAMMANN-MOOSA

INC

Respondent

Heard

on: 20 November 2024

Delivered: 27 November 2024 – This judgment was handed down electronically by circulation to the parties’ representatives by email, by being uploaded to the Caselines system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 17:00 on 27 November 2024.

ORDER

It is ordered:-

1.
The order of the court (default judgment order), under case number 32624/2022 granted on 17 August 2022, is hereby set aside.
2.
The respondent is ordered to pay the costs in this matter.

JUDGMENT

KOOVERJIE J

RESCISSION APPLICATION

- [1] This is a rescission application in respect of the default judgment granted in favour of the respondent on 5 October 2023. The applicant has premised the rescission application in terms of Rule 41(2)(a), alternatively in terms of the common law. For the purposes of this judgment, the applicant will also be referred to as the “RAF”.
- [2] The respondent not only opposed the rescission application but contended that the delay in instituting the application was unreasonable. Hence the first hurdle for the applicant to pass, is to convince this court that the delay was reasonable.

DEFAULT JUDGMENT ORDER

- [3] The respondent succeeded in obtaining the default judgment order against the RAF in an amount of:
- 3.1 R435,320.00 in respect of counsels’ fees (not paid);
 - 3.2 R6,242,305.92 in respect of counsels’ fees that was submitted to the respondent which became due, owing and payable; and
 - 3.3 R8,635,230.86 in respect of medical expert fees, together with interest and costs.

ISSUES

FOR DETERMINATION

- [4] The crisp issues for determination are the following:
- 4.1 whether the delay was reasonable;

4.2 whether Rule 42(1)(a) finds application on the facts;

4.3 if not, whether the applicant has made out a case in terms of the common law;

4.4 whether the striking out notice filed by the respondent has merit.

[5] From the outset, I reiterate that this application must be adjudicated in the context of a rescission for default judgment.

THE

BACKGROUND

[6] The common cause background facts are as follows:

6.1 the respondent was a former panel attorney appointed by the RAF in terms of a Service Level Agreement (“the SLA”) during 2014, for a period of 5 years and thereafter the agreement was extended until 31 May 2020 by virtue of an addendum;

6.2 upon the expiry of the SLA the respondent returned its files to the RAF. On 3 November 2021[1] the RAF’s Acting Chief Operations Manager, Ms Rambauli transmitted a letter to the respondent stating that the RAF will make payment of expenses incurred by the respondent despite non-compliance with the SLA. The respondent’s signature on the undertaking was required in order to trigger the payment process;

6.3 on the same day, at approximately 11h13, the undertaking was signed by the respondent’s managing director and transmitted back to the RAF’s acting chief operations officer;

6.4 later, on the same day, the RAF delivered a further letter advising that it retracts its letter of earlier that day;

6.5 the respondent persisted with the undertaking by the RAF to pay the outstanding service providers’ accounts;

6.6 on 15 July 2022 the default judgment application was served by the sheriff at the RAF’s offices on an official of the RAF;

6.7 also on 15 July 2022, the notice set down indicating that the matter is to be heard on 10 August 2022 was served on the RAF simultaneously with the main application by the sheriff;

6.8 on 10 August 2022, on the hearing date, the respondent’s offices was contacted telephonically by Ms Tsela of the RAF. She requested a copy of the main application which was forwarded to her just after 11h00 on the same morning. The court granted a default judgment against the RAF and in the absence of the RAF. Such default judgment order was later served on the RAF on 21 September 2022.

WAS THE DELAY REASONABLE

- [7] It was argued that the RAF was required to give an explanation for failing to institute its rescission application upon the default judgment order being served at its offices, being 21 September 2022.
- [8] I deem it necessary in these circumstances, to have regard to what transpired between the parties, more specifically from date of service of the default judgment order, being 21 September 2022, to 5 October 2023, when the rescission application was instituted.
- [9] The RAF held the view that its rescission application was instituted within a reasonable time. The RAF alleged that from the time that they received the default judgment order up until the application for the warrant of execution was served, the parties were involved in “negotiations”.
- [10] Counsel for the RAF was asked to define the concept “negotiations”. It was explained that both parties made room for the verification process of the claims to get underway. In this time, the respondent had engaged with the various RAF offices that dealt with its claims.
- [11] I had taken the time to independently peruse the correspondence, particularly the correspondence after the default judgment order was served. It cannot be disputed that since October 2022, the respondent furnished its invoices together with supporting information as requested by the various RAF branches. In particular:

11.1 Ms Strydom, from the respondent’s office, in an email dated 19 October 2022, noted that the RAF had requested the respondent not to proceed with the warrant of execution against the RAF. Ms Strydom particularly expressed her frustration in having to furnish supplementary documentation which was requested by various offices of the RAF. This included medical expert invoices as well as advocates’ invoices together with the supplementary documentation. She nevertheless obliged to do so;

11.2 on 28 October 2022, the RAF requested that the execution of the court order be pended whilst the parties attempt to resolve the payment issue. The RAF also reminded the respondent that there are internal processes in place, hence the need for supporting documentation, before payments could be made. It further expressed that the court, when granting the default judgment order, failed to appreciate the said processes; 11.3 on the same day, on 28 October 2022, Ms Strydom responded by stating:

“In an attempt to streamline the payment process we will furnish you with as much of the relevant documentation that might be at our disposal, however, this is to be done without prejudice of rights, as payment is already due in terms of the court order. Should we not be able to furnish you with such documentation we will solely rely on the court order to obtain payment”;

11.4 on 7 November 2022, Ms Strydom again informs that the respondent would continue to furnish documentation in their possession, even though it was not obliged to do so. It was also only then that Ms Strydom advised that the respondent would proceed to issue the warrant of execution should the RAF not make payment of all the invoices furnished to the various offices of the RAF;

11.5 on 10 January 2023 the RAF sent an email to the respondent advising:

“Before we can proceed with application for rescission, we are of the view that this matter can be resolved amicably without incurring further litigation expenses. Kindly provide us with the outstanding invoices and the RAF authorization and the supporting documents so that we can forward same to our clients so that payment can be attended to.

We further attach for your perusal a spreadsheet of all matters not having RAF authorization and the ones where invoices are outstanding”;

11.6 in response, on the same day, the respondent indicated that it would oppose the rescission application;

11.7 on 11 January 2023, Ms Strydom nevertheless advised that the invoices would be furnished;

11.8 on 25 January 2023, the RAF provided a progress report on payments which were authorised and paid thus far;

11.9 on 31 January 2023, the respondent reminded the RAF that all invoices together with the supporting documentation had been furnished and demanded that payment be made;

11.10 two months later, on 24 April 2023, Ms Strydom, not satisfied with the delay in receiving payment, informed the RAF that the respondent would proceed to execute the warrant of execution. The writ of execution was issued on 1 August 2023;

11.11 shortly thereafter the RAF brought an application to stay the execution process;

11.12 on 5 October 2023, the rescission application was instituted.

[12] From the aforesaid conduct of both parties, it cannot be gainsaid that despite the default judgment order being granted, both parties proceeded to engage in resolving the payment issue. The respondent, despite expressing its frustration in having to continually furnish invoices as well as supporting documents, still engaged in furnishing the RAF with same.

[13] Although the respondent indicated on several occasions that the default judgment order was extant, it had not proceeded to execute the default judgment order during this period. It was evident from both parties’ conduct, that they attempted to resolve the payment issue. The RAF verified the claims upon receipt of the documents from the respondent’s offices. I therefore find that the delay in instituting the rescission application was not unreasonable and that it did not prejudice the respondent.

[14] It is settled law that this court has a discretion which is to be exercised judicially upon the consideration of all the facts and that it is a matter of fairness to both parties. Various factors, including the degree of lateness as well as the prospects of success, should all be considered cumulatively.[2]

RULE 42(1)(a) RESCISSION

[15] Rule 42(1)(a) reads:

“The court may, in addition to any other powers it may have, mero motu 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 ...”

[16] The RAF contended that since the default judgment was erroneously granted on the basis that there existed at the time, facts which the judge was unaware of, hence its remedy fell within Rule 42(1)(a). It submitted that had the court been aware of certain material facts, it would not have granted the default judgment.

[17] In summary, it was advanced that the court was not made aware of certain material facts, namely:

17.1 the court lacked jurisdiction to grant an order. The parties were bound to alternative dispute resolution processes as set out in the SLA. In other words, the dispute had to be referred to mediation, negotiation and/or arbitration;

17.2 clauses 17 and 19 of the Service Level Agreement (“SLA”) bound the parties to a process whereby claims would be verified and paid. The said provisions stipulated that the RAF’s written authorisation prior to the appointment of experts and briefing of counsel, was necessary;

17.3 the 3 November 2021 letter could never have constituted a waiver of the provisions of the SLA alternatively a new agreement between the parties;

17.4 the signatory to the 3 November 2021 letter was not authorized to make the undertaking;[3]

17.5 such letter did not absolve the respondent of its obligations in terms of the SLA, nor did the letter create liability or acknowledge a debt between the applicant and the respondent in respect of the fees levied by the experts and advocates.

[18] The respondent correctly contended that a rescission under Rule 42(1)(a) only finds application on aspects of procedure, not matters of substance. The defences which the RAF relied upon, in my view, pertain to the matters of substance.

[19] The Supreme Court in *Lodhi*[4] had succinctly set out under what circumstances Rule 42(1)(a) finds application. It is authority for the proposition, in law, that:

19.1 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. In other words, a judgment granted against a party in its absence cannot be considered to have been granted erroneously because of the existence of defence on the merits which had not been disclosed to judge who granted the judgment;

19.2 it was emphasized that the court that granted the judgment by default does not grant judgment on the basis that the defendant does not have a defence. It grants the default judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant had not given notice of its intention to defend and does not defend the matter. In such circumstances, the plaintiff is, in terms of the Rules, entitled to the order sought.[5]

These salient principles have been cited with approval by the Constitutional Court, in the matter of Zuma.[6]

[20] In casu, the default judgment application was served in terms of the rules on the RAF, the notice of set down for the hearing of the application was served on 10 August 2022 on the RAF. Hence by applying Lodhi, the respondent was procedurally entitled to the default judgment order in terms of the Rules.

[21] Consequently the RAF's reliance on Rule 42(1)(a), in my view, is misconceived. The grounds relied upon deals with substantial matter and not procedural aspects. The only available recourse the RAF has is in terms of the common law.

[22] The RAF's reliance on Rossitter[7] is further distinguishable. In such matter, the Registrar granted default judgment without ensuring that proper notice was

effected. The Supreme Court of Appeal held that since there was no non-compliance with Rule 31(5)(a) and the provisions of the Practice Manual of the KZN Division of the High Court, the rescission fell within the purview of Rule 42(1)(a).

RESCISSION IN COMMON LAW

[23] The RAF is then left with its recourse in terms of the common law. For the applicant to be successful, in common law, it has to show "good cause". This entails that the applicant has to, firstly, furnish a reasonable and satisfactory explanation for its default and, secondly, it must show that on the merits it has a bona fide defence which prima facie carries some prospects of success.

[24] "Good cause" includes an explanation for the applicant's default, and in this regard the applicant was required to furnish a sufficient explanation to enable the court to understand how it really came about that it defaulted and then to assess the applicant's conduct.[8]

- [25] Generally, for a party to be in willful default, the following elements should be present, namely that the party is aware of the action brought; it deliberately refrains from entering appearance; and such party adopts a certain mental attitude towards consequences of the default.[9]
- [26] The overarching test when enquiring if a party is in willful default is when a party's conduct and intention is deliberate and is indifferent to what the consequences of the default may be. [10]
- [27] In this case it was illustrated that the notice of set down and the application was served on the RAF by the sheriff. Ms Kgaditse, the legal administrator received the documents on 15 May 2022.
- [28] Our courts have often experienced circumstances where the RAF fail to be present in court when their matters are heard. More often than not, the RAF simply fail to engage in litigation, which resulted in default judgments being granted against them.
- [29] However the circumstances of this matter are somewhat unique. The RAF, through Ms Tsela, came out of the woodworks, on the day of the hearing, and requested a copy of the application.
- [30] The evidence before me is that on 10 August 2022 Ms Tsela contacted the respondent's offices for a copy of the default judgment application. When the application was emailed just after 11h00, the set down date on the application was not recorded. Ms Tsela confirms that the application was emailed to her by the respondent's representative did not contain a date for hearing the application. The respondent does not dispute this fact.
- [31] The respondent however argued that the application and set down was served on the RAF in terms of the Rules of Court. The RAF was advised of the date of the hearing.
- [32] In exercising my discretion, I am required to determine if the RAF acted in willful default. The proposition in law is that there must be deliberate conduct and mindset on the part of the RAF for not attending court. Through Ms Tsela's conduct, I cannot make such a finding.
- [33] Her conduct was also not one where the RAF deliberately absented itself from the hearing. The facts herein are distinguishable from the Zuma scenario where Mr Zuma elected to absent himself. The court in Zuma held that the decision taken not to participate does not constitute absence.[11]
- [34] Even if it is argued that the version of the RAF constitutes a weak explanation, I am ultimately required to weigh the circumstances of the default against the RAF's defences raised on the merits. It is settled law that where the applicant has provided a poor explanation for default it will succeed if it has a good defence. In this instance, the applicant has to furnish sufficient information to satisfy the court that he has a good defence.[12]

NOTICE TO STRIKE OUT

- [35] At this juncture, I find it convenient to firstly consider the respondent's notice to strike out. In its "notice to strike out" it took objection to the belated defence raised by the RAF. In such notice the respondent took objection to the defence raised by the RAF, namely that Ms Rambauli, the alleged author of the 3 November 2021 "undertaking", lacked the authority to make the concession in dispute.
- [36] The RAF, firstly, raised a procedural point, namely that it could not properly deal with the contention as the notice filed was insufficient for the RAF to respond to the objection. The notice should have been supported with an affidavit. Secondly, the defence raised did not constitute new matter.
- [37] In respect of the latter defence, the RAF pointed out that the defence raised was in reply to the respondent's version that a new agreement came into being. The RAF illustrated that a "new agreement" between the parties could only exist if the RAF was represented by a duly authorized official. It was pointed out that the Chairman of the Road Accident Fund Board, upon being duly authorized by virtue of the Delegation of Authority Framework, entered into the SLA with the respondent.
- [38] The respondent's contention was that the belated "new" defence prejudiced the respondent. It did not have an opportunity to reply thereto. I am mindful that the underlying reason is for the applicant to make its case out on the founding papers is in order to give the other party an opportunity to respond. In this way the other party would not be prejudiced.
- [39] In these circumstances, I have noted that the application to strike was instituted in March 2024. The respondent could have responded to the new matter and raised contentions by way of an answering affidavit. In that way the respondent would not have been prejudiced.
- [40] The fact that the SLA was concluded with an official of the RAF, being the Chairman of the Road Accident Fund Board, who purportedly had the authority to do so, is noted. The RAF has raised a defence which, in my view, is substantive.
- [41] Even if I were to find that the defence did constitute new matter, our courts have adopted a flexible approach in instances where there is no prejudice to the other party. In *Smith v Kwanonqubela Town Council*[13], the court held that the rule against new matter is not absolute and should be applied with a fair measure of common sense.
- [42] In any event, whether or not this defence has merit, must be considered when the issues are ventilated together with the other defences raised by the RAF. At this stage of the proceedings, the RAF has to show that it has raised substantive

issues.

BONA FIDE DEFENCE

- [43] The leading authority on whether a bona fide defence exist, is Silber v Ozen Wholesalers (Pty) Ltd.[14] The court therein held that good cause includes but is not limited to the existence of a substantial defence. It has been held that the requirement of good cause cannot be satisfied unless there is evidence of not only the existence of a substantial defence but the bona fide on the part of the applicant to raise the defence concerned. The RAF has to show that it honestly intends to place before the court a set of facts, which if true, will constitute a defence.[15]
- [44] As alluded to above, the application should be considered in the context of a rescission application. Hence at this stage of the proceedings, the RAF is required to show the existence of a substantial defence. It need not demonstrate its probability of success. It merely needs to show a prima facie case or the existence of an issue which is fit for trial.[16]
- [45] The applicant need not deal fully with the merits of the case but the grounds of defence must be set forth with sufficient detail to enable the court to conclude that there is a bona fide defence and that the application is not made merely for the purposes of harassing the respondent. The existence of a bona fide defence presupposes that triable issues exists wanting of consideration at the trial. Ultimately the object of rescinding a judgment is to restore a chance to air the real dispute.
- [46] The genesis of the dispute between the parties was the 3 November 2021 “undertaking”. I deem it necessary to reiterate the wording of the said letter:
- “(1) In terms of Clause 16, 17 and 19 of Annexure ‘B’ of the attorney’s Service Level Agreement (SLA) the erstwhile panel of attorney (Firm) were required to obtain prior authorization from the RAF before instructing assessors, advocates and experts. The SLA further provided that if authorization is not obtained for instructions, the Fund will not be liable for any of the fees and disbursements charged.*
- (2) It has been established that your Firm has failed to comply with the above requirements when instructing same Assessors, Advocates and Experts.
 - (3) The ‘RAF’ has assessed the non-compliance and the effect it will have on these experts. The assessment extended to the legitimacy of the services rendered and the benefit to the Fund and the claimants.
 - (4) The Fund has decided to make payment for invoices “where prior authorization was not obtained by your Firm to ensure that the experts are not prejudiced by the non-compliance.
 - (5) To ensure that the experts receive payment for their invoices consequent to the RAF paying the said moneys into your Firm’s account, your Firm through the Managing Partner/Director is required to sign an undertaking that payment will be made to the experts’ account within 10 days of the Fund effecting payment to the Firm.
 - (6) The undertaking, attached to this letter, should be signed and returned to the RAF, to trigger the payment process.”

[47] The respondent immediately signed “the undertaking” and emailed it to the RAF on the same day. It is the respondent’s case that:

47.1 by signing the undertaking an agreement came to light between the parties, which is incapable of unilateral retraction or termination by the RAF;

47.2 the respondent held the RAF liable to the undertaking, namely that fees of the experts and advocates would be paid where authorization from the Fund to appoint them had not been obtained;

47.3 since the RAF did not make payments as demanded, it was justified in instituting the default judgment application.

[48] I pause to mention that in considering this matter, I will confine myself to the allegations set out in the pleadings.

[49] The RAF contended that there are good prospects of success on the merits since the court that heard the default judgment application was not placed with certain material facts. If same were disclosed, it would not have entertained the application, namely:

49.1 the parties were bound to the SLA, which made provision for the disputes between them to be resolved through alternative dispute resolution processes (ADR);

49.2 clauses 17 and 19 of the SLA made provision for the respondent to obtain written authorization from the RAF for the appointment of the experts and advocates. Failing such approval, the RAF was not obliged to make payment;

49.3 there was no purported amendment to the SLA, more notably, the non-variation clause prevented the SLA terms to be amended or waived.

I will extrapolate on each of these defences below.

ALTERNATIVE DISPUTE RESOLUTION CONTENTION

[50] The RAF argued that in terms of Clauses 20 and 21, all disputes concerning or arising out of the SLA comes into existence once a party notifies the other party in writing of the dispute and submits that the dispute be resolved in terms of negotiation, or mediation and/or arbitration. It was argued that if the court was aware that the parties had agreed to ventilate their disputes through alternative dispute resolution processes, it would not have entertained the matter.

[51] The respondent in opposition relied on the proposition, in law, namely that the existence of ADR processes in an agreement does not ouster the court’s jurisdiction.[17] The respondent further contended that if this was the case then why had the RAF not directed the prescribed manner whereby the disputes could be resolved.

[52] On my understanding, the Surpeme Court in Foize[18] determined that there is no hard and fast rule for courts to exclude ADR processes. It appreciated that the issue on jurisdiction

has to be ventilated in the court hearing the matter. The court emphasized that parties to a contract cannot exclude the jurisdiction of a court by their own agreement. A party that wishes to invoke the protection of a foreign jurisdiction or arbitration clause, should ventilate same. Ultimately the court is required to exercise its discretion as to whether the clause can be enforced. It is required to have regard to the relevant facts and circumstances of each matter. In this case, it is evident that the court did not have an opportunity to consider the jurisdiction point. This constitutes a substantive defence which is deserving of a hearing.

AUTHORIZATION FROM THE RAF BEFORE THE APPOINTMENT OF EXPERTS AND COUNSEL

[53] The RAF persisted in its argument that both parties were, at all relevant times, bound to the terms of the SLA. By virtue of the provisions of the SLA, the RAF could not be held accountable for the counsels' or experts' fees, unless their appointments were authorized, more specifically in terms of clauses 17 and 19 of the SLA.[19]

[54] Clause 17 of the SLA stipulates:

"17. INSTRUCTINS TO EXPERT WITNESSES

17.1 The Firm will obtain instructions in advance from the Fund to instruct expert witnesses or obtain follow-up reports from expert witnesses and no expert witness shall be engaged without the prior written authorisation of the Fund.

17.2 The Fund will select the expert/s to be engaged. Such selection may, at the sole discretion of the Fund, be made in consultation with the Firm.

17.3 In the event of paragraphs 17.1 and 17.2 not being complied with when an expert witness is instructed, the Fund will not be liable for any the fees charged by such expert witness.

17.4 Where applicable, expert witnesses must be instructed within 3 (three) months of the Firm being instructed in terms of paragraph 9 of the Service Level Agreement.

17.5 Expert reports obtained on behalf of the Fund must be received by he Firm no later than 2 (two) months before the date of trial, except in circumstances where an amendment to the claim requires additional experts to be instructed, and such amendment is received less than 2 (two) months before the date of trial."

[55] Clause 19 of the SLA stipulates:

"19. BRIEFING OF COUNSEL

19.1 The Firm will obtain instructions from the Fund to brief counsel. Written instructions to be brief counsel must be sought from the Fund at least 15 (fifteen) days before the trial date or the date an application is set down for hearing.

19.2 Counsel will be briefed in accordance with the tariff set out in Annexure D. Any deviation from the tariff must be requested in writing and approved in advance by the COO.

19.3 When briefing counsel the Firm will have to give preference to historically disadvantaged individuals.

19.4 Should the Fund fail to instruct the Firm within 5 (five) days of the written request by the Firm to instruct counsel in terms of 19.1 above, the Firm may proceed to instruct counsel, and shall notify the Fund within 2 (two) days of the name of the counsel instructed.

19.5 In the event of paragraphs 19.1 not being complied with when counsel is briefed, the Fund will not be liable for any of the fees charged by such counsel.

19.6 Counsel will not be instructed in the Magistrates' Court, unless the written consent of the Regional General Manager is obtained.

19.7 When counsel is instructed on trial, the Firm shall not, without the prior written approval of the Fund, brief counsel to provide written opinions on any aspect of the claim, including but not limited to opinions on liability and/or quantum or to draft or settle any notices, applications and/or pleadings.

19.8 The written consent referred to in paragraph 19.7 above, must be obtained from the Regional General Manager of the region where the claim is managed."

[56] The RAF argued that if the court was made aware of these provisions, it would have sought confirmation from the respondent as to whether the experts' and counsels' appointments were authorised.

THE AMENDMENT TO THE SERVICE LEVEL AGREEMENT / NEW AGREEMENT

[57] It was evident that the respondent proceeded to obtain default judgment in terms of the 3 November 2021 undertaking.

[58] The respondent contends, by virtue of the "undertaking", that a "new agreement" came into being. On the respondent's interpretation, it was argued that the RAF waived the authorization requirement in respect of not only experts, but counsel as well. Moreover, in law, the RAF could not retract the waiver.

[59] The RAF concluded the following:

59.1 firstly, no such amendment could ever come into effect, unless both parties agreed thereto and in writing. Clause 26 stipulates that the SLA constitutes the whole agreement between the parties. No amendment, edition, variation, any extension, waiver, relaxation or suspension of any provisions or terms of the SLA shall have any force or effect unless there has been reduced to writing or signed by both parties;

59.2 secondly, the undertaking was contrary to the provisions of the SLA, which stipulated that authorization had to be obtained from the RAF in order to validate the payment;

59.3 thirdly, on the RAF's interpretation, the "undertaking" related only to the fees of experts, thereby excluding counsels' fees.

[60] I reiterate that at this stage of the proceedings, the RAF is merely required to set out in sufficient detail grounds to show that it has a bona fide defence. In my view, the RAF has raised a substantive defence on the said issue. A determination must be made as to whether in fact an agreement came into being, alternatively whether the terms of the SLA were amended. It is evident that the parties have differing interpretations of the wording in the “undertaking” as well as the status of the undertaking.

[61] I had further taken the time to peruse the founding papers in respect of the default judgment application. I have noted that the court had been informed that the undertaking was made in respect of counsels’ fees as well. A further factor noted was that the respondent, on its own version was, at that stage, unable to determine which experts’ or counsels’ appointments were authorized by the Fund. I reiterate Clause 26(2) which stipulates that:

“Representations not contained in the SLA shall not be binding on the parties and shall be without force or effect. Any provision at variance with the terms and conditions of the SLA shall not be binding on the parties and shall be without force or effect.”

[62] I find that substantive triable defences have indeed been raised and which are bona fide. A prima facie case exist which requires a ventilation of the disputes raised. At this stage, I am mindful that I am not required to deal with the merits of the matter, nor am I required to determine if there are good prospects of success.[20]

COSTS

[63] On the issue of costs, since the respondent opposed this application and the result is not in its favour, I am of the view, that it should be burdened with a costs order.

[64] In the premises, the rescission application is granted with costs.

H. KOOVERJIE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant: Adv. T Pillay Instructed by: Malatji & Co Attorneys Counsel for the second and third respondents: Adv. J Kilian Instructed by: Hammann-Moosa Attorneys C/o Hannes Smith Attorneys Date heard: 20 November 2024 Date of Judgment: 27 November 2024

[1] The letter is incorrectly dated 2 November 2021, it should be 3 November 2021

[2] National Union of Mine Workers v Council for Mineral Technology [1998] ZALAC at 211 paragraph 10 Melane v Sanlam Insurance Co Ltd 1962 (4) SA 531 (A)

[2] National Union of Mine Workers v Council for Mineral Technology [1998] ZALAC at 211 paragraph 10

Melane v Sanlam Insurance Co Ltd 1962 (4) SA 531 (A)

[3] this ground is dealt with in the striking out application

[4] Lodhi 2 Properties Investments CC and Another v Bondev Development (Pty) Ltd 2007 (6) SA 87 (SCA) (Lodhi)

[5] Paragraphs 17, 25 and 27 of Lodhi

[6] Zuma v Secretary of the Judicial Commission of an enquiry into allegations of state capture, corruption and fraud in the public

sector, including organs of state 2021 (11) BCLR 1283 CC at paragraph 63

[7] Rossitter v Nedbank Ltd 2015 ZASCA 196

[8] Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345A at 353A

[9] Nale Trading CC v Freyssinet Posten (Pty) Ltd in RE: Freyssinet Posten (Pty) Ltd v Nale Trading (Pty) Ltd unreported, GJ, case number 26992/2019 dated 22 September 2021 at paragraph 15

[10] Checkbuin v Barkett 1931 CPD 423

[11] Zuma supra at para 61

[12] Colyn v Tiger Food Industries t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at par 12: "... even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that count, unless, perhaps a weak explanation is cancelled out by the defendant being about to put up a bona fide defence which has not merely some prospects, but good prospect of success (Melane v Santam Insurance)

[12] Colyn v Tiger Food Industries t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at par 12:

"... even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that count, unless, perhaps a weak explanation is cancelled out by the defendant being about to put up a bona fide defence which has not merely some prospects, but good prospect of success (Melane v Santam Insurance)

[13] 1999

(4) SA 947 (SCA) at paragraph 15

[14] supra

[15] Saphula v Nedcor Bank Ltd 1999 (2) SA 76W at 79C-D

[16] Colyn v Tiger Foods Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at 9C-F para 11

[17] ...

[18] Foize supra at paragraphs 21 and 22

[19] Foize Africa (Pty) Ltd v Foize Beheer BV and Others 2013 (3) SA 91 (SCA) at para 21

[20] I find it apt to refer to RGS Properties v Ethekweni Municipality 2010 (6) SA 572 (KZD) at 575 G to 576G where the court remarked: “I may add to this principle that judgment by default is inherently contrary to the provision of Section 34 of the Constitution.

The Section provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court ... Therefore ... in weighing up facts for decision, the court must on the one hand balance the need of an individual who is entitled to have access to court, and to have his or her dispute resolved in a fair public hearing, against those facts which led to the default judgment being granted in the first instance. ... the court will no doubt be mindful, especially when assessing the requirements of reasonable cause being shown, that while the requirement incorporates, among others, showing the existence of a bona fide defence, the court is not seized with the duty to evaluate the merits of the defence. The fact that the court may be in doubt about the prospects of the defence ... it is not a good reason why the application should not be granted ...”

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Therefore ... in weighing up facts for decision, the court must on the one hand balance the need of an individual who is entitled to have access to court, and to have his or her dispute resolved in a fair public hearing, against those facts which led to the default judgment being granted in the first instance. ... the court will no doubt be mindful, especially when assessing the requirements of reasonable cause being shown, that while the requirement incorporates, among others, showing the existence of a bona fide defence, the court is not seized with the duty to evaluate the merits of the defence.

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