

SOUTH AFRICA / JUDGMENT

Road Accident Fund v Mbali (11727/2019) [2025] ZAGPPHC 247 (7 March 2025)

[2025] ZAGPPHC 247**COURT**

North Gauteng High Court, Pretoria

BEFORE

De Beer

CASE / FILE NUMBER

11727/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION,****PRETORIA****Case****number: 11727/2019****(1)****REPORTABLE: YES/NO****(2)****OF INTEREST TO OTHERS JUDGES: YES/NO****(3) REVISED****DATE: 7/3/2025****SIGNATURE****In**

the matter of:

THE
ROAD ACCIDENT
FUND
Applicant
and
MANDLA
JAMES MBALI
Respondent
In

re: MANDLA
JAMES
MBALI
Plaintiff
THE
ROAD ACCIDENT
FUND
Defendant

JUDGMENT

DE BEER AJ

Introduction

1. The applicant seeks an order to rescind or set aside the order and judgment granted on 20 September 2021 striking out the applicant's (defendant in the main action) defence and to reinstate its defence in the main action.
2. The application is opposed. The applicant's deponent, the Senior Claims Handler of the RAF deposed to a founding affidavit which was commissioned by the Commissioner of Oaths on 17 November 2021 (although the affidavit itself is dated 15 October 2021).[1] The order granted[2] is attached to the papers and the contents and import common cause.
3. This rescission application is premised on the provisions of Rule 31(2)(b), alternatively in terms of Rule 42(1)(a), alternatively based on the principles of the common law.
4. Particulars of the merits of the respondent's claim are detailed in the founding affidavit at paragraph 8.[3]
5. The applicant's case for rescission is detailed at paragraph 9 of the founding affidavit.[4] The applicant's deponent alleged that there is a dispute regarding liability of the applicant, that the respondent operated (or "was on the back of") a truck owned by GIO Construction & Plant Hire (Pty) Ltd was situated at the back of the truck. The respondent drove the truck.

After the truck came to a standstill, the respondent unloaded bags of cement. Due to a brake failure whilst the truck was in a stationary position, it ran downhill which caused the respondent to be injured (erroneously referred to as "the applicant was injured" in paragraph 9.1.5 of the founding affidavit).

6. Hereafter, the applicant's deponent concludes that the applicant was not negligent and did not contribute to the collision; based thereon, good cause exists to rescind the order previously granted and that a substantial defence exists.

7. In the heads of argument belatedly uploaded on behalf of the applicant (one day before this matter was allocated for hearing), the applicant submits that the rescission application which is brought under the auspices of Rule 42(1)(a) of the Uniform Rules should be granted and that that applicant should be allowed to cross-examine the respondent regarding the incident detailed above. As submitted, this will constitute a fair hearing at the behest of the applicant to be provided with the reasonable opportunity to state their case and resuscitate their right to have this dispute heard, as is their constitutional right in terms of section 34 of the Constitution.[5]
8. Rule 42 deals with the rescission of judgment erroneously granted, i.e., due to an irregularity in the proceedings or if the court was not legally competent to make such an order. Rule 42 does not cover orders ostensibly wrongly granted.[6]
9. During argument, applicant's legal representative conceded that the court (that granted the now order sought to be rescinded) did not perpetrate a procedural error, wherefore Rule 42 is not applicable.
10. As to whether there exists a reasonable explanation for the delay and whether the applicant has a bona fide defence, to therefore rescind the matter on the merits, it is trite in motion proceedings that a party is limited to the presentation of its case in what is stated in the founding affidavit. The gist of the applicant's case on the merits has been referred to above.
11. It is also established law that affidavits represent a dual purpose in litigation. The efficient conduct of litigation has as its object the judicial resolution of disputes optimising both expedition and economy. The conduct and finalisation of litigation in a speedy and cost-efficient manner is a collaborative effort. The role of witnesses is to testify to relevant facts of which they have personal knowledge. The role of legal representatives has two key aspects. The first is the supervision, organising, and presentation of evidence of the witnesses and the second is the formulation and presentation of argument in support of a litigant's case. The diligent observation of those roles facilitates the role of the judicial officer, which is to arrive at a reasonable determination of the issues in dispute in favour of one or other of the parties. Where practitioners neglect their roles, it leads to the protracted conduct of the litigation in an ill-disciplined manner, the introduction of inadmissible evidence and the confusion of fact and argument, with the attendant increase in cost and delay in its finalisation, inimical to both expedition and economy.
12. In motion proceedings, affidavits serve a dual function of both pleadings and evidence.[7]
13. As aptly stated in the Venmop decision by Goldstein J, in a judgment of the Full Court, it summarised the principle as thus: "In application proceedings the affidavits serve two purposes: First date of the pleadings, i.e., delineating the facta probanda or essential averments necessary to find a cause of action or defence, and, secondly, to supply the facta probantia or evidence to support a finding of the correctness of the facta probanda."

14. Having considered the conspective of the common cause facts and the evidence before court in this matter, the applicant's version does not rise to admissible evidence in order to adjudicate whether a bona fide defence exists.
15. The applicant's deponent does not have first-hand knowledge of the facts detailed and referred to above. The deponent, i.e., the claims handler does not have personal knowledge of the incident; in fact, the exact opposite. The allegations contained in the founding affidavit were not confirmed by the driver of the applicant's vehicle, alternatively any other witnesses.
16. No other witness confirmed any of the allegations contained in paragraph 9.1 of the founding affidavit (under the heading of the "APPLICANT'S CASE"). No details have been provided of any witness that will in future be able to corroborate the veracity of what has been stated therein.
17. Based on the authorities detailed above, no admissible evidence has been submitted in order to find in favour of the applicant.
18. As to the inordinate delay, it is trite and established law that the applicant must set up facts providing a reasonable explanation why the applicant failed to be present during 2021 when the order sought to be rescinded was granted. It seems as if certain internal

restructuring occurred pertaining to the legal representatives, previously the panel attorneys appointed by the applicant and the

later appointment of the State Attorney. A reasonable explanation of the entire period has not been provided, and the internal challenges of the applicant behove no argument if the same is applied to the relevant authorities. In the matter of *Van Wyk v Unitas Hospital and Another*,^[8] the Constitutional Court stated that: "An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay and, what is more, the explanation given must be reasonable."

19. Furthermore, in *Grootboom v National Prosecuting Authority*,^[9] the Constitutional Court emphasised the legal position of condonation. It held that: "It is axiomatic that condoning a party's non-compliance with the Rules of Court or directions is an indulgence. The Court seized with the matter as a discretion whether to grant condonation. It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to a court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the Rules or a court's directions. Of great significance, the explanation must be reasonable enough to excuse the default"

20. Although these authorities deal with condonation applications, it confirms the principle of a full explanation that must be provided should a party institute a rescission application in terms of Rule 31(2)(d). In order to satisfy the “good cause” requirement, the applicant must satisfactorily explain the “delay” in complying with the times set in the Rules or directives and would further have to satisfy the court that a “bona fide defence” exists.[10] As detailed above, the court cannot find that a bona fide defence exists on any admissible evidence.
21. Pertaining to a delay, the vehicle accident forming the subject matter herein occurred on 20 June 2017. The judgment sought to be rescinded was granted during 2021, and this matter was enrolled during the first week of March 2025. A day before the hearing, the applicant's heads were delivered, which constituted yet a further delay without any explanation.
22. In this regard, the dominus litis party i.e., the applicant should have filed its heads of argument 15 (fifteen) days after the filing of a replying affidavit. The applicant failed to file a replying affidavit, or failed to within the period allowed file the heads of argument. The court accepted the heads of argument to be filed. It's in the interest of justice to enable the applicant to address the court fully and receive all of its submissions.
23. Having said that, the applicant failed to provide this court with a reasonable explanation for the entire period of its default and did not convince this court that it has a bona fide defence which prima facie carries some prospects of success. This could have been achieved upon the instruction of investigators on behalf of the applicant, for instance, in order to ascertain and confirm the necessary details regarding the incident.
24. The explanation regarding the maladministration and instructions provided to previous attorneys does not suffice. A right to a fair hearing is a double-edged sword, the respondent's right to achieve finality in litigation will be negated if yet another further delay transpires should the rescission sought be granted.

Motion proceedings

25. The basic principle in motion proceedings is that the affidavits define the issues between the parties and the affidavits embody evidence. An applicant who seeks relief from a court must make out a case in its notice of motion and founding affidavit.[11]
26. In *Betlane v Shelly Court CC*, [12] the Constitutional Court stated that it is trite that an applicant ought to stand and fall by its notice of motion and the averments made in its founding affidavit.
27. In *National Council of Societies for the Prevention of Cruelty to Animals v Open Shore*, [13] the SCA referred with approval to *Shakot Investments (Pty) Ltd v Town Council of Borough of Stanger* [14] where Muller J said: “In proceedings by way of motion the party seeking relief ought in his founding affidavit to disclose such fact as would, if true, justified the relief sought ...”.

28. Because motion proceedings are concerned with the resolution of legal issues based on common cause facts, where there are disputes of fact in proceedings in which final relief is sought, those disputes are to be determined in accordance with the Plascon Evans rule.[15]
29. The accepted approach to deciding factual disputes in motion proceedings requires that subject to “robust” elimination of denials and “fictitious” disputes, the court must decide the matter on the facts stated by the respondent, together with those the applicant avers, and the respondent does not deny. On the accepted test for fact-finding in motion proceedings, where disputes of fact arise, it is the respondent’s version that will prevail.[16]
30. The applicant had to rely on evidence and testimony confirmed by a competent witness. It failed to provide the same. The founding affidavit constitutes inadmissible hearsay evidence.

Conclusion and Order

31. For the reasons detailed above, the applicant has not provided proof or a basis to rescind the order granted as sought.
32. As to costs, there is no reason why the court should deviate from the normal position as to costs, costs should follow the event.
33. In the foregoing, the following order is granted:
- 33.1. The application for rescission of judgment is dismissed with costs on Scale B in terms of Rule 67A.

DE BEER AJ

Acting Judge of the High Court

Gauteng Division

Date of hearing: 4 March 2025

Judgment

delivered/Uploaded: 7 March 2025 For the applicant: The State Attorney Pretoria Ref: Ms C Mothata/RAF2025/MBALI/MJ/Z31 Tel: 012-429-5000 For the respondent: Adv J van der Merwe Cell: 083-315-1407 Email: jana@gkchambers.co.za Instructed by: Nel van der Merwe Smalman Inc Tel: 012-807-1989 Ref: V vd Merwe/dg/WN4061

- [1] CaseLines page 12.3-13 and 12.3-15.
- [2] CaseLines page 12.3-64 attached marked to the answering affidavit as Annexure “OG” (no order has been attached to the founding affidavit, although so referred to).

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- [3] CaseLines page 12.3-10 to 12.3-11.
- [4] CaseLines page 12.3-12 to 12.3-13.
- [5] See applicant's heads at CaseLines 23-1 to 23-16.
- [6] *Seale v Van Rooyen NO; Provincial Government, Northwest Province v Van Rooyen NO* 2008 (4) SA 43 (SCA) at 52B-C.
- [7] *Radebe and Others v Eastern Transvaal Development Board* 1988
- (2) SA 785 (A) at 793 D – F; *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008
- (2) SA 184 (SCA) at 200 para 43, *ABSA Bank Ltd v Kernsig 17 (Pty) Ltd* 2011
- (4) SA 492 (SCA) at 498 – 499 para 23; *Foize Africa (Pty) Ltd v Foize Beheer BV and Others* 2013
- (3) SA 91 (SCA) at 103 para 30.
- [8] 2008 (4) BCLR 442 (CC).
- [9] 2014 (2) SA 68 (CC) at 75F-H, 76C-D and 78B-79C.
- [10] See Erasmus: Superior Court Practice RS20, 2022, D1-323 and the authorities cited therein.
- [11] *Molusi and Others v Voges N.O. and Others* 2016 (3) SA 370 (CC) at [27].
- [12] 2011
- (1) SA 388 (CC) at 2; see also *Brayton Carlswald (Pty) Ltd and Another v Brews* 2017 (5) SA 498 (SCA) at [29].
- [13]
- [2008] ZASCA 78; 2008 (5) SA 339 (SCA) at [29] to [30].
- [14] 1976
- (2) SA 701 (D) at 704F-G.
- [15] *National Director of Public Prosecutions v Zuma* 2009 (1) SA 277 (SCA) at [26].
- [16] *Plascon Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at p634E - 635J; *Fakie N.O. v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at [63] to [64]; *Snyders v De Jager and Others* 2017 (3) SA 545 (CC) at 565, [71].

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