REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

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

DATE 1-05-2025 SIGNATURE [redacted]

CASE NO. 625/2022

In the matter between:

ROAD ACCIDENT FUND **APPLICANT**

AND

MASHISHI, KAMOGELO ARNOLD **RESPONDENT**

Heard : 01st April 2025

Delivered : 07th May 2025 by circulation to the parties' legal representatives

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JUDGMENT

MASHAMBA AJ:

INTRODUCTION

[1] On the 04th June 2024, the Road Accident Fund, ("the Applicant or RAF") brought a rescission application in terms of rule 42(1)(a) of the Uniform Rules of Court[1] ("the Rules") against the judgement and order granted by his Lordship Justice Kganyago on the 17th July 2023. In brief, the RAF was found 100% liable to compensate the Respondent for his proven damages, RAF to pay the sum of R 8 552 552.00 to the Respondent for past and future loss of earnings and that RAF should issue an undertaking certificate (Limited to 100%) in terms of Section 17 (4)(a) of the Road Accident Fund Act[2] ("the Act")

[2] This application was brought after 11 (eleven) months after the abovementioned court order.

[3] Mashishi Kamogelo Arnold (''the Respondent") served and filed his notice of intention to oppose this application on the 12 June 2024. Subsequently, the Respondent served and filed his opposing affidavit to the Applicant.

[4] The matter was set down for hearing on the 01st April 2025, therefore, the judgment was reserved.

[1] Uniform Rules of Court of South Africa, as amended on the 01 July 2019 (the rules)
[2] the Road Accident Fund Act No 56 of 1996

BACKGROUND OF THE CASE

[5] The Respondent instituted a delictual claim against RAF, due to the accident that occurred on the 23rd November 2018. On the 29th July 2012, the Respondent lodged his claim against RAF. Subsequently, the summons was issued at the above honourable court on the 20th January 2022 and served to the Applicant by Sheriff.

[6] RAF did not serve and file his notice of intention to defend against the Respondent's claim. Therefore, RAF was in default. The notice of set down was served to the Applicant on the 29th May 2023. The Respondent proceeded to set down the matter for default hearing on the 17th July 2023. The judgment and order were granted against RAF.

[7] The Applicant issued an undertaking in terms of Section 17(4)(a) of the Act, as per the aforementioned court order. RAF refused to effect payment in accordance with the court order, therefore, the application for rescission of judgment was made.

LEGAL QUESTIONS

[8] The court is called to determine the following two (2) legal questions;

8.1 whether the Applicant has met all the legal requirements either in terms of rule 42 (1) (a) of the Rules, or at common law, for the rescission of the default judgment?

8.2 Whether the application for rescission was brought within reasonable time?

THE LAW

[9] In terms of rule 42(1)(a) of the Rules, states that;

"(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;"

[10] A party seeking rescission of judgment in terms of the common law, bears the onus to show good cause. This essentially entails prove of two requirements which are (1) reasonable and satisfactory explanation for its default and (2) that on the merits the party has a bona fide defence which carries some prospects or probability of success.

See: **Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) [56]**

[11] In the case **Zuma v Secretary of Judicial Commission of Injury into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others 2021 (11) BCLR 1263 (CC)** the court once again emphasized the onus that rests upon an applicant and the requirements he has to prove. The CC held: *"Requirements for rescission of a default judgment are twofold. First, applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospects of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in the refusal of the request to rescission."*

Absence or otherwise of the Applicant

[12] In the case of Zuma in supra the Constitutional Court had to decide and determine whether or not Mr. Zuma the applicant had met and satisfied the requirements for rescission of judgment either in terms of rule 42 (1) (a) of the Rules or the common law. The court summarized the legal position and correct approach as follows:

"It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that the court "may", not "must", rescind or vary its order – the rule is merely an "empowering section and does not compel the court" to set aside or rescind anything. This discretion must be exercised judicially."

[13] In Zuma (supra) the court drew a distinction between two litigants: In the first place, there is a litigant who was physically absent because he or she was not present in court on the day the judgment was granted. In the second place there is a litigant whose absence she or he chose or elected. Accepting this approach, the court held that on the facts, Mr. Zuma was given notice of the case against him and also, sufficient opportunity to participate in the matter by opposing same if he wanted to. He deliberately chose not to participate. The court therefore found that a litigant who elects not to participate in despite knowledge of legal proceedings against him or her is not absent within the meaning of rule 42 (1) (a) of the Rules, in other words, the court emphasized that the word "absence" in the rule,

"...exists to protect litigants whose presence was precluded, not those whose absence was elected."

Erroneously sought or granted orders.

[14] In order to satisfy this requirement, the Applicant has to show on a balance of probabilities that at the time the orders were granted, there were material facts that the court was unaware of, and that if the court had been privy to these facts, the court would not have granted the order. In other words, the Applicant has to show and demonstrate that there was a deliberate and intentional non-disclosure and or withholding of crucial and material facts and information from the court, which induced the court to grant the order. This simply means that the court must have been misled, into granting the order.

[15] In **Bakoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 446 (ECD)** the court explained the position as follows:

"An order or judgment is 'erroneously granted' when the court commits an 'error' in the sense of 'a mistake in a matter of law appearing on the proceedings of a Court of record'. It follows that in deciding whether a judgment was 'erroneously granted' is, like a Court of Appeal, confined to the record of proceedings." Para 47 F

[16] In Zuma (Supra) the Constitutional Court found that Mr. Zuma had the opportunity to present his case and raise the defences but he failed to do so, and trying to cue it by bringing his defence in his application for rescission. Therefore, his argument that the judgment or order was erroneously sought was rejected. The court held:

"Mr Zuma's bringing what essentially constitutes his "defence" to the contempt proceedings through a rescission application, when the horse has effectively bolted, is wholly misdirected. Mr Zuma had multiple opportunities to bring these arguments to this Court's attention. That

he opted not to, the effect being that the order was made in the absence of any defence, does not mean that this Court committed an error in granting the order. In addition, and even if Mr Zuma's defences could be relied upon in a rescission application (which, for the reasons given above, they cannot), to meet the "error" requirement, he would need to show that this Court would have reached a different decision, had it been furnished with one or more of these defences at the time". Para 64.

Undue delay

[17] In **Schmidlin v Multisound (Pty) Ltd 1991(2) SA 151 (C)** the court in dealing with the issue of undue delay held:

"Delay is however, relevant in this case, not per se, but because that judgment was being executed...Acquiescence in the execution of a judgement must surely in logic, normally bar success in an application to rescind on the same basis as acquiescence in the very granting of the judgment itself would."

"Applicant said in his... affidavit... that his application was brought in terms of Rule 42, which lays down no time limit within which rescission of judgment granted in error should be sought. There is therefore, nothing requiring or capable of condonation by this court. Page 155 para 1-J

[18] In **First National Bank of SA Ltd v Van Rensburg No and others 1994 (1) SA 677 (TPD)** the court confirmed that an application for rescission of judgment can simply be dismissed on the basis of undue delay only. This applies in cases where an applicant relies on both rule 42 (1) (a) of the Rules or the common law, Eloff JP held:

"Even if it can be said that the order granted by Coetzee J was erroneously sought or constitutes a patent error, the application should, in my view have been dismissed by reason of the long-time lapse."

THE APPLICANT'S SUBMISSIONS

[19] The Applicant made the following submissions;

19.1 that the Respondent's notice of set down was served to the Applicant via general email, despite the parties' lack of agreement to serve it electronically.

19.2 that the Respondent had to serve the notice of set down in terms of rule 29 (2)(b) of the Rules which states that; -

"The party which applied for the trial date must, within 10 days of notification from the registrar, deliver a notice informing all other parties of the date or dates on which the matter is set down for trial".

19.3 The Applicant contended that if the court had been aware of the error of the notice of set down and how it was served as established in supra would not have granted the order in question.

19.4 that the Respondent prayed for 80 % on merits but 100 % merits were granted in his favour and that if the court had been aware of the notice of amendment in terms of rule 28, would not have granted 100% on merits[3].

19.5 that in the case of **Chabalala v Peer 1979 (4) SA 27**, it was mentioned that once an error has been identified, the court is entitled to grant rescission of the judgment or order.

19.6 that the period of a year from the receipt of the order or judgment is reasonable to make an application for rescission of judgment. The Applicant further submitted that rule 42 of the Rules does not mention the period within which to make an application for rescission. Therefore, a period of a year should be considered reasonable under the circumstances, and that there is no need to make an application for condonation as stated by the Respondent.

THE RESPONDENT'S SUBMISSIONS

[20] The Respondent made the following submissions;

20.1 that on the 28th November 2022 the Applicant wrote a correspondence letter to all legal practitioners and inform them to serve all notices of set down via an email[4]. Furthermore, on the 12 June 2023 the matter was assigned to the claim

[3] Index to motion, annexure MKA5, page 54-59
[4] Index to motion, page 83

handler. This is sufficient to demonstrate that the Applicant was aware of the trial date but chose not to attend the trial.

20.2 that the court did not err in granting 100% on merits because amendment was made prior to court judgment and order. Furthermore, the prayer for 'further and alternative relief' gives court wider discretion to grant alternative relief which is fair and reasonable at the circumstances.

20.3 that the Applicant failed to satisfy the requirements for rescission application to be granted. The Applicant did not explain why he was absent and why it took 11 months to submit this rescission application.

DISCUSSIONS AND COURT'S FINDINGS

[21] The Applicant received a combined summons but he did not serve and file his notice of intention to defend and further that no plea was served to the Respondent. It seems that from the beginning, the Applicant had no intention to participate in the legal proceedings to defend the Respondent's claim against him.

[22] It took the Applicant approximately 11 (eleven) months after receipt of the court order to lodge the application for rescission. The Applicant was not committed to finalise the Respondent's claim. In my view the period of 11 (eleven) is unjustifiable and the Applicant had no justifiable reason for his delay.

[23] On the 29th May 2023 the notice of set down was served to the Applicant via an email which was provided by the Applicant[5]. The Applicant contention that the notice of set down was not properly served is not true because the Respondent referred the court to various email correspondences between the parties which clearly proved that the Applicant knew that he was in default and that the default application was set to be heard on the 17th July 2023[6].

[24] On the 17th July 2023 the court heard the default application and the order was granted in favour of the Respondent. On the 03rd April 2024, the Applicant issued the Respondent with an undertaking certificate in terms of the Act in partial compliant with the court order[7]. The Applicant did not make payment in terms of the court order, instead application for rescission was issued. The Applicant founding affidavit does not disclose the apparent explanation of his absence in court.

[25] The most interesting case of Zuma referred in paragraph 11 *supra*, the Constitutional court found that a litigant who elects not to participate in legal proceedings is not absent within the meaning of rule 42 (1)(a) of the Rules. Precisely, rule 42(1)(a) of the Rules protects only litigants who were absent in court for reasons other than their own decisions.

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[5] Ipid.p.83
[6] Index to motion, page 85
[7] Index to motion, page 101

[26] The Applicant's allegation that the court erred in granting 100% on merits instead of 80% is not correct because the Applicant was absent in court and had no record of what transpired in court. The Applicant did not provide any supporting evidence to prove that the Respondent misled the court when the default application was heard. The court finds that the Applicant has no *bona fide* defence which caries some prospect against the Respondent's claim.

[27] The court finds that the Applicant failed to prove both requirements for rescission application stipulated in rule 42 of the Rules, therefore, the application should be refused.

COSTS

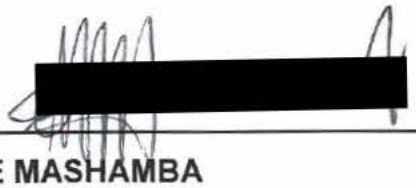
[28] The general rule is that the cost should follow the successful party and the court has discretion to grant or refuse costs at the end of each matter. The court's view is that the Respondent should be compensated for his legal cost for successfully opposing this application.

ORDER

[28] In the circumstances, the court make the following Order;

[1] The application for rescission of judgment, is dismissed with costs.

[2] Such costs shall be taxed or agreed, on party and party scale.



E MASHAMBA

ACTING JUDGE OF THE HIGH COURT,

POLOKWANE; LIMPOPO DIVISION

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Heard on: 01st April 2025

Judgment delivered on: 07th May 2025