Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: M198/2020

In the matter between:

DR TSHEPO MATSEKE **APPLICANT**

and

SEONYA KENNETH MAINE **RESPONDENT**

JUDGMENT

MAAKANE AJ

Introduction

[1] This is an opposed application for rescission of the default judgment and orders granted against the applicant on **25 March 2021** by Snyman AJ (as she then was).

[2] The order sought to be rescinded reads as follows:

> *"[1] That: The Respondent be and is hereby ordered to give the Applicant access to all clinical notes, blood test results, X-ray results, prescriptions, medical reports, invoices and medical accounts and all other tests and medical results in the file of the Applicant from the* ***3rd day of SEPTEMBER 2013*** *to date hereof ("the information").*
>
> *[2] That: The Respondent be and is hereby ordered to provide the Applicant with the information, within ten (10) days from date on which the order is made.*
>
> *[3] That: The Respondent pay the costs of this application."*

[3] The application is brought in terms Rule 42 (1) (a) of the uninform rules of this court as well as the common law. Applicant also applies for and seeks condonation for his delay in launching this application

[4] The respondent opposes.

Background

[5] The applicant is a General Medical Doctor also referred to as a General Healthcare Practitioner. He is in private practice. He has his consulting rooms and surgery in Mmabatho. Respondent is one of his patients. This doctor-patient relationship started on their very first consultation, which according to the applicant was on **14 January 2012.** It is common cause that there were a number of other and further consultations after this day.

[6] On **3 September 2013**, respondent was involved in a motor vehicle accident, as a result of which he sustained certain bodily injuries. On **16 February 2016**, he gave instructions to his current attorneys of record, to lodge on his behalf a claim against the Road Accident Fund ("the Fund").

[7] In order to further pursue his claim with the fund, respondent's attorneys during **November 2019** completed a request for information form, seeking information in terms of Section 53 (1) of the Promotion of Access to

Information Act, 2 of 2000 ("PAIA"). More specifically the information sought and required was described as:

> "*All clinical notes, blood tests results, X-ray results, prescriptions, medical reports, invoices and medical accounts and all other tests and medical results in the file of Seonya Kenneth Maine…. from* **3 September 2013** *to date hereof".*

[8] Again, according to the said form as completed, the right which is exercised and or protected, and also the reason why the record requested is required, is set out and explained by the respondent as follows:

> *"RIGHT TO OBTAIN ALL MEDICAL RECORDS TO DETERMINE THE AMOUNT OF COMPENSATION THAT CAN BE CLAIMED IN RESPECT OF DAMAGES SUFFERED AS A RESULT OF A MOTOR VEHICLE ACCIDENT THAT OCCURRED ON* ***3 SEPTEMBER 2013*** *AGAINST THE ROAD ACCIDENT FUND".*

[9] This completed form was forwarded by email to the applicant, under cover of a letter dated **29 November 2019**. Attached to the said completed form and letter, was a special power of attorney as well as a copy of respondent's identity document.

[10] In the said power of attorney the applicant is specifically referred to as "the Doctor". Mention is also made of "the case". It further appears from the document that the attorneys were given and specifically had direct mandate

and authority to engage, negotiate with and obtain those documents from the applicant. This whole exercise is referred to as “the case”. The following paragraphs of the power of attorney, clearly provide and set out exactly what his attorneys are empowered and authorized to do:

> *“2. To <u>obtain</u> from the relevant DOCTOR concerned all documents, statements and details relating to “the CASE”.*
>
> *3. …*
>
> *4. To <u>negotiate</u> and <u>conclude a settlement</u> with the relevant DOCTOR in connection with the case.*
>
> *5. To <u>discuss</u> all matters necessary for the purpose of obtaining the necessary documents above mentioned for which disbursements … shall be liable……*
>
> *6. To <u>do all that is necessary to</u> finalize the case.*
>
> *7. …”*

[11] The applicant did not respond nor provide respondent or his attorneys with the required and or requested information. He failed to respond to the

request within 30 days as provided for in section 56 (1) of PAIA. For that reason, he is regarded as having refused the request. The 30-day period envisaged in that section expired on **29 December 2019.**

[12] On **14 January 2020**, respondent's attorneys sent another letter via email to the applicant. The letter reads in part:

> *"…We act herein on behalf of Mr. Seonya Kenneth Maine.*
>
> *A request for access to records of a private body was sent via email to your offices on **29 November 2019**, a copy of which is attached hereto for your ease of reference.*
>
> *To date hereof, our client has not yet received any response with regard to the request.*
>
> *We hold instruction to proceed with an application in terms of PAIA should you not revert to us within FIVE (5) DAYS from date of receipt hereof.*
>
> *Yours faithfully"*

[13] Once again, applicant failed to provide the requested information, and or even respond to this letter. Having received no response and or information sought in terms of PAIA from the applicant, respondent issued out of this court

an application seeking an order compelling and directing the applicant to provide the required and specified information.

[14] The application was issued on **16 March 2020**. It was served by the Sheriff at the office and or surgery of the applicant. According to the first return of service, the Notice of Motion as well as the entire application was served at the reception of the applicant's surgery on an employee, Mr. Katlego Abueng on **23 March 2020** at 12H45. It is common cause that, according to the notice of motion and application so served, in the event of non-opposition, the application would be heard on **14 May 2020**.

[15] On **14 May 2020**, the matter indeed served before the Judge President of this division, Hendricks JP. It was however, removed from the roll. It is common cause that on that day there was no notice of intention to oppose filed by the applicant. Over and above that, he did not appear either in person or through a legal representative.

[16] Hereafter the matter was again set down for hearing on ***25 March 2021,*** by the respondent's attorneys. According to the return of service, the Notice of Motion, that is the entire application as well as the Notice of Set Down for the **25 March 2021** was <u>again</u> served personally on the respondent, at 15H15

on **11 March 2021.** This is the second service of the entire application on the applicant.

[17] On **25 March 2021**, the matter served before Snyman AJ, (as she then was) who then granted the order. It is common cause that again there was no appearance by the respondent, either in person or through a legal representative. He also did not file any notice of intention to oppose, and or an answering affidavit.

[18] Following the granting of the default judgment, on **2 September 2021**, the Sheriff served on the applicant a notice of taxation of the bill of costs, scheduled for **3 October 2021**. On **8 September 2021,** about a week after service of the bill of costs, applicant sent a WhatsApp message to the respondent. The message reads:

> *"Evening, Since I waited for you brother. Please sort out the issue of those Lawyers and inform them please."*

[19] It is not clear whether or not there was any responce to this message. Be that as it may, on **3 October 2021**, the bill of costs was duly taxed. There was no notice on intention to oppose and or any process served and or filed by the applicant in respect of the taxation. Again, on that day there was no appearance either by the applicant personally or through a legal representative.

[20] On **2 November 2021,** applicant received from one Wilma de Klerk, a secretary in the office of the respondent's attorneys an email to which was attached a letter as well as a copy of the taxed bill of costs. Except for the covering email, the letter has not been attached to these papers. According to the applicant, he in response prepared and sent an email to the respondent's attorneys. However, he later discovered that the response was sent to one of his own internal office email addresses, and not to the respondent's attorneys. Be that as it may that email is attached to his founding affidavit and reads:

> *"I've informed your office that <u>I did not consult with the patient on those dates</u>. I've informed your client who acknowledges <u>he was not seen by me</u>. I even informed your office several times that he was not seen by me. Please stop harassing me with your letters <u>as I did not see that client</u>. Please."*

[21] On the same day, **2 November 2021** applicant sent yet another WhatsApp message to the respondent. The message reads:

> *"Morning. I'm still getting letters from your lawyers. Please inform them that I am not the one who saw you after your accident please. We don't want any legalities to kick in please brother. Give them the instruction to stop harassing me."*

[22] On **21 February 2022,** respondent's attorneys applied for and obtained from the Registrar of this court, a warrant of execution against the applicant.

On **4 March 2022,** the Sheriff attended to the surgery of the applicant and went on to attach certain movable goods, in enforcement of the said warrant of execution. These movables were, however not removed by the Sheriff.

[23] On **23 March 2022,** a Notice of Sale in Execution was issued and later

served on the applicant. According to the notice, the attached goods were to be sold by public auction scheduled to take place at 10H00 on **1 June 2022** at the Sheriff's premises.

[24] After service of this Notice of Sale in execution, the applicant then approached his attorneys of record for legal assistance. On **17 May 2022** his attorneys sent a letter to the respondent's attorneys, confirming their mandate and also, instructions to launch this application. The attorneys further requested that the sale by public auction be cancelled pending finalization of this rescission application.

[25] What transpired and further engagements between the attorneys is not relevant. Of relevance and importance however, is the fact that this application was ultimately launched on **1 June 2022**.

The issues

[26] The main issue for determination is firstly whether the applicant has met all the legal requirements either in terms of Rule 42 (1) (a) of the uniform Rules of this court, or at common law, for the rescission of the default judgment.

[27] In the second place, whether the undue delay in launching this application for rescission of judgment in terms of rule 42 (1) (a) and or the common law, both of which require that such an application be brought within a reasonable time, has in fact been cured by a prayer or an application for condonation of such undue delay. In other words, what is the legal effect of undue delay in launching an application for rescission of judgment under circumstance similar to these in *casu*.

Parties' submissions

The Applicant

[28] In so far as reliance is placed on Rule 42 (1) (a) of the uniform rules of this court, counsel for the applicant contends that the default judgment was erroneously granted. More specifically he submitted that there was fraud on the part of the respondent in that, there were certain facts which were not brought to the attention of the court when the default judgment was sought. Had these facts been brought to the attention of the court, the court would not have granted the default judgment.

[29] In the main, applicant submitted that respondent failed to disclose to the court that the applicant did not treat him for the injuries he sustained in the motor vehicle accident that took place on **3 September 2013.** This failure to disclose he argues, amounts to fraud. He went on to submit that according to information respondent was apparently treated by a Dr. Sekoaila at the Victoria Private Hospital, Mahikeng. By persisting and demanding medical records from the applicant, as he how does, respondent is misrepresenting true facts and creates the impression that it is in fact the applicant who treated him for injuries he sustained in the said motor vehicle accident. This failure to disclose he argues, amounts to fraud.

[30] Applicant further went on to point out that he was never at any stage requested by the respondent or his attorneys, to complete as a doctor, a medical report that has to accompany his initial claim form with the fund. In other words, therefore, if the respondent and or his attorneys genuinely believed that applicant treated him for injuries he sustained in the accident, they would have requested him to complete such a medical form.

[31] Counsel also referred to section 50 of PAIA and the respondent's basis of his entitlement to the medical records sought. He submits that the request was made on **29 November 2019*.*** Because the accident took place on **3 September 2013*,*** the respondent's claim had already been extinguished by prescription then. In other words, therefore, so the argument goes, one of the requirements set out in Section 50 (1) (a) to the effect that the record must be

sought or required "for the exercise or protection of any rights," has not been met. In this regard, counsel referred me to the following cases:

Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and others 2001 (3) SA 1013 (SCA) at paragraph 28

Unitas Hospital v Van Wyk and Another 2006 (4) SA 436 (SCA) at paragraph 17

[32] As regards the common law basis, counsel submitted that applicant has successfully shown good cause and demonstrated that he was not in willful default. His explanation for not opposing the application is that respondent told him not to worry because he the applicant did not treat him, (the respondent) for the injuries he sustained in the motor vehicle accident of **3 September 2013**.

[33] He also submitted that applicant has shown that he has a *bona fide* defence to the respondent's claim and also prospects of success on the merits. In this regard, he submits that medical records as well as facts before court show that applicant never treated respondent for his accident-related injuries. He submitted that even if the applicant's explanation was considered to be weak such a weak explanation has been cancelled out by the *bona fide* defence which he has put up. He referred to case law in this regard.

[34] Finally, he submitted that even if there has been <u>undue delay</u> in the launching of this application, this undue delay has been cured by the application and or prayer in the notice of motion, for <u>condonation</u> of such undue delay.

<u>Respondent submissions</u>

[35] Counsel for the respondent submitted that there was no procedural irregularity when the order or default judgement was granted. Over and above that, the default judgment was not erroneously sought and or erroneously granted. Similarly, a validly obtained judgment cannot be transformed into an erroneously granted judgment by a subsequently disclosed defence. He referred in this regard to case law.

[36] He argued and denied that of the facts, there was any fraud or misrepresentation on the part of the respondent as alleged by the applicant. In this regard, he pointed out that the respondent throughout stated that he required the medical reports, documents and information in order to establish and determine <u>“the amount of compensation”</u> he can claim following the accident. It was never at any stage been respondent’s case that the information is sought in order to lodge a claim, as the applicant alleges. He went on to submit and point out that in cases specifically involving bodily injuries such as this, there is always a distinction drawn between the lodging

of a claim with the fund which is all about merits or liability or otherwise of the fund on the one, hand and the amount of compensation that can be claimed which is all about the quantum of damages on the other. These are two distinct and different issues which as a matter of practice are even considered separately by our courts.

[37] He further denied that the information that the respondent sought is irrelevant and or that the claim has prescribed. He submitted that the information was relevant when the PAIA form was completed and information requested. To this day, the information is still relevant, necessary and required. The information is required for the purpose of determination or calculation of the amount which is all about quantum of damages. In any event, the defence of prescription is for the fund to raise on the issue of liability. Be that as it may, the allegation by the applicant around prescription is pure speculation and not factually based.

[38] It is also common cause and the applicant admits that he did see, treat and examine the respondent on the dates relevant herein, that is post the accident. Whether the treatment and diagnosis is accident related or not has nothing to do with the applicant. The relevance or otherwise and or nexus between the accident on the one hand and the medical condition and or records required, on the other, is a matter for determination by medical experts of the Fund and those of the respondent in the determination of quantum. It is not for the applicant to decide or determine which or what medical information is relevant or not.

[39] It is true that there is in existence a doctor-patient relationship between the applicant and the respondent. At the core of this relationship, is the privilege and or confidentiality pertaining to the respondent's medical records, history and condition. Of importance is the fact that this privilege is that of the patient, that is the respondent in this case. It is not the privilege of the doctor. That being so, in the case where a patient waives this privilege and demand his or her records, a doctor cannot refuse or deny this on the basis of or claim privilege. In a case of waiver or consent, a doctor will and is under a duty to release and give the records. He submits that in this case, respondent has clearly and unconditionally waived his privilege and gave consent and instruction that his medical records be released to his attorneys of record. This is clearly set out in all the documents of demand, directed to the applicant.

[40] Regarding the absence of the applicant when the order was granted, he submitted that the applicant from the beginning took a decision not to oppose the application and relief sought against him. Therefore, his non-attendance or opposition of the application was done deliberately, intentionally, and out of his own choice. For these reasons, he has failed to make a case for rescission in terms of rule 42 (1) (a).

[41] Counsel finally raised the issue of undue delay. He submitted that applicant failed to launch this application within a reasonable time. Rule 42 does not lay down or prescribe a time period within which the application is to be launched. Same goes for the application in term the common law. On each

of both grounds, it is an important requirement that such an application be brought within a reasonable time. In this case, applicant only brought and launched this application on **1 June 2022** which is approximately one (1) year and two (2) months after the judgment was granted. The unreasonable delay cannot even be cured by an application or prayer for condonation, as the applicant tries to do. For this reason alone, the application for rescission of judgment stands to be dismissed.

Legal position

RESCISSION OF JUDGEMENT IN TERMS OF RULE 42 (1) (a)

[42] Rule 42 (1) (a) provides as far as is necessary as follows:

> *"[1] The court may, in addition to any other power it may have, mero muto or upon the application of any party affected rescind or vary;*
>
> *(a) An order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby."*

[43] It is trite that an applicant who places reliance on rule 42 (1) (a) for rescission, must show and prove firstly that the order sought to be rescinded, was granted in their absence, and secondly, that same was erroneously

sought or granted. Once the two requirements are met, that is not the end of the enquiry. The court will then be entitled to exercise its discretion, and in doing so take into account considerations of fairness and justice. In other words therefore, a court is not compelled to rescind an order or judgment, but has a discretion, which discretion must be exercised judicially.

[44] It follows from the provision and wording of the rule that there are, for the purpose of this matter, at least three jurisdictional facts. The first, being the existence of a court order and or judgment which is common cause in this case. What remain and is crucial for determination herein are two issues: Whether firstly, the judgment was erroneously granted and secondly, whether same was granted in the absence of the applicant. I find it necessary to deal with and individually consider each of these two jurisdictional facts.

Absence or otherwise of the applicant

[45] In the case of **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 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) 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."*

[46] 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) 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."*

[47] In summarising this requirement, the constitutional court put the position as follows:

"Our jurisprudence is clear: where a litigant, given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42 (1) (a). And it certainly cannot have the effect of having an order granted in absentia, into one erroneously granted."

Erroneously sought or granted orders.

[48] In order to satisfy this requirement an 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 had these facts been known to the court, 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 to the court, which induced the court to grant the order. This simply means that the court must have been misled, into granting the order.

[49] 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."

(at page 47 F)

[50] Similarly in **Rossitter v Nedbank [2015] ZASCA 196** at paragraph 16, the Supreme Court of Appeal held:

> *"The law governing an application for rescission under uniform rule 42 (1) (a) is trite. The applicant must show that the default judgment or order had been erroneously sought or erroneously granted".*

[51] In Zuma (Supra) the Constitutional Court found that Mr. Zuma had the opportunity to present his case and raise the defences he was trying to rely on in his rescission application. He failed to do so. For this reason, his argument that the judgment was erroneously sought and granted 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.*
>
> (At paragraph 64)

[52] In Naidoo v Matlala No 2012 (1) SA 143 (GNP) Southwood J said the following:

> *"In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment."*

(At page 153)

[53] It is also trite that a judgment will be errously granted if it is obtained through fraud. Fraud includes deliberate failure by a litigant to disclose to the court material facts that are relevant to the proceedings before it.

[54] In Naidoo (Supra) Southwood J puts the position as follows:

> *"It states that if material facts are not disclosed in an ex parte application or if fraud is committed (i.e., facts are deliberately misrepresented to the court), the order will be erroneously granted".*

RESCISSION OF JUDGEMENT UNDER COMMON LAW

[55] 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] In Zuma (supra) the court once again emphasized the onus that rest 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."*

[57] In **Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd 1994 (3) SA (3) 801 (CPD)** the court referred with approval to an earlier decision of **Hendriks v Allen 1928 CPD** where the following was said:

> *"If he knows that a case is coming on, and whatever his motive, deliberately refrains from entering appearance, then it seems to me there is wilful default. His reason need not be, to my mind, that he knows he has no defence; he may have some other motive, but, knowing that he is summoned to appear, if he deliberately fails to enter an appearance, from whatever motive, it seems to me there is wilful default."*

UNDUE DELAY

[58] Rule 42 (1)(a) does not prescribe the exact time limits within which such an application is to be launched. However, this has to be done within a reasonable time. The authors of Hebstein and Van Winsen: The Civil Practice of the High Court of South Africa: Firth Edition summarise the position as follows:

> *"Although Rule 42 lays down no time limit within which rescission of judgment should be sought, delay or acquiescence in the execution of the judgment would normally bar success in an application to rescind as it will be regarded as acquiescence in the granting of the judgement.*
>
> *The court will normally exercise its discretion in favour of* an applicant who through no personal fault, was not afforded an opportunity to oppose the orders granted *against him and who having ascertained that such an order has been granted takes expeditious steps to have the position rectified. This is in line with the common law position.*
>
> *If the applicant is to blame, the court is not likely to order rescission. When the judgment was not erroneously granted, an application for rescission in terms of Rule 42 will not succeed."*

[59] It follows therefore that undue delay is in itself fatal to an application for rescission of judgment, justifying the dismissal thereof. In such a situation the court will draw an inference that such an applicant has acquiesced himself

with the judgment. This is particularly so when a litigant knew all along about legal proceedings and relief sought and judgment against him or her but does nothing, and only try taking steps at very late stages of the execution processes.

[60] In **<u>Schmidlin v Multisound (Pty) Ltd 1991(2) SA 151 (C</u>**) 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…<u>Acquiescence</u> 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."*

[61] More specifically, the court held that because the application for rescission has to be brought within a reasonable time, unreasonable or undue delay in doing so cannot be cured by an application for condonation of such delay. The court said the following:

> *"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 <u>therefore, nothing requiring or capable of condonation by this court.</u>*
>
> *(at page 155 paragraph 1-J)*

"The application, which include the purported application for condonation is dismissed.

(at page 156 paragraph j)."

[62] 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) 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."

[63] Even where reliance is placed on the common law, it is still important that the application for rescission be launched within a reasonable time. In this regard Eloff JP continued as follows:

"I turn to the appellant's reliance on the common law. An interesting argument was submitted to us on the common law, but again the answer is that which I gave in relation to the attempt to invoke Rule 42 (1). As was said in the Geniture case, if the common law is to be invoked the application should be made within a reasonable time."

Applying the law to the facts.

[64] Having regard to facts and all circumstances surrounding this matter, I am of the view that the applicant has failed to discharge the onus that rests on him of proving on a balance of probabilities the requirements of Rule 42 (1) (a). These are that (1) the order was granted in his absence and (2) that same was erroneously granted.

[65] Firstly, with regard to the absence requirements, it is so that the applicant was not physically present in court when the order was granted. However, his absence was not precluded. On the contrary and as on his own version under oath, his absence was elected because he took a decision not to oppose the application. He was fully aware of the relief sought against him, including a costs order. In his affidavit, he states the under oath that he still chose or decided not to oppose the application.

[66] Secondly, applicant has failed to prove that the default judgment was erroneously granted. He was also failed to show and prove that there was fraudulent misrepresentation and or withholding of crucial facts to the court. From the totality of evidence on affidavits, annexures and all of the documents filed with the application, it has always been respondent's case that he requires the medical reports and records, in order to "…establish the amount of compensation…" that can be claimed. It was never his case that the information is sought or required in order to lodge a claim.

[67] Again, on the papers, it was never the respondent's case that the applicant treated him immediately after the accident for injuries he sustained therein. In any event, this fact is immaterial and the order would still have been granted. The allegations of fraud therefore have not been proved. I cannot find that there was fraudulent misrepresentation and or withholding of any material facts on the part of the respondent which induced the court to grant the default judgment.

[68] In this regard, it is important point out that even on his own version, applicant admits that he did see, consult with and medically examine the respondent on various occasions after his accident on **3 September 2013**. He also states under oath that he has in his possession medical records pertaining to such consultations. More specifically he states under oath the following:

> *"20. The respondent became my patient on **14 January 2012**. I held my first consultation with him on that day.*
>
> *21. After the first consultation I had further consultations with the respondent on **15 August 2012**, **07 March 2013**, **13 January 2014**, **24 February 2014**, **10 April 2014**, **08 September 2018**, **03 December 2018**, **05 December 2018**, **11 October 2020** and **14 October 2020**.*

22. I have in my possession the medical records showing that I consulted with the respondent on the above dates."

[69] The applicant's explanation and reasons for choosing not to oppose the application is that the consulted with the respondent, after the accident on the **11th** and the **14th of October 2020**. During one of these consultations, he raised with him the issue whether or not he consulted with him regarding the accident. Respondent told him "Not to worry about the case." He understood this to mean that he would not proceed with the matter as his attorneys were threatening him with litigation in. Despite this undertaking by the respondent, the sheriff served on him the notice of motion as well as notice of set down of the main application. As set out in the chorology of events, the application was served on him on two occasions. Despite this and on his own version the main applicant states that he still decided not to oppose the application.

[70] The applicant has dismally failed to give a reasonable and satisfactory explanation for his default. From the first moment the application was served on him, he states that he made contact with the respondent to try and solve the matter. On assumption that this is true was pertinently clear from the series of court processes as well as notices that were served on him that his attempt to engage the respondent was not bearing any fruits. It was clearly evident to him that the respondent was adamant and persisting with litigation against him. In any event, this is denied by the respondent.

[71] Over and above that, I have in paragraph 10 hereof referred to respondent's power of attorney and a clear and specific mandate he gave to his attorneys of record. Clearly, the totality of the wording and contents of thereof show clearly that the respondent has given complete mandate to his attorney of record, to deal with the applicant. This can clearly be seen and understood from the use of words such as "obtain" from the doctor, discuss negotiate and conclude a settlement "with the relevant doctor" being the applicant. Despite this applicant, failed to engage, or discuss or negotiate with the attorneys as per this power of attorney.

[72] I accept that the applicant is not legally trained. However, he is not an illiterate. He is a medical doctor, a graduate professional. This whole issue centres around and emanates from practice of his own from profession. He has seen and examined the applicant on specified dates after the accident of **3 September 2013.** It is clear and the power of attorney conveys to him in clear terms that whatever issues he has with the request he has to negotiate and discuss with the respondent's attorneys of record.

[73] Similarly, at common law, respondent has failed to <u>show good cause.</u> He was throughout aware of the court application and the specific relief sought against him including a costs order. He had ample opportunity to oppose same. He had all the opportunity to present to court what he now states are his defence. He failed and deliberately chose not to do so. In fact, he deliberately chose not to even appear on any of the dates he was made aware

of. In my view, and based on authorities to which I have referred, he was in willful default.

See: Zuma (Supra) Maujean (Supra)

[74] Applicant has also failed to show that he has a *bona fide* defence to the relief sought against him. The mere fact he did not immediately treat the respondent specifically for bodily injuries he sustained in the accident is irrelevant and in my view cannot serve as a *bona fide* defence. He under oath admits to have treated the respondent on different dates before and after the accident, including dates set out in the court order. He is therefore able to provide the required information pertaining to those dates on which he consulted with and medically examined and or treated the respondent post the accident. Having done so, it will be for medical experts of both the Fund and the respondent to take the matter further, and determine which medical condition is relevant to the issues between them. This is not the applicant's task.

[75] Authorities are clear that an application for rescission in terms of Rule 42 as well as the common law must be brought within a reasonable time. It is common cause that the applicant dismally failed to do so. In an attempt to cure this unreasonable delay, he tries to apply and or prays for condonation for his late launching of this rescission application. In other words, he acknowledges that there has been undue delay in bringing the rescission. On his own version and chronology of event herein, he all along known about this legal proceeding and also the judgment against him. He still chose to do

nothing about it. Unfortunately, this purported application does not and cannot assist the applicant. Once delay has been proved, the application for rescission cannot succeed. In any event the application is a mere repetition and in effect serves to try and supplement the rescission application

Conclusion

[76] Taking into account the totality of the evidentiary material, applicable legal principles as well as case law, I am of view that the applicant has failed to prove all the elements and the requirements, for the rescission of judgment, either in terms of Rule 42 (1) (a) or at common law.

[77] I am also satisfied that there was undue delay in the launching of this application, under circumstances where the applicant had knowledge of all the legal proceedings and court processes against him. It was only at the final steps of execution process that is towards the sale of movables by public auction, that this application was launched. Such delay cannot even be cured by an application or prayer for condonation.

[78] On the totality of the facts and by his conduct applicant has throughout acquiesced himself with the judgment, and only tried to take some steps when execution processes became uncomfortable for him. In essence applicant's conduct,

"…in bringing what essentially constitutes his defence [in the main application] through a rescission application when the horse has effectively bolted, is wholly misguied."

Zuma (Supra) at para 64

Order

[79] Consequently, I make the following order:

[1] The application for rescission of judgment, as well as the application for condonation for the late launching thereof is dismissed with costs.

[2] Such costs shall be taxed or agreed, on party and party scale and shall include costs consequent upon employment of Senior Counsel.

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S.S MAAKANE
ACTING JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION – MAHIKENG

APPEARANCES

On behalf of the Applicant	:	ADV O I Monnahela
Instructed by	:	Motshabi & Associate Inc MAHIKENG
On behalf of the respondent	:	Adv A B Rossouw SC
Instructed by	:	W J Coetzee's Attorney MAHIKENG
Date Heard	:	26 January 2023
Date of Hearing	:	12 October 2023