



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

CASE NO: 38313/2018

**DELETE WHICHEVER IS NOT APPLICABLE**

- (1) REPORTABLE: YES/NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED:

13/6/2024  
DATE

[REDACTED]  
SIGNATURE

In the matter between:

**ROAD ACCIDENT FUND**

Applicant

and

**NKOSINATHI EMMANUEL PHUNGULA**

Respondent

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**JUDGMENT DELIVERED ON 13 JUNE 2024**

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**CP WESLEY AJ**

1. In this application the applicant seeks an order:
  - 1.1 that the late filing of the application be condoned in terms of Rule 27(3);
  - 1.2 that the order that was granted by my brother, the honourable Kumalo J, on 2 March 2023, in terms of which judgment was granted against the applicant in the sum of R6 234 275.00 in respect of loss of earnings, together with interest and costs, be rescinded in terms of Rule 42, alternatively, the Common law; and
  - 1.3 that each party pays their own costs, alternatively, that the respondent pays the applicant's costs in the event of opposition.
2. The respondent does oppose the application. In its answering affidavit the respondent seeks an order that the application be dismissed with costs on the attorney and own client scale.
3. At the commencement of her argument for the applicant, counsel conceded that the applicant did not make out a defence to the respondent's claim in respect of loss of earnings, together with interest and costs, on the papers. In this regard the arguments that are made by the applicant in its founding affidavit are that the damages award by the court in the amount of R6 234 275.00 in respect of loss of earnings, together with interest and costs, was not properly quantified; that the

actuary concerned relied on assumptions that were not clarified by the industrial psychologist concerned as well as the unverified earning of, it is presumed, the applicant; and essentially that the applicant's damages were actually less than the damages that were awarded by the court.

4. Having regard to the applicant's papers, it is correct that the applicant has not made out a defence therein to the respondent's claim as foresaid. The arguments that are put up by the applicant are speculative at best, and are not supported by any countervailing evidence.
5. The approach that a court should take in an application for condonation in terms of Rule 27(3), and the factors that a court should take into account, are succinctly summarised in Harms, *Civil Procedure in the Superior Courts*.<sup>1</sup> Save for what follows, it is not necessary to repeat same herein. The court has had regard to what Harms records. One of the factors that a court must take into account is the applicant's prospects of success. According to Harms,<sup>2</sup> condonation ought to be refused if the proceedings lack merit. The court respectfully agrees with this.
6. Insofar as the application for rescission is based on the Common law, in order to succeed an applicant must give, at least, a reasonable and acceptable explanation for the default and show that on the merits that it has a *bona fide*

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<sup>1</sup> April 2024 at B27.7.

<sup>2</sup> Above and authorities in note 25.

defence.<sup>3</sup> According to the applicant, it was in default of appearance at the court concerned, on the day in question, because the attorney concerned at the State Attorney had to attend to another trial in another matter where the applicant was a party at the same time. The applicant's legal representative thus made a deliberate election not to be present at the court concerned, on the day in question, when the judgment was granted against the applicant. In the court's view, this is neither a reasonable nor acceptable explanation for the applicant's default. Regarding the applicant's *bona fide* defence on the merits, it has already been shown that the applicant has not made out a defence to the respondent's claim as foresaid.

7. Insofar as the application for rescission is based on the Common law, it can accordingly not succeed.
8. Insofar as the application for rescission is based on Rule 42, subrule (1) provides as follows:

*“(1) The court may, in addition to any other powers it may have mero motu or upon the application of any party affected, rescind or vary—*

*(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*

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<sup>3</sup> Harms above at B42.10.

- (b) *an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
- (c) *an order or judgment granted as the result of a mistake common to the parties.”*

9. It should first be noted that Rule 42(1)(a) does not apply where a party deliberately elects to be absent.<sup>4</sup> As stated by Harms,<sup>5</sup> the term “party” is defined to include the legal representatives of a party. It has already been shown that applicant’s legal representative made a deliberate election not to be present at the court concerned, on the day in question, when the judgment was granted against the applicant. It follows that Rule 42(1)(a) does not presently apply.
10. Insofar as the application for rescission is based on Rule 42(1)(a), it can accordingly not succeed. Although it is not necessary to make a finding on the issue because of the foresaid finding, it should also be noted that the applicant has in any event not established that the order or judgment concerned was erroneously sought or erroneously granted within the ambit of Rule 42(1)(a).<sup>6</sup>
11. The applicant does not either make out a case that there is an ambiguity or a patent error or omission in the order or judgment concerned, within the ambit Rule

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<sup>4</sup> Harms above at B42.4 and authorities in note 6.

<sup>5</sup> Above and authorities cited in note 5.

<sup>6</sup> Harms above and authorities in notes 7 to 17.

42(1)(b), or that the order or judgment concerned was granted as the result of a mistake common to the parties, within the ambit of Rule 42(1)(c). Insofar as the application for rescission is based on Rule 42(1)(b) or (c), it can accordingly also not succeed.

12. As indicated, the respondent seeks a cost order against the applicant on the attorney and own client scale. The respondent seeks this cost order because, in its view, the application is a clear abuse of the court's process. It was submitted in argument that in the prevailing circumstances, the respondent should not be out of pocket regarding the costs of this application.
13. In a special case the court may come to the conclusion that the successful party should not be out of pocket as the result of the litigation and may in its discretion then award costs, for example, on the attorney and own client scale.<sup>7</sup> Such an order may be made where the other party has been guilty of dishonesty, fraud or that his motives and conduct may have been vexatious, reckless, malicious or frivolous, or that he has been guilty of some form of misconduct in connection with the matter investigated or in the conduct of the case.<sup>8</sup>
14. In the court's view, the application was still born, having no prospects of success from the outset. It is accordingly a frivolous application, amounting to an abuse

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<sup>7</sup> See *Nel v Waterberg Landbouwers Ko-operatiewe Vereniging* 1946 AD 597.

<sup>8</sup> See *Van Dyk v Conradie* 1963 2 SA 413 (C); *De Goede v Venter* 1959 3 SA 959 (O); *Ward v Sulzer* 1973 3 SA 701 (A).

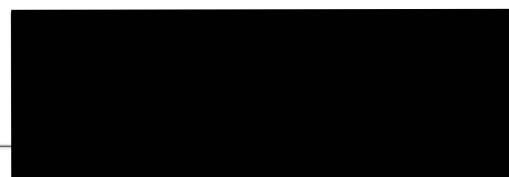
of the court's process. In the prevailing circumstances, the court agrees that the respondent should not be out of pocket regarding the costs of the application. A cost order against the applicant on the attorney and own client scale falls to made.

15. In argument the respondent requested that I grant an order that the conduct of the attorney at State Attorney concerned who failed to appear for the applicant as set out above be referred to the Legal Practice Council for investigation. I am not inclined to do so at this juncture. If the respondent or his attorneys are of the view that this must be done, they can make the report to the Legal practice Council.

16. In the result I make the following order:

16.1 The application is dismissed.

16.2 The applicant is to pay the respondent's costs, on the attorney and own client scale.

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**CP WESLEY**

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

**Appearances**

For applicant: Adv L Keijser  
instructed by the State Attorney, Pretoria

For the respondent: Adv CM Dredge  
instructed by Dirk Duvenhage Attorney

Date heard: 21 May 2024

Date of Judgment: 13 June 2024