

**Flynote/Sleutelwoorde:    Rescission – Default Judgment – meaning of ‘absence’ and ‘erroneously granted’ for purposes of Rule 42(1)(a) of Uniform Rules – residual discretion of court – delay in rescission application – lack of explanation for default**

**Headnote/Kopnota:**

Applicant (Defendant in the action) sought rescission under Rule 42(1)(a) of the Uniform Rules of Court. Default judgment had been granted in favour of Respondent (Plaintiff in the action), in which the latter had been awarded damages for unlawful arrest and detention.

A belated notice of intention to defend had been served on correspondent attorney, but did not come to the attention of Respondent’s principal attorney. Respondent’s notice of set down was served on the State Attorney but did not come to his personal attention.

*Held*, Applicant failed to meet requirements of Uniform Rule 42(1)(a). First, Applicant’s absence from the hearing was to be deemed voluntary; elective absence is not absence for purposes of the Rule. It was not open to Applicant to shift the blame for its failure to appear upon State Attorney, without satisfactory explanation as to why notice of set down had not come to attention of responsible attorney in the office of State Attorney.

*Held*, second, default judgment had not been erroneously granted within the meaning of the Rule. A party does not, by filing a notice to defend, excuse itself from appearing on date stipulated in a duly served notice of set down. Even had the Court that granted default judgment been aware of the fact that notice of intention had been filed, it could in its discretion have granted default judgment. Court would not necessarily have been led to refuse default judgment had it been aware that no plea had been filed, because Applicant had failed to deliver docket to State Attorney.

*Held*, Applicant for default judgment was not bound by strict disclosure principles governing *ex parte* proceedings.

*Held*, Party cannot excuse default by pointing to its own or attorney's delinquency. There are not "mistakes" in the proceedings, nor "procedural irregularities".

*Held*, Court retains a broad residual discretion, even if Applicant has satisfied the formal requirements under Rule 42(1)(a). It could, in any event, have refused rescission in its discretion in view of Applicant's unexplained delay in seeking rescission.

*Held*, failure of Applicant to explain adequately non-appearance also weighed against it. The contention that a party was understaffed or underfunded did not avail Applicant. There is no reason an organ of state should be held to lower standard than any other litigant.

Application for rescission refused and Applicant mulcted with costs on attorney-and-client scale.