REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/4135

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

[redacted]

27 JUNE 2025

Judge Dippenaar

In the matter between:

MUZI O MUHLE GAMEDE **APPLICANT**

and

SANI FLEET MANAGEMENT (PTY) LTD **RESPONDENT**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it onto the electronic platform. The date and time for hand-down is deemed to be 10h00 on the 27th of JUNE 2025.

DIPPENAAR J:

[1] The applicant, the second defendant in the main action proceedings, seeks the rescission of a default judgment granted by the registrar of this court pursuant to r 31(5)(a) on 3 May 2022, pursuant to an application for default judgment dated 1 June 2021. In terms of the order, default judgment was granted against the applicant and an entity styled M Telecoms Africa (Pty) Ltd t/a Motheo Telecoms (the first defendant) in an amount of R2 427 393.20, together with interest and costs.

[2] The applicant and the first defendant had entered an intention to defend but failed to deliver a plea after a notice of bar was served. Writs of execution had been executed against the first and second defendants during May 2022 and September 2022 respectively. Thereafter, sequestration proceedings were launched against the applicant based on a *nulla bona* return issued pursuant to the aforesaid writ of attachment against him. The applicant opposed the application and in his answering affidavit, delivered on 9 March 2023, intimated that he may launch a rescission application. In the sequestration application the applicant stated that the default judgment had been obtained against him based on an invalid suretyship agreement and he was not actually indebted to the applicant. The rescission application was launched on 19 January 2024, shortly before

the sequestration application was due to be heard on 24 January 2022. The sequestration application was postponed and remains pending.

[3] In its particulars of claim underpinning the default judgment, the respondent relied on an acknowledgement of debt in relation to the first defendant and a deed of suretyship signed by the applicant, in relation to the claim against him. It was common cause that the deed of suretyship reflected the principal debtor as being 'Sani Fleet Rental'. In paragraph 20 of the particulars of claim, it is averred:

> *'When completing the Suretyship Agreement, which was attached to the Plaintiff's credit Application, the Second Defendant incorrectly inserted the Plaintiff's name as the principal debtor and not that of the First Defendant '.*

[4] It was common cause that the deed of suretyship did not state the amount of the indebtedness of the surety. It provided for '*repayment on demand of all sums of money which the Debtor may now or from time to time hereafter owe to the creditor…arising from any cause of indebtedness whatsoever and whether now existent or which may come into existence in the future'.* In relevant part, the suretyship further provided: *'2 A statement of the indebtedness of the Debtor purporting to have been certified correct by the auditors of the creditor shall be prima facie proof of my indebtedness hereunder'*.

[5] It was further common cause that the respondent did not plead, seek or obtain rectification of the deed of suretyship to reflect the second defendant as debtor on the deed of the suretyship and that the reference to Sani Fleet Rental was an error in the deed of suretyship.

[6] The rescission application was based on r 42(1)(a), alternatively the common law. At the hearing, counsel for the applicant disavowed reliance on the common law. The case made out by the applicant in the founding affidavit was that the deed of suretyship

failed to comply with s 6 of the General Law Amendment Act 50 of 1956 and was thus invalid. It was averred in the founding affidavit that the applicant did not stand surety on behalf of the first defendant, Motheo Telecoms, in favour of the respondent, but on behalf of Sani Fleet Rental in favour of the respondent. It was submitted that the suretyship was invalid as it failed to describe the nature and amount of the principal debt, was for an unlimited number of causes and for an unlimited amount of liability. The applicant further contended that the respondent misrepresented that the suretyship was valid in the default judgment application. In the particulars of claim it was averred that '*[the applicant] signed a suretyship agreement in terms of which [the applicant] bound himself jointly and severally as surety and co-principal debtor in favour of the respondent…'.*

[7] The respondent opposed the application on various grounds. First, that there was no procedural irregularity as envisaged by r 42(1)(a) and the applicant had not alleged any error in procedure. It submitted that the ostensible error complained of strikes at the merits of the matter and that r 42(1)(a) found no application.

[8] Second, that the applicant was not absent as envisaged by r 42(1)(a) because the inference could be drawn that he was in wilful default. It was submitted that the applicant failed to demonstrate that he was not in wilful default or that his application is *bona fide.* It was submitted that the applicant delivered a notice of intention to defend but no plea, despite being placed under bar and provided no justification for his default.

[9] Third, that there was an excessive and unexplained delay of some 14 months on the part of the applicant in launching the application which was not launched within a reasonable time, given that a period of 20 months had expired since the respondent gained knowledge of the judgment against him. The respondent submitted that no condonation was sought and that the explanation proffered made a mockery of the court rules, which was fatal to the relief sought. The respondent submitted that the rescission was better suited to r 31, but that it would be fatally defective. It was further pointed out

that the applicant demonstrated a lack of diligence in pursuing the application, and that his actions highlighted his willfulness and lack of seriousness in pursuing the application. A punitive costs order was sought on these grounds.

[10] The respondent contended in its answering affidavit that when completing the suretyship agreement, the applicant erroneously incorrectly inserted the respondent's name as the principal debtor and not that of the first defendant, which was a patent error.

[11] The parties defined the issues to be determined as follows: (i) whether the error complained of is a procedural error as contemplated by r 42(1)(a), which would preclude the respondent from being entitled to the default judgment order granted on 3 May 2022; (ii) whether the order was granted in the applicant's absence; (iii) whether the rescission application was launched within a reasonable time and, if not, whether condonation should be granted to the applicant; (iv) whether the applicant demonstrated that he was not in wilful default resulting in the default judgment order; and (v) whether the applicant set out a *bona fide* defence to the merits.

[12] Rule 42(1)(a) provides: '*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…*'

[13] It is well established that the rule caters for a mistake in the proceedings. An applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in s 31(2)(b). The error may arise either

in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court.[1]

[14] As stated in *Colyn*:[2] *'The rule caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The rule gives the courts a discretion or order it, which must be exercised judicially'.* Because it is a rule of court its ambit is entirely procedural.[3]

[15] The mistake in the current proceedings relied upon by the applicant is that rectification of the suretyship was not sought prior to judgment being granted. That appears from the record of the proceedings and is common cause between the parties.

[16] It is so that rule 42(1)(a) does not cover all orders wrongly granted, as held in *De Beer* [4] and submitted by the respondent. It covers orders which were erroneously sought or erroneously granted. *De Beer* must be considered in the context of appealability. It concerned a rescission application of a summary judgment order granted in the absence of the applicant's legal representatives, in circumstances where an opposing affidavit had been delivered and considered before summary judgment was granted. In dismissing the rescission application, the Full Court held that the summary judgment was appealable and did not fall within the ambit of r42(1)(a). The present facts are different. What must be determined is whether there was a procedural error in the seeking or the granting of the order.

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[1] *Kgomo v Standard Bank of South Africa* 2016 (2) SA 184 (GP), with reference to *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) *(Lodhi)* and *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 SCA (Colyn).
[2] Para 5.
[3] Ibid para 6.
[4] The full court decision in *De Beer v Absa Bank Ltd* [2016] ZAGPPHC 325, para 15, with reference to *Seale v Van Rooyen and others; Provincial Government, North West Province v Van Rooyen NO and Others* 2008 (4) SA 43 (SCA) para 18.

[17] Reliance was placed on *Lodhi 2 Property Investments CC and Another v Bondev Developments (Pty) Ltd* [5] by the respondent in contending that the phrase 'erroneously granted' relates to the procedure followed to obtain the judgment in the absence of the other party and not the existence of a defence. A judgment to which a plaintiff was procedurally entitled in the absence of the defendant cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. That is the legal position.

[18] The respondent contended that the applicant's challenge to the validity of the deed of suretyship was a subsequently disclosed defence which cannot mean that the judgment was erroneously granted under r 42(1)(a).

[19] In the present instance, the deficiencies in the suretyship and its invalidity were apparent from the particulars of claim. The default judgment was not granted by a court, but by the registrar. According to the applicant, the respondent deliberately misrepresented the facts by pleading that the applicant signed a suretyship agreement in terms of which he bound himself jointly and severally as surety and co-principal debtor in favour of the respondent for the repayment on demand of all sums of money which Matheo Telecoms may at the time of signing of the suretyship or from time to time thereafter owe to the respondent. *Ex facie* the suretyship, the applicant bound himself with Sani Fleet Rental as debtor and no case for rectification of the suretyship agreement was made out. The particulars of claim thus misstated the position reflected in the deed of suretyship itself. It is not necessary to consider whether that was done deliberately or not.

[20] I agree with the applicant that rectification was necessary before a court could entertain evidence running counter to the written words unless all parties affected by the

[5] Lodhi supra; *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (5) SA 327 (CC).

alleged error agreed extra judicially to remedy the situation.[6] There was no evidence placed before the court that the parties agreed to rectify or amend the suretyship in any way. There was thus a procedural mistake in the proceedings in that the registrar granted an order based on a suretyship agreement that did not support the relief sought against the applicant in the particulars of claim. The agreement was not rectified before the order was granted. The order was granted without any a legal foundation.[7]

[21] Applying the principles in *Lodhi 2,* if it is shown that at the time the judgment was granted there was a fact of which the judge (here the registrar) 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. This has been established. I do not agree with the respondent that the invalidity of the suretyship is purely a defence on the merits which does not avail the applicant as it is a subsequently disclosed defence. *Ex facie* the terms of the suretyship, it is invalid and does not sustain the judgment granted. The particulars of claim and the suretyship upon which reliance was placed are thus in conflict and the judgment was granted without a legal basis.

[22] The applicant submitted that a judgment can be deemed to be erroneously sought and granted if the facts were deliberately misrepresented to the court or if it was not legally competent for the court to grant the order. There is merit in that submission. As the respondent had not pleaded rectification of the suretyship to reflect the correct principal debtor, and had not sought or obtained rectification of the suretyship, the defects in the suretyship remain.

[23] I agree with the applicant that in its current form, the deed of suretyship does not comply with the mandatory requirements of s 6 of the General Law Amendment Act 50

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[6] *Schroeder v Vakansiburo (Edms) Bpk* 1970 (3) SA 240 (T) at 242H.
[7] *Marais v Standard Credit Corporation Ltd* 2002 (4) SA 892 (W).

of 1956 and is invalid.[8] Under those circumstances, the respondent should not have obtained the default judgment in its favour. This issue lies at the heart of the matter. Had this fact been brought to the attention of the registrar who had granted the default judgment, it would not have been granted.[9] It was not as a result of a subsequently disclosed defence, as contended by the respondent, that the judgment is procedurally wrong. It was, simply put, legally incompetent for judgment to have been granted.

[24] The respondent's legal representatives must reasonably have been aware of the consequences of the incorrect debtor being referred to in the suretyship. The averment in paragraph 20 of the particulars of claim did not properly address the issue and does not avail the respondent.

[25] The respondent further relied on *Freedom Stationery (Pty) Ltd v Hassim and Others*[10] in contending that a party, such as the applicant, who is aware of the proceedings and the relief sought, who did not oppose or participate in the proceedings would not be entitled to relief under r 42(1)(a). I am not persuaded that *Freedom Stationery* avails the respondent. It was held:

> *'…the question is whether the party that obtained the order was procedurally entitled thereto. If so, the order could not be said to have been erroneously granted in the absence of the affected party. An applicant ot plaintiff would be procedurally entitled to an order when all affected parties were adequately notified of the relief that may be granted in their absence. The relief need not necessarily be expressly stated. In my view, it suffices that the relief granted can be anticipated in the light of the nature of the proceedings, the relevant disputed issues and the facts of the matter. In this regard it would be useful to enquire whether the relief could have been granted without amendment of the process in question. If so, the failure*

[8] *Nedbank Ltd v Wizard Holdings (Pty) Ltd* 2010 (5) SA 523 (GSJ) at 528D-F; *Sapirstein and Others v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A).
[9] *Lodhi 2* para 17
[10] *Freedom Stationery (Pty) Ltd v Hassim and Others* 2019 (4) SA 459 (SCA) para 25.

of an affected litigant to take steps to protect his interests by joining the fray, ought to count against him …'[emphasis added]

[26] It is at this hurdle that the respondent's argument loses force. Relief could and should not have been granted without amendment of the process in question, given the absence of a rectification claim and the deficiencies pertaining to the suretyship already referred to.

[27] Lastly, reliance was placed on *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* [11]. The respondent argued that to fall within the purview of r 42(1)(a), the applicant could not rely on being absent from the proceedings as his absence was wilful and he had failed to show that he was for some reason precluded from participating, physically or otherwise. It was submitted that he would not be entitled to a rescission in the event that an error was committed.

[28] The respondent argued that the applicant was aware of the proceedings and elected not to participate therein. It was submitted that the inescapable conclusion is that he was aware of the proceedings, and of his own accord, elected not to participate therein, thus rendering the matter on all fours with *Zuma.*

[29] As held by the Constitutional Court in *Zuma*: *'….if everything turned on actual presence it would be entirely too easy for litigants to render void every judgment and order ever to be granted by mere absentia'*[12] *….' Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, the absence does not fall within the scope of the requirements of*

[11] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (5) SA 327 (CC) para 60.
[12] Ibid para 60.

Rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted in absentia into one erroneously granted [13]'.

[30] The factual matrix in *Zuma* is however entirely distinguishable from the present facts as Mr Zuma had knowledge of the proceedings. I am not persuaded that it avails the respondent. In the present instance, the applicant and the first defendant were barred from delivering a plea. The record reflects no notification to the first defendant and the applicant that default judgment was being sought against them from the registrar nor was the application served on the applicant. An inference that the applicant deliberately and willfully elected to be absent, can only be drawn if such inference is reasonable in the circumstances, based on primary facts. I am not persuaded that this threshold has been met by the respondent. The necessary facts to do so do not appear from the respondent's affidavit. It is a stretch to conclude on the present facts that the applicant was willfully absent, not having knowledge that default judgment was being sought against him or had been granted by the registrar.

[31] Given the present facts, I conclude that the applicant was absent as envisaged in r 42(1)(a). For the reasons provided, I am persuaded that the provisions of r 42(1)(a) do apply. I am further persuaded that the default judgment was erroneously sought and erroneously granted in the circumstances as envisaged by r42(1)(a).

[32] Rule 42(1)(a) does not provide for a specific period within which a rescission application must be launched. The general principle is that it must be done within a reasonable time, which is dependent on the facts of the case. The applicant sought to explain his delay in launching the application in his founding affidavit in support of the contention that the application was launched within a reasonable time.

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[13] Ibid para 61.

[33] The applicant's explanation for the extensive delay in launching the rescission application is dealt with in terse terms in his founding affidavit. The high water mark of his explanation is that as the respondent did nothing to pursue the judgment for a period of some 4.5 months, and thereafter proceeded to attach a third party's assets, he did not believe it would be necessary to bring a rescission application as the 'respondent clearly did not seem serious to pursue the alleged judgment debt'. He informed the respondent of his intention to launch rescission proceedings so in March 2023 but did not want to incur unnecessary costs in launching the application as the respondent would itself realise it would not succeed with the sequestration application brought against him in January 2023.

[34] The respondent placed great emphasis on the lack of a proper explanation for the long delay in launching the present application. There is merit in its contention that the applicant's explanation is inadequate. As held in *Van Wyk v Unitas Hospital and Another (Democratic Advice Centre as Amicus curiae)*[14] the inordinate delay in launching the application induced a reasonable belief that the order had become unassailable. To grant condonation after an inordinate delay and in the absence of a reasonable explanation would undermine the principle of finality and could not be in the interests of justice. However, *Van Wyk* is distinguishable on the facts. There, leave to appeal was sought against a judgment of the Supreme Court at a belated stage. Here, I have concluded that the default judgment should not have been granted. The finality of litigation must in these circumstances yield.

[35] Despite the weakness of the explanation tendered by the applicant, the applicant has established that the judgment was erroneously sought and granted, given the invalidity of the deed of suretyship and the fact that the suretyship did not support the relief sought against the applicant. In those circumstances, I am not persuaded that the

[14] *Van Wyk v Unitas Hospital and Another (Democratic Advice Centre as Amicus curiae)* 2008 (2) SA 472 (CC) para 31.

delay of itself is fatal to the application for rescission, although it stretches the boundaries of what can be considered reasonable in the circumstances.

[36] I conclude that the rescission application must succeed. Having come to this conclusion, it is not necessary to deal with the other issues raised in the papers.

[37] In accordance with the general principle that costs follow the result, each of the parties sought costs against the other on scale B. In the alternative, the respondent argued that even if rescission were to be granted, the applicant should be held liable for the costs, considering his dilatory conduct in relation to the matter. In response, the applicant submitted that persistence with opposition to the application was vexatious and frivolous and that the respondent should thus be held liable for costs, if the application was successful.

[38] I am not persuaded that the respondent's opposition to the application was frivolous or vexatious. The conduct of the applicant in relation to the rescission application leaves much to be desired and the submission that he was utilising delaying tactics has merit. Considering all the facts and the respondent's conduct, it would be just to direct the applicant to pay the costs of the application, despite his ultimate success and to deprive him of his costs.

[39] In the result, the following order is granted:

> [1] The order granted against the applicant as second defendant in the action proceedings under case number 2021-4135 on 3 May 2022, is rescinded and set aside;
>
> [2] The writ of execution issued pursuant to the order referred to in 1 above is set aside;

[3] The applicant is directed to pay the costs of the rescission application on scale B.

[redacted]

EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

HEARING

DATE OF HEARING	: 22 APRIL 2025
DATE OF JUDGMENT	: 27 JUNE 2025

APPEARANCES

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