IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED
(4) DATE: 19 MAY 2025

(5) SIGNATURE: C.J. COLLIS

CASE NO: 13027/2024

ROAD ACCIDENT FUND APPLICANT

and

MVL GOBHOZI RESPONDENT

(Link: 3040286)

This judgment is issued by the Judges whose names are reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge's secretary.

The date of this judgment is deemed to be 19 May 2025.

JUDGMENT

COLLIS J

Introduction

1.This is an opposed application wherein as per the Notice of Motion, the Applicant seeks the following relief:[1]

> *"1. Condonation of late filing of the rescission application.*
>
> *2. Rescission of the judgment granted by Justice Mokose on the 26th October 2022.*
>
> *3. Each party to pay own costs, alternatively Respondent to pay costs if opposed.*
>
> *4. Further and/or alternative relief."*

2. The application was enrolled for hearing by the Respondent and the Applicant herein also did not file any Heads of Argument in preparation of the hearing.

3. It is also worth mentioning that on 18 January 2024, the Applicant's Replying Affidavit was struck out as an irregular step and is therefore not before the Court.[2]

4. In this rescission application, the Applicant is seeking the setting aside of the order granted by Mokose J on 26 October 2022.[3]

Background

5. The Respondent before Court was a pedestrian in a motor vehicle collision which occurred on 25 September 2010, wherein he sustained serious bodily injuries and suffered damages as a result thereof.[4]

6. The claim was lodged with the Applicant on 1 August 2011.[5]

7. Despite the expiry of the statutory time period, the Applicant did not make an acceptable offer in respect of the matter, and it was accordingly necessary to issue and serve summons upon the Applicant.[6]

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[1] Caselines 024-1.
[2] See Caselines 000, sub-item 1, pages 000-1 up to and including 000-2.
[3] See Caselines 024, sub-item 1, pages 024-1 up to 024-3 and, Caselines 024, sub-item 10, pages 024-79 up to and including 024-82, and Caselines 024, sub-item 13, pages 024-152 up to and including 024-154, and Caselines 024, sub-item 1, pages 024-2.
[4] See Caselines 015, sub-item 3, pages 015-14 up to and including 015-17.
[5] See Caselines 024, sub-item 16, page 024-165 paragraph 5.1, as read together with Caselines 024, sub-item 17 and 18, pages 024-224 up to and including 024-236.
[6] See Caselines 024, sub-item 16, page 164 paragraphs 5.2, and 5.3 as

8. Summons in this matter was issued on 13 February 2014, and served upon the Applicant on 18 February 2014.[7]

9. The merits of the action was not resolved, until the trial date of 4 November 2015, despite the Applicant having been in possession of all the necessary documentation to have properly considered the claim, since 1 August 2011.

10. The Applicant gave notice of intention to defend the action on 24 February 2014.

11. The Applicant delivered its plea only on or about 22 April 2014. [8]

12. The first and only pre-trial attended by the Applicant, was held on 26 June 2014.[9]

13. On 4 November 2015, an order was granted in terms whereof the General Damages were resolved in the amount of R350 000.00, and the Defendant was ordered to supply the Plaintiff with an undertaking, in terms of section 17(4)(a) of the Road Accident Fund

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read together with Caselines 024, sub-items 19 and 20, pages 024-236 up to and including 024-245.

[7] See Caselines 024, sub-items 19 and 20, pages 024-237 up to and including 024-245.

[8] See Caselines 024, sub-item 16, page 024-165 paragraph 5.4, as read together with Caselines 024, sub-item 21.

[9] See Caselines 024, sub-item 16, page 024-165 paragraph 55.6, as read

Act, 56 of 1996 (limited to 70%, indicating the resolution of the merits on that basis).[10] Despite the agreement in the aforesaid pre-trial (that the matter would proceed in respect of merits and quantum), the Applicant sought an indulgence, from the Respondent, to postpone loss of earnings.

14. The action was certified trial ready, on 24 August 2017, in respect of the outstanding issue, of loss of earnings.

15. On 8 September 2017, a notice of set down was served upon the Applicant's attorneys.[11] This related to the trial date of 23 April 2019. There was no offer forthcoming, on the aforesaid date, and unfortunately due to the unavailability of judges, the matter was removed from the roll.[12]

16. During July and August 2020, various correspondence was sent to the Applicant's attorneys, requesting that a pre-trial conference be held.[13]

17. On 30 April 2021, a Rule 37(2)(a) notice was served upon the

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together with Caselines 024, sub-item 22.
[10] See Caselines 024, sub-item 16, page 024-165 paragraph 5.9, as read together with Caselines 024, sub-item 25.
[11] See Caselines 024, sub-item 16, page 024-167, paragraph 5.16.
[12] See Caselines 024, sub-item 16, page 024-167, paragraphs 5.16 and 5.17.
[13] See Caselines 024, sub-item 16, page 168 paragraphs 5.22 and 5.23, as read together with Caselines 024, sub-items 26 up to and including 28.

Applicant, for a pre-trial conference to be held on 7 May 2021.[14] The Applicant did not attend the pre-trial conference.

18. On 10 May 2021, another notice in terms of Rule 37(2)(a) was served upon the Applicant, calling for a pre-trial conference on 14 May 2021.[15] The Applicant did not attend this pre-trial conference either.

19. On 17 May 2021, a further Rule 37(2)(a) notice was served upon the Applicant calling for a pre-trial conference to be held on 21 May 2021.[16] This pre-trial was also not attended by the Applicant.

20. Due, *inter alia*, to the Applicant's repeated failures to attend pre-trial conferences, the Respondent served an application upon the Applicant, on 24 June 2021, to compel the Applicant to attend a pre-trial conference. The application was set down for 17 August 2021.[17] Notice of Set Down of the application was properly served upon the Applicant.

21. An order was granted on 17 August 2021 compelling the Applicant to attend a pre-trial, and a copy of this order was duly

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[14] See Caselines 024, sub-item 16, page 024-168, paragraph 5.25 thereof, as read together with Caselines 024, sub-items 29 and 30.
[15] See Caselines 024, sub-item 16, page 024-169, paragraph 5.28, as read together with Caselines 024, sub-items 39 and 40.
[16] See Caselines 024, sub-item 16, page 024-170, paragraph 5.31, as read together with Caselines 024, sub-items 45 and 46.
[17] See Caselines 024, sub-item 16, pages 024-172, paragraphs 5.34 and

served upon the Applicant.[18]

22. The Applicant failed to comply with the aforesaid Court order, and accordingly, on 13 October 2021, an application was served upon the Applicant, wherein an order was sought, *inter alia*, striking out their defence. The Application was set down for 25 October 2021, notice having been duly given to the Applicant.[19]

23. On 25 October 2021, an order was granted, striking out the Applicant's defence. A copy of the order was sent to the Applicant on 3 November 2021.[20]

24. A notice of set-down for the default judgement hearing date of 26 October 2022, was served upon the Applicant on 14 December 2021.[21]

25. Between 18 October 2022, and 20 October 2022, all the documentation in relation to the trial was emailed to the "new" claims' handler and the deponent to the Founding Affidavit.[22]

5.35.

[18] See Caselines 024, sub-item 16, page 024-172, paragraph 5.36 as read together with Caselines 024, sub-items 54 and 55.

[19] See Caselines 024, sub-item 16, pages 024-172 and 024-173, paragraph 5.37, as read together with Caselines 024, sub-items 56 up to and including 59.

[20] See Caselines 024, sub-item 16, page 024-173, paragraph 5.38.

[21] See Caselines 024, sub-item 16, page 024-173, as read together with Caselines 024, sub-items 62 up to and including 64.

[22] See Caselines 024, sub-item 16, pages 024-173 and 024-174, paragraphs 5.40 up to and including 5.42, as read together with Caselines 024, sub-items 65 and 66.

26. The State Attorney who purported to provide a notice of substitution, on 24 October 2022, was also invited to and accessed Caselines on 25 October 2022.[23]

27. The Respondent proceeded with the Default Judgement Trial on 26 October 2022, in the absence of the Applicant, and an order was granted by Mokose J, which was uploaded to Caselines on 27 October 2022, and also emailed to the claims handler, and the State Attorney.[24] The defence of the Applicant had been struck out a year before the Default Judgement Trial date, and the Applicant would in any event, even if it had attended Court on that day, have had no right of appearance. They could present no evidence, and also could present no argument before the Court as they were no longer before the Court.

28. The present application was only launched before this Court during March 2023,[25] some five months after the order by Mokose J was granted.

Relief sought as per the Notice of Motion

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[23] See Caselines 024, sub-item 16, page 024-174, paragraphs 5.43 and 5.44.
[24] See Caselines 024, sub-item 16, page 024-174, paragraph 5.46.
[25] See Caselines 024, sub-item 16, pages 024-174 and 024-175, paragraphs 5.47 up to and including 5.48, as read together with Caselines 024, sub-items 1, 9, 10, 12, 13 and 14.

29. The Applicant, notwithstanding the relief sought as per the Notice of Motion, as per the Founding Affidavit also seeks an order that: *"…* any interdict and / or warrant of execution which may have been issued against the Applicant, as a result of the court order dated the 26 October 2022, issued by the Justice Mokose J on 26th October 2022 be stayed."[26]

30. The Notice of Motion, quoted in paragraph 1 above, makes no mention for such relief and accordingly in the absence of an amendment to the Notice of Motion, and before this Court there was none, this Court will not further entertain the granting of such relief.

Condonation

31. As per prayer I of the issued Notice of Motion, the Applicant seeks condonation for the late filing of the rescission application in terms of Rule 27(3) of the Uniform Rules of Court.

32. Rule 27(3) clearly defines that a Court may, *"…on good cause shown, condone any non-compliance with these rules."*

33. As per its Founding Affidavit, the Applicant makes very little attempt to properly explain why the application was only launched in March 2023[27], this when the order to be rescinded had already

[26] See Caselines 024, sub-item 2, page 024-6, paragraph 6.1.
[27] See Caselines 024, sub-item 2, pages 024-7 up to and including 024-8, paragraphs 7.1 up to and including 7.8.

come to their knowledge on 26 October 2022[28] or at the latest 27 October 2022.[29]

34. As part of its explanation presented explaining the delay, the Applicant refers to the fact that it is working with "the public purse" and that it takes "careful deliberation" to deal with these types of matters.

35. The Applicant however, is required to show "good cause" in order to obtain condonation, and if it cannot do so, the issue of any prejudice, which it may suffer, does not even arise for determination.[30]

36. Courts in considering whether good cause has been shown, have tried to steer clear of a precise definition of good cause.

37. In Melane v Santam Insurance Co. Ltd[31] Holmes JA stated the following:

"In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially

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[28] See Caselines 024, sub-item 2, page 024-7, paragraph 7.2.
[29] See Caselines 024, sub-item 16, page 024-174, paragraph 5.46, as read together with Caselines 024, sub-item 69, page 024-394 up to and including 024-396.
[30] See Standard General Insurance Co Ltd v Eversoft (Pty) Ltd 2000 ?(3) SA 87 (W) at 95E-F.
[31] 1962 (4) SA 531 (A) at 532 C - F.

upon a consideration of all the facts and, in essence, is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are inter-related; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion ..."

38. In applying the ratio in Melane, *supra*, the court in Academic and Professional Staff Association v Pretorius NO and Others[32] summarised the principles for consideration as follows:

"The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice…

It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success.

[32] (2008) 29 ILJ 318 (LC) at para 17 - 18.

Similarly, strong prospects of success may compensate the inadequate explanation and long delay."

39. In Brummer v Gorfil Brothers Investments (Pty) Ltd[33] the Constitutional Court pointed out that an application for condonation should be granted if it is in the interests of justice and refused if it is not. The Constitutional Court went on to say that the interests of justice must be determined by reference to all relevant factors outlined in Melane, *supra,* including the nature of the relief sought, the nature and cause of any other defect in respect of which condonation is sought, and the effect of the delay on the administration of justice.[34]

40. In Steenkamp and Others v Edcon Limited,[35] the Constitutional Court reaffirmed that granting condonation must be in the interest of justice and it referred with approval to its decision in Grootboom v National Prosecuting Authority and Another:[36]

> *"[36] Granting condonation must be in the interests of justice.*
>
> *This Court in Grootboom set out the factors that must*

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[33] 2000 (2) SA 837 (CC).
[34] [2000] ZACC 3; 2000 (5) BCLR 465; 2000 (2) SA 837 (CC) at para 3; See also Ndlovu v S 2017 (10) BCLR 1286 (CC); 2017 (2) SACR 305 (CC) (15 June 2017) at paras 22 – 23; Van Wyk v Unitas Hospital (Open Democratic Advice Centre as amicus curiae) [2007] ZACC 24; 2008 (2) SA 472 (CC) at 477A-B; SA Post Office Ltd v CCMA [2012] 1 BLLR 30 (LAC) at para 23.
[35] [2019] 11 BLLR 1189 (CC).
[36] [2013] ZACC 37; 2014 (2) SA 68; 2014 (1) BCLR 65 (CC).

be considered in determining whether or not it is in the interests of justice to grant condonation:

"[T]he standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors, but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or

court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."

[37] All factors should therefore be taken into account when assessing whether it is in the interests of justice to grant or refuse condonation."

41. In the present application the deponent sets out that the Court order come to their knowledge on 26 October 2022[37] or at the latest 27 October 2022.[38] Apart from the vague reference to nebulous policy directives, and policies and procedures, for referral of a matter to the so called "rescission committee" there is no explanation of the delay from 26 or 27 October 2022, until March 2023, when the application was eventually launched.

42. Having regard to the authorities listed above the deponent to the Founding Affidavit was required to satisfactorily explain the delay, that it would be in the interest of justice to have the judgment rescinded and to explain to this Court its reasonable prospect of success to have the judgment rescinded.

43. In casu, the Applicant has failed to satisfactorily explain its delay and it has failed to persuade this Court of its prospect of success to have the judgment rescinded.

44. Consequently, in exercising my discretion judicially, condonation is refused.

Merits of application in terms of Rule 42(1)(a)

45. In the present application, it is unclear, on what basis the

[37] See Caselines 024, sub-item 2, page 024-7, paragraph 7.2.
[38] See Caselines 024, sub-item 16, page 024-174, paragraph 5.46, as read together with Caselines 024, sub-item 69, page 024-394 up to and

Applicant brings this application i.e. Rule 31(2)(b), Rule 42 or the common law. The Deponent to the Applicant's founding affidavit refers in paragraph 6.3 of the Founding affidavit to Rule 42(1)(a), but give the conflicting references to time periods and condonation. This confusion on the part of the Applicant, makes it difficult for this Court to consider the application against the different requirements of the various rules.

46. At the outset, it should be mentioned that condonation is however not even strictly speaking required where a rescission application is brought in terms Rule 42 or the common law, as in terms of the common law and Rule 42 the launching of a rescission application, must merely be brought within a reasonable time,[39] and as already found no basis has been made out to have condonation granted.

47. Rule 42(1)(a) 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:*

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including 024-396.

[39] See First National Bank of Southern Africa Ltd v Van Rensburg N.O.: in re First National Bank of Southern Africa Ltd v Jurgens 1994(1) SA 677 (T) at 681 B-G and Firestone South Africa v Gentiruco AG 1977(4) SA 298 (A) at 306 H.

(a) An order or judgment erroneously sought, or erroneously granted in the absence of any party affected thereby;"

48. The matter of Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd (128/06) [2007] ZASCA 85; [2007] SCA 85 (RSA); 2007 (6) SA 87 (SCA) (1 June 2007), is very informative, in respect of what is considered when the question is posed, whether an order was *"erroneously sought, or erroneously granted"*.

49. In Bakoven Ltd v G J Howes (Pty) Ltd 1992 (2) SA 466 (E) at 471F-G, where Erasmus J said:

> *"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" (The Shorter Oxford Dictionary). It follows that a Court in deciding whether a judgment was "erroneously granted" is, like a Court of appeal, confined to the record of proceedings."*

50. In the matter of Kgomo and Another v Standard Bank of South Africa and Others (47272/12) [2015] ZAGPPHC 1126; 2016 (2) SA 184 (GP) (15 June 2015), Dodson AJ stated, at [11] up to and including [11.7], the following:

"*[11] Based inter alia on the judgments of the Supreme Court of Appeal in* Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd (128/06) [2007] ZASCA 85; [2007] SCA 85 (RSA); 2007 (6) SA 87 (SCA) (1 June 2007) and Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA), *the following principles govern rescission under rule 42(1)(a):*

[11.1] the rule must be understood against its common law background;

[11.2] the basic principle at common law is that once a judgment has been granted, the judge becomes *functus officio, but subject to certain exceptions of which Rule 42 (1)(a) is one;*

[11.3] the rule caters for a mistake in the proceedings;

[11.4] the mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application in an application for rescission of judgment;

[11.5] a judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment;

[11.6] the error may arise either in the process of seeking the judgment on the part of the applicant for judgment or in the process of granting default judgment on the part of the court; and

[11.7] the applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)(b).”

51.The Constitutional Court decision of 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 and Others (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) at paragraphs [56] up to and including [61] which deals with whether an order is granted in the absence of a party or not, for purposes of Rule 42. It is imperative to note that

the same line of reasoning will be applicable to a common law rescission, as well. It was stated that:

> *'[56] Mr Zuma alleges that this Court granted the order in his absence as he did not participate in the contempt proceedings. This cannot be disputed: Mr Zuma did not participate in the proceedings and was physically absent both when the matter was heard and when judgment was handed down. However, the words "granted in the absence of any party affected thereby", as they exist in rule 42(1)(a), exist to protect litigants whose presence was precluded, not those whose absence was elected. Those words do not create a ground of rescission for litigants who, afforded procedurally regular judicial process, opt to be absent.*
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> *[57] At the outset, when dealing with the "absence ground", the nuanced but important distinction between the two requirements of rule 42(1)(a) must be understood. A party must be absent, and an error must have been committed by the court. At times the party's absence may be what leads to the error being committed. Naturally, this might occur because the absent party will not be able to provide certain relevant information which would have an essential bearing on the court's*

decision and, without which, a court may reach a conclusion that it would not have made but for the absence of the information. This, however, is not to conflate the two grounds which must be understood as two separate requirements, even though one may give rise to the other in certain circumstances. The case law considered below will demonstrate this possibility.

[58] In Lodhi 2, for example, it was said that "where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him, such judgment is granted erroneously".[22] And, precisely because proper notice had not been given to the affected party in Theron N.O.,[23] that Court found that the orders granted in the applicants' absence were erroneously granted. In that case, the fact that the applicant intended to appear at the hearing, but had not been given effective notice of it, was relevant and ultimately led to the Court committing a rescindable error.

[59] Similarly, in Morudi,[24] this Court identified that the main issue for determination was whether a procedural irregularity had been committed when the order was

made. The concern arose because the High Court ought to have, but did not, insist on the joinder of the interested applicants and, by failing to do so, precluded them from participating. It was because of this that this Court concluded that the High Court could not have validly granted the order without the applicants having been joined or without ensuring that they would not be prejudiced.[25] This Court concluded thus:

"[I]t must follow that when the High Court granted the order sought to be rescinded without being prepared to give audience to the applicants, it committed a procedural irregularity. The Court effectively gagged and prevented the attorney of the first three applicants – and thus these applicants themselves – from participating in the proceedings. This was no small matter. It was a serious irregularity as it denied these applicants their right of access to court.[26]

[60] Accordingly, this Court found that the irregularity committed by the High Court, insofar as it prevented the parties' participation in the proceedings, satisfied the requirement of an error in rule 42(1)(a), rendering the order rescindable.[27] Whilst that matter correctly emphasises the importance of a party's presence, the

extent to which it emphasises actual presence must not be mischaracterised. As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed.[28] I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, ipso facto (by that same act), plead the "absent victim". 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 merely electing absentia (absence).

[61] The cases I have detailed above are markedly distinct from that which is before us. We are not dealing with a litigant who was excluded from proceedings, or one who was not afforded a genuine opportunity to participate on account of the proceedings being marred by procedural irregularities. Mr. Zuma was given notice of the contempt of court proceedings launched by the

Commission against him. He knew of the relief the Commission sought. And he ought to have known that that relief was well within the bounds of what this Court was competent to grant if the crime of contempt of court was established. Mr Zuma, having the requisite notice and knowledge, elected not to participate. Frankly, that he took issue with the Commission and its profile is of no moment to a rescission application. Recourse along other legal routes were available to him in respect of those issues, as he himself acknowledges in his papers in this application. Our jurisprudence is clear: where a litigant, given notice of the case against them and 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 turning the order granted in absentia, into one erroneously granted.[29] I need say no more than this: Mr Zuma's litigious tactics cannot render him "absent" in the sense envisaged by rule 42(1)(a).'

52. In the present matter, the Applicant is in the same position, as was the case in the Zuma matter quoted above. The Applicant and its legal representatives deliberately decided not to appear in this matter, on the day of the Default Judgement trial proceedings

notwithstanding notice to it and were therefore, by any definition, in wilful default of appearance.

53. The Applicant can therefore not be described as "absent", within the definition of the word, in terms of Rule 42, and was also not absent, within the definition, on the day that their defence was struck out, a year earlier.

54.The next requirement to be met as referred to in the Rule is whether the order was erroneously sought or granted. In its Founding Affidavit, in this respect the Applicant avers that at the trial on Default Judgment the Respondent proceeded to trial without exercising their duty to disclose all crucial information to the Court which would have assisted the Court to come to a different and fairer award to that which has been granted. In this respect the Applicant alleges that the Respondent was in possession of the Applicant's Industrial Psychologist and Actuarial report, which formed the basis for the Applicants loss of earnings calculations. These reports however was not presented before Mokose J and it is on this basis that the Applicant contends that had it been, a significantly different and lower award would in all likelihood have been made by the Court.[40]

[40] Founding Affidavit para 9. 024-10.

55. The Founding Affidavit further sets out that the Respondent prior to the hearing date was requested to postpone the trial but that it was not amenable to accede to this request. It is worth mentioning that the allegations made hereinbefore is specifically denied by the Respondent in its Opposing Affidavit.[41]

56. A judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware of which would have precluded the granting of the judgment and would have induced the court, if aware of it, not to grant the judgment.[42]

57. As already mentioned, the Applicant's defence had been struck out, a year earlier, than the order granted which the Applicant now seeks to rescind. Absence such a defence, even if this Court was to rescind the order of Mokose J, it would serve no purpose as the Applicant would still not be before court.

58. This then begs the question, is it the order of Mokose J which stands to be rescinded or indeed the order of Mogotsi AJ dated 25 October 2021, which struck out their defence, as absence a defence, it would serve no purpose to rescind the order of Mokose J.

59.Consequently, this Court cannot conclude that the order of Mokose J was erroneously granted.

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[41] Opposing Affidavit para 30 to 40 Caselines 024-193.

Merits of the Application in terms of the common law.

60. An Applicant in order to succeed rescinding a judgment in terms of the common law is required to show good cause, which entails:

60.1 The giving a reasonable explanation of its default;

60.2 The showing that its application is made bona fide; and

60.3 The showing that it has a bona fide defence to the plaintiff's claim which *prima facie* has some prospect of success.

61. In respect of the giving of a reasonable explanation for the Applicant's default, the Founding Affidavit is silent of a valid excuse for the default. What is clear, is that the Applicant was aware of the trial date, and that it was constantly kept abreast of the progress of the matter as it proceeded. Furthermore, what the Applicant fails to deal with, at all, is the fact that it had no right of appearance, on the Default Judgment Trial date of 26 October 2022, in any event, by virtue thereof that its defence had been struck out by court order dated 25 October 2021.[43]

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[42] Occupiers, Berea v De Wet NO 2017 (5) SA 346 (CC) at 366E-367A.
[43] See Caselines 024, sub-item 16, page 024-173, paragraph 5.38, as read together with Caselines 024, sub-items 60 and 61.

62. The effect of the striking out of a Defendant's defence is trite law. Default judgment is granted against the Defendant when the defence is struck out. The court has the power to strike out the defence and to give judgment for the Plaintiffs as if the action were undefended. After the defence is struck out, the case is treated as undefended. Where a defence is struck out the Defendant is placed in the same position as if he had not defended. The striking out of a defendant's defence is an extremely drastic step which has the consequence that the action goes forward to trial as an undefended matter. A Defendant is placed in the same position as if he had not defended the action; his whole defence is struck out.

63. It was held in Motor Marine (Edms) Bpk v Thermotron 1985 (2) SA 127 (SE) at 128 that:

> "Once the defence has been struck out, in the present case in terms of Rule of Court 21(6), the defendant is no longer before the Court, and has no right of further appearance. His defence, which includes his notice of appearance to defend, and his plea have been struck out and no longer form portion of the papers upon which the Court is required to adjudicate."

64. A Defendant whose defence has been struck out can no more proceed than a Plaintiff whose claim has been struck out. It is

absurd to suggest otherwise. The striking out of a Defendant's defence is the equivalent of the sanction envisaged for a Plaintiff whose claim is struck out; as does appear from Rule 30A (non-compliance with rules) where provision is made for the claim or defence to be struck out as the case may be:

> *"Rule 30A(1):* Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.
>
> "Rule 30A(2): Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet."

65. Consequently, there exists no basis upon which the Applicant could claim to be entitled to participate in any way in the Default Judgment Trial of 26 October 2022. Its defence having been struck out, the Applicant was in wilful default and the Respondent was entitled to proceed without the involvement of the Defendant in the

proceedings on 26 October 2022.

66. As to the second requirement whether the Applicant has given a valid explanation for its default, none has been given and therefore, the Applicant also fails to have met the second requirement.

67. The next requirement to be met is whether the application is made *bona fide*? In this regard, Counsel for the Respondent submitted that the application has not been made bona fide for the following reasons:

67.1 The conduct of the Applicant from the outset of the action has been nothing more than the employment of delaying tactics to try delay the finalisation of the action, as long as possible.[44] The finalisation of the Respondent's claim has been delayed since August 2011.

67.2 The Applicant launched the present application, almost 5 months to the date, after the granting of the order by Mokose J. This just before the time, when it would have had to have made payment of the capital amount.

67.3 The Applicant despite, the order and the order of 4 November 2015 in respect of the section 17(4)(a) undertaking, has

[44] See Caselines 024, sub-item 16, pages 024-164 up to and including 024-174, paragraphs 5.1 up to and including 5.546.

made no effort to provide the Respondent with the undertaking aforesaid.[45]

67.4 In considering the *bona fides* of the application, it is also essential to consider the deliberate obfuscations and misleading and untruthful statements made in the Founding Affidavit, which are pointed out in the Opposing Affidavit, and are not disputed, nor can they be.[46]

68. The submissions advanced by Counsel on behalf of the Respondent, this Court is in agreement with and it is for this reason that this Court conclude that no bona fide defence has been disclosed by the Applicant which has a prima facie prospect of success to have this judgment taken against it rescinded.

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[45] See Caselines 024 sub-item 16, page 024-165, paragraph 5.9.

[46] See Caselines 024, sub-item 2, paragraphs 7.3, as read together with Caselines 024, sub-item 16, pages 024-180 up to and including 024-182, paragraphs 16 up to and including 16.8. See Caselines 024, sub-item 2, paragraph 8.6, as read together with Caselines 024, sub-item 16, pages 024-191 up to and including 024-193, paragraphs 27 up to and including 27.5. See also Caselines 024, sub-item 2, paragraph 9.3, as read together with Caselines 024, sub-item 16, page 024-195 to 024-197, paragraphs 32 up to and including 32.6. See Caselines 024, sub-item 2, paragraphs 9.7, as read with Caselines 024, sub-item 16, pages 024-202 up to and including 024-203, paragraphs 36 up to and including 36.6. See Caselines 024, sub-item 2, paragraph 9.10, as read together with Caselines 024, sub-item 16, pages 024-205 up to and including 024-206, paragraphs 39 up to and including 39.4. See also Caselines 024, sub-item 2, paragraph 9.11, as read together with Caselines 024, sub-item 16, pages 024-206 and 024-207, paragraphs 40 up to and including 40.5. See also Caselines 024, sub-item 2, paragraph 10.2, as read together with Caselines 024, sub-item 16, pages 024-209 to 024-210, paragraphs 43 up to and including 43.3.

69. Consequently, even in terms of the common law the application cannot succeed.

Costs

70. On behalf of the Respondent the argument was advanced that this Court should show its rebuke against the conduct of the Applicant, by awarding costs on a punitive scale in the event of the application being unsuccessful and that such costs should include the costs of two counsel.

71. In support of this contention, the Respondent relied on the decision Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) where at para 8 it was noted that *"[c]osts on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process."* Khampepe J and Theron J further noted that *"a punitive costs order is justified where the conduct concerned is* "extraordinary" and worthy of a court's rebuke".

72. In the present matter, the deponent to the Founding Affidavit has deliberately made allegations, importing that the conduct of the Respondent's legal representatives was dishonest and unethical, which allegations have been shown to be devoid of any substance.

73. In addition, the Applicant has also clearly delayed the finalisation of the matter unnecessarily, by its conduct, as can be seen clearly from the background to the matter, and the manner in which the present application has been conducted.

74. For the above reasons Counsel for the Respondent had submitted that the Applicant should be ordered to pay costs on the scale as attorney and client, as a result of the aforesaid, to show the Court's displeasure with conduct of this nature.

75. Given the conspectus of what has been set out above in relation to costs, I am persuaded in exercising my discretion that costs on a punitive scale is warranted given the recalcitrant behaviour displayed by the Applicant, but that costs of two counsel would not be warranted in the circumstances.

ORDER

76. In the result the following order is made:

76.1 The Application for Condonation is refused.

76.2 The Application is dismissed.

76.3 The Applicant is to pay the costs of the application, including the costs of the opposed hearing dates of 31 July and 14 August 2024, on the scale as between attorney and client.

76.4 The aforesaid costs shall include the costs of only one counsel.

C. COLLIS

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

APPEARANCES:

Attorney for the Applicant:	Mr. Makgoka
Instructed By:	Office of the State Attorney, Pretoria
Counsel for the Respondents:	Adv. C M Dredge
	Adv. L Botha
Instructed By:	Gert Nel Attorneys
Date of Hearing:	14 August 2024
Date of Judgment:	19 May 2025