

REPUBLIC OF SOUTH AFRICA



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

Case no: 40162/2019

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
<u>2023/11/03</u>	
DATE	SIGNATURE

In the matter between:

HALSTEAD MICHAEL ROBERT

Plaintiff

and

**THE MEC FOR PUBLIC TRANSPORT AND ROAD
INFRASTRUCTURE OF THE GAUTENG DEPARTMENT**

Defendant

In re

THE MEC FOR PUBLIC TRANSPORT AND ROAD

Plaintiff

and

**INFRASTRUCTURE OF THE GAUTENG DEPARTMENT Defendant
HALSTEAD MICHAEL ROBERT**

This judgment has been delivered on 3 November 2023 at 10h00 at the Gauteng Division of the High Court of South Africa, Johannesburg. It is uploaded to the caselines file and emailed to the parties.

APPLICATION FOR LEAVE TO APPEAL JUDGMENT

Sutherland DJP:

- [1] This is an application by the defendant for leave to appeal against the decision given by me on 31 July 2023, dismissing an application to rescind a judgment given in favour of the plaintiff by Segal AJ against the defendant on 30 August 2021.
- [2] The litigation arises from a motor car accident in which the plaintiff was seriously injured. The parties had agreed to separate the question of liability of the defendant from the quantum of damages.
- [3] The defendant then failed to file a plea. The defendant was thereafter barred. Notwithstanding proper notice to the defendant of the date of the application for a default judgment, the defendant failed to attend the hearing. Segal AJ was required to give judgment only on the liability issue. Because the claim was for unliquidated damages Segal AJ had to receive evidence. She did so and gave the order declaring the defendant liable for 100% of the damages that might be proven in due course.
- [4] This is the judgment that was put before me in the application for a rescission. In support of the application for rescission a notice of motion and an affidavit on behalf of the defendant was filed by the then attorney of record. The Notice

of Motion sought a rescission of the judgment by Segal AJ, the upliftment of the bar and leave to file a plea. The allegations put up in an affidavit to support the rescission application were few; they included a contention that there had been bad service of the summons, a reference that a notice of opposition had been filed, an allegation that the details of the claim pleaded were vague, and an allegation that the defendant was being denied access to a court. Such was the sum of the case placed before me.

[5] Having heard argument, I gave judgment. The treatment of the grounds for rescission are in the judgment.¹ Inter alia, I dealt with the significance of the

¹ The relevant passages in the judgment is missing the application for rescission are thus:

[12] An affidavit supporting the rescission application has been filed. That affidavit is bereft of any proper explanation for the events between the dates that I have cited, 5 August 2021 and 30 August 2021. It must therefore follow that whatever excuses there may be, and whatever degree of latitude might be afforded to a party for not responding to the application or the notice of set down, an evaluation can only take place on the basis of the facts placed before me. There are no relevant facts placed before me. Therefore, not merely is there no reasonable explanation, there is no explanation at all.

[13] There are other issues which bear mention in passing, which reflect on the absence of an appropriate response to the service of set down.

[14] The events described took place during the time that the Covid pandemic was prevailing in our country, and there is a suggestion, more forcibly made elsewhere, that the office of the State Attorney, was to some degree, if not entirely, paralysed by lockdown provisions. That is what I am told. I am given no detail, I am not told who was unable to work, what systems were dysfunctional, or what remedial action was taken. Indeed, all I am given is a bold sweeping generalisation. Given the fact that, in this Division, throughout the whole of the Covid pandemic, this Court continued to operate, and hundreds of firms of attorneys in Johannesburg continued to operate, albeit under very difficult circumstances, it is insufficient to place before me a generalised statement that Covid interfered with the workings of the office, when it is clear that hundreds of other attorneys were able to function during that time.

[15] At a later stage, a plea was filed. Astoundingly, this plea did not confine itself to the quantum leg, which remained the only *lis* now open to the defendant to defend, but also addressed the liability leg which had been the subject matter of the default judgment.

This step was plainly incorrect. After an exchange between the parties' respective counsel, by consent, that part of the plea, in regard to liability, was struck out. What is staggering, is that plea was filed at all on the liability leg, instead of addressing at once the need for a rescission. Indeed, the rescission application came much, much later. The circumstances which might explain that are not placed before me.

[16] Lastly, what is glaringly obvious and is omitted from the rescission affidavit, is any indication of what the defence of the defendant might be to the allegation of negligence. Considering that before the default judgment Court on 30 August 2021, the reports of two experts had been adduced, and this rescission application is being heard in July 2023, it is apparent that no effort whatsoever has been made by the defendant to address the allegations of negligence by either considering those reports and seeking countervailing advice, or any other investigation. That an

attempt after the judgment of Segal AJ had been given to file a plea and which, by consent before Wepener J, was struck out.

[6] At the time of giving the judgment I directed the parties to meet to address the remaining issue of the computation of the damages and report to me in due course. A report was prepared. What transpired there is the subject of controversy which I shall deal with discretely.

[7] Thereafter, the application for leave to appeal against my judgment was launched on 8 September 2023. The application was out of time and

investigation was contemplated is clear, because it is common cause that an inspection was sought by the state attorney of the spot where the collision took place. Whether that, in fact, took place, and what followed from it, I have been told nothing.

[17] Thus, what we have before me is an absence of any defence of the merits of the claim as regards to liability. What has been advanced to support the rescission application are two points, both of which are bad.

[18] The first point is that there was a failure to serve the summons in 2019 on the State Attorney, at the same time that the summons was served on the defendant. It is common cause that the summons was indeed served on the defendant. The applicant has not only drawn to my attention, but notified the defendant at once of the decision in the case of *Minister of Police and others v Molokwane*, 2022 JDR 1956 (SCA). This judgment deals with precisely the point of whether or not the failure to serve a summons on the State Attorney in terms of section 2(2) of the State Liability Act 20 of 1957, but nevertheless a summons is served on the organ of state invalidates the summons. The judgment disposes of the point, saying that it would be a mechanical nonsense to interpret the State Liability Act in such a fashion.

[20] The point raised in the rescission affidavit is therefore bad. It is made worse by the fact that, after that event, of which the complaint is raised so belatedly, there have been dozens of further steps taken, which would constitute a waiver against raising such a point. At the critical time during March to August of 2021, the State Attorney was fully apprised and engaged with the matter, and the absence of action, as I have alluded to, is not explained in this affidavit.

[21] The only other point advanced, is that the particulars of claim are excipiable on the grounds that they are inadequate, given the provisions of rule 18(4) of the Uniform Rules of Court. It is true that the particulars are lean, and indeed, it may well be, - I make no decision, I simply mention that as a prospect - that some criticism of the pleadings would be valid. But that would have resulted in nothing more than an order directing the plaintiff to amplify its pleadings. It certainly would not have led to the dismissal of the action.

[22] Therefore, in the context of the rescission application, it is an unhelpful point to raise, even if it had been raised at an earlier time. Curiously, the inappropriate plea on the liability, which was struck out, to which I have alluded, raises no points of excipiability, suggesting that there was no difficulty in pleading to those allegations, albeit that from a procedural point of view, it was inappropriate to have done filed a plea.

condonation is sought thereof. No real resistance is advanced to condonation being appropriate. It is therefore granted.

- [8] The notice of motion sets out the grounds upon which leave is sought. The basis for this application does not take issue with any of the specific findings made by me in relation the grounds pressed in the defendant's affidavit for rescission. Instead, they traverse the material before Segal AJ; ie, the particulars of claim and affidavits filed by experts on road accidents which were adduced to supposedly explain aspects of the scene of the accident. The argument advanced in the hearing retraced these criticisms of the judgment of Segal AJ which may be summed up by the contention that there was inadequate evidence adduced to infer negligence on the part of the defendant. The 'wrong' conclusion is thereupon described as an instance of a judgment 'erroneously granted' within the meaning of rule 42 (1) (a). Relying upon that premise, it is contended on behalf of the defendant that the application for rescission which came before me should have been granted; in different words, a proper case was made out which I, in my judgment, failed to grasp. There are substantial difficulties from which this thesis suffers.
- [9] The case put up in the application for leave to appeal was not the case put up to support the rescission application.² The new case is also not a pure point of law which one might suppose could survive that shortcoming. The thesis is, rather, a view that Segal AJ ought not to have been convinced that a case was made out. This criticism is a ground of appeal not a ground of rescission.
- [10] Reliance was placed on the decision of Lewis JA in *Minnaar v Van Rooyen* 2016 (1) SA 117 (SCA). That reliance is misplaced. In that case an order had been made against a director of a company, by default, in terms of Section 424 (1) of the Companies Act 61 of 1973. That section provided:

² Cf: *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2009 (6) SA 87 (SCA) at Paras [8] – [9]

'When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.'

- [11] The section 424(1) order was the subject of a rescission application which was dismissed. That decision, in turn, was taken on appeal. The crucial point on which the dismissal of the rescission application was overturned was that an order in terms of section 424 cannot be granted in the absence of evidence and none was adduced. That aspect is what distinguishes the case; in the case before Segal AJ there was evidence.³ Also, Section 424(1) is plainly draconian in its implications and thus dwells in a context foreign to that in which this case is to be located.

- [12] Moreover, I turn now to the provisions of Rule 42(1)(a) which provides the following:

"The court may rescind an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby"

- [13] The plaintiff makes much of the need for the party invoking this relief to have been absent; ie absent in fact and 'absent in law'. The contention is advanced that the formalities to secure the presence of the defendant at the hearing of the application for a default judgment having been fulfilled the defendant is deemed to have chosen to be absent, which means 'in law' it was not absent. Support for this proposition is derived from *Zuma v Secretary of the Judicial Commission of Inquiry into allegations of State Capture et al 2012 (11) BCLR*

³ See: *Minnaar*, at paras [10] ff and esp para [19].

1263 (CC); I cite these passages of the Constitutional Court's judgment at length because they traverse the full breadth of the controversy debated here:

[53] 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 a 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.

[54] As an affected party, Mr Zuma has a direct and substantial interest in the order sought to be rescinded. He has *locus standi* to approach this Court for rescission in terms of rule 42. However, of course, having standing is not the end of the story. Any party personally affected by an order of court may seek a rescission of that order. But these sorts of proceedings have little to do with an applicant's right to seek a rescission and everything to do with whether that applicant can discharge the *onus* of proving that the requirements for rescission are met. Litigants are to appreciate that proving this is no straightforward task. It is trite that an applicant who invokes this rule must show that the order sought to be rescinded was granted in his or her absence *and* that it was erroneously granted or sought. Both grounds must be shown to exist.

[55] Mr Zuma alleges that various rescindable errors were committed, and that both of the requirements in rule 42(1)(a) have been met. These allegations will now be addressed against the backdrop of rule 42(1)(a).

Was the order granted in Mr Zuma's absence?

[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.

[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". And, precisely because proper notice had not been given to the affected party

in *Theron NO*, 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*, 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

"[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."

[60] Accordingly, this Court found that the irregularity committed by the High Court, in so far as it prevented the parties' participation in the proceedings, satisfied the requirement of an error in rule 42(1)(a), rendering the order rescindable. 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. 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 him 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. 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).

Was the order erroneously sought or granted?

[62] Mr Zuma's purported absence is not the only respect in which his application fails to meet the requirements of rule 42(1)(a). He has also failed to demonstrate why the order was erroneously granted. Ultimately, an applicant seeking to do this must show that the judgment against which they seek a rescission was erroneously granted because:

"... 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."

[63] It is simply not the case that the absence of submissions from Mr Zuma, which may have been relevant at the time this Court was seized with the contempt proceedings, can render erroneous the order granted on the basis that it was granted in the absence of those submissions. As was said in *Lodhi 2*:

"A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous one."

[64] Thus, 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.

[65] I accordingly proceed to address Mr Zuma's *ex post facto* (after the fact) defences, which he claims disclose "rescindable errors". Firstly, Mr Zuma takes issue with the Commission's decision to approach this Court seeking his imprisonment by way of motion proceedings, rather than invoking the Commissions Act. It is not necessary to address these issues, which have been addressed by the majority in the contempt judgment: the Commission had standing to approach this Court; the possibility of committal for contempt in motion proceedings was the subject of debate between the majority and minority; and the fact that the Commission may have sought redress by way of the Commissions Act does not expunge the fact that it had a cause of action in terms of contempt proceedings."
(Emphasis added)

- [14] What, therefore, is the upshot of these considerations? The case for the defendant is, in my view, extinguished. The premise upon which the defendants rely is not a *causa* within the contemplation of Rule 42(1).
- [15] The arguments advanced on behalf of the defendant thereupon reached out to the provisions of section 17(1)(a) (ii) of the Superior Courts Act 10 of 2013 (SCrt Act.) There, in stating the test for leave to appeal, after stipulating in the previous sub-section that an opinion needs to be formed that there are reasonable prospects of success, this subsection provides as a basis to grant leave that: 'there is some other compelling reason why the appeal should be heard'. This provision, it is argued encompasses the norm of the interests of justice, a proposition with which I agree; indeed, could there be a more compelling reason than the interests of justice, or to put it even more strongly, a need to thwart an injustice? Moreover, the common law ground of *Justus error* remains extant.⁴
- [16] The font of the supposed injustice on these facts is that Segal AJ was wrong to be persuaded to grant the order. I have already addressed this aspect and am of the view that it is an ineligible criticism because it is more properly the subject matter of an appeal. Moreover, we do not have the arguments addressed to Segal AJ before this court, and to assume that because a supposedly plausible argument could be composed which is adverse to the plaintiff's case, it is inappropriate to suppose that no plausible argument was advanced to her which convinced her to grant the order in the face of not a tittle of resistance, is not appropriate. The defendant though its own unprovoked dereliction in the conduct of the litigation brought upon itself a forfeiture of the chance to appeal. To afford it, via leave to appeal, not so much a back door, but rather, a side window to creep back in, in the form of a disguised appeal, would be also inappropriate. I am unpersuaded that an injustice, as is contemplated by the section, is likely to result. Orderly litigation

⁴ See: *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003 (6) SA 1 (SCA) esp para [4] ff.

makes demands of litigators and they, quite properly, act at their peril if they do not conduct themselves appropriately.

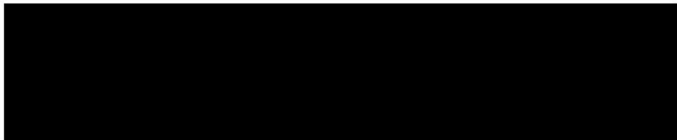
[17] In addition to these considerations, as alluded to above, a joint report had been prepared which the plaintiff contends is evidence of a waiver to challenge the dismissal of the rescission; i.e., the doctrine of pre-emption snookers the defendant from seeking leave to appeal. The defendant's perspective is that it did no more than get ready for a quantum battle. I am unconvinced that the high threshold for waiver had been shown. But because of the view I take of the matter on a more basic issue, is it unnecessary to make a finding.

[18] In the result, I find that there are no compelling reasons to grant leave. More basically, I am unconvinced that a court of appeal would find favour with the thesis advanced in support of the application for leave to appeal.

[19] The application therefore falls to be dismissed. The costs should follow the result. Both parties used two counsel whose costs shall be included.

The Order

- (1) The application is dismissed.
- (2) The defendant shall bear the plaintiffs costs including the costs of two counsel.



Roland Sutherland
Deputy Judge President, Gauteng
Division, Johannesburg.

Heard: 31 October 2023

Judgment: 3 November 2023

Appearances:

For the Defendant (In re Applicant):

Adv Bruinders

With Him, Adv Sikate

Instructed by Office of the State Attorney

For the Plaintiff (In re Respondent) :

Adv B Joseph

With him, Adv D Nigrini

Instructed by A C Rooseboom/ Rooseboom Attorneys