

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 12437/2019

(1)	REPORTABLE: NO.
(2)	OF INTEREST TO OTHER JUDGES: NO.
(3)	REVISED: NO.
02/05/2024	
DATE	SIGNATURE

In the matter between:

KGOTSO CHIKANE

First applicant

VANITY CONSULTING (PTY) LTD

Second applicant

and

REDEFINE RETAIL (PTY) LIMITED

Respondent

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 2 May 2024.

JUDGMENT

MEIRING, AJ:

INTRODUCTION

- [1] This is an application for the rescission of a judgment that this court granted in favour of Redefine Retail on 31 October 2022. Mr Chikane and Vanity Consulting seek this relief on two alternative grounds, namely under rule 42(1)(a) of the Uniform Rules of Court or, otherwise, at common law.
- [2] In the remainder of this judgment, I refer to the parties as the plaintiff, and the first and second defendants, in other words by their roles in the action to which this application is interlocutory. While Mr Chikane is the first applicant here, in the action he is the second defendant. The second applicant here, Vanity Consulting, is the first defendant.

SERVICE

- [3] At various stages of these proceedings, the defendants were represented by attorneys. From the CaseLines court file, I glean that first there was Van Hulsteyns Attorneys. In May 2021, Thobakgale Attorneys withdrew, only to be replaced in, December 2022, by Gardee Godrich Attorneys, who in turn withdrew in July 2023. In this application, counsel prepared heads of argument for the defendants bearing the date 22 March 2023. However, at the hearing on 16 November 2023, the defendants were not present at court, whether, in the case of the second defendant, in person or through legal representatives.
- [4] In a service affidavit dated 13 October 2023, Ms Callyn Datnow of the plaintiff's attorneys of record sets out the various steps that her firm took to bring the set-down of this application to the attention of the defendants. She recounts that, on 19 September 2023, the sheriff served the notice of set-down at their principal place of business, 25 Vincent Avenue, in Morningside, Sandton. This is borne out by the enclosed returns. According to other returns, on 3 October 2023 the sheriff again effected service, on the registered office of the first defendant and at the residence of the second defendant. Then, on 5 October 2023, Ms Datnow e-mailed the notice of set-down and the proposed joint practice note to two e-mail addresses of the second defendant.

FACTS

The order

- [5] On 31 October 2022, the special interlocutory court (*per* Makume J) handed down an order striking out the plea of the first and second defendants. The order proceeded also to enter judgment against the first and second defendants, jointly and severally, the one paying, the other to be absolved (but limiting the second defendant's liability to R2,445,615.00).
- [6] The order confirmed the cancellation of the lease agreement between the parties and directed the first defendant to vacate the property at Shop 121 in the Benmore Shopping Centre.¹ Subject to the above limitation as far as the second defendant goes, the defendants were to pay R4,017,545.30, as well as interest on that amount at the rate of 2% per annum higher than the prime rate, such interest compounded monthly from the due date for payment until the date of payment in full.
- [7] The defendants were to pay costs of suit on the attorney-and-client scale and damages calculated at the rate of R202,749.92 monthly reckoned from 1 May 2019 to the date that the first defendant and all persons holding Shop 121 under it had vacated it, including the actual charges for electricity, water consumption, and refuse and sewerage.
- [8] The defendants apply for the rescission of the order that Makume J handed down. The granting of that order was the final chapter in the story that I recount briefly below.

The lease

- [9] On 13 March 2018, the plaintiff and the first defendant concluded a written agreement of lease over Shop 121 in the Benmore Shopping Centre. The second defendant signed a suretyship in favour of the plaintiff.
- [10] According to the averments in the particulars of claim, the first defendant breached the agreement by failing to pay the deposit by the due date of 1 May

2018, and by failing to pay the monthly amounts due at the start of July, August, September, October, and November 2018.

- [11] Therefore, according to the particulars of claim, on 8 November 2018 the plaintiff gave written notice to the first defendant. The particulars say that, nevertheless, the first defendant remained in Shop 121.

Summons

- [12] On 3 April 2019, the plaintiff brought action proceedings against the first and second defendants, for essentially the relief contained in the Makume J order.
- [13] On 9 April 2019, the summons was served. On 25 April 2019, Van Hulsteyns Attorneys gave notice on behalf of the first and second defendants of their clients' intention to defend the action.
- [14] Then, after a delay of some months – the reason for which is not clear – on about 13 August 2019, the first and second defendants delivered a joint plea, and a counterclaim on the part of the first defendant.

Discovery

- [15] On 6 December 2019, the plaintiff delivered a notice under rules 35(1), (6), (8), and (10), calling upon the first and second respondents to discover. On 2 March 2020, the defendants did the same, calling upon the plaintiff to discover.
- [16] On 9 March 2020, the defendants delivered their discovery affidavit. On 15 July 2020, the plaintiff also did so.

The plaintiff's documents of 10 December 2020

- [17] On 10 December 2020, the plaintiff fired a salvo that led inexorably to the order of Makume J. It delivered a trio of documents, namely a notice under rules 35(3) and (6), a request for further particulars for trial, and a notice seeking admissions and directing interrogatories.
- [18] Neither the first, nor the second defendant responded to the call made in any of those documents.

[19] On 22 January 2021, the plaintiff's attorneys tried to extract a response from the defendants' attorney. On 26 January 2021, they made another overture. On the latter date, the defendants' attorneys responded, saying they were awaiting a response from the defendants. On 23 February 2021, with a response still outstanding, the plaintiff's attorneys wrote to the defendants' attorneys saying that an application to compel had become necessary.

The applications to compel

[20] On 16 April 2021, the plaintiff brought the promised application to compel, which came to be set down for hearing on 31 May 2021.

[21] As I mention above, on 10 May 2021 Thobakgale Attorneys withdrew as the defendants' attorneys of record. Accordingly, the sheriff served the application on the second defendant. Neither the first, nor the second defendant recorded their intention to oppose that application.

[22] On 31 May 2021, this court granted an order to compel against the first defendant. (It is not clear why that order did not track the notice of motion and include the second defendant.) On 15 July 2021, the sheriff served the compelling order at the registered office of the first defendant. On 2 November 2021, the plaintiff obtained an order in the same terms against the second defendant. On 22 April 2022, the sheriff served that compelling order on the second defendant.

[23] The defendants refrained from complying with either order.

The applications to dismiss

[24] The plaintiff then brought an application to dismiss the defendants' defence in the action. That application was set down for hearing on 5 September 2022. On 19 July 2022, it was served on both defendants. Neither defendant took any steps to oppose it. For reasons unknown, the hearing of that application did not proceed.

[25] On 22 September 2022, the plaintiff brought another application to dismiss. It was to be heard on 31 October 2022. In the notice of motion, the date of the hearing, namely 31 October 2022, was inscribed.

[26] In prayer 1, the plaintiff sought the dismissal of the defence of the first and second defendants. In prayer 3, it sought that judgment be granted against the first and second defendants “*as prayed in the Plaintiff’s Summons and Particulars of Claim commencing this action ...*”

[27] It is common ground that, on 14 October 2022, the application was served on the first and second defendants. What is more, CaseLines shows that, on 18 October 2022, a notice of set-down was uploaded to that electronic court file, to which it would appear the defendants had access.

THE LAW

The scheme of rule 42(1)(a)

[28] Rule 42 provides:

- “(1) *The Court may, in addition to other powers it may have, mero motu or upon the application of any other party affected, rescind or vary –*
- (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
 - (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
 - (c) an order or judgment granted as the result of a mistake common to the parties.*
- (2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.*
- (3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.*”

[emphasis added]

[29] In *Colyn v Tiger Food*,² the Supreme Court of Appeal said this about rule 42:³

- [4] *[T]he common law before the introduction of rules to regulate the practice of superior courts in South Africa is the proper context for the interpretation of the rule. The guiding principle of the common law is certainty of judgments. Once judgment is given in a matter it is final. It may not thereafter be altered by the judge who delivered it. He becomes functus officio and may not ordinarily vary or rescind his own judgment (Firestone SA (Pty) Ltd v Gentiruco A.G.). That is the function of a court of appeal. There are exceptions. After evidence is led and the merits of the dispute have been determined, rescission is permissible only in the limited case of a judgment obtained by fraud or, exceptionally, justus error. Secondly, rescission of a judgment taken by default may be ordered where the party in default can show sufficient cause. There are also, thirdly, exceptions which do not relate to rescission but to the correction, alteration and supplementation of a judgment or order. ...*
- [5] *It is against this common law background, which imparts finality to judgments in the interests of certainty, that Rule 42 was introduced. The rule caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The rule gives the courts a discretion to order it, which must be exercised judicially (Theron NO v United Democratic Front (Western Cape Region) and others) and Tshivhase Royal Council and another v Tshivhase and another; Tshivhase and another v Tshivhase and another.*
- [6] *Not every mistake or irregularity may be corrected in terms of the rule. It is, for the most part at any rate, a restatement of the common law. It does not purport to amend or extend the common law. That is why the common law is the proper context for its interpretation. Because it is a rule of court its ambit is entirely procedural.*
- [7] *Rule 42 is confined by its wording and context to the rescission or variation of an ambiguous order or an order containing a patent error or omission (rule 42(1)(b)); or an order resulting from a mistake common to the parties (rule 42(1)(c); or ‘an order erroneously sought or erroneously granted in the absence of a party affected thereby’ (rule 42(1)(a)).”*

[30] Rule 42(1)(a) posits two requirements. An order might be rescinded under that subrule if it was erroneously sought or granted. Second, it must have been granted in the absence of an affected party.

[31] As to what the court might do upon finding that both requirements have been satisfied, in *Zuma*⁴ the Constitutional Court echoed the point made in the extract above from *Colyn*:⁵

“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.”

[32] Yet, despite the clarity of this statement in *Zuma*, it appears that there remains some confusion on this point. In the second edition of *Erasmus Superior Court Practice* (of 11 July 2022) at pp D1-568 to D1-570, reams are quoted from the *Zuma* judgment (yet not paragraph 53). However, immediately thereafter, on pp D1-570 and D1-571, the authors say: *“Once the court holds that an order or judgment was erroneously sought or granted, it should without further enquiry rescind or vary the order and it is not necessary for a party to show good cause for the subrule to apply.”* The authors refer to decisions like *Bakoven Ltd v GJ Howes*⁶ and the unreported one of the Supreme Court of Appeal in *Rossitter v Nedbank Ltd*,⁷ which, having characterised the law on rule 42(1)(a) as “trite”, says: *“If the default judgment was erroneously sought or granted, a court should, without more, grant the order for rescission.”* In *Rossitter*, the Supreme Court of Appeal relies upon *Bakoven*. It does not mention the opposite position adopted by itself in *Colyn*. Although the *Zuma* court does not refer to *Rossitter*, it clearly overrules it by adopting *Colyn*.

[33] So, contrary to what the authors of *Erasmus* say, the law is that, if the requirements of rule 42(1)(a) have been met, the court retains a discretion. That is the ordinary discretion, which naturally must be exercised judicially. It does not place upon the shoulders of the applicant for rescission a further, second-stage onus to demonstrate good cause.

[34] Accordingly, if I find that both requirements of rule 42(1)(a) have been met, I am to exercise a discretion over whether the order sought should be granted.

[35] I turn to consider the two requirements of rule 42(1)(a).

Requirement 1: the absence of the defendants

[36] In *Zuma*, under the heading “Was the order granted in Mr Zuma’s absence?”, the Constitutional Court considered the meaning of the absence of an affected party for purposes of this subrule:⁸

“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.”

[emphasis added]

[37] In other words, the physical absence of the affected party does not suffice as far as rule 42(1)(a) goes. They must have been absent because their presence was somehow precluded or prevented. For purposes of the subrule, it is not enough for such an affected party to elect to be absent. If they so choose, they exclude themselves from the protective purview of rule 42(1)(a).

[38] The *Zuma* court went on to observe:⁹

“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.”

[39] The *Zuma* court proceeded:¹⁰

“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 N.O., 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.

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 would not be prejudiced.

... 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."

[40] In sum, then, the absence requirement entails significantly more than proof of physical absence on the part of the applicant for rescission.

Requirement 2: error

[41] In reliance upon *inter alia* *Colyn* and *Lodhi 2 Properties Investments CC & another v Bonde Developments (Pty) Ltd*,¹¹ in *Kgomo v Standard Bank of South Africa*,¹² this court collected what is set out in the following two paragraphs as the central principles governing rule 42(1)(a). (While some of these go to rule 42 and 42(1)(a) generally, they are most appropriately discussed under this rubric relating to the requirement of erroneously sought or granted.)

[42] The rule must be understood against its common-law background.¹³ At common law, the fundamental principle is that, once a judgment has been granted, the judge becomes *functus officio*, subject only to limited exceptions, of which rule 42(1)(a) is one.¹⁴

[43] Rule 42 caters for a mistake in proceedings.¹⁵ The mistake in question might either be one that appears on the record of proceedings or one that becomes

apparent only later from facts stated in a rescission application.¹⁶ A judgment is not granted erroneously because of a defence that is later disclosed that was not raised at the time of default judgment.¹⁷ The error might arise either in the process of seeking the judgment by the applicant for default judgment or in the process of the court's granting of that default judgment.¹⁸ Over and above the error, the applicant for rescission does not have to show that there is good cause for the rescission as contemplated in rule 31(2)(b) or at common law.

[44] In the light of what I say above, I would add to this list an eighth principle that, if the requirements of rule 42(1)(a) are met, the court retains (the ordinary judicial) discretion whether to grant the rescission or not.

[45] The following are some exemplary errors for which rescission has been granted under rule 42(1)(a).¹⁹ A party was not represented at an application for leave to appeal since, as a matter of fact, its attorney had not received a notice of set-down from a Judge's registrar and, therefore, lacked knowledge of such set-down (there was a failure in the "*pigeon-hole method and Docex clearance system*" used by the attorney of the applicant for rescission).²⁰ An order was sought and granted in the absence of the President who, as head of the executive, was affected.²¹ A party had to get notice of proceedings but did not.²² A notice of intention to apply for default judgment was defective in failing to provide the date and time of the hearing so that the applicant for rescission did not have notice.²³ Default judgment was obtained without notice to the respondents once the application had become opposed (even though the latter had not yet delivered an answering affidavit).²⁴ Summons had not been served.²⁵ Since the pleadings lacked an averment, there was no cause of action.²⁶ A summons founding a judgment lacked averments to sustain a cause of action.²⁷ A defence was struck out under rule 30A where that rule was not applicable.²⁸

[46] The authorities marshalled above that concern an absence of notice turn on the question whether, as a matter of fact, the applicant for rescission had notice of – in the common-sense meaning of knew of – the process that would take place. So, for instance, in my view, the proper way to understand *Rossitter v Nedbank Ltd* is that the error was not the non-compliance with rule 31(5)(a) and a provision in

a practice note *simpliciter*, but rather the fact that the breaches in question deprived the applicant of notice of the proceedings.

[47] The two requirements in rule 42(1)(a) are distinct. A court must apply its mind to both and determine that both are met. Yet, as some of the authorities referred to in the previous paragraph indicate, sometimes they intersect. Sometimes it is the absence of the affected party that brings about the irregularity. For instance, the absence of an affected party might prevent certain information coming to the court's attention, from which absence the irregular decision then flows. In other cases, like in *Rossitter*, where a party has been precluded from attending, the very absence of that party is itself the irregularity.

Good cause at common law

[48] In the alternative, the defendants seek the rescission of the order of Makume J at common law.

[49] To obtain a rescission on that basis, the defendants are to show good or sufficient cause. In *Colyn*, the Supreme Court of Appeal framed the applicable test in these terms:²⁹

“With that as the underlying approach the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospect of success.”

[50] None of these factors is necessarily determinative. The court retains an overriding and unfettered discretion to determine whether there is good cause.

[51] It is these principles that I apply to the facts of this case.

ANALYSIS

Absence

[52] The defendants marshal essentially two arguments in aid of their complaint over their absence at court on 31 October 2022.

- [53] In their written argument, the defendants say that it is “*common cause*” that the order was granted in their “*absence*”. As far as physical absence from the courtroom goes, that is indeed so. There is no quibble between the parties that the defendants were not in court before Makume J, whether in person in the case of the second defendant or, through a legal representative.
- [54] The real question is whether the defendants were absent from the court of Makume J on 31 October 2022 since they were somehow prevented or precluded from being there, for instance through not having been given notice.
- [55] While the defendants concede that, on 14 October 2022, the application was served on them, they complain that thus they were given “*merely ... 2 weeks to secure the legal representation, to consult and draft opposing papers*” and, again, that the plaintiff “*did not provide a sufficient time period to secure legal representation in order to oppose the matter*”.
- [56] Beyond those broad assertions, the defendants do not say why, within that fortnight, they were not able to engage attorneys to represent them. In fact, they do not set out any steps they took in that period to protect their rights. They also do not say why the second defendant did not himself attend at court on 31 October 2022 to convey to Makume J that the defendants had been afforded only two weeks and that they required an extension within which to get their house in order.
- [57] The second, allied complaint of the defendants is that no notice of set-down of the application was served upon them. While the plaintiff says that, in an application of this type that is unopposed, a notice of set-down does not have to be served on the respondents, the defendants construct an elaborate argument to the effect not only that a notice of set-down was required, but also that the application had to have been referred to the default judgment court.
- [58] In this regard, the defendants rely upon paragraph 24 of the Judge-President’s practice directive 1 of 2021 (issued on 18 February 2021 and revised on 11 June 2021). In that paragraph 24, read with *inter alia* 22 – both of which are in chapter 6, which governs a special procedure for “Y” matters (namely ones where the RAF, the MEC for Health in Gauteng, or PRASA are defendants) – the rule is

framed that, if a defendant failed to comply with a compelling order, the plaintiff should apply in the trial interlocutory court for a referral to the registrar to obtain a date for default judgment, whereupon the plaintiff should serve a notice of set-down on the defendant.

- [59] The practice directives are a matter of some complexity, but, as the plaintiff's counsel pointed out, chapter 6 deals with a specific category of matters, as described above. The application that served before Makume J was not in that category. These defendants are neither the RAF, the MEC for Health in Gauteng, nor PRASA.
- [60] Also, on 7 June 2022 the Deputy Judge-President issued a revision of chapter 8 of the practice directive 1 of 2021, which chapter deals with the special interlocutory court. At the start of the explanatory note, *inter alia* this is said: "*Consequential relief in cases where a compelling order is not complied with shall also be dealt with in this court in cases other than those in which the RAF is the defendant.*" In paragraph 44, the note proceeds to say: "[C]ases shall be set down on notice filed before noon 7 clear Court days before the hearing date ..."
- [61] The plaintiff's argument, that it had complied with the notice and set-down requirements, is cogent. Over and above service of the application to dismiss that took place on 14 October 2022, a notice of set-down was uploaded onto CaseLines on 18 October 2022. What is more, the defendants' argument was based on inapplicable provisions of the practice directives.
- [62] Yet, for the sake of this analysis, I shall accept in the defendants' favour that formally a further notice of set-down was also required, over and above the service of the application that took place on 14 October 2022 and the notice of set-down uploaded onto CaseLines.
- [63] Yet, the question is what relevant impact its absence might have had on these defendants. The suggestion might be that, somehow knowing there was a formal, legal requirement for a further notice of set-down, on that basis the defendants chose to absent themselves from the hearing. Yet, this is not what they say.

[64] The application having been served on them on 14 October 2022, the defendants had notice. If, still accepting in their favour for the sake of this analysis that a further notice of set-down was required which was not delivered, I cannot see how this could have undone the defendants' notice of what was due to take place on 31 October 2002. Accordingly, the defendants' reliance upon *Lodhi 2 Properties* is misplaced. By their own concession, they had notice.

[65] Accordingly, there is no substance to the defendants' contention that they were absent from the special interlocutory hearing *coram* Makume J in the sense required by *Zuma*.

Error

[66] Under the rubric of error, the defendants rely upon four complaints. They say, again, that no notice of set-down was served. Next, they complain that no damages affidavit was delivered. Third, they say that no founding affidavit was delivered that "*relates to default judgment relief*". Last, they complain that there was non-compliance with provisions in the practice directives relating to default judgment.

[67] Above, I deal with the question of the notice of set-down. I say that, even if I am wrong in finding that no notice of set-down was required, in circumstances where it is common ground that the application was served on the defendants on 14 October 2022, in my view this would not be an error cognisable under rule 42(1)(a).

[68] As to the complaint over the allegedly absent damages affidavit, the defendants say nothing beyond asserting it. The plaintiff's response is sound, namely that, since its damages were liquidated by virtue of a certificate of balance enclosed with the particulars of claim, no damages affidavit was required.

[69] The defendants leave similarly unelaborated the third complaint, namely that the founding affidavit in the dismissal application is silent on default relief. The founding affidavit in that application makes out a case for the dismissal of the defendants' defence. It follows inexorably that, once the defence is dismissed, the claim that the plaintiff framed in its particulars of claim, now undefended, is

to be granted. Properly construed, therefore, the founding affidavit makes out a case for default judgment. An affidavit serves to recite the applicable facts. Normally, it should contain minimal law. What is more, as I say above, in prayer 3 in the notice of motion in the dismissal application, the plaintiff sought that judgment be granted against the first and second defendants “*as prayed in the Plaintiff’s Summons and Particulars of Claim commencing this action ...*” Accordingly, the third complaint does not reveal a cognisable error.

[70] Similarly, in main part the fourth complaint is a repackaging of the argument that I address above concerning the notice of set-down. The defendants also say that the plaintiff misconstrues the Deputy Judge President’s explanatory note of 7 June 2022 on the special interlocutory court. In reliance upon the Oxford Dictionary, the defendants say that, on these facts, default relief is not consequential relief, as envisaged in the explanatory note. For the reasons I set out above, I disagree.

[71] In sum, the defendants say that, if the special interlocutory court *coram* Makume J had been aware of these various errors, it would have refrained from granting the order for default judgment.

[72] I see no reason among those advanced by the defendants or otherwise why this would be so. Yet, even if I am wrong on any of these four points, the defendants were not cognisable absent from the court of Makume J.

[73] Accordingly, rule 42(1)(a) does not avail the defendants.

Good cause

[74] In the alternative, in the founding affidavit, the defendants also seek to make out a case for rescission at common law. In their heads of argument, they do not pursue this ground. Nevertheless, out of an abundance of caution, I consider it, too.

[75] Glibly, in their answering affidavit, the defendants say that their failure to “*file a notice to oppose the matter or an opposing affidavit was due to the Respondent’s failure to effect proper service of the ‘default judgment’ application*”. They profess to hold this view despite their concession that the application was served on

them, and simply because they say that a notice of set-down had also to be served on them. This explanation is at odds with their complaint that they lacked ample time to get legal representation. In sum, they knew about the application, which, in the notice of motion, is plain about the relief sought.

[76] This rescission application, the defendants say, is brought *bone fide* since they have no interest in delaying the action and because they have a counterclaim. They say that delaying the finalization of the matter would “*severely prejudice*” their counterclaim. Yet, this is squarely contradicted by the defendants’ sustained conduct since the plaintiff’s salvo of 10 December 2021. The onlooker remains perplexed as to why the defendants have remained so expensively remiss in not answering to the three documents that the plaintiff delivered on that date.

[77] As to a *bona fide* defence, normally expected under the *Colyn* guidelines, the defendants do not address a defence to the application to dismiss. They address only their defence to the action. The defendants say nothing about their defence to the dismissal application.

[78] What is more, to the extent that this is also relevant, the defence set out in the plea is inscrutable and vague, on the one hand based on an alleged common mistake and, on the other, on an impressionistically framed repudiation on the part of the plaintiff. There is a counterclaim for the repayment of a deposit.

[79] Upon a *conspectus* of everything put up by the defendants, I am minded that the exercise of my discretion at common law in their favour would not be judicial.

COSTS

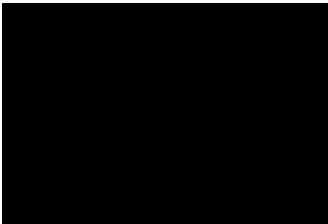
[80] Costs are to follow the result. The plaintiff seeks costs on the attorney-and-client scale.

[81] The account set out above – of the defendants’ complete disengagement from this litigation, only latterly to appear again by bringing this application and, yet again, absenting themselves from the hearing, despite the plaintiff’s best efforts to secure their attendance – is remarkable. It demonstrates a studied disrespect to the court, and indeed imperils the proper administration of justice.

[82] In these circumstances, a punitive costs order is appropriate.

ORDER

1. The application is dismissed.
2. The applicants are to pay the costs of this application, on the attorney-and-client scale, jointly and severally, the one paying, the other to be absolved, including the costs of counsel.



J J MEIRING
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 16 November 2023

Date of judgment: 2 May 2024

APPEARANCES

For the first applicant: V Mukwevho (heads of argument only)

Instructed by: Gardee Godrich Attorneys (withdrew after the heads)

For the respondent: Adv A J Venter

Instructed by: Witz Inc.

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- 1 The order speaks of the lease having been between “*the parties*”. As I say below, it was between the plaintiff and the first defendant.
 - 2 2003 (6) SA 1 (SCA).
 - 3 Footnotes are omitted from this quotation.
 - 4 *Zuma v Secretary of the Judicial Service Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Others* 2021 (11) BCLR 1263 (CC).
 - 5 See para 53.
 - 6 1992 (2) SA 466 (ECD)
 - 7 (96/2014) [2015] ZASCA 196 (1 December 2015).
 - 8 See paras 56–60.
 - 9 See para 57.
 - 10 See paras 58 and 59.
 - 11 2007 (6) SA 87 (SCA).
 - 12 2016 (2) SA 184 (GP).
 - 13 *Colyn*, at paras 1–5.
 - 14 *Colyn*, at para 4.
 - 15 *Colyn*, at paras 5 and 9.
 - 16 *Lodhi*, at paras 24 and 26.
 - 17 *Lodhi*, at paras 17 and 27.
 - 18 See the wording of the rule. See also *De Wet & Others v Western Bank Ltd* 1979 (2) SA 1031 (A), at 1038 E–H.
 - 19 The authors of *Erasmus Superior Court Practice* mention more examples, at D1–570B to D1–570C.
 - 20 *Topol v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W). The quotation is at 646I–J.
 - 21 *President of the Republic of South Africa v Eisenberg & Associates (Minister of Home Affairs Intervening)* 2005 (1) SA 247 (C), at 264E–F.
 - 22 *Absa Bank Ltd v Mare* 2021 (2) SA 151 (GJ) (a decision of the full court). The facts, simplified for present purposes, were that a default judgment granted in favour of Absa against the first respondent, Ms Mare, was rescinded. The bank had addressed a notice to her under section 129(1) of the National Credit Act, 2005, alerting her to her being in arrears with monthly payments under a loan agreement. It had been served at the property by affixing it “*to the gate*” of her *domicilium citandi*. There was no response. Next, the bank caused summons to be served at the property “*by affixing a copy ... on the grass*”. There came no notice of intention to defend. The bank obtained judgment by default. Ms Mare she had no knowledge of the statutory notice, the action instituted and the default judgment (or of the later steps taken in execution) until the purchaser in execution came to the property. The court granting rescission held: “*By simply leaving the process to be served at the domicilium citandi, as happened in this instance where the section 129(1) notice was attached to the gate and the summons was affixed to the grass, without taking*

the necessary precautions that same will come to the notice of the defendant, does not constitute effective service to me."

23 *Rossitter v Nedbank Ltd* (unreported, SCA case no 96/2014, dated 1 December 2015), at paras 15–16.

24 *Top Trailers (Pty) Ltd v Kotze* (unreported, SCA case no 1006/2018, dated 1 October 2019). The respondent applied for an order setting aside a resolution commencing the business rescue of the first appellant company. The application was served on the first and second appellants, who belatedly filed a notice to oppose. The appellants did not deliver their answering affidavit. Without notice to the appellants' attorneys, the respondent's attorneys caused the application to be set down for hearing on the unopposed roll, where an order was thus granted by default.

25 *Custom Credit Corporation (Pty) Ltd v Bruwer* 1969 (4) SA 564 (D); *Fraind v Nothmann* 1991 (3) SA 837 (W); *Thomani v Seboka NO* 2017 (1) SA 51 (GP), at 57F–58F; *Interactive Trading 115 CC v South African Securitisation Programme* 2019 (5) SA 175 (LP), at 176D–F.

26 *Marais v Standard Credit Corporation Ltd* 2002 (4) SA 892 (W).

27 *Silver Falcon Trading 333 (Pty) Ltd v Nedbank Ltd* 2012 (3) SA 371 (KZP), at 373F–375E.

28 *Katlou Boerdery v Matsepe N.O.* (unreported, WCC case no A79/21, dated 19 April 2022; a decision of the full court), at paras 29–32. The respondent used rule 37(4) to try to extract admissions from the appellant. When there was no compliance, it used rule 30A to enforce compliance, failing which it would seek the striking out of the appellant's defence. The respondents abused rule 37 and delivered a notice which was in essence a request for further particulars and demanded a response thereto, both of which were not envisaged in the Rule. The respondents were not entitled, in law, to the relief sought and granted on 13 December 2019 (namely an order that the appellant be directed to furnish the respondents with the outstanding replies as requested by the applicants in their rule 37(4) notice within ten days of service of the order and that, if the appellant failed to comply, the respondents were entitled to apply on the same papers duly supplemented, for an order striking out the appellant's defence.

29 At para 11.