



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

Case No: 51133/2021

(1)	REPORTABLE: NO YES
(2)	OF INTEREST TO OTHER JUDGES: NO YES
(3)	REVISED.
SIGNATURE	DATE

12 July 2024

In the matter between:

MINISTER OF POLICE

Applicant

and

JOHN HLONGWENI

Respondent

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 14h00 on 12 July 2024.

JUDGMENT

OSBORNE AJ

1. An application for rescission of judgment is brought by the Applicant (the Defendant below) under Rule 42(1)(a) of the Uniform Rules of Court. Default judgment was granted in favour of the Respondent (the Plaintiff below) by

Vorster AJ. The Respondent was awarded some R1.5 million in damages for unlawful arrest and detention. Applicant wants this judgment and order rescinded.

Background

2. The Respondent was arrested without a warrant on a charge of rape. After being released, then re-arrested, and then released again, the charges were dropped. On 4 November 2021, he filed suit against the Applicant, seeking damages for unlawful arrest and detention.
3. On 10 February 2022, the Applicant served a notice of intention to defend out of time on the Respondent's corresponding attorneys. This did not come to the attention of Respondent's principal attorney for reasons that have not been explained. (A copy of the notice bears the stamp of the correspondent attorneys of 16 February 2022).
4. The Applicant did not file a plea, which the State Attorney explains by alleging that it did not receive the docket from its client.
5. The Respondent's notice of set down was served on the State Attorney on 6 May 2022. According to the attorney responsible for the file (the deponent to the Applicant's affidavit, Mr Pooe), this never came to his personal attention. He offers no explanation for this.
6. Vorster AJ granted default judgment on 14 June 2022.
7. The Applicant lodged its rescission application on 3 April 2023, 10 months after the default judgment was handed down.

The Applicant's Arguments

8. The Applicant contends it is entitled to rescission under Rule 42(1)(a) by reason of the fact that it was absent from court when default judgment was granted. The Applicant argues further that the judgment was erroneously granted insofar as Vorster AJ would not have granted the order had he been made aware that the Applicant had served a notice of intention to defend the Respondent.
9. The Applicant contends further that default judgment was granted in error also because the Particulars of Claim did not include an itemised breakdown of the quantum of damages claimed and because the Respondent's attorney signed the Particulars of Claim without stating that he was vested with rights of appearance.

Rule 42(1)(a)

10. Rule 42(1)(a) reads:

"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... an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."
11. The general rule is that once a court has duly pronounced a final judgment or order, it has no authority to set it aside or correct, alter, or supplement it. The reasons are twofold. First, the court becomes *functus officio*; its authority over the subject matter ceases the moment it issues judgment. Second, the principle of finality of litigation expressed in the maxim *interest rei publicae ut*

sit finis litium applies. Rule 42(1)(a) offers an exception to this rule, but only in narrowly defined circumstances.

12. The Constitutional Court in Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector issued an authoritative rendition of the law relating to rescission. It dismissed the former President's application to rescind a contempt of court finding granted by default. Writing for the Court, Khampepe ADCJ crystallised four principles:

- 12.1. The applicant faces a particularly heavy burden in justifying a default that led to the adverse underlying decision against him. That necessitates the applicant for rescission, providing an exhaustive explanation of the circumstances that gave rise to the default.
- 12.2. The Rule 42(1)(a) words "granted in the absence of any party affected thereby" are intended to protect litigants whose presence was precluded - not those whose absence was *elective*.
- 12.3. The order must have been "erroneously granted" – in the sense that there existed at the time a fact of which the Judge was unaware which would have induced the Judge, if made aware of the fact, not to grant the judgment.
- 12.4. The court is vested with a broad discretion to refuse rescission, even if all of the requirements for the relief are satisfied.

13. The Zuma judgment (which, surprisingly, was not acknowledged by counsel for the Applicant) disposes of this matter in favour of the Respondent. The Applicant falls well short of satisfying both of the Rule 42(1)(a) requirements for rescission. What is more, I would have been inclined to refuse rescission in the exercise of my discretion even had these requirements been satisfied by the Applicant.
14. I elaborate with reference to the elements of Rule 42(1)(a) and thereafter with respect to the residual discretion.

Was Default Judgment Granted in the Absence of the Applicant?

15. The Applicant explains in its heads that it was absent from Court because, *“although it appears that the notice of set down was served on the Applicant's attorneys on 6 May 2022, the notice did not come to the attention of the Applicant's attorney”*. (One assumes that the words “Applicant's attorney” here refer to the individual attorney in the office of the State Attorney, Mr Poove, who was responsible for the file). The Applicant does not explain how and why the document fell through the cracks in the office of the State Attorney - although there was some suggestion at oral argument that the receptionist at the office of the State Attorney did not properly process it.
16. The inescapable fact is that the notice of set down was served upon the Applicant, as indicated by the stamp of the office of the State Attorney, which appears on both pages of the service copy of the notice of set down, bearing the date 5 June 2022, and an initial. The Applicant must be deemed to have

been duly served.¹ It is trite that a party cannot deny service by relying upon an internal administrative failure. (More on this below.)

17. The Applicant's absence from the hearing is hence to be treated as "voluntary". The Zuma decision of the Constitutional Court teaches that elective absence is not absence at all. Had the Applicant appeared at the hearing, he would have had the opportunity to raise his points about the alleged infirmities in the particulars of claim, as well as the implication of the fact that it had served a notice of intention to defend. He forfeited that opportunity by not showing up.
18. It is not open to the Applicant to impose the blame upon its attorney.² The Supreme Court of Appeal's decision in Van Heerden v Bronkhorst, upholding the denial of rescission, is salient.³ The notice of motion had set down a date for the hearing. The applicant for rescission notified the respondent of her intention to oppose the application but omitted to serve the opposing affidavit timeously. That prompted the respondent to address a letter to the applicant's attorneys, stating that, unless an opposing affidavit was served, she would prepare for argument on the date stipulated in the notice of motion. But this letter was not received because the address provided by the applicant in

¹ Absa Bank Ltd v Mare and others 2021 (2) SA 151 (GJ) (full court) para 26 (service is effective if effected in such a manner as it would in the ordinary course come to the attention and be received by the intended recipient).

² De Wet and others v Western Bank Ltd 1979 (2) SA 1031 (A) (1038D-H) (cited in Zuma, para 83); Obiang v Van Rensburg and others [2023] 2 All SA 211 (WCC) (3 February 2023) "Obiang"), para 53.

³ 2020 JDR 2363 (SCA); [2020] JOL 48938 (SCA), para 18.

the notice of intention to oppose was that of a secretary who had departed the firm. In granting rescission, the Court affirmed the principle that is now well-established: a party in default cannot be heard to shift the blame to its legal representative.

19. On the papers that served before me, I must find that, because the Applicant received service of the notice of set down at the State Attorney's offices as per Rule 4(1)(a)(v) of the Uniform Rules, the Applicant's absence at the hearing must be deemed voluntary. The Applicant fails to satisfy the first requirement for rescission of Rule 42(1)(a).

Was Default Judgment Erroneously Granted?

20. But even if I am wrong on this, the Applicant cannot succeed because default judgment was not granted in error.
21. The Applicant contends that Vorster AJ was unaware of the fact that the Applicant had filed the notice of intention to defend. Had he been so aware, he would not have granted default judgment, so the argument goes. The Respondent is said also to have misrepresented the facts by not disclosing that the Applicant had informed him of the need to await the docket before filing a plea.
22. It appears to be common cause that the notice of intention to defend was out of time. But I will assume in the Applicant's favour that this could have been condoned. I accept also the Applicant's point that the Respondent cannot be heard to blame its failure to receive the notice of intention to defend on the error of its correspondent attorney. ("Sauce for the goose is sauce for the

gander”). In this regard, at least the parties are in *pari delicto*.

23. But none of this ultimately assists Applicant's cause. There is no reason Vorster AJ would have refused judgment had he been aware that a notice of intention to defend had been served or that the Applicant had told the Respondent that it had not filed a plea for the reason that no docket had been delivered to the State Attorney by its client.⁴ A party does not, by filing a notice to defend, excuse itself from appearing on the date stipulated in a duly served notice of set down. Likewise, had the Applicant filed a plea, it would still have been obliged to appear before Vorster AJ, having been duly served a notice of set down.
24. But Applicant contends that default judgment is akin to *ex parte* proceedings and that this entails that the Respondent had a duty of full disclosure. This is wrong. The duty of full disclosure in an *ex parte* setting arises from the fact that the respondent *ex hypothesis* lacked the opportunity to have a say. Here, by contrast, the Applicant *did* have an opportunity to be heard – which, in the eyes of the law, was voluntarily forfeited.
25. It is for this reason not necessary to consider the alleged infirmities in the particulars of claim - that the Respondent's attorney failed to stipulate that he had rights of appearance in the High Court, and that an undifferentiated globular sum had been specified with respect to quantum. These are points the Applicant would have had ample opportunity to place before the court had

⁴ Sehube and others v City of Johannesburg and others [2021] JDR 2696 (GJ); [2021] JOL 51935 (GJ), para 14 (“If the Court would have granted the order even if it had knowledge of the overlooked facts, then to rescind that order would transgress on what is the domain of an appeal and not of a rescission.”)

it appeared.

26. I would add that it must, in any event, be assumed that Vorster AJ, having read the papers, would have been alive to the issues raised by the Applicant with regard to the particulars of claim. The fact that he nonetheless granted judgment in favour of the Respondent betokens that the Applicant's remedy here is appeal, not rescission.⁵
27. We have already seen that a party cannot excuse its default by pointing to its attorney's delinquency. An error caused by the internal affairs of the Applicant's attorneys is not a "mistake" in the proceedings, nor is it a "procedural irregularity". It cannot be treated as an "error" that vitiates default judgment.⁶ In any event, if the Appellant was to have any prospect of shifting the blame to its attorney, it needed to produce an affidavit stating the reasons for its delinquency in the fullest detail.⁷
28. In this case, the Applicant made no attempt provide an explanation of any kind. Its affidavit says precisely nothing about why the responsible attorney was not made aware of a notice of set down bearing the receipt stamp of the State Attorney's office. As has been held by the Full Bench of the High Court in Cape Town, there is no place for equivocation or withholding of readily

⁵ See First Rand Bank v Winter Case No. 6150/2011 (SGHC) 24 May 2012 (alleged error justifying rescission "must have been known and present to the mind of the Judge at the time when the Judge made the order, which she did. She could not have made the order otherwise than in circumstances where she was satisfied that the matter had been properly served.")

⁶ Van Heerden v Bronkhorst 2020 JDR 2363 (SCA), para 18.

⁷ Mkwananzi and Another v Manstha and Another [2003] 3 All SA 222 (T), para 27.

available information in a rescission application. The applicant must play open cards, at peril of being refused rescission.⁸

The Court's Residual Discretion

29. The Applicant is mistaken in describing the discretion under Rule 42(1)(a) of the Court as *extremely narrow*. As we have noted, the Constitutional Court in Zuma affirmed that, even once an applicant has met the requirements for rescission, a court is endowed with the discretion to rescind an order – but is not obliged to do so. (Rule 42(1)(a) postulates that a court *may*, not *must*, rescind or vary its order.) The Rule is empowering; it does not compel the Court to set aside or rescind anything.
30. The Constitutional Court did not indicate that the bounds of discretion are constrained. To the contrary, it considered a wide range of factors potentially relevant to whether or not the discretion falls to be exercised in favour of or against the applicant for rescission, holding that a court must have regard to all the facts and circumstances before it.⁹
31. Even had the Applicant satisfied the requirements of Rule 42(1)(a), I would have been inclined to exercise the discretion against it. The Constitutional Court in Zuma held that a factor in the exercise of the residual Rule 42 discretion is whether the applicant for rescission has demonstrated "a

⁸ Obiang, para 31.

⁹ Zuma, *supra*, para 53, n. 20.

determined effort to lay his case before the court.”¹⁰ These are hardly words one would use to describe the Applicant’s posture herein. It tarried for some eight months before applying for rescission. In fact, it appears that only when faced with a writ of execution the Applicant was spurred into action. And when it did come to seek rescission, it furnished nothing that could move a court to grant such relief.

32. The purpose of Rule 42(1)(a) is “to correct *expeditiously* an obviously wrong judgment or order”:

“It is in the interest of justice that there should be relative certainty and finality as soon as possible concerning the scope and effect of orders of Court. Persons affected by such orders should be entitled within a reasonable time after the issue thereof to know that the last word has been spoken on the subject. The power created by Rule 42(1) is discretionary, and it would be a proper exercise of that discretion to say that, even if the appellant proved that Rule 42(1) applied, it should not be heard to complain after the lapse of a reasonable time.”¹¹

33. One finds a suggestion in the Applicant’s heads that to deny rescission would in effect be punishing the Applicant. That is not so. In refusing rescission, this Court is applying the same standard it would apply to any party that sought rescission by attempting to leverage its delinquency. The fact patterns of the authorities cited in this judgment make that more than clear.

34. That brings me to another consideration that would weigh against the Applicant in the exercise of a court’s residual discretion. Both the Applicant and the State Attorney have not conducted themselves in a manner that one

¹⁰ *Id.*

¹¹ First National Bank v Van Rensburg NO 1994 (1) 677 (T), 681.

is entitled to expect of any litigant. Why should an organ of state be held to a lower standard than any other party before the Court? If anything, an elevated standard should apply. As pointed out in an early Constitutional Court decision, the State is called upon to act as an example to the rest of society.¹² Administrative failure is no excuse for a State's failure to fulfil its responsibilities. As the Namibian Supreme Court observed, "It would be a travesty of justice if a citizen must be prejudiced because the Minister, his Ministry, the State Attorney and the whole bureaucracy with all the financial and other resources available to them, are unable and unwilling to act expeditiously when involved in litigation with a citizen."¹³

35. Counsel for the Applicant explained that the State Attorney is understaffed. But this, it has been held in so many words, is "no excuse for not coming to Court".¹⁴ No doubt, many corporations, universities, trade unions, political parties, banks, insurance companies and civil society formations are understaffed, underfunded, ineptly managed, or just generally disorganised. Must they be indulged, perhaps in a spirit of *misericordia*? Plainly not, and neither should the Applicant herein. And there is no reason an individual litigant should have to bear the burden of the delinquencies of an organ of the State any more than she or he must endure the poor conduct of non-state actors.

¹² Mohamed v President of RSA 2001 (3) SA 893 (CC) para 68.

¹³ Minister of Home Affairs, Minister Ekandjo v Van Der Berg 2008 (2) NR 548 (SC), para 40.

¹⁴ See Directorate, Special Operations, and Another v Mpumalanga Economic Empowerment Corporation 2005 (2) SACR 618 (T) p. 622.

Costs

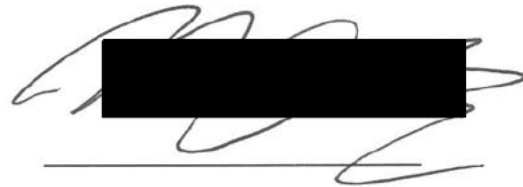
36. I think it is fitting that the Applicant be mulcted with costs on an attorney-and-client basis. Two reasons present themselves. First, the rescission application is patently unviable - as a cursory perusal of the Constitutional Court's decision in Zuma would have made clear. Second, the Applicant and the State Attorney's conduct of the litigation was unacceptably dilatory. The Applicant tarried for months in delivering the docket; an error in the State Attorney's office led to a failure to appear when the matter was called; and months again passed before rescission was applied for – prompted only when the Applicant's assets were on the verge of being executed upon. No explanation is offered for any of these delinquencies. In the circumstances, the Court would be remiss not to mark its displeasure by way of an appropriate cost order. I see no reason the Respondent, as the successful party, should be out of pocket, as he may well be if costs are limited to the party-and-party scale..
37. Finally, it appears to me that the importance and relative complexity of some of the issues arising warrant the application of Scale B in the Table that is part of Rule 69(7) of the Rules of Court.

Order

38. In the premises, the application for rescission is dismissed.
39. The Applicant shall pay the costs of the Respondent on the attorney-and-client basis *per* Scale B in the Table in Rule 69(7) for costs incurred after 12 April 2024 and otherwise in accordance with the costs regime prevailing prior

to that date.

SO ORDERED




OSBORNE AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

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