

REPUBLIC OF SOUTH AFRICA



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

Case Number: 11262/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
7/10/2024	[REDACTED]
DATE	SIGNATURE

In the matter between:

THE MUNICIPAL EMPLOYEES PENSION FUND

Applicant

and

NTABANKULU LOCAL MUNICIPALITY

Respondent

This judgment was delivered electronically by circulation to the parties' legal representatives and uploading on caselines.

JUDGMENT

MAHALELO, J

Introduction

- [1] In this application the applicant, Municipal Employees Pension Fund (“MEPF”) is asking this Court to rescind the judgment and order which was granted in favour of the respondent, Ntabankulu Local Municipality on 5 September 2022, in its absence. The applicant is relying on the provisions of Uniform Rule 42 alternatively, the common law.
- [2] The applicant contends that the order of 5 September 2022 was erroneously sought and erroneously granted in its absence. In the alternative, the applicant contends that the rescission application should succeed under the common law because there is good cause to do so and it has bona fide defences.
- [3] The order granted on 5 September 2022 required MEPF to pay Ntabankulu Municipality:
- (a) An amount of R5 127 149.63 being the purported value of the pension contributions allegedly due to the respondent.
 - (b) All investment returns and on the purported pension contributions paid by the respondent to the applicant from one September 2018 to 30 June 2020.
 - (c) Interest on the aforesaid amount at the legally prescribed rate from 29 March 2019, alternatively from the date of the order to the date of payment, and
 - (d) the cost of the application for default judgment and the main action.
- [4] The respondent opposed the application and contended that the order of 5 September 2022 was properly sought and granted. He further submitted that there is no good cause shown for the rescission application to succeed.

Background Facts

- [5] Prior to 2013, certain employees of the respondent were all members of the South African Municipal Workers Union National (“the SAMWU”) Provident Fund and the respondent paid contributions to the SAMWU Fund in respect of the relevant employees.

- [6] During or about 2013, MEPF was invited to present its product and service offering as a pension fund to the respondent's employees. Pursuant to the presentation, 101 employees elected to become members of the MEPF. The respondent then commenced making pension contributions in respect of these employees to the MEPF from 1 September 2013.
- [7] From 1 September 2013 101 employees terminated their membership with the SAMWU fund and became members of the MEPF. The respondent continued to pay monthly pension contributions of these members to the MEPF in accordance with section 13A of the Pension Fund Act¹.
- [8] On or about 17 February 2015, the SAMWU instituted legal proceedings against the respondent in the Eastern Cape Division of the High Court Mthatha in which inter alia, it sought to compel the respondent to pay the pension contributions with interest in respect of the 101 employees from the date 1 September 2013 to date of the proceedings (the 2015 proceedings). The basis of the SAMWU's claim was that the 101 employees were not permitted in terms of Rule 3.2.1 of the Rules of the SAMWU Fund to terminate their membership of the SAMWU Fund while they remain in the service of the respondent.
- [9] MEPF was initially not a party to the proceedings, but intervened and was joined to the proceedings by a court order. On 14 August 2018, the Court per Hartle J inter alia, ordered the first, second and third respondents being the respondent, MEPF and Akani (the administrator of the MEPF) to pay the SAMWU fund all area pension contributions in respect of their 101 employees and any interest accrued thereto.
- [10] Dissatisfied with the order granted against them, the MEPF and Akani sought and were granted leave to appeal to the Supreme Court of Appeal ("SCA"). On 29 March 2019, the SCA granted judgment in terms of which only paragraph two of the Hartle J judgment was amended and only the Ntabankulu Municipality was directed to pay the SAMWU fund all the area pension contributions in respect of the 101 employees for the period 1 September 2013 to the date of the order.

¹ 24 of 1956.

There appears to be a difference in the interpretation of the judgment between MEPF and the respondent.

- [11] On 23 July 2020 the applicant paid the total pension contributions and the accrued interest in respect of 71 out of 101 members to the respondent. The applicant says that it did this without any legal obligation to do so and only acted in good faith. The refund paid by the applicant amounted to R19 928 666.19.
- [12] On 23 March 2022, the respondent instituted action proceedings against the applicant claiming an additional amount of R5 127 149.63 and interest. According to the respondent, as a result of the SCA judgement, the applicant was due to refund it a total amount of R25 055 815.82 in respect of the area pension contributions and not R19 928 666.19 which was paid to it.
- [13] On 25 March 2022, the respondent served the summons and particulars of claim in the action against the applicant at the registered address of the applicant. A notice of intention to defend was never filed. On 5 September 2022, the respondent applied and was granted default judgment. The judgment was served by the Sheriff on the applicant on 10 October 2022.
- [14] On 11 July 2023 the applicant launched an application to rescind the judgment granted against it on 5 September 2022. The respondent served and filed its notice to oppose.

The applicant's contentions

- [15] In the founding papers and oral submissions, the applicant contended that it has met the requirements for a rescission application in terms of Rule 42 (1)(a) of the uniform Rules in that at the time that the order was granted by default the court was unaware of all the facts and legal contentions in the matter which, had the court being aware of, would have precluded the granting of an order. The applicant contended further that at all times it intended and gave instructions to defend the matter on substantial grounds, but the instruction did not reach the attorneys on account of administrative errors in its office. The applicant therefore contended that the order of 5 September 2022 was erroneously sought and erroneously granted in its absence.

[16] In advancing the relief under the common law, the applicant contended that good cause exists for the granting of the rescission on the basis that its defenses in the main action were not disclosed to the court in the application for default judgment and the respondent's factual and legal contentions raised in the main action are materially incorrect. The applicant submitted that he was not in willful default and he has legitimate grounds on which he brings the rescission application to defend the main action, and that the rescission application is not made with the intention to delay the action.

The Respondent's contentions

[17] On behalf of the respondent it was contended that the application for rescission does not meet the requirements set out in Rule 42 and that the applicant has failed to show good cause for the judgment to be rescinded under common law. The contention in this regard on behalf of the respondent is that the applicant has not given a reasonable explanation for its failure to defend the main action. According to the respondent, summons in the main action were properly served on the applicant. The applicant was aware of the matter. Therefore, it is incorrect to insinuate that the judgment was erroneously sought and erroneously granted.

Rescission in terms of Rule 42(1)

[18] The court has the power to rescind a judgment under Rule 42(1) which provides that:

“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:

- (a) an order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) an order of judgment in which there is 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 a result of a mistake common to the parties.”

[19] Rule 42(1)(a) empowers the court to rescind an order or judgment erroneously sought or erroneously granted in the absence of a party seeking rescission provided that such party is affected by such order or judgment. The prerequisite

factors for granting rescission under this rule are the following (a) the judgment must have been erroneously sought or erroneously granted, (b) such judgment must have been granted in the absence of the applicant, (c) the applicant's right or interest must be affected by the judgment. Once these requirements are established, the applicant would ordinarily be entitled to succeed. He is not required to show good cause in addition thereto.

- [20] The import of Rule 42 was explained by the Constitutional Court in the *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*² matter, in the following terms:

"[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."

- [21] As stated in the Zuma matter, to satisfy the requirements of Rule 42 (1) (a), the applicant must show the existence of both the requirements that the order or judgment was granted in his or her absence and that it was erroneously granted or sought. However, the court retains the discretion to grant or refuse the rescission of an order having regard to fairness and justice.

- [22] The discretion conferred under rule 42 is a narrow one. In *Mutebwa v Mutebwa and Another*,³ the court held—

"Although the language used in Rule 42(1) indicates that the Court has a discretion to grant relief, such discretion is narrowly circumscribed. The use of the word 'may' in the opening paragraph of the Rule indicates circumstances under which the Court will consider a rescission or variation of the judgment, namely, that it may act mero motu or upon application by an affected party. The Rulemaker could not have intended to confer upon the Court a power to refuse

² [2021] ZACC 28; 2021 (11) BCLR 1263 (CC).

³ 2001 (2) SA 193 (TKH); See also *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W) at 578E-F; *De Sousa v Kerr* 1978 (3) SA 635 (W).

rescission in spite of it being clearly established that the judgment was erroneously granted. The Rule should, therefore, be construed to mean that, once it is established that the judgment was erroneously granted in the absence of a party affected thereby, a rescission of the judgment should be granted.”

In *Tshabalala and Another v Peer*⁴, Eloff J adopted this interpretation and said at 30D:

“The Rule accordingly means – so it was contended – that, if the Court holds that an order or judgment was erroneously granted in the absence of any party affected thereby, it should without further enquiry rescind or vary the order. I agree that it is so, and I think that strength is lent to this view if one considers the Afrikaans test which simply says that: “Die hof het benewens ander magte wat hy mag he, die reg om . . .”

- [23] In the founding papers, there is no complaint that there was no service of the summons prior to the hearing of the application for default judgment. In these circumstances, the applicant was aware of the matter. The meaning of the phrase “absence of any party” affected thereby was finally settled by the Constitutional Court in *Zuma*⁵ where the court held:

“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).”

- [24] It is now clear that absence in the context of Rule 42 does not mean physical absence. Absence in the context of Rule 42 refers to a failure to follow proper procedure to ensure that the party is present in the court, which result is that the

⁴ 1979 (4) SA 27 (T).

⁵ Above n 2 at para 60.

party then being precluded from participating physically or otherwise in the proceedings.

- [25] Uniform Rule 42(a) exists to protect litigants whose presence was precluded or in instances 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. The applicant was not precluded from participating in the proceedings. It is common cause that the summons were properly served on it. The reason it did not participate was because the official who was instructed to brief attorneys forgot to do so. It cannot therefore be contended that the judgment was sought erroneously in the absence of the applicant.

Was the judgment erroneously sought and granted

- [26] The applicant does not attack the procedure by the respondent to obtain the judgment. It does not say that there was no proper notice, nor does it suggest that there is anything wrong with the return of service so as to render the judgment erroneously granted. In *Freedom Stationery Pty Ltd and Others V Hassan and Others*⁶ the court said the following regarding the requirements of Rule 42(1)(a) and specifically with the phrase erroneously granted:

“As Streicher JA explained in *Lodhi 2 Properties Investments CC & another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) ([2007] ZASCA 85) paras 25-27, the phrase ‘erroneously granted’ relates to the procedure followed to obtain the judgment in the absence of another party and not the existence of a defence to the claim. See also *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) ([2003] 2 All SA 113; [2003] ZASCA 36) paras 6 and 9. Thus, a judgment to which a party was procedurally entitled, cannot be said to have been erroneously granted in the absence of another party.”

⁶ 2019 (4) SA 459 SCA

[27] For the above reasons, I come to the conclusion that the judgment was not erroneously sought and erroneously granted, and the result is that the rescission application under rule 42(1) must fail.

Rescission under the Common Law

[28] The test for a rescission under the common law is trite, namely that “good cause” must be shown. The concept of good cause necessary to sustain a rescission application was restated by the Constitutional Court in *Ferris and Another v First Rand Bank Ltd*⁷ as follows:

“Under both grounds, Mr and Mrs Ferris must show good cause for rescission, which means that they must (a) give a reasonable explanation for their default; (b) show that the rescission application is brought bona fide; and (c) show that they have a bona fide defence, including a prima facie case on the merits.”

[29] In *Zuma*⁸ the Constitutional Court restated the two requirements that need to be satisfied under the common law as being the following:

“First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that it has a bona fide defence which prima facie carries some prospect of success on the merits. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.”

[30] In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*,⁹ the Supreme Court of Appeal held that refusal of rescission might be justified based on inadequate explanation unless the weakness in the explanation is amplified by a bona fide defence which has good prospects of success.

[31] In *Government of the Republic of Zimbabwe v Fick and Others*,¹⁰ the Constitutional Court confirmed and quoted with approval the traditional approach

⁷ [2013] ZACC 46; 2014 (3) SA 39 (CC) at para 24.

⁸ Above n 2 at para 71.

⁹ 2003 (6) SA 1 (SCA) at 9H-10A.

¹⁰ [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC).

for a rescission application which was stated in *Chetty v Law Society, Transvaal*¹¹ as follows:

“It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.”

Explanation of the Default

[32] The applicant firstly relies on what can be called Ms Moodleys gross negligence and submits that it was not in wilful default in the handling of the matter. It was submitted on behalf of the applicant that it has always been its intention to defend the matter even though it had not filed its notice of intention to defend.

[33] The reasons for the default are summarized in the heads of arguments of the applicant as follows:

“44. The summons was served on the MEPF and received by Mr Tleane, the then Strategic Legal Manager of Akani (the administrator of the MEPF).

45. The MEPF's intention to defend the summons was communicated internally and Mr Tleane was instructed to take the matter forward and arrange to brief the legal representatives of the MEPF, WW, and to instruct WW to file a notice to defend the main action. The instruction to WW was to be sent only once a reconciliation of the amounts claimed in the main action was conducted.

46. Mr Tleane notified Ms Moodley, an employee of Akani, that once the necessary reconciliation has been finalised by the finance department of Akani, Ms Moodley was to send the instruction to WW to file a notice to defend the summons.

47. The instruction to defend the action was not received by WW, however, due to an internal administrative error on the part of Akani, Ms Moodley forgot to ask the finance department to do the reconciliation of the amounts claimed or to contact WW in relation to the filing of the notice to defend. The mistake was on account of Ms Moodley's hectic schedule. Despite the MEPF's

¹¹ 1985 (2) SA 756 (A).

intention to defend the main action, the MEPF did not file its notice to defend due to the administrative error.

....

53. It is submitted that the MEPF, though it was aware of the action against it, did not freely refrain from filing its notice to defend, or act in wilful disregard of the Court's rules. The MEPF had always intended to defend the main action. In addition, upon becoming aware of the default, the MEPF acted expeditiously to bring this application within a reasonable time to ensure that its intention to defend the main action is noted by the Court, despite there being a default. The default judgment was therefore granted erroneously and in the absence of the applicant within the meaning of Rule 42(1)(a)."

[34] The issue before me is whether the applicant has shown good cause to warrant the rescission of the default judgment.

[35] I have reservations in accepting that the applicant's default is fully explained. The explanation given by MEPF for not defending the action is that because of Ms Moodley's hectic schedule, she forgot to contact the attorneys and give them instructions to defend the summons. What this mean is that from 25 March 2022 until 5 September 2022, which is a period of more than five months, Ms Moodley's schedule was so hectic that she forgot to forward the instruction to the attorneys to defend the summons. Ms Moodley deposed to a confirmatory affidavit in this matter. She simply confirms what is stated in paragraph 40 of the founding affidavit. She provides no explanation as regards what was hectic about her schedule over a period of five months that made her to forget to instruct attorneys to defend the matter. It is difficult to regard this inexcusable inefficiency on the part of Ms Moodley as a reasonable explanation. It is my considered view that the applicant has failed to present a reasonable and acceptable explanation for its default.

[36] The applicant has advanced several defences amongst others that the SCA judgment placed no liability on the it to pay pension contributions received by it from the respondent, that the respondent confuses its intention and its decision to refund the pension contributions (plus the members investment returns being the return on contributions earned by the members) received by MEPF in respect

of the 101 employees, that it has paid over all that which could possibly have been claimed by the respondent, even if there was no obligation to do so because at the time of the pay-out, only 71 of the 101 employees remained active members of the MEPF, the other 30 employees had terminated their membership with the MEPF and had already received their benefits, that the respondent is not entitled to any returns or gains made by MEPF during the period MEPF received the pension contributions from the respondent because there were at all times binding membership contracts, and the participation agreement with the respondent has not been voided by the SCA judgement, that the list of employees relied on by the respondent differs from the initial list of members on behalf of whom the pension contributions were made by the respondent to MEPF and which the SCA referred to in its August 2018 judgment, and that the respondents claims had prescribed, lastly, that there is non-joinder of the 101 employees.

[37] In the present matter, the summons were served on the applicant at its registered address. Those who had authority to defend the matter or to make decisions about it were aware of the action. They failed to defend the matter. They must have, or at least should have been aware of the probable legal consequences of their inaction to defend the matter. The applicant has failed to present a reasonable and acceptable explanation of its default.

[38] In *Zuma*¹², at paragraph 76, the Constitutional Court said that the explanation must be plausible and acceptable. It went on to say that “*an unsatisfactory explanation remains so, whatever the prospects of success in the merits.*”

[39] In the same paragraph, the Constitutional Court said that “in fact, and although I have considered the merits of this application, in the absence of a reasonable explanation for his default, we are not even obliged to assess Mr Zuma’s prospects.”

[40] At paragraph 77 the Constitutional Court stated that the absence of a plausible and acceptable explanation puts an end to the common law inquiry.

¹² Above n 2.

[41] It was held in *Lodhi 2 Properties Investment CC and Another v Bonde Developments (Pty) Ltd*¹³ that judgment granted against a defendant could not be considered erroneously granted because such defence was not disclosed to the judge who granted the judgment. At paragraph 27, the court explained that:

“... in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. 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 defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.”

[42] In view of the above, it follows that the applicants have failed to show that the default judgment was erroneously granted; the application must accordingly fail.

[43] In the result I make the following order

1. The application is dismissed with costs.



MB MAHALELO
JUDGE OF THE HIGH COURT
JOHANNESBURG

¹³ 2007 (6) SA 87 (SCA).

Heard: 27 May 2024

Judgment: 07 October 2024

For the applicant: Mr V Movshovich

Instructed by: Webber Wenzel

For the respondent: Adv S Khumalo SC
& Adv M Mtshali

Instructed by: T.L Luzipho Attorneys