

REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES/NO
16/01/25	[REDACTED]
DATE	SIGNATURE

Case Number: 76672/2017

In the matter between:

ROAD ACCIDENT FUND

Applicant

and

NWABISA NANA NIBE

Respondent

JUDGMENT

Joyini J

INTRODUCTION

- [1] This is an application for rescission of a default judgment ("the judgment" or "the order") brought by the applicant, the Road Accident Fund ("RAF" or "the Fund"). The judgment was granted in favour of the respondent, Ms Nwabisa Nana Nibe, on 2 September 2021.

- [2] The applicant seeks to have the judgment rescinded and set aside.
- [3] The applicant relies on the common law grounds for rescission.
- [4] The respondent opposes the application.
- [5] The court appreciates the insightful and engaging submissions from both parties' legal representatives, which greatly assisted in adjudicating this matter.

BACKGROUND FACTS

- [6] The facts are largely common cause between the parties. It is common cause that this application originates from the main action that was instituted by the respondent against the applicant for damages arising from a motor vehicle accident.
- [7] The matter was placed on the trial roll for 2 September 2021, before Honourable Justice ADJP Molopa (as she then was) as matter number 39 on the roll. There was no representation for the applicant. Counsel for the respondent went ahead to request allocation in order to proceed with trial. The matter was subsequently allocated to Honourable Acting Justice Noncembu.
- [8] It is also common cause that the applicant failed to appear before court on 2 September 2021 which was the date of the trial. As such, the default judgment was granted in favour of the respondent, Ms Nwabisa Nana Nibe.
- [9] In the said court order, the applicant's defence was struck off and an amount of R8 533 577.00 was awarded to the respondent for loss of earnings. As stated above, there was no appearance for the applicant.
- [10] Counsel for the applicant contends that the respondent amended her particulars of claim in the action proceedings and this amendment re-opened the pleadings. Therefore, the defence of the applicant should not have been struck out.

APPLICATION FOR LEAVE TO TO FILE SUPPLEMENTARY AFFIDAVIT

[11] Counsel for the applicant, in his application for leave to file a supplementary affidavit, submits that the purpose of the supplementary affidavit is to assist the court to have a full picture of the factual matrix in *casu*. This affidavit does not change the cause of action nor introduce a new cause of action and it reads as follows: *"I wish to supplement as follows to the earlier founding affidavit I had deposed to:*

2.1 The application is solely aimed at the amount awarded for past and future loss of earnings; the Applicant conceded 100% liability and has taken no issues with the merits. The present application is solely aimed at rescinding the amount for damages made in favour of the Respondent.

2.2 The Applicant's defence was struck out in the main action proceedings on the 2nd of September 2021.

2.3 On the same day of the 2nd of September 2021, the Respondent filed its amended particulars of claim and the amount claimed for future loss of earnings went from R2 500 000-00 (in the initial Particulars of Claim) to R8 352 231-00 (in the amended Particulars of Claim).

2.4 Therefore, the pleadings in the action proceedings were reopened when the Respondent amended its particulars of claim after the Applicant's defence was struck out.

2.5 This common cause fact strengthens the Applicant's right to re-enter the main action proceedings and amplifies the call for the rescission of the impugned order.

2.6 Authorities in support of this further ground of rescission shall be cited in the Applicant's heads of argument and referred to during the hearing of the matter."

[12] Counsel referred the court to Rule 6(5)(e) of the Uniform Rules of Court which provides as follows: *"[w]ithin 10 days of the service upon the respondent of the affidavit and documents referred to in subparagraph (ii) of paragraph (d) of*

subrule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits.”

[13] Counsel also referred the court to *Garnnet-Adams Properties (Pty) Ltd v Thomas Fanahan Kenny*,¹ where the court listed the following factors that should be considered in allowing supplementary affidavit:

- i. “The reason the evidence was not produced timeously;*
- ii. The degree of materiality of the evidence;*
- iii. The possibility that it may have been filed to “relieve the pinch of the shoe”;*
- iv. The balance of prejudice to the applicant if the application is refused in relation to the prejudice to the respondent if it is granted;*
- v. The stage of the litigation;*
- vi. The possibility of an appropriate order cost to address the late filing;*
- vii. The general need for finality in judicial proceedings;*
- viii. The appropriateness of visiting the attorney's fault upon the head of his client.”*

[14] Counsel argues that it is in the interest of justice that the court determines this application with all the relevant facts before it, inclusive of those facts reflected in the supplementary affidavit. Counsel submits that the issue raised in the supplementary affidavit is relevant to the issue of rescission, which this court is called upon to determine.

[15] In this regard, counsel argues that in the same judgment of *Garnnet-Adams Properties supra*:² *“As stated, the crux of the matter turns on whether there is reason to believe that it will be to the advantage of the creditors of the respondent if he is sequestrated. Material to answer that question is the issue of the residential property and the outstanding amount on the bond registered over the property. The issues raised in the supplementary affidavit speak to this and seek to address some of the issues raised in the Applicant’s replying*

¹ *Garnnet-Adams Properties (Pty) Ltd v Thomas Fanahan Kenny*, para 17.

² *Garnnet-Adams Properties (Pty) Ltd v Thomas Fanahan Kenny*, para 18.

affidavit. Without the benefit of all the information on this issue, the court cannot determine the issue of "benefit to the creditors."

- [16] Counsel contends that the issue on re-opening of pleadings which is raised in the supplementary affidavit, merely reinforces the argument for a rescission of the impugned order. This is so because the point raised about the re-opening of pleadings fits neatly with the second requirement of rescission based on common law, which is good prospects of success. This is because *litis contanstio* was disturbed in the action proceedings. Should the impugned order be rescinded, the applicant will have an opportunity to re-enter the fray in the action proceedings.
- [17] Counsel submits that the supplementary affidavit does not in any way prejudice the respondent. Counsel contends that the supplementary affidavit was filed long time ago, the respondent had ample opportunity to respond to it if it so wishes. Anyway, it chose not to do so.
- [18] With regard to this point, Counsel referred the court again to *Garnnet-Adams Properties sup*, where the court remarked as follows:³ *"The Respondent also did not file the supplementary affidavit on the eve of the hearing – there was time for the Applicant to answer and engage with the issues raised had it wish."*
- [19] Counsel for the applicant concludes by submitting that the interest of justice demands that the supplementary affidavit be allowed.
- [20] Counsel for the respondent argues against granting leave to the applicant to file the supplementary affidavit. The argment by counsel for the respondent does not clearly show what type of prejudice will be suffered by the respondent if the leave is granted.
- [21] In weighing up the prejudice of allowing the supplementary affidavit on the respondent versus the prejudice on the applicant, the balance again tips in favour of the applicant.

³ *Garnnet-Adams Properties (Pty) Ltd v Thomas Fanahan Kenny*, para 20.

- [22] It is my considered view that the applicant's supplementary affidavit does not significantly prejudice the respondent and it will in fact assist the court in reaching a decision. It should thus be allowed.

ISSUES FOR DETERMINATION

- [23] The court is also called upon to deal with this question: Has *litis contestation* been disturbed by the amendment effected by the respondent in the action proceedings? In other words, have the pleadings in the action proceedings been re-opened by such an amendment?
- [24] The main issue for determination is whether the applicant has met all the legal requirements in terms of common law, for the rescission of the default judgment. The requirements are as follows:
- (a) A reasonable and acceptable explanation for the default; and
 - (b) A *bona fide* defence that carries some prospects of success.

APPLICANT'S CONTENTION

- [25] Counsel for the applicant contends that the respondent amended her particulars of claim in the action proceedings and this amendment re-opened the pleadings. Therefore, the defence of the applicant should not have been struck out.
- [26] It is also contended that the impugned order was wrongly sought and wrongly granted in accordance with the provisions of Rule 42(1)(a) and that the court should *mero motu* rescind the order.
- [27] Counsel further contends that, based on common law, the impugned order should be rescinded as the applicant satisfies the two essential grounds for common law-based rescission which are as follows:
- (a) A reasonable and acceptable explanation for the delay; and
 - (b) a *bona fide* defence which carries some reasonable prospects of success.

[28] Counsel for the applicant referred the court to *Nkala and Others v Harmony Gold Mining Company Limited and Others*:⁴ “[188] The issue as to when the stage of *litis contestatio* is reached in the modern day law is a complicated one. It is reached when pleadings are closed. But this is no simple matter. Guidance as to when pleadings are closed can be found in Rule 29 of the Uniform Rules of Court. It advises that pleadings are closed if all parties to the case have joined issue and there are no longer any new or further pleadings, or the time period for the filing of a replication has expired, or the parties have agreed in writing that the pleadings have closed and have filed their agreement with the registrar of the court, or the court, on application, has declared that the pleadings are closed. At that point the pleadings are treated as being closed and the proceedings are said to have reached the stage of *litis contestatio*. In everyday practice, they are normally closed as soon as the period for the filing of the replication has expired, for at that stage the issues have become identified and parties are able to commence preparation for battle. However, it is important to bear in mind that, as annoying as it can be, the law often places a caveat to its pronouncements. In this case it is this: pleadings, though closed, will be re-opened should an amendment be effected, or should the parties agree to alter the pleadings. Amendments to pleadings can be brought by any party any time before judgment is delivered.”

[29] The court in *Nkala and Others v Harmony Gold Mining Company Limited and Other*:⁵ went on to say:⁶ “[189] In our law even when the defendant fails to adhere to the time periods afforded to him to identify his defence he is always given the opportunity to seek condonation for his failure to adhere to those time periods. It follows that in our legal system it takes much longer for the stage

⁴ (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) [2016] ZAGPJHC 97; [2016] 3 All SA 233 (GJ); 2016 (7) BCLR 881 (GJ); 2016 (5) SA 240 (GJ) (13 May 2016).

⁵ (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) [2016] ZAGPJHC 97; [2016] 3 All SA 233 (GJ); 2016 (7) BCLR 881 (GJ); 2016 (5) SA 240 (GJ) (13 May 2016).

⁶ At para 189.

of litis contestatio to be reached. Further, unlike the old Roman legal process, which consisted of two stages (in iure and in iudicio or apud indicem) ours is a single process which can be a long drawn-out affair. In the Roman legal system the arrival of the stage of litis contestatio was a simple and straightforward matter. As we show above, the arrival of the stage of litis contestatio now is anything but a simple and straight forward matter. The procedural developments that have taken place in our modern law have ensured that our legal process is significantly distinct and different from that which prevailed during the Roman times. A difference of fundamental significance is that in our law pleadings can be re-opened at any stage before judgment.”

- [30] Counsel for the applicant, in support of his argument on the issue of amending pleadings without giving notice, referred the court to *Road Accident Fund v Sethole*,⁷ where the court held the following:

“[40] In considering the application for rescission brought by the Defendant, it is imperative to emphasise the critical importance of compliance with procedural rules, particularly Rule 28(2) of the Uniform Rules of Court. Rule 28(2) mandates that any party wishing to amend their pleadings must give notice of the intended amendment to the other party, allowing them the opportunity to object. This procedural requirement ensures fairness and transparency in the litigation process, allowing all parties to respond appropriately to the claims made against them.

[41] In the present case, the Plaintiff's failure to comply with Rule 28(2) is a fundamental procedural flaw that cannot be overlooked. Plaintiff did not provide Defendant with the requisite notice of the intended amendment, thereby denying Defendant the opportunity to object. This non-compliance renders the purported amendment invalid and any default judgment based on such an amendment must be set aside. The procedural integrity of the court process is paramount, and adherence to the rules of court ensures that justice is not only done but seen to be done.

⁷ (3714/2022) [2024] ZALMPPHC 62 (18 June 2024).

[42] The principle that a judgment obtained through procedural irregularities should be set aside is well-established in South African jurisprudence. In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape*,⁸ the Court held that non-compliance with procedural rules, such as failing to provide notice of an amendment, can result in the rescission of a judgment. The Court emphasised that procedural rules are in place to ensure fairness and that non-compliance undermines the judicial process.

[43] Moreover, the Constitutional Court in *Fose v Minister of Safety and Security*,⁹ reiterated the importance of procedural fairness and the necessity of allowing parties a fair opportunity to present their case. The Court stressed that procedural rules are designed to ensure that disputes are resolved in a just and equitable manner, and failure to adhere to these rules can result in an unjust outcome.

[44] It is also crucial to consider the implications of allowing default judgments to stand when they are based on amounts exceeding those stipulated in the pleadings. The Road Accident Fund (RAF), being a public entity funded by taxpayers' money, has a duty to ensure that its resources are used appropriately and justly. Allowing litigants to obtain orders in excess of what they have pleaded without due process not only depletes public resources unjustly but also sets a dangerous precedent that could encourage frivolous or inflated claims."

- [31] On requirements for rescission, Counsel for the applicant referred the court to *Zuma v Secretary of Judicial 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), where it was outlined that for a common law based application for rescission to succeed, the applicant needs to establish the following: "Requirements for rescission of a default judgment are twofold. First, applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has

⁸ 2003 (6) SA 1 (SCA).

⁹ 1997 (3) SA 786 (CC).

a bona fide defence which prima facie carries some prospects of success. 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 the refusal of the request to rescind.”

- [32] According to the counsel for the applicant, the applicant does satisfy the twofold requirements referred to in this *Zuma* judgment.
- [33] On reasonable and satisfactory explanation, counsel for the applicant explained to the court that the contracts of the applicant's panel of attorneys expired on 31 May 2020 and the Fund decided not to renew the contracts for financial reasons. They were too costly and as such, not affordable. In pursuit of this noble intent, the Fund was not represented in the pre-trial conference and when the order was granted on 2 September 2021. The applicant has since collaborated with the State Attorney to assist the applicant with litigation.
- [34] On *bona fide* defence, counsel for the applicant submits that the loss of earnings that was awarded to the respondent on 2 September 2021 after an amount claimed was increased from R2 500 000-00 to R8 352 231-00 through an amendment of particulars of claim. This was done without giving the applicant an opportunity to contest the amendment especially the increased amount. Therefore, the pleadings in the action proceedings were re-opened when the respondent amended the particulars of claim after the applicant's defence was struck out. This common cause fact strengthens the applicant's right to re-enter the main action proceedings and it also amplifies the call for the rescission of the impugned order.

RESPONDENT'S CONTENTION

- [35] Counsel for the respondent contends, on undue delay, that the cause of action upon which the court granted the order on 2 September 2021, took place on 10 December 2016. By then, the contract between the applicant and the panel of attorneys was still in existence. Counsel submits that the fact that the applicant was, without the assistance of the panel of attorneys, able to settle the merits and future medical expenses proved that the contention that the applicant

defaulted in attending pre-trial conference due to the absence of legal representation cannot be held to be a reasonable explanation.

- [36] Counsel for the respondent contends that this matter was duly and correctly set down for trial. The notice of set down was served on 21 September 2020. Even though the applicant was served with the notice of set down almost a year before trial date, the applicant established contact with the respondent only a day before trial requesting various documents.
- [37] Counsel therefore contends that the applicant was not ready to proceed on the trial date hence it elected not to appear before court.
- [38] It took approximately 4 years 10 months for the respondent to find justice caused by injuries sustained in a motor vehicle accident.
- [39] The order which is the subject of this application was granted on 2 September 2021, the applicant only instituted these proceedings during October 2023, that is, a period of over 2 years has already elapsed prior to bringing this application.
- [40] Counsel argues that applications for rescission, whether under common law or Rule 42, must be brought within a reasonable time.
- [41] Counsel further contends that amending the pleadings at the time is by law permissible and procedurally correct as pleadings can be amended at any time before judgment is granted.
- [42] Counsel submits that the strike out of the applicant's defence had no material impact on the matter as the matter was before trial court and would have proceeded in any event without the strike out order being granted. This would have happened due to the fact that the matter was ripe for trial and the applicant elected not to appear before court.
- [43] Counsel for the respondent argues that this application is therefore bad in law and therefore, bound to fail as it does not meet the requirements for rescission of a default judgment. In this regard, counsel for the respondent referred the

court to *Elia Andreas Demetriou and others vs Absa Bank Ltd* (A5083/2021) [2023] ZAGPJHC 649 (06 June 2023), where the court held:

"[10] As indicated earlier, the appellants contend that they are entitled to rescission of the order in terms of either Rule 42 (1) (a) of the Uniform Rules of Court or the Common law. The test for a rescission under Common law is trite, namely that good cause must be shown. In order to establish good cause, an applicant must set forth a reasonable explanation for the default and a bona fide defence/s. Regarding the issue of 'good cause shown' in an application for rescission, the following dictum in the matter of Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) 1985 (2) SA 746J to 765 C, is apposite:

'The Appellant's claim for rescission of judgment confirming the rule nisi cannot be brought under Rule 31 (2) or Rule 42 (1), but must be considered in terms of the common law, which empowers the Court to rescind a judgment obtained on default of appearance, provided sufficient cause therefore has been shown. (See De Wet and Others v Western Bank 1979 (2) SA 1031 (A) at 1042 and Childerly Estate Stores v Standard Bank SA Ltd 1924 OPD 163.)

The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors are required to be considered (See Cairn's Executors v Gaarn 1912 AD 181 at 186 per Innes JA), but it is clear that in principle and in the long-standing practice of our courts two essential elements "sufficient cause" "for rescission of a judgment by default" are:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success (De Wet's case supra at 1042; PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty)

Ltd 1980 (4) SA 799 (A); Smith N O v Brummer N O and Another; Smith N O v Brummer 1954 (3) SA 352 (O) at 357-8).'

[11] *In 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 2021 (11) BCLR 1263 (CC), the Constitutional Court restated the two requirements for the granting of an application for rescission 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.'"

RESCISSION OF JUDGEMENT/ORDER UNDER COMMON LAW

- [44] Rescission of judgment is a common law remedy that empowers a court to cancel the order that was granted against the party that was not present in court when the order was made on a previous occasion to allow such a party to defend/oppose the matter. At common law, the court could only rescind the judgment when such a party demonstrates that there is sufficient cause for the judgment to be rescinded.¹⁰
- [45] To establish sufficient cause, the party that sought to rescind the judgment had to first, offer the court a reasonable and acceptable explanation for its failure to either defend/oppose the matter or attend in court.¹¹

¹⁰*De Wet and others v Western Bank Ltd 1979 (2) SA 1031 (A) 1042.....*

¹¹ *Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) 765.*

- [46] Secondly, as the Constitutional Court confirmed in *Barnard Labuschagne Incorporated v South African Revenue Service and Another*, the party seeking rescission must also demonstrate ‘... that on the merits it has a bona fide defence which prima facie carries some prospect of success’.¹² In *Chetty v Law Society, Transvaal*, the Appellate Division (as it then was) held that the application for rescission runs the risk of being refused if the party against whom the order was made fails to meet one of these requirements.¹³
- [47] When considering whether to rescind any judgment, the court is exercising its discretion which must certainly be exercised judiciously. In *Van Heerden v Bronkhorst*, Molemela JA (as she then was) emphasised that the ‘court’s discretion whether or not to grant rescission of judgment must be influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case’.¹⁴
- [48] A party seeking rescission of judgment in terms of the common law, bears the onus to show good cause. This essentially entails prove of two requirements which are (1) reasonable and satisfactory explanation for its default and (2) that on the merits the party has a bona fide defence which carries some prospects or probability of success. In *Chetty v Law Society, Transvaal*,¹⁵ Miller J dealing with the concept of “sufficient cause” or “good cause” stated that, “these concepts defy precise or comprehensive definition, for many and various factors require to be considered.” The learned Judge stated that “it is clear that in principle the two essential elements of “sufficient cause” for rescission of a judgment by default are: (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and (ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success.

¹² 2022 (5) SA 1 (CC); 2022 (10) BCLR 1185 (CC) para 46. See also *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* 2021 (5) SA 327 (CC); 2021 (11) BCLR 1263 (CC) para 71.

¹³ 1985 (2) SA 756 (A) 765.

¹⁴ [2020] JOL 48938 (SCA) para 50.

¹⁵ 1985 (2) SA 756 (A).

- [49] Turning to the common law in *Zuma supra*, the court reaffirmed the long-standing two-part test for rescission. First, the applicant must provide a reasonable and satisfactory explanation for its absence or default. Second, the applicant must show that it has a *bona fide* defence (or grounds for opposition) which exhibit reasonable prospects of success in the matter. The court stated that both requirements must be met before an order can be rescinded. The court found that Mr Zuma had failed to provide an acceptable explanation for his absence, and had also failed to show that he had reasonable prospects of success in challenging the contempt of court judgment.
- [50] The court concluded by relaying the following message to all litigants: “*rescission as an avenue of legal recourse remains open, but only to those who advance meritorious and bona fide applications, and who have not, at every turn of the page, sought to abuse judicial process.*” It follows that future litigants seeking to rescind court orders would do well to take heed of this message by ensuring that they have legitimate grounds for rescission, falling within the ambit of the requirements set out in any relevant rules or the common law.

UNDUE DELAY

- [51] An application for rescission on common law grounds must be brought within a reasonable period. For the applicant to succeed with the application for rescission on common law grounds, the applicant must show good cause or sufficient cause by giving a reasonable explanation for delay and showing that application for rescission was *bona fide* and showing a *bona fide* defence to the claim with a *prima facie* prospect of success. It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospects of success on the merits will fail in an application for rescission of a default judgement against him, no matter how reasonable and convincing the explanation of his default.

- [52] It follows therefore that undue delay is in itself fatal to an application for rescission of judgment, justifying the dismissal thereof. In such a situation the court will draw an inference that such an applicant has acquiesced himself with the judgment. This is particularly so when a litigant knew all along about legal proceedings and relief sought and judgment against him or her but does nothing, and only try taking steps at very late stages of the execution processes.
- [53] In *Schmidlin v Multisound (Pty) Ltd* 1991(2) SA 151 (C) the court in dealing with the issue of undue delay held: *"Delay is however, relevant in this case, not per se, but because that judgment was being executed... Acquiescence in the execution of a judgement must surely in logic, normally bar success in an application to rescind on the same basis as acquiescence in the very granting of the judgment itself would."*
- [54] More specifically, the court held that because the application for rescission has to be brought within a reasonable time, unreasonable or undue delay in doing so cannot be cured by an application for condonation of such delay. The court said the following: *"Applicant said in his... affidavit... that his application was brought in terms of Rule 42, which lays down no time limit within which rescission of judgment granted in error should be sought. There is therefore, nothing requiring or capable of condonation by this court (at page 155 paragraph 1-J). "The application, which include the purported application for condonation is dismissed (at page 156 paragraph j)."*
- [55] In *First National Bank of SA Ltd v Van Rensburg No and others*,¹⁶ the court confirmed that an application for rescission of judgment can simply be dismissed on the basis of undue delay only. Even where reliance is placed on the common law, it is still important that the application for rescission be launched within a reasonable time. In this regard, Eloff JP continued as follows: *"I turn to the appellant's reliance on the common law. An interesting argument was submitted to us on the common law, but again the answer is that which I gave in relation to the attempt to invoke Rule 42 (1). As was said in the Geniture case, if the common law is to be invoked the application should*

¹⁶ 1994 (1) SA 677 (TPD).

be made within a reasonable time. [77] I am also satisfied that there was undue delay in the launching of this application, under circumstances where the applicant had knowledge of all the legal proceedings and court processes against him. It was only at the final steps of execution process that is towards the sale of movables by public auction, that this application was launched. Such delay cannot even be cured by an application or prayer for condonation."

ANALYSIS

[56] Justice B R Southwood of the Pretoria High Court said: "Default judgment proceedings are akin to *ex parte* proceedings, and that in effect means that there is indeed a duty of disclosure, and that duty of disclosure requires (of counsel) to disclose even the adverse factors in the case, and if such material aspects of a case have been suppressed, which material aspects would have influenced the decision of the court, then a breach of the duty of disclosure has indeed occurred and if such a breach of disclosure has occurred, then it matters not whether the breach was wilful or mala fide, all that matters is the fact that a material breach has occurred, and such a material breach would in law warrant a rescission of judgment.¹⁷

[57] The Constitutional Court in *Grootboom v National Prosecuting Authority*¹⁸ stressed the necessity of strict adherence to procedural rules to maintain the integrity and credibility of the judicial process. The Court emphasized that procedural fairness is a cornerstone of justice and that failure to comply with procedural requirements cannot be condoned.

¹⁷ Hyundai Motor Distributors (Pty) Ltd v The Honourable Mr Justice J M C Smit 2000 (1) All SA 259 (T).

¹⁸ 2014 (2) SA 68 (CC).

- [58] On the issue of undue delay, while the RAF's delay in defending the action and filing the rescission application is concerning, the court must balance this against the need to ensure procedural fairness. In *Bezuidenhout v Patensie Citrus Beherend Bpk*,¹⁹ the Court highlighted the need for swift adjudication to avoid prejudice and unnecessary delay. Similarly, in *Mohlomi v Minister of Defence*,²⁰ the Constitutional Court emphasised the detrimental effects of delays on the administration of justice and the rights of the parties involved.
- [59] I guess, it is fair to say, if the rescission is granted, the RAF will be given an opportunity, if it so advised, to deal the issue of non-compliance with Rule 28, which is a fundamental aspect of procedural fairness. Granting the rescission will rectify the procedural irregularity that occurred due to the respondent's failure to comply with Rule 28(2). This will obviously cause further delays and additional costs for the respondent, who has already obtained a judgment in her favour.
- [60] In the same vein, if the rescission is not granted, the RAF will suffer significant prejudice as it was not given the opportunity to object to the proposed amendment, which resulted in an increased amount claimed from R2 500 000-00 in the initial particulars of claim to R8 352 231-00 in the amended particulars of claim.
- [61] It is my considered view that the respondent's non-compliance with Rule 28(2) deprived the RAF of its right to contest the amendment and this led to a judgment that may not reflect the true extent of the applicant's liability. Upholding such a judgment would undermine the principles of fairness and justice, as it would enforce an order obtained through procedural irregularities.
- [62] The respondent's failure to comply with Rule 28(2) is a critical procedural flaw that cannot be overlooked. This non-compliance renders the purported

¹⁹ 2001 (2) SA 224 (SCA).

²⁰ 1997 (1) SA 124 (CC).

amendment invalid, and the default judgment with such an amendment must be rescinded. Procedural rules are the backbone of the judicial system, ensuring fairness and predictability in legal proceedings. Compliance with these rules is not merely a formality but a substantive requirement that safeguards the rights of all parties involved.

CONCLUSION

- [63] I am of the view that the facts set out in the applicant's founding and supplementary affidavits constitute an applicant's commitment to satisfy the requirements for rescission of the default judgment in terms of common law. It may be recalled that the applicant was deprived of an opportunity to contest the amendment to the particulars of claim by the respondent. From both the parties' arguments it is clear that there are issues like *inter alia* the amendment of particulars of claim without notice which the parties place in dispute and needs to be ventilated at a trial.
- [64] In this regard, the applicant has therefore shown good cause in the form of a potential or possible triable case with *prima facie* prospects of success in the main action. The applicant has therefore advanced a satisfactory explanation why it needs to come onboard, notwithstanding the respondent's contention that good cause is absent to justify the rescission.
- [65] The applicant has shown good cause for the rescission of the judgment. Good cause means that the applicant: i) has a reasonable explanation for its default; ii) that the application is *bona fide* and not with the intention to delay the respondent's claim; iii) can show that it has a *bona fide*, *prima facie* defence to the respondent's claim and that it has a *bona fide* intention to raise the defence if the application is granted.
- [66] As a matter of balancing the potential prejudice, the court must consider the importance of procedural compliance and the right of an applicant to a fair trial. While the respondent faces the inconvenience of additional litigation, the RAF's right to defend itself against a significantly increased amount claimed, which it was not given a fair chance to consider or contest, is paramount. Therefore,

ensuring procedural fairness and adherence to court rules justifies granting the rescission, despite the resultant delay and inconvenience to the respondent.

- [67] I am persuaded by the argument that the respondent's non-compliance with Rule 28(2) and the subsequent granting of the default judgment necessitates the rescission of the judgment. I am of the view that the applicant has demonstrated that the judgment was granted owing to procedural irregularities, which if known to the court at the time, would have precluded the granting of the judgment.
- [68] In terms of the common law, a court is entitled to rescind a judgment obtained in default of appearance if good cause can be shown. What constitutes good cause is that the applicant can explain that it has a reasonable and acceptable explanation for the default and that on the merits, it has a *bona fide* defence.
- [69] The second stage of the inquiry is whether the applicant has raised a *bona fide* defence to the respondent's claim against it. It is the applicants' case that it has a *bona fide* defence with a reasonable prospect of success. It is trite that an applicant for rescission must demonstrate an existence of a substantial defence and not necessarily a probability of success. It is sufficient that in his evidence it shows a *prima facie* case which raises triable issues. The applicant in this matter has fully and sufficiently explained its defences. The defences raised by the applicants in my view raise triable issues.
- [70] The court is still required to determine whether the applicant has raised a *bona fide* defence or not. I need to stress that insofar as this is concerned, it is not for this court to determine whether or not a trial court will make a finding in favour of the applicant in respect of any of the defences it has raised.
- [71] That is a determination to be made by the trial court. It is sufficient at this stage that the defences set out averments which, if they are established at a trial, could lead to a court holding in favour of the applicant. In other words, it is sufficient if the applicant makes out a *prima facie* defence, that raises an issue which is triable.

- [72] It is obvious that whether such issue is triable or not will depend on the nature of the defence that has been raised and each situation will have to be judged according to its own merits.
- [73] It follows from what transpired that the applicant has succeeded in showing that the defences that it has raised may lead to a different result to the default judgment that has been granted.
- [74] Taking into account the totality of the evidentiary material, arguments and submissions by parties' counsel, I am of the view that the applicant has managed to provide a reasonable and satisfactory explanation and as such, I am satisfied that the applicant has shown good cause for the rescission of the judgment.

COSTS

- [75] One of the fundamental principles of costs is to indemnify a successful litigant for the expense put through in unjustly having to initiate or defend litigation. The successful party should be awarded costs.²¹ The last thing that our already congested court rolls require is further congestion by an unwarranted proliferation of litigation.²²
- [76] It is so that when awarding costs, a court has a discretion, which it must exercise after a due consideration of the salient facts of each case at that moment. The decision a court takes is a matter of fairness to both sides. The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstances which may have a bearing on the issue of costs and then make such order as to costs as would be fair in the discretion of the court.
- [77] No hard and fast rules have been set for compliance and conformity by the court unless there are special circumstances.²³ Costs follow the event in that the

²¹ Union Government v Gass 1959 4 SA 401 (A) 413.

²² Socratous v Grindstone Investments (149/10) [2011] ZASCA 8 (10 March 2011) at [16].

²³ Fripp v Gibbon & Co 1913 AD 354 at 364.

successful party should be awarded costs.²⁴ However, I have a wide discretion in making costs orders, and I am entitled to depart from the general rule in appropriate circumstances. I am mindful of the fact that this rule should be departed from only where good grounds for doing so exist.²⁵

[78] In this matter, the court acknowledges the RAF's delay in bringing this rescission application. While the delay is a factor to be considered, the Court finds that both parties have contributed to the procedural complications and delays in this matter.

[79] Given these circumstances, the Court deems it equitable and just that each party should bear their own costs in this rescission application. This approach aligns with the principle of fairness, as it avoids penalising either party excessively for their respective roles in the procedural issues that have arisen.

[80] This decision is supported by case law, which recognises that in certain circumstances where both parties have contributed to procedural errors or delays, a court may exercise its discretion to order that each party bear their own costs.²⁶

[81] In light of these considerations and both parties' argument relating to the costs of this application, I am accordingly inclined to grant costs wherein parties shall bear their own costs.

ORDER

[82] In the circumstances, I make the following order:

[82.1] The applicant is hereby granted leave to file its supplementary affidavit supplementing its founding affidavit.

²⁴ Union Government v Gass 1959 4 SA 401 (A) 413.

²⁵ Gamlan Investments (Pty) Ltd v Trillion Cape (Pty) Ltd 1996 3 SA 692 (C).

²⁶ Steyn v Ronald Bobroff & Partners Incorporated [2013] ZASCA 51. See also Durascaff CC v Essilfie-Appiah(3330/2019) [2022] ZAECHMHC 43, and Van Zyl NO v Nedbank Ltd(20832/2019) [2023] ZAWCHC 120.

[82.2] The order that was granted on 2 September 2021 by this court under case number 76672/17 is hereby rescinded and set aside.

[82.3] The parties shall bear their own costs.


T E JOYINI

JUDGE OF THE HIGH COURT, PRETORIA

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Date of Hearing: 14 November 2024

Date of Judgment: 16 January 2025

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 16 January 2025 at 10h00.