



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

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
14/4/2025	
DATE	SIGNATURE

Case No: 28807/2020

In the rescission application between:

THE MINISTER OF POLICE

Applicant
(Defendant in the main action)

and

MAGEZI HEROLD CHAUKE

Respondent
(Plaintiff in the main action)

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date for the handing down of the judgment shall be deemed to be 15 April 2025.

JUDGMENT

LG KILMARTIN, AJ:

A. INTRODUCTION

[1] This is an opposed application to rescind an order granted by his Lordship Mr Justice Holland-Mutet (then Acting - "Holland-Mutet J") on 27 September 2021, in terms of which the defence of the Minister of Police ("the applicant" and defendant in the main action), was struck out in terms of Rule 35(7).

[2] The main action is an action for damages arising out of the alleged unlawful detention and arrest of Magezi Herold Chauke ("the respondent" and plaintiff in the main action) by unnamed members of the South African Police Service ("SAPS"). The unlawful detention and arrest apparently took place at the respondent's workplace, Transpharm (Pty) Ltd, in Hermanstad. According to the respondent, he was arrested without a warrant on 7 October 2019 and was released on 9 October 2019, without appearing in Court.

[3] At the outset, it is not clear from the founding affidavit whether the application is made in terms of Rule 42(1) or the common law. However, I will deal with both grounds.

[4] Before dealing with the relevant legal provisions and authorities as well as the merits of the matter, it is necessary to have regard to the relevant background facts as this provides the fundamental backdrop against which this dispute must be adjudicated.

B. RELEVANT BACKGROUND FACTS

[5] The respondent issued a notice in terms of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002.

[6] Summons was served on the applicant on 7 and 14 July 2020.

[7] The applicant filed its notice of intention to defend the litigation on 22 October 2020.

[8] The applicant failed to plead within the required 20 (twenty) days.

[9] On 20 November 2020, the applicant was served with a notice of bar.

[10] There was no response to the notice of bar and, as a result, the applicant became *ipso facto* barred.

[11] On 18 March 2021, the respondent served the applicant with an application for default judgment.

[12] About five and a half months after the notice of bar was served, and without bringing an application to uplift the bar in terms of Rule 27, the applicant served a special plea and plea on 7 May 2021.

[13] On 11 May 2021, the applicant delivered a notice in terms of Rule 35(1) requesting the applicant to file his discovery affidavit within 20 (twenty) days. This notice was served on the office of the State Attorney, Pretoria.

[14] On 12 May 2021, the application for default judgement was removed from the roll by agreement between the parties. At this juncture, it is important to point out that the fact that the default judgment application was removed from the roll and the respondent took further steps to advance the matter shows that the special plea and the plea was accepted by the respondent, albeit that it was filed out of time.

[15] The applicant failed to comply with the Rule 35(1) notice and this prompted the respondent to bring an application to compel the respondent in terms of Rule 35(7).

[16] On 30 July 2021, her Ladyship Madam Justice Mokose ("Mokose J") ordered the applicant to comply with the respondent's notice in terms of Rule 35(1).

[17] The applicant failed to comply with the Mokose J's order.

[18] The respondent then served an application to strike out the applicant's defence in terms of Rule 35(7). That application was served on the office of the State Attorney, Pretoria, on 24 August 2021.

[19] On 27 September 2021, Holland-Muter J struck out the applicant's defence.

[20] The explanation proffered by the applicant for the failure to file the discovery affidavit is that, despite the discovery affidavit having been deposed to on 21 July 2021 by a legal officer of the applicant by name of Polisa Mazele, it was never filed. It is further explained that, at the time, the matter was being handled by one Thirusha Naidoo ("Ms Naidoo") and she resigned from the office of the State Attorney on 31 August 2022. There is no affidavit by Ms Naidoo explaining what had transpired. What this means is that despite the discovery affidavit being capable of being filed before the striking-out application was brought, this was not done. There is no admissible evidence to explain why this was not done.

[21] The deponent to the founding affidavit, Mulaudzi Vuledzani ("Mr Vuledzani"), an attorney at the office of the State Attorney, explains that the matter only came to his attention on Monday, 23 January 2023 (almost five (5) months after Ms Naidoo resigned, and that was why the application was only brought on 27 January 2023. Mr Vuledzani indicates that he read the file and was surprised to find that the discovery affidavit had already been signed on 21 July 2021 but had not been served on the respondent.

[22] Mr Vuledzani has no personal knowledge of why the discovery affidavit was not filed and merely states the following in paragraph 14 of the founding affidavit:

"14. The only reason that I can give for Defendant's failure to serve the available signed discovery affidavit could only be covid related, as this case was lodged during the year 2020 and the Order in which the Defendant (sic) defence was struck off was granted on the 27/09/2021 while covid pandemic was still in full swing and the court normal processes was partially suspended and majority of the people were working from home." (sic)

[23] Mr Vuledzani further:

[23.1] explained that during the period March 2020 to December 2021, the attorneys at the State Attorney's office would work two weeks at the office and the following two weeks at home;

[23.2] confirmed that even during the times that one had to work at the office, one could not always do so as, if one of the staff members suffered from Covid, the office would be closed for about three (3) days in order to fumigate it;

[23.3] complained that the State Attorney's office was short staffed and the fact that they had work from home made it difficult to cope with job demands, resulting in staff mainly dealing with urgent matters;

[23.4] explained that, in his section, which is a General Litigation Section, there were only four (4) attorneys, including himself, dealing with all kinds of matters except labour law and conveyancing matters. He further confirmed that on average

each person had about 400 active files and about 600 dormant files;

[23.5]. confirmed that he had 35 matters in court during the months of September to December 2022 which included trials, applications and judicial case management meetings; and

[23.6] confirmed that during the months July 2021 to November 2021, the Department of Justice's IT system was hacked and the State Attorney's offices could not access their emails.

[24] In the heads of argument which were delivered on behalf of the respondent (which were prepared by Adv Sibara) the following statements are made in paragraphs 13 to 15 thereof.

"13. From the founding papers, the Minister has no qualms with the order of Holland-Muter J. One can therefore conclude that the defence was properly struck out.

14. The Minister tried to make out a case on the prospects of success on merits. However, the Minister's case seems to have intentionally missed another challenge. The Minister's plea is non-existent, it was served outside of time. The notice of bar was served on the 20th November 2020. The Minister has failed to uplift the bar.

15. In fact, after the Notice of Bar the plaintiff ought to have proceeded with the application for default." (sic)

[25] The respondent was not represented at the hearing but the arguments in paragraphs 15 and 16 of the respondent's heads of argument are not set out in the answering papers and fly in the face of the respondent's application to strike out the applicant's defence. If there was no plea and no defence, why did the respondent apply for same to be struck out?

[26] What the chronology demonstrates is that, after the special plea and plea were filed, the default judgment application was removed and the respondent accepted that the plea and special plea had been filed. At no stage did it insist on an application to uplift the bar under Rule 27. In fact, it continued to request that applicant make discovery and proceeded with its Rule 35(7) applications after that. The conduct of the parties demonstrates that the respondent accepted that the applicant had pleaded.

[27] Insofar as the prospects of success in the main action concerned, Mr Vuledzani alleges (albeit without any personal knowledge and no confirmatory affidavit by a person with the requisite knowledge) that the respondent was lawfully arrested in terms of section 14(1)(b) of the Criminal Procedure Act, 51 of 1997 ("Criminal Procedure Act"), which entails that the arresting officer had a reasonable suspicion that the person had committed a Schedule 1 offence and it is submitted that the respondent was also detained lawfully in terms of section 50 of the Criminal Procedure Act. As far as the issue of prejudice is concerned Mr Vuledzani claims that it is the interests of justice to set aside the order and the only prejudice to the respondent will be a delay in finalising his claim. Essentially, the same allegations are repeated in the replying affidavit of Carol Mabena ("Ms Mabena") who is also an attorney working in the State Attorney's

offices and alleges that she was allocated the files of Ms Naidoo. Ms Mabena also has no personal knowledge of the alleged unlawful arrest and no confirmatory affidavits by any SAPS official or other person who has personal knowledge of what happened on the day in question has been filed in support of the rescission application.

[28] The special plea and plea also do not disclose any *bona fide* defence. In fact, it is denied in paragraph 4 of the plea that the respondent was arrested by members of SAPS – this is in direct contradiction with the alleged *bona fide* defence referred to by Mr Vuledzani and Ms Mabena.

C. RELEVANT LEGAL PROVISIONS AND AUTHORITIES

[29] Rule 42 is titled “*Variation and rescission of orders*” and Rules 42(1)(a), 42(2) and 42(3) read as follows:

“(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 judgment erroneously sought or erroneously granted in the absence of any party affected thereby;***

...

(2) *Any party desiring any relief under this rule shall make application therefore upon notice to all parties whose interest 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.*"

[30] In order to succeed with an application based on Rule 42(1)(a), there are 3 requirements that must be met, namely:

[30.1] The judgment must have been erroneously sought or erroneously granted;

[30.2] The judgment must have been granted in the absence of the applicant; and

[30.3] The applicant's rights or interests must be affected by the judgment.

[31] Once the three requirements of Rule 42(1)(a) are established, an applicant would ordinarily be entitled to succeed and would not be required to show good cause in addition thereto.¹

[32] The Constitutional Court has confirmed that Uniform Rule 42 is an empowering provision for the Court to rescind a judgment. 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*,² the Constitutional Court stated the following:

¹ *Hard Road (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W) at 578 (G).

² [2021] ZACC 28, para [53].

“It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with the 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.”

[33] A judgment is erroneously granted if there existed, at the time of its issue, a fact of which the Court was unaware, which would have precluded the granting of the judgment, and which would have induced the Court, if aware of it, not to grant the judgment.³

[34] An order or judgment was erroneously granted where:

[34.1] There was an irregularity in the proceedings;⁴

[34.2] If it was not legally competent for the Court to have made such an order.⁵

[35] As far as rescission under the common law is concerned, the requirements which need to be met were described in *Hetty v Law Society, Transvaal*.⁶ In this regard, there are two requirements that need to be met, namely:

³ *Occupiers, Berea v De Wet* NO 2017 (5) SA 346 (CC) at 366 E – 367 A.

⁴ *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1038 D.

⁵ *Athmaram v Singh* 1989 (3) SA 953 (D) at 956 D and 956 I.

⁶ 1985 (2) SA 756 (A) at 765 A-E.

[35.1] The applicant must furnish a reasonable and satisfactory explanation for its default; and

[35.2] It must be shown that on the merits it has a *bona fide* defence which *prima facie* carries some prospects of success.

[36] Rule 35 deals with “*Discovery, Inspection and Production of Documents*” and Rules 35(1) and 35(7) provide as follows:

“(1) Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within 20 days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings.

(2) The party required to make discovery shall within 20 days or within the time stated in any order of a judge make discovery of such documents on affidavit in accordance with Form 11 of the First Schedule, specifying separately—

(a) such documents and tape recordings in the possession of a party or such party’s agent other than the documents and tape recordings mentioned in paragraph (b);

(b) such documents and tape recordings in respect of which such party has a valid objection to produce;

- (c) *such documents and tape recordings which a party or such party's agent had, but no longer has possession of at the date of the affidavit.*

A document shall be deemed to be sufficiently specified if it is described as being one of a bundle of documents of a specified nature, which have been initialled and consecutively numbered by the deponent. Statements of witnesses taken for purposes of the proceedings, communications between attorney and client and between attorney and advocate, pleadings, affidavits and notices in the action shall be omitted from the schedules.

...

- (7) *If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence."*

[37] Rule 26 is titled "*failure to deliver pleadings - barring*" and reads as follows:

"Any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be ipso facto barred. If any party fails to deliver any other pleading within the time laid down in these rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleading within five days after the day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice within the time

therein required or within such further period as may be agreed between the parties, shall be in default of filing such pleading, and ipso facto barred: Provided that for the purposes of this rule the days between 16 December and 15 January, both inclusive shall not be counted in the time allowed for the delivery of any pleading.”

[38] Rule 27 is titled “*extension of time and removal of bar and condonation*” and provides that:

- “(1) ***In the absence of agreement between the parties***, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.
- (2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.
- (3) The court may, on good cause shown, condone any non-compliance with these rules.
- (4) After a rule nisi has been discharged by default of appearance by the applicant, the court or a judge may revive the rule and direct that the rule so revived need not be served again.”

(Emphasis added)

[39] An application for removal of bar is only necessary in the absence of an agreement between the parties.⁷

D. DISCUSSION OF THE MERITS

[40] As far as the application based on Rule 42(1)(a) is concerned, I am of the view that the chronology and documents demonstrate that there was proper service of the Rule 35(7) applications on the State Attorney's office and it is common cause that the relevant discovery affidavit was not delivered in compliance with the Court order of Mokose J. Hence, I am of the view that the order of Holland-Muter J was not erroneously sought or granted and the application for rescission based on Rule 42(1)(a) cannot succeed.

[41] Insofar as the common law case is concerned, I am of the view that: (i) the explanation for default is scant and mostly based on speculation. It is clear that the relevant Rule 35(7) applications were physically served on the State Attorney's office and there is no adequate explanation for the delay between the granting of the order of Holland-Muter J on 27 September 2021 and the bringing of the application on 27 January 2023. No effort appears to have been made to ascertain from Ms Naidoo why she had not ensured that the discovery affidavit was filed. In any event, even if the scant explanation for the delay was to be accepted, the applicant has failed to demonstrate that he has any *bona fide* defence which has reasonable prospects of success. The evidence in this regard is entirely inadmissible and contradicts what is stated in the plea. I also

⁷ *Erasmus* at Rule 27-2; and *Gool v Policansky* 139 CPD 386 at 390.

do not agree that the respondent is not prejudiced. This matter has been dragging on since 2020 and this application, which is devoid of any merit, has caused a delay of more than 2 years in having this matter finalised.

[42] In the circumstances, as far as the application for rescission brought on the basis of the common law is concerned, I am not satisfied that:

[41.1] The applicant has furnished a reasonable and satisfactory explanation for his default; and

[42.1] The applicant has shown that on the merits he has a *bona fide* defence which *prima facie* carries some prospects of success.

[43] The rescission application therefore falls to be dismissed. I do not any reason why costs should not follow the result.

ORDER

I make the following order:

1. The rescission application is dismissed; and
2. The applicant is ordered to pay the costs of the application on party and party Scale B.


 LG KILMARTIN

ACTING JUDGE OF THE HIGH COURT
PRETORIA

Dates of hearing:	17 March 2025
Date of judgment:	15 April 2025
Counsel for the Applicant:	L Liphoto
Instructed by:	The office of the State Attorney, Pretoria
Counsel for the Respondent:	No appearance
Attorneys for Respondent:	Tshuketana Attorneys Inc.