

**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.

22 April 2025

Case No:012905/2024

In the matter between:

**MINISTER OF DEFENCE AND  
MILITARY VETERANS**

**First Applicant**

**CHIEF OF THE SOUTH AFRICAN  
NATIONAL DEFENCE FORCE**

**Second Applicant**

**SECRETARY FOR DEFENCE**

**Third Applicant**

**SOUTH AFRICAN NATIONAL DEFENCE FORCE:  
CHIEF OF HUMAN RESOURCES**

**Fourth Applicant**

and

**MOSES JABULANI ZWANE AND 15 OTHERS**

**First to Sixteen Respondents**

*In re:*

**MOSES JABULANI ZWANE AND 15 OTHERS**

**First to Sixteen Applicants**

and

**MINISTER OF DEFENCE AND  
MILITARY VETERANS**

**First Respondent**

**CHIEF OF THE SOUTH AFRICAN  
NATIONAL DEFENCE FORCE**

**Second Respondent**

**SECRETARY FOR DEFENCE**

**Third Respondent**

**SOUTH AFRICAN NATIONAL DEFENCE FORCE:  
CHIEF OF HUMAN RESOURCES**

**Fourth Respondent**

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## **JUDGMENT**

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**SK HASSIM J**

### **Introduction**

[1] The applicants in the main application are members of the South African National Defence Force (“SANDF”), referred to as “the DoD Employees”. On 27 November 2024 they obtained an order (“the default order”) against the Minister of Defence and Military Veterans (“the Minister”), the Chief of the South African National Defence Force (“the Chief of the SANDF”), the Secretary of Defence (“the Secretary-DoD”) and South African National Defence Force: Chief of Human Resources (“Chief: HR”), collectively referred to as (“the DoD”). The default order compelled the DoD to (i) take all steps required to staff all Applicants in terms of the Military Dispensation (“MD”) for Engineers and Related Professions and to communicate this to the Applicant’s attorneys - both to be done within 30 days of the order; and (ii) to pay to the DoD Employees technical allowances (or a similar benefit in terms of the MD) retrospectively from 1 April 2023 until the date of being fully incorporated and/or staffed in terms of the MD in accordance with (i).

[2] On 20 February 2025, the DoD applied on an urgent basis under rule 45A of the Uniform Rules of Court for the suspension of the operation and execution of the default order pending the finalisation of a rescission application which had been served on 12 January 2025. The DoD Employees disputed that the application was urgent and moved for it to be struck from the roll. As far as the merits of the application were concerned, they contended that the application should not be entertained by the court because the DoD is in contempt of court and therefore barred from approaching a court. and in any

event, there are no prospects of success in the rescission application. I heard the parties on both urgency and the merits. For reasons discussed later, I was of the view that the application was urgent. The DoD Employees' counsel, Mr Hamman, properly agreed that pending the decision on the urgent application, his clients would not enforce the default order.

[3] On 19 March 2025, I issued the following order suspending the execution and operation of the default order and requested the parties to make submissions or agree to time frames for the delivery of outstanding affidavits in the rescission application, as well as heads of argument, to ensure that there is no delay in finalising the rescission application. I indicated reasons for the order will be provided after receipt of the submissions:

- “[2] The operation and execution of the order granted by Davis J on 27 November 2024 is suspended pending the finalisation of the pending application to rescind the judgment.
- [3] The parties are requested to submit brief submissions within five (5) days of this order why the following orders cannot, or should not be made in addition to the orders in paragraph 2 above and 5 below -
  - (i) placing the applicants on terms to deliver a replying affidavit in the rescission application, if one has not been delivered,
  - (ii) directing when practice notes and heads of argument must be delivered by the parties.
- [4] In the event the parties agree to time frames for the delivery of the outstanding replying affidavits, if it is outstanding and further the exchange of heads of argument such agreement must be recorded in a practice note which must be uploaded to CaseLines within 5 (five) days of this order.
- [5] The costs of the application, including the costs occasioned by compliance with paragraphs 4 and/or 5 [sic] above shall be costs in the cause.
- [6] Written reasons for this Order will be handed down after receipt of the written submissions referred to in paragraph 3 or the practice note referred to in paragraph 4.

[4] These are the reasons for the order.

### **Background to the application**

[5] The main application was a review application under the Promotion of Administrative Justice Act, Act No 3 of 2000. During 2007 the Department of Public Service and Administration (“the DPSA”) adopted an Occupation Specific Dispensation (“OSD”) in terms of which scales of remuneration for public service employees was to be determined according to occupational categories. On 1 July 2009, the DPSA implemented an Occupation Specific Dispensation (“OSD”) for Engineers and Related Professions and Occupations and issued in this regard Circular 5 of 2009. According

to the DoD, the OSD for Engineers and Related Professions formulated by the DPSA was not suited to the military environment. The DoD did not adopt the Public Service OSD for Engineers and Related Professions and Occupations and developed a Military Dispensation for engineers and related professions.

[6] On or about 30 November 2010, the Chief: HR issued the “Implementation: 71/2010 Technical Allowance and Phasing in of Occupational Specific Dispensation (OSD) for Engineers and Related Professions and Occupations in the Department of Defence (DOD)” (**“the 71/2010 DoD Technical Allowance and in-phasing of OSD”**)<sup>1</sup>. It provided for the payment of a technical allowance for engineers and related professions and occupations in the DoD to those at salary notches B3 to C7 until such time as a military occupation specific dispensation for engineers and related professions in the SANDF was approved.

[7] On 30 June 2011, the DOD issued “Amendment Implementation Instruction:/2010 Technical Allowance and Phasing in of Occupational Specific Dispensation (OSD) for Engineers and Related Professions in the Department of Defence (DOD)” (**“the Amended Technical Allowance and in-phasing of OSD”**) which was aimed at those members who had not been receiving a technical allowance.

[8] On 31 August 2021, the DoD implemented the “Military Dispensation (MD) for Engineers and Related Professions in the Department of Defence (DOD)” (**“the DoD’s MD”**) being the occupation specific dispensation for the DOD. The DoD’s MD applied to DOD employees on salary grades B1 to C7<sup>2</sup> who fell under the DoD’s MD. In terms of paragraph 42(a)(ii) only those posts with technical qualification and experience in the profile of the post would be converted to Military Dispensation (“MD”) posts.

[9] The DoD’s MD repealed the 71/2010 Technical Allowance and in-phasing of OSD<sup>3</sup> and abolished the technical allowance with effect from 1 April 2022.

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<sup>1</sup> Attached marked “MJZ-3” to the main application.

<sup>2</sup> According to the DoD, private to colonel (previous salary levels 1 to 12).

<sup>3</sup> As well as the “Implementation Measures for a Pay Incentive Scheme for Identified Technical Musterings in the SAAF” and the “Implementation Measures for the Special Medium-Term Service System (SMTSS) for Engineers, Technical Officers and Technical Ratings in the SA Navy”.

[10] On 7 February 2024, the DoD Employees launched the main application to compel the DoD to take all steps required to place them in MD posts in terms of the DoD's MD. They also sought an order compelling the DoD to pay a technical allowance, or similar benefit in terms of the DoD's MD, retrospective to 1 April 2023 until the DoD Employees are placed in MD posts in line with the DoD's MD. In the alternative, they sought the following declaratory orders:

“...that the termination of the technical allowance paid to the Applicants is unlawful and/or is reviewed and set aside and/or...that the implementation of the Military Dispensation (MD) for Engineers and Related Professions in the Department of Defence dated 31 August 2021 is unlawful and invalid and/or it is reviewed and set aside.”

[11] The DoD delivered a notice of intention to oppose the application but not an opposing affidavit. This was on the advice of counsel. Counsel had recommended that at least pending the finalisation of grievance proceedings initiated by other members of the SANDEF, referred to in the papers as the “Sullivan case,”<sup>4</sup> the DoD Employees should be paid, in addition to the monthly salary, an amount equal to the technical allowance they would have received prior to the implementation of the DoD's MD on 1 April 2022. The main application was set down on the unopposed motion court roll of 22 October 2024.

[12] On 22 October 2022, the DoD's counsel applied for a postponement of the application because the State Attorney was awaiting approval to settle the application. Davis J postponed the application to 27 November 2024. However, by the postponed date a settlement had not been approved. The Court was informed that the memorandum recommending a settlement had not been approved by all the relevant officials in the DoD and the State Attorney did not hold instructions to settle the matter. From the bar an application was made for the postponement of the application pending the approval of a settlement. Davis J refused the application and granted the following order:

- “1. The First to Fourth Respondents are ordered to take all steps required to staff all Applicants in terms of the Military Dispensation (“MD”) for Engineers and Related Professions within 30 (thirty) days from the date of this order and to report that same has been done in writing to the Applicant's attorneys within the same timeframe;
2. The 1<sup>st</sup> to 4<sup>th</sup> respondents are ordered to ensure that all Applicants are retrospectively paid technical allowances (or a similar benefit in terms of the MD) from 1 April 2023 until the

<sup>4</sup> *Vide. Sullivan and Others v The Minister of Defence and Others* (37166/2023) [2024] ZAGPPHC 197 (29 February 2024)

date of being fully incorporated and/or staffed in terms of the MD in accordance with prayer 1.

3. The first to fourth respondents are ordered to pay the cost of this application on scale B, jointly and severally, the one to pay the other/s to be absolved”.

### **The institution of the application for the rescission of the default order**

[13] Counsel’s advice came to the attention of the Chief: HR after the default order had been granted. He disagreed with counsel’s interpretation of the DoD’s MD Policy. According to him counsel had not been given the correct facts.

[14] On 7 January 2025, the DoD’s Employees’ attorney e-mailed a letter to the State Attorney, delivered by hand to the DoD on 9 January 2025, demanding compliance with the default order within 10 days and threatened an application for contempt of court in the event of non-compliance.

[15] On 12 January 2025, a day before the expiry of the thirty-day period within which the DoD had to comply with the default order, the DoD launched an application to rescind the default order.

[16] This urgent application which is to suspend the execution and operation of the default order was served on 20 February 2025 and placed on the urgent court roll of 4 March 2025.

[17] The crux of the DoD’s defence to the main application is that the DoD Employees,<sup>5</sup> but for two, do not meet the qualification criteria under the DoD’s MD for the translation of their posts to MD posts. Their posts can therefore not be translated to MD posts, and they are not entitled to be placed in MD posts under the DoD’s MD. Furthermore, they do not meet the criteria for the payment of a technical allowance.

[18] The termination of the technical allowance paid to the DoD Employees was not declared unlawful or reviewed and set aside. Nor the implementation of the DoD’s MD dated 31 August 2021. Consequently, according to the DoD, the termination of the technical allowance, and the implementation of the DoD’s MD dated 31 August 2021 is valid and enforceable.

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<sup>5</sup> These are the first applicant and private Madonsela who have been appointed in a technical post and are being remunerated in terms of the Military Dispensation Policy.

## Urgency

[19] I am satisfied that the DoD has established that it will not obtain substantial redress at a hearing in due course. It is common cause that the DoD Employees intend enforcing the default order by instituting contempt of court proceedings. Once the default order is executed an order suspending its operation and execution will be *brutum fulmen*.

[20] The question whether the urgency is self-created does not arise. The suspension application did not suddenly become urgent, it was urgent when the default order was granted and remains urgent until the default order is rescinded. Unless and until the default order has been rescinded, or its the operation and execution suspended, the DoD will have to pay a technical allowance to the DoD Employees retrospectively to 1 April 2023. And, the DoD Employees have not disputed the averment in the DoD's founding affidavit that if they are paid a technical allowance in terms of the default order the DoD will not be able to recover it from them. <sup>6</sup>

[21] Whilst the DoD can be chided for not having brought the suspension application when it realised that it had a defence to the application or when the rescission application was launched, the failure to act earlier did not cause the application to become urgent.

[22] The question is not whether the application is urgent. It is rather whether the abridgement of the times for the delivery of affidavits was commensurate with the urgency. The application was served on 20 February 2025. The DoD Employees delivered their answering affidavit on 25 February 2025 as dictated in the notice of motion. The replying affidavit was delivered before noon on 27 February 2025. By the time the application was called in the urgent court it was ripe for hearing.

[23] While the application could have been heard in the urgent court a week or two later, the relief which the DoD was seeking, and the effect of the implementation of the order, meant that the application would at some time or other have found its way back on the urgent court roll because it is unlikely that the application could have been

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<sup>6</sup> FA: 105 para 105. AA

accommodated on the normal motion court roll in the immediate or near future. Until the application was disposed of, the DoD was in breach of a court order. And, if it complied with the order by paying a technical allowance the likelihood of recovery from the DoD Employees in the event of a successful rescission application was tenuous. The prejudice to the fiscus if the DoD Employees are ultimately not entitled to a technical allowance was a further factor that moved me to entertaining the application as urgent. I was satisfied that the DoD will not obtain substantial redress if this application is heard in due course.

### **Merits of the suspension application**

[24] The rescission application is brought under rule 42(1)(a), rule 31(2)(b) and the common law. The DoD Employees argue that the DoD is not entitled to stay the operation and execution of the order because it is in contempt of court and until such time that it has purged the contempt it is barred from instituting legal proceedings. Additionally, that there is no merit to the rescission application. In this regard they urged that there are no prospects of success in the rescission application because (i) the default order was not granted in the DoD's absence; (ii) the default order was not erroneously granted or sought as contemplated in rule 42(1)(a); and (iii) the DoD has not shown good cause to rescind the default order.

[25] Generally, a court will grant a stay of execution where real and substantial prejudice requires stay, put otherwise where injustice will otherwise ensue.<sup>7</sup> A court will suspend the operation and execution of an order if the underlying *causa* of the judgment debt is disputed.<sup>8</sup> Though an application for the suspension of the operation and execution of an order is interlocutory to a rescission application, the analogy of an interim interdict is not appropriate if the applicant for the suspension is not asserting a right in the strict sense but is seeking a discretionary indulgence based on the apprehension of injustice.<sup>9</sup> The court in Erasmus v Sentraalwes Koöperasie Beperk<sup>10</sup>

<sup>7</sup> Van Rensburg NO v Naidoo NO and Others; Naidoo NO and Others v Van Rensburg NO and Others [2010] All SA 398 (SCA) para 51.

<sup>8</sup> Van Rensburg NO v Naidoo NO and Others; Naidoo NO and Others v Van Rensburg NO and Others para 52.

<sup>9</sup> Road Accident Fund v Strydom 2001(1) SA 292 (C) at 304 G-H.

<sup>10</sup> [1997] 4 All SA 303 (O).

found that a court does not have to determine the prospects of success of the application pending which the operation and execution of an order is sought to be suspended. It should however be satisfied that an applicant has an arguable case for the rescission of the judgment.<sup>11</sup>

[26] Waglay J (as he then was) in Tony Gois t/a Shakespeare's Pub v Van Zyl & others<sup>12</sup> succinctly captured the principles for the stay of the operation and implementation of an order -

“[37] The general principle for the granting of a stay in execution may therefore be summarized as follows:

- (a) a court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result;
- (b) the court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right but attempting to avert injustice;
- (c) that the court must be satisfied that:
  - (i) the applicant has well-grounded apprehension that the execution is taking place at the instance of the respondent(s); and
  - (ii) irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.
- (d) irreparable harm will invariably result if there is a possibility that the underlying *causa* may ultimately be removed i.e. where the underlying *causa* is the subject matter of an ongoing dispute between the parties;
- (e) the court is not concerned with the merits of the underlying dispute - the sole enquiry is simply whether the *causa* is in dispute.”

[27] The DoD is not asserting a right; it is attempting to prevent injustice and irreparable harm. I therefore do not have to decide whether the requirements for an interdict have been satisfied.

### **Is the DoD barred from applying for the suspension of the operation of the default order?**

[28] The rule that orders of court must be obeyed is grounded in the rule of law and is reinforced by section 165 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). Where a party is of the view that a court order is unenforceable or wrong, it has the right to contest the court order, but if it fails to do so then it must

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<sup>11</sup> At 302.

<sup>12</sup> [2003] JOL 11875 (LC).

comply with it. It cannot simply ignore the court order. In the oft-quoted case of Hadkinson v Hadkinson [1952] 2 All ER 567 (CA) Rome LJ stated –

“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged...”

[29] The correct process for DoD to discharge the default order and relieve itself of the obligation to comply with it, is to apply to rescind it.<sup>13</sup> This application is to preserve the *status quo ante* until a court has decided whether the default order is unassailable or not.

[30] The DoD Employees resist this application and the rescission application on the basis that the DoD is in contempt of court and therefore barred from coming to court until it has purged the contempt.

[31] A person who disobeys a court order, may be found to be in contempt of court and must then endure restrictions that flow from that conduct. One of the restrictions which befall a contemner is arrest and committal to jail. Another, an application by the contemner will not be entertained until the contempt has been purged.<sup>14</sup> However, denying a hearing is inimical to section 34 of the Constitution and can cause great injustice. The rule that the contemnor must purge the contempt before it can be heard is not an absolute rule and is a matter for the discretion of a court dependent upon the circumstances of the case.<sup>15</sup>

[32] If the DoD is barred from court, it will have to comply with an order it considers wrong and has already taken steps to set aside. This would effectively deprive the DoD of the opportunity to seek the suspension of its obligations under the default order as well as deprive it of its right to contest the default order and have it set aside. The DoD Employees’ defence to this application has the ring of the principle in tax law “pay now, argue later”. I am not aware of any precedent importing this principle, or a similar principle, where a party wishes to challenge the court order compelling it to perform under a court order. The DoD has the right to have the dispute regarding the correctness

<sup>13</sup> Cf. Readam v BSB International 2017 (5) SA 183 (GJ) at 197H-I, para 24.

<sup>14</sup> Di Bona v Di Bona and Another 1993 (2) SA 624 (C) at 688 F-G.

<sup>15</sup> Di Bona

of the default order decided in a fair hearing before a court. If the default order is rescinded the DoD will not be able to recover the technical allowance it has paid in terms of the default order.

[33] Whilst the DoD has not complied with the default order, it has not been found in contempt of court. In my view it is unjust to withhold the right to be heard to a party who has disobeyed an order of court but where the issue of contempt of court has not been decided.

[34] In the circumstances, I exercised my discretion in favour of hearing the DoD.

### **Is there an arguable case for the rescission of the main order?**

[35] The DoD has put up all the available grounds for the rescission of the default order leaving me wondering whether this is due to a misunderstanding of the law or is it a case of putting all available options on the wall in the hope that one will stick. Whichever it is, it is not conducive to efficient litigation. The reliance on rule 31(2)(b) is misconceived. The judgment was not granted in action proceedings.

[36] As far as the rescission of the default order is sought in terms rule 42(1)(a) and the common law, the one issue is whether the order was granted in the DoD's absence. The others are whether the default order was erroneously sought or granted, and whether good cause or sufficient cause has been shown for the rescission of the default order under the common law.

[37] The default order had followed on an unsuccessful application for a postponement of the main application. The DoD's legal representatives were in court when it was granted. Mr Hamman argued that because the order was not one granted by default, the DoD's remedy is to appeal the default order and not to apply for its rescission.

[38] Lamentably, despite the issue having pertinently been raised in the papers, neither counsel addressed the issue when a party is considered "in default". I accept that it is not always possible for legal practitioners to prepare for a hearing in an urgent court with the diligence expected by a court, especially where the time for the delivery of papers is severely truncated thus leaving little, if any, time for thorough preparation

and incisive research. However, the way in which a case is put before the court and argued, impacts upon the efficiency of an urgent court, or any other court for that matter.

[39] The issue of when a party is considered to be in “default” was determined by the Appellate Division in *Katritsis v De Macedo*.<sup>16</sup> In terms of section 20(1),<sup>17</sup> at the time, of the Supreme Court Act, Act No 59 of 1959, an appeal against a judgment or order by a single judge in an action or application in which the defendant was in default was to the full court of the division concerned or where that division was a local division, to the full court of the provincial division which exercised concurrent jurisdiction in the area of jurisdiction of the local division. The Appellate Division had to decide whether the appellant had been in default when the judgment was granted to determine whether it had jurisdiction to hear the appeal, or whether the appeal should have been to the full court. Having reviewed the Old Authorities, Van Blerk JA found that “default” includes a failure to file necessary documents required by the rules in opposition to a claim, the failure to appear when the case is called as well as failure to attend court during the hearing of the matter.<sup>18</sup> It is thus evident that the physical presence or absence alone is not definitive whether a party is in default or not. The determining factor is whether the party was prevented from participating in the proceedings. In addition to considering the Old Authorities, Van Blerk JA considered the English position. Having quoted *Merula* he says:

“van Leeuwen, *Romeinse Hedendaagse Reg*, Bk. V, Ch. XIV, 9, ... says, if the plaintiff or defendant, after answer or completion of the pleading, fails to go on with the case, application to bar him is made, whereby he is prevented from benefiting by whatever takes place on that day. *Voet*, 2.11.11., makes it even more clear. I quote from *Gane's* translation:

‘Moreover not only is he who does not attend at all on the day fixed to be accounted a dallier and defaulter, but also he who does indeed attend, but does not take in hand the business for the taking in hand of which the day had been appointed. For instance a plaintiff appears and makes no claim; or a defendant does not challenge the plaintiff's claim when he should do so. He who though present makes no defence is surely reckoned in the position of one who is

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<sup>16</sup> 1966 (1) SA 613 (A).

<sup>17</sup> “An appeal from a judgment or order of the court of a provincial or local division in any civil proceedings may be made-

(a) in the case of, . . . on application by way of motion or petition or on summons for provisional sentence or in a trial case or as to costs only which by law are left to the discretion of the court, to the full court of the division ; and

(b) in any other case, including an appeal against a judgment or order made on appeal, to the appellate division.”

<sup>18</sup> 618B-C.

not there; and he who when called upon does not plead is deemed to have been futile and is expressly classed as contumacious.’

It follows from all these authorities, and *Voet's* statement in particular, that a party who appears when the hearing starts, but thereafter withdraws, and absents himself from the remainder of the proceedings, must also be accounted a defaulter. That would be an *a fortiori* case to those mentioned by *Voet*. Consequently, the judgment given against the appellant in his absence would be one "in a trial case in which the defendant is in default". These words are wide enough to include such a judgment.

The English practice seems to accord with this procedure. Thus Order 36, Rule 33, of their Rules provides for the setting aside of "any verdict or judgment obtained where one party does not appear at the trial". It has been held that that includes a verdict or judgment given against a party who, although appearing initially to ask for a postponement, thereafter on its being refused withdraws and absents himself from the remainder of the trial. He is regarded as if he had not appeared at the trial at all. (See *Robinson v. Chadwick*, (1878) 7 Ch. D. 878; *London Steamship & Trading Corporation Ltd. v. Russian Volunteer Fleet*, 135 L.T. 607)."

[40] The issue was considered more recently by the Full Court of the Limpopo Division, Polokwane in Rainbow Farms (Pty) Ltd v Crockery Gladstone Farm.<sup>19</sup> Makgoba JP found that a respondent who has not filed opposing papers is in "default" even if the respondent, or his legal representative, is present in court when the judgment is granted.<sup>20</sup> The Full Court's judgment was upheld on appeal to the Supreme Court of Appeal.<sup>21</sup>

[41] The DoD had not filed an answering affidavit, and a postponement sought to do so was refused.<sup>22</sup> After Davis J refused the postponement, the DoD's legal representatives did not withdraw. They were in court when the order was granted. However, even though represented and therefore present, the DoD could not participate in the proceedings because it could not defend the case against it. It was therefore in the same position as a party who was not in court when a judgment is granted. The DoD was therefore in default when the default order was granted.

<sup>19</sup> Rainbow Farms (Pty) Ltd v Crockery Gladstone Farm (HCA15/2017) [2017] ZALMPPHC 35 (7 November 2017).

<sup>20</sup> Rainbow Farms para 11.

<sup>21</sup> Crockery Gladstone Farm v Rainbow Farms (Pty) Ltd [2019] ZASCA 61, at para 2.

<sup>22</sup> The Zimbabwean Supreme Court held in Sibanda and Others v Nkayi District Council [1999] JOL 4734 (ZS) that once a postponement is refused a party is effectively in default.

[42] It is established that an order granted to a party who is procedurally entitled to it, is not considered an order erroneously granted as contemplated in rule 42(1)(a), even if the judge who granted the order was unaware of certain facts.<sup>23</sup>

[43] The DoD's case is that under the MD Policy the posts which fell to be translated into MD posts were those which required technical qualification and experience. They aver that the DoD Employees were not in posts requiring a technical qualification and experience with the result that their posts cannot be translated to Military Dispensation posts. Additionally, the technical allowance is inconsistent with the MD with the result that unless it is set aside a technical allowance cannot be paid to the DoD Employees.

[44] The DoD submits that if these facts had been brought to the court's attention, the court would not have granted the default order, and therefore the default order was erroneously sought and/or granted and consequently falls to be rescinded under rule 42(1)(a). The DoD has not identified the procedural impediment to the main order, nor have I been able to find one on the papers.

[45] As far as the DoD's case for the rescission of the default order at common law is concerned there is an arguable case. A party who applies for the rescission of a judgment under the common law must show "sufficient cause" or "good cause" for its rescission. However, I do not have to consider the merits of the rescission application.

[46] In this application, the DoD has only to persuade me that the *causa* for the default order is in dispute. Its burden at this stage is to demonstrate that there is an arguable case for the rescission of the default order.

[47] The DoD has given an explanation why the main application was not opposed. It sets forth reasons why the DoD Employees are not entitled to a technical allowance, why their posts cannot be translated to MD posts and why they cannot be placed in MD posts. They have an arguable case for the rescission of the default order. It is also arguable that unless the DoD's MD is set aside, the DoD Employees are not entitled to the technical allowance and because technical qualifications and experience were not in

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<sup>23</sup> Lodhi 2 Properties Investments CC v Bondev Developments 2002(6) SA 87 (SCA) at para 25.

the profile of the posts occupied by the DoD Employees the posts cannot be translated into MD posts.

[48] I am satisfied that the underlying *causa* for the default order is in dispute. This brings me to the question whether the operation and execution of the order should be suspended.

### **The suspension of the default order**

[49] The DoD has established a well-grounded apprehension that the order will be executed. Not only is the underlying *causa* disputed, it is the subject of a pending rescission application.

[50] The DoD Employees do not dispute that they will execute the main order. If the execution and operation of the default order is not stayed, the DoD will have to pay a technical allowance (or similar benefit) calculated from 1 April 2023 until the rescission application is finalised. There is no assurance that if the default order is rescinded that the DoD will recover what it paid to the DoD Employees. The DoD Employees have not offered security, nor a different method for protecting the money paid to them. Their counsel's answer to my concern regarding recovery if the DoD ultimately succeeds was that the DoD is protected by the Pension Funds Act. While employers may resort to section 37D(1)(b)(ii) of the Pension Funds Act, the circumstances under which the remedy is available are limited, and none of those circumstances exist in this case.

[51] Aside from the prospect of recovery being remote or realistically unachievable, I understand the DoD's case to be that not only does the DoD's MD not confer a right to a technical allowance, it withdrew the right which the DoD Employees had enjoyed. It argues that unless the DoD's MD is set aside, which has not occurred, the payment of a technical allowance will not be a payment under the DoD's MD. This is an appealing argument. As I see it, the main order compels the DoD to implement the Policy by paying the technical allowance, however the DoD's MD does not cater for a technical allowance. A payment under the court order will not be a payment in terms of the DoD's MD.

[52] In addition to the default order compelling the DoD to pay a technical allowance to the DoD Employees, it compels the DoD to place the DoD Employees in MD posts. The DoD's case is that the DoD Employees do not qualify for MD posts. If the operation and execution of the default order is not suspended, the DoD will have to place the DoD's Employees in posts for which they do not qualify, or which may not exist. This will result in injustice.

[53] Invariably irreparable harm will result if the operation and execution of the default order is not stayed, and the DoD ultimately succeeds in rescinding the default order.

[54] I cannot ignore that the rescission application is aimed at remedying the breach of the default order. The law gives to a party a choice; it must comply with the court order or have it set aside. If the party fails to do one or the other, it is not insulated from proceedings to hold it in contempt of court, and if found to be in contempt sanctioned. Paragraphs 1 and 2 of the default order are *ad factum praestandum*. However, notwithstanding, having exercised a permissible choice, the DoD is not insulated unless the default order is suspended. Injustice will result if a person who has opted to set aside a court order must comply with it even though he wants to be released from the obligations imposed thereunder.

[55] On a conspectus of the facts, I am satisfied that injustice would result if the operation and execution of the default order was not suspended.

[56] As far as costs are concerned, I ordered that the costs of the application shall be costs in the cause. In my view, it is fair that the party who ultimately fails should bear the costs.

[57] In an effort to arrest delays in the finalisation of the rescission application, or avert lethargy in acting expeditiously, I invited the parties to address in writing why I should not make an order placing the DoD on terms to deliver a replying affidavit as one seems not to have been delivered and directing by when practice notes and heads of argument should be filed. There was no response from the DoD. The DoD Employees are seemingly resistant to such orders. They contend that (i) I cannot compel the DoD to deliver a replying affidavit because it may elect not to do so; (ii) the deadline

for the delivery of a replying affidavit has passed and the DoD will therefore have to apply for condonation; (iii) placing the DoD on terms to file a replying affidavit will create a new deadline and the DoD “cannot be assisted by a new deadline effectively being created”; (iv) the time for delivering a replying affidavit has passed and the respondent should “suffer the consequences if they want to reply”. They weakly suggest the DoD could possibly be ordered to deliver a replying affidavit within 3 days together with a condonation application and should they fail to do so timeously the applicant should file its heads of argument within 10 days and the respondent 10 days later. With the DoD Employees having taken the view that I cannot compel the DoD to deliver a replying affidavit and having in the written submissions reserved all their rights, accompanied by the disclaimer that “filing [these submissions] does not entail acquiescence. All rights are reserved by the Respondents”, I make no order as to the further exchange of papers.



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**S K HASSIM**

Judge of the High Court of South Africa  
Gauteng Division, Pretoria

Applicant's Counsel:      Adv NS Tshabalala  
Respondent's Counsel      Adv JGC Hamman

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 22 April 2025