



**HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case No.: 644/2024

In the application between:

VINK MULTI SERVICES (PTY) LTD

Applicant

and

FIRST RAND BANK LIMITED T/A WESBANK

First Respondent

SCHOEMANLAW INCORPORATED

Second Respondent

LIPCO BUSINESS (PTY) LTD t/a LAW FOR ALL

Third Respondent

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

Fourth Respondent

THE DEPARTMENT OF JUSTICE

Fifth Respondent

**THE DIRECTOR GENERAL
DEPARTMENT OF JUSTICE**

Sixth Respondent

AUTO AND GENERAL INSURANCE

Seventh Respondent

Date of Argument: 30 January 2025

Judgment delivered: 19 March 2025

JUDGMENT

MTHIMUNYE AJ:

Introduction:

[1] This is an application brought by the Applicant to rescind, set aside and declare certain judgments obtained by the First Respondent invalid. The First and Second Respondents opposed the application. The application is based on Rule 42 of Uniform Rules of Court, alternatively the common law. The specific relief is outlined in prayers 2, 2.1, 2.2 and 2.3 of the Applicant's notice of motion of:

"2. The following decisions are rescinded and set aside and declared invalid:

- 2.1 The decision of Justice Francis dated 14th February 2022 under case number 15990/21 granting the First Respondent an interim interdict authorizing the termination of the lease agreement between the Applicant and the First Respondent as well as ordering the Applicant to return the vehicles attached the lease agreement to the First Respondent.*
- 2.2 The decision of Justice Van Zyl AJ dated 19th April 2022 granting the First Respondent an order under case number 15990/2021 in the absence of the Applicant in terms of the set down under case Number 3383/2022.*

2.3 *The decision of this Honourable court under case number 1887/2023 date 1st June 2023 granting the First Respondent default judgment against the Applicant in its absent.”*

[2] *The Applicant further seeks in terms of the notice of motion the application in terms of which orders were obtained under case number 15990/2021 to be declared void ab initio.*

[3] *The Applicant also seeks in terms of prayers 3 and 4 of the notice of motion the return of the vehicles and damages suffered.*

Factual Background:

[2] It is prudent to mention at this stage that the Third to the Sixth respondents were not parties to either the main application or action that is now being sought to be rescinded or set aside by this court. Accordingly, no consideration will be given to them in this judgment. I will consider the Second Respondent's averments in respect of him being the erstwhile legal representative of the Applicant in case 15990/2021 and his response pertaining to the allegations made by Applicant against him.

[3] Urgency is also no longer a factor for this court to consider, as it had been dealt with prior to the matter being referred to me for hearing. I now turn to deal with each case respectively:

Case 15990/2021:

[4] It is important to note that in the main application 15990/2021 the First Respondent was cited as the Applicant and Vink Waste and Seawater Treatment Investors (Pty) LTD (“Vink Waste”), as the Respondent. Mr Kafula as the director of Vink Waste appeared on behalf of Vink Waste in his personal capacity after the Second Respondent withdrew as attorney from record. For the sake of clarity, in this application I will refer to the Applicant as Mr Kafula and the other parties as they were cited in the main applications.

- [5] The First Respondent entered into a vehicle rental agreement with Vink Waste. Vink Waste breached the terms of this agreement by failing to make payments timeously, which resulted in them falling into arrears. It is common cause that the First Respondent proceeded by instituting application proceedings under case number 15990/2021 seeking that a rule nisi be issued against Vink Waste. In terms of the rule nisi, Vink Waste were to appear and show cause, if any, on a date to be determined by the court why a final order should not be confirmed. In addition, the sheriff was to be directed to attach and seize the vehicles from Vink Waste and thereafter hand over the vehicles to the First Respondent for safekeeping., This action is to be initiated against Vink Waste within 60 (sixty) days of the interim order being granted.
- [6] The matter was defended. The Second Respondent filed a notice of intention to oppose dated 20 October 2021 on behalf of Vink Waste. Subsequently on 25 October 2021, an agreement was reached between parties that all services of notices, pleadings and documents were to be effected by email and filed with the registrar.
- [7] On 31 January 2022 matter was postponed to 31 January 2022 on the semi-urgent roll for hearing.
- [8] The Second Respondent , Schoemanlaw Inc, filed an answering affidavit on behalf of Vink Waste, to which the Third Respondent replied by filing a replying affidavit on 13 December 2021.
- [9] On 4 January 2022, Mr Kafula on behalf of Vink Waste filed a further affidavit, labelled as an *“Addition to Answering Affidavit”*. In this affidavit, he requested the court to take notice that he is appearing on behalf of Vink Waste and that service of all notices and documents were to be sent to 141 Castle Street, Cape Town. Notwithstanding the agreement pertaining to service that was filed with the Registrar of the Court on 25 October 2021. Despite the fact that the Second Respondent still on record on behalf of Vink Waste at that stage.

- [10] On 31 January 2022, both legal representatives on behalf of the First Respondent and Vink Waste were before court. The Second Respondent withdrew as attorney of record due to conflict of instructions between him and Mr Kafula. Matter was subsequently postponed to 14 February 2022, at 11h30 on the semi-urgent roll for hearing. Vink Waste was ordered to pay the Third Respondent's cost occasioned by the postponement.
- [11] On 14 February 2022, Mr Kafula appeared in his personal capacity informing the court that he will making submissions on behalf of Vink Waste. Consequently, a rule nisi was issued after the court had heard submissions from the Third Respondent's legal representative and Mr Kafula on behalf of Vink Waste. The rule nisi was extended to 29 March 2022, calling upon Vink Waste or any interested party to give reasons why a final order should not be granted.
- [12] On 29 March 2022, Vink Waste and Mr Kafula were absent, consequently the rule nisi granted on 14 February 2022 was extended to 19 April 2022, to provide the Third Respondent with an opportunity to institute action against Vink Waste. No order as to costs were made.
- [13] The relevant action was instituted on 6 April 2022, by the First Respondent under case number 3383/2022, wherein the Third Respondent sought payment in the sum of R250 625.82 plus interest on the aforesaid amount at prime rate of 7.75% calculated from 10 January 2020, to date of final payment in lieu of damages suffered, being the arrear and future rentals in terms of the vehicle rental agreement.
- [14] On 8 April 2022, the legal representative of First Respondent served the order granted on 29 March 2022 via email on Mr Kafula, subsequently informing him of the return date of 19 April 2022. A compliance affidavit on behalf of the First Respondent was filed by Emma Van Der Merwe a candidate legal practitioner, confirming that the order dated 29 March 2022 was served on

Vink Waste as well as Mr Kafula, and that the relevant action as per order has been instituted.

- [15] Consequently, the cancellation of the vehicle rental agreement between the First Respondent and Vink Waste was declared valid by this court on 19 April 2022.

Case 1887/2023:

- [16] The First Respondent issued summons in this action. Summons was served on the First to Fifth Defendants on 15 February 2023, at their chosen domicilium citandi et executandi and registered addresses.
- [17] The notice of opposition under case number 1887/2023 was signed by Mr Kafula, and no notice of opposition was filed by the other defendants, neither was any reference made of them by Mr Kafula in his notice of opposition. On 27 March 2023, Mr Kafula filed his plea. Subsequently the parties agreed that service of all proceedings, notices and all documentation to be by way of email. Mr Kafula filed an amended plea on 19 May 2023.
- [18] On 1 June 2023, all the Defendants were in default. The court subsequently, only granted judgment against the First to the Fourth Defendant, and not Mr Vink who was the Fifth Defendant as he had filed a notice of opposition and a plea. It is common cause that the matter against Mr Kafula, the Fifth Defendant is currently scheduled for trial.

Issues to be determined:

- [19] The court is required to determine the following issues:
- (a) Whether the Applicant has shown a bona fide defence which exhibit reasonable prospects of success in the matter or good cause, whereby a valid reason for the setting aside of the judgments exist.

- (b) Whether the Applicant has provided any grounds upon which it can be said that the judgments had been granted erroneously.
- (c) Whether the Applicant has provided a reasonable explanation for launching the application two years after the judgments/order were granted in respect of matter 15990/2021 and 1 year in respect of matter 1887/2023.

Applicant's Submissions:

Case 15990/2021

- [20] Mr Kafula in his founding affidavit avers that on 5 January 2022, he served a notice on the attorneys of the Respondents, Annika Whelan Attorneys, informing them of the address where all correspondence and notices were to be sent.
- [21] An interim interdict was granted against the First Respondent on 14 February 2022. He submits that the documents relating to case number 15990/2021 were withheld from him by Second Respondent, his erstwhile attorney who acted in collusion with the Third Respondent. He further avers that this resulted in him being unable to access critical information necessary in presenting Vink Waste's case.
- [22] He confirms that he complied with the interim court order dated 14 February 2022 by returning the vehicles to the First Respondent.
- [23] Mr Kafula further avers that subsequently, he received a notice of set down for 19 April 2022, which was purportedly for the matter under case number 15990/2021, which in fact it was not. He avers that it was instead a new action that the First Respondent launched on 6 April 2022, under case number 3383/2022, which was never served on him. According to Mr Kafula the launching of this action was done fraudulently by the First Respondent,

resulting in him being unable to locate the court file on case 15990/2021 and determining who the judge was presiding over the matter.

[24] He confirms that he was present at court on 19 April 2022, when the rule nisi was confirmed and the final order for the return of the vehicles was granted. His explanation as to why he was unable to attend the court proceedings was due to the fact that the matter was not posted on the notice board and the Registrar of the Court being unable to provide him with the information regarding the court in which he was scheduled to appear on case 3383/22. Consequently, the rule nisi granted on case number 15990/2021, on 14 February 2022, was made final. He avers that his constitutional right in terms of section 34 had been violated as he had not been afforded an opportunity to place his dispute in a public hearing before court. Furthermore, that this serves as sufficient justification for the court to rescind and set aside the interim court order dated 14 February 2022 as well as the final order dated 19 April 2022.

[25] During his submissions and in his founding papers Mr Kafula contradicted himself by asserting that he never received any notices from the First Respondent, resulting in him being unaware of the date the matter was on the roll. Accordingly, he had no knowledge that a default judgment had been granted against him. He submitted that he only became aware that the default judgment had been granted against him in case number 15990/2021 when he approached the Registrar of the Court on 12 June 2022 to request assistance in locating the case file.

Case 1887/2023

[26] Mr Kafula in his founding affidavit and during argument avers that on or about February 2023, the First Respondent instituted action proceedings against him under case number 1887/2023. He maintains that this matter is identical to the one that was brought under case number 15990/2021. He avers that notwithstanding him acting in person, filing a notice of intention to defend and his plea, an order was still granted against him in default.

- [27] Mr Kafula attempted to set out what the rationale for his application was in his papers by quoting Rule 42 and citing various cases dealing with whether it is a procedural irregularity to grant an order where a party has not been afforded an opportunity to participate in the court proceedings. In further elaboration during his submissions he referred to the case of ***Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others*** (CCT 52/21) [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (29 June 2021) , and submitted that in terms of the common law he only has to prove that he has established a reasonable and satisfactory explanation for his failure to oppose the proceedings and that he has a bona fide case that carries some prospects of success.
- [28] Mr Kafula further also avers in his papers that the First Respondent was not authorised to terminate the vehicle rental agreement without his permission. He refused to pay an imaginary amount to the First Respondent for the rental of the vehicles as there was no adequate justification, which he believed constituted a breach of his rights. Furthermore, he avers that the decision by Francis J, to enforce the payment provision of the vehicle rental agreement was inconsistent with the established principles of the law of contract in South Africa.
- [29] To substantiate this contention during his submissions, Mr Kafula referred the court to the case of ***Barkhuizen v Napier*** (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007) and avers that based on the principles stated in this case the order dated 19 April 2024, under case number 15990/2021 and the order dated 1 June 2023, under case number 1887/2023, should be rescinded as it raises constitutional issues and arguable points to the general public. In addition, the Applicant also requests that this court impose a punitive cost order against the First Respondent in the event that his application should be successful.

[30] The Applicant argued that his failure to appear in court was attributable to his legal representative not supplying him with the case file, which hindered his ability to appoint a new legal representative. He submitted that the First Respondent failed to apply for condonation for the late filing of their answering affidavit, and therefore, the court should not consider the First Respondent's answering affidavit.

[31] Applicant also seeks a punitive cost order against the Fourth to the Sixth Respondents, as he avers that they share responsibility for the irregular court process due to their failure to implement significant measures to build an incorruptible system, which would be to his disposal.

First Respondent's Submissions:

[32] In response to the Applicant's averments, Ms Sithabile Mpanza ("Ms Mpanza") deposed to an affidavit on behalf of the First Respondent. Ms Mpanza, confirms that she is employed by the First Respondent as a Commercial Credit Recoveries Manager. The following is a concise summary of the averments in her affidavit:

[33] She is duly authorised to depose to this affidavit, which contain facts within her own personal knowledge. She avers that the First Respondent is of the view that Mr Kafula failed to make out a case for the relief sought. In addition, Mr Kafula's grounds for urgency is non-existent, having regard to the fact that the rule nisi was obtained and fully opposed as far back as 14 February 2022. Furthermore that the rule nisi was confirmed on 19 April 2022, almost two years ago.

[34] She further avers that the Mr Kafula failed to seek leave to appeal, as all the issues he has raised in his papers have been present during the proceedings. Mr Kafula filed an opposing affidavit together with a supplementary affidavit in opposition of the First Respondent's application. Accordingly, she avers that the Mr Kafula fails to disclose any grounds for the rescission of the judgments or orders that were obtained by the First Respondent.

- [35] Ms Mpanza further avers that the Mr Kafula fails in all respects to indicate that the judgments granted were erroneously sought or obtained. The First Respondent during oral submissions submitted that Mr Kafula failed to show good cause in his founding papers which supports the rescission of the orders or judgments. Furthermore, that there is no bona fide defence to the First Respondent's claim in the main application and neither was Mr Kafula in wilful default.
- [36] Ms Mpanza further avers, that under the common law, Mr Kafula failed to demonstrate sufficient cause nor presented a reasonable and acceptable explanation for his default. Additionally, it was argued that on the merits, there exists no bona fide defence which prima facie, carries some prospect of success.
- [37] Ms Mpanza further avers and the Third Respondent during his submissions that in matter 15590/2021, the Court decided upon the issues of the vehicle rental agreement in the initial application, in Mr Kafula's presence. Consequently, the Court had full knowledge of the averments made in that application and as such the order was not obtained erroneously. In addition, she avers that the Mr Kafula is not disclosing any facts that are different from those already determined by the Court in the main application, which is necessary for this Court to decide whether the judgement should be set aside.
- [38] Ms Mpanza further avers in the founding papers that under case 1887/2023, Mr Kafula, as sole director, was fully aware of the proceedings, having served the First Respondent with a notice of intention to defend and a plea. Furthermore, Mr Kafula was present in Court at the time, having filed the notice to oppose and answering and supplementary affidavit to the First Respondent's application for the return of the vehicles. Therefore, Mr Kafula's contention that the order was granted in his absence is unsubstantiated.
- [39] Ms Mpanza further avers that Mr Kafula was present at the time when the matter was postponed per court order to a date as agreed upon by the

parties. A copy of the order was handed to the Mr Kafula on the same date. She is adamant that Mr Kafula, consequently, had full knowledge of when he had to return to Court.

[40] Ms Mpanza avers that Mr Kafula failed to disclose any grounds for a decision of the orders or judgment granted by this Court, nor does the Applicant advance any defence, save for the legal argument, which she contends fails to take this matter any further. She seeks this court to dismiss the Mr Kafula's application with costs.

[41] Counsel on behalf of the First Respondent submitted that during the proceedings of this matter, case 644/2024 Mr Kafula was afforded an opportunity by the court to amend his notice of motion. They then subsequently filed their answering affidavit, therefore they do not need to apply for condonation of the late filing of their answering affidavit as Mr Kafula filed a new notice of motion to which they replied.

Second Respondent's Submissions:

[42] The Second Respondent avers due to Mr Kafula's founding affidavit and notice of motion being inconsistent and contradictory. He disputes that he was acting in collusion with the First Respondent on case 15990/2021 or that he withheld the case file from the Mr Kafula. He avers that he withdrew from the case as there was a conflict of instructions between him and Mr Kafula, evidenced by Mr Kafula filing an additional answering affidavit after he had already filed an answering affidavit. Furthermore that the present application by Mr Kafula bears no relevance to him.

Applicable Legal Principles:

[43] Rescission in terms of Rule 42 of the Uniform Rules of Court provides that:

“Variation and rescission orders

- (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 affected party affected thereby;*
 - (b) *an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
 - (c) *...*

[44] In instances where Applicants also rely on the common law alternative to Rule 42, they are required to show that there is sufficient or good cause warranting the judgment or order to be rescinded. In ***Government of the Republic of Zimbabwe v Fick*** 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) at **para 85**, the Constitutional affirmed the common law requirements and stated as follows:

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

[45] This extract clearly indicates that in order for an Applicant to rely on the common law, he will have to satisfy both requirements as set out in ***Fick***. In other words, the Applicant must establish that he had a reasonable and satisfactory explanation for his failure to oppose the default judgment proceedings and that he has a bona fide defence with reasonable likelihood of success on the merits.

Analysis:

- [46] In their heads of arguments, the First Respondent contends that it appears from the Applicant's notice of motion that the relief he is seeking is that of a review of the proceedings rather than an application for a rescission of judgment. I am inclined to agree with the First Respondent. This is evidenced from the Applicant's founding affidavit at paragraph 17 where he states; "*The main purpose of the application is to obtain a rescission order of the previous decisions of this Honourable Court against the Applicant. The following decisions below are to be reviewed and set aside and declared invalid ...*"
- [47] The Applicant goes further to contradict himself at paragraph 18 of his founding affidavit by stating; "*The First Respondent's application under case number 15990/21 is void ab initio 13 January 2021 to service notices and proceeding on the address provided by the Applicant on 5 January 2022.*"
- [48] Given the inconsistencies present in paragraphs 17 and 18 of the Applicant's founding affidavit, the specific relief sought by Mr. Kafula remains unclear. In his notice of motion, the request for this court to rescind, set aside, and declare the decisions of the court a quo invalid is at odds with his founding affidavit, where he seeks a review of the merits in case 15990/2021.
- [49] I am of the view that the Mr Kafula ought to have followed the procedure provided for in Rule 49 of the Uniform Rules of Court. This rule allows the court to reconsider the merits of the matter and to decide whether or not to uphold the decision that was previously made.
- [50] Mr Kafula's application for rescission regarding these matters extended over 435 pages inclusive of his notice of motion. During the review of these papers, the terms and the purpose of the sought order were not clearly defined. He failed to articulate clearly what the grounds for the rescission of these two orders/judgments that were granted are. I am inclined to agree with the argument presented by the First Respondent that Mr Kafula's application is unclear as to whether the application is premised upon the common law or Rule 42 of the Uniform Rules of Court.

Whether the Applicant has provided any grounds upon which it can be said that the judgments had been granted erroneously.

Case 15990/2021

[51] Upon a proper analysis of the papers, it is noted that on page 550 of the transcribed record of proceedings dated 31 January 2022 annexed to the founding papers, the Applicant appeared personally in court for case number 15990/2021, before Francis J. The matter was subsequently postponed to 14 February 2022. This is confirmed by both the Applicant and the First Respondent in their affidavits.

[52] It is not in dispute that on 14 February 2022, the accused appeared before Francis J, as noted on page 556 of the transcribed record. The record further shows that when questioned by the court about the agreement between him and the First Respondent, he acknowledged that there was an agreement in place that had been cancelled. The court then granted him leave to file his supplementary affidavit to elaborate his defences, and consequently on the 14 February 2022 the interim order was granted in Mr Kafula's presence.

[53] The matter was consequently postponed with the applicant being aware that he had to appear in court on 29 March 2022. He does not dispute that he failed to appear on 29 March 2022 and that the return date was extended to 19 April 2022. Mr Kafula does not dispute that he was served with the notice of set down of 19 April 2022 together with the court order dated 29 March 2022. By the Applicant's own averments he was at court on both 29 March 2022, and 19 April 2022, the day the interim order was made final, but was looking for his case file.

[54] The argument by Mr Kafula that the new action launched by the First Respondent on 6 April 2022, under case number 3383/2022, was done fraudulently, resulting in him being unable to locate the court file on case 15990/2021 is unsubstantiated. The matter in case 15990/2021 was an

application for the cancellation of the vehicle rental agreement, whereas the matter under case number 3383/2022 is a total different action that was instituted against Mr Kafula and had no bearing on the return date of the rule nisi that was granted on 14 February 2022.

Case 1887/2023

[55] In this action there were five Defendants, the Mr Kafula being the Fifth Defendant. The notice of intention to defend was signed by Mr Kafula in his personal capacity, without any mention of the other Defendants. Pleadings in this action were also filed by the Mr Kafula, which is a clear indication that he had full knowledge of the action and that he was the only person that defended the action. Consequently, judgement was not rendered against him in his personal capacity, but rather against the Company, Vink Multi Services (Pty) Ltd, and the other defendants.

Whether the Applicant has shown a bona fide defence which exhibit reasonable prospects of success in the matter or good cause whereby a valid reason for the setting aside of the judgments exist.

[56] The references made by Mr. Kafula to numerous case law do not elevate his founding affidavit to a proper pleading that would justify the relief sought. He merely reiterates what has already been decided upon, in over 88 pages of his founding papers. Furthermore he does not set out any comprehensible grounds for the rescission or variation of the judgment/order under the common law or Uniform Rule 42. I am of the view that the Mr Kafula has not demonstrated a genuine defence that presents reasonable prospects of success in this case, nor has good cause been shown for a valid reason to set aside the order or judgment/s in case 15990/2021 or 1887/2023.

Whether the Applicant has provided a plausible explanation for launching the application 2 years after the judgment was granted in respect of matter 15990/2021 and 1 year in respect of matter 1887/2023.

[57] Mr Kafula failed to provide adequate and succinct reasons for the delay in bringing his application to have the judgment/s or order rescinded. Furthermore, Mr Kafula did not submit an application to this court to condone the late filing of the application on his part. Counsel for the First Respondent correctly referred to Constitutional Court case of ***Ethekwini Municipality v Ingonyama Trust* 2014 (3) SA 240 (CC)**, where it was held that where the delay was lengthy, the explanation given must not only be satisfactory, but must also cover the entire period of the delay. The only clear reason that Mr Kafula provide for the delay is due to him looking for the case file after his attorney withdrew from record and that he had to attend another matter in the Magistrate's court apparently dealing with the same issue. That contention holds no water as he failed to explain what steps he took from the time he became aware of the order or judgment/s that were granted in case 15990/2021 and 1887/2023 up to when he launched the application in court. No further explanation setting out the delay succinctly since he became aware of the judgement or orders. I am therefore of the view that the application has not been brought within a reasonable timeframe and falls to be dismissed on that ground alone.

Whether Mr Kafula can raise the argument of the right to a fair hearing in terms of section 34 of the Constitution.

[58] Mr Kafula, although no judgment was granted against him in case 1887/2023, and although being aware of the court date in case 15990/2021, but failed to appear in court, is now raising a section 34 of the Constitution defence in an application for rescission, variation, and setting aside. He is fundamentally contending that his entitlement to a fair hearing and access to justice has been infringed upon.

[59] Section 34 of the Constitution guarantees that every individual has the right to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a court. It is apparent from the papers of Mr Kafula and the First Respondent, that Mr Kafula was fully aware of the date that he had to appear in court in case 15990/21. By Mr Kafula's own

admission in his founding affidavit he was at court but at the Registrar of the Court not looking for case 15990/2021 but looking for a case file of a new action under case number 3387/2022. More importantly on 14 February 2022 he was present in court when the rule nisi was granted in case 15990/2021 and was informed by the court of the return date set for 29 March 2022.

[60] He failed to appear on 29 March 2022, resulting in the court granting an order for the matter to be postponed to 19 April 2022. Furthermore, he does not dispute receiving the email with the order of 29 March 2022, informing him of the extension date of the rule nisi and that he had to appear in court. It is clear that he knew that he had to be at court on 19 April 2022. This is evident from the admission in his founding affidavit that he was at court on the same date. In my view the failure of Mr Kafula to appear, despite being aware of the court date, can only be seen as failure by him to participate in the fair hearing, potentially violating the constitutional right in terms of section by his own conduct.

[61] It is important to note that no judgment or order in case 1887/2023 was not granted against Mr Kafula. The ruling pertained solely to the other Defendants. The matter against him is still on the roll for trial. Mr Kafula can therefore not rely on the section 34 constitutional defence, as he will be given a fair hearing with regard to his matter on a date in due course.

[62] In my view for the reasons set out above the Applicant has failed to show that the order or judgment/s granted was erroneously sought or obtained, or that it was invalidly or unconstitutionally granted. It follows that the Applicant's application is flawed due to unsubstantiated contentions and falls to be dismissed with costs.

[63] In the result I make the following order:

1. The application to rescind and set aside or declare invalid the judgments/order under case number 15990/2021 and case number 1887/2023 is dismissed with costs on an attorney and client scale B.

MTHIMUNYE AJ
JUDGE OF HIGH COURT

APPEARANCE:

Attorney for the Applicants: Mr Kafula (In person) Vincent.kafula@gmail.com

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