



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

CASE NO: 17185/2017

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |

09 June 2025

Date

K. La M Manamela

In the matter between:

ANTHONY WILTON THINANE INCORPORATED

Applicant

and

MALASELA HEZEKIEL RALEBIPI

Respondent

In Re:

MALASELA HEZEKIEL RALEBIPI

Plaintiff

and

ANTHONY WILTON THINANE INCORPORATED

Defendant

DATE OF JUDGMENT: This judgment is issued by the Judges whose names are reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge's secretary. The date of the judgment is deemed to be 09 June 2025.

JUDGMENT

Khashane Manamela, AJ

Introduction

[1] This is an application for the rescission of judgment or order of this Court of 04 October 2023 ('the October Order') made or granted against the applicant, Anthony Wilton Thinane Incorporated ('AWT'), a law firm, in favour of its erstwhile client, Mr Malasela Hezekiel Ralebipi ('MHR'), the respondent. The October Order was granted by Fisher J in an interlocutory application brought by MHR to compel delivery of medical report(s) relating to the damages claim or action instituted by MHR against AWT, as his former attorneys. AWT, also, seeks orders for the reinstatement of its defence in the action and condonation for its material late compliance with Uniform Rule 36(9)(b), as well as for the late bringing of this rescission application. This application is opposed by MHR.

[2] MHR was injured in a motor vehicle accident on 24 October 2008 and, subsequently, sought legal assistance from AWT to pursue a damages claim against the Road Accident Fund ('the RAF'). He accused AWT of failure to timeously lodge a claim against the RAF in terms of the provisions of the Road Accident Fund Act 56 of 1996 ('the RAF Act'). The action is defended by AWT.

[3] The rescission application came before me on 11 February 2025, when Mr E Coleman appeared for AWT, whilst Mr J L Khan appeared for MHR. This judgment was reserved after listening to oral submissions by counsel.

Brief background

[4] This being a rescission application, ordinarily the issues to be determined should be crisp or straightforward. But, as it would be clear below, they are not. I, therefore, consider it necessary to provide a brief narration of the facts in the background hoping to place the issues in their proper context. I will endeavour to do so using the issues I consider to be common cause between the parties or indicate the contrasting view, where necessary.

[5] On 18 May 2017, MHR (as the plaintiff in the action) caused summons to be issued against AWT (as the defendant in the action). MHR, as already indicated, was injured in a motor vehicle accident on 24 October 2008 and, subsequently, retained AWT as his attorneys to pursue a claim against the RAF. It appears that MHR's claim against the RAF was successfully met with a special plea of prescription by the RAF and, thus, nullified. MHR, in turn, seeks compensation from AWT in the amount of almost R8 million, as damages for his personal injuries. AWT, as indicated, is defending the action, but the parties have already amicably settled issues relating to liability on a 70/30% split in favour of MHR.

[6] A lot of ground has been covered in the litigation between the parties. For current purposes it may be proper to commence with the circumstances which led to the granting of the order just prior to the October Order. In notices served in terms of Rule 36(1)-(2) dated 24 October 2022, AWT required MHR to attend medical examination by Dr Masilela, an occupational therapist, and Dr Ragkokong (probably Rakgokong), an industrial psychologist, on 26 October 2022. MHR duly complied and, accordingly, was examined. Subsequently, in a notice in terms of Rule 36(8), dated 11 November 2022, MHR called for the delivery of the medical reports by these medical practitioners.

[7] When the reports, despite reminders, were still not delivered, MHR launched an application to compel their delivery in January 2023. The application was set down for hearing on 27 February 2023, but it became opposed by AWT and was removed from the unopposed roll, with costs reserved. It was subsequently set down for hearing on 12 July 2023. On the day of the hearing, Mr Thinane, a director of AWT, agreed to the order being granted by Raulinga J, despite AWT's opposition ('the July Order').

[8] The terms of the July Order included direction for AWT to deliver the reports of the material expert witnesses within one month. The order specified that should AWT fail to

comply, its plea would be struck out and MHR would have leave to obtain default judgment against AWT. The consequences for compliance with the order by AWT would have facilitated the finalisation of the joint minutes of expert witnesses retained by the parties. AWT was also ordered to pay costs of the application on attorney and client scale.

[9] The July Order, as stated above, required delivery of the expert reports within a period of a month, which would have been by 12 August 2023.

[10] On 8 August 2023, AWT served notice(s) in terms of Rule 36(1)-(2) on the attorneys on board for MHR requiring that MHR attend and submit himself to further medical examination by an orthotist (i.e. Ruan du Preez) and prosthetist (i.e. Troy Kircher) on 17 August 2023. AWT or its counsel referred to the latter notice as being in respect of a ‘new’ orthotist and prosthetist, whereas MHR considers the notice to form part of the July Order. I will deal with the implications of these views, below.

[11] On 14 August 2023, MHR reacted to the notices(s) above and expressed an intention to agree to or waive his rights with regard to the short notice on condition that AWT will provide the report(s) of the orthotist and prosthetist by 31 August 2023. Ms Montanna des Neeves (‘Ms Montanna’), previously an attorney at AWT, responded on 15 August 2023 and stated the following:

We acknowledge receipt of your e-mail below dated the 14th instant, the contents of which have been noted and for which we thank you.
We will advise our expert accordingly.
We trust you will find the above to be in order.¹

[12] MHR attended the medical assessment by the orthotist and prosthetist. But, the relevant medical report(s) was/were not filed by 31 August 2023, despite a reminder made on behalf of MHR on the same date. The application to compel, eventually ensued and was served on AWT

¹ Answering Affidavit (‘AA’) pars 15.8 at CaseLines (‘CL’) 020-64; annexure ‘FGR5’, CL 020-123.

on 13 September 2023. It, primarily, sought to compel delivery of the reports of Du Preez and Kircher, which AWT undertook to file by 31 August 2023 in terms of the agreement reached between the parties. AWT did not oppose the latter application and it was granted by Fisher J on 4 October 2023 (i.e. ‘the October Order’) compelling AWT to file a notice in terms of Rule 36(9)(b) of the Uniform Rules of the Court in the following terms:

1. That the Respondent is Ordered to comply with Rule 36 (9) (b), to deliver its Expert Witness Summary of **RUAN DU PREEZ AND TROY KIRCHER - (ORTHOTIST AND PROSTHETIST)**, as agreed between the Parties, within 5 – (Five) days from the date of this Order being granted;
2. That in the event that the Respondent fails, neglects and/or refuses to comply with **Prayer 1** *supra*, the Court, in this appropriate circumstance, infers the Respondent’s wilful refusal to engage with the Applicant in this regard, and in respect of such wilful refusal, the Respondent’s Plea is hereby Struck - Out and the Applicant is hereby granted Leave to apply for a Trial Date, on the same papers, duly supplemented and for Judgment to be granted pursuant to the Applicant’s Combined Summons and Particulars of Claim;
3. In the event that the Respondent duly complies with **Prayer 1** *supra*, the Respondent is Ordered to instruct his Expert Witness to attend to drafting, finalizing, signature and delivery of a Joint Minute with the Expert Witness of Ruwan Kleinsmit – (Orthotist and Prosthetist) appointed by the Applicant, within 5 – (Five) days from the date of this Order being granted;
4. ...
5. That the Respondent pay the Costs of this Application.’²

[13] On 5 April 2024, the current application for rescission of the October Order was served by AWT on MHR. The application, as admitted by AWT, was brought late, hence the prayer for condonation. Also, it is vigorously opposed by MHR. I start with the issue of condonation for the late institution of the rescission application.

Condonation for the late institution of the application

[14] AWT, also, seeks condonation for the late bringing of the application for the rescission of the October Order under Uniform Rule 42(1)(a).³ The rule does not prescribe a timeframe within which applications are to be initiated. But it is trite that where a litigant seeks rescission

² Court order granted on 4 October 2023, *per* Fisher J, CaseLines (‘CL’) 020-23 to 020-26.

³ Par [30] below for a reading of Rule 42(1)(a).

it ought to do so within a reasonable time of becoming aware of the impugned order or judgment.⁴ As to what constitutes a reasonable time depends on the facts of a particular matter.⁵

[15] The October Order was granted on 4 October 2023. This application for its rescission was launched around 5 April 2024. AWT says it became aware of the existence of the October Order in January 2024, after a frustrating use of a wrong e-mail address by a medical doctor and the intransigence of counsel's email outbox. According to AWT, the application ought to have been brought by 5 March 2024. This, as with most of the explanation given, is disputed by MHR, also armed with an affidavit by Ms Montanna, previously with AWT, and, even, on the very words used or narration given by Mr Anthony Wilton, the deponent of AWT's affidavits. MHR says AWT knew about need to bring the rescission application as far back as the second week of October 2023, when it was made aware of the impugned order.

[16] Condonation, including in terms of Uniform Rule 27 of this Court, requires that a seeker thereof must show 'good cause' for the non-compliance with the rules to be condoned.⁶ There is no universal or exhaustive definition by the courts as to what constitutes 'good cause'.⁷ Although the doctrine is located in the discretionary realm of the Court, it comprises two principal requirements: (a) a satisfactorily explanation under oath for the delay by the applicant, and (b) existence of a *bona fide* defence or satisfactory proposition that the applicant's defence or quest for the material relief is clearly not ill-founded or patently unfounded.⁸ An additional

⁴ *First National Bank of Southern Africa Ltd v Van Rensburg NO: In re First National Bank of Southern Africa Ltd v Jurgens and Others* 1994 (1) SA 677 (T) at 681B–G; *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306H; *Ledwaba N.O v Mthembu and Others* (25312/2016) [2021] ZAGPJHC 641 (30 August 2021) [22].

⁵ *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 (C) at 421G.

⁶ DE van Loggerenberg, *Erasmus: Superior Court Practice* (Service 23, Jutastat e-publications December 2024) ('*Erasmus: Superior Court Practice*') RS 25, 2024, D1 Rule 42-11 and, further, RS 25, 2024, D1 Rule 27-1-RS 25, 2024, D1 Rule 27-9.

⁷ *Erasmus: Superior Court Practice* RS 25, 2024, D1 Rule 27-3.

⁸ *Erasmus: Superior Court Practice* RS 25, 2024, D1 Rule 27-4 to D1 Rule 27-5 and the authorities relied upon there.

requirement is laid down in some of the authorities to the effect that the indulgence sought and granted should not lead to prejudice on the part of the opposing party incapable of amelioration by a costs order and/or postponement.⁹ Further, clarity has been provided by, among others, the decision of the Supreme Court of Appeal ('the SCA') in *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi* ('*Mulaudzi*')¹⁰ wherein it was held that factors usually weighing with the Court when considering condonation of applications, include 'the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice'.¹¹ The SCA in *Mulaudzi* pointed out that in condonation applications the issue of prospects of success, generally, is an important, but not decisive consideration amongst the factors relevant for the exercise of the discretion of the Court.¹²

[17] The explanation for the delay proffered by AWT is criticised in very minute and specific details by MHR. It appears rattled to the core by the exposition of what is considered by MHR inconsistencies and/or improbabilities. And the affidavit acquired from Ms Montanna almost sinks the foundation upon which the explanation for the delay is premised, that Ms Montanna: (a) exclusively handled the matter without reasonably sharing on developments with her colleagues, including Mr Wilton; (b) left abruptly on maternity leave without the necessary handing over on the matter, and, (c) thus, she is solely or substantially responsible for the material turn of events. I will return to this issue in a moment.

⁹ *Erasmus: Superior Court Practice* RS 25, 2024, D1 Rule 27-5 and the cited authorities.

¹⁰ *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi* (98/2016, 210/2015) [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA) (6 June 2017).

¹¹ *Mulaudzi* [26].

¹² *Mulaudzi* [34].

[18] On the issue of existence of *bona fide* defence – mindful of the fact that one need only take a peek of same for current purposes – I am reasonably satisfied that the application has prospects of success. Prominent in my mind – with respect – is the approach adopted by the Court in the October Order of directing on what is to happen if there is non-compliance simultaneously and prospectively when making the order to be complied with. It is this part of the determination which urged me towards a finding of some level of satisfaction in AWT’s explanation for the delay.¹³ Also, the granting or refusal of condonation sought in this matter ought to be balanced against the prejudicial effect thereof on both parties. Therefore, I consider it justified that condonation be granted for the late bringing of this application. The interests of justice – borne by the facts of this matter – so dictate.

Applicant’s (i.e. AWT’s) case (including submissions)

[19] It is AWT’s case (and, consequently, the submissions on AWT’s behalf by Mr Coleman are) that the October Order was erroneously sought by MHR and so granted by the Court for various reasons, including those appearing next:

[19.1] Primarily, it is contended that the Court ought not to have allowed the provisions of Rule 30A to be applied to Rule 36(9)¹⁴ in the granting of the October Order. MHR compelled the filing of a notice in terms of Rule 36(9)(b), when it was not due, as it was not preceded by notice in terms of Rule 36(9)(a) by AWT signalling its intention to call the material expert, as a witness. AWT did not file a notice in terms of Rule 36(9)(a) for the orthotist and prosthetist and, thus, the only logical conclusion is that a notice in terms of Rule 36(9)(b) was not due to be filed. Besides, MHR cannot dictate to AWT what expert reports to file, as a party who fails to do this, *ipso facto*, is precluded from calling the witnesses.

¹³ *United Plant Hire* at 720E-G.

¹⁴ Pars [28] and [29.2] below, for a reading of the provisions of Rule 30A and Rule 36(9), respectively.

[19.2] Also, the provisions of Rule 30A are not available for applications to compel compliance under Rule 36(9) and/or to strike out a litigant's defence, as Rule 36(9) has its own internal remedy for non-compliance with its provisions. The internal remedy or mechanism wasn't deployed by MHR in this matter.

[19.3] Further, AWT says that the Court ought not to have included as a term of the October Order the striking out of AWT's plea or defence for not filing a notice in terms of Rule 36(9)(b). The application to compel did not set out facts justifying 'the double barrel' approach adopted in granting an order to compel and strike out AWT's defence the argument continues. For, an order made this way, does not allow a party in the position of AWT to place its version before the Court by way of an explanation or reasons for non-compliance and, thus, is in conflict with the *audi alteram partem* ('hear the other side') rule. Given the latter opportunity, AWT would have informed the Court that the material report was only received from the expert witness in January 2024, hence the non-compliance with the October Order. Besides, nothing in the application to compel justified the granting of the drastic remedy of striking-out a defence. It also ought to be borne in mind that the July Order is distinct from the October Order, as the medical report implicated in the latter order was not the subject of the July Order.

[20] Therefore, for these reasons, the October Order was erroneously sought by MHR and erroneously granted by the Court. No opposition should have been mounted against this rescission application or MHR should have abandoned the October Order, to avoid being mulcted with costs thereof, AWT's case and submissions conclude.

Respondent's case (i.e. MHR's) (including submissions)

[21] The rescission application is opposed on several fronts. These and the submissions made by Mr Khan, on behalf of MHR, are dealt with under this part. Overall, the rescission

application and its factors are labelled by MHR as one of AWT's delaying tactic advanced without any consideration to the costs of the litigation and the unbearable plight visited upon MHR by the delays in the finalisation of the damages claim against AWT.

[22] It is argued that AWT attempts to muddy the waters in respect of October Order. The premise of the application leading to this order is borne by what clearly appears in the notice of motion, namely, the 'agreement between the parties'. The agreement was reached by the parties through their representatives' correspondences on 14 and 15 August 2023, as set out above.¹⁵

[23] Further, it is disingenuous for AWT to claim compliance with the October Order when it failed to file the reports of Drs Harper, Masilela and Ragkokong, but instead elected to instruct a new orthotist and prosthetist in the form of Drs Du Preez and Kircher. Also, AWT served the reports of the industrial psychologist and occupational therapist on 11 August 2023, as well as the report of the actuary on 6 September 2023. It is stated that the July Order was also aimed at the production of these reports. AWT has not furnished an explanation for non-delivery of the former batch of reports. This approach confirms wilful default or refusal on the part of AWT to engage with MHR in this respect in contradiction of the Judge President's Revised Directive. AWT had all reasonable opportunity to comply with its own undertaking.

[24] Also, that Rule 42(1)(a) is applicable where an applicant for rescission of an impugned order or judgment was absent from court. AWT was not absent from the Court, but only chose not to oppose the application. It now seeks to pass the blame for not opposing the application on 4 October 2023 and not timeously filing the report of its orthotist and prosthetist.

¹⁵ Par [11] above.

[25] As for a notice under Rule 36(9)(a) having to precede one under Rule 36(9)(b), it is pointed out that AWT, eventually, did file the report in terms of Rule 36(9)(b) on 23 January 2024 without, first, serving Rule 36(9)(a). AWT, as confirmed by this type of conduct, has no regard to the rules of this Court, unless it is convenient or advantageous to AWT.

[26] MHR rejects – as incorrect - the approach by AWT of treating the October Order as separate from the July Order. The former ought to be viewed in light of the latter calling on AWT to file all its experts reports, which it agreed to do. The rescission ought to be dismissed for want of merit with costs *de bonis propriis* ('from personal funds').

Applicable legal principles

[27] The legal principles mostly implicated in this matter relate to: (i) the rescission of orders or judgments in terms of Rule 42(1)(a); (ii) medical examinations and material reports under Rule 36(8) and Rule 36(9), and (iii) the enforcement of compliance with these rules, possibly, in terms of Rule 30A. Some of these rules (or the legal principles arising therefrom) have already been referred to above. But, the primary principles are reflected in greater detail below, to facilitate the discussion and determination of the issues in this application.

[28] Rule 30A concerns non-compliance with the Rules and orders of the Court and read as follows in the material part:

- (1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order —
 - (a) that such rule, notice, request, order or direction be complied with; or
 - (b) that the claim or defence be struck out.
- (2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.

[29] Inspections, examinations and expert testimony are provided under Rule 36, which reads as follows in the material part:

[29.1] Rule 36(8):

Any party causing an examination to be made in terms of subrules (1) and (6) shall—

(a) cause the person making the examination to give a full report in writing, within two months of the date of the examination or within such other period as may be directed by a judge in terms of rule 37(8) or in terms of rule 37A, of the results of the examination and the opinions that such person formed as a result thereof on any relevant matter;

(b) within five days after receipt of such report, inform all other parties in writing of the existence of the report, and upon request immediately furnish any other party with a complete copy thereof; and

(c) bear the expense of the carrying out of any such examination: Provided that such expense shall form part of such party's costs.

[29.2] Rule 36(9):

(9)(a) No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless —

(i) where the plaintiff intends to call an expert, the plaintiff shall not more than 30 days after the close of pleadings, or where the defendant intends to call the expert, the defendant shall not more than 60 days after the close of pleadings, have delivered notice of intention to call such expert; and

(ii) in the case of the plaintiff not more than 90 days after the close of pleadings and in the case of the defendant not more than 120 days after the close of pleadings, such plaintiff or defendant shall have delivered a summary of the expert's opinion and the reasons therefor:

Provided that the notice and summary shall in any event be delivered before a first case management conference held in terms of rules 37A(6) and (7) or as directed by a case management judge.

(b) The summary of the expert's opinion and reasons therefor referred to in subparagraph (a)(ii) shall be compiled by the expert himself or herself and shall contain a statement by the expert confirming that the report is —

(i) in such expert's own words;

(ii) for the assistance of the court; and

(iii) a statement of truth.

[30] Rule 42(1)(a), the prominent enabling rule in this application and part of Rule 42 providing for variation and rescission of orders, reads:

- (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...

Issues for determination

[31] This is an application for the rescission of the October Order and, thus, the requirements for rescission are the primary issues to be determined. The rescission is typecast as one under Rule 42(1)(a) on the ground that the October Order was erroneously sought and granted.

[32] Tied to the primary issue(s) and forming part of the grounds for rescission are a number of secondary or ancillary issues. The following appear to be the latter type of issues: (a) reinstatement of AWT's struck-out plea or defence; (b) condonation for the late delivery of a notice under Rule 36(9)(b); (c) nature and extent of the July Order; (d) Agreement of August 2023 between the parties; (e) nature and extent of the application to compel of September 2023; (f) nature and extent of the October Order; (g) relationship between the October Order and the July Order; (h) applicability of Rule 30A to Rule 36(9); (i) compelling compliance with Rule 36(9)(b) without notice under Rule 36(9)(a); (j) 'double barrel' approach adopted in granting orders to compel compliance by AWT and strike AWT Inc's defence; (k) existence under Rule 36(9)(a) of own remedial mechanism not subject to Rule 30A, and (l) whether AWT complied with the October Order.

[33] I have identified the primary and ancillary issues above to facilitate the discussion to follow. The issues are interlinked and, in some instances, will be discussed jointly. And the discussion will not necessarily take the sequence of the issues, apparent, above.

Nature and extent of the July Order

[34] The material term of the July Order for purposes of this part is the following:

The respondent be ordered to comply with the applicant's Notice in terms of rule 36(8), namely, to deliver its Expert Witness Reports, within one month from date of Order being granted¹⁶

[35] It is clear from the above that MHR had approached the Court for the July Order to compel AWT to comply with his notice under Rule 36(8). The material reports were those of Dr Masilela, an occupational therapist, and Dr Ragkokong (probably Rakgokong), an industrial psychologist, referred to above.¹⁷ These are the only experts whose reports gave rise to the application which led to the July Order. The latter order directed that the aforesaid reports and not any other reports were to be delivered within a month from the date of the order. Therefore, it is incorrect for MHR to say that the July Order extended to other medical reports, including those not dealt with in the application predicated the July Order.

Agreement of August 2023 between the parties

[36] The application to compel which led to the October Order is said to have been premised on an agreement reached by the legal representatives of the parties. This is the case of MHR. AWT seeks to extricate itself from the alleged agreement by contending that undertakings by legal representatives are not binding on the parties. But what is the alleged agreement?

[37] The events under this part began when AWT delivered notice(s) requiring MHR to attend medical examination by orthotist and prosthetist on a short notice. Attorneys for MHR agreed to waive the notice period on condition that AWT provides the report(s) by 31 August 2023. AWT, through its attorney, Ms Montanna, undertook to convey the condition or agreement to the material experts tasked with the assessment of MHR.¹⁸ Therefore, an agreement was reached and I do not accept that the undertaking by Ms Montanna was not

¹⁶ Answering affidavit, CL 020-113.

¹⁷ Par [6] above.

¹⁸ Par [11] above.

binding on AWT. It is not insignificant that in this instance – on the part of AWT - the attorneys are exactly the same as the client.

Nature and extent of the October Order

[38] MHR, as stated above, launched the second application to compel the delivery of medical report(s) in September 2023. This led to the October Order. The order directed AWT to comply with Rule 36(9)(b) by delivering the expert summary of Du Preez and Kircher, an orthotist and prosthetist within five days from the date of the order. The consequences of non-compliance with this part of the October Order, included the striking out of AWT’s plea and granting of leave to MHR to seek default judgment.¹⁹

Relationship between the October Order and the July Order

[39] It is contended on behalf of MHR that there is a link between the July Order and the October Order. In the second application to compel, relevant to the October Order, MHR asserted the existence of a link between the October Order and the July Order by, among others, (a) tabulating the terms of the July Order; (b) stating that the Rule 36 notice for the orthotist and prosthetist was delivered outside of the terms of the July Order, and (c) stating that an agreement was reached between the parties indulging AWT to file the reports or expert summaries by 31 August 2023.²⁰ On the other hand, AWT referred to the Rule 36 notice for the orthotist and prosthetist as a ‘new notice’, thus, denoting a disjoint with the earlier process including the July Order.

[40] I do not see the issue as MHR does. In my view, there is no link between the two orders. I have mentioned what I believe to be the nature and extent of the orders above.²¹ The July Order, as I stated above, is circumscribed and does not extend beyond the medical experts

¹⁹ Court order granted on 4 October 2023, *per* Fisher J, CaseLines (‘CL’) 020-23 to 020-26.

²⁰ Founding Affidavit (September 2023 application to compel), CL 017-12 to 017-13.

²¹ Pars [34]-[35] for the July Order and par [38] of the October Order, above.

mentioned in the papers founding that order. There was no basis for such expansive width when the material in the founding papers did not establish such a case.

[41] The October Order, essentially, is a product of the agreement between the parties, referred to above.²² It does not matter that MHR sought to rely on the terms of the July Order when reaching the agreement. Of course, the parties enjoy contractual freedom to incorporate whatever terms in their agreement reached within the confines of our laws and moral convictions. But this did not create a bridge between the two orders, at least of the nature and extent asserted by MHR.

Rule 36(9)(a)-(b)

[42] It is AWT's case that it was incompetent for the Court to direct compliance with the provisions of Rule 36(9)(b), when a party has not delivered a prior notice under Rule 36(9)(a). I agree with the generality of the principle implied in this submission.

[43] But in this instance, the Court when granting the October Order or part thereof was enforcing the terms of an agreement reached freely between the parties (i.e. AWT and MHR) on what was to be done regarding the delivery of the material medical report(s). In my view, it is immaterial that the application also made reference to Rule 36(9)(b). The agreement reached between the parties, referred to above, clearly stated that AWT will provide the report(s) of the orthotist and prosthetist by a particular date. This was not done and, thus, MHR as a party to the agreement approached the Court to enforce its terms. The argument about Rule 36(9)(b) requiring the trigger of Rule 36(9)(a) is of no practical value under the circumstances of this matter. There is no need for such debate.

²² Pars [36]-[37] above.

Is Rule 30A applicable to Rule 36(9)?

[44] For the same reasons appearing under the topic immediately above, I find it unnecessary to determine whether Rule 36(9)(a) has its own or internal enforcement mechanism not subject to Rule 30A. An answer this or the other way to the question whether or not Rule 30A is applicable to Rule 36(9) does not take this matter a step further, when MHR could have exclusively relied on the agreement between the parties with the same outcome. It is also common cause that AWT did deliver the report or summary in terms of Rule 36(9)(b) on 23 January 2024 without prior delivery of a notice under Rule 36(9)(a). Therefore, AWT has acquiesced in this part of the October Order.

Has AWT complied with the October Order

[45] AWT says that it complied with the terms of the October Order. It is common cause between the parties that the report of the orthotist and prosthetist was indeed delivered on 23 January 2024. It is also common cause that this was outside of the period prescribed by the October Order. Therefore, there was compliance with the order albeit late, hence AWT's quest for condonation in this regard. I deal with the latter issue under the requirements for rescission, below.

[46] MHR also bemoans the fact that the reports of other medical experts who examined him were not availed by AWT and, thus, label as disingenuous for AWT to claim compliance. I have mentioned above that this is beyond the terms of the October Order.

Requirements for a rescission application

[47] It is by now clear that AWT seeks the rescission of the impugned order on the basis that it was both erroneously sought and erroneously granted in its absence, as envisaged in Rule 42(1)(a). This is possible in terms of the authorities.²³ MHR disputes that the October Order

²³ Erasmus: Superior Court Practice RS 25, 2024, D1 Rule 42-22.

was granted in the absence of AWT and, therefore, the applicability of Rule 42(1)(a). According to MHR, AWT sat back and did not oppose the application leading to the October Order. I agree that the Court frowns upon a party whose presence was not precluded, but rather opted to absent itself.²⁴ This part of the application has some parallels with the issue of condonation, dealt with above.²⁵ I see no reason to give it particular attention.

[48] The other element (than the one of the absence of a party) is an error alleged to have been committed by the Court. The principles relating to the ‘error’ in this regard include the following: (a) a mistake in the proceedings;²⁶ (b) a mistake either appearing on the record of proceedings or which subsequently became apparent from a rescission application for the judgment; (c) an error may have arisen in the process of seeking default judgment by an applicant or the process of granting default judgment by the court, and (d) this type of rescission requires that an applicant only show the error, as good cause for the rescission does not have to be established.²⁷

[49] Good cause was discussed in the context of condonation above.²⁸ But, as appearing from the latter principle relating to the ‘error’ above, AWT, as an applicant for rescission on the basis of Rule 42(1)(a) does not need to establish good cause in addition to the proven error in the seeking or granting of the October Order.

[50] As also appearing above, the October Order, effectively, compelled the delivery of orthotist and prosthetist report(s) within five days of its date (‘the Compliance Term’). AWT

²⁴ *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* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) [56]-[57].

²⁵ Pars [14]-[18] above.

²⁶ *Kgomo and Another v Standard Bank of South Africa and Others* 2016 (2) SA 184 (GP) (‘Kgomo’) [11]; *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) (‘Freedom Stationery’) at 465G–H. See also *Erasmus: Superior Court Practice* RS 25, 2024, D1 Rule 42-18.

²⁷ *Kgomo* [11]; *Freedom Stationery* at 465G–H. See also *Erasmus: Superior Court Practice* RS 25, 2024, D1 Rule 42-18.

²⁸ Par [16] above.

complied with the Compliance Term, although late. Compliance with an order is giving effect to its terms or acquiescing thereto. AWT cannot now, in an about-turn, seek rescission of the very same part of the order (i.e. the Compliance Term). Its compliance is proof that there was no error in its seeking or granting. Also, seeking condonation for the late delivery of the expert report or summary, as envisaged in Rule 36(9)(b), is further confirmation of AWT's quest to comply with the Compliance Term. When a term of the order has been complied with, condonation for non-compliance is moot and will not serve any practical purpose.

[51] This brings me to other part or term of the October Order: inference of 'wilful refusal to engage' on the part of AWT with MHR and, the striking-out of AWT's defence to facilitate default judgment ('the Strike-out Term').²⁹ It is AWT's case that the Strike-out Term deprived it of the right to be heard in the form of determination by the Court of the reasons for non-compliance with the Compliance Term. AWT, further, says that has it been given the opportunity it would have advised the Court that the material report was not timeously received, as it was only received in January 2024. MHR, as indicated above, disputes this and contend that available information suggest receipt of the report much earlier. But, this is immaterial given the fact that the latter information was not placed before the Court when the October Order was made. This was impossible given that the Strike-out Term of the October Order purported to regulate future unknown matters. I searched in vain for the justice and equity in this type of orders. I would have held a different view if the Strike-out Term was to gain effect only upon a future determination by the Court of the facts surrounding non-compliance with Compliance Term. Rule 30A, clearly, does not provide for such an approach, but clearly envisages separate applications for either 'that such rule, notice, request, order or direction be complied with' or 'that the claim or defence be struck out'.³⁰ In the absence of this, I hold that

²⁹ Par [12] above for a reading of the October Order.

³⁰ Par [28] above for a reading of Rule 30A.

the Strike-out Term was erroneously sought and granted. I am mindful of the fact that the approach may have been derived from the practice directive of this Court or influence thereby.

[52] But the interests of justice, in my view and on the facts of this matter, dictate that the Strike-out Term be rescinded or set aside. Therefore, whilst not quibbling with the choice of words, I agree that the ‘double barrel’ approach embedded in the October Order – on the facts of this matter – has proven erroneous. AWT’s plea or defence of the action, thus, will be restored through a rescission order of its strike-out, which is located in paragraph 2 (i.e. the Strike-out Term) of the October Order.

Conclusion and costs

[53] AWT is successful in the matter when considering the ultimate effect of the findings of the Court above, as will be borne by the order to be made, below. I doubt that I can call the success, substantial, for purposes of guiding the landing of liability for costs. But this is not necessary.

[54] AWT’s conduct which precipitated this application – although I will avoid the label ‘unclean hands’ – was full of blemishes. And, MHR’s primary objective in opposing this application and bringing the incessant applications to compel, appears to be the speedy disposal of the damages claim or action against AWT. This, in fact, should be the focus of both parties instead of some form of gamesmanship when liability has already been conceded. It ought, also, to be mentioned that expert witnesses participate in matters before the Court to assist the Court in arriving at a just and equitable outcome. This is trite.³¹ An expert witness is not a hired gun or someone to be at some party’s corner. The reasons for all these are obvious, they include

³¹ *Price Waterhouse Coopers Inc v National Potato Co-op* SCA 2015 par 98. See also John Saner, *Medical Malpractice in South Africa* (LexisNexis, November 2024) pp 14-10-14-11.

the fact that, the Court is tasked with a delicate exercise of balancing the interests of the warring parties. Lives and livelihoods are often at stake.

[55] Therefore, I consider a costs order against MHR or in favour of AWT not justified by the facts of this matter. I will direct that the costs of the application be costs in the action.

Order

[56] In the result, I make the following order:

1. the late filing of this application for rescission is condoned;
2. paragraph 2 of the order of this Court granted on 4 October 2023 in this matter is rescinded and set aside, and, consequently, the applicant's plea and/or defence are/is hereby reinstated, and
3. the costs of this application will be costs in the action related to this application.



Khashane La M. Manamela
Acting Judge of the High Court

Date of Hearing : **11 February 2025**

Date of Judgment : **09 June 2025**

Appearances :

For the Applicant : Mr E Coleman
Instructed by : Anthony Wilton Thinane Inc, Germiston, Johannesburg

For the Respondent : Mr J L Khan

Instructed by : CN Sweetnam Attorneys, Norwood, Johannesburg