



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

CASE NO: 20831/2022

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

12 June 2025

Date



K. La M Manamela

In the matter between:

MMAZWI CIVIL AND CONSTRUCTION SERVICES CC

Applicant

and

PHOPHOLO H.M. (PTY) LTD

Respondent

In Re:

PHOPHOLO H.M. (PTY) LTD

Plaintiff

and

MMAZWI CIVIL AND CONSTRUCTION SERVICES CC

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 12 June 2025.

JUDGMENT

Khashane Manamela, AJ

Introduction

[1] On 27 October 2022, this court granted judgment or an order against the applicant, Mmazwi Civil and Construction Services CC ('Mmazwi') in favour of the respondent, Phopholo H.M. (Pty) Ltd ('Phopholo') for payment in the amount of R837 200 (together with interest and costs) ('the Default Order'). The Default Order arose from an oral agreement in terms of which Mmazwi hired waste removal trucks from Phopholo. Mmazwi had not defended the action instituted by Phopholo, hence the Default Order.

[2] In this application, Mmazwi seeks the rescission of the Default Order in terms of Rule 42(1)(a) of the Uniform Rules of this Court on the basis that it was erroneously sought and erroneously granted, alternatively on the basis of the common law. Mmazwi, also, rather tentatively I must add, seeks condonation for the late bringing of this rescission application. It says that the latter order is sought only in the event that the application is considered by this Court to have been launched late. The rescission application is opposed by Phopholo.

[3] When this application came before me on 14 February 2025, Mr T Kgomo appeared for Mmazwi and Mr NG Louw appeared for Phopholo. I reserved this judgment following oral submissions by counsel on behalf of the parties.

Brief background

[4] The issues in this application are crisp, but a brief background on the common cause facts is warranted for purposes of context. Where a particular issue may be disputed, I will indicate the contrasting view.

[5] Mmazwi was contracted by the City of Tshwane Metropolitan Municipality ('the City') to render refuse or waste removal services to the City during 2021. Mmazwi, initially, did not have its own vehicles for the services to the City. During or about February 2021, Mmazwi approached Phopholo to use its trucks. The two concluded an oral agreement for the hiring out

of trucks. Mmazwi was duly represented by Mr Mpho Patrick Letladijwane Lesufi, whilst Phopholo was duly represented by Ms Mantlawe Evelyn Modise during the conclusion of the agreement.

[6] The terms of the agreement, essentially, were as follows, that: (a) Mmazwi would hire Phopholo's waste removal vehicles or trucks as and when required; (b) Phopholo will charge Mmazwi for the use of the trucks at the rate or a fee of R8 000 plus VAT (i.e. value added tax) per truck per day; (c) Phopholo would render invoices to Mmazwi monthly in arrears for the applicable charges, and (d) Mmazwi would be liable for payment of the rendered invoices within 30 days of delivery of same.

[7] I hasten to point out that the conclusion and terms of the oral agreement are common cause between the parties, save for the rate or charge for hiring each truck per day. Mmazwi says the daily rate for a truck was R6 000 plus VAT and not R8 000 plus VAT, contended for by Phopholo.

[8] For the period from 19 February 2021 to 10 May 2021, the charges levied by Phopholo to Mmazwi for the use of the former's trucks was in the amount of R1 214 400. The following were the invoices rendered for the aforesaid period: (a) invoice for February 2021 in the amount of R128 800; (b) invoice for March 2021 in the amount of R460 000; (c) invoice for April 2021 in the amount of R496 800, and (d) invoice for May 2021 in the amount of R128 800. Mmazwi effected full payment of the invoice for February 2021 on 9 April 2021. But, there was only part payment for the invoice of March 2021 in the amount of R248 400, instead of R460 000, made on 3 May 2021. Mmazwi, also, did not pay the remainder of the invoices at all and all these outstanding debits tallied to an amount of R837 200 owed by Mmazwi, according to Phopholo.

[9] On 14 June 2022, summons was issued at the instance of Phopholo against Mmazwi for payment in the amount of R837 200. On 8 July 2022, the summons was served by the sheriff of this Court at 44 Arklow Road, Bryanston Johannesburg. This was the registered office address of Mmazwi in terms of the records obtained by Phopholo from the Companies and Intellectual Property Commission ('the CIPC').

[10] There was no delivery by Mmazwi of a notice of intention to defend the action. On 27 October 2022, the Default Order was granted by this Court, *per* Carrim AJ. Thereafter, Phopholo embarked on steps to execute the Default Order in order to recover the judgment debt arising from the Default Order. The bank account belonging to Mmazwi was attached at the instance of Phopholo.

[11] During March 2024, Mmazwi launched an urgent application to suspend the effect of the Default Order and, thus, free its bank account from attachment. The urgent application was opposed by Phopholo. Ultimately, by agreement between the parties, an order was made on 19 March 2024, *per* Wanless J. The terms of the order included: (a) the upliftment of the attachment placed on Mmazwi's bank account; (b) immediate payment by Mmazwi to Phopholo in the amount of R558 000, and (c) Mmazwi being placed on terms to launch this rescission application within 15 days from the date of the order ('the Urgent Order').

[12] On 12 April 2024, this application for rescission of the Default Order was initiated by Mmazwi. Mmazwi says the application was launched on time in compliance with the Urgent Order, but seeks condonation for the timing of its institution, if needed. Phopholo contends that, indeed, condonation is necessary and vigorously opposes both condonation and the application (on its merits). I deal with the issue of condonation, next.

Condonation for the late institution of the application

[13] Mmazwi, as already stated, seeks the rescission of the Default Order under Rule 42(1)(a).¹ There is no time period for the launch of a rescission application in terms of this Rule. But, I consider trite the fact that an applicant seeking rescission under this Rule ought to bring the application within a reasonable time of knowing of the existence of the impugned order.² What constitutes a reasonable time would vary from case to case, as this depends on the particular facts of a matter.³

[14] Mmazwi, as already indicated, says that the rescission was launched timeously. This, according to Mmazwi, is so when reckoned from the date of the Urgent Order. The time frame in the Urgent Order was by agreement between the parties, sanctioned by the Court.

[15] When a party seeks condonation, including under Rule 27 of this Court, it is required to show ‘good cause’ for the material non-compliance with the rules of the Court.⁴ But, no universal or exhaustive definition exists on what constitutes ‘good cause’.⁵ The doctrine of ‘good cause’ is within the realm of the discretion of the Court. It has constitutive requirements, including the following principal ones: (a) a satisfactory explanation for the delay by the applicant, and (b) existence of a *bona fide* defence or satisfactory proposition that the applicant’s defence or the seeking of material relief is clearly not ill-founded or patently unfounded.⁶ There is another requirement, also, considered essential by some of the authorities, namely, that the indulgence sought ought not to be prejudicial to the other party in the matter

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

² *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].

³ *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 (C) at 421G.

⁴ 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.

⁵ *Erasmus: Superior Court Practice* RS 25, 2024, D1 Rule 27-3.

⁶ *Erasmus: Superior Court Practice* RS 25, 2024, D1 Rule 27-4 to D1 Rule 27-5 and the authorities relied upon there.

in a manner which is not capable of being remedied by an order as to costs, postponement or both.⁷ 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'),⁸ provided the needed clarity by depicting the factors usually weighing with the Court when determining the issue of condonation. The factors 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'.⁹ It was emphasised by the SCA in *Mulaudzi* that when dealing with condonation the issue of prospects of success whilst, generally, an important factor or consideration, is not decisive amidst factors relevant to the Court's discretion.¹⁰

[16] The explanation for the delay proffered by Mmazwi is criticised by Phopholo. I think the criticism is valid and deserved. Mmazwi has not satisfactorily explained why this rescission application was not brought earlier when it became aware of the existence of the Default Order. In its founding papers Mmazwi said that it became aware of the Default Order only on 19 February 2024.¹¹ Phopholo disputed this and pointed out that the Default Order formed part of the documents emailed to Mmazwi on 29 May 2023 and that Mmazwi has 'purposely neglect[ed] to include the annexures to the ... email'.¹² In its replying affidavit, filed woefully late and, in fact, a few days before the hearing of this application, Mmazwi chooses to advance its case for rescission differently. Whilst maintaining its equivocation about when precisely it became aware of the Default Order, it contends that what it had before was not 'meaningful

⁷ *Erasmus: Superior Court Practice* RS 25, 2024, D1 Rule 27-5 and the cited authorities.

⁸ *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).

⁹ *Mulaudzi* [26].

¹⁰ *Mulaudzi* [34].

¹¹ FA par 66, CL 04-27.

¹² AA par 18, CL 04-109.

response and the [required] documents that gave rise to the Judgment and Taxation’ and, thus, it was ‘precluded from bringing this application’.¹³ This is rather absurd, to say the least. Nothing prevented Mmazwi and its attorneys, when confronted with a bill of costs - relating to disputed litigation of unknown origin - from immediately approaching the Registrar of this Court for the additional documents sought. Why wait for an opponent who has already taken judgment against you to clarify the judgment when the Registrar of Court is the actual custodian of the material documents, even through the CaseLines platform. If there is anyone who precluded Mmazwi from launching the rescission is Mmazwi itself and its own dithering. This is so, as even after Mmazwi gained access to the CaseLines platform in early November 2023, it still delayed the rescission until 12 April 2024, when spurred into action by the attachment of its bank account. I agree with Phopholo that Mmazwi did not furnish an explanation of its default for the period between November 2023 and February 2024, let alone a satisfactory explanation.

[17] I turn to the issue of existence of *bona fide* defence. I am equally mindful of the fact that at this stage of the enquiry one need not do more than take a peek at the merits of the defence proffered. Mmazwi’s defence, essentially, is its disagreement with the rate used for the truck hire from Phopholo. Mmazwi has already made full payment for the February 2021 invoice constituted by the impugned rate and part payment of the invoice of March 2021. According to Mmazwi, it disputed the rate used in the invoices and withheld payment, but there is absolutely no proof of this. The reference to payment being made under the so-called protest in a letter of 24 February 2024 by Mmazwi’s attorneys, referred to in the replying affidavit, does not change the position. There is nothing contemporaneous with the making of the payments by Mmazwi or immediately thereafter to establish its defence or payment under protest. The criticism of how Phopholo acquired the City’s letter of appointment of Mmazwi

¹³ Replying Affidavit par 48, CL 04-328.

as a contractor, including of Phopholo's assertions regarding the amounts payable in terms thereof to Mmazwi, does not serve to establish Mmazwi's defence. Available evidence clearly confirms a party to a contract who ignored a term of the contract and proceeded to make payment on its own extra-contractual terms. I am, thus, not reasonably satisfied that the application has prospects of success, as I consider Mmazwi's defence not *bona fide*. Besides, our law does not promote for an applicant to build its case in the replying affidavit. Also, it ought to be borne in mind that in this application Mmazwi bears the onus of proof as the applicant for relief.

[18] Therefore, the condonation will fail on the bases that Mmazwi did not provide a satisfactory explanation for the delay and lacks a *bona fide* defence.¹⁴ But for reasons that will become clear below, I deem it necessary to deal with the merits of the rescission.

Mmazwi's (i.e. applicant's) case (including submissions)

[19] I have already dealt with the crux of Mmazwi's case against Phopholo above. But, under this part I will – in the main – concentrate of the submissions by Mr Kgomo, who appeared at the hearing for Mmazwi. I will not reflect all of his submissions those critical for the determination to be made.

[20] The dispute between Phopholo and Mmazwi is long standing. Mmazwi disputed the charge rate of R6 000 plus VAT per truck per day used by Phopholo in its invoices. Phopholo undertook to rectify or adjust same, but persisted in using the rate in subsequent invoices. Mmazwi decided to withhold payment from Phopholo until a reconciliation of its account was done by Phopholo. In the meantime and without Mmazwi being aware, Phopholo instituted the action and obtained the Default Order.

¹⁴ *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 720E-G.

[21] During May 2023, Mmazwi says that it was alerted to the existence of the Default Order when it received a Notice of Intention to Tax a Bill of Costs (‘Notice of Taxation’) from the attorneys acting for Phopholo. Mmazwi says that it instructed its own attorneys to make the relevant inquiries. On 19 June 2023, Mmazwi’s attorneys wrote to Phopholo’s attorneys requesting copies of the pleadings in the action and to be invited on the CaseLines platform of the Court. According to Mmazwi there was no response to the enquiry/request.

[22] On 17 October 2023, Phopholo’s attorneys served on those for Mmazwi a notice of set down of the bill of costs. Mmazwi says its attorneys pressed their counterpart for a response to no avail, until on 6 November 2023 when Phopholo’s attorneys invited them onto CaseLines. This, according to Mmazwi, is when it became aware of existence of the circumstances which led to the Default Order, including that Phopholo issued summons on 14 June 2022. The summons was served by the sheriff by way of affixing it to the post box of Mmazwi’s registered office address, purportedly in terms of Rule 4(1)(a)(v) of the Uniform Rules of this Court.

[23] Mmazwi contends that the summons never came to its attention as the address used was the former place of residence of its member. The member had vacated the address more than a year prior to the date of the purported service. Therefore, for these reasons, the Default Order was erroneously sought by Phopholo and erroneously granted by the Court. Rescission is also sought in terms of the common law.

Respondent’s case (i.e. Phopholo’s) (including submissions)

[24] The rescission application is opposed forcefully by Phopholo. Some of the aspects raised by Phopholo to oppose the granting of the relief sought by Mmazwi have been already stated above. Further aspects of Phopholo’s case and principal submissions made by Mr Louw, on its behalf are dealt with under this part.

[25] Phopholo says that it performed in accordance with the terms of the oral agreement between the parties. Further that it is entitled to use the rate of R8 000 per truck per day, agreed with Mmazwi, when billing Mmazwi for the use of its trucks. It is the breach of the agreement - through non-payment of its invoices – by Mmazwi, which led to the summons and the Default Order. In fact, Mmazwi cannot *bona fide* dispute the charge-out rate used, as it has already conceded that Phopholo is entitled to payment in the amount of R558 900 of the judgment debt, but only dispute the balance thereof.

[26] According to Phopholo, Mmazwi's assertions of the applicability of the rate of R6 000 per truck per day is contradicted by the following objective facts:

[26.1] Mmazwi says that it cannot have agreed to the rate of R8 000 per truck, without suffering a loss, because it was paid by the City at exactly the same rate. This is false according to Phopholo as borne by Phopholo's appointment letter by the City, which reflects that Mmazwi was paid R11 500 per truck per day. Phopholo regards this as destructive to Mmazwi's version and, also, as fundamentally going to the credibility and *bona fides* of Mmazwi in seeking brazenly to mislead the Court. Mmazwi in its replying affidavit sought to criticise the origin or acquisition of the letter by Phopholo. Mmazwi sought to explain itself out of the resultant situation, among others, by referring to a plethora of bids it allegedly made to the City and the fact that the rate of R11 500 per truck did not include diesel costs and those relating to the driver of the truck.

[26.2] Mmazwi made payment of the invoice for the month of February 2021 in full, as well as part of the invoice for March 2021. The two invoices clearly reflected the rate of R8 000 per truck and, therefore, Mmazwi could not have made the payment of R8 000 if the rate did not apply.

[26.3] Mmazwi, in its founding papers, alleged that it did not pay the second invoice as it had realised that the rate used in the invoice was still incorrect. It is submitted on behalf of Phopholo that this is untrue as Mmazwi had made part payment as aforesaid. Mmazwi never contemporaneously raised the issue of the rate used with Phopholo. There is no e-mail, WhatsApp messages, text or SMS or call to this effect, by Mmazwi to Phopholo expressing its discomfort or dissatisfaction with the rate used. There is no evidence whatsoever in this regard presented to the Court. In the circumstances, Mr Louw for Phopholo, submitted that there is no *bona fide* defence borne by the evidence before the Court. As stated above, Mmazwi and its replying affidavit, stated that the payments were made under protest and sought to rely on a letter by its attorney of 23 February 2024. This was almost three years after the last payment had been made on 3 May 2021 without demur. I have rejected this attempt by Mmazwi to build or patch up its case in the replying affidavit.¹⁵

[27] Two bank accounts of Mmazwi were attached. The first was a bank account held by Mmazwi with Nedbank. The second account to be attached was with ABSA Bank. Mmazwi only reacted when Phopholo attached its Absa Bank account in February 2024 as there were funds available for attachment in this account. This was the only time when Mmazwi felt inconvenienced and took steps to have the Default Order rescinded. Such conduct is not consistent with a party who truly disputed the validity of a judgment and who bona fide intends to defend a matter, it is also submitted on behalf of Phopholo. Also, that Mmazwi has clearly acquiesced in the Default Order.¹⁶

¹⁵ Par [17] above.

¹⁶ *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C); *Blue Crane Route Municipality v Municipal Workers Retirement Fund* (3016/2019) [2020] ZAECGHC 113 (8 October 2020) [20].

[28] It is further submitted that judgment, in the form of the Default Order, was not erroneously granted. The address at which service of the summons was effected by the sheriff was proper. It was Mmazwi's address in terms of official records of the CIPC. The affixing of the summons to the post box was proper mode of service in terms of the legal authorities.¹⁷ The summons was properly served, it is submitted for Phopholo, and Mmazwi only failed to enter an appearance to defend.

Applicable legal principles

[29] This application for rescission of the Default Order is premised on Rule 42(1)(a) and the common law. The principles or legal requirements of aforesaid, therefore, serve as the principal legal principles applicable to this matter for current purposes. But, some of these rules (or the legal principles arising therefrom) have already been referred to above. Therefore, this part serves to reflect in greater detail the primary legal principles to facilitate further discussion and determination, below.

[30] The application, as already stated, is co-anchored upon Rule 42(1)(a), forming part of Rule 42 for variation and rescission of orders, which 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...

[31] The rescission is also sought in terms of the common law. The following extracts from *Erasmus: Superior Court Practice* reflect the essence of applications for rescission based on the common law:

At common law a judgment can be set aside on the following grounds:

(a) fraud;

(b) *justus error* (on rare occasions);

(c) in certain exceptional circumstances when new documents have been discovered;

¹⁷ *Absa Bank Ltd v Mare and Others* 2021 (2) SA 151 (GP) [27].

- (d) where judgment had been granted by default; and
 - (e) in the absence between the parties of a valid agreement to support the judgment, on the grounds of *justa causa*.
- An application on common-law grounds must be brought within a reasonable time.¹⁸

[32] These legal principles, to the extent required, would be referred to in the discussion of the issues necessary for the determination of this matter, identified next.

Issues for determination

[33] Most of the issues dispositive of this matter have already been addressed above. Therefore, I will avoid a repetition of the issues in the discussion below, although in some instances this may prove unavoidable. The primary issues in this application for rescission of the Default Order, naturally, are the requirements for rescission. Mmazwi, as the applicant in this matter, places reliance on Rule 42(1)(a) and the common law. There may be other issues of ancillary or secondary nature, as would appear below, tied to these primary issues relevant to the determination of this matter.

Service of the summons which led to the default order

[34] Phopholo has furnished proof from the CIPC that the address used for service of the summons was the registered office address of Mmazwi and, therefore, a proper and valid address for service in terms of the rules of this Court. It is irrelevant that Phopholo may have been aware of some other address where the summons could have been served. Mmazwi has a statutory responsibility to update and maintain its records as kept by the CIPC.

[35] But there is one thing more to be said about the defence raised by Mmazwi with regard to the address of service of the summons. The deponent to affidavits filed by Mmazwi and this application is Mr Mpho Patrick Letladijwane Lesufi ('Mr Lesufi'). Mr Lesufi is the sole member of Mmazwi. Throughout the papers Mr Lesufi appears to ignore that Mmazwi, as a close corporation, is a separate juristic or legal personality and not his alter ego. This is so with

¹⁸ Erasmus: *Superior Court Practice* RS 25, 2024, D1 Rule 42-9.

regard to the service address used by Phopholo for the summons. Mr Lesufi says the address also served - at some point - as his residential address. And for this reason, Mr Lesufi assumes that when he vacated the address it automatically ceased to be the registered office address of the corporate entity, Mmazwi. The aforesaid notion is obviously inimical to the durable principle of the sanctity of the separate juristic personality of corporate entities recognised more than a century ago in *Dadoo Ltd and Others v Krugersdorp Municipal Council* ('Dadoo')¹⁹ that a 'registered company is a legal *persona* distinct from the members who compose it'.²⁰ This principle is applicable to close corporations. It is recognised in a long line of decided cases including in this Division in *Hlumisa Investment Holdings (RF) Limited and Another v Kirkinis and Others*²¹ per Molopa-Sethosa J, which was confirmed on appeal by the SCA in *Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others*.²² The corporate veil of Mmazwi is not lifted or otherwise affected by the manner in which Mr Lesufi may choose to conduct the affairs of Mmazwi as its sole member. Therefore, as long as the address of Mmazwi, as reflected in the records of the CIPC, was the same as the service address used by Phopholo for service of the summons on Mmazwi, there is no room for further discussion on this point.

Requirements for a rescission application

General

[36] Mmazwi, as stated above, seeks the rescission of the Default Order on the basis that it was erroneously sought and erroneously granted in its absence, as contemplated in Rule

¹⁹ *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530.

²⁰ *Dadoo v Krugersdorp Municipal Council* 1920 AD 530 at 550-551.

²¹ *Hlumisa Investment Holdings (RF) Limited and Another v Kirkinis and Others* 2019 (4) SA 569 (GP) [50].

²² *Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others* 2020 (5) SA 419 (SCA) [17], [24] partly relying on *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA). See further Piet Delport, *Henochsberg on the Companies Act 71 of 2008* (LexisNexis, October 2024) 84 for a detailed discussion on the principle of separate legal personality of companies.

42(1)(a).²³ The second basis for the rescission relied upon by Mmazwi is the common law. I start the discussion on Rule 42(1)(a).

Rescission based on Rule 42(1)(a)

[37] This rule allows for the rescission of judgment or order on the basis of an error and the fact that the impugned judgment or order was granted in the absence of a party. It is common cause that the Default Order was granted in the absence of Mmazwi, after it did not react to the summons. Although, I have rejected the criticism by Mmazwi of the service address for the summons, there is nothing to cast doubt on the fact that the Default Order was granted in its absence. The Court is satisfied that Mmazwi did not merely absent itself from the proceedings.²⁴

[38] The other element for rescission based on Rule 42(1)(a) is an error alleged to have been committed when judgment was sought and/or when it was eventually granted by the Court. When the Court deals with the element of ‘error’ it ought to be guided by principles which include the following: (a) mistake in the proceedings; (b) mistake clear from the record of proceedings or subsequently becoming apparent from the application for rescission; (c) the impugned error may have arisen in the process of applying for default judgment or on the part of the Court in the process of granting the default judgment, and (d) applicant for rescission under Rule 42(1)(a) is only required to show the error, not good cause for the rescission.²⁵ But in this case there was a need to discuss the issue of ‘good cause’ for purposes of condonation for the late bringing of the rescission application, above.²⁶

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

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 *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.

²⁶ Par [15] above.

[39] Mmazwi, primarily, argues that the Default Order was erroneously sought and granted as it did not simply elect not to participate in the proceedings. Had it been aware of the action proceedings it would certainly have defended same, as it had a *bona fide* defence. By *bona fide* defence Mmazwi is referring to the rate at which Phopholo charged for the use of the trucks. The other reason advanced by Mmazwi is the service address for the summons and the manner of service of the summons. I have already ruled that there was nothing wrong with both.²⁷ I have searched in vain from the reasons advanced and submissions made on behalf of Mmazwi for an error either in the process of applying for or the granting of the Default Order.²⁸ Also, there is no mistake clear from the record of proceedings or the application for rescission.²⁹ Therefore, rescission of the Default Order on the basis of Rule 42(1)(a) cannot succeed.

Rescission based on the common law

[40] Mmazwi, also, relies on common law ground for rescission of the Default Order. Its case under this ground is also, primarily, premised upon the place of address of service of the summons, and the fact that the summons never came to its attention hence the failure to defend the action. Further, that it has a *bona fide* defence which is good in law and enjoy good prospects of success. In support of the latter, Mmazwi again raises its dispute of the rate of R8 000 per truck per day used by Phopholo when invoicing for the use of the trucks.

[41] An applicant for rescission under the common law ought to show ‘sufficient cause’.³⁰ There are two essential elements of ‘sufficient cause’ in this context, namely, that (a) a reasonable and acceptable explanation for the default, and, (b) a *bona fide* defence on the merits

²⁷ Pars [34]-[35] above.

²⁸ Kgomo [11]; *Freedom Stationery* at 465G–H. See also *Erasmus: Superior Court Practice* RS 25, 2024, D1 Rule 42-18.

²⁹ *Ibid.*

³⁰ *De Wet and others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042.

which merits carries a *prima facie* prospect of success.³¹ Unless, both elements are established, the application would fail.

[42] I reiterate that there is no doubt that the summons did not come to the attention of Mmazwi. This means there is reasonable and acceptable explanation for the default. This element (and the concomitant ruling) should not be confused with the requirement to explain the delay in seeking rescission, discussed above.³²

[43] As for the second element under the common law, I refer to my findings above that Mmazwi's assertions in this regard fall short of a *bona fide* defence.³³ To avoid doubt, I also do not find any of the common law grounds for setting aside judgments, such as fraud, established.³⁴ There is also no room for the application of exceptional circumstances to allow the rescission of the Default Order. Therefore, the application and the defence raised are devoid of any indication of prospects of success. The findings in this matter and the Default Order will not be tantamount to miscarriage of justice, as contended by Mmazwi.

Conclusion and costs

[44] For the reasons stated above, the application for rescission will be dismissed with costs. Mr Louw did not urge the Court to order any specific scale of costs for counsel, but I consider scale B warranted on the facts of this matter. Therefore, I will dismiss the application with Mmazwi held liable for costs of the application on a party and party scale, with counsel's fees at scale B.

Order

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

³¹ *De Wet v Western Bank* at 1042; *PE Bosman Transport Works Committee and others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A); *Smith NO v Brummer NO and another*; *Smith NO v Brummer* 1954 (3) SA 352 (O) at 357-358.

³² Par [16] above.

³³ Par [39] above.

³⁴ Par [31] above.

1. the application is dismissed, and
2. the applicant is liable to pay to the respondent costs of this application, with counsel's fees at scale B where employed.



Khashane La M. Manamela
Acting Judge of the High Court

Date of Hearing : **14 February 2025**

Date of Judgment : **12 June 2025**

Appearances :

For the Applicant : Mr T Kgomo
Instructed by : D Reddy Inc, Bedfordview, Johannesburg

For the Respondent : Mr NG Louw
Instructed by : Albert Hibbert Attorneys, Nieuw Muckleneuk, Pretoria