

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG HIGH COURT DIVISION, PRETORIA

Case No: **48804/2017**

**DELETE WHICHEVER IS NOT
APPLICABLE**

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

DATE: 17 JUNE 2025

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In the matter between:

ROAD ACCIDENT FUND

APPLICANT

and

FRANCOIS JOHANNES LABUSCHAGNE

RESPONDENT

In re:

FRANCOIS JOHANNES LABUSCHAGNE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Judgment

RUST, AJ

1. While the media is abuzz with the wasting of millions of public funds by the applicant (herein referred to as the “RAF”) on its chaotic approach to litigation, and on numerous meritless applications to rescind default judgments previously granted against it, before me is an opposed application in terms of Rule 42(1)(a) of the Uniform Rules of Court, wherein the RAF seeks to rescind the default judgment that this Court granted against it on 22 February 2023 in the amount of R 5 061 941.00, on the basis thereof that such default judgment was allegedly erroneously sought or granted, or alternatively in terms of the common law.
2. Before dealing with the merits of this application, it is prudent to set out the relevant background thereto.

Background

3. On 19 July 2017, summons under the above case number was served on the RAF as the defendant in the action. The RAF filed a plea on 3 August 2017. In due course, this Court on 22 August 2019 granted an order in respect of the merits of the action, and the issue of quantum was postponed *sine die*.
4. On 22 February 2021, the plaintiff served on the RAF expert notices in terms of Rule 36(9)(a) and (b) for the expert evidence intended to be presented to the court to substantiate the plaintiff’s claim for loss of support, namely that of an industrial psychologist and an actuary. The RAF had the opportunity to consider these expert notices, and to prepare its own expert notices. However, the RAF failed to make use of this opportunity and never filed any expert notices of its own.
5. Despite having been served, both on 12 August 2021 and 10 February 2022, with an application to strike out the plea and defence of the RAF, and further despite having been served on 22 February 2022 with a notice of set down for the application to strike out the plea and defence of the RAF, the RAF again failed to make use of these opportunities to participate in the litigation against it. As a result of the RAF’s persistent failure to comply with the Uniform Rules of Court, this Court

on 4 March 2022 granted an order for the striking out of the RAF's plea and defence, inclusive of the following order:

"2. Judicial Authorisation is granted for the matter to proceed by default on the trial date to be allocated by the registrar."

6. On 21 July 2022, the plaintiff nevertheless served on the RAF a notice of set down of its application for default judgment in respect of the quantum of its claim. The RAF also failed to make use of this opportunity to participate further in the litigation against it.
7. On 13 October 2022, the plaintiff furthermore served on the RAF a notice in terms of Rule 28 of the Uniform Rules of Court for the amendment of its particulars of claim, particularly to amend the quantum of its claim for loss of support from R 550 000.00 to R 5 061 941.00. The RAF also failed to make use of this opportunity to object to the amendment of the quantum of the claim.
8. On 30 January 2023, the plaintiff served on the RAF its application for default judgment wherein the expert evidence of the industrial psychologist and actuary are dealt with, and the plaintiff's claim for past and future loss of support is set out. The RAF also failed to make use of this opportunity to oppose the application for default judgment.
9. With the benefit of the expert evidence of the industrial psychologist and actuary before it, this Court on 22 February 2023 granted default judgment against the RAF in respect of the quantum of the claim. The default judgment order was served on the RAF on 18 May 2023.
10. On 29 September 2023, the RAF (now as the applicant herein) served this rescission application on the plaintiff (as the respondent herein), but filed its rescission application only on 9 July 2024 on Caselines. The respondent nevertheless opposed the rescission application by filing its answering affidavit on 23 November 2023, and in due course also filed its heads of argument and practice

note in respect thereof. The RAF never filed any replying affidavit in its rescission application, and belatedly filed written submissions and a practice note for purposes of the hearing of its rescission application.

Rescission of court orders

11. As authoritatively stated in Erasmus's *Superior Court Practice*¹, it is trite that, as a general rule, a court has no power to set aside or alter its own final order. The reasons for this age-old rule are twofold. Firstly, once a court has pronounced a final judgment, it becomes *functus officio* and its authority over the subject matter has ceased. The second reason is the principle of finality of litigation expressed in the maxim *interest rei publicae ut sit finis litium*: it is in the public interest that litigation be brought to finality.² The instances in which a court is permitted to set aside or alter its own final order are narrowly circumscribed under the Uniform Rules of Court or in terms of the common law.
12. When a rescission application is brought, a litigant must establish the jurisdictional facts for rescission as set out in Rule 42(1)(a) or the common law before a court can exercise its discretion to rescind an order.³ Even if the specific prerequisites are met, it must still be in the interests of justice for a court to exercise its discretion to entertain the matter, or to grant such rescission.⁴
13. Rule 42(1)(a) of the Uniform Rules of Court provides as follows:

“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 -

¹ Erasmus, *Superior Court Practice*, Second Edition, Van Loggerenberg, Volume 2, [Service 25, 2024] D1 Rule 42-1 to D1 Rule 42-2

² *Freedom Stationery & others v Hassam & others* (921/2017) [2018] ZASCA 170 at par [16].

³ *Minister for Correctional Services and Another v Van Vuren and Another; In re Van Vuren v Minister for Correctional Services and Others* 2011 (10) BCLR 1051 (CC) at par [7].

⁴ *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 (Council for the Advancement of the South African Constitution and another as amici curiae)* 2021 (11) BCLR 1263 (CC) at par [50] and [86]-[90].

(a) *an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*"

14. In respect of the first jurisdictional condition, Streicher JA explained in *Lodhi 2*⁵ that the phrase 'erroneously granted' in Rule 42(1)(a) relates to the procedure followed to obtain the judgment in the absence of another party, and not to the existence of a defence to the claim. Thus, a judgment to which a party was procedurally entitled, cannot be said to have been erroneously granted in the absence of the affected party. An applicant or plaintiff would be procedurally entitled to an order when all affected parties were adequately notified of the relief that may be granted in their absence. The relief need not necessarily be expressly stated. It suffices that the relief granted can be anticipated in the light of the nature of the proceedings, the relevant disputed issues and the facts of the matter.

15. The second leg of the first jurisdictional condition requires an applicant to show that the judgment against which the rescission is sought, was erroneously granted because there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment.⁶ However, the absence of submissions from a defendant, which may have been relevant at the time the Court was seized with the relevant proceedings, could not render erroneous the order granted, simply because it was granted in the absence of those submissions.⁷ Thus, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant, the judgment if granted, cannot be said to have been granted erroneously in the light of a subsequent disclosed defence. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, could not transform a validly obtained judgment into an erroneous one.⁸

⁵ *Lodhi 2 Properties Investments CC & another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at par [25]-[27].

⁶ *Rossiter v Nedbank Ltd* (96/2014) ZASCA 196 (1 December 2015) at par [16].

⁷ *Zuma supra* at par [63]-[64].

⁸ *Lodhi 2 supra* at par [27].

16. With regard to the second jurisdictional condition, the Constitutional Court explained that the words ‘granted in the absence of any party affected thereby’, as they exist in Rule 42(1)(a), exist to protect litigants whose presence was precluded, not those whose absence was elected.⁹ Those words do not create a ground of rescission for litigants who were afforded procedurally regular judicial process, but opted to be absent. It is thus at its own peril where a litigant elected not to participate in the proceedings, and such elected absence could not have the effect of turning a procedurally competently granted order into one erroneously granted, as contemplated by Rule 42(1)(a). The issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that such a procedural error is committed. In this regard, the Constitutional Court pertinently stated as follows:

*“... I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, ipso facto (by that same act), plead the “absent victim”. If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing absentia (absence).”*¹⁰

17. Having received adequate notice of the relief that may be granted in its absence, the failure of an affected litigant to take steps to protect his interests by joining the fray, ought to count against him. A defendant is expected to protect its interests by keeping in touch with the progress of the litigation against it and, once its opposition to it is serious, by joining the fray and by its appearance or representation in Court.¹¹ A party who did not oppose or participate in the proceedings, would not be entitled to relief under Rule 42(1)(a). This is not only logical and fair, but accords with the fundamental principle of finality of litigation.

⁹ Zuma *supra* at par [56].

¹⁰ Zuma *supra* at par [60].

¹¹ See in this regard *Freedom Stationery supra* at par [25]; *Ex parte Mason* 1981 (4) SA 648 (D) at 651C-D.

18. At common law, a judgment can be set aside on the grounds of fraud, *justus error* (on rare occasions), in certain exceptional circumstances when new documents have been discovered, where judgment had been granted by default, and in the absence between the parties of a valid agreement to support the judgment, on the grounds of *justa causa*.¹² In order to succeed with an application for rescission of judgment taken against it by default, an applicant must show good or sufficient cause.¹³ Such an applicant must (i) give a reasonable and obviously acceptable explanation for his own default, (ii) show that his application is made *bona fide*, and (iii) show that on the merits he has a *bona fide* defence which *prima facie* carries some prospect of success.

Was default judgment against the RAF erroneously sought or granted?

19. The RAF contends that, at the time when default judgment was granted, there existed facts of which the court was unaware, which would have precluded the granting of such default judgment, and which the Court, if aware of it, would not have granted the judgment. In this regard, the RAF alleges as follows:

19.1 The industrial psychologist attributed the deceased's potential loss of earnings to be the respondent's loss of support, while the industrial psychologist ought to have indicated what amount was the deceased contributing as monthly or regular maintenance to the respondent. The actuary relied on this basis to compute the deceased's support to his surviving parents. Because the basis was wrong and factually incorrect, the conclusion is automatically erroneous.

19.2 The respondent is not indigent. Because of information that has been obtained from new documents discovered after the judgment, the RAF alleges that the respondent is a director of Tlou Mills, alternatively Botshelo Mills (Pty) Ltd, further alternatively Batho Bothle, and a farmer.

¹² Erasmus *supra* at D1 Rule 42-9.

¹³ Zuma *supra* at par [71].

20. Relying on the decision in *Childerly Estates Stores*¹⁴, Mr Malatji for the RAF submits that a judgment could be set aside on the ground of the discovery of new documents after the judgment has been given in certain exceptional circumstances. The new evidence discovered after default judgment was granted, allegedly discloses that the plaintiff is not indigent, but that he is self-sustainable without assistance and that he runs a successful business(s). However, the decision in *Childerley Estate Stores* is no authority for the proposition that the RAF may, as it proposes to do, introduce and rely upon “new documents” created only after default judgment was already granted.

21. Mr Malatji further submits that the meaning of ‘erroneously granted’ was explained in *Bakoven Ltd*¹⁵, as follows:

“An order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of 'a mistake in a matter of law appearing on the proceedings of a Court of record'. It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a Court of Appeal, confined to the record of proceedings. Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission.”

22. However, this aspect of the judgment in *Bakoven Ltd* was overturned by the Supreme Court of Appeal in *Lodhi 2*.¹⁶ In any event, a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously within the meaning of this subrule by reason of facts of which the court was unaware at the time of granting the judgment.¹⁷

23. Mr Keet for the respondent submits that, what is effectively being rescinded is the procedure in terms of which the judgment was granted, and therefore, by necessary implication, also the judgment, but the procedure followed both by the claimant/respondent and by this Court at the time when the default judgment was

¹⁴ *Childerly Estates Stores v Standard Bank of SA Ltd* 1924 OPD 163.

¹⁵ *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E)

¹⁶ *Lodhi 2 supra* at par [22]-[24].

¹⁷ *Lodhi 2 supra* at par [25].

granted, is not questioned at all by the RAF. A rescission of judgment in terms of Rule 42(1)(a) can only succeed if the procedure followed when the judgment was obtained was erroneous, or there was a procedural irregularity, as the focus of Rule 42(1)(a) is procedural and not substantive:

“...The purpose of Rule 42 is ‘to correct expeditiously an obviously wrong judgment or order’. An Applicant must prove that there is a procedural issue present which causes the judgment to have been erroneously sought or granted. In other words Rule 42(1)(a) caters for a mistake in the proceedings. A judgment cannot be said to have been granted erroneously in the light of a subsequent disclosed defence which was not known or raised at the time of the default judgment. ...”¹⁸

Fatally, the RAF has not even attempted to prove any procedural defect in the present case, and the procedure followed is not even put in issue by the RAF. This is dispositive of the attempt by the RAF to achieve rescission under Rule 42(1)(a).

24. In respect of the RAF’s contention that the basis for the calculation of the quantum was allegedly wrong and factually incorrect, and that the conclusion is automatically erroneous, Mr Keet pointed out that, as a matter of fact, there was before the Court when default judgment was granted, a computation made by the actuary against the RAF of *“The Capitalised Value of the Loss of Financial Support by the dependents of Mr E Labuschagne as a result of the accident”*. On the other hand, the preferred interpretation of this actuarial computation chosen by the RAF is merely speculative. The RAF clearly misunderstands the nature of the judicial exercise: *“In assessing the compensation [for loss of support] the trial Judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations.”*¹⁹ All the above-mentioned evidence as well as the actuarial and industrial psychological reports were properly before this Court before default judgment was granted. The application for default judgment was therefore procedurally in order.

¹⁸ *Hlatshwayo NO and another v Nedbank Limited and another* [2024] JOL 63169 (GP) at par [11].

¹⁹ *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 614.

25. Furthermore, the purported defences relied on by the RAF was at its disposal at the time the default judgment was granted and as such same cannot now, subsequently be disclosed and relied upon. What was missing was the RAF, it being in default.
26. With regard to the allegation that the respondent is not indigent, the RAF relies upon a “new document” - what appears to be every second page of an undated Draft Report from Kay Gee Investigations and Security, which allegedly defeat the claim of the claimant by revealing that he is not indigent. This document is incoherent as well as incomplete. It is furthermore not referred to in the founding affidavit and it is not an annexure thereto. This document is therefore inadmissible and stands to be ignored as *pro non scripto*.
27. In order to succeed with rescission of judgment by default at the common law, the RAF must establish "good cause" comprising of two essential elements, namely, both²⁰ –
 - 27.1 a reasonable and acceptable explanation for its default; and also
 - 27.2 a bona fide defence on the merits which, *prima facie*, carries some prospect of success.
28. There is no explanation in the RAF's founding affidavit, or elsewhere in the papers, for its default, and its papers are indicative of a total failure to offer any defence whatsoever to the default judgment application.
29. There is therefore no merit in the RAF's claim that the default judgment against it was erroneously sought or granted.

²⁰ *Van Heerden v Bronkhorst* 2020 JDR 2363 (SCA) par [19].

The RAF's absence

30. The default judgment in respect of the quantum of the claim was granted on 22 February 2023 in the undisputed absence of any representation for the RAF.
31. Mr Malatji relied upon the dictum in *Natal Joint Municipal Pension Fund v Endumeni Municipality*²¹ as referred to in *Oliver NO v MEC for Health*²², for the argument that the procedure prior to the granting of default judgement was defective because the plaintiff's amendment of its particulars of claim effectively reopened the pleadings and that the previously established *litis contestatio* fell away until such time as the pleadings are closed once again. On the basis hereof, Mr Malatji submits that the RAF was entitled to plead to the amended particulars of claim, failing which the plaintiff had to serve a notice of bar, and only if the RAF did not respond to such notice of bar, could the plaintiff apply for default judgment.
32. However, in interpreting this principle, Kruger J in *KS v MS*²³ said:

"Nor do I understand the judgment of Wallis JA to mean that any amendment, however immaterial or minor it may be, would result in a fresh litis contestatio. It is when the parties 'add to or alter the issues they are submitting to adjudication', by amendment or agreement, that 'a new obligation' comes into existence and a fresh situation of litis contestatio arises."
33. Rule 28(5) of the Uniform Rules of Court provides that, if no objection is delivered as contemplated in subrule (4) thereof, every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days after the expiration of the period mentioned in subrule (2) thereof, effect the amendment as contemplated in subrule (7). In the matter at hand, it is not in dispute that the RAF never objected to the amendment of the plaintiff's particulars of claim. The RAF is therefore deemed in terms of this subrule to have consented to the amendment.

²¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) at par [15].

²² *Oliver NO v MEC for Health: Western Cape Provincial Department of Health and another* [2022] JOL 56033 (WCC) at par [21]-[22].

²³ 2016 (1) SA 64 (KZD) at par [16].

The amended pages were furthermore before the Court when the default judgment was granted against the RAF.

34. While Rule 28(8) provides any party affected by an amendment with the opportunity, within 15 days after the amendment has been effected or within such other period as the court may determine, to make any consequential adjustment to the documents filed by him, or to take the steps contemplated in rules 23 and 30, the adjustments such an affected party may make are limited to consequential adjustments to any pleading already filed by him.²⁴ Contrary to the argument advanced on behalf of the RAF, such an affected party does not acquire the general right to plead to the amended particulars of claim.
35. The RAF furthermore seems to have lost track of the fact that this Court on 4 March 2022 granted an order for the striking out of the RAF's plea and defence. At the time when default judgment was granted against the RAF, this order remains valid and effective with the result that there was no plea already filed by the RAF before the Court to which the RAF could have made any consequential adjustments. The RAF also did not bring a substantive application for condonation to file a new plea against the amended particulars of claim.
36. Bearing in mind that an application for default judgment was served on the RAF already on 21 July 2022 - despite the previous striking out of its plea and defence, and that the claimant's Rule 28 application for the amendment of the quantum of its claim was also served on the RAF, the RAF was given adequate notice of the case against it, and had sufficient opportunities to participate in the matter. In the absence of any excuse or justification for its failure to participate in this action, the inference is inescapable that the RAF elected to be absent. A litigant's strategic election not to participate does not constitute 'absence' for the purposes of Rule 42(1)(a). The RAF therefore also fails to meet this jurisdictional condition of Rule 42(1)(a).

²⁴ Erasmus *supra* at D1 Rule 28-24.

Costs

37. The actions and/or omissions of the RAF are evidence thereof that the RAF does not regard the Uniform Rules of Court, or the orders granted by this Court, as binding on it. This rescission application seems to be yet another endeavour to delay the finalisation of the matter. This Court must show its displeasure with the actions, or the lack thereof, of the RAF in the hope that the RAF will be prevented from persisting with its dismissive and lackadaisical approach to the Uniform Rules of Court and its disregard of the orders granted by this Court. It is furthermore neither in the interest of the respondent, nor in the general public's interest, nor in the interest of justice, that the RAF be allowed to escape the finalisation of matters and orders against it.
38. Due to the RAF's complete disregard for the Uniform Rules of Court, and of orders granted by this Court, as the sole cause for the delay in the finalisation of this matter, the respondent unnecessarily had to incur additional legal costs to exercise its rights against the RAF. Such conduct warrants a punitive cost order against the RAF.

Order

39. The RAF's application to rescind the default judgment that this Court granted on 22 February 2023, is dismissed with costs on the scale as between attorney and client, including the costs of two counsel, where so employed.

Appearances:

For the Applicant: TM Malatji
 Applicant's Counsel

Instructed by:
 Thabang Shivambo
 RAF Link no: 5201581

For the Respondent: F de W Keet
Respondent's Counsel

Instructed by:
Alicia Steenkamp
Van Dyk Steenkamp Attorneys
Pretoria