



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Not Reportable

Case no: 14686/2024

In the matter between:

RASHIEDA SARLIE

Applicant

and

RUKEYA ELY

First Respondent

RUKEYA ELY N.O.

Second Respondent

**THE MASTER OF THE HIGH COURT,
CAPE TOWN**

Third Respondent

NEDBANK LIMITED

Fourth Respondent

Coram: JONKER AJ

Heard: 29 July 2025

Delivered: 30 July 2025

ORDER

1. Condonation for the late filing of the rescission application is granted.
2. The order of this court dated 6 August 2024 is rescinded.
3. The costs shall be costs in the main application.

JUDGMENT

JONKER AJ:

INTRODUCTION

[1] This is an application for rescission in terms of Rule 31(1)(b) and Rule 42(1)(a) of the Uniform Rules of Court, alternatively under the common law of a court order granted by Samela J on 6 August 2024 in motion court. The order was granted in the absence of any appearance or opposition, at the time that the matter was called and dealt with by the presiding Judge.

[2] The application is accompanied by an application for condonation for the late filing thereof. The applicant seeks an order setting aside the judgment granted, contending that it was erroneously sought and granted in her absence, despite her presence in court and intention to oppose, which was not brought to the court's attention until after the order had been issued.

FACTUAL BACKGROUND

[3] The applicant and the first respondent are sisters. Their mother passed away on 21 March 2023. She had executed two wills during her lifetime: one dated 26 April 2006 and another dated 17 July 2015.

[4] The 2006 will named all siblings, including the applicant and the first respondent, as beneficiaries, and appointed the first respondent as the executrix. The 2015 will, which was professionally drafted by Nedbank (the third respondent), nominated Nedbank as executor and named the applicant as the sole beneficiary.

[5] The estate was initially reported to the Master on the basis of the 2006 will, and the first respondent was appointed as executrix. However, upon discovery of the 2015 will, it was submitted to the Master, who then issued a notice to the first respondent in May 2024, advising of the newer will and revoking her appointment.

[6] In response, the first respondent launched an application in July 2024, seeking relief aimed at setting aside the Master's decision to revoke the 2006 will and her appointment, and to allow interested parties to make representations before any decision was taken by the Master.

[7] The applicant, having initially consented to the relief sought, signed a supporting affidavit, unaware at the time that the 2015 will had been accepted and that she had been named the sole heir. On 21 June 2024, Nedbank informed her of the existence and status of the 2015 will. The applicant then consulted with an attorney but, due to practical and financial constraints, legal representation could not be secured in time for the hearing of 6 August 2024.

[8] On the day of the hearing, the applicant attended court in person. However, she was only noticed by the usher and counsel after the matter had already been called and the order granted.

[9] Notably, while the notice of motion sought interim relief, final relief was handed up and granted by the court without prior notice to the affected parties, including the applicant.

[10] The applicant now seeks rescission of the order on the basis that it was erroneously granted in her absence and under a misapprehension of the facts. She also seeks condonation for the delay in launching this application, which was filed in November 2024.

PRINCIPLES OF RESCISSION

[11] There are three bases for rescission of a default judgment – rule 31(2)(b), rule 42(1)(a), and the common law. The substantive requirements for rescission are different under rule 42(1)(a) compared to rule 31(2)(b) and the common law.

[12] Under rule 31(2)(b) and the common law¹ a court has a general discretion to rescind. It will consider: (a) whether the applicant for rescission was in wilful default; (b) whether the rescission is brought in good faith; and (c) whether the defendant has a bona fide defence to the claim.² These are not formal requirements – the court retains a wide discretion.³

[13] Rule 42(1)(a) is different. The rule requires an applicant to show that the judgment was “erroneously sought or erroneously granted in the absence of any party affected thereby”. An order will be erroneously granted “if there existed at the time of its issue a fact which the court was unaware of, which would have precluded the granting of the judgment and which would have induced the court,

¹ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9E–F.

² See, for example, *EH Hassim Hardware (Pty) Ltd v Fab Tanks CC* [2017] ZASCA 145 at para 12.

³ *Wahl v Prinswill Beleggings (Edms) Bpk* 1984 (1) SA 457 (T).

if aware of it, not to grant the judgment.”⁴ It is not necessary for a party to show good cause under the subrule. In *Rossiter*, Mbha J wrote: “If the default judgment was erroneously sought or granted, a court should without more, grant the order for rescission.”

[14] A court does not have a discretion. This was confirmed by the Constitutional Court in *Ferris*.⁵

[15] In terms of the common law, a judgment may also be rescinded upon a showing of good cause, which includes: (a) a reasonable and acceptable explanation for the default; and (b) a bona fide defence that carries some prospect of success.

[16] The principles governing condonation applications are well established: the court has a discretion to be exercised judicially upon a consideration of all relevant facts, including the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case.⁶

ANALYSIS OF THE PLEADINGS AND CONDUCT OF THE PARTIES

[17] It is common cause that the court granted final relief on 6 August 2024 in the absence of the applicant, who was also unaware that the relief had shifted from interim to final. The applicant was physically present in court and wished to oppose the application but was not recognised as such until after the matter had already been disposed of, due to no fault of either the Court or Counsel, I might add. Motion Court proceedings are conducted in a fluid and expeditious manner, and matters are called and disposed of swiftly. Counsel for the first respondent concedes rightly so, when prompted by the court, that had the court known of her

⁴ *Rossiter & Others v Nedbank Ltd* [2015] ZASCA 196 at para 16.

⁵ *Ferris and Another v FirstRand Bank Ltd* [2013] ZACC 46; 2014 (3) SA 39 (CC); 2014 (3) BCLR 321 (CC) at fn 19.

⁶ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A)..

presence and intention to oppose on the day, the order would not have been granted. This alone, in my view, constitutes a material irregularity justifying rescission under Rule 42(1)(a). This Court has no discretion but to rescind the judgment on the basis alone.

[18] It is furthermore procedurally irregular and fundamentally unfair for an applicant to alter the relief sought in the notice of motion, post-service, and to present final relief on the day the matter is heard without providing proper notice to the respondents. The purpose of a notice of motion is to clearly set out the relief sought, thereby affording respondents a fair opportunity to consider, oppose, or consent to such relief. In the present matter, the relief initially sought was expressly framed as interim in nature. No amendment was affected to the notice of motion, and no communication was made to alert the respondents to the intention to pursue final relief. The fact that the Master may have filed a report — which, this Court has not seen — can only be assumed to have addressed the interim relief as set out in the original notice of motion, and not what was ultimately reflected in the draft order handed up.

[19] The submission by counsel for the first respondent that the Master did not oppose the relief and was abiding, does not cure this defect, as neither the Master nor any other respondent had knowledge of the change in relief. Litigants are entitled to know, with certainty, the nature and extent of the relief being pursued against them. The submission made by counsel that it was unnecessary to adhere to the original relief in order to avoid incurring further costs is wholly untenable and must be rejected. It is not open to an applicant to circumvent procedural safeguards under the guise of efficiency, particularly where the result is the granting of final relief in the absence of notice and due process.

[20] The applicant does however also comply with the requirements of Rule rule 31(2)(b) and the common law. The delay from August to November 2024 is explained by the applicant in a manner that is both plausible and reasonable.

She engaged legal assistance promptly after being notified by Nedbank of the status of the 2015 will. She was required to make financial arrangements, obtain access to the court recording from 6 August 2024, and received legal advice based on the audio recording, which was only accessed in the last part of October 2024 and which confirmed that the court had only been informed of her presence post facto.

[21] These steps demonstrate that the delay was not wilful or due to disregard of the Rules. I am satisfied that the applicant has shown good cause for the delay, and condonation is accordingly granted.

[22] Furthermore, the applicant has set out a bona fide defence. She avers that she is the sole beneficiary under the 2015 will, which was accepted by the Master, and disputes the assertion that her mother lacked capacity to execute that will. She contends that the first respondent's reliance on her prior allegations in protection order proceedings is taken out of context, as the averment of mental illness was aimed at halting familial coercion of the deceased in respect of changes to her will. Also, the protection order proceedings took place in 2021, 6 years after the conclusion of the 2015 will. The circumstances could notionally have been different.

[23] The applicant's claim that no expert or medical evidence was placed before the court to support an incapacity defence is unchallenged. These assertions raise bona fide disputes of fact which warrant proper ventilation in due course. This Court need not enter the merits at this stage other to establish that there is a triable issue.

[24] In light of the above, the applicant has demonstrated not only that the order was erroneously granted in her absence, but also that she has a bona fide defence with prospects of success.

CONCLUSION

[25] The court is satisfied that the applicant has provided a reasonable explanation for her delay and has demonstrated good cause for condonation. Furthermore, she has made out a compelling case for rescission under Rule 42(1), Rule 31(2)(a) and the common law.

COSTS

[26] The general rule is that costs follow the result. However, in view of the fact that the effect of this order is to restore the parties to the position they were at on at 6 August 2024, I consider it just and equitable that the costs of this rescission application be costs in the cause of the main application.

ORDER

[27] In the result, the following order is made:

1. Condonation for the late filing of the rescission application is granted.
2. The order of this court dated 6 August 2024 is rescinded.
3. The costs shall be costs in the main application.

E JONKER
ACTING JUDGE OF THE HIGH COURT

Appearances:

For applicant: Adv A Lawrence

Instructed by: Y Agherdien Associates

For First Respondent: Adv JT Benade

Instructed by: Mike Strydom Attorneys