



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

Case no: 11227/2024

In the matter between:

JOHAN LEWIS POTAS

FIRST APPLICANT

JAYEHMENN LEWIS POTAS

SECOND APPLICANT

and

VAN DER MERWE VENTER 24 (PTY) LTD

RESPONDENT

Heard: 08 August 2025

Delivered: 19 August 2025

Summary: Rescission application under Rule 42, alternatively, the common law. Applicants rely on Rule 42(1)(a), alternatively, the common law. Applicants contend they were not properly served with the Respondents' papers in the money judgment based on an acknowledgement of debt. Requirements for a valid acknowledgement of debt revisited. Loose and imprecise reference to and usage of provisional sentence proceedings, negotiable instruments, and suretyship is not encouraged. There is a limit to which Applicants can attribute blame to the opponent's legal representatives before it becomes untenable, if not unbelievable. Applicants fail to make out a case for rescission.

ORDER

The application for rescission of the order of 18 June 2024 under case number 11227/2024 is dismissed. The Applicants shall pay the Respondent's party and party costs and Counsel's fees on scale B as taxed or agreed.

JUDGMENT

Bhoopchand AJ:

[1] The Applicants apply for rescission under Rule 42 of the Uniform Rules of Court ('URC'), alternatively under the common law, of the order by default granted on 18 June 2024. They allege that the order was erroneously sought and/or erroneously granted. They, in addition, seek leave to oppose the application instituted by the Respondent for R810 374.90. The First Applicant deposed to the founding affidavit.

[2] The First Applicant explained that the cause of action was an acknowledgement of debt. He denies that either he or the Second Applicant is indebted to the Respondent in their personal capacities or their capacities as directors of Fulani Investments (Pty) Ltd ('Fulani/the business'), which the Respondent liquidated. The First Applicant believed that the amount claimed by the Respondent may have been extinguished or significantly reduced by the sale of the business and assets owned by Fulani to another entity, which continued operating the business using the assets and accounting procedures of Fulani.

[3] Fulani concluded a lease agreement with the Respondent to rent premises in Paarden Eiland on 23 March 2021. The Respondent did insist on security to cover Fulani's debts. Fulani experienced financial difficulties during 2022 and 2023 and fell into arrears with its rental payments. The Respondent instituted liquidation

proceedings against Fulani in 2023. Fulani was indebted to the Respondent for R766 877.51 as of 9 May 2023. To prevent the liquidation, Fulani agreed to sign an acknowledgement of debt ('AOD'). The Applicants were included as parties in the acknowledgement of debt process. The Applicants contend that they were not sureties under the lease agreement and, in the absence of a deed of suretyship, they were not indebted to the Respondent for any amount. The Applicants claim that the Respondent's attorney placed undue influence on them to sign the AOD. They allege that the Respondent's attorney did not explain to them that the AOD would bind them personally for the debt owed to the Respondent by Fulani. After signing the AOD, Fulani and the Respondent concluded a settlement agreement under which the liquidation proceedings were settled. Still, the Respondent reserved its rights to continue with the liquidation application should Fulani fail to discharge its payment obligations as per the settlement agreement. The Applicants assert that the underlying *causa* of the settlement agreement was the arrears of rent under the lease agreement. Neither the Respondent nor Fulani intended to novate the lease agreement and the obligations arising thereunder. The latter was evinced by the Respondent proceeding with the liquidation of Fulani based on the lease agreement and the arrears accumulated thereunder. Fulani was unable to discharge its payment obligations under the settlement agreement, with the result that the Respondent proceeded to liquidate Fulani.

[4] Fulani was placed under provisional liquidation on 30 November 2023 and finally liquidated on 5 February 2024. After the final liquidation was granted, the Applicants were not permitted to enter the leased premises. All Fulani's assets and accounting documents were left in the premises. The Applicants learnt sometime after that, Fulani's assets were transferred to a new entity, which continued with Fulani's business. The Applicants allege that Fulani's assets were acquired at a value exceeding R3 million. As of 2023, Fulani's assets were insured for R1.6 million. They requested, but did not receive from the liquidators, the sale proceeds achieved. They contend that the debt owed by Fulani would have been discharged in total from the sale of Fulani. They were unable to determine whether Fulani's debt was discharged in full. The Court notes that the Applicants were unable to support any of these allegations and relied upon the Respondent to answer them.

[5] The default judgment was for R810 374.90. The application for default judgment was served on Ms Buys, their secretary, on 15 May 2024. Ms Buys could not have accepted service as she was on sick leave. On 10 June, the Respondent subpoenaed the Applicants to appear at the second meeting of creditors at 09h00 on 18 June 2024. The Applicants suggest that the Respondent, in collusion with the liquidators, arranged the second meeting of creditors for the same day on which the application for default judgment was enrolled. They allege that they learnt of the application a few days before 18 June 2024, but after they received the subpoena to attend the creditor's meeting. The First Applicant states he contacted the Respondent's attorney to inform him of the situation that required them to attend the Court and the creditor's meeting simultaneously. The Respondent's attorney advised him that, as they had failed to enter an appearance to oppose the application, there was nothing the Applicants could do to prevent the relief sought in the default application from being granted. They understood their attendance at Court would be futile. They took the advice of the Respondent's attorney as being correct. They did not attend Court as they did not want to attract criminal sanctions by ignoring the subpoena and avoid contempt proceedings and incarceration. The Applicants state they did not appoint an attorney because of their ignorance of correct legal procedures. They did not know that they could have filed an intention to oppose to stave off the default judgment. Their non-attendance at Court was not wilful or *mala fide*.

[6] The First Applicant states that ' the Respondent's attorney did not report to him or the Second Applicant on the outcome of the proceedings on 18 June 2024. They were advised for the first time on 7 August 2024 that the order had been granted. On 7 August 2024, the Sheriff attended to attach property pursuant to a writ of execution arising from the order granted on 18 June 2024. They state that there was no correspondence from the Respondent's attorneys demanding payment of the judgment debt before the Sheriff attended their offices to execute on it. The Court feels compelled to note the theme that permeated the Applicants' papers, whereby they attributed responsibility to everyone else but themselves and failed to provide a satisfactory explanation for their inaction.

[7] The Applicants contended that a judgment is erroneously granted if there existed at the time of its issue a fact of which a 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. If the facts of the matter disclose that it was not legally competent for the Court to have made the order, or if the capital claimed by the Respondent may have already been paid. The Applicants submitted that their case falls within these categories.

[8] They assert that their *bona fide* defence is that they were not at any stage indebted to the Respondent in their personal capacities, and the absence of a deed of surety means they are not liable for the debt of the company. The AOD records that the Applicants are indebted to the Respondent for R766 877.51. They assert that an acknowledgement of debt cannot be used to create a liability retroactively. They contend that the AOD lacks the necessary elements to impose personal liability upon them. They did not have the necessary *animo contrahendi* to bind themselves personally for the discharge of Fulani's obligations. They submit that the AOD can only be viewed as an undertaking to facilitate payment on behalf of Fulani. There was no prior personal debt for them to acknowledge. The AOD was either a mistake or a deliberate misrepresentation. The AOD did not meet the legal requirements for a deed of suretyship.

[9] Fulani's indebtedness under the lease agreement amounted to R766 877.51. The deposit paid to the Respondent was also not considered. The Applicants contend that they will suffer severe prejudice if the application for rescission is not granted. They will be held liable for a debt they did not incur in terms of an AOD for which there is no underlying cause. The Respondent may recover more from them than they could recover from Fulani. They seek the opportunity to place their defences before this Court. The only prejudice the Respondent can suffer is a delayed hearing of its case after pleadings have been exchanged. The legal costs it incurs would have been anticipated by the Respondent when it instituted these proceedings.

[10] Tyrone Kleinjan, a director of the Respondent, deposed to the answering affidavit. He averred that the AOD constitutes a liquid document entitling the

Respondent to apply for a provisional sentence under Rule 8 of the URC. The liquidity of the AOD was not affected by the underlying *causa*. The *causa debitoris* does not have to appear *ex facie* the document. The Respondent asserted that the AOD was in effect akin to a suretyship as it complied with all the legal requirements of a suretyship.

[11] The Respondent admitted that the Applicants were not indebted to the Respondent in their personal capacities before the signing of the AOD. Still, they, to gain an advantage for Fulani, accepted liability jointly and severally with Fulani. The latter constituted an indebtedness by them to the Respondent and constituted a cause of action against them. The AOD was secured after a provisional liquidation order was granted against Fulani. The Applicants met with the Respondent as they wished to negotiate to halt the liquidation proceedings. The Respondent agreed to negotiate, provided the Applicants signed the AOD and thus accepted responsibility for Fulani's debt. The Applicants had to pay R150 000 immediately as part payment of Fulani's debt. He met with the Applicants on 9 May 2024. The Applicants agreed to the Respondents' terms and conditions.

[12] The AOD was specifically worded as the Applicants failed to sign a deed of suretyship when Fulani entered into the lease agreement. The Respondents then prepared a settlement agreement in the liquidation application, which would have the effect of postponing the liquidation *sine die*. The settlement agreement was concluded on 12 May 2023. The Applicant's attorney denied speaking to the Applicant about the AOD before it was signed. The Applicants trade as Accountants in Malmsbury. They cannot claim ignorance of an AOD. The Respondent proceeded with the liquidation application as the Applicants and Fulani had breached the AOD and the terms of the settlement agreement. Fulani was finally liquidated on 5 February 2024.

[13] The liquidators valued Fulani's assets at R453 350. They sold the assets for R230 000. The Liquidators hold the funds. Fulani's business was not sold. An entity conducting a similar business operates from the same premises. The insurance valuation of Fulani's assets contained stock and other assets that did not exist when Fulani was liquidated. The Master of the High Court approved the sale of Fulani's

assets. The Applicants declined the opportunity to object thereto, apply to set it aside, or to participate in liquidating Fulani's assets. The debt owing to the Respondent increased until the premises were re-let.

[14] The Respondent asserted that the provisional sentence application was served on the Applicants at their offices in Malmesbury. The Sheriff would not have known the surname of the Applicants' secretary unless she told them so. The Respondent did not serve the subpoena to attend the creditors' meeting of Fulani. The Registrar grants the Court date. The Master determines the date for appearance at a creditor's meeting. The First Applicant told the representative of the Respondent's attorney that he was aware of the application in the High Court. It was simply by coincidence that these two events fell on the same day. The Respondent's attorney denied that he ever had a conversation with any of the Applicants. The only conversation he had was when he was phoned and asked whether he was prepared to accept an arrangement to pay the outstanding amount in instalments.

[15] The Respondent submits that the Applicants do not have a *bona fide* defence or a defence that has any prospect of success. The deposit paid on behalf of Fulani was taken into account in calculating the outstanding debt. Respondent denies that the Applicants will suffer any prejudice if the rescission application is unsuccessful, as their defence is without merit.

[16] In reply, the Applicants denied that the AOD is akin to a surety agreement. The agreement signed by them does not comply with the legal requirements of a surety agreement. They state that the liquidation application was addressed in the settlement agreement, which was signed and obliged Fulani to pay the Respondents' debt to postpone the liquidation. Fulani was also required to pay the agreed instalments on the debt. Fulani did make the first payment of R150 000. The Respondent reserved the right to continue with the liquidation if the terms of the settlement agreement were breached. It was incorrect for the Respondent to state that it reserved the right to continue with the liquidation if the terms of the AOD were breached.

[17] The Applicants deny that the valuation placed on Fulani's assets and the sale thereof was for fair value. They deny that there was any rental payable post-liquidation. The new company started trading before the liquidation was finalised. The Applicants admit that they sent an email to the Respondent to suggest a payment plan for the amount ordered by the Court to avoid their property being sold. They reassert that they did not have legal knowledge and did not know their options. It was only after consulting their legal representatives that they realised they could apply for rescission. They reassert that they were advised it was too late for them to do anything to stave off the default judgment. They were made to understand that appointing an attorney would be futile. Had they known that they could oppose the application, they would have done so. They rejected the accusation that they were guilty of fraud. They reiterated that they did not pay any amount under the AOD, and any payments made to the Respondent were by Fulani in terms of the settlement agreement. The new entity used their equipment, accounting software and even their VAT number for a period, and their invoice numbers continued where Fulani's ended. Some of Fulani's invoices were paid to the new entity. The Applicants did not provide any documents to support the latter contentions.

[18] The Applicants insisted that they could explain their failure to defend the main application. The Respondent misrepresented the agreement it sought to enforce against them. It is unclear as to whether they refer to the agreement underlying the AOD or that of the settlement agreement. The Applicants' mistake as to the true character of the agreement resulted in an *iustus error*, which they contend is a *bona fide* defence to the main application. The defence of *iustus error* was pleaded as a sustainable *prima facie* defence that the Applicants sought to advance in the main application if granted leave to do so. They asserted that they would suffer greater prejudice than the Respondent, should the default judgment not be rescinded, hence the balance of prejudice favoured the rescission of the default judgment.

EVALUATION

[19] The first issue of precedence in this evaluation is to address the loose, imprecise, and incorrect usage of terminology in the Respondent's answering affidavit. Respondent referred to its entitlement to apply for a provisional sentence

under Rule 8 of the URC. The Respondent later denied that the AOD is without any legal force and that it could not be relied upon to obtain provisional sentence against the Applicants. Concerning the AOD, the Respondent stated that although it is headed AOD, it is in effect akin to a suretyship as it complies with all the legal requirements of a suretyship. Further in the founding affidavit, the Respondents state that the AOD was worded as it is because the Applicants failed to sign a deed of suretyship when Fulani entered the lease agreement. These themes prevailed in the Respondent's written and oral submissions. Apart from causing confusion, the procedure adopted by the Respondent that led to the order of 18 June 2024 and the instrument upon which the application was premised is clear from those papers.

[20] The Respondent did not institute action proceedings for provisional sentence. The Respondent proceeded on application for a money judgment based on the AOD. The terminology used by the Respondent is not merely semantic, as it determines the nature of the remedy available to the Applicants. A provisional sentence is a specialised summons-based procedure for enforcing liquid documents like an AOD. There is no procedural irregularity in applying for a money judgment based on an AOD. Although the answering affidavit loosely refers to provisional sentence, that reference need not be fatal. The reference to provisional sentence was not indicative of an intention to invoke Rule 8 of the URC. The Respondent therefore obtained default judgment on an application for a money judgment on notice of motion and no further explanation or analogy was required. In the absence of factual contestation, the issue of a dispute of fact on application proceedings did not arise. The Court proceeds to assess the rescission application under Rule 31 and the common law. The court must be guided by substance rather than form, and where no prejudice is occasioned, a mischaracterisation of the procedural label is not fatal to the relief sought.

[21] The Respondent, having obtained an acknowledgement of debt (AOD) signed jointly and severally by Fulani and the two Applicant directors for outstanding rental under a lease agreement, was entitled to pursue enforcement of the AOD independently of the company's liquidation. The AOD did not novate the original obligation but suspended the remedy until the AOD matured or was dishonoured, following the principles articulated in *Adams v SA Motor Industry Employers*

*Association*¹. The Respondent's election to proceed against the Applicants personally, and culminating in a default judgment, was procedurally sound given their failure to oppose despite notice. The directors' liability under the AOD was not contingent upon the finalisation of the liquidation, and the Respondent was not obliged to await the outcome of that process before seeking judgment.

[22] However, the Court notes that the Respondent did not disclose the status of the liquidation process or the likely yield in its papers informing the application for a money judgment. The Respondent's omission to disclose the ongoing liquidation, and the anticipated dividend from the insolvent estate raises concerns of procedural candour and equitable accounting. While such omissions do not vitiate the judgment *per se*, they may be material to a rescission application. The onus is on the Respondent to account for any yield from the liquidation to avoid double recovery and must reconcile the interdependent remedies flowing from the original obligation and the AOD. The enforcement of the AOD, though valid, had to be tempered by the overarching duty of good faith and the equitable imperative to prevent unjust enrichment.

[23] The Respondent's submission that the AOD constituted a deed of suretyship is also incorrect. The Court does not agree with the Respondent when it characterises the AOD as a deed of suretyship. The surrounding circumstances that led to the conclusion of the AOD are part of a process that validates the AOD and not a deed of suretyship. The process in concluding a deed of suretyship differs materially from that of an AOD, but this does not constitute a ground that could find favour for the Applicants. The document is a valid AOD. The Court can, in the circumstances, do nothing further than warn against the loose reliance on and usage of terminology. It could well be material in an application of this nature.

[24] The Applicants rely on Rule 42(1)(a) or, in the alternative, the common law in their application for rescission of the order of 18 June 2024. Under Rule 42(1)(a), a Court may, on application, rescind an order obtained in the absence of any affected party if it was erroneously sought or erroneously granted. The two other sub-rules

¹ 1981 (3) SA 1189 (AD) at 1190 C-E

allow for rescission if there is an ambiguity or a patent error or omission to the extent of such ambiguity or omission, or in the circumstances of a mistake common to the parties. The Applicants undertook to provide sufficient or good cause to substantiate the application for rescission under the common law.

[25] Rule 42 allows for the expeditious correction of a wrong judgment or order.² The elapse of time since the delivery of the judgment or knowledge of the judgment would influence the Court's discretion in granting or refusing the application.³ The Applicants instituted this application eleven weeks after the order was granted, asserting that they obtained knowledge of the order only when the Sheriff arrived to attach their belongings. They contended that it was incumbent upon the Respondent's attorney to inform them of the order. As alluded to earlier in this judgment, these types of excuses hold no water. The Applicants were aware of the application and the order. The concurrence of the application and the insolvency hearing was not of the Respondent's making. The Applicants did not have to be present at the application proceedings. They attempted settlement of the order before consulting a lawyer who advised seeking rescission. The Respondent asserted that it is common cause that the Applicants were physically absent when the order was granted, but that was by their own election. The words 'granted in the absence of any party affected thereby' in sub-rule 1(a) were to protect litigants whose presence had been precluded and not those who had been afforded regular judicial process but opted to be absent or whose absence was elected.⁴

[26] The submission that service was not properly effected as Ms Buys was on sick leave is unsustainable. How would the Sheriff have known that the person accepting service at the office of the Applicants was Ms Buys if the latter did not give her name? The Applicants do not dispute that service was effected at their office. This period between service and the granting of the order is characterised by their inactivity. They sought to evade responsibility for their inactivity by, once again,

² *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471 E-F

³ *First National Bank of Southern Africa Ltd v van Rensburg NO: in re: First National Bank of Southern Africa Ltd v Jurgens* 1994(1) SA 677 (T) at 681 B-G, *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) 411 (C) at 421 G

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* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) at para 56('Zuma')

attributing blame to the Respondent's attorney. The Applicants are Accountants, professional people, and businessmen who managed a substantial business, Fulani. It is untenable for them to contend that they relied upon the opponent's attorney to inform them of the process and that they were ignorant of the law. The procedure they had to follow was set out in the Notice of Motion. The Applicants rendered an unsatisfactory account of how they became aware of the application for the money judgment that was subsequently granted by default. The Respondent submitted that a return of service of a duly appointed Sheriff constituted *prima facie* proof of the matter stated therein.⁵

[27] The Respondent's attorney denied giving the Applicants any advice or consulting with them during the times material to this application. All the Applicants had to do was notify the Respondent's attorney that they intended to oppose the application, appoint a service address, and file their answering affidavit. They did nothing. There is no merit in this peripheral ground raised by the Applicants to justify the rescission of the order. The delay in instituting the rescission application would, on its own, have been fatal to the application. Still, the Court shall consider the merits of the grounds raised by the Applicants under Rule 42 and the common law.

[28] Once one of the grounds is established, e.g., that the judgment was erroneously sought in the absence of a party affected by it, the rescission of the judgment should be granted.⁶ In *Zuma*, the apex Court tempered the latter *ratio* by stating that once an Applicant has met the requirements for rescission, a Court is merely endowed with a discretion to rescind the order. It does not compel the Court to do so.⁷ Absence and error are two separate requirements.

[29] The Applicants' defences are based on mistakes committed by them and misrepresentations made to them. To the extent that the Applicants relied upon Rule 42(1)(a), the only question is whether the judgment was erroneously sought or

⁵ S43(2) of the Suoerior Courts Act 10 of 2013, Rule 4(6)(a), *Greef v First Bank Ltd* 2012 (3) SA 157 (NCK) at 160D.

⁶ *Mutebwa v Mutebwa* 2001 (2) SA 193 (Tk) at 199 I-J

⁷ *Zuma* supra at para 53

granted. Rule 42 caters for mistakes.⁸ The Applicants assert that to constitute *iustus* error relating to the conclusion of the AOD, a mistake implies a misunderstanding, misinterpretation, and resultant poor judgment and exacts a weaker standard of scrutiny than an error in imputing blame or censure.⁹ The Applicants suggest that they laboured under a mistake that forms the basis to resile from the contract. The contract referred to concerns the AOD.

[30] The Applicants contend that the wording of the AOD, which states that they acknowledged that they were truly and lawfully indebted to the Respondent jointly and severally, the one paying the other to be absolved, for the amount of R766 877.51 instead of arrears, rentals and services, under certain terms, was false. The Applicants did not provide surety for the lease, and their evidence that they did not do so was uncontested. They submit that, against this, there is an untrue acknowledgement that the Applicants were jointly and severally liable to the Respondent.

[31] The Applicants allege that the Respondent's attorney misrepresented the document to them, and the issue of whether the misrepresentation is true is not a matter before this Court. The Trial Court will determine that issue. The Applicant's intention was to assist Fulani in meeting its obligations, not to bind themselves personally for Fulani's obligations. The Applicants then proceeded to justify the reasonableness of their mistake. They raised, among others, their vulnerability as lay litigants, the ambiguous wording of the AOD, and the context of the liquidation of Fulani and the purpose of the negotiations between the parties.

[32] An examination of the AOD indicates that the Applicants admission of liability for the debt is unambiguous and express, not contingent or qualified. It was signed by both parties in the presence of witnesses. The AOD specifies the exact amount owed, the origin of the debt, i.e., the lease agreement, the interest rate payable, repayment terms, and default consequences. It reflects the full names of the debtors, including their identity numbers and the registration number of Fulani. On the face of

⁸ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) ('Colyn') at para 5,

⁹ *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) at 238 H

it, it is a properly executed AOD and thus a liquid document that can serve as prima facie proof of indebtedness, permitting the Respondent to act on it in certain prescribed ways.

[33] The Respondent answered that the Judge who granted the default judgment order would not have known whether the Applicants signatures were appended to the document or not. This had to be accepted at face value. The Court did not err in this regard. The Applicants were prepared to accept liability in their personal capacity jointly and severally for the debt of their company owed to the Respondent. The Applicants did not dispute the debt owed to the Respondent.

[34] The Applicants persisted with their untenable contentions that they were unrepresented and susceptible to influence and that they placed reliance on the Respondent's legal representative throughout. The Respondent's attorney denied any interactions with the Applicants relating to the AOD. The Respondent's director discussed the AOD with the Applicants, and the wording of the document, which they signed, is clear in its meaning and is distinguishable from being a trap for the unwary as contended by the Applicants.¹⁰ There is a limit to which the Applicants can point a finger at their opponents before these excuses become untenable and unbelievable. As for the alleged misrepresentation, the conclusion of the AOD occurred in circumstances where the Applicants attempted to avoid the liquidation of Fulani, and they agreed to sign the AOD under the understanding that the liquidation would be deferred, provided they paid the amounts agreed to. The circumstances leading to the signing of the AOD belie the Applicant's contentions regarding misrepresentation. The Applicants do not suggest that the Respondent committed any irregularity in the process.

[35] As for the Applicants contention that the claim may have been settled through the liquidation process and the takeover of their business by another entity, the Respondents provided proof that there was no substance to these contentions. The Applicants assets were sold in a forced sale, and the Respondent denied that the

¹⁰ *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) at 426 B-F

new entity that took over the Applicant's business or benefited from the Applicants name, assets, or accounting procedures.

[36] The Applicants have failed to establish that the order to be rescinded was granted erroneously, nor that any good or sufficient cause exists for the order to be rescinded. They do not have a reasonable or acceptable explanation for their default, or a *bona fide* defence which carries any prospect, let alone on even a *prima facie* basis, for succeeding with the application for rescission of the order of 18 June 2024. There was no mistake in the proceedings, no procedural irregularity, and no mistake in respect of the issue of the order. The Applicants purported to introduce a defence, but the existence of a defence is, in any event, an irrelevant consideration after the fact of the order being granted, as it cannot transform a validly obtained judgment into an erroneously granted judgment.¹¹ The order was not erroneously sought or erroneously granted.

[37] An application for rescission of judgment on common law grounds includes fraud, *iustus error*, the discovery of new documents, default judgment and the absence of a valid agreement and *iustus causa*. An application on common law grounds must be brought within a reasonable time.¹² The test for rescission under the common law is that the Applicants must establish that they had a reasonable and satisfactory explanation for their failure to oppose the proceedings, and that they had a *bona fide* case that carries some prospects of success.¹³

[38] The Applicants must detail a reasonable explanation for the sequence of events that led to the default. If the default was due to gross negligence, the Court should not come to the Applicants assistance. Their case must be based on good faith, with a genuine defence, and not instituted for delay.¹⁴ Under the common law, the Applicants are only required to make out a *prima facie* defence by setting out

¹¹ *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (60 SA 87 (SCA) at paras 17 and 27.

¹² *Money Box Investments 268 (Pty) Ltd v Easy Greens Farming and Farm Produce CC* case number: A221/2019 GP, 16 September 2021 at para 7

¹³ *Zuma* at para 71

¹⁴ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at para 11, *Greenberg v Meds Veterinary Laboratories (Pty) Ltd* 1977 (20 SA 277 (T) at 279

averments which, if established at the trial, would establish a defence.¹⁵ The Applicants rely on the same assertions supporting their application for rescission under Rule 42(1)(a) to found their case for rescission under the common law. They have not made out a case for rescission under either Rule 42 or the common law.

[39] It follows that the application must fail. The Respondents sought their party and party costs with Counsel's fees on scale C. The defence of this application was not complex enough to warrant the Court granting Counsel's fees on the C scale. The Court shall grant the appropriate order incorporating costs.

ORDER

The application for rescission of the order of 18 June 2024 under case number 11227/2024 is dismissed. The Applicants shall pay the Respondent's party and party costs and Counsel's fees on scale B as taxed or agreed.

BHOOPCHAND AJ
Acting judge
High Court
Western Cape Division

Judgment was handed down and delivered to the parties by e-mail on 19 August 2025.

Applicant's Counsel: A J Van Aswegan
Instructed by: Bester and Lauwrens Attorneys
Respondent's Counsel: J C Tredoux
Instructed by: Jordaan & Ferreira Inc

¹⁵ *RGS Properties (Pty) Ltd v Ethekwini Municipality* 2010 (6) SA 572 (KZD) at para 10