

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2019/23341 and 2019/23342

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
15 September 2025	
DATE	SIGNATURE

In the matter between:

MARK MCKINNON DEMPSTER

Applicant

and

SANLAM LIFE INSURANCE LIMITED

Respondent

JUDGMENT

PILLAY, AJ

Introduction

- [1] The applicant applies, under uniform rule 42(1)(a), for the rescission of the judgment handed down by then Mooki AJ (as he then was) on 6 September 2022 under above case number 23342/2019 in terms of which the applicant's special

plea, plea, and counterclaim (as amended) were struck out and the applicant was ordered to pay arrear rental, holding over damages, and reinstatement costs together with interest, and costs on an attorney and own client scale.

[2] The applicant also applies, on the same basis, for the rescission of a near identical judgment handed down by Carrim AJ on 6 October 2022 under case number 23341/2019.

[3] The applicant contends that both judgments were erroneously sought and erroneously granted because the applicant did not read the email from the respondent which contained the application to strike out. According to the applicant, if this fact was known to both Mooki AJ (as he was then) as well as Carrim AJ, they would not have granted the said judgments.

[4] The respondent opposes the applications on the basis that:

4.1. The orders were correctly sought and correctly granted. There was no legal impediment to either of two judgments being granted;

4.2. Service of the applications to strike out was effected in compliance with uniform rule 4A. In this regard, the email addressed used by the respondent for the service of process on the applicant is the one furnished by the applicant and registered on caselines; and

4.3. The applicant's conduct in disregarding the application to strike out was consistent with its chronic recalcitrance and failure to respond to court processes.

[5] While not formally consolidated, given that the matters under case number 23341/2019 and case number 23342/2019 are almost identical, the two rescission applications were dealt with as one during the hearing of the applications with argument addressed specifically in regard to 2019/22341. The applicant accepts that, given the stark similarities, the outcome of that case would also apply to case 2019/22342. In keeping with this approach, I hand down one judgment that addresses both matters.

The facts

- [6] I record below the facts pertinent to 2019/22341. The dispute involves a written lease agreement concluded between the applicant and the respondent for the premises known as Floor 3, Office No. 03 - 14, the Forum, Sandton Square, Sandton. The respondent issued summons against the applicant for breach of the lease agreement alleging that the applicant failed to pay the basic monthly rental and other charges payable in terms thereof.
- [7] The respondent alleges that, as a result of the applicant's breach, it cancelled the lease agreement. It also alleges that the applicant acted wrongfully and unlawfully in failing to vacate the premises after the lease agreement was cancelled.
- [8] On 1 October 2021, the respondent brought an amended application for summary judgment in which it sought:
1. Payment of the sum of R926 217.92;
 2. Interest on the aforesaid amount at 12.25% a tempora morae;
 3. Payment of holding over damages in the amount of R312 711.88; 4.
 4. Payment of reinstatement costs of the premises in the amount of R68 520.00.
- [9] The applicant opposed the application for summary judgment but failed to file his heads of argument and practice note.
- [10] Following a number of unsuccessful requests for the applicant to deliver his heads of argument and practice note, the respondent brought an application to compel the delivery thereof.
- [11] The application was not opposed. On 12 July 2022, Matojane J granted an order compelling the applicant to, within three days from the date of his order, deliver his heads of argument and practice note. The applicant failed to comply with this court order. The respondent then brought an application to, inter alia, strike out the applicant's defence. This application was eventually granted on a default basis by Mooki AJ (as he was then)

[12] In response, the applicant instituted the rescission applications. The founding affidavits are deposed to by the applicant's attorney of record, Ms Jocelyn Dempster, who also happens to be the applicant's daughter. Ms Dempster contended in the founding affidavit that the judgment was erroneously sought and granted in her client's absence given that she did not receive service of the application to strike. Ms Dempsey contends that it was only on 7 December 2022, after the applicant's bank account was frozen and the judgment came to her attention. Ms Dempster indicated that, had she been aware of the application to strike, she would have instructed counsel to draft heads of argument and to appear at the hearing.

[13] Ms Dempster also contends that there was a "standing arrangement between opposing attorneys" that whenever there was electronic service of legal process, should there be no confirmation of receipt there would be telephonic confirmation.

[14] Mr Dempster deposed to the replying affidavit. He alleged that it was established that the application to strike which had been sent, had ended in his attorneys spam inbox.

[15] The respondent disputes the "standing arrangement" and alleges that it has no knowledge of whether or not the email ended in Ms Dempster's spam box.

The applicable legal principles

[16] Rule 42(1) reads 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 —

- a. an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
- b. an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
- c. an order or judgment granted as a result of a mistake common to the parties.'*

[17] An applicant for rescission under rule 42(1)(a), must 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, if aware of it, not to grant the judgment.¹

[18] A Court has a discretion whether or not to grant an application for rescission under rule 42 (1), and that relief will be granted if there was an irregularity in the proceedings, or if facts existed at the time the order was made, of which the Court was unaware of, and which, if known to it, would have precluded the granting of the order.

[19] Our courts have also held that the absence of proper notice may result in a judgment being erroneously granted. In ***Lodhi 2 Properties Investments***², Streicher JA held:

*'Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. . .'*³

Application to the facts

[20] The applicant argues that had Mooki AJ (as he was then) and Carrim AJ known that the application to strike, although emailed to the correct e-mail address, had gone to spam they would not have granted the judgment.⁴ Thus the judgment was erroneously granted.

¹ *Pro Media Drukkers en Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 (C)

² 2007 (6) SA 87 (SCA)

³ n 2 above Paragraph 24

⁴ Applicant's heads para 22

[21] However, this is not the case made out in the founding affidavit in this rescission application. Ms Dempster, the deponent to that affidavit, alleges in paragraph 6 of her founding affidavit that:

“On 11 August 2022 the Respondent in this matter sent an application to strike out the defence and counterclaim of the Applicant. The aforementioned application did not come to my attention and the first time I became aware of this application had been after the learned Judge Carrim granted an application to strike the defendant's plea and counterclaim on 7 December 2022 when the Applicant's bank account had been frozen.”

[22] It is noteworthy that Ms Dempster does not allege under oath in the founding affidavit that the email went to a spam folder. Instead, this allegation emerged for the first time in the supplementary affidavit deposed to by Mr Dempster where he states that: “I then established that the application to strike which had been sent, through no fault of my own, ended in my attorney's spam inbox.” However, there is no affidavit from Ms Dempster confirming this crucial fact.

[23] The effect of this omission is significant. It means that the applicant does not establish in his founding papers (in spite of the applicant taking the opportunity to supplement his founding affidavit) that the application to strike, although emailed, went to Ms Dempster's spam folder. On the contrary, the case made out in the founding papers was that the email had been sent by the respondent but was not opened by the applicant's attorneys.

[24] I note that the replying affidavit deposed to by Mr Dempster (which includes a confirmatory affidavit by Ms Dempster) does include the allegation that the email went to a spam folder. However, it is trite law that an applicant has to make out a case for the relief sought in its founding papers. See for example *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at paragraph 29. There is no explanation from the applicant, an attorney by profession, why this crucial fact was not included in his founding papers. I accordingly find that no proper case has been made out for relief under rule 42(1)(b).

- [25] In any event, even if one assumes that the proper allegations were included in the founding papers, the applicant falls short of establishing that Mooki AJ (and Carrim AJ) were precluded from granting judgment against the applicant, given the existence of a fact of which they were unaware.
- [26] The argument raised by the applicant that the respondent was under a duty to make sure that there was a “read receipt” for the email in question is unconvincing to say the least. Rule 4A of the rules of court clearly provide that service is effected where an email is transmitted to an email address selected by an opposing party. The rule does not require the party effecting service to ensure that the email is read by the other party.
- [27] Thus, given that the respondent complied with rule 4A, there was nothing precluding Mooki AJ from granting the order concerned.
- [28] Despite its reliance on the argument that there was a duty on the respondent’s attorneys to ensure that there was a ‘read receipt’ for the said email, the applicant failed to provide any authority to support the existence of such a legal duty. The applicant also made a weak attempt to rely on an alleged ‘standing arrangement’ between the opposing attorneys that whenever there was electronic service of legal process, should there be no confirmation of receipt, there would be telephonic confirmation.
- [29] However, the applicant failed to properly plead or prove a binding agreement to that effect. He provided no indication of when, where, how or with whom that “arrangement” was concluded. Despite this, counsel for the applicant argued that the respondent provided a bald denial to the allegation of this ‘arrangement’ and failed to put up a confirmatory affidavit by its attorney corroborating its denial. However, this submission overlooks the fact that the agreement was not properly pleaded by the applicant in the first place. I accordingly find that no reliance can be placed on the allegation that such an arrangement existed.

Conclusion

- [30] For these reasons, in the exercise of my discretion, I find that both rescission applications stand to be dismissed with costs. The respondent seeks costs on

an attorney and client scale. I however do not find it appropriate to award punitive costs.

Order

[31] I accordingly make the following orders:

[32] In case number 23341/2019:

- a. The application is dismissed with costs on scale B.

[33] In case number 23342/2019:

- b. The application is dismissed with costs on scale B

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K PILLAY
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:

Adv SS Cohen instructed by Dempster
McKinnon Inc

For the Respondent:

Adv A Saldulker instructed by Le Roux
Vivier Attorneys

Date of hearing:

21 July 2025

Date of judgment:

15 September 2025

