

REPUBLIC OF SOUTH AFRICA



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

DELETE WHICHEVER IS NOT APPLICABLE:

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO

(3) REVISED:

DATE: 02/09/2025 SIGNATURE: [REDACTED]

CASE NR: 2024-061081

In the matter between:

SEPCOIII (PTY) LTD

APPLICANT

and

SMECSOUTH AFRICA (PTY) LTD

RESPONDENT

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 2 September 2025.

JUDGMENT

MARUMOAGAE AJ

A INTRODUCTION

1. The Applicant approached this court on an urgent basis seeking different orders under Part A and Part B of its application. This judgment is only concerned with Part B of the Applicant's application, where the Applicant seeks an order to rescind the default judgment granted against it on 29 August 2024. The Applicant also seeks condonation for the late filing of its rescission application.
2. In its founding affidavit, the Applicant stated that this rescission application is brought in terms of Uniform Rule 42(1), alternatively, the common law. The Respondent also brought an application to condone the late filing of its answering affidavit. The main issue in this matter is whether the late filing of the Applicant's rescission application should be condoned. If so, the court must decide whether to make an order rescinding the default judgment granted against the Applicant.

B FACTUAL MATRIX

i) Applicant's case

3. On 12 June 2024, the Respondent instructed the sheriff to serve the simple summons at the Applicant's registered place of business in Johannesburg. The summons was served on the Respondent's employee, who was found on the premises. This employee did not bring the summons to the attention of the Applicant's commercial manager, who is based at the Applicant's management office in the Northern Cape.
4. The Applicant did not defend the matter. On 29 August 2024, a default judgment was issued against the Applicant. The Applicant's commercial manager discovered

that the summons was served at the Applicant's registered office in Johannesburg after a default judgment was granted against the Applicant.

5. According to the Applicant's commercial manager, had the summons been provided to him, the Applicant would have defended the action against it. It is contended that the Applicant is not in wilful default and condonation ought to be granted. It is also alleged that the Applicant has a *bona fide* defence in that it is not indebted to the Respondent in the full amount claimed. It is alleged that the Respondent partially completed the work, leading the Applicant to procure the services of another contractor to complete the job.
6. The Applicant also alleges that, in terms of clause 19 of the contract signed by the parties, the dispute between the parties ought to have been referred to arbitration in London, United Kingdom. As such, this court does not have exclusive jurisdiction to adjudicate this dispute. Furthermore, had this information been presented to the court that granted the default judgment, such an order would not have been made.

ii) Respondent's case

7. The Respondent alleges that its answering affidavit was due on 9 December 2024. However, it could not be filed because on 19 November 2024, the Respondent instructed its attorneys to lodge an extremely urgent application in the Limpopo Division of the High Court, which was heard on 3 December 2024. The Attorney dealing with the matter asked one of his assistants within the firm to remind him to draft the answering affidavit.
8. However, his assistant was preparing for her conveyancing examination. She also had to attend an arbitration in the CCMA, which kept her out of the office until 11 December 2025. The Respondent's attorney also had to attend to the massive discovery of documents for the said arbitration, which had to be completed by 11 December 2024. The Respondent's attorney's assistant only realised on 12 December 2024 that the answering affidavit in this matter had not been filed.

9. Furthermore, it was alleged that the counsel that the Respondent's attorney usually briefs had already left his chambers for the December holidays. The Respondent's attorney amended his holiday plans and drafted the answering affidavit. It was contended that the delay in submitting the answering affidavit was not due to the Respondent's fault but that of the Respondent's attorney. According to the Respondent, this was a *bona fide* oversight on the part of its attorney. The answering affidavit was drafted, commissioned, and served on 17 December 2025. This affidavit was five court days late.
10. The Respondent contends that there is no merit to the Applicant's rescission application. It is alleged that the Applicant's rescission application is fatally flawed. First, the Applicant admits being indebted to the Respondent without disclosing the extent of its indebtedness to the Respondent. Secondly, the Applicant failed to provide a reasonable explanation for its default and to demonstrate that it has a *bona fide* defence that carries a prospect of success. Third, the Applicant failed to explain the delay in bringing its rescission application in totality. This makes it challenging to consider the degree of lateness.
11. The Respondent alleges that the simple summons was properly served on the Applicant's employee at the Applicant's principal place of business. The Applicant's failure to defend the matter led the Respondent to apply for a default judgment. The parties' agreement was attached to the summons for the court's consideration. When granting the default judgment, the court had sight of the arbitration clause, which did not oust its jurisdiction.
12. The Respondent denied that the services it rendered to the Applicant were not completed. The Respondent claims that it is entitled to payment. It was alleged that the Applicant failed to provide the court with the details regarding the alleged appointment of another contractor who allegedly completed the work. Further, the Applicant failed to explain what steps, if any, were taken against the Respondent for the alleged incomplete work. The Applicant failed to disclose a *bona fide* defence, on a *prima facie* basis, that carries prospects of success.

C CONDONATION

13. The Constitutional Court in *City of Ekurhuleni Metropolitan Municipality; In re: Unlawful Occupiers: 1 Argyl Street and Others v Rohlandt Holdings CC and Others*, reminded us that:

'[a] party seeking condonation must make out a proper case for the court's indulgence with reference to these criteria. The explanation for the delay must be full and "reasonable enough to excuse the default".¹

14. The same court in *Grootboom v National Prosecuting Authority and Another*, held that:

'[i]t is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default'.²

15. Most importantly in *Van Wyk v Unitas Hospital and Another*, the Constitutional Court also authoritatively held that:

'[t]his Court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay ... and the prospects of success'.³

16. The Applicant's application to be allowed to file its rescission application late does not comply with the test for condonation. It appears that the Applicant is of the view that all that it had to do was to mention in its papers that it would like to be granted

¹ 2025 (1) SA 1 (CC) para 26.

² 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) para 23

³ 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) para 20.

an indulgence to file its papers late without any adequate explanation. The primary consideration when the court assesses whether to condone the late filing of any document is the broader concept of the interest of justice.

17. The interest of justice concept is an important, flexible concept that allows the courts not to be merely technical in their approach, but to assess various factors to ensure that the doors of the courts are not unnecessarily and unfairly shut in the face of litigants who deserve to have their cases adequately adjudicated. This concept aims to prevent injustice that may befall litigants before the court when rules are strictly adhered to, particularly in instances where justice requires some form of flexibility.
18. However, in the context of condonation applications, the concept of interest of justice is not a standalone criterion. It must be assessed in line with certain key factors. The first factor is the nature of the relief sought. In this matter, the Applicant seeks permission to defend the action proceedings instituted against it by the Respondent through a rescission application. If successful, this application will enable the parties to present their respective cases effectively in a trial.
19. The second factor is the extent and cause of the delay. Unfortunately, it is unclear from the Applicant's papers when this rescission application should have been lodged and what caused the delay. Without this information, it is difficult for the court to determine the degree of lateness and its cause. It is difficult to assess whether the degree of lateness is fatal to the application. This made it difficult for the Applicant to deal with the third factor, which is the reasonableness of the delay. If the extent of the delay is not explained, it is impossible even to consider whether the delay is reasonable.
20. The fourth factor is the effect of the delay on the administration of justice and other litigants. The Applicant also does not engage with this factor, thereby placing the court in a position to determine whether the delays in lodging the rescission application have impacted the administration of justice. It is not even clear from the Applicant's papers how this application would potentially affect the Respondent, or,

at the very least, to demonstrate that there will be no prejudice that the Respondent will suffer.

21. The final factor that ought to have been engaged by the Applicant is the prospects of success. In this case, this must be assessed in line with the test for rescission, in terms of both Uniform Rule 42 and the Common law which the Applicant pleaded in the alternative. Uniform Rule 42(1)(a) provides that:

'[t]he court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind ... an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby'.

22. This rule requires the Applicant to make out a case that the default judgment was either erroneously sought or granted in the absence of the Respondent. The Respondent sought the default judgment because the Applicant failed to defend the action brought against it. The Respondent was entitled to approach the court for a default judgment because it received a return of service from the sheriff that indicated that the summons was duly served at the Applicant's principal place of business.

23. It is a common cause that the place where the summons was served is indeed the Applicant's place of business. It is also a common cause that when the sheriff arrived at this place to serve the summons, he found the Applicant's employee. In the return of service, which is attached to the Respondent's answering affidavit, the sheriff recorded that he explained the contents of the simple summons to the Applicant's employee.

24. Nothing prevented the Respondent from applying for a default judgment after receiving the return of service from the sheriff. The Applicant was entitled to make such an application when it was clear to it that the Applicant failed to defend the matter within the prescribed period. In this respect, the default judgment was not erroneously sought.

25. Once the default application had been lodged and a hearing date had been applied for, the court had to satisfy itself that the defendant was properly served at a place

where it was legally expected to accept service. In this case, the place the Respondent registered as its official address for receiving legal documents, at least as far as the Companies and Intellectual Property Commission is concerned, is the place where the sheriff served the summons. It is trite, as was held in *Epiphanyi IT Training and Advisory (Pty) Ltd v Moben South Africa*, that:

'[t]he service at the registered office or at the principal place of business within the jurisdiction of court will be in compliance with the rules and be good in law'.⁴

26. Upon being satisfied that the summons was properly served and received by the Applicant's employee, once the *dies* for filing and serving a notice of intention to defend had expired, the court was entitled to consider the Respondent's application for default judgment and exercise its discretion to grant it. The default judgment was not erroneously granted.

27. I am of the view that the Applicant failed to demonstrate that the default judgment was erroneously sought and granted in its absence. The fact that its employee did not alert it about the received simple summons cannot be a reasonable excuse. It is the Applicant's responsibility to adequately train its employees to ensure that essential documents are promptly referred to its officials. Thus, there are no prospects of the Applicant succeeding in terms of the Uniform Rule 42.

28. In terms of the common law, it was held in *Mokgatle v Allegiance JHB South (Pty) Ltd*, that:

'[t]he test for a rescission under Common law is trite, namely that good cause must be shown. In order to establish good cause, an applicant must set forth a reasonable explanation for the default and a bona fide defence/s'.⁵

29. The Constitutional Court in *Government of the Republic of Zimbabwe v Fick*, held that:

⁴ (6806/2018) [2019] ZAGPJHC 115 (27 March 2019) para 17.

⁵ (47615/2020) [2024] ZAGPPHC 661 (2 July 2024).

'[a]t common law the requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind'.⁶

30. In this matter, the Applicant failed to provide a reasonable and satisfactory explanation for its default. The fact that the employee received the summons and failed to forward it to the relevant officials who could have acted cannot be regarded as a reasonable and satisfactory explanation. It is also not an excuse that the Applicant's 'management office' is based in the Northern Cape.
31. The fact is that the Applicant has an office or place that is recognized as the place where legal documents can legally be served on it. It was the Applicant's responsibility to train its employees adequately to ensure that, upon receiving essential documents with legal implications for the Applicant, such documents are promptly given to the relevant officials within the company.
32. It is also clear that the Applicant is indebted to the Respondent and failed to provide a sense of its indebtedness, at least on its version. The Applicant does not dispute the fact that it owes the Respondent. In my view, the Applicant failed on the merits to demonstrate that it has a *bona fide* defence which *prima facie* carries some prospect of success.
33. The Applicant's argument that the court would have granted default judgment had it been aware that the parties' agreement contained an arbitration clause lacks merit. The Respondent duly demonstrated that the parties' agreement was attached to the summons. In other words, the arbitration clause was before the court when it granted a default judgment. It is well established that arbitration clauses do not oust the jurisdiction of the civil court, and any party to the contract

⁶ 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) para 58

is well within their rights to approach a civil court, despite the presence of an arbitration clause.⁷

34. The Respondent also brought an application for condonation. The reasons for this condonation appear somewhat unusual. It is not clear why the Respondent's attorney did not diarise the fact that an answering affidavit had to be drafted at a certain point. Suppose it is an established practice within the firm that the assistant is responsible for reminding the attorney to draft the answering affidavit. Why did the assistant not call the attorney to remind him, even if she was not in the office?
35. It is even more strange that the advocate was not briefed at the time the instructions to oppose the application were given, but only sought to be briefed when he was out of his office due to the December holidays. In any event, the alleged delay was not extensive.
36. However, I am not convinced that there was a need for a substantive condonation application by the Respondent. In 2024, the last day of the court term was 8 December 2024. The new term in 2025 began on 20 January 2025. Surely, the calculation of days excludes the days the court is in recess.⁸ The answering affidavit was not delivered late.

D CONCLUSION

37. The Applicant failed to satisfy the requirements for the application for condonation. Even on the merits, the Applicant's application for rescission does not have any prospect of success.

ORDER

38. In the premises, the following order is made:

38.1. The Applicant's application for condonation is dismissed.

⁷ See *VJ v VJ and Another* 2024 (6) SA 400 (SCA) para 10.

⁸ *Absa Bank Limited v Shikwambana* (2370/15) [2016] ZANHC 3 (10 June 2016) para 8.

38.2. The Applicant's rescission application is dismissed.

38.3. The Applicant shall pay the costs of both applications, including the costs of counsel in terms of scale B.



C MARUMOAGAE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

Counsel for the Applicant : Adv D Masia

Instructed By : Langa & Co Attorneys

Counsel for the Respondent : Adv C Richard

Instructed By : Kally & Co Attorneys

Date of Hearing : 26 May 2025

Date of Judgment : 2 September 2025