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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)**

CASE No: 8164/2017

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED: YES/NO

SIGNATURE: VAN WYK ASL (AJ)

DATE: 10 September 2025

In the matter between:

ROAD ACCIDENT FUND

APPLICANT

and

H[...] S[...] M[...]

FIRST RESPONDENT

BALOI V.J ATTORNEYS

SECOND RESPONDENT

JUDGMENT

VAN WYK ASL (AJ):

INTRODUCTION

[1] Central to this application, the applicant, The Road Accident Fund, instituted an application for rescission in accordance with rule 42(1)(a) of the Uniform Rules of Court¹ against the judgment and the order granted by the Honourable M.G Phathudi on the 7 December 2022. The applicant seeks to have the judgment set aside on the basis that it was erroneously sought and granted in the absence of the applicant.

[2] The order dated 7 December 2022 reads as follows:

“1. The Defendant is liable for 100% of the Applicant/Plaintiff’s proven and/or agreed damages as a result of the motor vehicle collision that took place on 25 May 2018.

*2. The Defendant shall pay to the Plaintiff the sum of R **7 200 875-00 (SEVEN MILLION TWO HUNDRED THOUSAND EIGHT HUNDRED AND FIFTY RANDS ONLY)** in respect of loss of earnings. The aforesaid amount is payable within 180 days.*

2.1 A trust is to be created by the Plaintiff’s Attorney, in the names and for the benefit of the Plaintiff, for the purposes of protecting the funds.

3. The Respondent/ Defendant furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of future accommodation in hospital or nursing home or treatment of or rendering of a service or supplying of goods to the Applicant/Plaintiff after such costs have been incurred and on proof thereof limited to 100%.

4. In the event of the aforesaid amount mentioned in paragraph 2 not being paid timeously, the respondent shall be liable for interest on the amount

¹ Uniform Rules of Court of South Africa, as amended on the 01 July 2019 (the rules)

at 9.75% calculated from the 15th calendar day after the date of this order to date of payment.

5. *The Respondent shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale in respect of quantum from the onset of the matter, up to and including 07th of December 2022 and notwithstanding and over and above the costs referred to in paragraph 5.2 below, subject to the Taxing Master's discretion:*

5.1 *In the event that the costs are not agreed:*

5.1.1 *The Plaintiff shall serve a notice of taxation on the Defendant (in the main action).*

5.1.2 *The Plaintiff shall allow the Defendant 180 days from date of allocator to make payment of taxed costs.*

5.1.3 *Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the prescribed legal rate on the taxed or agreed costs from date of allocator to date of final payment.*

5.2 *Such costs shall include:*

5.2.1 *The costs incurred in obtaining payment of the amounts mentioned in paragraphs 2 above.*

5.2.2 *The costs of and consequent to the appointment of the Counsel, including his preparation and his full day fee for the 21st of November 2022 and 07th of December 2022.*

5.2.3 *The costs of and consequent to the Plaintiff's trial bundles and witness bundles, including the costs of 3 (three) copies.*

6. *The amounts referred to in paragraph 2 shall be paid to the Plaintiff's attorneys of record, Baloi VJ Attorneys Inc by direct transfer into their trust account with details as follows...*

7. *This (sic) There is a valid contingency fee agreement between the client and attorneys.*

8. *General damages are postponed sine die."*

[3] The application was filed and served on 31 July 2023, more than seven months after the order by M.G Phathudi J dated 7 December 2022. The Applicant alleges that it received the court order on 16 April 2023. The second respondent attorney, however, alleges that he informed the applicants claims handler on 7 December 2022 as regards the outcome of the trial and undertook to furnish the applicant with the stamped court order as soon as it is made available by the Court. The second respondent mentioned that he informed the applicant of the Court order on 23 January 2023. I must add that neither party attached proof in support of the allegations made as regards their respective knowledge obtained of the court order.

[4] On 14 August 2023, the first respondent through the second respondent filed and served her notice to oppose the application. The answering affidavit was filed approximately 20 days late. I understand if consideration is given to the veracity of the allegations made by the applicant in its founding affidavit, the technical and legal arguments advanced therein, the availability of the first respondents counsel, and most importantly the weight of each parties prejudice suffered or to be suffered by the late filing of the answering affidavit, I ought to exercise my discretion in favour of the first respondent. I am of the view that the applicant will suffer no prejudice as opposed to disallowing it, the first respondent stands to suffer severe prejudice. Considering all timelines in this matter and prior thereto and the processes that followed holistically, I am exercising my discretion by allowing the first respondents answering affidavit because it is in the interest of justice to do so². Accordingly, I condone the late filing and serving of the first respondents answering affidavit.

² Brummer v Gorfil Brothers Investments (Pty) Ltd 2000(2) SA 873 (CC)

[5] The matter was set down for hearing on the 19th of May 2025 and I accordingly reserved judgment herein.

BACKGROUND FACTS OF THE CASE

[6] The first respondent instituted a delictual claim against the applicant (RAF), due to the accident that occurred on the 23rd of July 2014. At the time of the accident, the first respondent being a passenger was 17 years old. On 24 July 2017 the first respondent through her attorneys lodged a claim with the applicant. The summons was issued at this court on the 5th of December 2017 and served to the applicant by Sheriff.

[7] The applicant served and filed its notice of intention to defendant on 9 February 2018 and its special plea and ostensibly its plea shortly thereafter. Although the applicant failed to explicitly canvas when the applicants' erstwhile attorneys, Noko Maimela Incorporated' mandate was terminated, I would assume it was during 2019 or 2020 when the erstwhile CEO of the applicant declared that the applicant shall not appoint other attorneys of record to represent them in litigious matters.

[8] On 22 April 2022, on the applicant's version it received a notice of set down for trial from the second respondents offices. The matter was set down for trial on 21 November 2022. The matter was adjourned on the 21st of November 2022 and postponed to 7 December 2022. The notice of set down for 7 December 2022 was similarly physically served on the applicant on 22 November 2022. It follows that the applicant was aware of the trial date(s) and elected not to attend, participate, or approach this court on the date(s) of trial.

[9] In paragraph 9.6 of the applicants founding affidavit it states ... *"However, no expert reports were provided at this stage (on the date the applicant received the notice of set down- 22 April 2022- my emphasis) and as such the matter could not have been assessed nor an offer of settlement could be made"* In paragraph 9.7 it states further: *"It was only on or about 16 November 2022 (although service thereof*

indicates 15 November 2022- my emphasis) that the Plaintiff attorneys could provide us with expert reports on the matter. After having assessed the said reports and with the aim to settle the matter, we then discovered that the matter might have prescribed. It was for these reasons that we had requested further and more documents in respect of merits of which documents Plaintiff refused to provide and then they proceeded to obtain default judgment as we have come to learn now”.

[10] The applicant proffers no explanation why it did not participate, approach (or attend) this court on either the 21st of November 2022 or 7 December 2022 to advance its purported discovery that the first respondents claim might have become prescribed or took issue with the late serving and filing of the expert reports. The applicant did not invoke the provisions of Uniform Rule 30A or instituted application for postponement of the matter. The applicant however concedes that it assessed the first respondents reports with the aim to settle the matter.

[11] Further, upon considering the applicants version, I did not receive the impression that the applicant seriously challenged or intended to challenge the expert findings before judgement was granted on 7 December 2022. I am of the view that as an afterthought, the applicant attempted to suggest that there exists irregularities or inconsistencies in the first respondent’s expert assessments. I am of the view that these attempts are futile and not supported by expert evidence or primary facts.

[12] I must add that the issue of prescription was not raised by the applicant in its pleadings and insofar as its founding affidavit is concerned, it simply suggests that the claim *might* have become prescribed and in the same breath argues that it was at all material times engaged with settlement negotiations with the second respondent. The applicant seems to suggest that it was engaging settlement negotiations with the respondents and therefore it was excused from attending court or that it was entitled to further notice of the proceedings.

I do not agree.

LEGAL ISSUES FOR DETERMINATION

[13] The court is called upon to determine the following six (6) legal questions;

13.1 whether the Applicant has met all the legal requirements either in terms of rule 42 (1) (a) of the Rules, or at common law, for the rescission of the default judgment.

13.2 In amplification of 13.1 *supra* whether the late filing and serving of the first respondents expert reports and accepted by the court on 7 December 2022 translates to the judgment being granted erroneously.

13.3 In further amplification of 13.1 *supra* whether the applicant was prejudiced by the first respondent's proposed amendment, that the 10- day objection period had not lapsed and whether any procedural irregularity in this regard occurred.

13.4 Whether the application for rescission was brought within reasonable time.

13.5 Whether the second respondent lacks authority to act or sign the answering affidavit without resolutions as such.

13.6 Condonation for the late filing of the for the late filing of the first respondents answering affidavit. In exercising my discretion, I condoned the late filing of the first respondents answering affidavit.

13.7 I will deal with the issues raised by the applicant and summarised in paragraphs 13.1 to 13.5 *supra* in no specific order later in this judgment.

THE LEGAL PRINCIPLES: UNIFORM RULE 42(1)(a), THE COMMON LAW - RESCISSION OF JUDGMENT

[14] Rule 42(1)(a) of the Uniform Rules, states that;

“(1) 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;”

[15] The Court, in *Nkabinde and Another v Judicial Service Commission and Others*³ held that:

“[14] As already indicated, the applicants brought their application for rescission in terms of Rule 42(1)(a). Rule 42(1)(a) reads as follows in so far as it is relevant:

“(1) 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 erroneously...granted in the absence of any party affected thereby.”

[16] An applicant for rescission who brings an application under this Rule must show that the order sought to be rescinded was granted in his or her absence and that it was erroneously granted or sought.

[17] Rule 42(1)(a) affords this Court wide discretion to deal with applications, such as the instant one in an expeditious and cost-effective manner⁴

[18] The Court (Mbha JA), in *Rossitter & others v Nedbank Ltd*⁵, held that:

“[16] The law governing an application for rescission under Uniform rule 42(1)(a) is trite. The applicant must show that the default judgment or order had been erroneously sought or erroneously granted. If the default judgment was erroneously sought or granted, a court should, without more, grant the order for rescission. It is not necessary for a party to show good cause under

³ 2016 (11) BCLR 1429 (CC); 2017 (3) SA 119 (CC).

⁴ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (AD) at 531; *Tshivhase Royal Council v Tshivhase* [1992] ZASCA 185; 1992 (4) SA 852 (A) at 862J – 863A.

⁵ 96/2014 [2015] ZASCA 196 (1 December 2015) at para 16.

the subrule. Generally, a judgment is 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.”

[19] In *Zuma v Secretary of Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC) the court emphasized the onus that rests upon an applicant and the requirements he has to prove:

“Requirements for rescission of a default judgment are twofold. First, 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 prospects 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 the refusal of the request to rescission.”

[20] The court in *Zuma* had to decide whether rescission of judgment either in terms of rule 42 (1) (a) of the Rules or the common law ought to be granted. The court summarized the legal position and correct approach as follows:

“It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that the court “may”, not “must”, rescind or vary its order – the rule is merely an “empowering section and does not compel the court” to set aside or rescind anything. This discretion must be exercised judicially.”

[21] In *Zuma* (supra) the court drew a distinction between two litigants: In the first place, there is a litigant who was physically absent because he or she was not present in court on the day the judgment was granted. In the second place there is a litigant whose absence she or he chose or elected. Accepting this approach, the court held that on the facts, Mr. Zuma was given notice of the case against him and also, sufficient opportunity to participate in the matter by opposing same if he wanted

to. He deliberately chose not to participate. The court therefore found that a litigant who elects not to participate in despite knowledge of legal proceedings against him or her is not absent within the meaning of rule 42 (1) (a) of the Rules, in other words, the court emphasized that the word “absence” in the rule,

“...exists to protect litigants whose presence was precluded, not those whose absence was elected.”

[22] Although the facts in this matter are in some ways distinguishable in that the applicant did file its notice to defend, special plea and plea to the first respondents claims many years ago, the principle that the applicant elected its absence on the 21st of November 2022 and 7 December 2022 remains apparent. According to the applicant it was at all material times engaging the second respondents’ offices with settlement negotiations and attempts to use this as an excuse for its absence on the dates mentioned. I will elaborate on this issue later in the judgement

[23] On the requirements of the Rule 42(1)(a) rescission application, per Khampepe J (majority), held, among others that:

“[62] Ultimately, an applicant seeking to do this must show that the judgment against which they seek a rescission was erroneously granted because “there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment”⁶.

[24] To satisfy this requirement, the Applicant must show on a balance of probabilities that at the time the orders were granted, there were material facts that the court was unaware of, and that if the court had been privy to these facts, the court would not have granted the order.

⁶ 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).

[25] In *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 446 (ECD) the court explained the position 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 in deciding whether a judgment was ‘erroneously granted’ is, like a Court of Appeal, confined to the record of proceedings⁷”

[26] I am aware that rescission does not, however, follow automatically upon all the jurisdictional requirements of rule 42(1)(a) being present. The rule gives the courts the discretion to order rescission or variation, which discretion must be exercised judicially⁸ Broadly speaking, an exercise of a court's discretion is influenced by considerations of fairness and justice, having regard to all the facts and circumstances of the specific case⁹

[27] In *Van der Merwe v Bonaero Park (Edms) Bpk*¹⁰, the court refused to rescind an order despite the jurisdictional facts required by rule 42(1)(a) being present. In *Nkosi v ABSA Bank Ltd*¹¹ the court exercised its discretion against rescission notwithstanding that the applicant met all the jurisdictional requirements of rule 42(1)(a) because a rescission would have had no practical effect and merely caused delay.

[28] In *Schmidlin v Multisound (Pty) Ltd* 1991(2) SA 151 (C) the court dealing with issues of undue delay in rescission application held as follows:

⁷ Para 47F.

⁸ *Colyn Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 7A, referring to *Theron NO v United Democratic Front (Western Cape Region)* 1984 (2) SA 532 (C) at 536G and *Tshivhase Royal Council V Tshivhase; Tshivhase v Tshivhase* [1992] ZASCA 185; 1992 (4) SA 852 (A) at 862 -863A.

⁹ *Chetty v Law Society, Transvaal* 1983 (1) SA 777 (T) at 761D, referred to with approval by the majority the Constitutional Court *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC) at para 53 footnote 20.

¹⁰ 1998 (1) SA 697 (T).

¹¹ Unreported, GP case no 53195/2019 (6 June 2023); [2023] ZAGGPPHC 431; 53195/2019 (6 June 2023).

“Delay is, however, relevant in this case, not per se, but because that judgment was being executed...Acquiescence in the execution of a judgement must surely in logic, normally bar success in an application to rescind on the same basis as acquiescence in the very granting of the judgment itself would.” “Applicant said in his... affidavit... that his application was brought in terms of Rule 42, which lays down no time limit within which rescission of judgment granted in error should be sought. There is, therefore, nothing requiring or capable of condonation by this court¹²”

[29] In *First National Bank of SA Ltd v Van Rensburg NO and Others*¹³, the court emphasised the importance of bringing a rescission application promptly. The court noted that Rule 42(1)(a) is designed to correct judgments that were granted erroneously in the absence of an affected party and that this correction must be sought expeditiously to prevent prejudice to the parties involved and to uphold the administration of justice. The court held that an unreasonable delay in bringing a rescission application could result in the dismissal of the application, even if the judgment were erroneously granted. This applies to cases where an applicant relies on both rule 42 (1) (a) of the Rules or the common law, Eloff JP held:

“Even if it can be said that the order granted by Coetzee J was erroneously sought or constitutes a patent error, the application should, in my view have been dismissed by reason of the long-time lapse.”

[30] Further authorities highlight the importance of finalising matters expeditiously to prevent prejudice to the parties. In *Bezuidenhout v Patensie Citrus Beherend Bpk*¹⁴ the Court highlighted the need for swift adjudication to avoid prejudice and unnecessary delay. Similarly, in *Mohlomi v Minister of Defence*¹⁵, the Constitutional Court emphasised the detrimental effects of delays on the administration of justice and the rights of the parties involved.

¹² Page 155 para I-J

¹³ 1994 (1) SA 677 (T).

¹⁴ 2001 (2) SA 224 (SCA).

¹⁵ 1996 ZACC 20; 1997 (1) SA 124 (CC).

[31] It is a well-established principle that a rescission application in terms of Rule 42(1)(a) of the Uniform Rules of Court must be brought within a reasonable time. This requirement ensures that the judicial process is not unduly delayed and that the finality of judgments is respected, thereby maintaining the integrity and efficiency of the judicial system. Several key cases highlight this necessity and provide guidance on what constitutes a reasonable time frame for bringing such applications.

[32] In *Graham v South African Reserve Bank*¹⁶, the Supreme Court of Appeal reiterated that while Rule 42(1)(a) does not prescribe a specific timeframe, the application must be brought within a reasonable time. The court, in this case, underscored that the timeliness of the application is crucial to ensure that the court's resources are not misused and that an undue delay does not unfairly prejudice the opposing party. The court further explained that what constitutes a reasonable time depends on the circumstances of each case, including the reason for the delay and the nature of the judgment being challenged.

[33] The Court in *Government of the Republic of Zimbabwe v Fick and Others*¹⁷ addressed the issue of timely rescission applications. The court expressed that the principle of bringing applications within a reasonable time is not merely a procedural requirement but is rooted in the broader principles of justice and fairness. The Court highlighted that delays in seeking rescission can disrupt the finality of judicial decisions and undermine the credibility of the judicial process. Therefore, the need for prompt action in bringing rescission applications is imperative to maintain the integrity of the judicial system.

[34] In *Mutebwa v Mutebwa and Another*¹⁸, the court emphasised the discretionary nature of Rule 42(1)(a) and the importance for judicial officers to exercise this discretion judicially. The court emphasised that while the rule allows for rescission of judgments granted in error, this discretion must be balanced with the need to avoid opening the floodgates to frivolous rescission applications. The court emphasised that a reasonable time frame for bringing such applications is essential to ensure that

¹⁶ 2003 (4) SA 449 (SCA)

¹⁷ 2013 (5) SA 325 (CC).

¹⁸ 2001 (2) SA 193 (Tkh).

only genuine errors are corrected without causing undue disruption to the judicial process.

[35] Streicher JA explained in *Lodhi* 2¹⁹ 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.

THE LEGAL PRINCIPLES: AMENDMENT TO PLEADINGS AND DISCUSSION

[36] Kruger J in *KS v MS*²⁰ stated the following:

"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 contestation arises."

[37] 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).

¹⁹ *Lodhi* 2 Properties Investments CC & another v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA) at para 25-27.

²⁰ 2016 (1) SA 64 (KZD) at par [16].

[38] In *casu*, the first respondent sought to amend her particulars of claim insofar as the quantum/amounts were concerned, nothing more and nothing less. As aforesaid and on 16 November 2022, a formal notice of intention to amend was served on the applicant. The notice period for objection to the first respondents proposed amendment lapsed on 30 November 2022.

[39] During argument, the applicants counsel attempted to convince me that the 10-day period upon which the applicant is entitled to object to the proposed amendment had not lapsed as on 21 November 2022 being the initial court date. It is common cause that this court did not adjudicate the matter on 21 November 2022 and adjourned it to 7 December 2022. Considering the history of these facts, the proposed argument is patently wrong as the 10-day period for the applicant's assumed objection lapsed before judgment was granted on 7 December 2022.

[40] Within the context of these facts the applicant did not object to the first respondents proposed amendment to her particulars of claim within the allowed 10-day period and as such the applicant is deemed to have consented to the amendment in accordance with the aforesaid subrule before judgment was granted.

[41] Accordingly, the 10-day period for the applicant's proposed objection lapsed before the judgment and orders were granted on 7 December 2022 and as such no procedural irregularity was committed in this regard. On this point, the judgment and orders were not erroneously sought and granted.

THE LEGAL PRINCIPLES: LACK OF AUTHORITY AND DISCUSSION

[42] It is common cause that at all material times the first respondents were represented by the second respondent. The applicant suggested that the deponent to the answering affidavit lacks the requisite authority to act and/or sign the said answering affidavits without the second respondents'

[43] The following was stated by the Supreme Court of Appeal in *Ganes and Another v Telecom Namibia Ltd*²¹ :

*“There is no merit in the contention that Oosthuizen AJ erred in finding that the proceedings were duly authorised. In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorised and that he put the respondent to the proof thereof. In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings was duly authorised. In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (See *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C - J.)”* (emphasis added)

[44] The deposing to an affidavit need not be authorized. It is the institution of legal proceedings that must be authorized. Rule 7 of the Uniform Rules of this Court

²¹ 2004 (3) SA 615 (SCA) at para 19.

provides for the procedure to be followed by a party who wishes to challenge the authority of an attorney acting on behalf of another party.²²

[45] Gorven J said the following in ANC Umvoti Council Caucus and Others v Umvoti Municipality²³ :

“I am therefore of the view that the position has changed, since Watermeyer J set out the approach in the Merino Ko - operasie Bpk case. The position now is that, absent a specific challenge by way of rule 7(1), ‘the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant is sufficient. It is further my view that the application papers are not the correct context in which to determine whether an applicant which is an artificial person has authorised the initiation of application proceedings. Rule 7(1) must be used. This means I disagree with Mr Gajoo's submission that rule 7(1) provides only one possible procedure and that, if a respondent elects to challenge the matter of authority on the application papers, the applicant is required to prove such authority on the papers.” (emphasis added).

[46] In Unlawful Occupiers, School Site v City of Johannesburg²⁴ one of the issues raised by the appellant was that the respondent had failed to prove that the deponent to its founding affidavit had the requisite authority to institute the application on its behalf. Brand JA stated the following :

“However, as Flemming DJP has said, now that the new Rule 7(1) remedy is available, a party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this matter, ie by way of argument based on no more than a textual analysis of the words used by a deponent in an attempt to prove his or her own authority. This method invariably resulted in a costly and wasteful investigation, which normally leads to the conclusion

²² Eskom v Soweto City Council 1992 (2) SA 703 (W); Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at para 19; Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA) at para 16

²³ 2010 (3) SA (KZP) at para 28

²⁴ 2005 (4) SA 199 (SCA) at para 16.

that the application was indeed authorised. After all, there is rarely any motivation for deliberately launching an unauthorised application. In the present case, for example, the respondent's challenge resulted in the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical arguments on both sides. All this culminated in the following question: Is it conceivable that an application of this magnitude could have been launched on behalf of the municipality with the knowledge of but against the advice of its own director of legal services? That question can, in my view, be answered only in the negative."

[47] On the conspectus of the facts before me, there was no challenge in terms of Rule 7 by applicant. It follows that the appropriate approach to challenge authority was not invoked, and it is therefore not necessary for the second respondent to prove its authority.

[48] Accordingly, the point *in limine* is dismissed.

ARGUMENTS AND ANALYSIS

[49] The applicant complained that the first respondent's expert reports served on 15 November 2022 were late. On its own admission the applicant assessed the said reports and with the aim to settle the matter. On the conspectus of the evidence before me there were no attempts made (or even suggestions) by the applicant to challenge the expert reports, complain about the lateness thereof, filed any notice in support with non-compliance with the rules or attended court on either 21 November or 7 December 2022 with the view to raise these complaints. On its own version the applicant elected not to participate further in the proceedings. The presiding judge obviously had sight of all the expert reports including the actuarial calculations, considered the contents thereof and allowed it to form part of the record of the proceedings before judgement was granted. On this point, I am of the view that this issue is raised by the applicant as an afterthought and that the court on 7 December 2022 did not grant the judgement and order erroneously. The matter was "*ripe for trial*" on 7 December 2022.

[50] I believe that the reason why the applicant did not inform this court as regards its alleged “*settlement negotiations at all material times with the Plaintiff’s legal representative*” is because it is prohibited from doing so. It follows generally that settlement negotiations and the details thereof are conducted on a without prejudice basis with exclusion of its disclosure to this court or the presiding judge, by either party. Considering this position, the presiding judge on 7 December 2022 could not be made aware of the alleged settlement negotiations between the parties. Consequently, there were no material facts that the court on 7 December 2022 was unaware of and had it been privy thereto, the court would not have granted the order.

[51] In this regard it follows that no mistake in the process and/or the law occurred, and it is trite if any form of settlement negotiation fails, the claimant is entitled to advance his/her case before the court and the other party to attend court and raise its issues or objections with the presiding judge, before judgment is made.

[52] It is common cause that judgment was granted on 7 December 2022. There is a dispute between the parties whether the applicant became aware of the judgment on 7 December 2022, 23 January 2023 or 16 April 2023. Although the explanations presented by both parties are not clearly motivated or supported, I hold the view that the applicant instituted its application within a reasonable time and without undue delay within the context of Uniform rule 42(1)(a). I am alive thereto that all parties involved in this matter and during different stages of litigation, had to obtain instructions, and assess their respective factual or legal positions.

[53] On the conspectus of all the arguments presented and a careful analysis of the facts, I am of the view that the applicant failed meet all the legal requirements either in terms of rule 42 (1) (a) of the Rules, or at common law, for the rescission of the default judgment. The judgement dated 7 December 2022 was not erroneously sought or granted for all the reasons explained in this judgement.

COSTS

[54] The general rule is that the costs of this application should follow the result. I have a discretion as regards the scale of costs. Considering the facts of this matter

holistically and the arguments presented I believe that costs should be awarded to the respondents on a party and party scale B.

ORDER

[55] Accordingly I make the following Order;

- [1] Condonation is granted for the late filing of the respondents answering affidavit
- [2] The application for rescission of judgment is dismissed
- [3] The applicant is ordered to pay the respondents costs on a party-and-party scale B.

ASL VAN WYK
Acting Judge of the High Court
Limpopo Division, Polokwane

APPEARANCES:

HEARD ON : 19 MAY 2025

JUDGMENT DELIVERED ON: **10 SEPTEMBER 2025 .**

This judgment was handed down electronically by circulation to the parties' representatives by email.
The date and time for hand- down of the judgment is deemed to be at **11:00**

FOR THE APPLICANT : **R MUDAU**

INSTRUCTED BY : **STATE ATTORNEY POLOKWANE**

FOR THE RESPONDENTS : **D MPHAHLELE**

INSTRUCTED BY : **BALOI V.J ATTORNEYS**

C/O NKANYANI ATTORNEYS