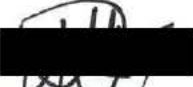


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 23801/2018

(1)	REPORTABLE: NO/YES
(2)	OF INTEREST TO OTHER JUDGES: NO/YES
(3)	REVISED: NO/YES
	
1 OCTOBER 2025	SIGNATURE

In the matter between:

THE MINISTER OF PUBLIC WORKS AND INFRASTRUCTURE

APPLICANT

and

ENDEMIC DEVELOPMENTS (PTY) LTD

1ST RESPONDENT

(Registration number: 2017/381678/07)

MVELA PHANDA CONSTRUCTION (PTY) LTD

2ND RESPONDENT

(Registration number: 1999/022710/07)

THE SHERIFF, PRETORIA EAST

3RD RESPONDENT

In re:

ENDEMIC DEVELOPMENTS (PTY) LTD

(Registration number: 2017/381678/07)

1ST PLAINTIFF

MVELA PHANDA CONSTRUCTION (PTY) LTD

(Registration number: 1999/022710/07)

2ND PLAINTIFF

and

MVELA PHANDA CONSTRUCTION (PTY) LTD

1ST DEFENDANT

(Registration number: 1999/022710/07)

**THE MINISTER OF PUBLIC WORKS AND INFRASTRUCTURE
AND DEVELOPMENT**

2ND DEFENDANT

***Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 1 October 2025.*

JUDGMENT

MAKHOBABA, J

- [1] This is an application for rescission of the Judgment granted by the Honourable Madam Justice Potterill on 27 February 2024, and that a warrant of execution dated 20 July 2024 and 3 September 2024 be set aside.
- [2] The Applicant also seeks condonation for the inordinate delay in bringing this rescission application.
- [3] The Applicant was the Second Defendant in the main action, while the First Respondent was the First Plaintiff in the main action. For ease of reference, the Applicant will be referred to as the Defendant and the First Respondent as the Plaintiff.
- [4] The orders sought by the Applicant are as follows:
 - 4.1. The court order granted in favour of the First Respondent by the Honourable Madam Justice Potterill on 7 February 2024 – striking out the Applicant's

defence in the main matter under case number 23801/2018 – be rescinded and set aside.

- 4.2. The Applicant's defence as set out in its plea be reinstated.
 - 4.3. An order granted by the Honourable Madam Justice Potterill, in favour of the First Respondent – for sum of R12 078 528.49 plus interest at 10.25% per annum as calculated from 22 September 2015 to date of final payment – be rescinded and set aside.
 - 4.4. The warrants of execution granted on 20 July 2024 and 03 September 2024, and served on 01 July 2024 and 05 September 2024 respectively, in favour of the First Respondent against the Applicant, be set aside.
 - 4.5. The application for condonation for the Applicant's inordinate delay in filing the rescission application against the order dated 27 February 2024 in Case No. 23801/2018 is granted.
 - 4.6. The First Respondent be ordered to pay the application costs, including costs of two counsel.
- [5] Counsel for the Applicant submitted that, the application is sought under Rule 31(2)(b) of the Uniform Rules, alternatively, in terms of the common law.
- [6] Counsel for the Applicant contends that, if the order granted to the First Respondent on 27 February 2024 is allowed to stand, the Department of Public Works and Infrastructure would have been unjustifiably denied an opportunity to meaningfully present its case in court bearing in mind the consequences that it will suffer insurmountable prejudice of having to pay monies in excess of Twenty Three Million Four Hundred Thousand Rands (R23 400 000.00), not due to the First Respondent.

Background

- [7] On 05 April 2018, the First Respondent issued summons commencing action against the Applicant and Mvelaphanda construction (Pty) Ltd before the North Gauteng High Court.

- [8] The First Respondent alleged that it was entitled to payment in the sum of R12 078 528.49, for the extension against Mvelaphanda Construction and the Applicant.
- [9] The Office of the State Attorney issued a notice of intention to defend followed by a plea. The plea averred that the claim had prescribed
- [10] The Second Respondent attempted to have the Applicant make payment to it in respect of certain request for extensions which the Applicant rejected. Following an impasse between the parties, the parties attended to an arbitration with regard to certain requests for extensions by the Second Respondent.
- [11] On 31 July 2021, the arbitrator ruled that the Applicant was not liable to the Second Respondent. As a result, the Applicant was not liable to pay the Second Respondent or any other party in relation to the construction project.
- [12] On 12 February 2024, the court refused the postponement by the Applicant and heard the strike out application without the opposition. The court granted the default judgment to the First Respondent. This led to the rescission application currently before this court.
- [13] It is contended that the default judgment by the Applicant was not wilful or due to gross negligence. However, due to unfortunate scheduling conflict involving concurrent matters in different courts, counsel was unable to draft the heads of argument and to appear. This together with the court's rejection of Applicant's plea for postponement of the hearing, resulted in a default judgment.
- [14] The Applicants referred to the decision in *Terrace Auto Centre (Pty) Ltd v First National Bank of South Africa Ltd*¹ and contended that even in this matter before this court the Applicant instructed the lawyers who failed to appear and also failed to draft the papers and were abandoned by both Advocate Mnisi and Advocate Bester SC. The court in *Terrace Auto* accepted the explanation as good cause for the rescission.
- [15] But for this abandonment, the Applicant would have been properly represented and would have had the opportunity to defend the matter. The court was further

¹ 1996(3) SA 209 (W).

referred to the decision in the matter of National Home Builders Registration Council v Versatile Polycrete Housing cc².

- [16] It is argued that the Applicant has a bona fide defence against the First Respondent's claim in that there is no contract between the Department of Public Works and Infrastructure and the First Respondent.
- [17] It is further argued that the contract was between the Second Respondent and the Applicant. There is no contract between the Applicant and the First Respondent. Therefore, the Applicant cannot be held liable to any claim by the First Respondent.
- [18] It is submitted that the claim by the First Respondent as a whole, against the Applicant has already prescribed. The summons were served on 05 April 2018 and the alleged cause of action as per the claim is from July 2011 to 04 April 2018.

Application for condonation

- [19] It is submitted that it will be just and equitable, and in the interest of justice, for the court to grant the relief sought by condoning the late application and afford the Applicant an opportunity to put its version before court.
- [20] The dismissal or refusal to grant the relief sought, will in no doubt result in the First Respondent being awarded an exorbitant amount in damages.
- [21] Counsel for the Respondent contended that, in terms of common law, rescission of a default judgment is only available where such judgment was taken in the absence of a party and without such party's knowledge. Rescission is not available if a party, with full knowledge of court proceedings, wilfully elects not to participate in such proceedings, as the Defendant had done.
- [22] Counsel argued that in the Terrace Auto³ decision referred to by the Applicant's counsel, in that matter the Defendants had furnished their attorney with explicit

² Unreported Judgment of the Full Court South Gauteng High Court, Johannesburg handed down under Case Number: A034592/2023 on 23 November 2023.

³ Id

- instructions to attend the hearing, but the attorney then failed to attend at all⁴. The case relied upon by the counsel is distinguishable from the matter before this court.
- [23] Counsel argued further that, the allegations about Ms Gejengane only becoming aware of the hearing date on 31 January 2024, and about Advocate Mnisi and Advocate Bester SC informing her on 02 February 2024 that they were unavailable on 26 February 2024 as they both had trials set down for that week, constitute inadmissible hearsay evidence. There is no confirmatory affidavit by Ms Gejengane.
- [24] No explanation is given as to why she only became aware of the Notice of Set Down on such date. The Notice of Set Down was served on 15 November 2023.
- [25] Advocate Mnisi and Advocate Bester SC were simply not approached in time and thus did not “abandon” the Defendant at all. In fact, they never accepted the brief.
- [26] Counsel contended further that, the Defendant thereafter still had more than three weeks (from 02 February 2024) to appoint alternative counsel to argue the application to strike out the Defendant’s defence.
- [27] On reliance on Rule 31(2)(b), counsel for the Plaintiff submitted that the Rule only finds application, where a Defendant has failed to deliver a plea. In the instant case the Defendant filed a notice of intention to defend and filed a plea. The rule is not applicable.
- [28] Counsel further submits that the rule finds application where the Defendant has no knowledge that its matter is before court. In contrast to this matter, the Defendant was represented in court and its counsel asked for a postponement.
- [29] The fact that the Defendant absented himself from the hearing thereafter was the result of a deliberate and wilful decision not to participate.
- [30] Counsel submitted that the Rule has a cut-off time of 20 days within which such an application is to be brought after knowledge is obtained of the default judgment. The present application is brought more than eight months after the judgment was granted, of which the Defendant and his attorney of record were fully aware.
- [31] Counsel is of the view that the Defendant has completely misconstrued his available remedy and his purported reliance on rescission proceedings, in terms

⁴ Id Par 211 and 212 D-E

of the common law or Rule 31(2)(b), is wholly misconceived. The Defendant's remedy was to seek leave to appeal against the judgment.

- [32] On the application for condonation counsel for the Plaintiff contended that the application was brought more than eight months later. This cannot be considered to be within a reasonable time. More-over, an application for condonation should be lodged without delay as soon as it is realised that there has not been compliance with a Rule of court.
- [33] Counsel concluded by saying, to grant condonation after such an inordinate delay and in the absence of a reasonable explanation would undermine the principle of finality in litigation and cannot be in the interest of justice.

Applicable legal principles

- [34] The Constitutional Court in *Zuma*⁵ reiterated the requirements for the granting of an application for rescission to be satisfied as follows:
- "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."
- [35] In *Harris v Absa Bank Ltd t/a Volkskas*⁶, Moseneke J, stated that:
- "A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation. Instead, the explanation, be it good, bad, or indifferent, must be considered in the light of the nature of the defence. Which is an important consideration, and in the light of all the facts and circumstances of the case as a whole."

⁵ *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* [2021] ZACC 28; 2021 JDR 2069 (CC); 2021(11) BCLR 1263 (CC) at Para 71.

⁶ 2006(4) SA 527 (T).

- [36] In my view the Plaintiff in the main action raises several triable issues. These triable issues include the ruling of the arbitration, the assertion that, the contract was between the Second Plaintiff and the Second Defendant, and the First Plaintiff is not part of the contract.
- [37] Another defence raised by the Second Defendant as averred in its plea and founding affidavit is that the First Plaintiff's claim as a whole and as against the Second Defendant has already prescribed. In my view one or all defences raised by the Applicant may succeed in the main trial.
- [38] In *Terrace Auto Services Centre Ltd*⁷, the court accepted that a bona fide ground for rescission may exist where a legal representative has effectively abandoned the client's case, resulting in judgment by default.
- [39] In this matter before me, Ms Gejengane asked for a postponement before Potterill J, however, she had no mandate to address the court on the merits.
- [40] The legal representatives that were supposed to appear on behalf of the Second Defendant were not present.
- [41] I am satisfied that the explanation furnished for their absence resulted in the client being abandoned. This in my view is a bona fide ground for rescission of Potterill J's judgment.
- [42] I am also of the view that, given the reasons furnished for the late filing of the application for rescission of judgment, the application for condonation must succeed.
- [43] I make the following order:
- 43.1. That an order granted in favour of the First Respondent by the Honourable Madam Justice Potterill J on 27 February 2024, ("the court order"), to strike out the Applicant's defence in the main matter under Case Number: 23801/2018 is rescinded and set aside.
 - 43.2. That the Applicant's defence as contained in the plea dated 20 August 2018, and served on the First Respondent on 21 August 2018, is reinstated.
 - 43.3. That an order made by the Honourable Madam Justice Potterill J on 27 February 2024, in favour of the First Respondent in the amount of Twelve

⁷ 1996(3) SA 209 (W).

Million and Seventy Eight Thousand and Five Hundred and Twenty Eighty Rands and Forty Nine Cents (R12 078 528, 49) plus interest that is to be paid at 10.25% per annum from 22 September 2015 to date of final payment, is rescinded and set aside.

- 4.4. The warrant of execution granted to the First Respondent against the Applicant on 20 July 2024 and 03 September 2024, and served on 01 July 2024 and 05 September 2024 respectively is set aside.
- 4.5. Granting of a condonation application to the Applicant for the inordinate delay in the filing of a rescission application against an order granted on 27 February 2024 in the Honourable Court. In respect of the proceedings under Case Number 23801/2018.
- 4.6. The First Respondent to pay the costs of this application.



D. MAKHOB A J
JUDGE OF THE HIGH COURT
PRETORIA

Date of Hearing: 26 August 2025

Judgment delivered: 1 October 2025

Appearances

For Applicant: Adv T. Tshitereke
Adv M.N. Kgare

For Respondent: Adv MC Maritz SC