



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 124865/2023

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

21/10/2025

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SIGNATURE

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DATE

In the rescission application of:

THE MINISTER OF PUBLIC WORKS AND INFRASTRUCTURE

Applicant

and

NAIDU CONSULTING (PTY) LTD

First Respondent

AFROTEAM CONSULTANTS (PTY) LTD

Second Respondent

In re:

NAIDU CONSULTING (PTY) LTD

Applicant

and

THE MINISTER OF PUBLIC WORKS AND INFRASTRUCTURE First Respondent

AFROTEAM CONTANTS (PTY) LTD

Second Respondent

JUDGMENT

LABUSCHAGNE J

- [1] This application deals with the interplay between rescission of judgment on the one hand and pursuit of an appeal against the judgment on the other hand.
- [2] The first respondent in the application for rescission (Naidu Consulting) launched review proceedings as applicant on 28 November 2023 and the review application was heard by Mali, J on 23 October 2024 in the absence of appearance by the Minister, on which day an order was granted in favour of Naidu Consulting in the review application.
- [3] On 29 October 2024 the Minister of Public Works delivered an application for leave to appeal.
- [4] On 01 November 2024 the Minister also delivered an application for rescission of the judgment of Mali, J
- [5] On 13 March 2025 Mali, J gave written reasons for the order granted on 23 October 2024. Having heard the application for leave to appeal, Mali J granted leave to appeal to the Full Court on 04 June 2025.
- [6] The Minister contends that the right to rescind the judgment and to pursue an appeal can co-exist. The question is whether this proposition is correct.

Further, the issue is whether the Minister has made out a case for rescission of judgment based on Rule 42 of the Common Law.

THE JUDGMENT OF MALI, J

- [7] Mali, J heard the review application on 23 October 2024 in the Opposed Motion Court. The Minister had filed an answering affidavit, but the second respondent did not.
- [8] There was no appearance for the Minister on 23 October 2024.
- [9] The review application related to a decision of the Minister to exclude the bid of Naidu Consulting in respect of Tender HP22/002/GS for the provision of technical support in the infrastructure sector for a period of 36 months.
- [10] On 25 October 2022 Naidu Consulting submitted a bid for the tender. On 08 August 2023 the Minister posted the award for the tender, with the result that the tender had been awarded to the second respondent for the sum of R20 899 824.00 (inclusive of VAT).
- [11] On 21 August 2023 Naidu Consulting lodged a notice of appeal and requested a copy of the bid adjudication report providing reasons for its unsuccessful bid. Naidu Consulting's tender offer was for an amount of R4 253 225.14.
- [12] On 12 October 2023 Naidu Consulting was provided with the bid evaluation report from which the rejection of its bid was apparent. It proceeded with an internal appeal on 20 October 2023. However, on 26 October 2023 the

Minister notified Naidu Consulting that it did not have an internal appeal process and that the applicant was required to bring a review in terms of PAJA.

[13] The applicant requested a Rule 53 record to prepare for the judicial review, and the record was delivered on 04 March 2024.

[14] The applicant and other bidders were invited to complete a pricing schedule, being **Annexure E** to the bid. **Annexure E** gave a choice to insert prices or not to insert prices at all. Naidu Consulting used the word “*included*” to indicate that other expenses were built in into its final tender price. The Minister however regarded Naidu Consulting’s bid as non-responsive, because it did not specifically set out the rate required for care hire, flight rates and other monthly costs such as making copies, accommodation, office and administrative expenses.

[15] Mali, J then embarked on an interpretation exercise of the word “included” and found that the Minister’s decision was reviewable. The applicant had applied a zero-based approach for travel and accommodation as it intended utilising a digital approach to the implementation of the tender. The decision of the Minister was consequently found to be irrational and subject to review. The Court then determined a just and equitable remedy and ordered substitution.

[16] The Court found that, at the time of the order that it granted, the 36 months tender period was substantially still in the future as only 6 months had expired. The Court found that to have referred the decision back to the Minister would be inappropriate and would not have been in the interests of justice.

- [17] It is apparent that Mali, J had engaged the merits of the conflicting contentions in the Court proceedings before her and assessed the substantive issues as part of the judgment.

ANALYSIS

- [18] In **Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture** [2021] ZACC the Constitutional Court in the majority judgment stated the following at paragraph [68]:

“Whether we consider this application in terms of rule 42 or in terms of the common law, to which I will turn my focus next, the insuperable problem that Mr Zuma is confronted with is that the law of rescission is clear: one cannot seek to invoke the process of rescission to obtain a rehearing on the merits. The reason for that is that, as stated by this Court in Daniel: ‘the general principle is that once a court has duly pronounced a final order, it becomes functus officio and has no power to alter the order’. Of course, rule 42 creates an exception to the doctrine of functus officio, but only in narrow circumstances. As stated in Chetty –

‘a distinction is drawn between the rescission of default judgments, which had been granted without going into the merits of the dispute between the parties, and the rescission of final and definitive judgments, whether by default or not, after evidence had been adduced on the merits of the dispute. In the case of a default judgment granted without going into the merits of the dispute between the parties, the Court enjoyed the relatively wide powers of rescission ... In the case of final and definitive judgment, whether by default or not,

granted after evidence had been adduced, the Court was regarded as functus officio.'

In the contempt judgment, this Court traversed the merits of the submissions Mr Zuma is now making in this rescission application. Our discretion, at this stage, is unwaveringly narrow. Accordingly, this Court is unequivocally and irrevocably, functus officio."

- [19] The Constitutional Court expressly endorsed the principle that emanated from **De Wet and Others v Western Bank Limited** 1972 (2) SA 1031 (A) regarding default judgments where the Court has made a finding on the evidence presented. The following is stated at 1041B:

*"The Courts of Holland, as I have mentioned, appear to have had a relatively wide discretion in regard to the rescission of default judgments, and a distinction seems to have been drawn between the rescission of default judgments, which had been granted without going into the merits of the dispute between the parties, and the rescission of final and definitive judgments, whether by default or not, after evidence had been adduced on the merits of the dispute. (Cf **Athanassiou v Schultz** 1956(4) SA 357 (W) at 360 G and **Verkouteren v Savage** 1918 AD 143 at 144). In the former instance the Court enjoyed relatively wide powers of rescission, whereas in the latter event the Court was, generally speaking, regarded as being functus officio, and judgments could only be set aside on the limited grounds mentioned in the **Childerley** case."*

- [20] In light thereof that Mali, J had made a considered judgment on the evidence presented before her, the only avenue available to the Minister for challenging the judgment could be by means of an appeal. This, the Minister did, and he obtained leave to the Full Court.
- [21] There is another reason why the rescission application is not competent.
- [22] Once leave to appeal had been granted to the Full Court, only the Full Court has the power to “*confirm, amend or set aside the decision which is the subject of the appeal*” (section 19(d) of the Superior Courts Act, 10 of 2023).
- [23] While it is so that the setting aside of the decision in terms of section 19(d) relates to the exercise of the Court of its Appellate jurisdiction, this nevertheless is an indication that the rescission which the Minister now seeks in this Court relates to a decision which is subject to a Full Court Appeal. The Minister’s section 34 rights in these circumstances require the decision to be heard before the Court of Appeal, being the Court of competent jurisdiction envisaged by section 34 of the Constitution.
- [24] A challenge to the judgment cannot be entertained before a single judge while the decision is subject to an appeal before the Full Court. Where it not so, then a single judge would be capable of determining the results of an appeal in which three judges would preside. This would offend against fundamental principles within the hierarchy of the Court structures.
- [25] In light thereof that Mali, J had given a judgment after considering the evidence before her, this is not a case in which the Minister had a choice whether to

apply for rescission or to appeal the judgment. A rescission was not competent due to the nature of the decision in question.

[26] It does not therefore become necessary to decide whether an election to pursue an application for leave to appeal constitutes a waiver of a right to rescind or not. On the facts of this matter, there is no right to rescind before a single judge and only the appeal before the Full Court can be pursued.

[27] In the premises I make the following order:

1. The application for rescission is dismissed with costs, such costs to include the costs of senior counsel on Scale C.



LABUSCHAGNE J
JUDGE OF THE HIGH COURT

APPEARANCES

COUNSEL FOR APPLICANT	: ADV MANALLA
ATTORNEYS FOR APPLICANT	: COX YEATS ATTORNEYS
COUNSEL FOR RESPONDENT	: APJ ELs
ATTORNEYS FOR RESPONDENT	: STATE ATTORNEY