IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable
Case no: 3341/2024

In the matter between

THE GOVERNMENT OF THE KINGDOM OF LESOTHO **APPLICANT**

and

TRENCON BUILDING WORLD BELELA JOINT VENTURE **FIRST RESPONDENT**

TRENCON CONSTRUCTION (PTY) LTD **SECOND RESPONDENT**

IN RE:

TRENCON BUILDING WORLD BELELA JOINT VENTURE **FIRST APPLICANT**

TRENCON CONSTRUCTION (PTY) LTD **SECOND APPLICANT**

and

THE GOVERNMENT OF THE KINGDOM OF LESOTHO **RESPONDENT**

Neutral citation: *The Government of the Kingdom of Lesotho v Trencon Building*

World Belela Joint Venture and Another (3341/2024) [2025] ZAFSHC 327 (16 October 2025)

Coram: MHLAMBI J

Heard: 12 June 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 16h00 on 16 October 2025.

Summary: Rescission of judgment – Uniform Rule 42(1)*(a)* – common law – default judgment – duty of disclosure – international arbitration – foreign state immunity.

ORDER

The application succeeds and costs are to be costs in the main application

JUDGMENT

Mhlambi J

[1] There are two applications before the court: the first is to admit additional affidavits into evidence, while the second aims to rescind the order granted by Van Rhyn, J on 28 November 2024. The applicant is the respondent, and the respondents are the applicants in the main application. The order of 28 November 2024 states as follows:

'1. The appeal arbitration award of the appeal arbitral tribunal (Retired Justice of Appeal Brand, Advocate Gautschi SC and Advocate Zietsman SC) dated 14 March 2024 and transmitted to the parties on 7 March 2024, is made in order of court in terms of section 16(3) of the International Arbitration Act (15 of 2017).

2. The respondents shall pay the costs of this application, including the costs of two counsel on Scale C.'

[2] On 10 December 2024, the applicant applied for an order in the following terms:

'1. The court order issued by the Honourable Madam Justice Van Rhyn on 28 November. 2024:

1.1 is hereby declared to be void and of no force or effect.

1.2 alternatively: is hereby rescinded and set aside.

2. The main application is postponed to a date to be arranged as between counsel for the parties, in consultation with the Registrar.

3. The costs of this application will be costs in the main application.

4. Granting further or alternative relief.'

[3] The application is opposed. On 5 January 2025, the respondents served the applicant with the transcript of the proceedings held before Justice Van Rhyn. On 31 January 2025, they filed and served their answering affidavits. On 14 February 2025, the applicant filed and served its replying affidavit. On 17 March 2025, the applicant filed and served supplementary founding papers. The respondents filed their affidavit in response to the applicant's supplementary affidavit in the application for rescission. The applicant filed its replying affidavit on 11 April 2025.

[4] At the start of the hearing, both parties agreed to proceed on the basis that all the papers were before the court, allowing the court to make a single decision after hearing the parties' submissions on all the facts. The respondents' view was that the additional affidavits raised only a limited issue. The application is based on two grounds: that the order was made or granted in error, and on common law principles.

Brief background

[5] The applicant and the first respondent entered into a construction contract to build and upgrade healthcare facilities in Lesotho. An arbitration agreement specified that any disputes would be resolved through arbitration and that the law governing the contract was that of Lesotho. Several disputes related to the contract arose and were referred to arbitration. Awards were initially granted to the applicant. An appeal was filed with the appointed tribunal, which included retired Judge Brand, Advocate J Gautchi SC, and Advocate J Zietsman SC. The tribunal's award on appeal was in favor of the respondents.

[6] The applicant was dissatisfied with the award and filed proceedings to set it aside in the Lesotho High Court on 8 May 2024. The applicant obtained a ruling in their favor, temporarily staying the recognition and enforcement of the award until the validity challenge is resolved. The order was finalised on 2 July 2024, by the Lesotho High Court. The respondents submitted their notice of appeal regarding both orders on 13 August 2024.

[7] On 20 June 2024, the respondents filed the application in this Court, leading to the order of 28 November 2024. The applicant opposed the application on 20 August 2024 and served its answering affidavit in the main application on 10 September 2024.

The respondents filed an index and a notice of set down on 30 October 2024. An amended index was delivered on 1 November 2024. The respondents' practice note, heads of argument, chronology and draft order were delivered on 20 November 2024. Correspondence was exchanged between the parties on 26 and 27 November 2024. The court granted an order on 28 November 2024.

The default judgment

[8] The applicant argued that the judge, had she known certain facts, would not have granted the order. These facts were that the respondents' legal representatives did not know the matter had been scheduled for a hearing on 28 November 2024. The applicant had informed the respondents' attorneys that it had briefed Advocate Louw SC, to represent it at the hearing of the main procedures and had requested that a hearing date be arranged between the two senior counsel. It was evident, so it was argued, that the applicant was unaware that the matter had already been scheduled. It was contended that the respondents sent an email after business hours the day before the hearing, which the applicant only saw too late to arrange counsel to attend, explain the facts, and request a postponement to give the applicant a chance to present its case in the main proceedings.

[9] The applicant contended that, had the presiding judge been aware of the facts, she would, in fulfilling her duty to ensure a fair process, not have issued the order but instead would have issued a fair and just order to ensure effective *audi alteram partem* in the main proceedings where answering papers had been filed. She could have ordered the matter to be deferred for an hour, postponed it for a week to allow the respondents to notify the applicant of the delay, or refused to grant an order.

[10] The applicant argued that it was not in willful default for failing to deliver its heads of argument or appear before the court on 28 November 2024, as the respondents' legal representatives were unaware that the main proceedings were scheduled for that date. It had a bona fide defence and prospects of success. It relied on the immunity provided under the Foreign State Immunities Act 87 of 1981 (the Act), and the procedural privilege in s 14, which prohibited the enforcement of any order against the applicant's property. As a friendly foreign state, the court has no jurisdiction to hear this matter because it cannot issue an effective judgment as outlined in s 14

of the Act. The status of the first applicant had not been established. Enforcing the arbitrary award in question would be against the public policy of the Republic, as there are ongoing proceedings (which predate this application) in the Lesotho High Court testing the validity of the arbitral award.

[11] The respondents pointed out several inconsistencies in the founding affidavits and noted that the judge was informed of the circumstances leading to the applicant's absence on 28 November 2024. They acknowledged the exchange of correspondence between the applicant's attorneys and Advocate Louw SC's secretary on 22 November 2024. They stated that on 21 November 2024, when the applicant's advocate inquired about the respondents' heads of argument being due, the attorneys should have been able to advise him, as they should have known the hearing date. The document bundle, including the notice of set down and the respondents' practice note, was paginated by the applicant's Lesotho legal representative according to the amended index and shared with its attorney and Advocate Louw's secretary. The first entry on the amended index listed the hearing date as 28 November 2024.

[12] The respondents acknowledge receiving the applicant's letter dated 25 November 2025, in which he informed them that Advocate Louw had been briefed to appear at the hearing. The letter suggested that a suitable date be agreed upon by the respective counsel, after which steps would be taken to schedule the matter. The respondents' attorneys received this letter on 26 November 2024, at 3h32, and forwarded it to their instructing attorney on 27 November 2024. The instructing attorney stated that he was traveling from Johannesburg to Bloemfontein for the hearing at the time but responded to the letter the same day at 17h06. In its reply, the respondents indicated that it was unclear whether the applicant was seeking a postponement of the application and, if so, on what grounds. They confirmed that the matter would proceed as scheduled and reserved their rights concerning any postponement that might be requested.

The transcript and additional affidavits

[13] It is clear from the transcript that at 11h31, Advocate Daniels informed the court that Mr Chris Edeling, who appeared in the Lesotho Court and not in this application, and with whom he had extensive dealings, told him that morning that they

seemed to have missed the notice of setdown and that they would need to seek a postponement and tender costs. He told Mr Edeling that this was a matter to be handled between their respective attorneys. Advocate Louw SC was a colleague and sat in the same group as he did. Neither he nor Miss De Villiers-Golding had heard anything from him. They were not willing to agree to a postponement that had not yet been requested. He argued that there was no reason why the order could not be granted.

[14] Mr Edeling, in a supporting affidavit, confirmed that on 28 November 2024, he exchanged several WhatsApp messages with Advocate Daniels, as shown in the two screenshots attached to his affidavit. The messages started at 11h01 and ended shortly after 12h17. At 11h17, he asked Advocate Daniels to 'advise the court that our SC was not told of the date?' Advocate Daniels said that the correspondence would obviously be disclosed. He was also informed that Advocate Louw had obtained the respondents' documents but missed the set-down because the respondents' practice note stated the matter was scheduled for 28 November, which they all missed. They needed to tender the costs of postponement and would ask Stephan to advise the respondents' attorney. Advocate Daniels' response was 'yes. I'm not in a position to deal with this on my feet. Chris'. At 12h17, he received a message saying the order was granted at approximately 11h45.

[15] The respondents stated in the answering affidavit that the applicant attempted to reinforce its case for rescinding the judgment by using the transcript, which was an improper second effort on the same issue. The WhatsApp messages were revealing. The first message was sent at 11h02. It indicated that the letter of 25 November 2024 was written because, by then, the respondent already knew that the application was scheduled for 28 November 2024. The transcript and the messages did not aid the respondent. They demonstrated that the respondents' reasons for rescission were unfounded.

[16] The respondents' counsel argued that all served processes were fully disclosed, including their contents, as well as all exchanged communications, including those between him and Mr Edeling. None of the applicants' legal representatives had contacted Advocate Louw SC. At the time of the hearing and the

granting of the order, all the applicants' legal representatives knew that the case was proceeding in court and deliberately chose not to appear.

[17] In response, the applicant argued that the respondents' counsel was aware that their counsel was unaware that the matter was in court. Instead of informing the court accordingly, the respondents' counsel claimed that the applicant, including its counsel, Advocate Louw, must have known the hearing date, describing the letter of the 25th as peculiar. He did not correct the judge's impression that Advocate Louw was aware of the hearing and had deliberately chosen not to attend. The counsel knew that the judge was mistaken, and he should have spoken up.

[18] The applicant referenced the record where the judge stated, 'And Adv Louw has been instructed to appear and here is just...'. The applicant explained that the judge was interrupted by the respondent's counsel, who did not correct the judge's impression that Advocate Louw 'has been instructed to appear and apparently chose not to do so. The respondent failed to bring to the court's attention the fact known to him and argued the probabilities as if Advocate Louw was aware of the set-down. This was a nondisclosure of a relevant fact.

Analysis and the law

[19] Uniform rule 42(1)*(a)* states that the court may, in addition to any other powers it has, *mero motu* or upon the application of any affected party, rescind or vary an order or judgment that was mistakenly sought or mistakenly granted in the absence of any affected party. In *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* (*Zuma*),[1] the court explained that the main issue for determination was whether a procedural irregularity was committed when the order was issued. In *Freedom Stationery (Pty) Limited and Others v Hassam and Others*,[2] the following was stated:

'[25] As I have said, when an affected party invokes rule 42(1)*(a)*, the question is whether

[1] *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* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (*Zuma*) para 59.

[2] *Freedom Stationery (Pty) Limited and Others v Hassam and Others* [2018] ZASCA 170; 2019 (4) SA 459 (SCA) para 25.

the party that obtained the order was procedurally entitled thereto. If so, the order could not 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. In my view 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. In this regard it would be useful to enquire whether the relief could have been granted without amendment of the process in question. If so, the failure of an affected litigant to take steps to protect his interests by joining the fray ought to count against him. I agree with what Didcott J said in *Ex parte Mason* 1981 (4) SA 648 (D) at 651C – D, namely:

"The creditor who is not a character from some fairy tale protects his interests by keeping in touch with the application's progress and, once his opposition to it is serious, by joining the fray. On the advertised date he appears or is represented in Court, to discover for himself whether the proceedings will be abandoned. If he has held back his affidavits in the meantime, he will have no difficulty in defending his caution and, should the case continue, in persuading the Court to allow him the opportunity to file them after the security is furnished."

In circumstances such as these, a party who did not oppose or participate in the proceedings would not be entitled to relief under rule 42(1)*(a)*. This is not only logical and fair, but accords with the fundamental principle of finality of litigation.'

[20] In *Chetty v Law Society,*[3] it was stated that under common law, the Court has the authority to rescind a judgment obtained by default of appearance if sufficient cause has been shown which involved two key elements: (1) the party seeking relief must provide a reasonable and acceptable explanation for their default, and (2) that on the merits, the party has a bona fide defence which, prima facie, has some prospect of success. It is not enough if only one of these conditions is met; for obvious reasons, a party with no prospect of success on the merits will fail in a rescission application of a default judgment against them, regardless of how reasonable and convincing their explanation for default is. Moreover, judicial process would be undermined if, on the other hand, a party who provides no explanation other than disdain for the rules is still allowed to have a judgment against them rescinded simply because they have a reasonable prospect of success on the merits. In some cases, when the question of whether a defendant's explanation for default is finely balanced, the fact that their proposed defence has reasonable or good prospects of success might sway the

[3] *Chetty v Law Society* 1985 (2) SA 756 (A) 765B-F.

decision in their favour for rescission. However, this does not mean that the greater the prospects of success, the more lenient the Court will be regarding the explanation of their default.

[21] The applicant, supporting its case based on Rule 42(1)*(a)*, relied on *Zuma*,[4] and *Mi-Tax (Pty) Ltd v National Printing & Publishing Trust (PTY) Ltd* (*Mi-Tax*).[5] In *Zuma,*[6] it was stated:

'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".'

[22] In *Mi-Tax*,[7] it was stated that:

'For the same reasons, there is in my view a legal duty on a litigant who moves an application for default judgment to disclose to the court certain relevant information in the possession of the litigant but not available to the presiding judge if the disclosure of such information might reasonably lead the judge to refuse, postpone or stand down the application. If the content of such information, when disclosed after the judgment, is relevant to the decision under rule 42(1)(a), then it must follow that there is a duty to disclose it when the application for default judgment is moved. The precise ambit of this duty may be difficult to anticipate and I shall not try to do so but the practical difficulty of identifying circumstances which call for disclosure should not be over-emphasised. This duty of disclosure is honoured by counsel every day in the unopposed motion courts of this division and indeed these courts could not function properly if this were not so.'[8]

[23] The respondent argued that the applicant's position was flawed because the court was informed that the applicant's representatives apparently missed the notice of set-down. The transcript showed that the Presiding Judge was aware of all the relevant facts. According to Ms Cooper's account, the applicant was in willful default. What the respondent's counsel overlooks is that, based on the WhatsApp messages,

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[4] *Zuma* fn 1 above.
[5] *Mi-Tax (Pty) Ltd v National Printing & Publishing Trust (Pty) Ltd* 2010 JDR 0067 (GNP) (*Mi-Tax*).
[6] *Zuma* para 62.
[7] *Mi-Tax* para 34.
[8] See also Fanang Diatla Business Enterprise & Construction CC and Another v Makatsuka Civils and Construction CC (9978/2023) [2025] ZALMPPHC 112 (9 June 2025).

he failed to tell the court that Mr Edeling had asked him to notify the court that Advocate Louw was unaware of the hearing date.

[24] On 3 December 3, before applying for rescission, the applicant requested the reasons related to the court order issued on 28 November 2024, as they planned to apply to set aside the order. If the application to set aside the order was dismissed, the applicant intended to seek conditional leave to appeal the order. The registrar informed the applicant by letter dated 12 December 2024, that the request for reasons had been handed to Judge Van Rhyn for her consideration. The default judgment was granted following the letter dated 25 November 2024, addressed to the respondents' representatives and presented at the hearing. The case was stood down and only reconvened around 12h30 because Advocate Louw SC did not appear in court on behalf of the applicant. Consequently, no reasons for judgment by default would be provided by Judge Van Rhyn.

[25] It is therefore clear that the presiding officer was troubled by the absence of the applicant's counsel on the hearing date. I believe that failing to inform the court that Advocate Louw was unaware of the hearing date, as requested by Mr Edeling, was significant, and this omission influenced the court's decision. In my opinion, the application based on rule 42(1)*(a)* should succeed. If I am mistaken, then the application should still succeed under common law for the reasons outlined below.

[26] It is not disputed that Advocate Louw may have missed the hearing date, but he had completed all preparations to ready the main trial. Ms Cooper's evidence is that she became aware of the respondents' letter on the day of the hearing of the application. She did not have the right to appear, but had informed her team members about the matter pending in court that morning. She arranged for Ms Streso, an attorney qualified to appear in court, who spoke to Mr Jeffrey around 12h00, expressing her willingness to appear and request a postponement, which would include paying wasted costs. These efforts to secure a postponement failed, as Mr Jeffrey informed her at 12h15 that the default judgment had already been granted.

[27] The notice of set down did not come to her, Mr Redelinghuys', or Advocate Louw's attention before 28 November 2024 because it was stapled to the back of the

respondents' index, which was delivered on 30 October 2024. Before that index could be circulated to other members of the legal team, an amended consolidated index was delivered on 1 November 2024, without any notice of set down attached. The amended consolidated index was circulated to her team because she saw no need to send the initial index, which was replaced by the amended one. Nothing indicated to her that the notice of set down was stapled to the back of the initial index.

[28] Although the amended index listed the notice of set down as the first item, she understood it would be inserted and paginated according to the amended index once the notice of set down was received. She did not realise that the set down was already in her possession, stapled to the back of the initial index that the amended index had replaced. Had she known about the notice of set down, she would have immediately sent a copy to Mr Redelinghuys, who would then have included it in the brief to advocate Louw.

[29] In De *Wet and Others v Western Bank Ltd (De Wet*),[9] it was stated that under common law, the court's discretionary power tends to be influenced by considerations of justice and fairness, taking into account all the facts and circumstances of each case. The burden of proving sufficient grounds for relief rested on the applicant in every case, and they had to satisfy the Court, among other things, that there was a reasonably satisfactory explanation for why the judgment was allowed to go by default. The Court's discretion under common law went beyond, and was not limited to, the criteria specified in rules 31 and 42(1), as well as those explicitly mentioned in the *Childerley Estate Stores v Standard Bank of SA Ltd*,[10] case (fraud, justus error or exceptional circumstances). Those criteria do not, for example, cover situations where a litigant or their legal representative defaults due to unforeseen circumstances beyond their control, such as sudden illness or other unforeseen misadventures; many scenarios exist where both logic and common sense would support that a defaulting party should, as a matter of justice and fairness, be granted relief.

[30] Unlike the circumstances in *De Wet*,[11] the applicant sent a letter to the

[9] *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) (*De Wet*) at 1042H.
[10] *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163.
[11] *De Wet.*

respondents to arrange a hearing date before the scheduled time. A response was received on the morning of the hearing, and both Ms Cooper and Mr Edeling did not sit on their laurels; they made efforts to secure a postponement. The applicant's attorneys made errors related to the enrolment of the application. However, I do not believe that, given the circumstances described in the papers, their behaviour can be considered a flagrant and gross violation of the rules. It cannot be said that the applicants' attorneys or representatives acted wilfully, as a span of a few hours does not constitute flagrant behaviour. The principle is that all matters should be brought to a final resolution.

[31] Having listened to the parties' submissions on all the facts, I allow the additional affidavits into evidence. I have considered all the relevant facts and circumstances and am of the view that, on common law principles, it would be fair and just to exercise my discretion in favour of the applicant to grant the relief sought.

[32] The following order issues:
The application succeeds and the costs are to be costs in the main application.

[redacted]

J J MHLAMBI
JUDGE OF THE HIGH COURT

Appearances

For the appellant:	P F Louw SC
Instructed by:	Coopers & Associates Inc.
For the respondent:	A J Daniels SC
Instructed by:	Mcintyre Van Der Post Inc.