

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

**CASE NO: 042667/23**

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|-----|---------------------------------------------------|
| (1) | REPORTABLE: NO / YES                              |
| (2) | OF INTEREST TO OTHER JUDGES:<br>NO/YES            |
| (3) | REVISED.                                          |
| (4) | SIGNATURE <span style="float: right;">DATE</span> |

In the matter between:

**CITY OF TSHWANE METROPOLITAN MUNICIPALITY**

**APPLICANT**

and

**BEKNOR CC t/a CRAWDADDYS**

**RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 06 November 2025.

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**JUDGMENT**

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**Khumalo N V J**

*Introduction*

[1] This is an Application by the City of Tshwane Metropolitan Municipality ("The City") for the rescission of default judgments granted against it by Phalane J on 22 December 2022 and Khwinana AJ on 17 February 2023 in favour of Beknor CC t/a

Crawdaddys Centurion, the Respondent. The judgments were granted under case number 7684/2020. The rescission is brought in terms of Rule 42 (1) (a) of the Uniform Rules of Court (**the Rules**) on the basis that the judgments were erroneously sought or erroneously granted in the City's absence, failing which under common law.

### *Background facts*

[2] The Respondent, a company duly registered, runs a restaurant within the City of Tshwane Metropolitan Municipality. It had sued the City as an entity responsible for the Roads in the Tshwane Metropolitan Municipality area for an amount of R639 61,25, for loss of profit/income as a result of a sinkhole that happened in front of its premises. Phalane J found the City liable for the loss and subsequently Khwinana J granted the Respondent an order for the amount claimed for damages. In both instances the City was in default of appearance notwithstanding the court processes and the notices of set down being served on it. The amount was subsequently settled by the City.

[3] The City alleges that the reason for its default was due to the fact that at the time the default orders were granted it was also sued for seven other claims resultant from the sinkhole. This particular summons fell within the cracks. On the substance it alleges that the judgments were erroneously granted by the court in that there are facts which, if the court was aware of would not have granted the orders. The court erred in law as well. The City has further argued that it is alternatively, entitled to rescission under common law as it has a bona fide defence against the claim.

[4] The Respondent disputes that the judgments were erroneously granted either procedurally or factually or in law. Furthermore, argue that the City was in wilful default when it failed to defend the matter and does not have a bona fide defence against its claim. It therefore is not entitled to a rescission either in terms of Rule 42 (1) (a) or under the common law.

[5] Rule 42 (1) (a) reads:

(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; [Rule 42(1)(a) substituted by GNR 235 in G. 1375 with effect from 18 February 1966.]

[6] The court has a discretion whether or not to grant an application under this subrule.<sup>1</sup> However for the court to exercise its jurisdiction to set aside the order in terms of the subrule, all the jurisdictional facts contained in the subrules have to exist.<sup>2</sup> The purpose of the rule is to correct expeditiously an obviously wrong judgment or order.

[7] The court in *Nyingwa*<sup>3</sup> on an erroneously granted judgment stated the following:

“therefore, it seems that a judgment has been erroneously granted if 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 he had been aware of it, not to grant the judgment.” The Constitutional Court confirmed this ratio in *Zuma*.<sup>4</sup>

[8] The interpretation of the reference to that “the court may” has been indicated to mean that “the fact that the application for rescission of judgment is brought under this subrule does not mean that it cannot be entertained under Rule 31 (2) (b) or the common law, provided the requirements thereof are met.

[9] In terms of the common law, a judgment can be set aside on the following grounds:

(a) fraud;

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<sup>1</sup> *De Wet vs Western Bank Ltd* 1977 (4) SA 770 (T) at 780H-781A; *Swart & Absa Bank Ltd* 2009 (5) SA 219 (C)

<sup>2</sup> *Swart* supra at 222B-C; *Van der Merwe v Bonaero Park Edms Bpk* 1998 (1) SA 697 (T) at 702H; Supreme Court Practice; Uniform Rules of Court: Rule 42 D1-563

<sup>3</sup> *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 570

<sup>4</sup> *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) at para 62

- (b) justus error (on rare occasions);
- (c) in certain exceptional circumstances when new documents have been discovered;
- (d) when judgment has been granted by default; and
- (e) in the absence between the parties of a valid agreement to support the judgment, on the ground of iusta causa.

[10] The application on common law grounds must be brought within a reasonable time, upon which the court still retain a discretion to be exercised after a proper consideration of all the relevant circumstances.

[11] Under Rule 31 (2) (b), in casu what is relevant to bring the City's rescission application within the framework of the subrule is the granting of the judgment by default. Under that circumstances the City must show good/sufficient cause. It generally means that the City must:

- (i) give a reasonable explanation for the default,
- (ii) show that the explanation is bona fide, and
- (iii) show that on the merits it has a bona fide defence which prima facie carries some prospects of success.<sup>5</sup>

### *The Defaults*

[12] The City does not dispute the following facts alleged by the Respondent in its Answering Affidavit. On 5 February 2020, the Respondent served its issued summons on the City through the sheriff. Nearly a year thereafter on 19 January 2021, it by email served its Notice to set the matter down for Default Judgment on 8 February 2021. A further notice was subsequently served by the sheriff on 7 October 2022 for a set down on 17 November 2022. A Mr M S Nkuna ("Nkuna") from the City emailed the Respondent's attorney of record, requesting a copy of the Application set down for 17 November 2022. The attorneys sent it to Nkuna on 28 October 2022. On 17 November 2022, the City was in default of appearance notwithstanding Mr Nkuna being aware of

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<sup>5</sup> *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042F-1043A;

the hearing. The Respondent was granted default judgment on the merits by Phahlane J (“the first order”)

[13] On 6 February 2023, the Respondent served on the City a notice of set down for 17 February 2023 and a Rule 36 (9) Notice by email directed to Mr Nkuna. The Respondent was again in the absence of the City, granted default judgment for its proven damages/loss (“the second order”). On 20 and 22 of February 2023 the Respondent served the two default judgment orders on the City’s Mr Nkuna. The court order of 17 February 2023 was also served on the City’s legal department by hand. A communication from the City was only received on 28 March 2023 requesting access to case line which was granted on 30 March 2023.

[14] Subsequent to being granted access, the City brought an application for rescission of the judgments issued only on 5 May 2023. This was after an attempt to bring the application on an urgent basis, which it withdrew following a few mishaps. The urgent application was prompted by the attachment of its bank account to the amount of the judgment debt.

[15] All the abovementioned facts regarding the City’s awareness of the court proceedings, from their commencement until default judgments were obtained, are not disputed. It therefore cannot be denied that the City was afforded the procedurally regular judicial process to make sure that it exercises its right to be heard<sup>6</sup>. It did not. It did not file a notice of intention to defend notwithstanding that the summons was properly served and did come to its attention. Neither did the City exercise the indulgence afforded by Rule 19 (5) to do so at a later stage nor to halt the judgment processes it was notified of on numerous occasions.<sup>7</sup>

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<sup>6</sup> The *audi alteram partem* rule is a **fundamental principle of natural justice** that relates to an individual’s right to be heard before a decision is made that could negatively impact such an individual; Also Zuma *supra* ft note 4

<sup>7</sup> Rule 19 (5) reads:

Notwithstanding the provisions of subrules (1) and (2) a notice of intention to defend may be delivered even after the expiration of the period specified in the summons or the period in subrule (2), before default judgment has been granted: Provided that the Plaintiff shall be entitled to costs if the notice of intention to defend was delivered after the Plaintiff has lodged the Application for judgment by default.

[16] This is the context in which the City had to explain its default. It had in that regard created serious hurdles to overcome in order to dispel the presumption of wilfulness of its conduct. The casual or poor explanation that there were a lot of complains resultant from the same sinkhole at the time is clearly unreasonable and insufficient to dispel its obvious disregard of the legal processes wilfully. It consciously took a decision not to defend the action nor to engage the Respondent to raise the issues it is raising now on rescission. It did not offer any explanation why it was failing to defend the action. It shunned all the legal protection a litigant is afforded constitutionally<sup>8</sup> or by common law, that of a fair administration of justice, by excluding itself from the proceedings.

[17] In *Zuma*<sup>9</sup>, the court opined that:

*“As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed. I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, ipso facto (by that same act), plead the “absent victim”. If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing absentia (absence).”*

[18] Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted in absentia, into one erroneously granted. This warning has been constantly repeated by our courts following the Zuma judgment.<sup>10</sup>

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<sup>8</sup> S 34 of the Constitution of South Africa, 1996

<sup>9</sup> *Zuma* supra, footnote 4 at paragraph [60]

<sup>10</sup> *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* [\[2007\] ZASCA 85; 2007 \(6\) SA 87](#) (SCA) (*Lodhi 2*)

[19] The City's absence was an own choice. It was only jolted to action in terms of instituting legal proceedings long after it was notified of the Judgment and only when the Sheriff attached the judgment debt amount in its bank account in execution of the order. It has stated that the orders affect the City adversely and its ability to deliver on its Constitutional and legislative mandate severely compromised. This is its only worry not a wish to litigate and see the matter through.

[20] Furthermore the City's impression that just being in default of appearance is sufficient to find a hearing under Rule 42 (1) is misguided. It should have been because of lack of knowledge of the proceedings or a prohibition by circumstances beyond one's control. Its explanation amounts to a poor explanation and fails to justify its absence for either the purposes of a rescission under Rule 42 (1) or the common law.

[21] In *Zuma*<sup>11</sup> where allegations of a judgment erroneously sought or granted in the absence of a litigant that has against all efforts had decided to stay away from any participation in the proceedings he was aware of were made, the court opined as follows:

*"Mr Zuma alleges that this Court granted the order in his absence as he did not participate in the contempt proceedings. This cannot be disputed: Mr Zuma did not participate in the proceedings and was physically absent both when the matter was heard and when judgment was handed down. However, the words "granted in the absence of any party affected thereby", as they exist in rule 42(1)(a), exist to protect litigants whose presence was precluded, not those whose absence was elected. Those words do not create a ground of rescission for litigants who, afforded procedurally regular judicial process, opt to be absent."*

[23] The court in *Zuma* further opined as follows:<sup>12</sup>

*"The cases I have detailed above are markedly distinct from that which is before us. We are not dealing with a litigant who was excluded from*

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<sup>11</sup> Supra footnote 4, at paragraph [56]

<sup>12</sup> See footnote 12

*proceedings, or one who was not afforded a genuine opportunity to participate on account of the proceedings being marred by procedural irregularities. Mr Zuma was given notice of the contempt of court proceedings launched by the Commission against him. He knew of the relief the Commission sought. And he ought to have known that that relief was well within the bounds of what this Court was competent to grant if the crime of contempt of court was established. Mr Zuma, having the requisite notice and knowledge, elected not to participate. Frankly, that he took issue with the Commission and its profile is of no moment to a rescission application. Recourse along other legal routes were available to him in respect of those issues, as he himself acknowledges in his papers in this application.*

[22] Finally the court stated that:

*“Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted in absentia, into one erroneously granted. I need say no more than this: Mr Zuma’s litigious tactics cannot render him “absent” in the sense envisaged by rule 42(1)(a).”<sup>13</sup>*

[24] It is the realm within which the City finds itself, that it cannot find refuge under Rule 42 (1) (a). It stated that the reason it would seek a rescission is because their account is affected and the orders inconvenience its fulfillment of its constitutional and legislative mandate. It is therefore far from being because the Judgment was erroneously sought or granted but rather to seek to protect itself from the problematic situation it puts itself into.

[25] It would be difficult to protect such a litigant as was pointed out by the Supreme Court of Appeal in *Colyn* when it held that<sup>14</sup>:

*“The defendant describes what happened as a filing error in the office of his Cape Town attorneys. That is not a mistake in the proceedings. However, one describes what occurred at the defendant’s attorneys’ offices which resulted in*

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<sup>13</sup> Zuma Supra, footnote 4 at paragraph [61]

<sup>14</sup> *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* (127/2002) [2003] ZASCA 36; [2003] 2 All SA 113 (SCA); 2003 (6) SA 1 (SCA) (31 March 2003) at para 9

*the defendant's failure to oppose summary judgment, it was not a procedural irregularity or mistake in respect of the issue of the order. It is not possible to conclude that the order was erroneously sought by the plaintiff or erroneously granted by the Judge. In the absence of an opposing affidavit from the defendant there was no good reason for Desai J not to order summary judgment against him."*

[26] Our jurisprudence was said to be clear: where a litigant, given sufficient opportunities to participate, elects to be absent, that such absence does not fall within the scope of the requirement of rule 42 (1) (a), and cannot have the effect of having an order granted in absentia, into one erroneously granted.<sup>15</sup>

### *Merits*

[27] On the merits it is also not disputed by the City that there was a sinkhole in front of the Respondent's restaurant and that as a result thereof the Respondent suffered a loss in profit. The court in Phahane J had found, in the absence of any contradictory evidence due to the City being in default of appearance, as alleged by the Respondent that the upkeep and maintenance of the roads in the Tshwane Metropolitan Municipality was the City's responsibility which included the fixing of, inter alia, sinkholes and storm water pipes and to do so within a reasonable time. Further that the City's /failure to do so was in breach of its duty of care therefore negligent, and such negligence to have resulted in the loss suffered by the Respondent. The court as a result found the City to be 100% liable for the Respondent's proven damages.

[28] The City denies being responsible for the sinkhole or the loss resultant therefrom. The City alleges that the court orders were granted erroneously and to be so on five grounds, and that the sinkholes were as a result of a natural phenomenon and none of them were because of the City's doing, that is the alleged failure to maintain the roads.

[29] The City in its denial of any liability further pointed out that the sinkhole was discovered and reported by contractors in 2017. At the time some other 23 sinkholes

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<sup>15</sup> *Zuma Supra*, footnote 4

were reported in the region. As a result some extensive geological drilling work had to take place to determine priority in the rehabilitation thereof. A repair plan was finalised after 26 drillings. Based on the determination of prioritisation, the sinkhole at Jean Avenue and Gherard, which is the sinkhole in *casu*, was classified as of highest priority. However, since the resources were inadequate at the time, the fixing of some sinkholes were rolled over to the next financial year. According to the plan the completion of the rehabilitation was supposed to be in July 2018.

[30] In the meantime it is alleged a second subsidence occurred. It changed the initial repair plan and completion date, which was now to be September 2018. The site was handed over to the service provider only in January 2018. The City received monthly reports throughout the period. It pointed out that the fixing of the sinkholes is a cumbersome process that involves 5 stages, one of which is advertising for the services, calling for tenders and finding a suitable service provider. The process was only finalised in December 2017 as procurement processes are highly regulated. The service provider's August 2018 report indicate that the intersection was partially opened to traffic on 10 August 2018. Eventually, the sinkhole was completely fixed in October 2018. The Respondent is accused of creating a false impression that the road was only open on 30 October 2018, and that to be one of the false facts and law under which the court had laboured when it granted the orders. It is alleged to have been a due process that the City had to embark on prior to commencing with the rehabilitation, that caused the delay of the maintenance and not a deliberate intention by the City.

[31] Furthermore it is alleged that the estimated costs for rehabilitation of that sinkhole was R25M when the budget allocated for repairs of all sinkholes for that period, 2017/2018 year, was R4.5M. The amount was obviously insufficient to cover the rehabilitation costs. The following year the City was able to source the amount of R25M required, which enabled the City to proceed with the Roads and Transport rehabilitation. Its argued that at no point did it not fix the sinkhole at the time when it had the means to do so and further that not having sufficient funds does not amount to negligent conduct.

[32] The City in its explanation of what has happened has not denied that it was responsible for maintaining the roads and infra structure and for fixing or repairing the

sinkholes within a reasonable time, once it has happened. It contends however that it cannot prevent the occurrence of sinkholes, arguing that they do not occur as a result of the City's failure to maintain the roads or infra structure but due to stormwater, pipes or leaks. It therefore cannot be found to have caused the sinkhole, but for the duty to repair the sinkhole once it has happened.

[33] It is denied that the City was further negligent when it failed to repair or rehabilitate the road immediately or within a reasonable time, after the discovery of the sinkhole, alleging that it had to follow process and as it has explained, there was a shortage of funds. All these facts were not before the court when the first order finding the City liable was made. As a result it is alleged by the City that the order on the merits were erroneously granted without this further evidence. The correctness of the decision on the merits placed in issue.

[34] It is therefore contended that the issue whether the City was negligent in the fixing of the sinkhole must be determined against the context of how the sinkholes occur. The rainy seasons led to more sinkholes than usual. Infra structure such as leaking pipes and even swimming pools all contributing to the creation of sinkholes, although water is not the sole cause of sinkholes, it happens more than usual. It is therefore extremely difficult for the City to predict when and where the sinkholes will occur. Therefore, the assessment of the City to determine if it was negligent or wrongful in its response as alleged, must be understood in the background of the causes of sinkholes.

[35] In addition, it is pointed out that when the Respondent obtained its orders, it alleged that the City failed in its legal duty:

[35.1] to ensure that all roads are maintained and had no weakenings as a result of water, and that pipes and storm water pipes are maintained and replaced.

[35.1.1] in that regard the City denies that water pipes and water had anything to do with the particular sinkhole. A geological investigation conducted by the City's service provider

revealed that the water had nothing to do with the particular sinkhole. No ground water was encountered in any of the boreholes drilled in that area. It is believed that the cavity was formed over a fairly long period as there are no active wet services nearby. The material was dry and no leaks found. As a result the City alleges that the court erred when it granted the order on the basis that the City failed in its legal duty to maintain the water pipes.

[35.2] to ensure that there is a system through which all the maintenance and the repairs within the Municipality are conducted and addressed within a reasonable time.

[35.2.1] According to the City, the time it takes to fix a sinkhole is dependent on the factors mentioned in the system which is in accordance with its sinkhole priority listing. The sinkhole in question was dealt with in accordance with this system. As a result, alleges that the court erred in finding that the city has no system by which it maintains the roads. Alleging that in fact the area around the sinkhole in question did not collapse because of poor maintenance or any other reason but excavated by the city as part of its plans to repair the tarmac.

[35.3] to make sure that all areas and roads within Tshwane are safe for use and inspected regularly.

[35.3.1] The City argues that a regular inspection of roads does not prevent the occurrence of sinkholes and incorrect that the City's failure to inspect the roads led to the occurrence of the sinkhole. The City confirms the allegation by the Respondent that most of the city is on dolomite land, therefore prone to sinkholes. However argue that nothing much can be done to prevent the disasters as they are

largely caused by burst water pipes and storm water. Also because of the dolomite nature of the land, the regular assessment of the road will not prevent the occurrence of disasters and its City Sinkhole Priority listing speaks to how the City reacts to sinkholes not to prevent them, as it cannot prevent the rain, floods and dolomite from forming.

[35.4] Furthermore, its alleged that the City has got policies and plans in place on how to fix the potholes and therefore cannot be said to have been negligent. If there was a problem then it must have been with the Sinkhole Priority Listing which still does not apply to this place.

[36] The City denies that it has failed in its duty. Overall it is argued that the court misapplied the test for negligence as a result of not having the above information.

[37] The issue that arises in view of the sentiments expressed in *Zuma supra* and on the basis of the authorities referenced therein is whether the facts mentioned would have induced the court not to grant the judgments.

#### Error in law

[38] On the issue of the decision being erroneous in law, the City referred to the first order that granted the Respondent condonation for its failure to serve the City with the notice in terms of s 3 of the Institution of Legal Proceedings Against Certain State Organs Act 40 of 2002 ("the notice") before instituting the action against the City. The Summons were served on 5 February 2020 and the notice only served on 3 August 2020. It is three years after the sinkhole occurred and almost 6 months after summons served. The Respondents alleged ignorance of the law as a layman, and the advent restrictions resultant from the Covid 19 epidemic for the late service of the notice.

[39] The City disputes the reasons advanced by the Respondent for the late notice. It pointed out that the Respondent was already being assisted by attorneys by the time the Notice was served in August 2020, in that the Summons is dated 31 January 2020

which it points out to be clearly signed by an attorney and Counsel. It therefore disputes the truthfulness of the Respondent's allegation that Counsel's opinion obtained only in March 2020, when Summons indicate the contrary.

[40] The City points out that condonation was only requested for the period January to August 2020 and not the period prior the institution of the action when the notice was supposed to be served. The condonation order was therefore erroneously granted for only the period post the summons. No condonation was sought for the period between six months after the date of the sinkhole occurrence on 17 November 2017 to the date of the summons. It argued that the requirements as per notice in terms of s 3 (4) (b) for granting condonation were not met.

[41] Moreover the City alleges to have been prejudiced by the Respondent's failure to serve the notice as it would have had knowledge that legal proceedings were to be instituted soon and less likely that it would have confused it with the other matters related to the same sinkhole. It stresses that the condonation granted to the Respondent was inadequate, as it covers the period from Summons until August 2020 when it eventually was served on the City.

#### Analysis on the Order erroneously sought

[42] In *Bakoven Ltd v GJ Howes (Pty) Ltd*<sup>16</sup> the position on erroneously granted judgment is explained 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 proceedings."*

[43] For the purpose of Rule 42 (1)(a) the defences were always available to the City when it was served with the papers. The City was also well aware of what the Respondent's claim was and of the excuses it has raised as a defence, however it

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<sup>16</sup> 1992 (2) SA 446 (ECD) at page 47F

chose not to participate all the same, and put the Respondent in a precarious position of having to proceed with Default Judgment, without a version of the City. At the time of the order the said allegations were not before court, therefore it cannot be said that the Judgment was erroneously granted or sought.<sup>17</sup>

[44] Further in relation to the order being erroneously sought or granted, in *Zuma*<sup>18</sup> the court stated that:

*“Mr Zuma’s purported absence is not the only respect in which his application fails to meet the requirements of rule 42(1)(a). He has also failed to demonstrate why the order was erroneously granted. 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”.*

[45] The absence of averments by the City which may have been relevant at the time when the court was seized with the adjudication of the allegation of the City’s negligence/failure to fulfil its duties towards maintenance of the roads and rehabilitation of sinkholes within a reasonable time cannot render the order granted erroneous, on the basis of absenteeism of the City. The City when it ignored the Notices was well aware of the relief sought and that it was well within the bounds of what this Court was competent to grant if a case for negligence was established. With the requisite knowledge, the City elected not to participate.

[46] In *Lodhi 2*<sup>19</sup> the situation was further explained that:

*‘A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant*

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<sup>17</sup> *Nyingwa v Moolman N.O.* [1993 \(2\) SA 508](#) (TK) at 510D-G; see also *Daniel* above n 10 at para 6 and *Naidoo* above n 20 at para 6.

<sup>18</sup> At paragraph [62]

<sup>19</sup> *Supra* footnote 10 at paragraph 27

*has been notified of the plaintiff's claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous one."*

[47] The City had reconciled itself with the consequences of not defending the matter or acting before the court orders were granted. It is true, it now cannot transform the validly granted judgments, when the basis upon which they were obtained was known by the City prior thereto and which they had consciously taken a decision not to defend, to one that has been erroneously granted.

[48] The fact that the City believes it has a defence on the merits (which by the way it has had all along deducing from the defence tendered) is an irrelevant consideration and, if subsequently disclosed, cannot transform a judgment validly obtained, into an erroneous one.<sup>20</sup> At the time a case was made on the facts that were before the court, that justified the granting of the order. It therefore cannot be said that the judgment was erroneously granted. The City consequently cannot succeed under Rule 42 (1).

[49] The court granted the judgment by default as is required by the rules, on the basis that the City has been notified of the Respondent's action against it and being aware of the Respondent's claim and allegations in support thereof, was not defending the order sought. The court was therefore entitled in terms of the rules absent any objection, after the Respondent has made a case for the relief sought, to grant the order.

[50] The City has however also raised the point of an error in law, in relation to the Notice in terms of s 3 (4) (b). It alleged that condonation was only requested for the period January to August 2020 and not the period prior the institution of the action when the notice was supposed to be served. No condonation was sought for the period between six months after the date of the occurrence on 17 November 2017 to the date

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<sup>20</sup> Supra footnote 10, paragraph 46

of the summons. The condonation order was therefore erroneously granted for only the period post the summons. It argued that the requirements as per notice in terms of s 3 (4) (b) for granting condonation were not met.

[51] It is apparent that what the Respondent sought was the condonation for failure to serve the Notice as required in terms of s 3 (4). The Respondent explained that it failed to serve the Notice on the City prior to the institution of the action as it was not aware, as a layman, rather entity, of this requirement. It then became aware that it needed to do so after procuring the services of Counsel who had then prepared and signed off the Notice in March 2020. A further indulgence was requested for having delayed to serve the Notice after being aware of the requirement, that is from March 2020 when the Respondent became aware of the prerequisite and the Notice prepared until August 2020 due to Covid. So it is nitpicking to allege that condonation was sought only for the stipulated period between March and August 2020. The order as stated granted condonation for the late notification as in terms of s 3 (4) of Act 40 of 2002.

#### Rescission under common law

[52] Under common law and Rule 31 (2) (b) the City's application fails to surmount the first hurdle, that is the requirement of a reasonable explanation for the default, in that the explanation proffered for its default was way off from being reasonable. The strength of the City's defence on the merits therefore very crucial. In that instance, the information presented must be sufficient to satisfy the court that it has a good defence.<sup>21</sup> A bona fide defence which prima facie has some prospects of success.<sup>22</sup> The inquiry being whether satisfactory evidence that is sufficient to establish a credible or "good" defense placed before court.

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<sup>21</sup> *Carolus v Saambou Ltd; Smith v Saambou Bank Ltd* 2002 (6) SA 346 (SE) AT 346 (SE) at 349B-E

<sup>22</sup> *HDS Construction (Pty) Ltd v Wait*: 1979 (2) SA 298 (E) at 300 in fine – 301 B.

[53] The City blames or relies on its working arrangements, internal systems and plans plus insufficient budget to explain its failure to fulfil its duties to repair the sinkhole within a reasonable time. It denies that occurrences that caused the sinkhole had anything to do with the maintenance of the road. Its denial is reliant on reports it alleges were by experts who conducted a study or an assessment on the cause and the extent of the sinkhole and came to a conclusion that the actual cause of the sinkhole was not because of water or stormwater pipes. It argues that the sinkhole in that regard has nothing to do with lack of maintenance of either the road or the storm waterpipes.

[54] Although the evidence forms the City's main defence, its credibility is not satisfactory as it is not collaborated or confirmed by the authors of the reports. The evidence presented is not sufficient to meet the case of the Respondent at trial. It has been presented as hearsay without confirmatory affidavits. One such report the source is unidentifiable and its evidentiary value questionable. Such quality of evidence does not inspire sureness and any prospects of success. It therefore lacks any bona fides.

[55] Moreover the system and plan it also complains about to have caused the delay in the maintenance is its own internal system that was devised being aware of the occurrences of sinkholes and the City's duty to maintain and rehabilitate or repair them within a reasonable time. The fact that the City further alleges that actually the collapse of the area around the sinkhole was not because of poor maintenance or any other reason but was due to an excavation by the city as part of its plan to repair the tarmac is of no assistance to the allegation of the delays on the repair.

[56] In addition the stated reports were clearly available at the time the City was recalcitrant, disregarding the continuing legal processes it was notified of. It is trite law that a party cannot have a validly obtained judgment set aside based on evidence whose authenticity is not confirmed and was or ought to have been available to it before judgment.

[57] In my view the City has failed to make a case for rescission either under Rule 42 (1) (a) and or at common law or even Rule 32 (1).

[58] Under the circumstances the following order is made:

1. The Application is dismissed with costs;
2. The Applicant to pay the costs of the Respondent on an attorney and client scale to be taxed.



**N V Khumalo**  
**Judge of the High Court**  
**Gauteng Division, Pretoria**

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|---------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| For the Applicant:  | S D Mbeki<br>adrianbotha@counsel.co.za                                                                                                                                                |
| Instructed by:      | MAJANG INC ATTORNEYS<br><a href="mailto:peter@majanginc.co.za">peter@majanginc.co.za</a><br><a href="mailto:ncube@majanginc.co.za">ncube@majanginc.co.za</a>                          |
| For the Respondent: | S Swart & JJ Bouwer<br>Taute Bower & Celliers<br><a href="mailto:bowერი@gmail.com">bowერი@gmail.com</a> .<br><a href="mailto:liezel.swart@vodamail.com">liezel.swart@vodamail.com</a> |