



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Reportable

CASE NO: 8030/2021

In the matter between:

S[...] L[...]

Applicant

and

A[...] C[...]

Respondent

And

In the matter between:

CASE NO: 8030/2021

A[...] C[...]

Applicant

and

S[...] L[...]

Respondent

Neutral citation: *L[...] v C[...]* (Case no 8030/2021) [2025] ZAWCHC __ (4/12/25)

Coram: Davis, AJ

Heard: 22 October 2025

Delivered: 4 December 2025

Summary: Application for rescission of a default judgment – application for the striking out of a defence and counterclaim in terms of Rule 35(7) of the Uniform Rules of Court – applicable principles – striking out appropriate where there is a high degree of contumacy and necessary to vindicate the authority of the Court – ethical duties of legal practitioners in terms of the LPC Code of Conduct – duty not to mislead the Court – duty not to permit abuse of the process of Court

ORDER

1. The defendant's application, for the rescission of the order granted by Baartman, J on 17 October 2024 under case number 8030/2021 ('the rescission application'), is dismissed.
2. The plaintiff's application, for the striking out of the defendant's defence in the divorce action under case number 8030/2021 ('the striking application'), is granted.
3. The defendant's defence in the divorce action under case number 8030/2021 is hereby struck out.
4. For the avoidance of doubt, it is recorded that the defendant's counterclaim in the divorce action under case number 8030/2021 stands, and the application for the dismissal thereof is refused.

5. The defendant shall pay the plaintiff's costs in the rescission application and the striking application on the attorney and client scale.

JUDGMENT

DAVIS, AJ

INTRODUCTION

1. I am seized with two interrelated applications concerning the divorce action brought by S[...] L[...] ('the plaintiff') against A[...] C[...] ('the defendant') under case number 8030/2021 ('the divorce action').
2. First, there is an application brought by the plaintiff in terms of Rule 35(7) of the Uniform Rules of Court ('the Rules of Court'), for the striking out of the defendant's defence and dismissal of his claim in reconvention in the divorce action ('the striking application').
3. Second, there is an application brought by the defendant for the rescission of the order granted by Baartman, J (as she then was) on 17 October 2024, in terms whereof the defendant was ordered to reply to the plaintiff's notice in terms of Rule 35(3) within ten days of service of the order ('the rescission application').

4. As the defendant's conduct in the litigation is directly relevant to the determination of both applications, it is necessary to set out the tortuous history of the matter in some detail.

THE LITIGATION HISTORY

The divorce action

5. The parties were married in 2009 in terms of Shariah Law. Two minor children were born of the marriage, a boy of 13 and a girl of 10 ('the minor children').
6. The plaintiff issued summons in the divorce action on 12 May 2021, at which time she and the minor children were residing in Cape Town, while the defendant resided in Sandton, Gauteng. They are still so resident.
7. In the divorce action, the plaintiff claims a decree of divorce, maintenance for herself and the minor children, and an order in terms of s 7(3) of the Divorce Act 70 of 1979 ('the Divorce Act') for the redistribution of assets to the value of 50 % of the defendant's estate. She also seeks an order incorporating the provisions of a parenting plan regulating the exercise of the parties' parental rights and obligations in respect of the minor children.
8. A notice of bar had to be delivered to prompt the defendant to file his plea in the divorce action. The notice of bar was served on 25 July 2021, whereafter the defendant delivered his plea and claim in reconvention on 30 July 2021.
9. In his plea, the defendant admitted that the parties had entered into a marriage, but he denied that the union was a valid marriage in terms of

Shariah Law. In this regard he alleged that the plaintiff had deceived him with regard to her age at the time of the marriage. Predicated on his denial of the existence of a valid Muslim marriage, the defendant also denied that the provisions of the Divorce Act applied to the union between the parties.

10. In his claim in reconvention, the defendant sought an order that the minor children reside with him, and that the plaintiff's contact with the children be limited. He alleged that the plaintiff was emotionally unstable, that she was alienating the minor children from him, that she displayed abusive and violent behaviour in front of the children, and that she had uprooted the children from a stable environment in Johannesburg and relocated them to Cape Town. He claimed that he was better equipped "*emotionally and psychologically*" to care for the minor children. The defendant also sought an order for forfeiture of any redistribution order awarded to the plaintiff.
11. In her plea to the defendant's claim in reconvention, the plaintiff denied the various allegations made by the defendant. She alleged that it had been necessary to leave the former matrimonial home as the defendant was verbally and physically violent and abusive towards her and the minor children.

The Rule 43 Order

12. A Rule 43 order was granted on 31 May 2021 in terms whereof the defendant was ordered to pay cash maintenance to the plaintiff, as well as payment of rental, medical expenses and the children's education costs. He was also

ordered to pay contribution to R200 000,00 towards the plaintiff's legal costs in the divorce action.

13. On 26 September 2024, the plaintiff launched contempt proceedings by virtue of the defendant's failure to pay the cash maintenance ordered in the Rule 43 order for a period of 3 months, as well as additional payments due in terms thereof ('the first contempt application'). The defendant settled a portion only of the outstanding cash maintenance shortly before the hearing of the contempt application. On 25 October 2024, Nuku, J declared that the defendant was in contempt of the Rule 43 order ('the first contempt order').
14. The defendant sought leave to appeal the first contempt order, which Nuku, J refused on 13 March 2025. The defendant then petitioned the Supreme Court of Appeal for leave to appeal, which was refused on 23 June 2025.
15. In the interim, the plaintiff had on 20 December 2024 brought a further application to declare the defendant in contempt of the Rule 43 order, as he had failed to make payment of the rental for the plaintiff and minor children from December 2022 to December 2024 ('the second contempt application'). On 17 January 2025, Van Zyl, AJ declared that the defendant was in contempt of the Rule 43 order ('the second contempt order').
16. The defendant then applied for leave to appeal the second contempt order. A decision in this regard is still awaited.

The application to compel discovery

17. On 25 January 2024 the plaintiff delivered a notice in terms of Rule 35(1) calling upon the defendant to make discovery. The defendant delivered a discovery affidavit on 31 January 2024.
18. The plaintiff delivered a notice in terms of Rule 35(3) on 4 June 2024, calling for discovery of additional documents said to be relevant to the plaintiff's claims in the divorce action.
19. The defendant's response to the Rule 35(3) notice was due on 19 June 2024. No response was forthcoming. The plaintiff's attorney wrote to the defendant's attorney and afforded an extension to the defendant until 24 June 2024 to deliver a response, failing which an application to compel would be brought. The letter elicited no response.
20. As heralded, the plaintiff launched an application to compel the defendant to respond to the Rule 35(3) notice, which application was set down on 5 July 2024 ('the application to compel').
21. On 28 June 2024, the defendant filed a notice of opposition in the application to compel. Having signalled his intention to oppose, however, he failed to deliver his answering affidavit on time. The plaintiff's attorney sent two reminder letters in this regard, but the letters were ignored.
22. The plaintiff then brought a chamber book application for an order compelling the defendant to deliver his answering affidavit in the application to compel. On 21 August 2024, Thulare, J granted a chamber book order directing the defendant to serve his answering affidavit within 5 (five) days, failing which

the application to compel could be enrolled on the unopposed roll. The order of Thulare, J was served on the defendant's attorney by email on 22 August 2024.

23. In terms of the order of Thulare, J, the defendant was obliged to deliver his answering affidavit in the application to compel by 29 August 2024, but he failed to do so. The matter was then enrolled on the unopposed motion roll for hearing on 17 October 2024. On 30 September 2024, the plaintiff's attorney emailed a notice of set down to the defendant's attorney, alerting him to the fact that the matter was set down on 17 October 2024 at 10:00am.
24. There was no appearance for the defendant in the third division on 17 October 2024. Baartman, J granted an order by default in terms whereof she directed the defendant to reply to the plaintiff's Rule 35(3) notice within 10 (ten) days service of the order ('the order of Baartman, J' or 'the discovery order').
25. The discovery order was served on the defendant's attorneys on 25 October 2024 by way of email. The defendant failed to deliver a reply to the plaintiff's Rule 35(3) by 8 November 2024, as required.
26. On 11 November 2024, the plaintiff's attorney wrote to the defendant's attorney demanding that the reply to the Rule 35(3) notice be delivered by close of business on 12 November 2024, failing which an application to strike out the defendant's defence in the divorce would be brought. Once again, the letter elicited no response.

27. The plaintiff accordingly launched the striking application on 7 January 2025, which was set down for hearing on the unopposed motion roll on 14 March 2025. The striking application was served on the defendant's attorney by email on 7 January 2025.
28. The defendant failed to respond to the striking application until 11 March 2025. On that day – three days before the matter was due to be heard on an unopposed basis – his attorney filed a notice of opposition to the striking application and conveyed to the plaintiff's attorney that he had instructions to file an answering affidavit in the striking application and to bring an application for the rescission of the discovery order.
29. The parties then reached agreement on the further conduct of the matter, which agreement was embodied in a court order granted by Kusevitsky, J on 14 March 2025. It was ordered that the striking application be postponed to 22 October 2025 for hearing on the semi-urgent roll, and that the defendant the rescission application by no later than 4 April 2025. Provision was also made for the filing of answering and replying affidavits in the rescission application.
30. The rescission application was not delivered on Friday, 4 April 2025, as ordered. On 7 April 2025, the plaintiff's attorney wrote to the defendant's attorney calling for the rescission application to be served, failing which a chamber book application would be brought to compel the defendant to do so. Yet again, no response was forthcoming.

31. On 8 April 2025, the plaintiff brought a chamber book application for an order compelling the defendant to deliver the rescission application within 5 (five) days. On 16 April 2025, Bhoopchand, AJ granted an order directing the defendant to serve the rescission application within 5 (five) days, failing which the matter (referring to the striking application) could be enrolled for hearing on the unopposed motion roll.
32. In terms of the order of Bhoopchand, AJ, the defendant was obliged to file the rescission application by 30 April 2025. He failed to do so. The striking application was then set down for hearing on 13 May 2025 in the third division, where the matter became before Saldanha, J.
33. The defendant's attorney appeared at the hearing before Saldanha, J. He informed the court that he had received instructions the day before, i.e., on 12 May 2025, to prepare the rescission application - this in circumstances where the rescission application had first been heralded two months previously on 11 March 2025.
34. The transcript of the proceedings on 13 May 2025 reveals that Saldanha, J was singularly unimpressed. He did not mince words, pointing out that the defendant's attorney had an ethical obligation to advise the defendant to comply with court orders, and that the defendant was abusing the process of the court.
35. In the event, Saldanha, J granted an order on 13 May 2025 in terms whereof he directed the defendant to file the rescission application and his answering

affidavit in the striking application by 14 May 2025. The order also provided for the filing of further affidavits and heads of argument, it being envisaged that the rescission application and the striking application would both be heard on 22 October 2025. The defendant was ordered to pay the wasted costs occasioned by the postponement on the punitive attorney and client scale.

The rescission application

36. Doubtless spurred into action by the wrath of Saldanha, J, the defendant duly delivered the rescission application and his answering affidavit in the striking application on 14 May 2025, as he had been ordered to do
37. The plaintiff's answering affidavit in the rescission application was delivered out of time.¹ The plaintiff's attorney proposed an adjusted timetable for the filing of the defendant's replying affidavit in the rescission application, but her letter elicited no response, and on 25 August 2025 she again wrote to the defendant's attorney asking when replying affidavit would be delivered. Yet again, no response was received.
38. The plaintiff then brought a chamber book application on 4 September 2025, seeking an order directing the defendant to serve his replying affidavit in the rescission application within 5 (five) days, failing which he would be barred from doing so. On 12 September 2025, Holderness, J granted such an order.

¹ The plaintiff was awaiting a transcript of the proceedings before Saldanha, J on 13 May 2025, which was attached as an annexure to the answering affidavit.

The order of Holderness, J was served on the defendants' attorney by email on 18 September 2025. The defendant was obliged to deliver his replying affidavit by 6 September 2025. He did not do so, even belatedly.

The hearing on 22 October 2022

39. When the two applications came before me on 22 October 2025, the plaintiff had delivered heads of argument and a practice note, but no heads of argument or practice note had been filed on behalf of the defendant. Despite the absence of a replying affidavit and/or heads of argument, counsel was briefed to appear for the defendant at the hearing. Mr Holland appeared for the defendant, and Ms Bezuidenhout for the plaintiff.
40. Without any apology or explanation for the absence of heads of argument, Mr Holland sought to argue what he described as a "*point of law*", namely that the order of Baartman, J should be rescinded because, so he said, the plaintiff had not served a Rule 35(1) notice and the defendant had not delivered a discovery affidavit, with the result that the Rule 35(3) notice was incompetent, and hence also the discovery order.
41. When I questioned whether a factual basis for this argument had been laid in the rescission application, Mr Holland persisted that the point was one of law, which he was entitled to argue. This approach is misconceived. The questions of whether or not a Rule 35(1) notice was served, and whether or not the defendant had filed a discovery affidavit in response, are factual questions. In the absence of the necessary factual allegations, the argument sought to be advanced by Mr Holland could not be entertained.

42. Moreover, it is wholly unacceptable for counsel to seek to advance an argument on a point of law which has not been heralded in a notice in terms of Rule 6(5)(d)(iii) or, at the very least, in heads of argument. Litigation by ambush is manifestly unfair to opposing counsel, not to mention discourteous to the Court. It cannot be tolerated. The Court, no less than opposing counsel, requires prior notice of any legal points to be argued in order to be in a position meaningfully to engage with the argument during the hearing.
43. Having been taken by surprise, Ms Bezuidenhout, who appeared for the plaintiff, was understandably unprepared to deal with the argument, save to point out that it had never been raised before.
44. In the circumstances, I ruled that Mr Holland could not raise new arguments which had not been heralded in the affidavits, and that he was confined to arguing the case made out in the papers.
45. Having had the opportunity for further scrutiny of the papers, it regrettably has to be said that there was no factual basis for the point sought to be argued by Mr Holland. The plaintiff alleged in the application to compel that she delivered a notice in terms of Rule 35(1) on 25 January 2024, and that the defendant delivered a discovery affidavit on 31 January 2024. The defendant at no stage denied these allegations. There was thus no conceivable basis on which Mr Holland could argue that the discovery order, granted in terms of Rule 35(3), was incompetent because no discovery affidavit had yet been delivered in terms of Rule 35(1).

46. It has long been recognized that counsel are under a duty not to mislead a court.² That duty is now codified in section 57.1 of the Legal Practice Council Code of Conduct made in terms of s 36(1) of the Legal Practice Act 28 of 2014 ('the Code of Conduct'), which provides that:

'A legal practitioner shall take reasonable steps to avoid, directly or indirectly, misleading a court or tribunal on any matter of fact or question of law. In particulars, a legal practitioner shall not mislead a court or a tribunal in respect of what is in papers before the court or tribunal, including any transcript of evidence.'

47. The duty not to mislead the court requires that legal practitioners appearing before a court take scrupulous care not to make inaccurate factual statements which are not borne out by the evidence, or to advance legal submissions which are not substantiated by authority. The proper functioning of the administration of justice requires that courts be able to rely implicitly on the correctness of the information conveyed by legal practitioners.³ It is an intolerable addition to the burden on Judges when they are forced to question the accuracy of what they are told by legal practitioners. Counsel and attorneys appearing before a court must ensure that their submissions can be justified with reference to the record, and that they can direct the court to the relevant passages in the record if asked to do so.

² See *Kekana v Society of Advocates of South Africa* 1988 (4) SA 649 (SCA) 655 I – J, where the Court observed that both the Bar and the Side Bar have strict ethical rules aimed at preventing their members from becoming parties to the deception of the Court.

See, too, Van Dijkhorst and Church 'Legal Practitioners' 14 Part 2 LAWSA (2ed) para 132.

³ See *Ex parte Swain* 1973 (2) SA 427 (N) 434 H.

48. It is therefore disquieting that counsel saw fit to advance an argument based on factual assumptions which were belied by the undisputed allegations in the striking application. At best for Mr Holland, he was unprepared for the hearing and acted recklessly in advancing submissions when he could not be sure of the relevant facts.

THE RESCISSION APPLICATION

49. In the founding affidavit in the rescission application, no attempt is made to identify the legal grounds on which the defendant relies for the rescission of the discovery order. The defendant's case in the rescission application can be summed up as follows:
- a) there was no valid Muslim marriage because the plaintiff lied to the defendant about her age, and since there was no valid Muslim marriage, the provisions of the Divorce Act do not apply, and the plaintiff therefore has no claim in terms of the Divorce Act;
 - b) but even if there was a valid marriage, the plaintiff should be ordered to forfeit any claims on account of her misrepresentation;
 - c) unless and until the plaintiff proves her entitlement to relief in terms of the divorce action, she is not entitled to information about the defendant's finances.
50. In the rescission application, the defendant also seeks condonation for his failure to comply with the orders of Kusevitsky, J and Bhoopchand, AJ. He

alleges that he was unable to comply with these orders as his legal team had to prepare an urgent petition to the Supreme Court of Appeal when Nuku, J refused his application for leave to appeal against the first contempt order. The defendant furthermore alleges that he was unable to access funds because the plaintiff attached his bank account, the intimation being that he could not pay his legal team to prepare the rescission application.

51. In her answering affidavit in the rescission application, the plaintiff roundly refuted the defendant's explanations in this regard:

- a) firstly, she points out that the defendant's petition to the SCA was filed on 10 April 2025 already, whereas the defendant only instructed his attorney on 12 May 2025 to prepare the rescission application; and
- b) secondly, she attaches a copy of the defendant's Discovery Purple Card bank statement for April 2025 (obtained under subpoena). This statement shows a multitude of substantial payments (ranging from R25 000 to R200 000) into the defendant's account from CA Cell, the defendant's close corporation. It also reveals what appears to be luxurious expenditure on the part of the defendant, including travel, restaurants, spa treatments, a purchase for an amount of R 8 916.50 from Armani Exchange in Sandton, and two purchases at Incredible Connection for R45 998.00 and R115 004.00.

52. The defendant did not file a replying affidavit dealing with these allegations.

The requirements for rescission at common law

53. In the hearing, Mr Holland relied solely on the common law, disavowing any reliance on the provisions of Rule 42(1)(a).⁴
54. The common law requirements for rescission of a default judgment are well-established. An applicant is required to show 'good' or 'sufficient cause',⁵ an expression which defies precise definition and implies a wide discretion, but which generally entails that an applicant should:
- a) give a reasonable and acceptable explanation for his default, which must not be wilful or grossly negligent;
 - b) show that the application for rescission is made *bona fide* and not merely with the intention of delaying the plaintiff's claim; and
 - c) demonstrate that on the merits he has a *bona fide* defence, which *prima facie* has some prospects of success.⁶

⁴ Rule 42(1)(a) reads as follows:

'(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.'

⁵ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture* ("Zuma") 2021 (11) BCLR 1263 (CC); *Government of the Republic of South Africa v Fick* ("Fick") 2013 (10) BCLR 1103 (CC); *Colyn v Tiger Food Industries t/a Meadow Feed Mills (Cape)* ("Colyn") 2003 (6) SA 1 (SCA) para 11; *Chetty v Law Society, Transvaal* ("Chetty") 1985 (2) SA 756 (A) AT 765 A – C; *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042 G.

⁶ *Colyn* (*supra*) para 11; *Zuma* (*supra*) para 71; *Fick* (*supra*) para 85; *Chetty* (*supra*) at 765 A – C; *De Wet and Others v Western Bank Ltd* 1977 (2) SA 1033 (W) at 1036 D – E.

55. An important aspect to be taken into account in the exercise of the judicial discretion whether or not to grant the remedy of rescission is whether or not the applicant has demonstrated ‘a *determined effort to lay his case before the court and not to abandon it.*’⁷
56. It has been held that it is essential for an applicant for rescission to satisfy both the requirements of a satisfactory explanation for the default, and prospects of success on the merits.⁸ As Miller JA explained in *Chetty v Law Society, Transvaal*:⁹

*‘It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing his explanation of his default. And ordered judicial process would be negated it, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.’*¹⁰

57. I turn now to consider whether the defendant has met the requirements for rescission.

Reasonable explanation for default

58. In this particular case, it was incumbent on the defendant to provide an explanation for two discrete instances of default in order to satisfy the Court that rescission should be granted.

⁷ Zuma (*supra*) footnote 20.

⁸ Zuma (*supra*) para 71; Fick (*supra*) para 85.

⁹ Chetty (*supra*) at 765 D – E.

¹⁰ *Ibid.*

59. Firstly, the defendant was required to explain why the judgment in the application to compel was allowed to go by default, i.e., why the order of Baartman, J was obtained in his absence, particularly in circumstances where he been ordered by Thulare, J to deliver an answering affidavit by 29 August 2024, but failed to do so. The defendant signally failed to address this issue: the founding affidavit in the rescission application is silent in this regard.
60. Secondly, the defendant needed to explain his delay in launching the rescission application. The discovery order was served on the defendant's attorney on 25 October 2024, but no mention was made of a rescission application until 12 March 2025, two days before the striking application was to be heard on 14 March 2025. Worse still, having committed himself to deliver the rescission application by 4 April 2025 in terms of the consent order made by Kusevitsky, J, he failed to do so. He then failed to comply with the order of Bhoopchand AJ that he deliver the rescission application by 30 April 2025.
61. The defendant suggests in his founding affidavit that he was not required to explain the delay in bringing the rescission application in the period between the service of the discovery order (25 October 2024) and the date of the order of Kusevitsky, J (14 March 2025). He alleges in this regard that the plaintiff agreed, and Kusevitsky, J ordered, that he could bring the rescission application by 4 April 2025.
62. This argument is disingenuous. Kusevitsky, J was not seized with the rescission application. She could not, and did not purport to, decide anything

to do with the rescission application, which had not yet been brought. All Kusevitsky, J did was to make an order by agreement between the parties which regulated the further conduct of the matter, including the date by when the rescission application had to be brought. Moreover, there is no indication in the wording of the order that the plaintiff waived her right to object to rescission on the ground of delay. In any event, even had there been such a waiver, the plaintiff's attitude could not bind this Court, for it is for the Court to determine whether or not a sufficient explanation has been advanced for the delay in bringing the application.¹¹

63. Moreover, the defendant was required to provide an explanation for the entire period of default or delay, from the time when his answering affidavit in the application to compel was due up until the time when the rescission application was brought, as well as his subsequent failure timeously to deliver a replying affidavit and heads of argument in the rescission application.¹²

64. The defendant did not provide any explanation at all for:

- a) why he failed to deliver an answering affidavit timeously in the application to compel (including complying with the order of Thulare, J), and why he allowed judgment to be taken by default;
- b) why he failed to bring the rescission application between 25 October 2024 and 14 March 2025;

¹¹ *P E Bosman Transport Works Committee and Others v P E Bosman Transport (Pty) Ltd* ("P E Bosman") 1980 (4) SA 794 (A) at G – H.

¹² *P E Bosman* (*supra*) at 799 D – E.

- c) having brought the rescission application, why he failed to deliver a replying affidavit timeously, or to comply with the order of Holderness, J; and
- d) why he failed to deliver heads of argument in the rescission and striking applications.

65. The only explanation which the defendant did see fit to provide relates only to his failure to comply with the orders of Kusevitsky, J and Boopchand, AJ. That explanation is patently false. I say that for the following reasons.

66. Firstly, his reliance on the unavailability of his legal team due to the need to prepare a petition in respect of the first contempt order is spurious, given that the petition was already lodged on 10 April 2025, whereas the defendant only instructed his attorney to prepare the rescission application on 12 May 2025.

67. Secondly, his claim that he lacked access to funds because his bank account had been attached by the plaintiff is manifestly untrue if one has regard to the Discovery Purple Card statement for April 2025. It reveals that the defendant had access to other banking and credit facilities, and that he was adept at moving funds between various bank accounts.

68. I am therefore of the view that the defendant has failed to put up a satisfactory explanation for his default in opposing the application to compel, and his delay in bringing the rescission application – not to mention his failure to comply with the litany of court orders relating to the filing of papers.

69. Mr Holland seemed to concede that the defendant's explanation for his default is inadequate, but he argued that strong prospects of success in the rescission application may compensate for a weak explanation for the default.
70. This argument does not hold water. In *Zuma* the Constitutional Court expressly rejected the notion that a litigant can escape the obligation adequately to explain his default by showing prospects of success on the merits.¹³
71. In the absence of an acceptable explanation for the defendant's default, it is not strictly speaking necessary to consider whether or not he has shown prospects of success on the merits.¹⁴ I shall nevertheless do so, for the sake of completeness.

Prospects of success on the merits

72. In his founding affidavit in the rescission application, the defendant sought to show that he has prospects of success in the divorce action. In doing so, he misconceived the relevant enquiry. As rescission is sought in respect of the order of Baartman, J, which compelled him to reply to a Rule 35(3) notice, he is required to demonstrate that he has *prima facie* prospects of success in resisting the application to compel.
73. In the Rule 35(3) notice which formed the subject of the application to compel, the plaintiff sought various bank statements and financial documents which she

¹³ *Zuma (supra)* paras 71 – 76.

¹⁴ *Zuma (supra)* para 76.

alleges are relevant to the issues in the divorce action. It is trite that the question of relevance for purposes of discovery is determined with reference to the issues on the pleadings.¹⁵

74. In the divorce action, the plaintiff claims payment of spousal maintenance. In paragraph 10.5 of his plea, the defendant denies that he has sufficient means to afford the maintenance claimed by the plaintiff.
75. By virtue of the fact that the defendant has put affordability of maintenance in issue, the question of his financial standing is a live issue in the divorce action, and documents pertaining to his finances and means are therefore relevant.
76. It bears emphasis that the defendant did not raise any objection in the rescission application to the contents of the Rule 35(3) notice. He did not, for instance, complain that the notice was overly broad. Had he done so, he may or may not have had a point. But the point was not taken.
77. In contending that there were prospects of success in resisting the application to compel, Mr Holland relied solely on the argument that, because the defendant disputes that there was a valid marriage, the plaintiff is not entitled to discovery with regard to the defendant's finances unless and until she demonstrates an entitlement in terms of the Divorce Act.
78. The argument might have gained some traction had the defendant brought an application in terms of Rule 33(4) of the Rules of Court to have the question of

¹⁵ *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 297 (T) at 311; *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 15 B; *ST v CT* 2018 (5) SA 479 (SCA) at 488 B.

the existence or otherwise of a valid marriage determined as a separated issue, and for the remainder of the proceedings to be stayed (although it is doubtful whether a court would consider such a separation convenient, given that the court in any event has to determine arrangements for the care and maintenance of the minor children born of the parties' relationship, even if the marriage is invalid). But the defendant has not sought such a separation of issues, despite having had ample opportunity to do so.

79. As matters stand, therefore, the defendant's means are an issue on the pleadings, as he disputes his ability to pay the maintenance claimed by the plaintiff. The plaintiff is therefore entitled to seek documents pertaining to his finances.

80. In the circumstances, I consider that the defendant has failed to show prospects of success in resisting the application to compel compliance with the plaintiff's Rule 35(3) notice.

Is the application for rescission bona fide?

81. In my view the history of the litigation, to which I have referred, demonstrates the absence of any clear intention and determined effort on the part of the defendant to lay his case before the court.

82. The defendant has failed to explain why the application to compel was allowed to go by default in the first place. He has failed to explain his delay in launching the rescission application. He has failed to explain his failure to comply with a litany of Court orders granted in chamber book applications to

compel him to file affidavits. In the circumstances, the ineluctable conclusion is that the defendant is not serious about finalising the divorce action: his conduct points to a concerted effort to delay and protract the divorce action, particularly the plaintiff's claims against him for maintenance and a division of assets.

83. I conclude that the defendant's application for rescission is not *bona fide*, as the defendant has no genuine wish to put forward his case in the divorce action, and that the rescission application is merely part of an overall *modus operandi* aimed at delaying and frustrating the plaintiff's claims in the divorce action.

No case made out for rescission

84. In all the circumstances, given my findings with regard to the defendant's failure to put up a satisfactory explanation for his default, his lack of prospects of success in resisting the application to compel, and his lack of *bona fides* in bringing the rescission application, I conclude that the defendant has not made out a proper case for the granting of the remedy of rescission.

85. The rescission application therefore falls to be dismissed.

THE STRIKING APPLICATION

The relevant legal principles

86. Rule 35(7) of the Uniform Rules of Court provides that:

'If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence.'

87. The rule contemplates a two-stage procedure. At the first stage, an order compelling the defaulting party to provide discovery is sought. The usual order made at the first stage includes the granting of leave to the applicant to apply to court on the same papers, amplified if necessary, for the dismissal of the defence, or the striking out of the claim, in the event of non-compliance with the discovery order. The rule does not envisage dismissal or striking out automatically on non-compliance with the discovery order, but only on application.¹⁶
88. At the second stage, where the dismissal of a claim and/or the striking out of a defence is sought, the court is called upon to determine whether or not there has in fact been non-compliance with the discovery order and, if so, to exercise a discretion whether or not to grant an order dismissing the claim or striking out the defence, which discretion must be exercised judicially.¹⁷
89. It must be borne in mind that the power to dismiss a claim or strike out a defence is a drastic remedy which impacts on the constitutional right of access to court, as the usual effect of such an order is to prevent the presentation of a claim or defence, as the case may be, so that judgment by

¹⁶ *Ikamva Architects CC v MEC for the Department of Public Works and Another* (CA337/2013) [2014] ZAECHC 70 (22 August 2014).

¹⁷ *MEC Department of Public Works v Ikamva Architects* 2022 (6) SA 275 (ECB) para 18.

default will be entered for the other party.¹⁸ It has been held that '*striking out should normally be a last resort, considering that it has the potential to deprive a litigant of an entrenched right to a fair trial*' and that the sanction should fit the breach.¹⁹

90. In my view it should also be borne in mind that, while section 34 grants everyone the right of access to courts, it does not afford litigants the right of access to courts on their own terms. The constitutional imperative to provide access to court for all persons necessitates that such access be regulated through procedural rules designed to ensure the fair administration of justice in the interests of all parties. Both parties to a dispute have the right to a fair hearing. And if one party is delaying the matter by failing to comply with the Rules of Court, he or she is likely trampling on the other party's right to a fair hearing. In short, the Rules of Court are there for the benefit of all and should be observed by all.

91. It is equally important to bear in mind that the Rules of Court exist to preserve the orderly administration of justice. The justice system would collapse in the chaos which would ensue were litigants permitted to ignore procedural requirements and engage in a free-for-all. The justice system is undermined when litigants wilfully disobey the Rules of Court. Even worse is the flouting of orders of Court aimed at enforcing compliance with the procedural rules. Open disdain for the authority of the Court, if allowed to go unchecked, represents an existential threat to the maintenance of the rule of law. This is

¹⁸ *Ibid.*

¹⁹ *MEC Department of Public Works v Ikamva Architects (supra)* para 19.

an aspect to bear in mind when considering whether the sanction fits the breach.

92. It seems to me that the degree of contumacy of a litigant must play a role in determining whether it is appropriate to strike out a claim or defence. Where there is a reasonable explanation for non-compliance with a discovery order, and it appears that the non-compliance was not wilful and *mala fide*, ie, not contemptuous, the remedy of striking out will not be appropriate.
93. But if there is no satisfactory explanation for non-compliance with a discovery order, and the failure to comply is *prima facie* contemptuous,²⁰ the remedy of striking out may be the only way to vindicate the authority of the Court. Particularly where it appears that the failure to comply with a discovery order is part of a pattern of contemptuous and obstructive conduct, a robust exercise may be called for of the court's inherent power at common law to protect itself and others against an abuse of its processes,²¹ a power which has received statutory recognition in section 173 of the Constitution.²²
94. In my view, the common law requirements for the rescission of a default judgment referred to above, with some modification, provide a useful guideline for the exercise of the discretion under Rule 35(7) whether or not to grant an

²⁰ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 41.

²¹ *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734 D (affirmed in *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 CC para 20).

²² Section 173 of the Constitution provides that:

'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

application to strike out a claim or defence. In my view a respondent resisting such an application should be required to:

- a) put up a reasonable explanation for failing to comply with the discovery order, which suffices to show that the non-compliance with the discovery order was not wilful or *mala fide* (ie, not contemptuous);
- b) demonstrate that he or she has a *bona fide* claim or defence which carries *prima facie* prospects of success.

The defendant's defence to the striking application

95. In the striking application, the plaintiff's allegations in the founding affidavit are not placed in dispute. The defendant's defence to the striking application is based solely on the rescission application.

Explanation for the failure to comply with the discovery order

96. The defendant made no attempt in the striking application to explain why he failed to comply with the discovery order. Reliance was placed on the rescission application, but as mentioned, he delayed in launching the rescission application, which delay was never explained. And the rescission application was ultimately unsuccessful, for the reasons set out above.
97. In the circumstances, I find that the defendant has failed to put up a satisfactory explanation for his failure to comply with the discovery order. In particular, I find that his reliance on the rescission application does not serve to show that his failure to comply with the discovery order was not wilful or

mala fide, since he delayed in launching the rescission application and the rescission application itself was not *bona fide*. Instead, it formed part of pattern of deliberate delay and obstruction on the part of the defendant – the vogue expression ‘Stalingrad tactics’ comes to mind.

Does the defendant have a bona fide defence / counterclaim with prima facie prospects of success?

98. In regard to his defence to the divorce action, the defendant, in his founding affidavit in the rescission application, relied on the assertion that there was no valid Muslim marriage because the plaintiff allegedly lied about her age, and hence no valid marriage for purposes of the Divorce Act.
99. In the first instance, it is not clear that a misrepresentation as to age would indeed affect the validity of a Muslim marriage.
100. In South African law the validity of a marriage is not affected by a mistake as to the age of one of the parties, which is regarded as an error in motive which is not relevant to the marriage as such and therefore does not vitiate consent to marry.²³
101. The defendant states that he is of the opinion, ‘*having taken proper counsel on the issue from various Ulama bodies (a body of Muslim scholars who are recognized as having specialist knowledge of Islamic sacred law and theology) around South Africa*’ that a misrepresentation by the plaintiff as to her age would be material and would invalidate the marriage. But he failed

²³ Jacqueline Heaton *et al* ‘Marriage’ 16 LAWSA (2ed) para 31 and authorities cited at footnote 2.

identify the experts who he consulted, or to provide affidavits from them. His evidence in this regard is inadmissible hearsay. It was incumbent upon the defendant to substantiate his defence with reference to expert evidence, put up on affidavit, from a person or persons qualified to expound on the Islamic law of marriage. He failed to do so.

102. But in any event, the factual foundation of the defendant's defence is disputed. The plaintiff denies that she lied to the defendant about her age. She alleges that he was well-aware of her age. She explains in this regard that the defendant was aware that she had two adult children from a previous relationship; that the defendant had her identity document to arrange air tickets for her to visit him in Johannesburg before they married; that the defendant had her passport details to make travel arrangements before their marriage for their honeymoon in Dubai, and that the defendant himself inserted her identity number on their Muslim marriage certificate.

103. These allegations by the plaintiff stand undisputed, as the defendant failed to deliver a replying affidavit in response to the plaintiff's answering affidavit in the rescission application. The plaintiff's uncontested version puts paid to the defendant's claim that he was misled with regard to the plaintiff's age.

104. I therefore conclude that the defendant does not have a bona fide defence to the plaintiff's claim in the divorce action, which *prima facie* carries prospects of success.

105. The defendant's counterclaim in the divorce action stands on a different footing. The counterclaim relates entirely to the minor children. The defendant

makes allegations which have bearing on the best interests of the minor children. Section 6(1) of the Divorce Act states that a decree of divorce shall not be granted until the Court is satisfied that the provisions contemplated with regard to the minor children are satisfactory or are the best that can be effected in the circumstances.

106. In the light of the provisions of s 6(1) of the Divorce Act, as well as the principle laid down in section 28 of the Constitution that the best interests of minor children are paramount, it would not be appropriate to grant an order dismissing the defendant's counterclaim in the divorce action, as such an order would have the effect of precluding him the defendant from adducing evidence which may be relevant with regard to the best interests of the minor children.

Conclusion with regard to striking the defence

107. Not only has the defendant failed a) to put up a satisfactory explanation for his failure to comply with the discovery order and b) to show that he has a *bona fide* defence in the divorce action which carries *prima facie* prospects of success, but he has failed to explain his repeated failure to comply with a litany of Court orders granted in chamber book applications directing him to file affidavits in the striking application and the rescission application.
108. The defendant's conduct evinces a deliberate strategy of delay, clearly aimed at thwarting the plaintiff's claims in the divorce action. He has repeatedly violated Court orders without explanation or apology. There can be no doubt

that he is guilty of an egregious abuse of court process. In such circumstances the Court cannot stand by, wringing its hands in despair.

109. Mr Holland submitted that, if the rescission application were unsuccessful, I should grant the defendant a final opportunity to comply with the discovery order. I do not agree. The defendant has been given every latitude by this Court, and, in return, he has made a habit of thumbing his nose at the authority of the Court. There is no reason to believe that he will behave any differently in future. A line in the sand has to be drawn to put a stop to the defendant's abuse of court process.

110. Given the degree of the defendant's contumacy, I consider that the only appropriate sanction is to grant an order striking out the defendant's defence in the divorce action. This is necessary to vindicate the Court's authority and to protect the plaintiff's right to a fair hearing. A message has to be sent that the Court is not to be trifled with.

THE ETHICAL DUTY ON LEGAL PRACTITIONERS TO PREVENT ABUSE

111. The circumstances of this case call for a reminder of the ethical duties resting on legal practitioners in regard to abuse of process. Sections 60.1 and 60.2 of the Code of Conduct read as follows:

'60.1 A legal practitioner shall not abuse or permit abuse of the process of court or tribunal and shall act in a manner that shall promote and advance efficacy of the legal process.

60.2 *A legal practitioner shall not deliberately protract the duration of a case before a court or tribunal.'*

112. The defendant has systematically delayed the progress of the divorce action. He failed to make proper discovery. He failed to comply with the plaintiff's Rule 35(3) notice. When faced with an application to compel discovery, he delivered a notice of intention to oppose, but then failed to deliver an answering affidavit. He was ordered by Thulare, J to deliver his answering affidavit in the application to compel. He failed to do so. The application to compel was then set down on an unopposed basis, and a discovery order was granted by default. The defendant predictably failed to comply with the discovery order. The plaintiff brought the striking application to strike out his defence. The defendant allowed two months to pass and then surfaced at the last minute to prevent the plaintiff from taking a striking order by announcing that he intended to apply to rescind the discovery order. The defendant then failed to deliver the rescission application within the time frame ordered by Kusevitsky, J. He was ordered by Bhoopchand AJ to deliver the rescission application, and he ignored that order. But when the striking application was due to be heard on an unopposed basis on 13 May 2025, he instructed his attorney to appear to oppose the application. Having finally delivered the rescission application – only when Saldanha, J took the war to his attorney – he failed to deliver a replying affidavit in the rescission application, and had to be ordered to do so by Holderness, J. The defendant ignored the order of Holderness, J. He failed to file heads of argument, or a practice note in the rescission application and the striking application. Yet, in a striking show of discourtesy to the Court, Counsel was briefed to appear on the day appointed

for the hearing of the matter, and to argue the matter despite the absence of heads of argument.

113. There can be no doubt, in all the circumstances, that the defendant has adopted a deliberate *modus operandi* aimed at procrastinating the divorce action in order to delay and frustrate the plaintiff's claims. That conclusion is fortified by the fact that both the rescission and striking applications are wholly without merit.
114. The defendant is clearly pursuing a "*Stalingrad Strategy*", he repeatedly forces the plaintiff to incur the cost of chamber book applications to compel him to file papers, while failing to comply properly with the Rule 43 order, as is evident from the first and second contempt orders. Apart from his contempt of the Rule 43 order, he has defied five court orders relating to the application to compel, the striking application and the rescission application. We are dealing here with serial contempt and abuse of court process.
115. It regrettably has to be said that the defendant's attorney has been complicit the defendant's Stalingrad tactics. He repeatedly failed to respond to correspondence from the plaintiff's attorney. He clearly aided and abetted the defendant in failing to honour deadlines and Court orders. In my view he violated sections 60.1 and 60.2 of the Code of Conduct in so doing. Legal practitioners must not be enablers of abuse of process. They must not be complicit in contempt of Court. It is incumbent upon attorneys to advise their clients of the need to honour Court orders and to abide by the deadlines imposed by the Rules of Court. Attorneys have a duty to take a stand - even

to withdraw if necessary - when a recalcitrant client places the attorney in a position where he or she is unable to honour their duty to the Court.

116. Legal practitioners would do well to remember that their duty to the client is subservient to their duty to the court. A legal practitioner's first duty is to the court and the interests of justice. This much is clear from section 3 of the Code of Conduct, which reads as follows in relevant part:

'3. Legal practitioners, candidate legal practitioners and juristic entities shall –

...

3.3 treat the interests of their clients as paramount, provided that their conduct shall be subject always to:

3.3.1 their duty to the court;

3.3.2 the interests of justice;

3.3.3 observance of the law;

3.3.4 the maintenance of ethical standards as prescribed by this code, and any ethical standards generally recognized by the profession.'

[Emphasis added]

CONCLUSION AND COSTS

117. In the result, the rescission application falls to be dismissed, and the striking application succeeds to the extent that the defendant's defence in the divorce action is to be struck out.

118. For the reasons already referred to, I do not consider it appropriate to dismiss the defendant's claim in reconvention in the divorce action, as it relates to the parties' minor children, whose best interests are paramount.

Parkar Attorneys