

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**

Date: **01 December 2025** Signature: _____

A handwritten signature in black ink, which appears to be "ISAAC", is written over a black rectangular redaction box.

CASE NO: 2021/24303

In the matter between:

ISAAC SOLOMON DAVID

Applicant

And

INVESTEC BANK LIMITED

First Respondent

SOLOMON DAVID GROUP (PTY) LTD

Second Respondent

INVESTEC IMPORT SOLUTIONS (PTY) LTD

Third Respondent

BLUE STRATA SUPPLY CHAIN (PTY) LTD

Fourth Respondent

Coram: Dlamini J

Heard: 22 October 2025

Delivered: 01 December 2025 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines*, and by release to SAFLII. The date and time for the hand-down is deemed to be 10:30 on 01 December 2025

JUDGMENT

DLAMINI J

INTRODUCTION.

- [1] In this rescission proceeding, the applicant seeks to rescind an order granted by Killian AJ against the applicant, striking out his defence in the trial instituted by the first respondent.
- [2] The order sought to be rescinded struck out the applicant's plea and defence in the main action and granted judgment against the applicant in favour of Investec.
- [3] The facts surrounding this dispute are largely common and can be summarized as follows.
- [4] In the main action, the first respondent (Investec Bank) instituted proceedings against the applicant (Mr David) and four others for breach of a Facility Agreement concluded between the first respondent and Solomon David Group (the Solomon Group), represented by the applicant.
- [5] Mr. David, in his personal capacity, signed a Guarantee concluded by the applicant in favour of the first respondent. Upon breach of the Facility

agreement, Investec instituted action against the applicant, claiming ratification of the aforementioned Guarantee and payment of R7 738 689.73.

- [6] On 9 December 2021, Investec delivered a notice in terms of Rule 35 (1) (6) (a) and (10)¹ calling upon the applicant to discover. It is the delivery of this notice that led to the striking order being granted against the applicant.
- [7] Despite several reminders from Investec, it appears the applicant failed to discover, as per the Rule 35 notice. As a result, in April 2022, Investec filed a Rule 35 (7) motion to compel discovery.
- [8] On 1 June 2022, Adams J granted an order compelling the applicant to discover in accordance with the discovery notice, within 10 (*ten*) days of the service of the order.
- [9] It appears attempts were made to finalise discovery; however, there was no complete compliance with discovery.
- [10] On 2 August 2024, the respondent launched an application in terms of Rule 35(7) seeking to strike out the applicant's plea and defence and for judgment against the applicant.
- [11] On 2 September 2024, after hearing argument from both counsel for the applicant and Investec, Killian AJ granted an order striking out the applicant's defence and granted judgment against the applicant in favour of Investec, on the basis that applicant had not complied with an order granted in June 2022 by Adam J, compelling the applicant to make discovery within 10 days of the service of that order. Feeling aggrieved by this order, the applicant then launched this application seeking an order to rescind Killian AJ's judgment
- [12] This application is brought under Rule 42(1) of the Uniform Rules, in that the order was erroneously sought and granted. Alternatively, under common law, on the basis that good cause has been shown because the order was obtained by way of fraud at the instant of Invetsec.

¹ Superior Courts Act 10 of 2013.

[13] The rescission application is opposed by the first respondent.

ISSUES FOR DETERMINATION.

[14] The applicant has raised several grounds upon which he submits this court must grant rescission.

[15] The applicant avers that the first respondent in the trial proceedings instituted two claims; one being a claim for ratification of the deed of Guarantee signed by the applicant in favour of the third respondent to substitute the third respondent with the first respondent and claim B, which is a claim for payment of the credit facility owed by (Solomon Group) to the first respondent.

[16] Therefore, the applicant insists that it was imperative that claim A for ratification be granted to enable a judgment against the applicant. Accordingly, so the argument goes, the striking out order did not grant ratification of the deed of guarantee in terms of claim A, nor did the first respondent seek default judgment against the second respondent. This, according to the applicant, resulted in the default judgment being granted against him erroneously by the court in terms of Rule 42 (1) (a) despite his appearance of his legal representative. As a result, the order was granted in his absence.

[17] According to the applicant, he complied with the notice of discovery as outlined in Mr. Stoop's affidavit.

[18] The applicant submits that he had essentially purged his non-compliance by submitting an affidavit stating that various documents erroneously included in the Applicant's Discovery Affidavit were not in his possession. Therefore, any non-compliance order granted compelling discovery against the applicant had been purged. Hence, there was no basis for the granting of the striking out order.

[19] Then there is the issue of fraud. The applicant insists that the first respondent's legal representatives fraudulently set down the striking-out application before the application papers had even been served on the applicant. This ought to have warranted the striking out application being postponed to enable Killian

AJ to consider the applicant's grounds of opposition, which did not occur. Therefore, the striking-out application was fraudulently set down before the Special Interlocutory Court ("SIC").

[20] The applicant argues that the striking out order was defective because, despite the applicant's Plea being struck out, the second respondent's plea was not struck out, and hence, if the second respondent succeeds in its defence, there would be no cause of action against the applicant, and no judgment could be granted against the applicant.

[21] For these propositions, the applicant sought reliance in ***Zuma v Secretary Of The Judicial Enquiry Into Allegations of State Capture, Corruption and Fraud In the Public Sector Including The Organs Of State***,² and in particular the following paragraph:

"The Court further, at paragraph 60, held, "And yet I find myself constrained to grant it. My understanding of rule 42 (1) (a) is that if there was an error that is evident from the papers that precluded the grant of default judgment, then the judgment was erroneously sought and erroneously granted. Rescission must follow. The absence of a defence is irrelevant, and I have no discretion to refuse the rescission."

Counsel for Investec pointed out that the applicant had misquoted the ***Zuma***³ judgment, noting that the Constitutional Court never made those findings. The applicant's counsel correctly admitted the error. Nothing more can be said on this matter.

[22] Investec denies that the application was enrolled in the SIC prematurely. The respondent submits that Killian AJ considered the parties' arguments in this regard and made an order that the court made. Investec submits that, to the extent the applicant contends that Killian AJ erred in these respects, those issues pertain to the merits of the application before Killian AJ and cannot form the subject of rescission. I fully agree.

² 2021 (11) BCLR 1 TO 63 CC

³ Ibid

- [23] Investec dismisses the applicant's contention that the order was granted in his absence. The respondent avers that the applicant was represented in court by his counsel, who not only appeared but also made submissions to the court. That having followed the appropriate procedure for placing the matter before the SIC for determination. The applicant's counsel presented all the submissions the respondent intended to make, and the court did not prevent the applicant's counsel from making any arguments the applicant wished to present before the court.
- [24] In summary, Investec contends that the order issued by Killian AJ was not granted in the absence of the applicant and therefore cannot be rescinded under Uniform Rule 41(1)(a).

ANALYSIS.

- [25] The principles of rescission in under Rule 42 (1) (a) or common law are trite and have been pronounced upon in a number of our court's decisions. The order must have been granted in the absence of the applicant, or good cause must be shown by the applicant to succeed under common law. In this regard, the applicant must set out a reasonable explanation for the default and a *bona fide* defence.
- [26] The applicant's grounds for rescission are without merit and must be dismissed. The applicant's assertion that the order was granted in his absence is unfounded. This is because it is common cause, and the record clearly indicates that the applicant was duly represented by his legal representative and counsel in the hearing of the SIC application before Killian AJ.
- [27] The issues raised by the applicant herein were brought up by the applicant's counsel before the SIC court. Having heard the parties, considered the pleadings, and all arguments presented to him. Killian AJ granted the order striking out the applicant 's defence and ordered the money claim.
- [28] In my view, the SIC court order and judgment addressed the merits of the matter and dismissed the applicant's defence. In any event, I am satisfied that

all the applicant's complaints were fully ventilated by his legal counsel, and the SIC, having duly considered them, dismissed and granted the order that it.

[29] Therefore, I hold the view that if the applicant felt aggrieved by Killian AJ's order, he ought to have filed an application for leave to appeal the order and judgment of the SIC court. On this ground alone, the application for rescission must be dismissed. This should be the end of this inquiry.

[30] This finding was endorsed by the Constitutional Court in **Zuma**⁴ as follows:-

"One cannot seek to invoke the process of rescission to obtain a rehearing of the merits".

[31] For the sake of completeness, when asked about the status of the applicant's application for leave to appeal, counsel for the applicant confirmed that the applicant had noted and filed an application for leave to appeal the Killian AJ order. However, the applicant's counsel could not provide further details on the status of the leave to appeal, as he was unaware of its current status, whether it had been pursued or abandoned. The applicant ought to proceed with this application for leave to appeal.

[32] Insofar as the allegation of fraud is imputed to the respondent's attorney. The applicant's allegations in this regard are regrettable. These are bald, entirely unsubstantiated, baseless, and are therefore dismissed.

[33] Given all the circumstances I have set out above, it is my considered view that this application must be dismissed.

COSTS.

[34] The established principle of our law is that costs should follow the event. In this case, the Guarantee concluded by the applicant expressly provides that

⁴ Ibid.

all costs, including legal fees, incurred by the respondent are to be paid by the applicant as between attorney and own client.

I therefore make the following order;

ORDER.

1. The applicant's application for rescission is dismissed.
2. The applicant shall pay the first respondent's costs on the attorney-and-own-client scale, inclusive of the fees of two counsel.

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DLAMINI J

*Judge of the High Court
Gauteng Division, Johannesburg*

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