



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

Reportable

Case no:13204/2022

In the matter between:

THE MINISTER OF POLICE

APPLICANT

and

GARY WALTERS VAN DER MERWE

RESPONDENT

In Gary Walter Van Der Merwe v The National Director of Public Prosecutions, the Director of Public Prosecutions, Western Cape, and the Minister of Police.

Coram: BHOOPCHAND AJ

Heard: 25 July 2025, 11 September 2025, 21 November 2025

Delivered: 23 December 2025

Summary: Application for rescission of court orders instituted by a vexatious litigant without the Court's permission to litigate and sidestepping the restriction order by arguing historical continuation of an allegedly established cause of action. Vexatious proceedings under the Vexatious Proceedings Act 3 of 1956 impose a procedural bar. The distinction between a substantive cause of action

and a procedural bar against instituting proceedings was determinative in deciding that the Respondent was obliged to seek permission before instituting a restitution application under section 31(1)(a) of the Criminal Procedure Act. Lesser onus on Applicant to explain absence when proceedings are void *ab initio*. Application for rescission under Rule 42 (1)(a) granted. Cost orders do not necessarily follow the cause.

ORDER

- 1 The whole of the order granted on 31 July 2024 is rescinded, and the default judgment is set aside.
- 2 Paragraphs 3 and 4 of the order granted on 20 November 2024 are rescinded.
- 3 Each party shall bear its own costs.

JUDGMENT

Bhoopchand AJ:

[1] On 10 March 2008, the Directorate of Priority Crime Investigations (the Hawks) and the South African Police Services (SAPS) conducted a raid on the Respondent. They seized several items in his possession, including helicopter data plates. The Respondent subsequently contested the legality of this search and seizure operation, with the resulting legal proceedings documented in cases

from the High Court through to the Constitutional Court.¹ This division set aside the search and seizure warrants with subsequent confirmation of the decision by the higher Courts. The apex Court delivered its judgment on 7 June 2011. While the Court cases were ongoing, the Registrar of this Court kept the seized items, and the Respondent regularly inspected them.

[2] On 2 October 2014, SAPS obtained a second warrant, which effectively retained the goods seized in 2008. The seized goods were collected from the Registrar by the SAPS and handed over to the South African Revenue Services ('SARS').² On 21 September 2021, the Respondent was barred from instituting any legal proceedings without the leave of the Court under section 2(1)(b) of the Vexatious Proceedings Act 3 of 1956 ('VPA'). Despite the restriction, the Respondent, instituted an application on 8 August 2022 against the Applicant ('the Minister') and the National Director of Public Prosecutions and the Director of Public Prosecutions, Western Cape ('the Prosecuting Authority') under section 31(1)(a) of the Criminal Procedure Act 51 of 1977 ('CPA') for the return of the goods seized from him.

[3] On 10 November 2022, the State Attorney sourced the seized articles and arranged, together with the Respondent, for their return from SARS to the Respondent on the following day. The Respondent discovered that the helicopter data plates were missing. He approached SARS directly about the missing items. Without knowledge of the missing items or the attempts made to locate them, the State Attorney wrote to the Respondent on 5 May 2023, formally requesting that he provide a notice withdrawing the section 31 CPA

¹ *Van der Merwe and Others v Additional Magistrate, Cape Town and Others* 2010 (1) SACR 470 (C), *Minister of Safety and Security and Another v Van der Merwe and Others* [2011] 1 All SA 260 (SCA), *Minister of Safety and Security and Another v Van der Merwe and Others* 2011 (6) SA 61 (CC).

² In an application to introduce further evidence prior to the 11 September hearing, the Respondent referred to SARS Third Party plea to the action instituted by Wild Olive as owners of the data plates for damages for their loss. In its plea, SARS denied that the lost data plates were ever in its possession or of any knowledge of the execution of the 2 October 2014 warrant. The Respondent denied that the data plates were ever handed over to SARS.

application. The Respondent did not respond to the request to withdraw the application.³ On 20 March 2024, the Respondent informed the State Attorney by email that he was in the process of drafting papers to pursue the return of the missing items. The State Attorney did not respond to this email.

[4] In July 2024, the Respondent proceeded with his section 31 CPA application, which was subsequently amended to seek a declaratory order of liability against the Minister and the Prosecuting Authority and for compensation for the missing data plates. The Respondent obtained the first order on 31 July 2024 (‘the 31 July 2024 order’/ ‘the first order’) in the absence of the Minister and the Prosecuting Authority. The Honourable Justice Mangcu-Lockwood allowed the Respondent to file a supplementary founding affidavit. The Judge found that the Prosecuting Authority and the Minister lost custody of the data plates after seizing them from the Respondent on 10 March 2008. The Respondent was granted leave to enrol the matter for a hearing on quantum and file affidavits dealing with the value of the compensation for the lost data plates by no later than 20 days before the date of the next scheduled hearing on 20 November 2024. The first order comprised two pivotal findings: a factual determination that the data plates were lost while they were in the custody of the Minister and a legal conclusion that such loss rendered the Minister liable to compensate the Respondent for their value.

[5] On 20 November 2024, and again in the absence of the Minister and the Prosecuting Authority, the Honourable Justice Slingers granted the second order (‘the 20 November 2024 order’/ ‘the second order’). The second order allowed for the matter to be postponed for hearing in this Court’s Third Division on 24 December 2024. The Respondent was directed to serve a copy of the second order, together with the first order and the Respondent’s quantum affidavit, on

³ The Respondent does not dispute these allegations made by the State Attorney.

the State Attorney. The third paragraph of the order stated that in the event the Minister and the Prosecuting Authority did not file any appearance to oppose the quantum claimed by the Respondent within five days before the postponed hearing date, the matter would proceed on an unopposed basis on that date. The fourth paragraph of the order pertained to costs, which were reserved for further determination.

[6] The hearing scheduled for 24 December 2024 did not proceed as the Respondent failed to file a new practice note. The matter was rescheduled for the third hearing in January 2025. The Honourable Justice Allie granted the third order on 31 January 2025 after her Registrar alerted the State Attorney to the application that was to serve before her (‘the 31 January order’/‘the third order’). The Minister and the Prosecuting Authority were represented in Court for the first time since the section 31 CPA application had been instituted, and after the Respondent had obtained the first and second orders. The third order was taken by agreement between the parties. The matter was postponed to 29 July 2025. The Minister and the Prosecuting Authority agreed to file their answering affidavits, together with any other application for condonation or rescission, before 30 May 2025.⁴ The Respondent was to file his replying affidavit, together with any answering affidavit, in response to the applications before 20 June 2025. The Minister and the Prosecuting Authority had to file their replying affidavits in any new application by 30 June 2025.⁵ There were further arrangements agreed to regarding the filing of heads of argument.

[7] The Minister and the Prosecuting Authority applied under Rule 42(1)(a) of the Uniform Rules of Court (‘URC’) and in terms of the common law for a rescission of two orders granted in this matter. When the Respondent’s quantum application and the application for rescission served before this Court on 30

⁴ It is clear that this order contemplated an application for a rescission of the first two orders

⁵ This was a reference to any application for the rescission of the first and second orders.

June 2025, the Respondent informed the Court that he had withdrawn the relief he sought against the Prosecuting Authority. The Prosecuting Authority was no longer a party to this matter. There are instances in this judgment where the context requires further reference to them.⁶ The Minister remains the only applicant in this application for rescission of the orders obtained by the Respondent. The Minister sought the rescission of the whole of the first order and, to the extent necessary, paragraphs 3 and 4 of the second order.

[8] The Respondent's claim relates to missing helicopter data plates. The Respondent was not the owner of the data plates.⁷ A data plate is a metal identification plate that is permanently affixed to an aircraft frame or an essential part of the aircraft. It is typically located in a visible and accessible spot. It is used to identify an aircraft uniquely. In short, it's the legal and technical anchor for the aircraft's identity. If it's missing or damaged, it can be replaced. Replacing it requires formal approval and documentation from the aviation authorities.

[9] The hearing scheduled for 29 July 2025 proceeded before this Court. The Minister failed to comply with the timetable set in the third order for the filing of his papers. The Respondent's answering affidavit to the Minister's rescission application was consequently delayed. The Minister sought a postponement of the matters on 29 July 2025 to enable him to file a replying affidavit to the application for rescission. The Respondent indicated that he did not intend to proceed with the application on quantum on the date of the hearing. The Minister's application for a postponement was granted with costs. The hearing

⁶ The Court notes that the Respondent contested the Minister's reliance on the defences raised by the Prosecuting Authority as they lacked a shared factual base. The Court does not agree with this submission.

⁷ In a subsequent action for damages instituted against the Minister and the Prosecuting Authority, an entity called Wild Olive Enterprises (Pty) Ltd, claimed ownership of the data plates.

resumed and concluded on 11 September 2025. This judgment was delayed by the Respondent's application to introduce further evidence.

THE RESCISSION APPLICATION

[10] The law allows generously for the rescission of orders under the rules of Court as well as the common law, albeit under certain defined circumstances. The threshold to succeed, considering all factors, is not insurmountable. The Minister had to convince this Court under Rule 42(1)(a) that the first and second orders were erroneously sought or erroneously granted, failing which, he had to demonstrate good or sufficient cause for the default orders to be rescinded. As for the latter, he had to provide a reasonable and acceptable explanation for his absence. Pursuant to his providing good or sufficient cause, he had to show that the application for rescission was *bona fide* and that he had a *bona fide* defence on the merits, i.e., on the question of liability for the Respondent's claimed damages.

Rule 42(1)(a)

[11] This is settled law. The general rule is that once a court has duly pronounced a final judgment or order, it has no authority to set it aside or correct, alter, or supplement it. The reasons are twofold. First, the court becomes *functus officio*; its authority over the subject matter ceases the moment it issues judgment. Second, the principle of finality of litigation expressed in the maxim *interest rei publicae ut sit finis litium* (it is in the interest of the state that there be an end to litigation) applies. Rules 42(1)(a), 31(2)(b), and the common law offer exceptions to this rule. Rule 42(1)(a) provides relief in narrowly defined circumstances, i.e., an erroneously sought order or erroneously granted order in the absence of an affected party, an ambiguity, a patent error or

omission or a mistake common to the parties.⁸ It is apparent from the Minister's papers that he relies solely upon the first of the defined grounds, i.e., that the first and second orders were erroneously sought or erroneously granted in his absence.

[12] An order is erroneously sought or granted if there existed at the time of its issue a fact of which the Court was unaware, which would have precluded the granting of the order and which would have induced the court, if aware of it, not to grant the order.⁹ Rule 42 allows for the expeditious correction of a wrong judgment or order.¹⁰ The elapse of time since the delivery of the judgment or knowledge of the judgment would influence the Court's discretion in granting or refusing the application.¹¹ Once one of the grounds is established, e.g., that the judgment was erroneously sought in the absence of a party affected by it, the rescission of the judgment should be granted.¹² In *Zuma*, the apex Court tempered the latter *ratio* by stating that once an Applicant has met the requirements for rescission, a Court is merely endowed with a discretion to rescind the order. It does not compel the Court to do so.¹³ Error and absence are two separate requirements.

[13] The Minister relied principally upon the statutory restriction imposed upon the Respondent's right to litigate to motivate his application for rescission under Rule 42(1)(a). It is common cause that this court (per the Honourable Savage J) on 21 September 2021 declared the Respondent a vexatious litigant ('the restriction order'). The order was sought by the Commissioner for SARS

⁸ *Minister of Police v Hlongweni* [2024] ZAGPJHC 1128 at para 11

⁹ *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 153 C.

¹⁰ *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471 E-F

¹¹ *First National Bank of Southern Africa Ltd v van Rensburg NO: in re: First National Bank of Southern Africa Ltd v Jurgens* 1994(1) SA 677 (T) at 681 B-G, *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) 411 (C) at 421 G

¹² *Mutebwa v Mutebwa* 2001 (2) SA 193 (Tk) at 199 I-J

¹³ *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* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) ('Zuma') at para 53

and granted against the Respondent in his personal capacity as well as in his capacity as a trustee, together with two other trustees of a particular trust. The order forbade the Respondent in his personal capacity, or his capacity as a director, member or trustee of any company, close corporation, or trust, from instituting any legal proceedings against any person in any Court in this country without the leave of the Court. An application for leave to litigate would be granted only if the Court is satisfied that the proceedings are not an abuse of the process of the Court and there are *prima facie* grounds for such proceedings.

[14] The Respondent contended that the Minister and the Prosecuting Authority premised their ground of rescission on the VPA and his status as a vexatious litigant upon the erroneous view that the Court granting the first order was unaware of the existence or relevance of the restriction order when it was granted. The Respondent asserted that the Court was aware of the order and invited Respondent's Counsel to make submissions on the implications of the order for the proceedings before her. Counsel for the Respondent submitted that the cause of action, i.e., the loss of the data plates, was completed before the imposition of the restriction order. The section 31 CPA application was thus beyond the reach of the restriction order. The Respondent contended that the granting of the first order implicitly inferred that the restriction order did not prohibit the section 31 CPA application. The Respondent contended further that the appropriate recourse for the Minister if he were aggrieved by the first order being granted despite the restriction order would be to appeal the process.

[15] In reply, the Minister contended that apart from the Respondent's say-so, there was no record of what transpired between the Court and the Respondent's Counsel on the day of the hearing. It was unclear on what basis the Judge would have known of the restriction order. The Minister was unaware of any formal application required to lift the restriction imposed on the Respondent by the

order. The application would have had to have been served on SARS, who would have an interest in whether the restriction ought to have been lifted. The Respondent should have produced a recording of the proceedings on the day of the hearing to prove this allegation.

The Common Law

[16] In an application for rescission founded on the common law in an instance where the Applicant has been in default, the Minister must show good cause, provide a reasonable explanation for his default, show that the application is *bona fide*, and that he has a *bona fide* defence to the claim which *prima facie* has some prospect of success.¹⁴ The inherent jurisdiction of the High Court does not include the right to interfere with the principle of finality of judgments, other than in circumstances specifically provided for in the rules or the common law. The Courts have consistently refused rescission where there was no irregularity in the proceedings and the party in default relied upon the negligence or physical incapacity of his attorney.¹⁵ The refusal is not absolute, and another Court may take a different view in the exercise of its discretion regarding the peculiar facts of the case it adjudicates. The Minister must show that the failure to oppose was not wilful and was due to circumstances beyond his control. The Minister must demonstrate that the loss of the data plates was not due to negligence or custodial breach, or that liability does not attach in law. Given the quantum (R100 million), courts may be more inclined to scrutinise the merits to avoid unjust enrichment or fiscal prejudice (there are draft orders filed by the Respondent in the court file for the court to grant the R100 million in compensation).

¹⁴ *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) 476, *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) t 300 F-301C, *Chetty v Law Society, Transvaal*, 1985 (2) SA 756 (A) at 764 I – 765 F,

¹⁵ See *Topol and Others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W)

[17] The Court's discretion must be exercised after a proper consideration of all the relevant circumstances. When dealing with words such as "good cause" and "sufficient cause" in other rules and enactments, the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words.¹⁶ The explanation for the default must be assessed "in the light of the nature of the defence" and with reference to the totality of the case.¹⁷ This integrated assessment reflects a recognition that the merits of the defence may inform the plausibility or acceptability of the default explanation. An applicant who is in wilful default, or woefully absent, or who is grossly negligent in these respects, cannot demonstrate "good cause" for rescission.¹⁸ Such conduct disqualifies the applicant from equitable relief.¹⁹

[18] The Minister contended that he had not lost the missing articles. The items were 'plausibly' handed to SARS. He affirmed that he was not aware of either of the applications that led to the first and second orders until 30 January 2025. The Respondent acknowledged fairly that he could not contest the Minister's evidence that the Minister's office was unaware of the proceedings before 30 January 2025. Although the Minister advanced several explanations for his absence when the first and second orders were taken, the record demonstrates that it stemmed largely from the State Attorney's conduct as attorney for the Minister.

[19] The State Attorney accepted that she is the Minister's attorney of record and that the Court process directed at the Minister could legally be served on her. Her explanation for her failure to inform the Minister of the applications

¹⁶ *Cairns' Executors v Gaarn* 1912 AD 181 at 186; *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352-3)

¹⁷ *Elia v Absa Bank Ltd* [2023] ZAGPJHC 649 at paras (14) and [22]

¹⁸ *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C) at 804C-D,

¹⁹ *Wright v Westelike Provinsie Kelders Bpk* 2001 (4) SA 1165 (C) at 118F-G

ranged widely from austerity measures and the resultant reduction in personnel and logistical problems in the State Attorney's office, email communication difficulties, her assumption that the application had been finalised when the Respondent failed to respond to her invitation to withdraw the section 31 CPA application, her failure to convey the Minister's instructions to the Respondent, her failure to recall whether she saw the applications leading to the first and second orders, the failure of the Respondent to serve the applications on the Minister physically, the failure of the Respondent to inform her of the applications when they appeared before the Acting Judge President on another matter. Apart from the fact that the Minister was unaware of the applications that led to the granting of the first and second orders, and the State Attorney's assumption that the section 31 CPA application was withdrawn, the State Attorney's reasons for failing to inform the Minister of the applications are unsustainable. The Court shall not burden this judgment with the details of the reasons provided by the State Attorney for her failure to detect the emails about the applications or for her refusal to accept the court process emanating from the second order.

[20] The Respondent surveyed the caselaw relevant to rescission applications where the inaction of the State's legal representatives led to default judgments against it. Rescission has been refused where there was no irregularity in the proceedings and the party in default relied upon the negligence or physical incapacity of their attorney.²⁰ The State Attorney's institutional role offered no immunity, and Courts held the State to the same obligations of diligence and imputed the State Attorney's conduct to the client in deciding rescission and condonation applications.²¹ A litigant, as in this case, the Minister, who has legal advisors in addition to representation by the State Attorney, is not entitled

²⁰ See *Topol and Others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W)

²¹ *Minister of Police v Hlongweni* [2024] ZAGPJHC 1128 at paras 11, 19, 27,28,34,35

to sit back indefinitely without proactively enquiring about progress in a matter.²² The Respondent asserted that the State Attorney's account of how the Minister came to be absent from the July and November 2024 hearings was incomplete. She was uncertain as to whether the Respondent's emails were received on the State Attorney's email servers or whether they were transmitted to her. The Respondent consequently argued that an Applicant seeking rescission of orders must disclose all relevant information.²³ Once a notice of set down is correctly served, a party cannot claim to be absent in the sense contemplated by Rule 42(1)(a).²⁴ Structural failures in the office of the State Attorney, including inaction, heavy caseloads, refusal to accept court process, and alleged email dysfunction, cannot justify or excuse the failures that led to the granting of default judgment twice in this case and required the third Court to contact the attorney directly to warn her of the matter.²⁵

[21] The Respondent submitted that the findings in the selection of cases he cited were instructive and directly relevant to the present matter. The Minister once again sought to excuse procedural default based on no more than disorganisation within the State Attorney's office and offered only vague and speculative averments about the proposed defence to be offered if proceedings were to be reopened. This Court has taken cognisance of the extensive caselaw cited by the Respondent in support of his contention that the State Attorney's conduct could not be condoned or used to support the rescission application.²⁶

²² *Pikwane Diamonds (Pty) Ltd v Anro Plant Hire (Pty) Ltd* 2019 JDR 1861 (GP) at para [38]

²³ *Obiang v Van Rensburg* [2023] 2 All SA 211 (WCC) at para 32 *et seq*

²⁴ *Minister of Police v Lulwane* [2023] ZAECMHC 20 (9 May 2023) ('Lulwane')

²⁵ *Lulwane* at paras 15-18, 28-29, 37-38, 48

²⁶ *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), *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A), *Saloojee and Another NNO v Minister of Community Development*, 1965 (2) SA 135 (A), *Chetty v Law Society* at 767 J – 769 D, *Cf Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) ('Melane') at 532

[22] Even if one takes a benign view of the State Attorney's conduct, the inadequacy of her explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the Minister being able to put up a *bona fide* defence which has not merely some prospect, but a good prospect of success.²⁷

The Bona Fide requirements

[23] In addition to advancing a good cause for his absence when the orders were taken by default, the Minister must demonstrate that his application for rescission is made *bona fide* and he must show that, on the merits, he has a *bona fide* defence which *prima facie* carries some prospects of success.²⁸ The Minister must, beyond mere denial or conjecture, set out with sufficient clarity and supporting factual detail, satisfy the Court that, if the matter were reopened, there would be a triable issue requiring adjudication.²⁹

[24] The Minister raised several defences and contended that all of them have good prospects of success. The Minister's defences on the issue of liability include a broad denial of responsibility for the loss of the data plates. He suggests that the items were not lost while in SAPS custody but were instead delivered to officials of SARS after the issue of the 2014 seizure warrant. He contended that the totality of the evidence did not support the first order, which declared the Minister liable for the loss of the data plates. The Minister contended that the evidence points to the loss of the data plates whilst under the care of SARS. The agreement between the Respondent and the prosecuting authorities was premised upon SARS having the lost items. The Respondent's contention that the State raised no factual disputes is not true. The Minister did

²⁷ *Melane* at 532 C

²⁸ *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042F -1043A

²⁹ *Colyn v Tiger Food Industries Ltd* 2003 (6) SA 1 (SCA) at paras 11-12

not at any stage admit to having had possession of the seized articles. The Minister maintained that the Respondent should have known he would dispute a fundamental issue of the case, namely possession of the seized articles. He asserted that a matter of this magnitude and complexity could not be resolved in motion proceedings.

[25] The Minister argued that the issue of ownership would have been raised under the issue of liability. The Respondent was not the owner of the seized or lost articles. While section 31 of the CPA provides for a seized article to be returned to the person who possessed it when it was seized if it is no longer required for evidence, it did not follow that the possessor who was not an owner of the articles could claim compensation if the articles were mislaid. The owners left them in the Respondent's possession for safekeeping. He cannot suffer any loss personally. Any alleged loss relating to the value of the data plates was a loss to the owners of the data plates. It is not the Respondent's case that the lost value of the data plates has been ceded to him. The Minister contended that the Respondent sought to disguise his claim as a statutory claim for restitution based upon the true replacement cost of helicopters and helicopter engines. This claim cannot be that of the Respondent, as he is not the owner of the helicopters or the engines. The Minister contended that in pursuit of his amended relief, the Respondent relied upon the *rei vindicatio*, a remedy available to an owner of goods in the possession of a third party.³⁰ The Respondent was, on his own version, not the owner of the data plates. Accordingly, the Respondent did not have a statutory or common law claim against the Minister.

³⁰ The Respondent denied that his section 31 CPA claim ever relied upon the *rei vindicatio*, apart from an offhand reference to it. The facts are that the first order was obtained on the basis that the application was 'for a *rei vindicatio* against the State based on their refusal to return goods seized from my possession under a search and seizure warrant...'

[26] On the issue of quantum, the Minister asserted that this was a substantial money claim ultimately against the fiscus. The Respondent sought the value of the items lost from police custody. The Respondent contended that the data plates have a value of R100 325 653.42. The Minister declared that the helicopters have lost their commercial value, but the Respondent impermissibly applied the value of the helicopters and engine parts to the data plates.

[27] The Civil Aviation Act 13 of 2009. Regulation 47.01.2 of part 47 of the Civil Aviation Regulations 2011 provides that an owner of an aircraft shall, if the aircraft flies to, from, or within the Republic, hold a valid certificate of registration for such aircraft issued either by the Director or an appropriate authority. An aircraft registered in another country shall not be registered here. The South African Civil Aviation Technical Standards (SA-CATS) 47.00.3 3(1) provides that every South African registered aircraft must have affixed to it an identification plate stamped or engraved with its nationality and registration marks. There is no prohibition on replacing the identification plate with another containing the same information obtained from the Director if it is lost or destroyed. Regulation 21.13.1 caters for data plates for engines, propellers, other critical parts and certain replacement and modification parts produced for installation on type certificated products. Regulation 21.13.4 envisages the removal, alteration, and replacement of identification information. It states that no person may remove, alter, or replace any of the data plates referred to without the approval of the Director. If removed, they must be carried out under a method, technique, or practice that is acceptable to the Director.

[28] Removal of a data plate is strictly regulated. It may only occur under specific circumstances, such as during major repairs, modifications, or when the aircraft is de-registered or destroyed. In such cases, the removal must be documented, and the plate must be safeguarded to prevent misuse. Restoration

or replacement of a data plate must comply with the original specifications and be approved by the South African Civil Aviation Authority (SACAA). Unauthorised removal or tampering with a data plate is a serious offence, potentially compromising the aircraft's airworthiness certification and legal status.³¹

[29] The Minister asserted that none of the regulations contemplate that an aircraft can be operated or sold without an identification plate. A data plate can be reinstalled. It is for the owners of the aircraft and its data plates to approach the Director for permission to replace and reinstall data plates. The Respondent is not entitled to profit from his or the owner's failure to comply with the regulations or from his inaction in replacing the data plates under the method prescribed by the Civil Aviation legislation. In essence, the Minister sought to impress upon the Court the duty of the Respondent to mitigate his damages not only from the time he discovered that the plates were missing but from the time they were first seized.

[30] The Respondent challenged the Minister's defence that the seized goods were handed over to SARS. This is despite the Respondent failing to dispute that the goods were sourced from SARS when they were returned to him and that he directed his enquiries to SARS when he discovered that the data plates were missing from the articles that were returned to him through the efforts of the State Attorney. The Respondent contended that the Minister's failure to put in place systems to monitor the custody and return of the data plates constituted a breach of a constitutional legal duty.³² Accordingly, the Minister's alleged transfer of the plates to another organ of state, without any mechanism to ensure their traceability or return, did not extinguish his legal responsibility towards the

³¹ SA-CATS 2011, https://docs.sahpa.co.za/SACAA/Technical-Standards/SACATS_2011.pdf, SACAA Airworthiness, <https://www.caa.co.za/industry-information/airworthiness/>.

³² *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at paragraph [21]

Respondent. The Minister's proposed defence would not assist him if the proceedings were to be reopened. The Respondent contended that the Minister had failed to satisfy the second essential element of the rescission test under the common law and that rescission had to be refused on this ground as well.

[31] The Respondent's contention that the Minister provided no *bona fide* defence to the quantum claimed is incorrect. The Minister cited the statutes and regulations supporting the civil aviation authority regarding the replacement of the plates, which he contended would have at least imposed a duty on the Respondent to mitigate his loss or negated the quantum. The Minister denied that the Respondent was entitled to any damages or compensation, disputed that the Respondent had established the quantum of his claim and asserted that the Respondent, as his own expert on the quantification of the damages, lacked the qualifications or the independence to value the lost data plates. The Respondent contended that this issue bore directly upon paragraph 3 of the second order, in which the Honourable Justice Slingers expressly directed that the matter would proceed "on an unopposed basis" if the Minister failed to file an appearance to oppose by 17 December 2024. That deadline came and went. No appearance was filed.

[32] **THE APPLICATION TO FILE FURTHER EVIDENCE**

[33] The question of whether the Honourable Justice Mangcu-Lockwood, who granted the first order, knew of the restriction order was the subject of the application instituted by the Respondent for leave to file further evidence after the application had been heard and judgment was imminent. The Respondent's attorney applied to introduce further evidence on 21 September 2025, which included the transcript of the motion court proceedings of 31 July 2025. The application was summarily withdrawn on 22 September 2025. The Respondent then submitted the transcript directly to the Court on 25 September 2025. The

Court addressed both parties, indicating its displeasure at the Respondent's direct approach to the Court, and requested the parties to provide a combined response to the new documents it had received. The parties then agreed upon a timetable for the application to introduce new evidence. Although provision was made for further written submissions, the parties failed to timeously inform the Court that they did not intend to exercise the option.

Respondents founding affidavit

[34] The Respondent's attorney deposed to the affidavit supporting the application to file a supplementary affidavit, which included the transcript of the motion court proceedings of 31 July 2024 into evidence. The Respondent asserted that the evidence was materially relevant to the determination of the Minister's interlocutory applications. He referred to the Minister's Counsel's submission during the hearing of the rescission application that the Respondent was obliged to place the transcript of the 31 July proceedings before this Court. The Respondent contended that the Minister had the transcript before the 11 September hearing. The Respondent was informed by the transcribers and provided the email correspondence confirming that the State Attorney had paid for a copy. The Respondent asserted that the Minister improperly denied having the transcript.

Applicant's answer

[35] The Minister contended that as the VPA imposed an obligation on the Respondent to lift the bar on litigation imposed on him, it was incumbent upon him and not the Minister to prove that he had done so by producing the transcript of the 31 July 2024 proceedings. The issue of proof was raised in the Minister's answering affidavit. Despite filing his replying affidavit as well as a court-sanctioned supplementary affidavit, the Respondent failed to include the

transcript of the proceedings. The Minister contended that the new evidence in the form of the transcript should not be allowed except in exceptional circumstances.³³ The Minister admitted that his legal team had access to the transcript at least a day before the hearing, but its lead Counsel considered the transcript irrelevant.

Respondent's reply

[36] In his reply, the Respondent's attorney maintained that the Honourable Justice Mangcu-Lockwood was aware of his status as a vexatious litigant when she heard his application for declaratory and liability relief against the Minister.

[37] During the hearing of 11 September 2025, the Minister's Counsel did create the impression that he did not have the transcript for the 31 July 2024 proceedings. He argued that the version of events as recalled for this Court's benefit was that of the Respondent's Counsel, and it was incumbent upon the Respondent to obtain and file the transcript to understand what transpired. These submissions were made in circumstances where the Minister's legal team had the transcript and had already considered that it was irrelevant to the hearing.

[38] The transcript provided by the Respondent is incomplete. It would appear to be a continuation of an earlier interaction between the Court and the Respondent's Counsel, which was not included. The remaining interaction between the Court and the Respondent's Counsel related to the latter addressing the issue of proof of service, presumably to account for the absence of representation on behalf of the Minister on that day. The Court also raised its concerns about the Respondent's status as a vexatious litigant. The Court raised

³³ The Applicant's reliance on *Colman v Dunbar* 1933 AD 141 at 123-124 must be viewed in the proper context, i.e., authority for the leading of new evidence on appeal.

its concerns about whether the primary application had been withdrawn, after perusing the State Attorney's 2023 correspondence to the Respondent. Respondent's Counsel explained to the Court that the Respondent had regularly inspected the seized goods while they were with this Court's Registrar. They were then handed over to SARS. When the State Attorney returned the goods seized pursuant to the Respondent initiating the main application in July 2022, the Respondent discovered that the data plates were missing. After negotiating with SARS for their return, he undertook to withdraw the application when he received the data plates, which he did not.

[39] Respondent's Counsel then indicated to the Honourable Justice Mangcu-Lockwood that the Respondent's argument was going to be that the application heard on 31 July 2024 was not the institution of new proceedings, but a continuation of proceedings that had commenced in 2008. Respondent's Counsel handed up the restriction order of 21 September 2021. The Court acknowledged that it had heard Respondent's Counsel, indicated that it wished to consider some of the documents more carefully, and reserved its decision.

[40] The transcript supports the Respondent's contention that the Honourable Mangcu-Lockwood J had raised the issue of the Respondent's status as a vexatious litigant with Respondent's Counsel, obtained proof that the notice of the application had been served on the State Attorney and had been provided with the restriction order imposed on the Respondent. It also supports the Respondent's contention before that Court that the 31 July 2024 application was a continuation of the 2008 proceedings. This Court notes the Minister's position, which was that the transcript was important to either substantiate or refute the Respondent's contention that the Court hearing the application was aware of his status as a vexatious litigant. Under URC 6(5)(e), further affidavits beyond the three sets permitted in application proceedings are subject to the

Court's sanction exercised judicially. The party seeking that indulgence must provide a satisfactory explanation for its lateness in applying to introduce new evidential material, demonstrate its *bona fides* and show that no irreparable prejudice will eventuate to its opponent.³⁴ Allegations of impropriety on the part of any party may tilt the scales in favour of admitting new evidence.³⁵ Both parties acted irregularly. The Minister obtained the transcript before the 11 September hearing, and the Respondent sought to introduce it into evidence without following due procedure. It is in the interests of justice that the application to introduce new evidence after the matter had been heard on 11 September 2025 be permitted. The content of the transcript is relevant to the evaluation of the application for rescission.

EVALUATION

[41] The Respondent instituted the main application, i.e., the section 31 CPA for the return of the goods seized from him, without seeking leave to do so. The Minister asserted that he only became aware of the restriction order granted against the Respondent on 5 June 2025, although the Prosecuting Authority had raised it in their rescission papers at an earlier date. The Minister contends that even though the Court granted the first order, it did not have an application for leave to litigate before it, and the order did not contain a provision that the bar placed upon the Respondent had been lifted. The Respondent could not contend that the interlocutory order was an extension of the main application. He could not have instituted the main application until he had brought an application in which he satisfied the two requirements imposed under section 2(1)(b) of the VPA (i.e., it is not an abuse of the court process and there is *prima facie* ground

³⁴ *James Brown & Hamer (Pty) Ltd v Simmons NO* 1963 (4) SA 656 (A) at 660E-G, restated in *Mbali Coal (Pty) Ltd v Commissioner for the South African Revenue Services* [2023] ZAGPPHC 1792 (5 October 2023); *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA) para 11

³⁵ *Transvaal Racing Club v Jockey Club of SA* 1958 (3) SA 599 (W) at 604A-E; *Cohen NO v Ne/1975* (3) SA 963 (W) at 966B; *Dawood v Mahamed* 1979 (2) SA 361 (D) at 365-367

for the proceedings). The Minister states that had the Respondent done so, it would have allowed him to oppose the application, presumably upon the assumption that the application for leave to litigate had to be served upon the Minister. This Court accepts that the question of whether the Minister would have opposed the application is speculative, given the way the State Attorney failed to deal with the Respondent's papers. The Minister contended that the Respondent at the very outset did not have standing to institute these proceedings. The Minister asserted that the restriction order posed a significant hurdle for the Respondent as it rendered these proceedings void *ab initio*. The Minister contended that the Respondent is guilty of contempt of Court. The institution of the main application, in the absence of an application seeking the upliftment of the restriction, constituted a procedural irregularity.

[42] The Respondent answered the Minister's allegations by asserting that the Honourable Justice Mangcu-Lockwood enquired about the restriction order and granted the first order, fully aware of the restriction. The transcript of the proceedings in the Motion Court supports the Respondent's contention that the Honourable Judge was aware of the restriction order granted against him. Respondent's Counsel specifically referred to the concern raised by the Judge about the Respondent being a vexatious litigant. The Honourable Justice Mangcu-Lockwood stated that she wished to consider the matter before making an order. Respondent's Counsel handed up the restriction order and the draft order that the Respondent sought, to the Judge for consideration.

[43] Against the general background sketched and the facts considered, the situation peculiar to this case warrants further consideration. The main application for restitution was put on hold when the State Attorney offered to approach SARS in November 2022 to return the goods seized from the Respondent in 2008. The goods were returned to the Respondent. The

Respondent discovered that the data plates were missing. He approached SARS directly to enquire about the missing items. The State Attorney, unaware of the missing items, invited the Respondent to withdraw the application against the Minister and the Prosecuting Authority. The Respondent, having failed to recover the missing items from SARS, proceeded with the application and informed the State Attorney that he intended to do so. The application was enrolled for hearing on the motion roll.

[44] The Respondent amended his papers to include a prayer for a declaration of liability and for the quantification of his claim. On the date of the hearing, the Court asked Respondent's Counsel to address it on the Respondent's status as a vexatious litigant. The Respondent handed up the restriction order and argued that it did not apply as the matter was merely an interlocutory of an ongoing process that began in 2008 (not an interlocutory of an application that was instituted in 2022 without the Court's permission to do so). The Court adjourned the matter for further consideration. It subsequently granted the order drafted by the Respondent. What then, is a Court further down the line to make of the issue as to whether the Respondent's position (stated and repeated in the affidavits as well as in written and oral argument) that neither the restriction order granted by the Honourable Justice Savage on 21 September 2021 or the statute upon which it was based, did not apply to the section 31 CPA application and the amendments it spawned regarding liability for damages and the quantification thereof? The Minister has raised the issue of the Respondent's legal standing to institute the application from its outset in August 2022.

[45] The core question is whether the Respondent, a declared vexatious litigant, validly instituted his application for restitution in 2022 without obtaining leave, and whether he can retrospectively justify this omission by invoking the historical continuity of a 2008 cause of action and reading into the

first Court's silence on the leave requirement, acquiescence to litigate. The corollary to the core question, if answered in the negative, is whether the Respondent erroneously sought the first order and/or whether the first order was erroneously granted.

Vexatious Proceedings

[46] The Minister contends correctly that the Respondent instituted the main proceedings on 8 August 2022, as a declared vexatious litigant under the Vexatious Proceedings Act 3 of 1956 ('VPA') and against a court order declaring him to be a vexatious litigant. Section 2(1)(b) of the VPA provides that a Court may, if it is satisfied that any person has persistently and without any reasonable grounds instituted legal proceedings in any Court, whether against the same person or against different persons, grant an order against that person that they shall institute no legal proceedings against any person in any Court without the leave of the Court. A Court shall not grant leave unless it is satisfied that the proceedings are not an abuse of the process of the Court and there is a *prima facie* ground for the envisaged proceedings. Having demonstrated a propensity to abuse the process of the courts, it ill behoves a vexatious litigant to complain that he or she is required first to demonstrate his or her *bona fides* before instituting further litigation.³⁶

[47] The restriction imposed upon a vexatious litigant relevant to this matter relates to the 'institution' of any proceedings subject to the Court's satisfaction that the proceedings envisaged are not an abuse of the Court's process and that there is a *prima facie* ground for initiating it. The phrase 'no legal proceedings shall be instituted' is linguistically absolute as a peremptory ban against the initiation of proceedings. It does not apply to the continuation of proceedings or

³⁶ *Beinash and Another v Ernest & Young and Others* 1999(2) SA 116 (CC) ('*Beinash*') at para 20

to appeals. It means that any new proceeding filed under a summons or an application procedure without leave is procedurally defective and voidable. The provision is contained in a statute designed to protect judicial resources from abuse and parties from harassment and baseless and frivolous litigation. The circumstances include the vexatious litigant's litigating history that led to the imposition of the restriction.

[48] The VPA envisages that a vexatious litigant should raise a substantive application seeking leave to institute any new legal proceedings. The Applicant should be guided by the scope and terms of the restriction order as to whether it is indefinite, whether it bars litigation against all or specific persons and whether it applies nationally or to specific jurisdictions. The Applicant should draft a notice of motion and prepare a formal application requesting permission to litigate and motivate why the proceedings are not an abuse of the Court's process, explain the nature of the proposed litigation, identify the opponents, and make out a *prima facie* case against the party or parties placed in opposition.³⁷ The Applicant should acknowledge the conduct that led to the restriction, show that the circumstances have changed or that the proposed litigation is materially different. The Applicant must provide evidence of good faith, such as the necessity for the litigation, legal advice obtained or attempts to resolve the matter amicably.

[49] A *prima facie* ground means that the proposed litigation must disclose a legally cognisable cause of action supported by some factual basis, even if it is not conclusive. It is a threshold test, not proof on a balance of probabilities, but enough to justify judicial engagement. This requirement ensures that the court does not grant leave for speculative, incoherent, or legally untenable claims. It

³⁷ *Beinash* at para 13

protects defendants and respondents from being dragged into litigation that lacks even a rudimentary foundation.

[50] Logic dictates that the restriction order and the papers in the proposed litigation are included in the application. The text of the VPA does not require the vexatious litigant to serve the papers of the proposed litigation, i.e., the Court's process on their opponents or the original applicant who obtained the restrictive order, nor does logic require it. The application for leave to litigate is *ex parte* in nature. It is a gatekeeping mechanism, not a determination of rights. The listed opponents are not yet a party to the proceedings. The Court's role is to screen for abuse and *prima facie* merit. It is not called upon to adjudicate the dispute. The Court delegated the application must act judicially, not perfunctorily. It may call for further clarification or documentation if the circumstances warrant heightened scrutiny or if the *prima facie* case is ambiguous, or dismiss it after hearing the vexatious litigant, or on the papers. If leave to litigate is granted, the opponent will be served with the actual proceedings and can raise objections, including abuse or lack of merit. It follows that a Court must make an order declaring that the vexatious litigant is not abusing the Court's process, that they have satisfied the Court that a *prima facie* case has been made out against the proposed opponents, and that leave to litigate has been granted.

[51] Section 2(4) of the VPA provides a sanction of contempt of court and a monetary penalty of about R2000 against the vexatious litigant who institutes any legal proceedings against any person contrary to the restrictive order without the leave of the Court. This provision does not expressly impose a duty on the part of the vexatious litigant to disclose, but it creates legal consequences for instituting proceedings without leave. A vexatious litigant who fails to disclose their restricted status and proceeds without leave is in material breach

of the VPA. This means that the sanction or penalty may be imposed by the Court on its own accord in circumstances where the defiance is noticed or is evident from the papers. The Court may refuse to hear the matter, strike it from the roll, or initiate contempt proceedings. However, procedural fairness requires that the litigant be given notice and an opportunity to explain before a contempt sanction is imposed.

[52] Section 2(1)(b) of the VPA imposes a peremptory procedural bar, and section 2(4) criminalises non-compliance. These provisions are not discretionary. They are jurisdictional thresholds, and failure to comply renders the proceedings voidable and potentially unlawful. The Respondent's application for restitution, instituted in 2022, is a new procedural act, not a mere continuation of a dormant 2008 process. The cause of action may have originated in 2008, but the initiation of a new procedure in 2022 constituted a fresh initiation of proceedings. The distinction between a cause of action and the institution of proceedings is critical. The former is substantive; the latter is procedural and triggers the statutory bar.

[53] The Respondent did not file a formal application for leave to litigate his section 31 CPA application. His status as a vexatious litigant was raised by the Court when the application was heard. The Respondent handed up the restriction order and argued tacitly that leave to litigate was unnecessary. The Court adjourned the matter but ultimately granted the draft order without recording any finding on leave or condonation. Disclosure, and here too, at the instance of the Court, is not equivalent to compliance with a requirement that seeks to protect the Court's integrity. The Act requires judicial satisfaction that the proceedings are not abusive and discloses a *prima facie* case, not mere awareness, in an instance where the vexatious litigant tests the Court's ability to protect its process so soon after he is banned from litigation without the Court's

consent. The Respondent submitted that the interlocutory application was heard on 31 July 2024, and the Registrar issued the order on 16 August 2024. If the Respondent sought to imply by that submission that the Court took time to consider the application, then that submission is unsustainable for two reasons. The Honourable Justice Mangcu-Lockwood signed off the order on the date of the hearing, and it is common practice in this division for the Court Registrar to issue the order later.

[54] This Court is obliged to interrogate the procedural validity of the proceedings, especially where jurisdictional compliance is in doubt. The temporal argument raised by the Respondent preceding the grant of the first order is tenuous and legally insufficient. The Respondent's failure to seek leave when he instituted the proceedings in 2022 cannot be retroactively cured by asserting historical continuity. The 2022 application is procedurally distinct in the prayers it sought, which were initially for restitution and then amended to include a declaration of liability and the subsequent enrolment of the matter for quantification of the compensation due to the Applicant. The VPA applies to all proceedings instituted after the restriction order. It does not ask when the cause of action arose, nor does it make an exception for a pre-existing cause of action.

[55] If the first Court lacked jurisdiction to grant the first order, then the order is a nullity even if the Court knew of the underlying facts. The Court did not retroactively grant the Respondent leave to litigate, nor did the Respondent seek such leave. The detailed analysis of the underlying facts and questions of law that arise in this rescission application means that the Minister has proved under the VPA that the order was not only erroneously sought, but also erroneously granted. The Respondent erroneously sought relief he was legally barred from seeking and advanced a legally incorrect basis for avoiding the restriction order

and the VPA. The Court erroneously granted relief it had no jurisdiction to grant.

[56] That is not the end of the enquiry under Rule 42(1)(a). The Court, hearing a rescission application, must determine whether the Applicant was a party affected by the order and whether they were truly absent from the proceedings. The Minister is undoubtedly affected by the impugned orders, and nothing further needs to be said about this requirement. The requirement that the orders were taken in the Minister's absence is less clear. The Constitutional Court stated that 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). It cannot have the effect of turning the order granted *in absentia* into one erroneously granted.³⁸

[57] The facts informing this application are distinguishable from *Zuma*. The Minister did not know about the proceedings as the State Attorney did not inform him of them. The Respondent cannot dispute that the Minister was unaware of the proceedings. There was no election on the part of the Minister to be absent, and the first order was obtained on the incorrect assumption that the Minister had been properly informed. The second order sought to ensure that this was not the case when it ordered that the court process be served upon the State Attorney.

[58] The facts in this case differ materially from the *Zuma* case and the other cases cited by that judgment in one other aspect. The rescission is sought in circumstances where a vexatious litigant obtained it without complying with a restriction order. As the underlying application was void, the Court was never properly seized of the matter, and the Minister was not legally required to

³⁸

Zuma at para 61

participate in it. The defect in this case lies not in the Minister's conduct but in the Respondent's lack of standing and lack of procedural capacity. An explanation for the Minister's absence is not required to the extent that it is under the common law requirement. The case, relying incorrectly upon historical continuity and avoiding the restriction order, was not jurisdictionally sustainable.

[59] That then should entitle the Minister to succeed with his application for the rescission of the first order and the parts of the second order as specified. The application was void *ab initio*. In the interests of completeness, the Court shall briefly consider the merits of the common law grounds raised by the Minister.

Rescission under common law grounds

[60] The Court would have been inclined, albeit guardedly so, to grant the relief sought by the Minister on common law grounds even if he did not prevail under section 42(1)(a) of the URC. The overall obligation, where an order was granted by default, is that the defaulting Applicant seeking rescission of the order must show good or sufficient cause for his absence. The Applicant must satisfy three requirements. The first is that the Applicant must give a reasonable explanation that is acceptable for their default. As alluded to, the Respondent cannot dispute that the Minister was unaware of the applications that led to the granting of the first and second orders. The State Attorney invited the Respondent to withdraw the section 31 CPA application after she had sourced and returned the goods seized from the Respondent in November 2022. She assumed that the matter had been finalised. The Respondent belatedly answered her email months later. The events that unfolded after the Respondent informed the State Attorney in March 2024, i.e., the failure to track the course of the

litigation, and the wilful refusal to accept this Court's process, temper any advantage that the Minister may wish to obtain under this requirement. At most, his explanation would be regarded as being weak.

[61] The second requirement under good cause is that the Applicant must show that the application is made *bona fide*. The Minister's conduct in prosecuting the rescission application has been marked by bureaucratic and procedural inefficiency, lack of coordination within the State Attorney's office, delays attributable to Counsel's availability, institutional sluggishness, non-compliance with the 31 January court order, late filing of affidavits, an eleventh hour request for a postponement and inexplicable opposition to the application to introduce evidence that the Minister thought was essential to prove the Respondent's assertions about his vexatious status. The Minister's conduct reflects regrettable delay and a lack of diligence, but it does not rise to the level of *mala fides*. The Minister's approach to a case is only as effective as the hands that craft it. There is a difference between *mala fides* and ineptitude, delay or administrative dysfunction. The former is fatal while the latter, although undesirable, cannot disqualify the Minister under this requirement. There is no evidence to suggest that the Minister's application for rescission was brought to frustrate the Respondent's claim.

[62] Under the third requirement that the Minister must have a *bona fide* defence on the merits, the situation is entirely different. The Court accepts that the defences raised by the Minister *prima facie* carry more than some prospects of success. On the issue of liability, the Respondent has not convinced this Court that the Minister had the goods seized from him. The Respondent has steadfastly maintained that the seized goods were held by the Minister before some of them were returned to the Respondent.³⁹ Neither the tax laws nor the

³⁹ The Court is not required to determine these defences on the balance of probability standard, but merely on a *prima facie* one.

CPA, at first blush, would have permitted the Minister to hand over the seized goods to the SARS after the 2014 warrant for their seizure was issued. The fact, though, is that the goods received by the Respondent were returned to him by SARS. Whether the Minister should have released the goods to SARS and the reasons for his doing so, and whether he is responsible for safeguarding seized goods held by another Ministry, is a question that needs to be decided in a proper forum. These are not issues that need to be determined in a rescission application.

[63] The CPA allows for the restitution of goods seized from a person in possession of them. The CPA does not make provision for compensating a possessor for the loss of goods seized from them. At common law, the right to claim damages for loss of a thing ordinarily vests in the owner who suffers the primary patrimonial loss. A possessor cannot claim the owner's loss without a cession of rights from the owner. This does not mean that the possessor is without a remedy. The possessor can claim the expenses he has incurred, the loss of the thing's use, and any liability to the owner. The Respondent has not formulated any alleged damages he has suffered on these bases, nor has he provided evidence that he has done so. In his court-sanctioned supplementary affidavit, the Respondent repeats that he claims the value of the missing plates in a fiduciary capacity for the true owners. He claims just over R100 million for its loss, suggesting that he is claiming the owner's patrimonial loss. There is also the question of whether the Respondent's claim had prescribed, given the inordinate delay in instituting his application.⁴⁰

[64] On the issue of quantum, the Respondent acts as an expert in quantifying his loss. The basket of civil aviation legislation allows for the formal replacement of data plates. The latter raises questions about whether the data

⁴⁰ This is an issue that has been raised against the owners of the data plates in the action proceedings instituted by them.

plates have any value, and if they do, then whether the Respondent has made any effort to mitigate his damages. The Respondent's quantification of his loss of R100 325 653.42 is ultimately a substantial money claim against the fiscus.

[65] The Minister's advancement of *bona fide* defences that *prima facie* carry more than some prospects of success, the lack of *mala fides* in seeking the application, coupled with the public interest implications of the claim, outweighs his weak explanation for his absence and the procedural irregularities. Even if the Respondent had surmounted the restriction order, his claim is problematic and probably unsustainable as currently formulated. In the circumstances, the Court would have granted the Minister's application for rescission under the common law ground relating to orders granted by default if he failed to demonstrate that the orders were erroneously sought or erroneously granted under Rule 42(1)(a).

COSTS

[66] The effect of the Court's finding that the first and second orders were erroneously sought and erroneously granted in the Minister's absence is that the application and its amendments were void *ab initio*. In the normal course, an application for rescission of a default judgment is an indulgence. As a general rule, the Applicant would be ordered to pay the costs of such an application if the Respondent's opposition was reasonable.⁴¹ The Minister has prevailed and is entitled to his costs. The Court cannot, however, ignore the inescapable conclusion that the Minister's conduct, which is largely attributable to his legal representatives, in the lead-up to this rescission application, was far from satisfactory. The State Attorney failed to accept the process emanating from the second order and failed to comply with the third court order and the agreed-

⁴¹ *Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd* 2000 (2) SA 1007 (C) at 1015 G-H

upon timetable, delayed the filing of essential papers, sought a postponement at the hearing, and generally prosecuted the matter with a lack of diligence inconsistent with the standard expected of the State in litigation. These shortcomings contributed materially to the need for the present application and compelled the Respondent to incur costs in circumstances that could have been avoided had the Minister acted with the requisite promptness and care. In these circumstances, it would be inappropriate to saddle the Respondent with the costs of the rescission application.

[67] The Court has already granted the Respondent the costs of the 31 July 2025 hearing and the postponement. That order stands. The Court retains a wide discretion to determine an appropriate costs order having regard to the conduct of the parties and the interests of justice. The Court cannot ignore the Respondent's conduct. The Respondent has a history of vexatious litigation and instituted the underlying proceedings without the leave of the court, as required. The claim advanced, seeking damages in excess of R100 million for the alleged loss of helicopter data plates, is on the papers, beset with legal and factual deficiencies. In these circumstances, it would be inappropriate to saddle the Minister with the Respondents' costs, for that would amount to rewarding litigation that ought not to have been instituted without the Court's permission.

[68] A just and equitable outcome lies between these extremes. The Minister should not be rewarded for his tardiness, nor should the Respondent be encouraged in his vexatious approach to litigation. Each party must therefore bear its own costs. The costs order includes the various applications for condonation by both parties, as well as the applications by the Respondent to introduce further evidence on two occasions. The Court finds, to the extent that it is required to do so, that all applications for condonation were granted. The Court finds further that the Respondent's application to strike out material from

the answering affidavit on behalf of the Minister is dismissed. This order reflects the court's disapproval of the Minister's procedural conduct while simultaneously recognising that the Respondents' application was irregular and unsustainable from inception.

CONCLUSION

[69] The Minister has demonstrated that the first and second orders were sought and granted erroneously. The interests of justice require that the first order be rescinded in its entirety and the second order be rescinded to the extent specified by the Minister. The respondents' claim, instituted without the requisite leave and burdened by substantial legal and factual defects, cannot be permitted to stand by default, particularly where its consequences for the public purse are potentially profound. Even if this Court were wrong under the Rule 42(1)(a) application, the Court has indicated that it would have granted the rescission under the common law. The Minister has demonstrated a *bona fide* defence warranting ventilation at trial, and the rescission sought must therefore be granted. The Respondents' claim, instituted without the requisite leave and burdened by substantial legal and factual defects, cannot be permitted to stand by default, particularly where its consequences for the public purse are potentially profound. At the same time, the Minister's procedural lapses cannot be overlooked, nor can the Respondent's vexatious approach to litigation be ignored. A balanced and equitable costs order was therefore necessary to reflect the conduct of both parties and to ensure that neither tardiness nor vexatiousness is rewarded. In the premises, this Court makes the order that follows.

ORDER

1. The whole of the order granted on 31 July 2024 is rescinded, and the default judgment is set aside.

2. Paragraphs 3 and 4 of the order granted on 20 November 2024 are rescinded.
3. Each party shall bear its own costs.

AJAY BHOOPCHAND

Acting judge

High Court

Western Cape Division

Judgment was handed down and delivered to the parties by e-mail on 23 December 2025

Applicant's Counsel: Advocate De Villiers-Jansen SC

Instructed by the State Attorney

Respondent's Counsel: Advocate P Tredoux

Instructed by Deon Perold & Associates Inc