

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Numbers: 2021/26452

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
21/01/2026	
DATE	SIGNATURE

In the matter between:

MINISTER OF POLICE

Applicant

And

AKHONA NTOMBIFUTHI NGCINGWANE

First Respondent

TITSWALO PORTIA KHOZA

Second Respondent

MOKGADULLEN SENYOLO

Third Respondent

JUDGMENT

MZUZU, AJ

Introduction

- [1] This is an application for rescission of a default judgment in terms of rule 42 (1)(a) of the Uniform Rules of Court. The default judgment that was granted on the 4 October 2023 by Judge Fisher.
- [2] The respondents oppose this application on the basis that the application does not meet the requirements for granting of a rescission, further, that the application is made in bad faith and is being used as a vehicle to delay finalisation of the matter.

Background

- [3] The respondents served on the applicant a notice in terms of rule 35 (3) and requested the applicant make better discovery. The applicant did not discover until an order to compel was made by Mudau J.¹
- [4] The applicant alleges that it complied with Mudau J's order. The respondents, however, were not satisfied with the applicant's response and accordingly approached the court with an application to strike out, this served before Fisher J. Judge Fisher granted an order finding that the applicant in the present application was in default of the court order issued by Mudau J on 25 April 2023.

Facts

- [5] The applicant submitted in summary the following:

When all the parties in this action had filed and served upon each other their discovery affidavits, the respondents brought an unopposed rule 35(3) application, the application was heard on the 25th of April 2023, the order was

¹ The order by Mudau J reads as follows: *The respondent is hereby ordered in terms of rule 35(7) to reply to the applicants rule 35(3) notice within 5 days from the date of the service of this order on the respondent attorneys of record.*

granted and called on the applicant (respondent then) to reply to the applicant rule 35(3) notice.

- [6] On the 1st of June 2023, the state attorney handling this matter sent the respondents correspondence, confirming that he had already previously complied with their rule 35 (3) request.
- [7] The respondents replied to the letter on the 6th of June 2023, requesting the state attorney to send proof of service of same. They did not, however, deny receipt of the rule 35 (3).
- [8] The applicant contends the reason why the respondents could not deny having received the replying affidavit is because they had already received it on 10 March 2023. In any event, the applicant resent it to them.
- [9] Despite the respondents' initial denial of not receiving a response to their rule 35(3) request, on 13 June 2023, they acknowledged receipt of same but advised that they would still be persisting with the application to strike out.
- [10] Even if one were to assume in favour of the respondents, that they had not received the replying affidavit prior to 7 June 2023, which the applicant denies, it was nevertheless impermissible and wholly irregular for the respondents to persist with the application. This is so because, in order to sustain an application to strike out, the respondents were required to allege non-compliance with their rule 35(3) request and the court order placing the applicant on terms. The allegation could not be made, as compliance had in fact occurred.
- [11] The respondents falsely averred that the applicant failed, neglected and or refused to comply with the court order which directed them to provide the requested information/documents...". Nothing whatsoever was said about the replying affidavit in compliance with the court order. Instead, the impression given was that the applicant has to date, ignored the court order.

- [12] The state attorney entered its notice of intention to oppose and briefed counsel to appear on the day the matter was set down, however, the applicant's counsel did not appear in court.
- [13] The respondents thereafter proceeded in the absence of counsel for the state attorney, without collegially informing the state attorney that there was no representative appearing on behalf of the applicant.
- [14] Therefore, the court order placing the applicant in default of Mudau J's order was, with respect, erroneously sought and granted. The court was unaware that the respondents' rule 35(3) request, as well as Mudau J's order had already been complied with, as implied above.

Respondents' version in summary

- [15] The respondents' version is this: they served on the applicant a notice in terms of rule 35(3) and requested the applicant make better discovery. The applicant ignored this notice until an order compelling better discovery was made by Mudau J.
- [16] That court order was served on the applicant by hand and by email. Following the applicant's failure to comply with the order issued by Mudau J, the respondents approached the court for an order striking out the applicant's defence in terms of the applicable directives.
- [17] The application to strike out and its notice of set-down were served on applicant.
- [18] The court order striking out the applicant's defence was served on the applicant. No steps were taken by the applicant in response thereto.
- [19] On 27 June 2024, the respondents instituted default judgment proceedings arising from the order by Fisher J dated 4 October 2023. This application was

set down for hearing on 25 November 2024 but was removed from the roll at the request of the applicant after it indicated that there were intentions to settle the matter out of court.

- [20] The applicant failed to settle the matter and as a result, the respondents proceeded with default judgement.
- [21] On 21 February 2025, the applicant was served with a notice of set-down of the default judgment application. The matter was set down for hearing on 3 April 2025. The applicant thereafter launched the present application, which had the effect of delaying the finalisation of the matter.
- [22] The applicant has not provided the court with evidence in support of common-law rescission beyond what is pleaded.
- [23] The issue for determination therefore is whether the applicant has made out a case for rescission.

Legal Framework and Analysis of the Evidence

- [24] It is trite law that in determining the case for rescission, two elements need to be proven:
 - a. The party seeking the relief must present a reasonable and acceptable explanation for his default; and
 - b. On the merits, such party has a bona fide defence which, *prima facie* carries some prospects of success.²
- [25] Rule 42 is confined to the rescission of an order erroneously sought or erroneously granted in the absence of a party affected thereby.³

² See *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) ("*Chetty*").

³ See Rule 42(1)(a).

[26] Regarding what “an order erroneously sought” relates to, the court in *Freedom Stationery Pty Ltd and others v Hassam and others*,⁴ approved its earlier decision in *Lodhi 2 Properties Investments CC and another v Bondev Developments Pty Ltd*⁵ where it was explained thus:

“As, the phrase ‘erroneously granted’ relates to the procedure followed to obtain the judgment in the absence of another party and not the existence of a defence to the claim...”⁶

[27] In *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*,⁷ the apex court explained that ultimately, an applicant seeking to argue that the judgment was granted erroneously must show that the judgment against which they seek a rescission was erroneously granted because:

“[t]here existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment, and which would have induced the Judge, if aware of it, not to grant the judgment”.⁸

[28] Once the requirements for rescission have been met, the court has discretion to rescind its order.

[29] The legal position is thus: an applicant seeking the rescission must show that the judgment against which they seek a rescission was erroneously granted because there existed at the time of its issue, a fact of which the judge was unaware which would have precluded the granting of the judgment, and which would have induced the judge, if aware of it, not to grant the judgment.

⁴ [2018] ZASCA 170; 2019 (4) SA 459 (SCA).

⁵ [2007] ZASCA 85; 2007 (6) SA (SCA) at para 25-27 (“*Lodhi 2*”).

⁶ *Id* at para 18.

⁷ [2021] ZACC 28; 2021 (11) BCLR 1263 (CC); 2021 JDR 2069.

⁸ *Id* at para 62.

[30] It is trite that when a rescission application is brought, the applicant must meet the jurisdictional requirements for the rescission, set out in rule 42(1) (a) or the common law, before a court can exercise its discretion to rescind an order.⁹

[31] Even where the specific prerequisites are satisfied, a court must still be persuaded that it is in the interests of justice to exercise its discretion to entertain the matter.

[32] The applicant relies, in the first instance, on rule 42, alternatively, on the common law for rescission.

[33] Rule 42 provides 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;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

[34] As already noted above, even after the requirements for rescission have been met, a court is merely endowed with a discretion to rescind or not. The precise wording of rule 42 after all postulates that a court "may" not "must" rescind or vary its order. The rule is merely an empowering section and does not compel

⁹ *Minister of Correctional Services v Van Vuren*; in re *Van Vuren v Minister for Correctional Services* [2011] ZACC 9; 2011 (10) BCLR 1051 (CC); 2012 (1) SACR 103 (CC).

the court to set aside or rescind anything.¹⁰ This discretion must be exercised judicially.¹¹

[35] It is trite law that an applicant who invokes this rule must show that the order sought to be rescinded was erroneously sought or erroneously granted in his or her absence. Both grounds must be shown to exist.

[36] Ultimately, an applicant seeking rescission must show that the judgment they seek to rescind was erroneously granted because "there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment."

[37] In *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd*,¹² the Supreme Court of Appeal stated the following:

"A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous one."¹³

¹⁰ *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) (De Wet) at 1034F and *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) [2003] ZASCA 36; 2003 (6) SA 1 (SCA) at para 5, see also *Theron N.O v United Democratic Front* (Western Cape Region) 1984 (2) SA 532 (c).

¹¹ In *Chetty* above fn 7 at 761D the court held as follows: "broadly speaking, the exercise of a court's discretion [is] influenced by considerations of fairness and justice, having regard to all the facts and circumstances of the particular case". One of the most important factors to be taken in to account in the exercise of discretion, so the court in *Chetty* found at 760H and 761E, was whether the applicant has demonstrated "a determined effort to lay his case before the court and not an intention to abandon it for it appears that [an applicant's] default was willful or due to gross negligence, the court should not come his assistance". And as stated in *Naidoo v Matlala* N.O 2012 (1) SA 143 (GNP) at para [4], a court will not exercise its discretion in favour of a rescission application if undesirable consequences would follow.

¹² *Lodhi 2* above fn 10.

¹³ *Id* at para 27.

[38] Even if the applicant was entitled to rely, in a rescission application, on a defence not pleaded in a plea (which, for the reasons stated above, it is not), and even if such reliance were sufficient to satisfy the “error” requirement, the applicant would still be required to demonstrate that the court would have reached a different decision had it been furnished with one or more of those defences at the time.

[39] As stated in *Chetty*:¹⁴

“[A] distinction is drawn between ‘the rescission of default judgment, which had been granted without going into the merits of the dispute between the parties, and the rescission of final and definitive judgments, whether by default or not, after evidence had been adduced on the merits of the dispute’... In the case of a default judgment granted without going into the merits of the dispute between the parties, the Court enjoyed the relatively wide powers of rescission...”¹⁵

[40] Based on all the submissions made, I find that the default judgment by Fisher J was erroneously granted.

[41] As for the costs of this application the fairest order in my view would be that each party to pay its own costs.

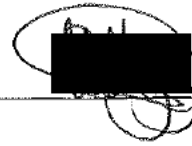
Order

[42] In the result, the following order is made:

1. The application for a rescission of a default judgment granted by Fisher J is granted and set aside.
2. The applicant is granted leave to defend the action.
3. Each party to pay its own costs.

¹⁴ 1985 (2) SA 756 (A).

¹⁵ *Id* 761G-I.



N MZUZU

Acting Judge of the High Court,
Johannesburg

Appearances

For the Applicant: Z Mokatsane
Instructed by: State Attorney (Johannesburg)

Respondents: HC Makhubele
Instructed by: HC Makhubele Inc

Date of Hearing: 27 August 2025
Date of Judgment: 21 January 2026