



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 012905/2024

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 4 MARCH 2026

SIGNATURE

In the matter between:

**THE MINISTER OF DEFENCE AND MILITARY
VETERANS**

First Applicant

**CHIEF OF THE SOUTH AFRICAN NATIONAL
DEFENCE FORCE**

Second Applicant

SECRETARY FOR DEFENCE

Third Applicant

**SOUTH AFRICAN NATIONAL DEFENCE FORCE:
CHIEF OF HUMAN RESOURCES**

Fourth Applicant

and

MOSES JABULANI ZWANE & 15 OTHERS

First to Sixteenth
Respondents

Summary *Rescission application based on Rule 42(1)(a) of the Uniform Rules of Court – requirement that the order must have been granted in the absence of a party – the applicants were at all relevant times represented by counsel who acted on the instructions of the State Attorney and made submissions to court – requirement that the judgment granted in the absence of a party not met.*

Rescission based on Rule 31(2)(b) of the Uniform Rules of Court – condonation for the late delivery of rescission application insufficiently motivated. In addition the applicants, although represented, not delivering any answering affidavits – reasons for being in default of doing so inadequately and unsatisfactorily explained – default wilful – no bona fide defence existing after Military Dispensation reviewed and set aside in related proceedings no reason to exercise discretion in favour of the applicants.

Summary of facts – respondents sought to benefit from the implementation of a Military Dispensation for certain professions – applicants denying such entitlement but rather than delivering opposing papers, opting to attempt to settle the matter. Despite postponements, no settlement forthcoming, resulting in an order granted in favour of the respondents. No basis to rescind the order on the allegation that the attempts to settle were based on incorrect legal advice. In any event, the dispensation has in the interim been reviewed by another court and set aside. The “defence” based on upholding the dispensation has become moot.

ORDER

The application for rescission is refused with costs, counsel's fees to be taxed on scale C.

J U D G M E N T

The matter was heard in open court and the judgment was prepared and authored by the judge whose name is reflected herein and was handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of handing-down is deemed to be 4 March 2026.

DAVIS, J

Introduction

[1] The respondents in the rescission application were the applicants in the main application and they are all members of the South African National Defence Force (SANDF). On 7 February 2024 they launched an application for an order to the effect that they benefit from a Military Dispensation (MD) implemented by the Department of Defence (DoD) from 21 August 2021. The MD concerns an occupation – specific dispensation, inter alia for engineers and related professions in the DoD.

[2] The applicants in the rescission application were the respondents in the main application. They are the Minister of Defence and Military Veterans, the

Chief of the South African National Defence Force, the Secretary for Defence and the South African National Defence Force: Chief of Human Resources.

[3] The applicants had delivered a notice of intention to oppose the main application but they never delivered an answering affidavit.

[4] On 26 November 2024 this court granted an order against the current applicants (then referred to as respondents) in the following terms:

- “1. The First to Fourth Respondents are ordered to take all steps required to staff all Applicants in terms of the Military Dispensation (MD) for Engineers and related professions within 30 days from date of this order and to report that same has been done in writing to the Applicants’ attorneys within the same time frame;*
- 2. The First to Fourth Respondents are ordered to ensure that all Applicants are retrospectively paid technical allowances (or a similar benefit in terms of the MD) from 1 April 2023 until the date of being fully incorporated and/or staffed in terms of the MD in accordance with paragraph 1;*
- 3. The First to Fourth Respondents are ordered to pay the costs of this application on scale B, jointly and severally, the one to pay the other to be absolved”.*

[5] The implementation of the order was suspended in terms of Rule 45A by Hassim J on 22 April 2025, pending the finalisation of the rescission application under consideration.

[6] The applicants in the rescission application relied on the provisions of Rule 42(1)(b) alternatively Rule 31(1)(b) for purposes of rescinding the order of 26 November 2024.

Summary of facts that led to the order sought to be rescinded

[7] The members of the SANDF claimed in the review application that the enactment of the MD had the effect of removal of technical allowances which they had previously received. Based on this and other allegations they are argued that the MD was *ultra vires* and should be declared unlawful and invalid. All of the applicants in the review application had their salaries effectively decreased with thousands of rands per month, resulting in financial difficulties for each of them.

[8] The respondents found their existing posts redefined without them being allowed to migrate to posts provided for by the MD. They had previously submitted grievances in terms of the Regulations promulgated in terms of the South African Defence Act¹. The grievances, submitted by the members on various dates have remained unresolved with the first of the grievances submitted as long ago as 3 March 2023. In their application the respondents submitted that they had, as far as possible, attempted to exhaust their internal remedies by way of the grievances but their circumstances compelled them to launch the main application. The main application was meticulously crafted and contained extensive supporting documentation.

[9] After service of the main application a notice of intention to oppose was delivered on 22 March 2024.

¹ 42 of 2002.

[10] When no answering affidavit was forthcoming, the matter was eventually set down for hearing on 20 October 2024.

[11] The timeous notice of set down was met by a letter from the State Attorney dated 18 October 2024. Therein the State Attorney submitted the following:

“We have noted that this matter is set down on the unopposed roll of 22 October 2024. We request that the matter be removed from the roll as we are in the process of obtaining instructions for settlement”.

The respondents’ attorneys responded that they hold instructions to proceed on 20 October 2024.

[12] What happened thereafter was succinctly recorded by Hassim J in her subsequent judgment regarding the suspension of the order, as follows:

“[12] On 20 October 2022 the DoD counsel applied for a postponement of the application because the State Attorney was awaiting approval to settle the application. Davis J. postponed the application to 27 November 2024. However, by the postponed date a settlement had not been approved. The court was informed that the memorandum recommending a settlement had not been approved by all the relevant officials in the DoD and the State Attorney did not hold instructions to settle the matter. From the Bar an application was made for a postponement of the application pending the approval of a settlement. Davis J. refused the application and granted the order”.

[13] It appears from the affidavit delivered in support of the application for suspension that the settlement proposals had been on the advice of counsel. Hassim J summarised the run-up to the suspension application that served before her, as follows:

“[13] Counsel’s advice came to the attention of the Chief: HR after the default order had been granted. He disagreed with counsel’s interpretation of the DoD’s MD policy. According to him counsel had not been given the great facts.

[14] On 7 January 2025 the DoD’s employees’ attorney emailed a letter to the State Attorney, delivered by hand to the DoD on 9 January 2025, demanding compliance with the default order within 10 days and threatened an application for contempt of court in the event of non-compliance.

[15] On 12 January 2025, a day before the expiry of the 30 day’ period within which the DoD had to comply with the default order, the DoD launched an application to rescind the default order.”

The belated reasons for opposition

[14] Referring yet again to the judgment of Hassim J, she summarised this issue as follows:

“[17] The crux of the DoD’s defence to the main application is that the DoD employees, but for two, do not meet the qualification criteria under the DoD’s MD for translation of their posts to MD posts. Their posts can therefore not be translated to MD posts and they are not entitled to be placed in MD posts under

the DoD's MD. Furthermore, they do not meet the criteria for the payment of a technical allowance.

[18] The termination of the technical allowance paid to the DoD employees was not declared unlawful or reviewed and set aside. Nor the implementation of the DoD's MD dated 31 August 2021. Consequently, according to the DoD, the termination of the technical allowance and the implementation of the DoD's MD dated 31 August 2021 is valid and enforceable".

[15] Based on the aforesaid facts, Hassim J found that there was a reasonable prospect of success in the review application, which satisfied the requirements for an application for the stay of execution of an order, which she accordingly granted.

[16] Subsequent events have however overtaken the facts contained in the summary provided by Hassim J. In a separate application launched in this court by 21 other members of the SANDF in case no. 107699/2023, a judgment was granted by Labuschagne J on 31 July 2025 whereby the MD was declared invalid and set aside. The review and setting aside was however suspended pending finalisation of a remittal of the decision to the Minister of Defence to "... *determine pay, salaries and entitlements of Engineers and Technical staff and compliance with statutory provisions governing a redetermination of pays, salaries and benefits in accordance with the prescripts of Section 55 of the Defence Act*".

[17] In order not to prejudice the parties outside that application, Labuschagne determined that members of the SANDF in the position of the applicants in that application were entitled to remuneration in terms of the Technical Competency

Based Incentive Pay (TCIP) System “*as they were before the implementation of the MD pending finalisation of the remittal*”. This accords in *pari materia* with par 2 of the order in this matter.

[18] The applicants in the rescission application under consideration, being the principal respondents in the application before Labuschagne J, had noted an application for leave to appeal the review and setting aside of the MD. This was the position when the rescission application was argued before me. Shortly thereafter however, the respondents brought to my attention that the application for leave to appeal has been withdrawn by notice, thereby leaving the declaration of invalidity intact.

[19] It is against the above background that the applicants’ application for rescission must be adjudicated.

The grounds relied on by the applicants for rescission of the judgment

[20] The first hurdle which the applicants sought to cross was the fact that they were, on their own version, out of time with their rescission application. In an affidavit delivered in support of the separate application for condonation, the sum total of their reasons for the delay was set out as follows:

“Circumstances giving rise to the application:

6. *On 27 November 2024 the Honourable Court by an order of the Honourable Lordship Davis granted an order in favour of the Respondents.*
7. *The above Honourable Court’s rules provided that the Department ought to have lodged its rescission application 20 days after becoming aware of the judgment.*

8. *The time frame as stipulated in the above court's rules regrettably presented itself during the court recess period. The recess period commenced on 15 December and ended on 15 January 2025.*
9. *On 17 January 2025 the counsel had finalised drafting the application for rescission on the date that the draft papers were received by myself, I immediately forwarded a copy by way of email to the Applicants' office for their inputs and signature.*
10. *It was only on 19 January 2025 that the signed and commissioned founding affidavit was received from the Department of Defence.*
11. *The rescission application was served on the Respondents' attorneys on 20 January 2025.*
12. *It is respectfully submitted that the rescission application is filed out of time not as a result of any wilful conduct on the part of the Department or myself but it is attributed to the fact that the period within which the rescission application ought to have been brought fell within the recess period. Counsel on brief was unfortunately on holiday during the recess period. He however was able to cut short his vacation and was able to draft the rescission papers shortly after the recess period.*
13. *I pause to mention that the Department of Defence had every intention or pursuing the rescission application ...".*

[21] The reference to the recess period might be a reference to *dies non* as contemplated in Rule 19(1) in respect of actions. It could not refer to the courts' actual recess period. Even if the reference to recess periods is taken to be reference to court directives, there was no explanation why, if the applicants had already on 27 November 2024 contemplated a possible rescission application, it had not then already been launched. There is no reason why it could not have been served together with the application for a stay. Be that as it may, there is also no confirmatory affidavit by the counsel to whom reference was made of the allegations regarding his absence on holiday. Most importantly however, and insofar as the applicants intended to rely on what they termed the "*recess*" period, there is no explanation for the lapse of time between the date of the order and the commencement of that period on 15 December 2025.

[22] It is trite that, in order to obtain condonation for the late delivery of a procedural step, a party has to take the court into its confidence and fully explain the totality of the period for which condonation is sought. This was clearly not done and the applicants' application for condonation should fall at this hurdle.

[23] However, it is equally trite that good prospects on the merits of a matter might excuse a party who has feeble grounds to otherwise obtain condonation.

[24] For purposes of evaluating this aspect I turn to the first ground relied on by the applicants, that is their reliance on Rule 42(1)(a). This rule provides that a court may "*... upon application of an affected party, rescind or vary ... an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby ...*". (my emphasis)

[25] Factually, the applicants were not absent when the order was granted. They had obtained an opinion from counsel dated 18 October 2024 (which was annexed to the rescission application), based on which the State Attorney sent a letter

referred to earlier indicating their knowledge of the hearing date. Thereafter, counsel appeared on 22 October 2024 on behalf of the applicants and requested a postponement of the matter on the basis that it is being settled. The applicants accept that a month's indulgence was granted by the court for this purpose and in their Heads of Argument they do not advance the proposition that they were denied a hearing or that their application for a postponement was in order for them to defend the matter or to deliver answering affidavits.

[26] In fact, under the heading "*circumstances under which the order of Davis J was granted*", the position was sketched as follows:

"66.12 *Following postponement of the matter and on 26 November 2024 the memorandum recommending settlement was still not approved by all the relevant authorities within the Department and more importantly, the Chief Human Resource was at that stage not aware of counsel's opinion and the settlement memorandum.*

66.13 *At the hearing of the matter on 26 November it was brought under the attention of the presiding Judge that the memorandum proposing settlement of the matter was not signed by all relevant authorities and therefore the State Attorney holds no instruction at that time to settle the matter on the terms proposed.*

66.14 *More importantly, an attempt was made from the bar by counsel on brief, to request further postponement of the matter pending the approval of the settlement memorandum ...". (again, my emphasis)*

[27] In order to deal with the question of whether the judgment was granted “*in the absence*” of the applicants, they relied on the decision in *Katritsis v De Macedo*². In particular reliance was placed on a finding by Van Blerk JA “*after having reviewed the old authorities*” to the effect that “default” includes “*a failure to file necessary documents required by the rules in opposition to a claim, the failure to appear when a case is called as well as the failure to attend court during the hearing of the matter*”.

[28] It is immediately apparent that the last two failures discussed by the learned Judge of Appeal are not applicable in the present case. Insofar as the applicants attempt to rely on a failure to file the “necessary documents”, namely the answering affidavits, it is clear that since the date of their notice of opposition, they had intentionally elected not to deliver answering affidavits but to settle the matter, albeit on the advice of counsel. In their own Heads of Argument, reference was made (in paragraph 75 thereof) to the principle that a court will not come to the assistance of a defendant whose default was wilful or due to gross negligence. Reference was made to *Chetty v Law Society Transvaal*³.

[29] It happens often that when a party seeks the indulgence of time to explore settlement, that a court is amenable thereto. It also happens equally often that a party seeking opportunity to settle can extend the time period granted for such an indulgence beyond that which a court might deem fair and just when considering the rights of the other party. This was such a case and when the indulgence was no longer extended, it was done in the presence, and not absence of the applicants.

[30] It appears that the applicants have foreseen that they might not be able to cross the hurdle of satisfying the requirements of Rule 42(1)(a) and in the

² 1996 (1) SA 613A.

³ 1985 (2) SA 756A at p. 765 A – E.

alternative relied on the provisions of Rule 31(2)(b)⁴. In this regard they faced the similar hurdle in that the order was not granted in their absence or without their knowledge. The applicants sought to counter the failure to fulfil that requirement, by attempting to rely on the argument that they had “*sufficient cause*” or “*good cause*” to have the order rescinded. For purposes hereof the applicants alleged that the advice of counsel to settle did not timeously come to the attention of the Chief of Human Resources who “... *upon receipt of the settlement memorandum ... concluded that counsel’s legal opinion was premised upon incorrect interpretation of the military dispensation policy and further that the opinion was premised on incorrect facts. Consequently, the Chief Human Resource declined to approve the settlement of the respondents’ claim*” (par. 83 of the applicants’ Heads of Argument). There is no explanation given as to how or why this conclusion had not been reached earlier but only after the judgment had already been granted.

[31] The applicants also attempted to base the rejection of the opinion of counsel on an alleged misunderstanding of the MD. This is not entirely correct nor is it fair to counsel who provided the opinion. The opinion referred to parallel litigation, in particular adjudication of the grievance procedures of other members of the SANDF in what was termed in the papers “the O’Sullivan matter”. Counsel had referred to the requirement of organs of State not to engage in frivolous litigation and pointed out that in the O’Sullivan matter, the court had already concluded that those applicants had a reasonable grounds of success in an application for review of the MD. Counsel further pointed out that should those facts or *prima facie* expression on the merits of a review application be brought to this court’s attention, it might well result in punitive costs for the applicants.

⁴ This rule contemplates the rescission of an order granted without the knowledge of a party.

These factors contributed to counsel advising the applicants to rather settle the matter.

[32] The decision to forgo the delivery of answering affidavits was therefore based on more than one consideration and was clearly consciously made. There was therefore no “*default*” but a wilful choice of options. At the time when the indulgence to settle was terminated, neither the applicants nor their counsel applied for leave to belatedly deliver answering affidavits.

Mootness

[33] At the time when the rescission application was argued, the order by Labuschagne J referred earlier whereby the MD had been set aside was suspended by virtue of an application for leave to appeal, lodged by parties which included the current applicants.

[34] The above-mentioned suspension meant that the MD was at the time still alive and notionally one could understand the applicants defending its implementation as a basis for their defence to the review application. The applicants went further to indicate how the specific members of the SANDF did not qualify for the migration of their posts or the translation thereof into the MD. They however wilfully failed in defending how salaries can be reduced by the unilateral implementation of a policy. Be that as it may, that defensive position fell away two days after the hearing of the rescission application by way of the withdrawal of the application for leave to appeal on 7 November 2025. This was done by the same applicants, astoundingly without any explanation.

Conclusion

[35] I conclude that the applicants had not sufficiently and properly explained the grounds upon which they should be granted condonation for the late delivery of the application for rescission.

[36] Even if one were to excuse the applicants for that failure and find that ultimately the time delay was not that long or could be excused, then the applicants have not crossed the hurdle of the requirement of Rule 42(1)(a). The simple fact of the matter is that the order was not granted in the absence of the applicants and therefore they are not entitled to rely on that rule.

[37] Insofar as Rule 31(2)(b) requires from an applicant in an application for rescission to explain its failure to file necessary documents and to indicate that it was not in wilful default, the facts are that the applicants have by conscious decision decided not to oppose the application until after the order was granted. They were therefore in wilful default and cannot rely on this sub-rule. The other requirement in Rule 31(2)(b) namely that the applicants had to show good cause has also not been met, particularly in view of the fact that the policy which was initially sought to be defended, has now been set aside. I am of the view that this is a factor which a court may lawfully take into account in exercising its discretion. In this case the exercise of that discretion does not favour the applicants.

[38] It is clear that, in similar fashion as in the O'Sullivan matter and in the matter before Labuschagne J, that the applicants in the review application should, pending the implementation of a new and lawfully compliant policy, be entitled to be paid as they were before the aborted implementation of the MD.

[39] On a conspectus of all the above, I therefore conclude that the applicants are not entitled to a rescission of the order of 26 November 2024.

Costs

[40] I find no cogent reason to depart from the customary rule that costs should follow the event. In the exercise of my discretion and in the circumstances of the case, I determine that counsel's fees should be taxed at scale C.

Order

[41] Consequently I make the following order:

The application for rescission is refused with costs, counsel's fees to be taxed on Scale C.



N DAVIS

Acting Deputy Judge president of the
High Court, Gauteng Division, Pretoria

Date of Hearing: 5 November 2025

Judgment delivered: 4 March 2026

APPEARANCES:

For the Applicant:

Adv H Mpshe

Attorney for the Applicant:

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For the Respondent:

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