REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2024-034009

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
14/4/2026	[redacted]
DATE	SIGNATURE

In the matter between:

BRIAN MASUKU	Applicant
and	
JOHN TSELCHOUS N.O	First Respondent
LEAD HOMES (PTY) LTD	Second Respondent
KRUGER INCORPORATED	Third Respondent

JUDGMENT

WENTZEL -THOMPSON J

Introduction

[1] This is an application in terms of rule 42(1)(a) of the Uniform Rules for rescission of a default judgment granted on 28 May 2024 against the applicant in favour of the three respondents, who were the plaintiffs in the main action. The judgment

was granted by default after summons had been served and no notice of intention to defend had been delivered.

[2] The applicant contends that the judgment was "erroneously sought or erroneously granted" because, so he says, the particulars of claim did not disclose complete causes of action, the claims were not competently pursued under rule 31(5), and the judgment was granted in his absence. He further says that, although summons was served at his former attorneys' office, the summons was overlooked and only later brought to his attention.

[3] The respondents oppose the application. Their case is that service was effected exactly where the applicant himself had instructed process to be served, that the applicant had more than one opportunity to defend the action before judgment was entered, that the summons disclosed triable causes of action, and that the rescission application was, in any event, brought after an unreasonable delay.

[4] The underlying dispute concerns an immovable property transaction. The first plaintiff was the seller in a representative capacity. The second plaintiff was the estate agency that marketed the property, and the third plaintiff was the conveyancer appointed to attend to the transfer. The applicant was the purchaser. These matters are either common cause or not genuinely disputed on the papers.

[5] The applicant paid a deposit of R250 000 and transfer-related amounts into the third plaintiff's trust account during July 2023. He thereafter took early occupation and, according to his version, discovered serious structural defects when contractors lifted carpets and exposed substantial cracking. He says he then elected to cancel the agreement and demanded repayment of what he had paid.

[6] On 22 December 2023 the applicant's former attorney addressed a letter to the third plaintiff stating, amongst other things, that the applicant had elected to cancel and that processes should be served on his attorneys. The respondents' attorneys responded the same day, setting out the contractual basis on which they intended to hold the applicant liable.

[7] Combined summons was issued on 28 March 2024 and was served on 5 April 2024 at the office of the applicant's former attorneys, on one Elise Engelbrecht. The applicant does not dispute that service occurred there. His complaint is rather that the summons was not attended to.

[8] The applicant's own chronology records that on 13 May 2024 he consulted with his former attorney and gave instructions for proceedings to be instituted to recover the deposit and transfer costs. The default judgment was granted on 28 May 2024. According to the applicant, he became aware of the judgment during mid-July 2024. Yet the rescission application was launched only on 18 March 2025.

[9] Rule 42(1)(a) empowers a court to rescind or vary an order or judgment "*erroneously sought or erroneously granted in the absence of any party affected thereby*". The rule is aimed at procedural error. It is not a substitute for an appeal, nor a vehicle by which a litigant who elected not to participate may revisit the merits because he now wishes he had defended the case. This much is clear *from Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd,*[1] *Rossitter v Nedbank Ltd* [2], and *Zuma v Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State*[3], all relied on in the respondents' heads of argument.

[10] The authorities also make plain that a judgment is not "erroneously granted" merely because the defendant later discloses a defence on the merits. The enquiry is whether, on the record as it stood when the judgment was granted, there existed a fact or procedural impediment which, had the registrar or court been aware of it, would have precluded the granting of judgment. That is the ratio reflected in *Bakoven Ltd v GJ Howes (Pty) Ltd,*[4] and *Kgomo v Standard Bank of South Africa Ltd.* [5]

[1] 2007 (6) SA 87 (SCA)
[2] 2015 ZASCA 196
[3] 2021 (11) BCLR 1263 (CC)
[4] 1992 (2) SA 466 (E)
[5] 2016 (2) SA 184 (GP)

[11] The requirement that the judgment be granted "*in the absence*" of the affected party does not assist a litigant whose absence was self-created. As the Constitutional Court explained in *Zuma*, rule 42 exists to protect a litigant whose presence was precluded, not one whose absence was elected. Likewise, *Rossitter* made it plain that where a litigant was notified and afforded sufficient opportunity to participate, an election not to do so does not convert an otherwise regular judgment into an erroneous one.

[12] Although rule 42 prescribes no fixed time period, the application must still be brought within a reasonable time. The respondents rely on *Matseke v Maine*[6]and *Madiro v Madibeng Local Municipality and Others*[7] in support of that proposition. That is correct in principle. Delay is not automatically fatal, but it bears materially on fairness, finality, and whether the court should exercise its power in the applicant's favour.[8]

[13] In the present matter the summons was served at the office of the applicant's chosen attorneys, exactly in accordance with the direction previously given by the applicant's own attorney in the letter of 22 December 2023. That is not merely substantial compliance. It is compliance in the very manner the applicant had requested.

[14] The applicant's explanation is that the summons was overlooked in the file and that, when he consulted on 13 May 2024 about launching his own proceedings, his attorney did not notice it. That explanation is thin. It is unsupported by confirmatory affidavits from all material role-players, including the former attorney who received service and the attorney said to have overlooked the summons. The deponent to the answering affidavit points out, correctly in my view, that no coherent explanation is given as to why no step at all was taken between December 2023 and May 2024 to protect the applicant's position, despite the obvious seriousness of the dispute.

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[6] (M198/2000) [2024] ZANWC 13

[7] (1760/2022) [2023] ZAGPPHC 1838; [2024] 1 All SA 225 (GP)

[8] *Madiro v Madibeng Local Municipality and Others* (1760/2022) [2023] ZAGPPHC 1838; [2024] 1 All SA 225 (GP) (19 October 2023); *Matseke v Maine* (M198/2000) [2024] ZANWC 13 (26 January 2024).

[15] More importantly, the consultation of 13 May 2024 occurred before default judgment was granted. Even on the applicant's own version, there remained an opportunity to defend the action or to take steps to prevent the judgment. None was taken. That is difficult to reconcile with any suggestion that the applicant's absence was involuntary in the sense required by rule 42.

[16] The matter becomes more acute once one considers the period after mid-July 2024, when the applicant says he was informed of the default judgment. From then until 18 March 2025, nothing was done beyond internal follow-ups with his legal representatives. No warning letter was sent. No urgent application was launched. No explanation of substance is furnished for the delay. On any ordinary standard, that is a long and inadequately explained period of inactivity.

[17] In these circumstances, I cannot find that the judgment was granted "*in the absence*" of the applicant in the rule 42 sense. He was not shut out of the process. Rather, process was served where he said it should be served, and no defence was entered despite opportunities before and after judgment to regularise the position. That is an election, or at best a remediable omission by chosen attorneys, not a procedural exclusion by the court or the plaintiffs. *Zuma* and *Rossitter* are directly against him on this point.

[18] The applicant's principal attack is directed not at service, but at the summons. He submits that the particulars of claim omitted essential averments and therefore disclosed no cause of action, with the consequence that the registrar granted judgment on a legally deficient pleading. On that footing, he invokes authorities such as *Bakoven, Marais v Standard Credit Corporation Ltd* ,[9] *Firstrand Bank Ltd t/a First National Bank v Moonsammy t/a Synka Liquors,*[10] and *Smit v Olivier*. [11]

[19] That argument requires careful attention. It is indeed correct that a default judgment granted on a summons which is patently excipiable for want of a

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[9] 2002 (4) SA 892 (W)
[10] 2021 (1) SA 225 (GJ)
[11] (18322/2008) [2011] ZAWCHC 414 (27 October 2011)

necessary averment may, in an appropriate case, be vulnerable under rule 42. But that is not because every pleading point becomes a rule 42 point. It is because the defect must be so fundamental, and so apparent on the face of the pleadings, that the plaintiff was not procedurally entitled to judgment at all.

[20] The applicant says first that all three claims were fatally defective because the particulars did not expressly plead that the "*competing offer to purchase*" had become valid and binding following fulfilment or waiver of the relevant suspensive condition. There is force in the general proposition that a contract subject to a suspensive condition is unenforceable unless the condition is fulfilled or waived in law. The heads cite *Paradyskloof Golf Estate v Stellenbosch Municipality*, [12] *BW Brightwater Way Props (Pty) Ltd v Eastern Cape Development Corporation*,[13] and Fairoaks Investment Holdings (Pty) Ltd v Oliver.[14]

[21] The difficulty for the applicant is that the rule 42 enquiry is narrower than an exception. The question is not whether the particulars could have been more elegantly or fully pleaded. It is whether, on their face, the claims were so devoid of necessary averments that the registrar was procedurally disabled from granting judgment. I am not persuaded that this threshold has been crossed.

[22] The respondents' heads point out that the particulars expressly relied on clauses of the agreement, incorporated the written sale agreement, and pleaded breach by the defendant in a manner that treated the contract as operative. They also rely on correspondence exchanged in December 2023 reflecting the respondents' stance that the agreement was binding and enforceable. Whatever one may say about the nicety of the pleading, I am unable to conclude that the summons was a nullity or that it disclosed no recognizable contractual cause at all.

[23] *Smit v Olivier*, on which the applicant relies, does not compel a different result. Much depends on the wording of the summons in that case and the nature of the omitted allegation. Here, the pleadings, read as a whole and with their

[12] 2011 (2) SA 525 (SCA)
[13] 2021 (6) SA 321 (SCA)
[14] 2008 (4) SA 302 (SCA)

annexures, advanced a comprehensible case that the defendant concluded a sale agreement, paid money pursuant to it, took occupation, repudiated or breached it, and thereby incurred liabilities stipulated or flowing from the transaction. That is not the sort of patent pleading vacuum that obliged the registrar to refuse judgment.

[24] In any event, rule 42 is not designed to permit a defendant to re-characterise as a procedural nullity what is, in truth, a contestable pleading or contractual issue that should have been ventilated by a notice of intention to defend, exception, or plea. Lodhi 2 is plain that the later disclosure of a defence does not transform a validly obtained default judgment into one erroneously granted.

[25] The applicant also attacks the second plaintiff's claim on the footing that the particulars did not plead compliance with sections 48 and 56 of the Property Practitioners Act 22 of 2019, including possession of valid fidelity fund certificates by the entity and, if applicable, its directors. He points out that the annexed certificate referred to Mr Carter acting on behalf of a different entity, First Realty Bedfordview (Pty) Ltd.

[26] That point is not insubstantial. It may well have provided fertile ground for a defence or exception had the applicant elected to defend the action. But again the issue under Rule 42 is not whether the second plaintiff's claim was vulnerable to attack; it is whether the claim was so plainly non-sustainable on the papers placed before the registrar that the judgment was procedurally incapable of being granted.

[27] The particulars alleged that the second plaintiff was the estate agency, that Mr Carter represented it, and that he held a valid fidelity fund certificate. Whether those allegations were sufficient in law, and whether they could be proved at trial, are classic matters for pleading and proof. They do not demonstrate that the registrar acted in error merely by granting default judgment on an undefended claim. The applicant seeks to turn an arguable merits defence into a rule 42 defect. That the rule does not permit.

[28] The third plaintiff's claim for wasted transfer costs is criticised on the basis that it was pleaded as damages without adequate averments explaining how the

amount was computed, why the full invoiced transfer-related sums constituted wasted costs, or what disbursements had actually been incurred. The applicant's heads develop this point with some vigour.

[29] Here too, however, the question is not whether the third plaintiff would necessarily have succeeded at trial on the amount claimed. The issue is whether the default judgment was erroneously granted because the particulars disclosed no legally cognisable claim whatsoever. The respondents rely on the agreement's clauses and on the parties' pleaded contractual arrangements to say the claim was authorised by contract. Whether that construction is ultimately correct is not the present enquiry.

[30] At most for the applicant, the third plaintiff's claim may have been open to attack as inadequately particularised or overstated. That is not enough for rule 42. A defendant who wishes to resist such a claim must defend the action. He cannot stand by, permit judgment to be taken, and later invoke rule 42 because he believes the claim should not have succeeded on its merits or quantum.

[31] The applicant also suggested that procedural irregularities attended the obtaining of the default judgment under rule 31(5). I am not persuaded that any such irregularity has been established on the papers. The chronology records service of summons on 5 April 2024, application for default judgment on 24 May 2024, and judgment on 28 May 2024. No fact is shown to have existed on the court record which would have deprived the registrar of authority to entertain the application.

[32] Nor does the fact that the third plaintiff is a firm of attorneys, or that an attorney employed by it deposed to a supporting affidavit, establish procedural error. The applicant's true complaint is not about formal incompetence but about conflict, fairness, or the substance of the claims. Those matters, once again, belong to the merits and should have been raised in defended proceedings.

[33] Even if I were wrong on one or more of the above issues, I would still regard the delay as material. From mid-July 2024 to 18 March 2025 there was no application. There is no confirmatory affidavit from the former attorney explaining the omission, no detailed chronology of follow-ups, and no satisfactory account

of why nothing at all was done externally for some eight months after the judgment allegedly came to the applicant's attention. That is not a reasonable time.

[34] I am mindful that some authorities state that once the jurisdictional facts under rule 42(1)(a) are established, rescission ordinarily follows. But those jurisdictional facts have not been established here. The applicant was not absent in the relevant sense; the judgment was not shown to have been erroneously sought or granted; and the long unexplained delay reinforces the conclusion that the present application is an attempt to reopen a judgment that was regularly obtained.

[35] The rescission application cannot succeed. Service of the summons was effected at the office of the applicant's chosen attorneys in accordance with the applicant's own prior instruction. The applicant had the opportunity to defend before judgment was granted and failed to do so. His later inactivity, even after knowledge of the judgment, was substantial and inadequately explained. On the merits of rule 42, he has not shown that the registrar granted judgment on a record which disclosed a procedural impediment or patent legal nullity. At best for him, he has demonstrated arguable defences that ought to have been raised before judgment. That is insufficient.

[36] In the result, the application must be dismissed.

Order

[37] The following order is made:

1. The application for rescission in terms of rule 42(1)(a) is dismissed.

2. The applicant is directed to pay the costs of the application.

[redacted]

WENTZEL-THOMPSON J

JUDGE OF THE HIGH COURT,
JOHANNESBURG

For the Applicant: MW Verster

Instructed by: Marais Verster and Associates

For the Respondent: Adv. Mailula

Instructed by: MC Kruger Attorneys.

Date of the hearing: 2 March 2026

Date of the judgment:14 April 2026