



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 9888/2023P

In the matter between:

FIRSTRAND BANK LIMITED t/a FIRST NATIONAL BANK

PLAINTIFF

and

**JLR SERVICES AND WAREHOUSING CC
ZAINUB MOTALA**

**FIRST DEFENDANT
SECOND DEFENDANT**

Coram: Mngadi J

Heard: 5 May 2026

Delivered: 5 May 2026

ORDER

1. The application for the rescission of the order handed down on 29 July 2024 dismissing the second defendant's exception with costs is struck off roll
2. No order as to costs.

JUDGMENT

Mngadi J:

Introduction

[1] On 29 July 2024, Mossop J heard an opposed application between the parties in which the second defendant had taken an exception to the plaintiff's particulars of claim. After hearing argument, he dismissed the exception in an *ex tempore* judgment and ordered the second defendant to pay the costs (the order).

[2] This is an application to rescind the order. For convenience, the same descriptions and reference to the parties is maintained. Thus, the applicant in this application shall be referred to as 'the second defendant' and the respondent in this application shall be referred to as 'the plaintiff'.

This application

[3] The relief that the second defendant claims is the following and any inaccuracies as to grammar are quoted verbatim from the second defendant's notice of motion:

'TAKE NOTICE that ZAINUB MOTALA (hereinafter called the applicant) makes an application for Rescission or variation of *ex tempore* Judgment or Order granted on 29 July 2024, to this Court in terms of Rule 42(1)(a)(b)(c) and the common law for an order that:

1. Order 1 of the *ex tempore* judgement granted iro dismissal on the 29th of July 2025 is rescinded or varied and the exception is upheld and Plaintiff/Respondents claim is dismissed.
2. Order 2 of the *ex tempore* Judgement granted iro costs on scale B on the 29th of July 2025 is rescinded/varied/set aside and costs is granted in favour of the Applicant for payment of Applicants costs on scale B.
3. Costs of this suite in favour of the Applicant on a party and party scale as for attorneys iro Rule 80.

4. Costs of the Exception suite de bonis propriis against Plaintiffs Attorneys Heerschop Pienaar Xaba Inc and Kevin van As the one paying the other to be absolved for their failure to act and rescind the ex tempore Judgement despite knowledge of Plaintiffs non disclosure of fraud.
5. Costs of the this suite de bonis propriis against Plaintiff's Attorneys Heerschop Pienaar Xaba Inc and Kevin van As the one paying the other to be absolved and their counsel in the event there is non disclosure fraud and/or false representations in the documents and arguments in this matter.
6. Further and/or alternative relief.'

[4] It is as well to point out that there was no judgment delivered on 29 July 2025. It was delivered on 29 July 2024.

[5] The order sought is not easy to comprehend, but it gives a fairly realistic preview of the quality of the founding affidavit to come. The founding affidavit is no easier to understand. Incredibly, both the notice of motion and founding affidavit are apparently drawn by someone who purportedly spent time and money studying the law as she is attorney.

[6] However, before considering the founding affidavit, I mention some more recent facts in the history of this matter.

More recent developments

[7] After delivering my judgment on 29 July 2024, Mossop J had no further dealings with this matter. It appears from the court file that the matter was last in court on 10 February 2026, when my sister, Mazibuko-Mudau AJ after hearing a Rule 30 application struck out the second defendant's amended plea and claim in reconvention, with costs, and gave her 20 days within which to deliver a fresh plea and claim in reconvention. The order made on 10 February 2026 followed reserving judgment after a hearing on 28 July 2025. It is regrettable that a ruling on a Rule 30 application took more than six (6) months. The written judgment erroneously reflects 6 February 2025 as the date of delivery of the judgment, and court order erroneously

reflects Singh J as the judge that made the order. These errors require the attention of the office of the Registrar to avoid reoccurrence.

[8] On 16 February 2026, a notice was delivered by the plaintiff to the registrar of this court (the notice). The notice, which was dated four days earlier than the date of its delivery, namely, 12 February 2026 it read as follows: **‘NOTICE OF WITHDRAWAL OF ACTION’** and read as follows:

‘KINDLY TAKE NOTICE THAT the plaintiff in the above action hereby withdraws the action instituted by the Plaintiff against the First and Second Defendants, instituted against the First and Second Defendants, in the Pietermaritzburg High Court on 4 July 2023, under case number 9888/2023P.

KINDLY TAKE NOTICE THAT THE action is withdrawn without tendering costs.’

[9] In any event, the delivery of the notice puts an end to any and all future proceedings at the instance of the plaintiff. The plaintiff has not given reasons for the withdrawal of the action and when the plaintiff learnt of those reasons. It is the institution of the action which resulted in the filing of an exception, the plea and counterclaim, as well as the interlocutory applications. All that and the orders made therein as a result of the withdrawal of the action falls away. The orders made as well as the orders of costs were made in interlocutory applications, therefore, the withdrawal of the action has a bearing. The institution of an action caused the defendants to engage in the litigation in an inefficient manner.

[10] The withdrawal of the action without the tender of costs was filed on 16 February 2026. The defendants have accepted it without insisting that the plaintiff tenders costs. Rule 41(1) provides that a person instituting any proceedings may at anytime before the matter has been set down deliver a notice of withdrawal and may embody in such notice a consent to pay costs, if no consent to pay costs is embodied, the other may apply to court on notice for an order for costs. The application for rescission was issued on 28 July 2025. Despite what is so poorly stated in the notice of motion, it appears that what the second defendant actually seeks in bringing this application is the rescission of the costs order that was granted

when dismissing her exception. This is buttressed by the fact that as a result of the withdrawal of the action no issues remain for litigation between the parties except the issue of costs.

[11] Mossop J in a letter that I sent both parties on 23 April 2026 seeking clarity from them on what was to be argued in the light of the notice of the withdrawal of the action and why it still needed to be argued received from the second defendant the following response: 'What is proceeding is the application for the rescission of the exception order of costs that Plaintiff obtained against Second Defendant, Zainub Motala unlawfully and fraudulently.' Thus, the order of costs that was granted is the true target of this application.

The basis for the application

[12] The notice of motion indicates that the second defendant relies upon the provisions of Uniform rule 42 and the common law in seeking the rescission of the order. The relevant portions of Uniform rule 42 read 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.'

The founding affidavit

[13] The second defendant reports in the founding affidavit that she served a 'written letter notice ito Rule 42 of the Uniform Rules' upon the plaintiff and its attorneys on two occasions, namely on 30 July 2024 and approximately a year later on 18 July 2025. Both 'written letter notices' apparently demanded the rescission of the judgment dismissing the exception. Neither of these 'written letter notices' attracted a response from the plaintiff's attorneys. This is not surprising because the Uniform rules do not require such a notice to be given. If a litigant wishes to rely upon one of the grounds mentioned in Uniform rule 42, it is required to bring an

application, supported by an affidavit, in which the entitlement to the relief permitted in terms of that rule is disclosed. Eventually coming to this obvious realisation, this application was launched on 28 July 2025, almost a year after the order was granted.

[14] What is disclosed in the founding affidavit is a dense litany of facts and allegations linked to invocations of an entitlement to the relief claimed because of the lack of merit of the plaintiff's claim which the second defendant asserts are non-existent and misconceived. The entire founding affidavit is difficult to comprehend and to demonstrate this point, I mention a single sentence that appears in the founding affidavit. It is alleged by the second defendant that the judgment that I delivered was:

'... erroneously granted and contains ambiguity, patent errors and omission and fraud in that The (sic) Plaintiff falsely represented and omitted and concealed material information intentionally fraudulently or with reckless disregard for the truth to the Court and to Second Defendants legal representative in the exception hearing and documents and in its particulars of claim, the Material (sic) facts of the matter, about Second Defendants disclosure of fraud to it and about its furthering of fraud by false representations, its closing of the business bank accounts to Second Defendant and opening it to the fraudsters and its refusal to close the overdraft facility on request and other gross irregularities done by it, to the benefit of the Plaintiff to obtain a quick judgement in its favour against Second Defendant and for dismissal of the Exception and scale B costs and to the prejudice and harm of the Second Defendant.'

[15] That is a fair representation of the nature and quality of the allegations that are to be found in the founding affidavit. I mentioned in my judgment in the exception that the notice of exception was not a good example of what such a document should be. I can only repeat myself in this regard concerning the quality of the founding affidavit.

[16] It is necessary to mention that the points taken by the second defendant in the exception related to the fact that the plaintiff did not put up a signed copy of the agreement upon which it relied, and that the plaintiff had not mentioned the name of its representative that concluded the agreement, simply referencing a 'duly

authorised representative' that acted on its behalf. Other allegations were made that were not appropriate in a notice of exception and were therefore not considered.

[17] The second defendant appears not to be aware that an exception is brought when it is alleged that a pleading, in this case the plaintiff's particulars of claim, is alleged to labour under an inherent defect that renders them unable to sustain a cause of action or to be vague and embarrassing. As was stated in *Pretorius and Another v Transport Pension Fund and Another*:¹

'The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.'

[18] Where the exception is taken to particulars of claim, as in this instance, its purpose is not to determine the merits of the action but to determine whether a case has been properly formulated and presented in the particulars of claim. The suggestion by the second defendant in the extract just mentioned from her founding affidavit that the plaintiff was seeking to obtain 'a quick judgment' against her is without any foundation in fact or law: factually, the second defendant brought the exception and not the plaintiff and, legally, the judgment refusing the exception did not determine the action.

[19] It appears to me that the numerous allegations presented in the founding affidavit in this application is what would have to be alleged in evidence at the trial. As an exception is decided on discrete, defined grounds, the complex narration of facts and suppositions in the founding affidavit are not appropriate in seeking the rescission of the order.

Analysis

[20] While the second defendant has purported to rely on all three of the sub-categories contained in Uniform rule 42(1) in seeking the rescission of the order, none of the plethora of facts that she has disgorged in the founding affidavit have any relevance to any of those sub-categories in that Uniform rule. It is therefore not

¹ *Pretorius and Another v Transport Pension Fund and Another* 2019 (2) SA 37 (CC) para 15.

explained why the order was erroneously granted, why there is any ambiguity in it or what that ambiguity is or what the mistake common to the parties was.

[21] As regards the allegation that the order was erroneously granted, Uniform rule 42(1)(a) deals with procedural irregularities and not the merits of the case. In this regard, the Supreme Court of Appeal stated in *Lodhi 2 Properties Investments CC & another v Bondev Developments (Pty) Ltd*² the phrase 'erroneously granted' relates to the procedure followed and not to the existence of a defence to the claim.

[22] No ambiguity is suggested to exist in the order and no ground as contemplated by Uniform rule 42(1)(b) has accordingly been presented. Nor has any mistake common to both parties been identified that could warrant the invocation of Uniform rule 42(1)(c). In short, no case has been made for the application of Uniform rule 42.

[23] The second defendant has, in addition, asserted reliance upon the common law, but has not indicated upon which grounds she relies. Reading the founding affidavit, she undoubtedly alleges that the plaintiff was guilty of some fraud perpetrated upon her insofar as the merits of the matter are concerned and I shall assume that fraud is ground upon which she relies at common law. While it is trite that a judgment or order may be rescinded at common law based upon fraud in its acquisition, a fraud pertaining to the merits of the action is not relevant when it comes to the rescission of an order arising out of an exception, because the exception does not deal with the merits of the action but merely with the legal propriety and formulation of the pleadings.

[24] In *Ellis v Eden; Eden v Ellis and Another*,³ Rogers J observed that a party seeking the common law rescission of a judgment must show good cause for its rescission. While such a review must merely be brought within a reasonable time, it remains a discretionary remedy and if a party unreasonably delays in claiming that remedy, the party may be non-suited. The second defendant has made no attempt at

² *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) paras 25 to 27.

³ *Ellis v Eden; Eden v Ellis and Another* [2022] ZAWCHC 112; [2022] 3 All SA 381 (WCC); 2023 (1) SA 544 (WCC).

all to explain the delay in the bringing of her application. In my view, a period of a year is unreasonable and needs to be explained.

[25] The second defendant appears, furthermore, to lose sight of the fact that she was the party that brought the exception, and the court took great pains to sift out the actual causes of complaint from her otherwise garbled notice of exception. The exception was not dismissed because of some fraudulent conduct on the part of the plaintiff: it was dismissed because the plaintiff was able to demonstrate that there was no merit in the grounds of exception defined by the second defendant.

[26] The founding affidavit goes on to allege the violation of the second defendant's rights in terms of ss 9, 15, 25, 33, 34 and 39(2) of the Constitution, as well as her rights in terms of 'Paja and Paia Acts' and asserts further that she has been prejudiced by the plaintiff's alleged abuse of Uniform rule 18 'and others'. None of these allegations have any relevance to this application.

[27] The result is that no case has been made out in the founding affidavit for any of the relief claimed. There is accordingly no need to consider the answering affidavit.

Delay in bringing the rescission application

[28] The second defendant sought rescission of the order and judgment granted in her presence on 29 July 2024 only on 28 July 2025. In her papers she sought no condonation for the late lodging of the rescission application. She simply did not file any application for condonation. She in the founding/supporting affidavit made no averments justifying her not applying for condonation or justifying that she be granted condonation. Rescission on common law grounds must be made within a reasonable period from the date of the judgment/ order sought to be rescinded failing which the application for rescission must be accompanied by an application for condonation. The failure to challenge an order or judgment soon after it is made creates a presumption that the party is acquiescing on the execution of the judgment or order. The inference is inescapable that the second defendant at the time or soon after the order was made on 29 July 2024 she had no intention to seek

rescission of the order made. See *Schmidlin v Multisound (Pty) Ltd* 1991(2) SA 151 (C) at 156B. As a result, the application for rescission with no application for condonation is not properly before court.

[29] In the normal course of events, the party that brought the application that is found not to be properly before court must bear the costs of the application. However, the issue of costs is in the discretion of the court. The plaintiff has withdrawn the action and without giving any reasons refused to tender costs. The defendants have not challenged the refusal to tender costs and they have lost the right to do so. This futile application for rescission was launched before the withdrawal of the action, and it is part of or consequential to the withdrawn application. In the circumstances, it appears to me that it is in order to make no order as to costs.

[30] The following order will therefore issue:

1. The application for the rescission of the order handed down on 29 July 2024 dismissing the second defendant's exception with costs, is struck off roll.
2. No order as to costs.

Mngadi J

APPEARANCES

Counsel for the second defendant: In person

Instructed by: Zainub Motala Attorneys
46 Mallinson Road
Sydenham
Durban

Locally represented by:

Cajee Setsubi Chetty Incorporated
195 Boshoff Street
Pietermaritzburg

Counsel for the plaintiff: Ms M E van Jaarsveld

Instructed by: Schuler Heerschop Pienaar Xaba Inc
Strubens Valley
Roodepoort
Gauteng

Locally represented by:

Venns Attorneys
30 Montrose Park Boulevard
Victoria Country Club Estate
170 Peter Brown Drive
Pietermaritzburg

Delivered on:

05 May 2026