



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 4272/2023

In the matter between:

ROAD ACCIDENT FUND

Applicant

and

LINDILE QINA OBO NOKULUNGA MNANA

Respondent

JUDGMENT

MHAMBI AJ

[1] This is an opposed application for rescission of the order by this court, “*the impugned order*”, in the absence of the applicant.

[2] The impugned order confirmed a rule nisi issued in favour of the respondent on 6 February 2024, to the extent that:

2.1 The decision of the Health Professions Council of South Africa taken on 7 July 2023 was reviewed and set aside.

2.2 The court declared the seriousness of the injuries sustained by the claimant, on whose behalf the applicant acts, in a motor vehicle accident that occurred on 16 April 2010.

2.3 The court ordered the applicant to pay the costs of the review application on an attorney and client scale.

[3] The issue for determination is whether the applicant has made out a case for the rescission of the impugned order. Below, I deal with the requirements for the grant of the rescission as sought by the applicant.

[4] The applicant relied on common law as the basis of its rescission application. I agree with the applicant in that regard. The following dictum in *Chetty v Law Society, Transvaal*, is apposite:

“The applicant’s claim for rescission of judgment confirming a rule nisi cannot be brought under rule 31 (2) or rule 42 (1), but must be considered in terms of common law, which empowers the court to rescind a judgment obtained on default of appearance,

provided sufficient cause therefore has been shown. (see *De Wet and Others v Western Bank* **1979 (2) SA 1031 (A)** at 1042 and *Childerly Estate Stores v Standard Bank SA Ltd* **1924 OPD 163**)”

[5] The test for rescission under common law is trite, namely that good cause must be shown, i.e. that there is a reasonable explanation for the default, that the application is bona fide, and that there is a bona fide defence to the plaintiff’s claim which prima facie has some prospects of success. See *Colyn v Tiger Foods Industries Ltd t/a Meadow Feeds Mills*¹.

[6] The principles applicable to applications for rescission brought in terms of rule 31 (2) (b) are applicable to rescission applications brought in terms of the common law. See *Terrace Auto Service Centre PTY Ltd and Another v First National Bank South Africa Lt*².

[7] In *Chetty*, Miller JA described “sufficient cause” or “good cause” as follows:

“ the term “sufficient cause” or “ good cause” defies precise or comprehensive definition, for many and various factors are required to be considered (see *Carns’s Executors v Gaarn* **1912 AD 181 at 186** per Innes J, but it is clear that in principle and in long standing practice of our courts two essential elements “ sufficient cause” for the rescission of a default judgment are:

¹ 2003 (3) SA 1 (SCA) at 9C-F, para 11.

² 1996 (3) SA 209 (W) at 2101 –J and 212 E-F.

(1) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(11) that on the merits such a party has a bona fide defence which, prima facie, carries some prospect of success (De wet case at 1042; **PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 799 (A)....**”

[8] In *Silber v Ozen Wholesalers*³ remains an authority for the proposition that an applicant’s explanation must be sufficiently full to enable the court to understand how the default came about and assess the applicant’s conduct. The explanation must be to the extent that the applicant was not in willful default.

[9] It is trite that the defences raised must not only be decided against the backdrop of the full context of the case but must be bona fide, and the nature of the grounds of the defence and the material facts relied upon must be fully disclosed. *Standard Bank of SA Ltd v El- Naddaf*⁴.

[10] In considering whether the applicant was in willful default, regard has to be had to what the court said in *Harris v ABSA Bank Ltd Volkskas*⁵:

“[8] before an applicant in a rescission of judgment application can be said to be in “willful default”, he or she must bear knowledge of the action brought against him or her

³ 1954 (2) SA 354 (A) at 353.

⁴ 1999 (4) SA 779 (W) at 784 D-F.

⁵ : (2006 (4) SA 527 (T).

and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the steps which would avoid the default and must appreciate the legal consequences of his or her actions. A decision freely taken to refrain from filing a notice to defend or a plea or from appearing would ordinarily weigh heavily against an applicant required to establish sufficient cause”.

[11] This was affirmed by the Constitutional court in *Zuma v Secretary of the Judicial Commission into Allegations of State Capture*⁶, which distinguished two litigants: first, there is a litigant who was physically absent because he or she was not present in court on the day the judgment was granted. Second, there is a litigant whose absence she or he elected. The court found that a litigant who elects not to participate despite the knowledge of the proceedings against him or her is not absent within the meaning of “absence” in rule 42 (1). The court emphasised that the word “absence” in the rule:

“ exists to protect litigants whose presence was precluded, not those whose absence was elected”.

[12] The events leading to the grant of the impugned order are as follows: the applicant was served with the papers of the main application on 25 October 2023. Despite that, the applicant failed to deliver notice to oppose the main application. The matter was set down on an unopposed basis on 6 February 2024. Instead of

⁶ [2021] ZACC 28.

granting the final order against the applicant, the issued a rule nisi returnable on 27 February 2024 for the applicant to show cause why the orders in the main application should not be made final. The court order with a rule nisi was served to the applicant on 14 February 2024.

[13] On 27 February 2024, the court granted the impugned order in the absence of the applicant; in essence confirming the rule nisi issued on 06 February 2024.

[14] Notably, there is a pending trial action between the parties. On 24 March 2024, the trial action was set down. On this day, the applicant sought a postponement of the trial action on the basis that it would appeal the impugned order. The trial action was again set down for 16 September 2024; the applicant again sought its postponement on the basis that it will institute the current rescission application. Consequently, the court ordered the applicant to file its rescission application to the impugned order on or before 31 October 2024. This application was subsequently filed in June 2025.

[15] In this application, the applicant has not explained the reasons for its absence when the impugned order was granted. Mr Badli, counsel for the applicant, was at pains to concede that indeed there is no explanation for the absence of the applicant in court when the impugned order was granted. The applicant has not shown sufficient cause or good cause for its absence in court. This impacts heavily

on the applicant. It may be said that the applicant elected to be absent from court when the impugned order was granted.

[16] A court is not compelled to rescind or vary its own order. It is merely endowed with a discretion to do so upon the satisfaction of the requirements for rescission, either in terms of common law or rule 42, or rule 31 (2) (b). The discretion the court has to be exercised judicially. In this case, the applicant has not met the requirements for the grant of rescission sought in a manner making it impossible for the court to exercise its discretion in favour of the applicant.

[17] The applicant has only argued that it has a bona fide defence on the basis that the court granting the impugned order transgressed its powers, it has no powers to grant the substitution order, in my view, without a reasonable explanation for the default or absence when the impugned order was granted, the prospects of success relied upon by the applicant are immaterial and do not take the case of the applicant any further.

[18] Clearly, from the facts of this case, the applicant was afforded sufficient opportunity to oppose the matter if it wanted to do so. The applicant, in its own accord, deliberately chose not to participate despite knowledge of the legal proceedings against it; its absence is its own election.

[19] I am reminded that the applicant is an organ of state and the constitutional court has, in 2014, in *MEC for Health, Eastern Cape v Kirkland Investments (Pty) Ltd t/a Eye and Lazer Institute*⁷ held that:

“ There is a higher duty on the State to respect the law, to fulfill procedural requirements and to tread respectfully when dealing with the rights. Government is not an indigent litigant or bewildered litigant adrift on a sea of litigious uncertainty to whom the courts must extend circumventing lifeline”

[20] I am not inclined to grant the applicant a procedural circumventing lifeline for which it is not entitled. In this case, the applicant has failed to prove all the requirements and elements for the grant of the rescission of judgment sought. Consequently, this application should fail.

Order

[21] In the result, I make the following order:

1. This application is dismissed.
2. The applicant is directed to pay the costs of this application on scale

B.

M. MHAMBI

⁷ 2014 (3) SA 481 (CC) para 82.

JUDGE OF THE HIGH COURT OF SOUTH AFRICA (ACTING)

APPEARANCES:

Counsel for the Appellant : *Adv. Badli Z.*

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Counsel for the Respondent : *Mr. Pangwa*

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Heard on : 9 April 2026

Judgment Delivered on : 5 May 2026