

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 2024-015063

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

In the matter between:

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY	Applicant
And	
INTERACTION MARKET SERVICES TSHWANE (PTY) LTD t/a THE RSA GROUP (Registration Number: 1964/004096/07)	FIRST Respondent
SUBTROPICO MARKET AGENTS (PTY) LTD (Registration Number: 1993/000422/07)	SECOND Respondent
DW FRESH PRODUCE (PTY) LTD (Registration Number: 2009/006978/07)	THIRD Respondent

Heard on: 26 February 2026

Delivered on: 24 April 2026

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is electronically circulated to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be **24 April 2026.***

JUDGMENT

KEKANA AJ

Introduction

[1] This is an application for rescission of the default judgment granted by Fisher J on 21 May 2025 in favour of the Respondents. The Respondents oppose the application on grounds inter alia that there was wilful default and that there is no bona fide defence on the part of the Applicant.

Background

[2] The Respondents (plaintiffs in the main action) claimed delictual damages arising from power failures at the Tshwane Fresh Produce Market from 19 to 24 January 2023. The damages suffered were, according to the Respondents caused by the Applicant's (defendant in the main action) gross negligence in failing to comply with its statutory duties under the Tshwane Market by-law, the Agricultural Produce Agents Act 12 of 1992, and related rules to provide proper infrastructure, inter alia, at the Tshwane Fresh Market precinct (*the Market*).

[3] There was a mandamus application instituted by the Institute for Market Agents (IMASA) and the Respondents under case number (2120/2022) where Meersingh J granted an order, inter alia, ruling that the damages occurred as a result of the

Applicant's failure to provide proper electricity and a backup system also ordering the Applicant to submit within 60 days a draft precinct plan and a final precinct plan in 180 days of the order. The Applicant failed to comply with this order. IMASA subsequently instituted an application for contempt of court against the Applicant; judgment was reserved on 14 August 2024. On 23 January 2023, a letter of demand was sent to the Applicant and on 26 January 2023, the Applicant invited the Respondents to submit their claims by way of a letter and supporting documentation.

[4] On 14 March 2024, the Respondents submitted their claims together with the necessary supporting documentation to the Applicant. Mr Mphago, an employee within the municipality, was appointed by the Applicant to handle the claims. Engagements with him date as far back as April 2023. On 23 April 2023, the Applicant's Department of Delictual and Contractual and Litigation Recovery informed the Respondents that the claims have been submitted to the Applicant's insurer for further handling. There was no response from the Applicant to the claims.

[5] Later on, 12 February 2024, the Applicant issued and served summons for the delictual claim and damages suffered. Again, because of the purported inaction due to some communication mishaps, the matter was argued on 9 May 2025, and the Court granted condonation in terms of section 3 of Act 40 of 2002. After argument on the merits and quantum of the action, the matter stood down for heads of argument to be filed on the issues in the action. Heads were filed on 12 May 2025, and on 21 May 2025, Fisher J granted in favour of the Respondents, the judgment that the Applicant seeks to rescind. This judgment was served on 9 June 2025 at the same addresses provided by the applicant.

Submissions by parties

[6] The Applicant makes several submissions that:

- 6.1 failure to file a notice of intention to defend was a clerical error occasioned by an incorrect email address being used to dispatch the notice;
- 6.2 there exists a bona fide defence to the Respondent claim for damages which can be summarised as follows:

- 6.2.1 the Respondent's case is further met by a substantive defence on causation, both factual and legal, including whether the losses alleged are sufficiently closely connected to the Applicant's conduct for liability to ensue, and whether intervening events and operational realities break or attenuate the causal chain;
- 6.2.2 the Respondents has not established locus standi/own loss in respect of the heads of damage claimed;
- 6.2.3 the Respondents' claim is one for pure economic loss arising from an alleged omission, and is therefore not prima facie recoverable;
- 6.2.4 the Respondents' pleaded case raises material and triable questions concerning wrongfulness and legal duty, including whether it is consonant with public and legal policy to impose delictual liability on a municipality for downstream commercial losses alleged to have arisen from a service interruption at the Market.

[7] The Respondents contend that:

- 7.1 there exists no basis for rescission under Rule 42(1)(a), the Applicant admitted receipt of the summons. The Applicant's default is due to their own negligence, by inter alia, failing to serve a notice of intention to defend. There is no procedural irregularity on the part of the Respondents;
- 7.2 no good cause shown under Rule 31(2)(b) or common law; again, no reasonable explanation for default exists; gross negligence has been displayed throughout.
- 7.3 The applicants appointed their attorneys late (25 April 2024); no proof of service exists. After being informed of non-receipt on 7 November 2024, no remedial steps were taken to rectify the issue. Failure by the Applicant to draft a plea for more than the supposed 16 months after the relevant periods expired, furthermore, constitutes wilful default;
- 7.4 the Respondents further contend that the rescission application was brought out of time.

Issues

[8] The crisp issue for determination before this Court is whether the Applicant was able to show “good cause” in terms of Rule 31(2)(b) of the Uniform Rules of the High Court, alternatively under common law, and whether the Applicant discloses a bona fide defence with prospects of success.

Point in Limine

[9] The Respondents contend that the founding affidavit by Mr Makgata is defective and does not constitute admissible evidence. That it contains allegations which are all hearsay and unconfirmed by an affidavit from the official who can actually testify thereto. That the founding affidavit must be disregarded. I am of the view that while Mr Makgata may not have personal knowledge of facts, he may be conversant with facts. Knowledge of facts is required in summary judgments, while being conversant with facts will be sufficient for these motion proceedings.

Legal principle and analysis.

[10] I will now turn to the contention raised that the Applicant’s rescission application is out of time. I agree with Eksteen AJA in *Van Heerden* at para [11]¹ where it is stated that:

“even peremptory provisions of the rules may, in appropriate circumstances, be condoned. The test, it seems to me, is whether any potential prejudice results to a party affected.”

[11] Upon careful analysis of the entire case, I am of the view that the Applicant’s lateness by just a day and further that the Respondents have not demonstrated how lateness by a day would result in them being prejudiced, and it is for this reason that this Court is of the view that it will be in the interests of justice to respond in affirmative, condone the lateness and allow the application.

¹ *Van Heerden v Bronkhorst* (Case no 846/19) [2020] ZASCA 147.

[12] The Applicant initially brought an application in terms of both Rule 42(1)(a) and Rule 31(2)(b), however, in paragraph 40.2 of its replying affidavit, the Applicant abandons the Rule 42(1)(a) application and is only proceeding on Rule 31(2)(b), and for that reason, I do not intend to delve into the legal principles applicable to Rule 42(1)(a). I will only confine myself to Rule 31(2)(b).

[13] Rule 31(2)(b) states that:

“A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.”

[14] For the Applicant to succeed in a rescission application, it must satisfy the Court that it has a bona fide defence to the Plaintiff's Particulars of Claim.² Eksteen AJA³ held that:

“...An applicant for rescission of judgment taken by default against him is required to show good cause. Whilst the courts have consistently refrained from circumscribing a precise meaning of the term ‘good cause’, generally courts expect an applicant to show ‘good cause’ (a) by giving a reasonable explanation of his default; (b) by showing that his application is bona fide; and (c) by showing that he has a bona fide defence to the plaintiff's claim which, prima facie, has some prospect of success.”

[15] The explanation provided by the Applicant that there was a clerical error occasioned by an incorrect email address being used to dispatch the notice of intention to defend is, to me, an inexcusable inefficiency on the Applicant's part. Mr Mphago who was handling claims for the municipality, was already aware of the correct email address of the Respondents' attorney of record. Again, the Applicant was made aware of the error or became aware of the error on 7 November 2024, but still did nothing to cure or remedy the situation. The Applicant had from this day (7 November 2024) till the date the default judgment was granted to remedy the error of an incorrect email address used. It is difficult to say there is a reasonable explanation. The Applicant, by

² *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476-477.

³ *Van Heerden* (supra).

its own admission, concedes in paragraph 21 of its heads of argument that it took no steps to rectify their various oversights. These concessions cannot be ignored in the determination of wilful default. There is nothing brought before this Court to explain this inaction to cure the error; the conclusion is strong that there was deliberate inaction on the part of the Applicant.

[16] A notice of intention to defend must be followed by a plea; the Applicant could not show this Court that such a plea was filed and served, which raises a suspicion whether the Applicant had genuine intentions to defend the matter. The Applicant alleges it has already taken steps consistent with that intention but fails to show those steps. The Applicant uses its conduct after it became aware of the default judgment. Unfortunately, in determining whether a litigant is a wilful defaulter, the Court looks at the conduct of the party prior to the default judgment being granted, not afterwards. A party must explain why it failed to file a notice to defend or appear before the default judgment was granted.

[17] The second crisp issue to be determined is whether the Applicant has a bona fide defence or prospects of success. The Court had to look at various submissions made by the Applicant to demonstrate prospects of success. Regarding the locus standi of the Respondents, the Respondents were able to prove their standing as market agents and the corresponding fiduciary duty to account and pay the producers for their produce from their trust account. The market agent acts in a fiduciary capacity for and on behalf of the farmer/producer and has to apply for a fidelity fund certificate in terms of section 16(3)(a), open a trust account in terms of section 19(1) of the Agricultural Produce Agents Act, 12 of 1992. The Respondents each confirmed that they paid the farmers/producers in full, even though the produce had to be sold at reduced prices or discarded as a result of the power failure.

[18] As regards the legal duty of the Applicant to pay for the damages, it has been shown that the Applicant invited claims on 26 January 2023 to be submitted to its insurer, exercising its discretion in accordance with by-law section 7(2). These invitations to submit claims were in themselves an acknowledgement by the Applicant of its liability and legal obligations.

[19] There was a Court order finding fault on the part of the municipality. A court order is, by its nature, a legal instruction which creates a legal duty to be complied

with. Once a valid court order exists, a legal duty immediately falls on the person bound by it, to obey its terms unless and until it is set aside or varied by a court of competent jurisdiction. This duty exists regardless of whether the person agrees with the order or believes it is incorrect. If the Applicant was not happy with it, it ought to have returned to court to seek rescission or relaxation of its terms.

[20] The Applicant failed to remedy the electrical infrastructure and upgrade it as ordered by this Court on 31 October 2022, which triggers non-compliance with the Court order; there was no rescission of this order by the Applicant. Absent the order being rescinded, the Applicant had no option but to comply with the order and upgrade the infrastructure at the Market as directed by this Court.

[21] It was mentioned by Mlambo J in the case of ***Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others***⁴ that:

"A democratic State based on the rule of law cannot exist or function, if the government ignores its constitutional obligations and fails to abide by Court orders. A Court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by Court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues".

[22] It cannot be correct for the Applicant to ignore Court orders, the value and the corresponding obligations of those Court orders. Since these orders were served on the Applicant, they gave rise to a legal duty; it is so quirky for the Applicant to now approach this Court and to think it can successfully raise the absence of a legal duty on its part as a bona fide defence. That duty was dealt with in the Court order granted by Meersingh J. If the Applicant was not happy with it, it ought to have returned to court to rescind the judgment. This was not done which means that the Applicant did not disagree with the duty imposed. There was a contempt of Court order application, which again the Applicant did not challenge. These piling and unchallenged Court orders created a legal duty on the part of the Applicant.

[23] As regards damages, they were proven with admissible evidence, with expert and confirmatory documents submitted since 2023, first to the Municipality, then to its

⁴ (27740/2015) [2015] ZAGPPHC 402 at para 37.2.

insurer, and finally to the Court. The municipality did not at any stage pronounce on the inaccuracy of the claims, not even the insurer of the Applicant. No explanation is provided by the Applicant for its inaction during this process. But what can be deduced from this process is that at no stage did the Applicant exonerate itself from liability; it therefore cannot be correct that this aspect of the matter is used as a reason to support an argument that the matter is to be reheard.

Conclusion

[24] There was no explanation provided by the Applicant for the six months period of inaction. The Applicant must account for the entire period, and this was not achieved. There is an interplay between the three requirements for "good cause" (explanation for default, bona fide intention to defend, and prospects of success). While all three must be present, they must be applied flexibly and holistically, weighting them against each other. An absence of any explanation for the default is fundamentally fatal to the application. The three requirements are cumulative, but a complete lack of an explanation is a deal-breaker. It is well-established principle that an applicant who fails to give a reasonable explanation for the default cannot succeed, irrespective of what their prospects of success are. The explanation is a threshold requirement. If it is absent or completely unacceptable, the court does not even need to consider the strength of the defence.⁵

[25] This matter has already been pending with various Court orders obtained, all attributing a responsibility on the part of the Applicant. Courts are also there to promote consistency, efficiency, and certainty in the legal system; hence, finality is paramount to serve the interests of justice. In the result, the Applicant failing to give an acceptable explanation and again failing to show good cause for a rescission order under Rule 31(2)(b) the Applicant is not entitled to rescission in terms of common law. The application for rescission should fail.

Costs

⁵ *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031.

[26] It is my view that it was very frivolous for the Applicant to bring this application. The Applicant did nothing after the clerical error was discovered. There was an unexplained inaction on the part of the Applicant for a period of 16 months. The Applicant fails to explain why it did not file its plea. The conclusion is strong that there was no genuine intention to defend the matter. Again, proving willful default on the part of the Applicant. There are numerous Court orders, including a contempt of Court order against the Applicant, which shows the egregious and contemptible conduct on the part of the Applicant. It being found that there was a willful default on the Applicant and that no good cause was shown as required by Rule 31(2)(b), and that the Applicant has no bona fide defence nor prospects of success, it was so unreasonable, unnecessary for the Applicant to institute this application, any such punishment against the Applicant will be warranted.

[27] I accordingly grant the following order:

1. The application to rescind the default judgment is dismissed
2. The Applicant to pay the costs of this application on a scale as between attorney and client, including the costs of counsel where so employed.



ND KEKANA
ACTING JUDGE OF THE HIGH COURT