IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

CASE NO: 2025-025198

(**OLD CASE NO**: 2016-30980)

DATE: 18 MAY 2026

In the matter between:

WILLEM ANDRIES HAMAN	Plaintiff
and	
ANTONY CHARLES PATRICK COTTERELL N O	First Defendant
ANITA BHIKA N O	Second Defendant
BRIDGET MARY NAUDÉ N O	Third Defendant

[The above defendants are cited nomine officio *in their Official capacities as the duly appointed Trustees for the time being of* **THE KEMPSTON MOTOR GROUP TRUST** *(TM334)]*

Neutral Citation: *Haman v Cotterell NO and Others (2025-025198)* **[2026] ZAGPJHC ---** (18 May 2026)

Coram: Adams J

Heard: 4 May 2026

Delivered: 18 May 2026 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 18 May 2026.

Summary: Practice – judgment and orders – rescission – application of Uniform Rule 42(1)(a) in terms of which a court is empowered to set aside a default judgment erroneously sought and granted in the absence of a party affected thereby – defendants raising triable defence –

Application in terms of Uniform Rule of Court 6(15) to have struck out paragraphs of the founding affidavit – on the basis that they contain inadmissible hearsay evidence – application ill-advised – application to be granted only if the applicant will be prejudiced if the application is not granted – no prejudice proven – no case made out by the plaintiff that the matter sought to be struck out is 'scandalous, vexatious or irrelevant' – plaintiff also failed to demonstrate prejudice in the event of the offending paragraphs not being struck out – application to strike out dismissed with costs –

Rule 42(1)(a) – an applicant need not show good cause or a *bona fide* defence on the merits – enough to show that the order was erroneously sought or granted – because of a procedural irregularity or because there were facts which the court did not know that would have prevented it from granting the order – in casu such a case made out by applicants for rescission –

Application for condonation and rescission granted.

ORDER

(1) The defendants' late filing of their application for a rescission of the orders granted by this Court on 30 November 2023 (per Cajee AJ) and 11 March 2024 (per Botsi-Thulare AJ) respectively, be and is hereby condoned.

(2) The orders granted by this Court, under case number: 2016-30980, against the defendants on 30 November 2023 (per Cajee AJ) and 11 March 2024 (per Botsi-Thulare AJ) respectively, be and are hereby set aside and rescinded.

(3) The defendants' plea and their defence in the main action be and are hereby reinstated.

(4) The costs of the above opposed applications shall be in the course of the main action instituted by the plaintiff against the first, second and third defendants in their official capacities as the duly appointed Trustees for the time being of the Kempston Motor Group Trust ('the Trust').

(5) The plaintiff's counter-application to have struck out certain paragraphs in the defendants' founding affidavit, is dismissed with costs.

JUDGMENT

Adams J:

[1]. The litigation between the parties in this matter, which came before me as an opposed application on Monday, 4 May 2026, has had a long and a tedious history, dating back to September 2016, when the plaintiff caused to be issued out of this Court a combined summons against the first, second and third defendants ('defendants') in their official capacities as the duly appointed Trustees for the time being of the Kempston Motor Group Trust ('the Trust'), claiming a statement and debatement of account and a monetary judgment

based on an alleged employment contract between the plaintiff and the Trust. I am referring to the parties as referred to in the main action.

[2]. In this opposed application the defendants apply for a rescission of two orders granted by default by this Court against them respectively on 30 November 2023 and 11 March 2024 – one striking out the defendants' plea and the second granting default judgment against them. The rescission is sought by the defendants under the common law and in terms of Uninform Rule of Court 42(1)(a). The plaintiff is the respondent in this opposed application and he has, in addition to opposing vigorously the defendants' rescission application, preferred a counter application against the defendants for an order striking out a number of paragraphs in the founding affidavit of the defendants.

[3]. The question to be considered by me is simply whether the defendants have made out a case for the rescission of the aforesaid court orders. That issue is to be decided against the factual backdrop of the matter, as set out in this judgment as and when I discuss the applicable principles relating to rescission.

[4]. The plaintiff was employed by the Trust from October 2010 until his dismissal in March 2015. He was employed as Group Parts Manager. In September 2016, he instituted an action against the defendants claiming an account and debatement of incentive payments allegedly due under his employment contract. He contended that he was entitled to a commission of 2.5% of the Group parts gross profit of all the Trust's dealerships.

[5]. From 2016 to 2019, the parties engaged in discovery. Then the matter lay dormant for about four and a half years – from early 2019 until July 2023. It was only in July 2023 that the plaintiff re-emerged, amending his particulars of claim to limit his claim to the Trust's Gauteng dealerships. What followed was a flurry of correspondence and applications. The plaintiff's attorney requested a pre-trial meeting. The defendants' erstwhile attorney struggled to obtain instructions. On 4 September 2023 – one day before the hearing of an

application to compel – the defendants' attorney withdrew, citing a failure by the defendants to provide instructions. The application to compel was granted on 5 September 2023, ordering the defendants to furnish dates for a pre-trial conference.

[6]. The defendants did not comply. The plaintiff then launched an application to strike out the defendants' plea. That application was served on a Ms Leah Kaschula, the Head of Legal of the Kempston Group, at 6[…] O[...] T[...] Road, East London. On 30 November 2023, the court granted the striking out order. Thereafter, the plaintiff applied for default judgment. That application was served on a receptionist, Ms Mariska Hartzenberg, at the same address. On 11 March 2024, default judgment was granted. The default judgment was served on Ms Kaschula on 2 April 2024.

[7]. The defendants only launched this rescission application in May 2025. They also seek condonation for the late delivery of the rescission application and, separately, for the late delivery of their replying affidavit. The plaintiff opposes all relief sought and has brought a counter-application to strike out five paragraphs of the founding affidavit as inadmissible hearsay.

[8]. Before addressing the rescission, I deal with the plaintiff's counter-application. The plaintiff seeks to have struck out – in terms of Uniform Rule of Court 6(15) – paragraphs 28, 76, 82, 100 and 133 of the founding affidavit on the basis that they contain inadmissible hearsay evidence.

[9]. I am of the view that the said application should fail. It is ill-advised and should be dismissed.

[10]. Rule 6(15) reads as follows: -

'(15) The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. *The court may not grant* *the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.*' (Emphasis added).

[11]. In *Helen Suzman Foundation v President of the Republic of South Africa and Others*[1], the Constitutional Court held as follows at paras 27 and 28: -

'[27] Is the additional evidence scandalous, vexatious or irrelevant? Two requirements must be met before a striking -out application can succeed: (i) the matter sought to be struck out must be scandalous, vexatious or irrelevant; and *(ii) the court must be satisfied that if such a matter is not struck out the party seeking such relief would be prejudiced*.

[28] "Scandalous" allegations are those which may or may not be relevant but which are so worded as to be abusive or defamatory; a 'vexatious' matter refers to allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy; and "irrelevant" allegations do not apply to the matter at hand and do not contribute one way or the other to a decision of that matter. The test for determining relevance is whether the evidence objected to is relevant to an issue in the litigation.' (Emphasis added).

[12]. On the basis of this Constitutional Court authority, it is clear that the plaintiff does not even begin to make out a case for the striking out of paragraphs from the founding affidavit. No case – none whatsoever – is made out by the plaintiff that the matter sought to be struck out is 'scandalous, vexatious or irrelevant'. Moreover, the plaintiff has failed to demonstrate prejudice in the event of the offending paragraphs not being struck out.

[13]. Accordingly, the application to strike out certain paragraphs falls to be dismissed with costs,

[14]. I now turn my attention to the defendants' application for condonation of the late delivery of the rescission application, which was brought about thirteen months after the default judgment was served on the defendants. That is a considerable delay. The defendants must provide a reasonable explanation.

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[1] *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC).

[15]. The explanation is this. The default judgment came to Ms Kaschula's attention in April 2024. She then investigated how the Trust had allowed a default judgment to be taken in a matter that had been dormant for years. That process took months because the events dated back more than a decade, relevant employees had moved on, and the defendants' erstwhile attorneys had refused to hand over files because of an alleged fee dispute with other group entities, not the Trust itself. Once the Trust's present attorneys of record were instructed in May 2024, they formed the view that the order was unenforceable. They wrote to the plaintiff's attorney on 7 June 2024, seeking agreement to rescind. The plaintiff refused. The defendants then waited to see if the plaintiff would take any steps to enforce the order. He did not. He sought only to collect costs. It was only when the sheriff attempted to remove attached assets in April 2025 that the defendants appreciated that the order might be enforced against them, and they launched this application.

[16]. Whilst the explanation for the delay may seem on the thin side, I do not believe same to be so unreasonable as to be rejected out of hand. Moreover, in view of my findings below, I conclude that the rescission application has good prospects of succeed and, for that reason, condonation should be granted. The point is that the explanation is not so deficient that condonation should be refused outright. The delay must be weighed against the strength of the defendants' case for rescission. As will become apparent later on in this judgment, that case is strong.

[17]. In that regard, see *Junkeeparsad v Solomon and Another*[2], in which the position regarding condonation applications was stated as follows: -

[18]. 'Factors which usually weigh with a court in considering an application for condonation include the degree of non-compliance, the explanation therefor and an applicant's prospects of success on the merits. (See *Ferris and another v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) para 10; *Federated Employers Fire &*

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[2] see *Junkeeparsad v Solomon and Another* [2021] ZAGPJHC 48 (GJ 37003/2019 and 37456/2019, 7 May 2021).

General Insurance Company Limited & another v McKenzie 1969 (3) SA 360 (A) at 362F–G; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] All SA 251 (SCA) para 11.) In *Valor IT v Premier, North West Province and Others* 2021 (1) SA 42 (SCA) para 38, Plasket JA said that "very weak prospects of success may not offset a full, complete and satisfactory explanation for a delay; *while strong merits of success may excuse an inadequate explanation for the delay (to a point)*".' (Emphasis added).

[19]. Condonation should therefore be granted.

[20]. The same principles apply to the defendants' application for condonation for the late delivery of their replying affidavit.

[21]. The answering affidavit was delivered on 27 June 2025. The replying affidavit was due by 11 July 2025. It was only filed on 6 October 2025 – a delay of nearly three months. The defendants explain that the answering affidavit was exceptionally long (121 pages, excluding annexures). They say they spent a month reconsidering their position. Correspondence was exchanged between the parties. The plaintiff's review application in the Labour Court was dismissed on 30 July 2025, and the defendants wished to obtain that judgment. The Trust's representative, Ms Kaschula, was unwell. There were also pending interlocutory skirmishes, including an application to compel heads of argument.

[22]. Again, the explanation is thin in places. However, the delay must be assessed in context and the plaintiff has not shown any material prejudice caused by the late replying affidavit. The plaintiff has had a full opportunity to respond to its contents in his supplementary heads of argument. In the interests of justice and given the strength of the defendants' case on the merits, condonation of the late filing of the defendants' replying affidavit is granted.

[23]. That brings me to the rescission application

[24]. The defendants seek rescission on two bases: the common law (good cause) and Rule 42(1)(a) (erroneously sought or granted). In my view, the application succeeds under Rule 42(1)(a), and it is therefore unnecessary to decide the common law grounds. That said, the common law principles are not irrelevant, and I will touch on them briefly.

[25]. Rule 42(1)(a) provides as follows:

'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 an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.'

[26]. The law is clear. To succeed under Rule 42(1)(a), an applicant need not show good cause or a *bona fide* defence on the merits. It is enough to show that the order was erroneously sought or granted because of a procedural irregularity or because there were facts which the court did not know that would have prevented it from granting the order. See *Freedom Stationery (Pty) Ltd v Hassam and Others*[3]; *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*[4].

[27]. A judgment is 'erroneous' when it is granted in the absence of a party without that party having been properly notified of the proceedings, or when there is an irregularity in the process that led to the judgment. Once the applicant shows that the order was erroneously sought or granted, the court has a discretion to rescind it. That discretion must be exercised judicially, having regard to the interests of justice.

[28]. I turn to the critical question: was the default judgment of 11 March 2024 erroneously sought or granted in the absence of the defendants?

[29]. The defendants are trustees of a trust. It is trite that a trust is not a separate legal person. Litigation by or against a trust must be conducted in the

[3] *Freedom Stationery (Pty) Ltd v Hassam and Others* 2019 (4) SA 459 (SCA); [2018] ZASCA 173.

[4] *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA).

names of the trustees in their representative capacities. Rule 4(1)(a)(ix) provides that where two or more persons are sued in their joint representative capacity as trustees, service shall be effected upon each of them. Service on the trust itself is not sufficient.

[30]. Yet, the application to strike out and the application for default judgment were not served on the defendants individually. They were served on Ms Kaschula (for the striking out) and Ms Hartzenberg (for the default judgment) at 6[…] O[...] T[...] Road, East London, described as the Trust's principal place of business. The sheriff's returns of service indicate that service was effected on the Trust 'c/o Kempston Motor Group Trust', not on each trustee as required by the Rules.

[31]. The plaintiff argues that this was proper service because the defendants admitted in their plea that the Trust's principal place of business is 6[…] O[...] T[...] Road, and because Ms Kaschula is a responsible employee who accepted service on behalf of the trustees. There are two problems with this submission.

[32]. First, Rule 4(1)(a)(ix) is specific. Service on a trust is not the same as service on trustees. The rule requires service on each trustee. Service on a receptionist or even a head of legal at the Trust's premises does not, without more, constitute service on the trustees personally in their representative capacities. The authorities are consistent on this point. See *Gross and Others v Pentz*[5].

[33]. Second, by the time the application to strike out and the application for default judgment were served, the defendants were unrepresented. Their erstwhile attorney had withdrawn on 4 September 2023. In the notice of withdrawal, the attorney provided a different address – 1[…] D[...] Street, Nahoon – as the address for service. The defendants contend, and I accept, that 1[…] D[...] Street is the Trust's main office, while 6[…] O[...] T[...] Road is

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[5] *Gross and Others v Pentz* 1996 (4) SA 617 (A).

the main truck hire dealership. The plaintiff did not serve the applications at the address stipulated in the notice of withdrawal. That was an irregularity.

[34]. It is no answer to say, as the plaintiff does, that the defendants received the documents anyway. Rule 4 is not merely directory; it is peremptory. Proper service is a jurisdictional prerequisite for the court to entertain an application in the absence of a party. When service is defective, any order granted in that party's absence is *prima facie* erroneously granted.

[35]. Because the applications were not properly served on the defendants, the court that granted the default judgment on 11 March 2024 did not have before it the assurance that the defendants had been adequately notified of the proceedings. Had the court been aware that service had not been effected in accordance with Rule 4(1)(a)(ix) and that the address used was not the address stipulated in the notice of withdrawal, it would not have granted the order. The order was therefore erroneously granted.

[36]. The same reasoning applies, in part, to the striking out order of 30 November 2023. That order too was granted in the absence of the defendants following defective service. However, there is a further difficulty: the defendants were in default of the earlier order to compel (the order of 5 September 2023). That order, I note, was obtained before the defendants' attorney withdrew. But I need not dwell on this because the default judgment order is the principal order the defendants seek to set aside. The striking out order is inextricably tied to the default judgment; it was a step on the way to default judgment. To the extent that the striking out order stands, it falls with the default judgment.

[37]. I am fortified in my aforegoing findings and conclusions by *Rossitter v Nedbank Ltd*[6], in which the Supreme Court of Appeal (per Mbha JA) held that if a default judgment was erroneously sought or granted, a court should, without more, grant the order for rescission. A judgment is erroneously granted if there

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[6] *Rossitter v Nedbank Ltd* 2015 JDR 2629 (SCA).

existed at the time of its issue a fact which the court was unaware of, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment. *In casu*, that may very well be the position in that the service of impugned applications was irregularly served. See also *Sekoati v Standard Bank of South Africa Ltd and Others*[7] and the authorities referred to therein, notably *The Master of the High Court (Northern Gauteng High Court, Pretoria) v Motala NO and Others*[8] and *Richards v Meyers*[9].

[38]. I therefore find that the default judgment of 11 March 2024 was erroneously granted within the meaning of Rule 42(1)(a).

[39]. The finding that the order was erroneously granted does not automatically entitle the defendants to rescission. The court retains a discretion. The question is whether, in all the circumstances, it is just and equitable to rescind the order.

[40]. Several factors weigh in favour of rescission. First, the defendants have a *bona fide* defence to the plaintiff's claim. The plaintiff claims that he was entitled to commission on all dealerships in Gauteng. The defendants point to the express terms of the employment contract, the letter of 30 August 2012, the plaintiff's own concessions in arbitration and Labour Court proceedings, and the commission slips the plaintiff signed without objection. Whether the defence will succeed is a matter for trial, but it is not frivolous or unsustainable. It is a real and substantial defence. That strongly favours rescission.

[41]. Second, the delay in launching the rescission application, while regrettable, does not outweigh the strength of the defence. The plaintiff has not shown any irreparable prejudice that cannot be compensated by a costs order.

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[7] *Sekoati v Standard Bank of South Africa Ltd and Others* 2025 (5) SA 581 (GP).

[8] *The Master of the High Court (Northern Gauteng High Court, Pretoria) v Motala NO and Others* 2012 (3) SA 325 (SCA).

[9] *Richards v Meyers* 1909 TS 158.

The plaintiff himself allowed the matter to lie dormant for four and a half years. He cannot now complain that the defendants took a little over a year to bring this application, particularly when the defendants were trying to ascertain whether the plaintiff would enforce the order.

[42]. Third, the interests of justice favour allowing the defendants their day in court. The default judgment grants in favour of the plaintiff an order for the statement and debatement of an account in respect of dealerships the defendants say he was never responsible for. If the default judgment stands, the Trust may be compelled to pay significant sums based on an interpretation of the employment contract that the defendants vigorously dispute. That would be a substantial injustice.

[43]. Fourth, the plaintiff's own conduct in the litigation has not been beyond reproach. He disappeared for years, then re-emerged with an amended claim. He applied for default judgment at a time when the defendants were unrepresented and after serving documents on the wrong address. Litigants must act *bona fide* and with due regard for the Rules. The plaintiff has not done so.

[44]. In the exercise of my discretion, I intend rescinding both the striking out order of 30 November 2023 and the default judgment order of 11 March 2024.

Costs

[45]. The general rule in matters of costs is that the successful party should be given his costs. The defendants should therefore be granted the costs of the plaintiff's counter-application. As indicated *supra*, that application was singularly without merit and ill-advised.

[46]. The costs in relation to the rescission application, however, stands on a different footing. The standard order granted in rescission applications is normally one of costs in the course. I therefore intend granting an order to that effect.

Order

[47]. In the result, I make the following order: -

(1) The defendants' late filing of their application for a rescission of the orders granted by this Court on 30 November 2023 (per Cajee AJ) and 11 March 2024 (per Botsi-Thulare AJ) respectively, be and is hereby condoned.

(2) The orders granted by this Court, under case number: 2016-30980, against the defendants on 30 November 2023 (per Cajee AJ) and 11 March 2024 (per Botsi-Thulare AJ) respectively, be and are hereby set aside and rescinded.

(3) The defendants' plea and their defence in the main action be and are hereby reinstated.

(4) The costs of the above opposed applications shall be in the course of the main action instituted by the plaintiff against the first, second and third defendants in their official capacities as the duly appointed Trustees for the time being of the Kempston Motor Group Trust ('the Trust').

(5) The plaintiff's counter-application to have struck out certain paragraphs in the defendants' founding affidavit, is dismissed with costs.

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	4 May 2026
JUDGMENT DATE:	18 May 2026
FOR THE PLAINTIFF:	G Ebersohn
INSTRUCTED BY:	Ebersohn Incorporated, Randpark Ridge Randburg
FOR THE FIRST, SECOND AND THIRD DEFENDANTS:	Baheeyah Bhabha
INSTRUCTED BY:	Vermaak Marshall Wellbeloved Inc, Rosebank, Johannesburg