

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

Case Number: 82687/2014

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO

(3) REVISED: YES/~~NO~~

DATE: 14 May 2026

SIGNATURE:

In the application between:

THE PREMIER OF THE NORTH-WEST PROVINCE

Applicant

and

SHANE NOEL ADAMS

First Respondent

MADIBENG LOCAL MUNICIPALITY

Second Respondent

**THE SHERIFF OF THE HIGH COURT,
MAHIKENG NORTH-WEST PROVINCE**

Third Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and/or uploading to the electronic platform. The date and time for hand-down is deemed to be 10h00 on the date reflected hereon.

Summary: *Rescission - Rule 42(1)(a) - application framed only under Rule 42 - no pleaded explanation in the founding papers for delay, acquiescence or*

absence - applicant's complaints directed to wrongfulness, negligence and causation and amount to an impermissible rehearing of the merits - anomalies in the default judgment application do not, on the case pleaded, establish that the order was erroneously sought or erroneously granted - application dismissed with costs.

JUDGMENT

INTRODUCTION

[1] This is an application to rescind the order granted on 8 December 2021 under case number 82687/2014, in terms of which the applicant and the second respondent were held jointly and severally liable to pay the first respondent R3 954 218.00 in respect of loss of earnings and general damages, together with costs, while the first respondent's future medical treatment costs and related expenditure were postponed sine die.

[2] The underlying claim arose from an accident (involving a pothole) on 28 March 2014 on the Bokfontein Road between Hartebeespoort and Brits. The pleaded case was that the first respondent struck a large pothole, failed in an attempt to evade it, rolled his vehicle, and sustained serious injuries in circumstances where there were allegedly no visible warning signs and where the road fell under the control and maintenance responsibilities of the public defendants.

[3] The pleas of the applicant and the second respondent were struck out on 26 February 2018. Thereafter the first respondent enrolled a default judgment application supported by affidavits, expert confirmations and reports, photographs, an accident report, hospital records and heads of argument.

[4] In the rescission application, the applicant seeks an order rescinding and setting aside the 8 December 2021 order, costs if opposed, and further or alternative relief. The

founding affidavit was deposed to by Mosweu Paul Mogotlhe, who describes himself as the Director General in the Office of the Premier and says that he is authorised to depose to the affidavit.

[5] The answering affidavit was deposed to by Shane Noel Adams. It raises two points in limine, namely an unreasonable delay without condonation or a satisfactory explanation, and a contention that the rescission is mala fide and an abuse of process brought to frustrate execution. It also gives a detailed chronology of the applicant's alleged knowledge of the judgment and its non-participation in the litigation and execution process.

[6] The principal issue is whether the applicant has made out a case for relief under Rule 42(1)(a). Ancillary issues are whether delay and acquiescence should bar relief and what costs order should follow.

THE RESCISSION APPLICATION AS PLEADED

[7] In the founding affidavit the applicant expressly pleads Rule 42(1)(a) as the basis for relief. In paragraphs 5.1 and 5.2 of the founding affidavit the applicant alleges that the Court, in granting the order on 8 December 2021, misconceived its proper discretion and that the order was therefore erroneously granted.

[8] The founding affidavit does not rely on Rule 31(2)(b), nor does it seek to make a case for a common-law rescission based on good cause. The applicant also makes out no case, factually, for relief under Rule 31(2)(b) or the common-law. The application contains no prayer for condonation, and no explaining when the applicant learnt of the order, why the rescission was only launched in July 2024, or why the applicant was absent when the default judgment application was heard.

[9] The substance of the founding affidavit is directed not at a procedural impediment to the order, but at the merits of the delictual claim. The applicant says that

the first respondent failed to establish a legal duty resting on the applicant, failed to establish wrongfulness, failed to prove causation, and failed to prove negligence. The affidavit then traverses road-authority delict principles, causation principles, and the negligence test before concluding that the default court should have dismissed the claim.

[10] In the founding affidavit the applicant makes a general allegation that relevant facts were outside the record or were withheld or misrepresented. The founding papers, however, does not identify with any particularity the concrete fact said to have been withheld or the precise misrepresentation relied upon.

LATER PAPERS

[11] After the main rescission application had been launched, the first respondent served a Rule 30 notice and then a formal Rule 30 application contending, in substance, that the rescission was irregular because it was delivered without any condonation application or explanation of the delay. The Rule 30 practice note records that the rescission was served on 23 July 2024 and that the Rule 30 notice followed on 26 July 2024.

[12] The Rule 30 application came before Molopa J on 5 February 2025. The operative order was that the Rule 30 application was postponed sine die and that the first respondent, in that interlocutory part (the applicant in this application), was to pay the costs occasioned by the postponement on the scale as between attorney and own client.

[13] A separate condonation application was later brought. It seeks condonation for the late filing of the rescission application, and states that the applicant became aware of the default order only when served with a notice of sale in execution on 5 June 2024, and says that the rescission application was instituted on 31 July 2024.

APPLICABLE PRINCIPLES

[14] Rule 42 is a narrow procedural mechanism. In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* 2003 (6) SA 1 (SCA) the Supreme Court of Appeal emphasised that the rule must be understood against the common-law principle of finality of judgments and that rescission does not follow automatically: the court retains a discretion that must be exercised judicially. The same approach is reflected in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC).

[15] To succeed under Rule 42(1)(a), an applicant must show that the order was granted in its absence and that it was erroneously sought or erroneously granted. *Zuma* makes it plain that the notion of "absence" protects a litigant whose presence was precluded, not one whose absence was elected. Where a litigant, given notice of the case and sufficient opportunities to participate, elects not to do so, the jurisdictional requirement of absence is not satisfied.

[16] In *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) the Supreme Court of Appeal held that a judgment validly obtained in accordance with the rules cannot later be transformed into an erroneous judgment by the subsequent disclosure of a defence. The existence, or non-existence, of a defence on the merits is ordinarily irrelevant to whether a default judgment was erroneously granted.

[17] In *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E) the court explained that the inquiry into whether a judgment was erroneously granted is confined to the record. In *Naidoo v Matlala* NO 2012 (1) SA 143 (GNP) this court formulated the position in general terms, being a judgment is erroneously granted if, at the time it was made, there existed a fact of which the judge was unaware and which would have precluded the granting of the judgment.

[18] Schmidlin v Multisound (Pty) Ltd 1991 (2) SA 151 (C) treats acquiescence in the execution of a judgment as a powerful indication against rescission. In First National Bank of SA Ltd v Van Rensburg NO 1994 (1) SA 677 (T) the full court held that even where error may arguably be shown, an application can be dismissed by reason of long delay.

[19] A litigant who knows a case is coming on and deliberately refrains from appearing is in wilful default, whatever the motive.

EVALUATION

[20] The rescission application must stand or fall on the case made out in the founding papers. On its face that case is a Rule 42 case only. It is not a Rule 31 case. It is not a common-law “good cause” case.

[21] On the issue of absence, the papers do not assist the applicant. Adams says that notice of the default judgment application for 8 December 2021 was given on 4 November 2021, but that the applicant neither opposed nor appeared. He further says that the signed default order was served on the State Attorney on 18 January 2022, that payment was pursued on 20 January 2023 and again on 3 March 2023, that a writ of execution followed, that eight vehicles were, in fact, attached on 9 October 2023, and that the rescission was only launched once renewed execution loomed in mid-2024.

[22] The applicant's later condonation affidavit advances a different chronology, namely that the order came to its attention only on 5 June 2024 when a notice of sale in execution was served and that operational disruption during the Covid period contributed to the lateness. Even taking that later version at face value, the founding papers still do not explain the applicant's absence when the default judgment application was heard, and it still does not transform elected non-participation into absence within the meaning of Rule 42(1)(a).

[23] In my view, the applicant has not shown absence in the Rule 42 sense. On the respondent's version the applicant knowingly elected not to participate. On the applicant's own version in the later condonation affidavit, the focus is on when it says it learnt of the order, not on any circumstance that precluded it from participating when the order was originally sought. *Zuma* therefore applies against the applicant. The absence requirement is not met.

[24] That conclusion is, on its own, fatal to the application. But even if I am wrong on absence, the applicant encounters a second and independent difficulty on the requirement of error.

[25] The founding affidavit does not identify a procedural fact on the face of the record that would have precluded the granting of the order. Instead, it says that Adams did not prove wrongfulness, legal duty, negligence and causation and that the court ought therefore to have dismissed the claim. That is the language of merits review, not the language of a Rule 42 rescission application.

[26] The default court had before it a substantial body of material. That material included Swan's affidavit in support of default judgment, Adams's supporting affidavit, Adams's short affidavit in the merits bundle, Stander's corroborating witness affidavit, the accident report, hospital records, monochrome and colour photographs of the road scene and roadway defects, expert confirmatory affidavits and reports; and heads of argument dated 7 December 2021 (03-1 to 03-179; 04-1 to 04-6; 10-1 to 10-86; 12-1 to 12-11; 13-1 to 13-26).

[27] On the merits, the material before the default court alleged a large or exceptionally large pothole, an attempted but failed evasive manoeuvre, a rollover, no visible warning signs, and control and maintenance responsibility on the part of the defendants. Adams stated that he believed the collision and injuries would have been avoided had warning signs been erected, and Stander corroborated that the vehicle hit

a pothole, left the road and overturned. Relevant photographs were also before the court.

[28] On the issue of the quantum of the claim, the default court had confirmatory affidavits and reports from an industrial psychologist, neurosurgeon, actuary, orthopaedic surgeon, neuropsychologist and occupational therapist, together with heads quantifying the claims for loss of earnings, general damages and future medical expenses (03-1 to 03-32; 03-56 to 03-57; 03-64 to 03-179; 13-12 to 13-26).

[29] The existence of that body of material does not mean that every criticism of the default case is unfounded. It does, however, demonstrate that the applicant is not confronting a situation in which judgment was granted on no evidence or in disregard of the procedural requirements for default judgment. What the applicant seeks to do is to revisit whether that material was enough to prove delictual liability. *Lodhi 2* makes clear that such a merits complaint does not turn a default judgment into an erroneously granted judgment.

[30] The present question is not whether the default judgement application and record were immaculate. The question is whether, on the case the applicant has pleaded, the anomalies establish that the order was erroneously sought or erroneously granted within Rule 42(1)(a). In my view they do not.

[31] First, the founding papers did not found the Rule 42 case squarely on those default judgement record anomalies. The founding affidavit did not contend that the application was inconsistent with the relief granted, the quantum arithmetic did not add up, and the jurat anomaly precluded reliance on the affidavit. Instead, it said that Adams had failed to prove wrongfulness, negligence and causation. The application was thus framed as a merits attack from the start.

[32] Second, the applicant did not show that any of the anomalies identified a fact of which the default court was unaware and which would have precluded the order. The

affidavit date anomaly, although troubling, was not shown to have been decisive in circumstances where other liability evidence and expert material were before the court.

[33] Third, the founding affidavit's general allegation of withheld or misrepresented facts is not particularised. No material withheld fact or misrepresentation is identified in the founding papers with the required specificity. That makes it impossible to conclude, on the founding papers, that the order was procured through a particular non-disclosure or procedural misstatement that brings the matter within Rule 42.

[34] The upshot is that the applicant has not shown that the 8 December 2021 order was erroneously sought or erroneously granted. The application seeks, in substance, a second opportunity to argue wrongfulness, negligence, legal duty and causation after the default order has already been granted. *Zuma* describes that course as misdirected, and *Lodhi 2* makes plain that a subsequently articulated defence does not convert a judgment regularly granted into an erroneous one.

[35] Even if I were to assume in the applicant's favour that one or more of the record anomalies created some arguable basis for concern, I would still decline rescission in the exercise of the discretion relevant to the current. The founding papers contain no explanation for the delay and no engagement with acquiescence. The answering papers set out a detailed chronology of knowledge, non-payment, execution and non-action. *Schmidlin* and *First National Bank v Van Rensburg* recognise that delay and acquiescence are highly material. In this application they operate strongly against the applicant.

[36] The Rule 30 and condonation detour does not alter that conclusion. The Rule 30 application was never decided on the merits and was merely postponed sine die with a punitive postponement-costs order already made by Molopa J. The later condonation application, even if entertained, does not cure the absence and error defects in the main rescission application.

COSTS

[37] The first respondent sought punitive costs and also sought to fold the costs of the interlocutory Rule 30 application into the costs of the main rescission application. The first respondent invoked, inter alia, *De Klerk v Scheepers* 2005 (5) SA 244 (T) and *Standard Credit Corporation v Bester* 1987 (1) SA 812 (W) in support of an abuse-of-process argument.

[38] I do not consider it necessary to make a further punitive costs order in the present judgment. The history of the matter undoubtedly reveals delay and procedural untidiness on the part of the applicant, but Molopa J has already made a punitive order in relation to the postponement of the Rule 30 application. In my view the proper order in respect of the rescission application itself is that it be dismissed with costs. The earlier costs orders already made in the matter remain undisturbed.

ORDER

[1] The application for rescission is dismissed.

[2] The applicant shall pay the first respondent's costs of the rescission application including the costs on Scale C.

R RAUBENHEIMER
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

14 May 2026

APPEARANCES:

APPLICANT'S COUNSEL: Adv M Boko

APPLICANT'S ATTORNEYS: The State Attorney

FIRST RESPONDENT'S COUNSEL : Adv A Lubbe

FIRST RESPONDENT'S ATTORNEYS : N S Swan Attorneys