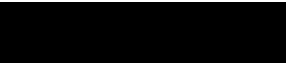


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

Case Number: 01155/2024

|             |                                                                                   |
|-------------|-----------------------------------------------------------------------------------|
| (1)         | REPORTABLE: NO                                                                    |
| (2)         | OF INTEREST TO OTHER JUDGES: NO                                                   |
| (3)         | REVISED: NO                                                                       |
| 11 May 2026 |  |
| DATE        | SIGNATURE                                                                         |

In the matter between:

**TANDEKA ZUKA**

**APPLICANT**

And

**LEOPARDS REST HOMEOWNERS ASSOCIATION**

**RESPONDENT**

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**JUDGEMENT**

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**HINRICHSEN AJ**

*Introduction*

- [1] The applicant, Miss Tandeka Zuka (*"the applicant"*), seeks rescission of an order granted by this Court on 29 July 2024 (*"the July order"*), together with condonation for the late bringing of the rescission application. The July order declared the applicant's immovable property, which constitutes her primary place of residence, specially executable in favour of the respondent, Leopards

Rest Homeowners Association NPC (*“the respondent”*), in respect of outstanding levy arrears.

- [2] The applicant brings the application for rescission on two alternative bases: first, under Rule 42(1)(a) of the Uniform Rules of Court (*“the Rules”*); and alternatively, under the common law. The respondent opposes the application in its entirety and seeks a cost order on an attorney and client scale.

### *Procedural History*

- [3] The main application was launched by the respondent against the applicant in early 2024. The applicant was served with the application papers on 4 March 2024. On 18 March 2024, the applicant, represented by her attorney of record, filed a notice of intention to oppose the application.
- [4] Notwithstanding the filing of the notice of intention to oppose, no answering affidavit was delivered within the prescribed period. The respondent caused the matter to be enrolled on the unopposed roll for hearing on 29 July 2024. On the date of the hearing, the applicant's attorneys addressed written correspondence to the respondent's attorneys requesting that the matter be removed from the roll. Despite that communication, no Counsel appeared on behalf of the applicant. The July order was accordingly granted.
- [5] The applicant avers that she became aware of the July order on approximately 12 August 2024. The present application was filed on 1 November 2024, approximately 11 weeks after the applicant became aware of the order and approximately 3 months after the order was granted. The respondent's answering affidavit was filed out of time, prompting a condonation application by the respondent in respect of the late filing. The answering affidavit was deposed to by Miss Lizelle Monica Brits (*“Miss Brits”*), the collection manager at CSI Property Management, following the departure from CSI's employ of the previous deponent, Mr. Llewellyn Van Niekerk (*“Mr. Van Niekerk”*).

[6] The applicant's replying affidavit, signed on 6 November 2025 and filed on 7 November 2025, raises a point *in limine* directed at the competency of the respondent's answering affidavit.

*Issues to be determined*

[7] The following issues arise for determination:

- a. Whether the respondent's application for condonation for the late filing of its answering affidavit should be granted.
- b. Whether the point *in limine* raised in the applicant's replying affidavit - to the effect that the respondent's answering affidavit constitutes inadmissible hearsay - should be upheld.
- c. Whether the applicant has established entitlement to rescission of the July order under Rule 42(1)(a) of the Rules.
- d. Whether the applicant has established entitlement to rescission under the common law.
- e. Whether the applicant's application for condonation for the late bringing of the rescission application should be granted.
- f. The costs of the application.

*Respondent's condonation*

[8] The respondent's answering affidavit was filed approximately 2 weeks late. The explanation tendered for the delay is as follows:

- a. The previous deponent, Mr. Van Niekerk, departed from CSI's employment after the service of the application.

- b. A new resolution of the respondent's board authorising Brits to depose to the answering affidavit on the respondent's behalf had to be obtained.
- c. The period in which the delay occurred coincided in part with *dies non* during the festive season.

[9] The approach to condonation is trite. In *Uitenhage Transitional Local Council v South African Revenue Services*<sup>1</sup>, the Supreme Court of Appeal emphasised that an applicant for condonation must furnish a full, detailed and accurate account of the causes of the delay and their effects, so that the Court is placed in a position to assess his or her conduct and motives.

[10] The Constitutional Court in *Baron v Claytile (Pty) Ltd*<sup>2</sup> confirmed it may be in the interest of justice to condone the late filing of an answering affidavit, having regard to factors such as the extent of the delay, the explanation and effect of the delay, as well as the importance of the issues to be raised in the matter.

[11] In *Melane v Sanlam Insurance Co Ltd*<sup>3</sup>, Holmes JA stated that among the facts usually relevant are the degree of lateness, the explanation thereof, the prospect of success, and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, because such an approach incompatible with a true discretion.

[12] The delay of approximately two (2) weeks is modest. The explanation is cogent: the departure of the deponent responsible for the matter necessitated the procurement of a fresh authorisation before a competent replacement could swear to an affidavit binding upon the respondent. The festive period accounts for a portion of the elapsed time. The respondent's prospects of success on the merits are, for the reasons that follow, strong. The applicant has not

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<sup>1</sup> 2004 (1) SA 292 (SCA)

<sup>2</sup> 2017 (5) SA 329 (CC)

<sup>3</sup> 1962 (4) SA 531 (A) at C-F

demonstrated any prejudice flowing from the short delay and did not oppose the condonation.

[13] Condonation for the late filing of the respondent's answering affidavit is granted.

*Point in Limine: Hearsay*

[14] In her replying affidavit, the applicant raises a point *in limine* to the effect that the respondent's answering affidavit constitutes inadmissible hearsay. The point is advanced on the basis that Miss Brits deposes to facts that were within the personal knowledge of her predecessor, Mr. Van Niekerk, without annexing a supporting or confirmatory affidavit from Mr. Van Niekerk.

[15] Miss Brits deposes that she has in her possession and under her control the files and electronic records relevant to this matter and that she has familiarised herself with the content thereof. She also says that she has access to and control over all the accounts and documents relating to the applicants arrear levies and the respondent's arrear levies. She has too perused these accounts and documents.

[16] The respondent's substantive case is borne primarily by a series of documentary annexures that stand independently of any hearsay content. Miss Brits, in her capacity as collection manager of CSI Property Management, is competent to produce and speak to those documents in her official capacity. The relevant annexures are:

- a. Annexure LRA1: the resolution of the respondent's board authorising Brits to depose to the answering affidavit.
- b. Annexure LRA2: the sheriff's return of service confirming service of the main application on Nedbank Limited on 20 June 2024.
- c. Annexure LRA3: the applicant's most recent levy statement, reflecting an outstanding balance of R99,902.79.

d. Annexure LRA4: the respondent's payment allocation resolution.

[17] These documents speak for themselves. Further, a deponent to its affidavit does not need first-hand knowledge of every fact comprising its cause of action: the deponent could rely for its knowledge on documents in the entities possession<sup>4</sup>.

[18] The point *in limine* is therefore dismissed.

### *Applicable Legal Framework*

#### *Rule 42(1)(a)*

[19] Rule 42(1)(a) of the Rules empowers a Court, in addition to any other power it may have, to rescind or vary any order or judgment that was erroneously sought or erroneously granted in the absence of any party affected thereby.

[20] The Constitutional Court examined the requirements of Rule 42(1)(a) 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 and Others (Council for the Advancement of the South African Constitution and Other as Amicus Curiae)*<sup>5</sup> ("Zuma"). The Court confirmed that the Rule contains two cumulative requirements:

a. The order must have been granted in the absence of the affected party;  
and

b. The order must have been erroneously sought or erroneously granted.

[21] Both these requirements must be satisfied before rescission under the Rule is competent.

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<sup>4</sup> *Rees and Another v Investec Bank Ltd* 2014 (4) SA 220 (SCA)

<sup>5</sup> 2021 JDR 2069 (CC)

- [22] In relation to the “*absence*” requirement, the Court drew a critical distinction between genuine absence - that is, ignorance of the proceedings - and elected non-participation, where a party who is aware of the proceedings elects not to participate.
- [23] Elected non-participation does not constitute “*absence*” within the meaning of the Rule.
- [24] In relation to the “*erroneously granted*” requirement, the Court in *Zuma* held that the inquiry is to be assessed by reference to the information that was before the Court at the time the order was made, not by reference to subsequent facts or developments. Post-hearing events cannot retroactively render an otherwise correct order erroneous.

#### *Common law rescission*

- [25] Where Rule 42(1)(a) is unavailable, a party may seek rescission under the common law upon proof of “*sufficient cause*”. The requirements for sufficient cause were authoritatively stated in *Chetty v Law Society, Transvaal*<sup>6</sup> (“*Chetty*”). Two essential components must be established:
- a. A reasonable and acceptable explanation for the default; and
  - b. A *bona fide* defence to the action with *prima facie* prospects of success on the merits.
- [26] Both components are indispensable. The absence of either is fatal to the application: a meritorious defence cannot compensate for an inadequate explanation for the default, and *vice versa*.

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<sup>6</sup> 1985 (2) SA 756 (A)

[27] In *Phetlu v Nthutang*<sup>7</sup> (leave to appeal) ("*Phetlu*"), this Court held that bare, unsubstantiated assertions of financial difficulty do not constitute an adequate explanation for a default. A sufficient degree of corroboration of the asserted financial position is required before the Court may be satisfied that the explanation is reasonable and acceptable.

### *Analysis*

#### *Rule 42(1)(a)*

[28] The threshold question under Rule 42(1)(a) is whether the July order was granted in the applicant's "*absence*" in the sense contemplated by the Rule. On the facts before me:

- a. The applicant was served with the main application on 4 March 2024.
- b. Her attorneys filed a notice of intention to oppose on 18 March 2024, formally placing the applicant's opposition on record.
- c. On 2 May 2024, one month after the applicant was required to file her answering affidavit to the main application, a notice of set down was served upon the applicant informing her that the main application had been set down for hearing on the unopposed motion court roll for 29 July 2024.
- d. On the morning of 29 July 2024 - the date on which the matter was set down on the unopposed roll - the applicant's attorneys addressed written correspondence to the respondent's attorneys requesting removal of the matter from the roll. This letter also appeared on CaseLines.
- e. Notwithstanding that correspondence, there was no appearance on behalf of the applicant at the hearing.

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<sup>7</sup> 2023 JDR 3921 (GP) at para 8 and 9

[29] The applicant, through her attorney of record, was fully aware of the proceedings and of the set down date of 29 July 2024. The correspondence on that date - authored by the attorneys and expressly referencing the roll - confirms active awareness. The election not to ensure an appearance was a deliberate decision, not a consequence of ignorance. This is precisely the scenario of elected non-participation identified in *Zuma* as falling outside the ambit of "*absence*" for purposes of Rule 42(1)(a). The first cumulative requirement is not satisfied.

[30] Even if the applicant could establish "*absence*" in the required sense, she would still fail at the second cumulative requirement: that the order was erroneously sought or erroneously granted.

[31] The applicant contends that the enrolment on the unopposed roll was irregular, notwithstanding the existence of a notice of intention to oppose.

[32] Chapter 13(10) of the Practice Directive of this Division provides as follows:

- "1. Where the respondent has failed to deliver an answering affidavit and has not given notice of an intention only to raise a question of law (rule 6(5)(d)(iii)) or a point in limine, the application must not be enrolled for hearing on the opposed roll.*
- 2. Such an application must be enrolled on the unopposed roll. In the event of such an application thereafter becoming opposed (for whatever reason), the application will not be postponed as a matter of course. The judge hearing the matter will give the necessary directions for the future conduct of the matter.*
- 3. The notice of set down of such an application must be served on the respondent's attorney of record."*

[33] The respondent, correctly in my view, submits that Chapter 13(10) permits the enrolment of a matter on the unopposed roll where, despite a notice of intention to oppose, no answering affidavit has been delivered within the prescribed period. That was the position on 29 July 2024.

- [34] The decisive consideration, however, is that drawn from *Zuma*: the inquiry into whether an order was erroneously granted is confined to the information before the Court at the time that the order was made. On 29 July 2024, the Court had before it a matter enrolled on the unopposed roll, with no opposing papers filed and no appearance by the applicant.
- [35] On the information then before the Court, the order cannot be characterised as erroneously granted. Arguments as to the propriety of the enrolment, or as the alleged non-compliance with Rule 46(1)(a)(i) or Rule 46A, raised only in the subsequent proceedings, cannot retroactively impugn the order under Rule 42(1)(a).
- [36] The application for rescission under Rule 42(1)(a) accordingly fails.

#### *Common Law Rescission – Explanation for Default*

- [37] I turn to consider whether the applicant has established "*sufficient cause*" for rescission under the common law. The first inquiry is whether the explanation for the default is reasonable and acceptable. Applying *Chetty*, the explanation must cover the entire period of the default and must be sufficiently particular and substantiated to enable the Court to assess its reasonableness.
- [38] The default here is not a single event but a sustained sequence. It encompasses:
- a. The failure to deliver an answering affidavit within the prescribed period following the notice of intention to oppose filed on 18 March 2024;
  - b. The failure to secure enrolment of the matter on the opposed roll;
  - c. The failure to appear at the hearing on 29 July 2024, notwithstanding a written communication to the respondent's attorney on that very date; and

- d. The attorney's failure, if instructions or funding had by that stage broken down, to withdraw from record, so that the status of the proceedings was not left in doubt.

[39] The explanation tendered must cover each limb of that sequence. The applicant's explanation, as set out in the founding and replying affidavits, rests on three pillars:

- a. Financial distress preventing her from funding her attorneys.
- b. A deterioration in her mental health attributed to the threat to her home and livelihood; and
- c. An absence from Johannesburg during which she travelled to the Eastern Cape for traditional healing, during which she was unable to consult with her attorneys.

[40] This explanation is, in my judgment, materially deficient for several reasons.

[41] First, the explanation is directed almost exclusively at the applicant's own alleged inability to engage with her attorneys. It does not address the attorney's own failure, over a period of more than four months, to take any procedural step to protect the client's position. The attorneys remained on record at all material times. They were in a position to correspond with the respondent's attorneys on the very date of the hearing, and they filed the present application.

[42] The mandate plainly subsisted. No explanation is offered by either the applicant or by the attorneys as to why no answering affidavit was delivered, why the attorneys considered themselves unable to take those steps or why they did not withdraw timeously from record. Practitioners are expected to take proactive steps to protect their clients' interests, and to withdraw formally where they cannot. Neither course was taken. The unexplained inaction of the attorneys must, on the authorities, be visited upon the applicant, absent a sufficient

showing that she was herself without fault in those failures - a showing she has not made.

- [43] Second, the financial dimension of the explanation is precisely the kind of unsubstantiated assertions against which this Court cautioned in *Phetlu*. The applicant has placed before the Court a single payslip reflecting her net monthly income. She has provided no particularised disclosure of her monthly expenditure, savings or other assets, her ability or inability to raise funds from family or others, or any effort (if any) she made to negotiate an arrangement with her attorneys in respect of their fees.
- [44] A single payslip does not discharge the evidentiary burden identified in *Phetlu* of demonstrating, to a sufficient standard of corroboration, an asserted financial incapacity extending over several months.
- [45] Third, the assertion of mental health deterioration is made without medical or supporting evidence whatsoever. No medical report, no letter from a treating practitioner and no record of consultation or treatment has been placed before the Court. Assertions of mental health difficulty - particularly where they are relied upon to explain the sustained period of procedural inactivity - must be capable of objective scrutiny. They cannot rest on the applicant's *ipse dixit* alone, especially where, on the applicant's own version, she was sufficiently well to instruct her attorneys to address correspondence in the morning of the hearing.
- [46] Fourth, the account of the traditional healing trip to the Eastern Cape is strikingly imprecise. The Court is not told when the applicant left, when she returned, or how long she was unable to communicate with her attorney. In the absence of such particulars, the Court cannot assess whether the alleged trip accounts for any material part of the default. A reasonable and acceptable explanation cannot be tendered in terms so imprecise.
- [47] Taken cumulatively, the explanation falls materially short of the threshold of reasonable acceptability required by *Chetty*. The lacunae are not marginal; they

go to the heart of the first component of sufficient cause. On the authority of *Chetty*, the inadequacy of the explanation is, without more, dispositive of the application under the common law.

*Common law rescission – bona fide defence*

- [48] For completeness, and because the parties directed submissions to each defence advanced, I record my conclusions on the second component of sufficient cause, namely, whether the applicant has demonstrated a *bona fide* defence with *prima facie* prospects of success on the merits. My conclusion is that she has not. I address this ground in turn.
- [49] The first ground is alleged procedural irregularity in the enrolment of the main application on the unopposed roll. For the reasons given in relation to the Rule 42(1)(a) analysis, the contention that Chapter 13(10) of the Practice Directive precludes such enrolment following a notice of intention to oppose, but absent the delivery of an answering affidavit within the prescribed period, is not a construction that can be sustained on the ordinary reading of the Practice Directive. The ground does not disclose a *prima facie* defence.
- [50] The second ground is the alleged non-compliance with Rule 46(1)(a)(i) of the Rules. The applicant offers a bare denial that she was visited by the sheriff or that any admissions of insufficient movables was made. She does not identify any movable assets of value that she owned at the relevant time, nor does she suggest that any such assets would have been sufficient to satisfy the judgement debt of R99,902.79. A bare denial, unaccompanied by any positive averment as to what would have been found, does not raise a *prima facie* defence of substance. The defence is insufficiently particularised to warrant the rescission of an order already granted.
- [51] The third ground concerns compliance with Rule 46A. The applicant asserts in terms of generality that Rule 46A was not complied with. She does not identify with any particularity which requirement of Rule 46A was allegedly overlooked, nor what material would have been placed before the Court if it had. The order

of 29 July was granted by a Judge who was required to be satisfied that there had been compliance with Rule 46A before declaring the primary residence specially executable.

- [52] The applicant's unparticularised assertion to the contrary is insufficient to found a *prima facie* defence of the character required by Chetty. A judgment debtor who contends on rescission that a Rule 46A safeguard was overlooked must, at the very least, identify the specific safeguard and explain what, had it been observed, would have altered the outcome. The applicant has done neither.
- [53] The fourth ground is the *in duplum* Rule. The applicant's reliance on the Rule proceeds on the premise that the difference between the original debt of R6,555.82 and the current balance R99,902.79 is in substance interest that has exceeded the capital. The premise is unsupported. The current balance as reflected in annexure LRA3, comprises not only interest but also ongoing monthly levy charges that continue to accrue as underlying contractual obligations during the period of default, together with legal costs and disbursements. No arithmetical case has been made out to show that unpaid interest properly so-called has exceeded the capital on which it accrued. The *duplum* defence is not made out even on a *prima facie* basis.
- [54] The fifth ground, the alleged non-joinder of Nedbank Limited as bondholder, is plainly unmeritorious. Annexure LRA2, the sheriff's return, confirms that Nedbank was duly served with the main application on the 20th of June 2024 and elected not to participate. A party that received due notice of proceedings affecting its interests and elected not to join cannot ground a non-joinder objection<sup>8</sup>. The ground does not disclose a *prima facie* defence.
- [55] None of the defences advanced, whether taken individually or cumulatively, amounts to a *bona fide* defence with *prima facie* prospects of success on the merits, as required by Chetty. The second component of sufficient cause is also not established.

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<sup>8</sup> *In re BOE Trust and Others NNO* 2013 (3) SA 236 (SCA) at para 20

[56] Both components of sufficient cause, having failed, the application for rescission under the common law must be dismissed.

#### *Applicant's condonation*

[57] The rescission application was filed on 1 November 2024, approximately 11 weeks after the applicant became aware of the July order on 12 August 2024.

[58] I have already identified the factors the Court considers when faced with an application for condonation herein above. I do not intend to repeat those here.

[59] The explanation tendered for the delay in bringing the rescission application mirrors the explanation tendered for the earlier default and suffers from the same infirmities identified above. More significantly, however, the prospects of success on the rescission, under both Rule 42(1)(a) and the common law, are, for the reasons set out above, poor. Under the *Melane calculus*, the absence of prospects of success is a weighted consideration and weighs here against the applicant.

[60] I have nevertheless considered the rescission application on its merits, in recognition of the fact that it concerns the applicant's primary residence and the home of her minor child. It is appropriate, on that footing, to grant condonation so that the substantive rescission application is determined on its merits. That determination, for the reasons already given, is adverse to the applicant.

#### *Costs*

[61] The respondent has successfully resisted the rescission application, and seeks costs on an attorney and client scale. The basis for the punitive costs request is that the applicant's conduct in filing a notice of intention to oppose, failing, over a period of months, to take any substantive step to defend the main application, and thereafter launching a rescission application on grounds that lack substance.

[62] The ordinary principle that costs follow the result plainly favours the respondent. The issue is whether the applicant's conduct of litigation warrants the departure from the party and party scale. The applicant's conduct is open to criticism, in particular her sustained inaction between March and July 2024 and her pursuit of a rescission application on grounds that, in substance, lack particularisation and *prima facie* merit. I am nevertheless not satisfied that her conduct crosses the threshold of vexatiousness, dishonesty, or gross impropriety ordinarily required before an order for attorney and client costs is made. The applicant is a natural person resisting execution against her primary residence, which is also the home of her minor child. A punitive cost order is in those circumstances not warranted.

[63] The respondent is entitled to its costs of the rescission application on the party and party scale. Having regard to the nature and complexity of the matter, I consider those costs appropriately awarded on scale B.

#### *Order*

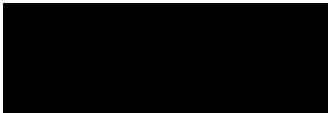
[64] The respondent's application for condonation for the late filing of its answering affidavit is granted.

[65] The point *in limine* raised in the applicant's replying affidavit is dismissed.

[66] The applicant's application for condonation for the late filing of the rescission application is granted.

[67] The application for rescission of the order granted on 29 July 2024 is dismissed.

[68] The applicant shall pay the respondent's costs for the rescission application on the party and party scale, scale B.



DH HINRICHSEN  
JUDGE OF THE HIGH COURT  
PRETORIA

**DATE OF THE HEARING: 16 MARCH 2026**

**DATE OF HANDING DOWN JUDGMENT: 11 MAY 2026**

Appearances:

For the Applicant:

P Zwane of Peter Zwane Attorneys

For the Respondents:

Adv EVR Braga instructed by JDB  
Attorneys Incorporated