IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 2023-099761

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHERS JUDGES: YES/NO

(3) REVISED

..... DATE 27 May 2026

SIGNATURE

In the matter between:

VICTOR MABE ATTORNEYS INCORPORATED	Applicant
and	
JOHN MOTLATSI MARITE	Respondent
In re:	
JOHN MOTLATSI MARITE	Plaintiff
and	
VICTOR MABE ATTORNEYS INCORPORATED	Defendant

This order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by e-mail. This Order is further uploaded to the electronic file of this matter on Case Lines by the Judge or his/her secretary. The date of this Order is deemed to be ..... 2026.

JUDGMENT

DU PLESSIS, AJ

INTRODUCTION

1.

1.1. This is an opposed application for the rescission of an order granted by Khumalo J on 24 April 2025, by which the court granted partial default judgment in favour of the plaintiff in the main action, Dr John Motlatsi Marite (the respondent in this application), against the defendant, Victor Mabe Attorneys Incorporated (the applicant in this application). The applicant is a firm of attorneys, represented in the litigation by its sole director, Mr Victor Mabe.

1.2. The applicant seeks the rescission of that order and, in the alternative, the upliftment of the notice of bar and leave to file its plea. It contends that the order was a default judgment and is therefore susceptible to rescission; that the court ought not to have determined the request for default judgment while its application under Rule 27 of the Uniform Rules to uplift the bar was pending; and that it has a bona fide defence to the claim.

1.3. The respondent opposes the application. He contends that the order was granted after the matter was argued, that it is in substance assailable only on appeal, that the applicant has been guilty of a series of procedural defaults of its own making, and that no *bona fide* defence has been disclosed.

1.4. The parties have been engaged in protracted and increasingly acrimonious litigation arising out of an attorney-and-client relationship that began during 2022 and subsequently broke down. I have had the benefit of full argument from Adv Nortje for the applicant and Adv Muller for the respondent, and of the heads of argument filed by both.

THE PARTIES

2.

2.1. The applicant is Victor Mabe Attorneys Incorporated, registration number 2008/021769/21, of 5[...] B[...] Street, Eloffsdal, Pretoria. It

was the defendant in the main action.

2.2. The respondent is Dr John Motlatsi Marite, a medical practitioner of Silver Lakes, Pretoria East. He was the plaintiff in the main action.

THE PROCEDURAL HISTORY AND THE DEFAULTS

3.

3.1. The respondent issued combined summons on 3 October 2023, claiming R141,992.67 with interest and costs. The claim, sounding in damages, arises from an attorney-and-client relationship and comprises three components: damages of R56,213.96 in respect of settlements and payments allegedly made to third parties without the respondent's instruction; R30,750.00 in respect of allegedly excessive counsel's fees; and R55,028.71 in respect of alleged overcharging for the applicant's own services.

3.2. The applicant delivered a notice of intention to defend on 20 November 2023, and was accordingly not in default in that respect. The defaults upon which the respondent relies, and their consequences, are these:

3.2.1. the applicant failed to deliver a plea within the dies, which entitled the respondent to serve a notice of bar;

3.2.2. within the period of the bar the applicant delivered a notice of exception under Rule 23(1)(a) on 28 December 2023. A notice of exception is not a pleading but a precursor to an exception. It did not constitute compliance and did not interrupt the running of the dies;

3.2.3. the applicant never delivered the exception itself, and the notice of exception lapsed;

3.2.4. on the second notice of bar, served on 23 February 2024, the applicant delivered a notice under Rule 30(2) and then abandoned it; and

3.2.5. the consequence of the foregoing was that the applicant became ipso facto barred from pleading.

3.3. It is right to record at the outset, and the applicant through Adv Nortje fairly accepted, that these defaults were of the applicant's own making and that the bar took effect. The applicant is a firm of attorneys and ought to have appreciated the distinction between a notice of exception and an exception, and the consequences of failing to prosecute either the exception or a plea. Nothing in this

judgment should be understood as condoning that conduct.

3.4. On 17 April 2025 the applicant served an application in terms of Rule 27 seeking the upliftment of the bar and leave to plead, together with the postponement or removal of the request for default judgment then set down for 22 April 2025. The Rule 27 application was opposed and was placed before the court. The request for default judgment was heard by Khumalo J on 24 April 2025 and the following order was granted:

default judgment in favour of the plaintiff "*for the amounts excessively charged, in the amount of R57,629.41*"; the postponement sine die of the claims in respect of counsel's fees and amounts paid to third parties; interest at 7.25% per annum from date of demand; and costs on the attorney-and-client scale, on scale C.

3.5. The rescission application was launched on 23 June 2025 and the answering affidavit was delivered on 3 October 2025. The applicant filed no replying affidavit. The matter was argued before me on 27 May 2026.

THE ISSUES

4.

Three questions arise. First, whether the order is susceptible to rescission, or whether the applicant's true remedy lies in an appeal. Second, what occurred at the hearing of 24 April 2025 — in particular, whether the applicant was heard, and whether the pending Rule 27 application was determined. Third, whether, on a claim of the nature pleaded, default judgment for a fixed sum was competently granted.

RESCISSION OR APPEAL

5.

5.1. The respondent's primary answer to the application is that the order was granted after argument and is therefore not a default judgment at all, so that the applicant's remedy, if dissatisfied, is an appeal and not a rescission. The applicant, through Adv Nortje, submits that the order was a default judgment entered after the applicant had been barred, and that the presence of its representative does not alter that character.

5.2. I am satisfied that the order must be treated as a judgment by default. The order records, on its face, that judgment was entered

by default; the relief was sought by way of a request for default judgment; and the applicant was, at the time, barred. The distinction between rescission and appeal turns on precisely this. The applicant correctly relies on Pitelli v Everton Gardens Projects CC 2010 (5) SA 171 (SCA), for the proposition that an order granted by default is not final in effect because it remains capable of being revisited by the court that granted it; on De Freitas v Addisionele Landdros, Heidelberg [1998] JOL 3645 (T), in which an order taken by default was held not to be appealable; and on Lee v Road Accident Fund 2024 (1) SA 183 (GJ), for the proposition that a court of appeal should not intervene while the court *a quo* retains the power to alter or reconsider its order, the aggrieved party's remedy in that event lying in rescission.

5.3. These authorities establish that where an order is granted by default, rescission — and not an appeal — is the appropriate remedy. Since I have found that the order of 24 April 2025 was a judgment by default, the applicant has approached this court by the correct procedure. The respondent's contention that the application is no more than a disguised appeal cannot be sustained. The first issue is decided in the applicant's favour.

WHAT OCCURRED AT THE HEARING: THE APPLICANT WAS EXCUSED AND THE RULE 27 APPLICATION

6.

6.1. It is common cause, and on the papers uncontested, that the applicant's representative appeared at the hearing of 24 April 2025 but was "*excused*" by the court on the footing that, being barred, he was not entitled to make submissions. It is also common ground that the Rule 27 application to uplift the bar had been served, was opposed, and formed part of the papers before the court.

6.2. Adv Muller submitted that, because the order was granted in the terms it was, the only inference to be drawn is that Khumalo J must have considered the entire record, including the Rule 27 application, and determined the matter on its merits. He urged that the judgment as granted admits of no other deduction.

6.3. I am unable to accept that submission, for two reasons. First, an inference that the court considered the quantum is not the same as an inference that the court adjudicated the Rule 27 application. The two are distinct. That the court arrived at a figure says something about its engagement with the amounts; it says nothing about whether the application to uplift the bar was heard and

decided. Second, and more fundamentally, the uncontested fact is that the applicant's representative was excused and not permitted to address the court. A litigant who is barred is, on that account, ordinarily precluded from contesting the merits of the claim against it. But a barred litigant remains fully entitled to be heard upon its own application to be relieved of the bar; the bar does not silence a party on the question whether the bar itself should be lifted. The Rule 27 application was the very mechanism by which the applicant sought to cure its default, and it was entitled to argue it.

6.4. On the material before me I cannot find that the Rule 27 application was heard and determined. What I can find is that the applicant was excused without being heard, and that there is no indication that the pending and opposed application to uplift the bar was disposed of before default judgment was granted. To grant default judgment while an undetermined application, the success of which would have entitled the defendant to plead, remained pending and unheard, was, in my respectful view, irregular. The respondent's invitation to infer a determination that the record does not disclose cannot cure that irregularity. This consideration alone lends substantial support to the rescission.

WHETHER DEFAULT JUDGMENT FOR A FIXED SUM WAS COMPETENT

7.

7.1. There is a further and, to my mind, decisive difficulty, and it emerged squarely from the argument. Adv Muller, properly and candidly, conceded that the amount reflected in the default judgment was unliquidated, by reason of the disputed nature of the fees and the marked accounts upon which the claim is based. That concession is well made: the claim is one for damages arising from alleged overcharging and breach of mandate, and the amount could only ever be arrived at by assessment, and not by mere computation of an agreed or self-evident figure.

7.2. The consequence of that concession is significant. A claim that is not for a debt or a liquidated demand cannot be disposed of as though it were. Where a plaintiff seeks default judgment on an unliquidated claim, the court is not entitled simply to accept the figure contended for; it must be placed in a position to assess the amount, upon evidence. The distinction is not a technicality. It exists precisely because an unliquidated amount, by definition, requires proof and judicial assessment before it can be reduced to a money judgment.

7.3. That brings me to what was in fact before Khumalo J. Adv Nortje drew my attention to the discrepancy between the amount pleaded and claimed in the application — the global sum of R141,992.67, and in particular the amount referred to in paragraph 8.4 of the founding papers in the main application — and the amount actually granted, being R57,629.41. The granted figure does not appear in the particulars of claim at all. It is the product of the calculations contained in the schedule prepared on the respondent's behalf (annexure M4), in which items were marked off the applicant's statements of account against the prescribed party-and-party tariffs and a revised total struck. Reliance was also placed by Adv Nortje on annexure N4 to the answering papers (at CaseLines 36-6), filed in opposition, in support of the contention that the amount was disputed and was not a liquidated figure capable of being granted by default.

7.4. The discrepancy is telling. It demonstrates that the court could not have granted R57,629.41 by accepting the sum claimed in the summons, because that sum was never claimed. The figure could only have been reached by an exercise of assessment of the disputed accounts. Yet what appears to have been before the court for that purpose was the summons, a damages affidavit, the marked invoices, and handwritten notes. A damages affidavit and a bundle of marked accounts are documents; they are not, without more, the leading of evidence upon which an unliquidated claim is to be assessed and proved. An affidavit may in a proper case serve as the vehicle for such proof, but only where the claim is one that may competently be disposed of in that manner and where the court directs that the matter proceed upon affidavit evidence. Where, as here, the amount is conceded to be unliquidated and disputed, the placing of documents before the court does not relieve the plaintiff of the obligation to prove the quantum, nor does it convert a disputed, unliquidated claim into one capable of summary disposal by default.

7.5. It follows that, on the respondent's own concession that the amount was unliquidated, the granting of default judgment for the fixed sum of R57,629.41 was not competent on the material before the court. The respondent's submission that the terms of the order admit of only one deduction — that the court must have considered the amounts — does not meet the point. Even accepting that the court engaged with the figures, the difficulty is not whether the court looked at the amounts but whether a disputed, unliquidated claim could be disposed of by default judgment for a fixed sum at all, upon documents rather than evidence. In my view it could not.

An order so granted is one that was erroneously granted, and falls to be rescinded.

7.6. I should add that this conclusion is consistent with, and reinforced by, the respondent's own complaint. Adv Muller submitted, with some force, that the applicant never prosecuted either its notice of bar challenge or its exception, and that the applicant is the author of the procedural morass. That is so. But it does not answer the difficulty. The respondent's remedy, faced with a barred defendant, was to obtain judgment in accordance with the Rules. Where the claim was unliquidated and disputed, that required proof of the quantum; it was not open to the respondent to obtain a fixed-sum judgment as though the claim were liquidated. The applicant's defaults explain why it was barred; they do not validate a judgment granted otherwise than in accordance with the Rules.

THE *BONA FIDE* DEFENCE

8.

8.1. In view of the conclusions reached above, it is not strictly necessary to decide whether the applicant has disclosed a *bona fide* defence, and I do not rest this judgment upon that question. I record, however, that I have considered it.

8.2. The applicable principles are not in dispute. The explanation for a default and the defence on the merits are not to be considered in isolation but together: De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd 1994 (4) SA 705 (E). An applicant who fails to establish a *bona fide* defence cannot succeed however good the explanation: Vosal Investments (Pty) Ltd v City of Johannesburg and Others 2011 (2) SA 372 (KZD); Chetty v Law Society, Transvaal 1985 (2) SA 756 (A). The test is not whether the defence will succeed, but whether, if established at trial, it would constitute a defence in law.

8.3. The applicant's defence on the merits is, in part, weak. Its reliance on a written mandate said to have been concluded on 18 June 2020 is attended by difficulty: the document is unsigned, it predates the agreement pleaded in the particulars, and the applicant filed no replying affidavit to meet the respondent's answer to it. Its reliance on instructions given by way of WhatsApp is asserted but the messages relied upon were not placed before the court. To the extent the defence rests on these matters alone, it is thin. There is, however, a further contention of a different character, namely that the respondent's claim is founded upon

disputed accounts which have not been taxed, and that an untaxed bill remains unliquidated until determined: Werksmans Incorporated v Praxley Corporate Solutions (Pty) Ltd [2015] 4 All SA 525 (GJ); Blakes Maphanga Inc v Outsurance Insurance Company Ltd 2010 (4) SA 232 (SCA).

8.4. Whether that contention ultimately avails the applicant, given the respondent's submission that a settled account cannot be taxed and that the proper remedy is an action of the present kind, is a matter that need not be resolved on these papers and is best left for trial. It is enough to observe that the very dispute over whether the amount is liquidated, taxable, or to be assessed as damages confirms what the respondent conceded: the amount was unliquidated. That confirms, rather than detracts from, the conclusion that the matter was not amenable to default judgment for a fixed sum.

RESCISSION AND UPLIFTMENT OF THE BAR

9.

9.1. For the reasons given, the order of 24 April 2025 falls to be rescinded. The order was a default judgment granted in respect of an unliquidated and disputed claim, for a fixed sum, upon documents and without the quantum having been proved and assessed as the Rules require; and it was granted while the applicant stood excused and unheard, and while its opposed application to uplift the bar remained, so far as the record discloses, undetermined.

9.2. It remains to consider whether the bar should now be uplifted. The relief is sought in the alternative, and is in any event the necessary corollary of rescission: to rescind the judgment but leave the bar standing would restore the applicant to the action while denying it the ability to plead, and would invite a fresh request for default judgment. The requirements for upliftment under Rule 27 — good cause — do not on these facts differ materially from the sufficient-cause enquiry that attends rescission, and I am satisfied that the interests of justice favour the determination of the whole dispute, including the claims postponed sine die, at a trial at which the quantum can be properly assessed. I therefore consider it just to uplift the bar and to afford the applicant leave to deliver its plea. I emphasise that the indulgence extends to the delivery of a plea; the applicant has had ample opportunity to except and has not done so, and the litigation must now proceed to the close of

pleadings without further delay.

COSTS

10.

10.1. Both parties sought costs on the attorney-and-client scale. I am not persuaded that a punitive order is justified against either party. The applicant has succeeded, but its success follows upon a default occasioned by its own want of diligence, and it would not be just to award it the costs of an application made necessary in part by its own conduct. The respondent has resisted the application unsuccessfully, but did so in defence of a judgment in his favour and cannot be visited with a punitive order for having done so. The conduct of neither party in the rescission application itself crossed the threshold of the vexatiousness or bad faith that warrants costs on the attorney-and-client scale.

10.2. In the exercise of my discretion, the fairest order is that the costs of the rescission application be costs in the cause, so that they follow the eventual outcome of the action. To the extent that any costs order is to be made or quantified, it is to be on scale B; the nature and complexity of the matter do not warrant scale C.

ORDER

11.

In the result, I make the following order:

11.1. The default judgment granted on 24 April 2025 is rescinded and set aside.

11.2. The notice of bar is uplifted, and the applicant (the defendant in the main action) is granted leave to deliver its plea within 15 (fifteen) court days of the date of this order.

11.3. The costs of the rescission application shall be costs in the cause, such costs, to the extent applicable, to be taxed or settled on scale B.

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DU PLESSIS AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

Date of hearing:	27 May 2026
Date of judgment:	28 May 2026
For the Applicant:	Adv N Nortje
Instructed by:	Sello B Letsoalo Attorneys Inc, Pretoria
For the Respondent:	Adv E Muller
Instructed by:	Elliott Attorneys Inc, Pretoria