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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 28903/2018
26 May 2026

(1) REPORTABLE: YES/NO

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

(3) REVISED

DATE.....26 May 2026

SIGNATURE

In the matter between:

THE ROAD ACCIDENT FUND **Applicant**

and

HERCULES ALEXANDER SANDENBERGH N.O. **Respondent**

(in his capacity as Curator Bonis for ***BOITUMELO AUDRY KHOZA****)*

(Substituted, by notice in terms of Rule 15(2) and 15(3) dated 17 December 2025, for Adv Heila Basson N.O., the erstwhile Curator ad Litem.)

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 26 May 2026.

JUDGMENT

DU PLESSIS, AJ

INTRODUCTION

1.

1.1. This is an opposed application by the Road Accident Fund ("the RAF", "the applicant" or "the defendant" in the main action) for the rescission of an order of default judgment granted against it by Hawman AJ on 25 September 2024 under the above case number. The applicant also seeks condonation, in terms of Rule 27 of the Uniform Rules, alternatively under the common law, for bringing this application outside the time periods prescribed by the Rules. Mr Mostert appears for the RAF instructed by the State Attorney.

1.2. The application is opposed by Mr Hercules Alexander Sandenbergh N.O., in his capacity as Curator Bonis for Ms Boitumelo Audry Khoza ("the patient"), who was substituted in terms of Rule 15(2) and 15(3) for Adv Heila Basson N.O., the erstwhile Curatrix ad Litem, by notice dated 17 December 2025. I shall refer to the respondent and his predecessor interchangeably as "the respondent" where the context permits. Adv Snyman SC appears with adv Adv Ronald Ernst.

1.3. The respondent opposes the application on the merits and on points in limine and seeks an order dismissing it with costs on the punitive scale of attorney and own client, including the costs of two counsel on scales C and B respectively.

1.4. For the reasons which follow, I am persuaded that the application falls to be dismissed and that a punitive costs order is justified.

THE PARTIES AND BACKGROUND

2.

2.1. The applicant is the Road Accident Fund, a juristic person established in terms of section 1 of the Road Accident Fund Act 56 of 1996, with its head office at Eco Glades Office Park, Centurion. The deponent to the founding affidavit, Mr Faizel Antulay, describes himself as a Senior Claims Handler stationed at the RAF's Menlo Park office.

2.2. The respondent represents the patient, Ms Boitumelo Audry Khoza, who was injured as an eight-year-old pedestrian in a motor vehicle collision on 27 February 2000. It is common cause that the

patient sustained, amongst other injuries, a serious brain injury with neurocognitive, neuro-psychological and psychiatric sequelae, and that she is unable to manage her own affairs.

2.3. A claim was lodged with the RAF on 18 October 2000 by the patient's mother and natural guardian, then represented by Rolanda Lemmer Attorneys. On 23 September 2009 the RAF made an offer of settlement which was accepted on 2 October 2009 in the capital sum of R9 800,00 (with R3 293,83 contribution to costs), all of which was paid out. That settlement is hereinafter referred to as "*the 2009 settlement*".

2.4. In 2017 a Curatrix ad Litem was appointed for the patient. On 24 April 2018 summons was issued, and served on the RAF on 2 May 2018, seeking inter alia to set aside the 2009 settlement and to claim the patient's damages afresh. The RAF's erstwhile panel attorneys, Mothle Jooma Sabdia Inc, entered an appearance to defend and filed a plea on 25 February 2019 which incorporated two special pleas: prescription and (so-called) misjoinder.

2.5. In March 2020 the RAF's litigation model changed: its panel of attorneys was disbanded and the file returned to the RAF. From that point on, and on the deponent's own version, the RAF's case "*was basically left unattended*".

2.6. On 25 August 2021, after argument, Tolmay J handed down an order in which she (a) separated the special pleas and the issue of settlement from quantum and liability in terms of Rule 33(4), (b) dismissed the special pleas, (c) set aside the 2009 settlement agreement, and (d) postponed the determination of quantum and liability sine die. The order made consideration of inter alia section 13(1) of the Prescription Act 68 of 1969 and the report of Dr Kritzinger that the patient was, from the date of the collision, incapable of managing her affairs. The RAF was served with notice of set down and was invited to participate in those proceedings but failed to do so. It has never sought to appeal or rescind the order of Tolmay J, and it accordingly stands as a final order of this Court. I shall return to its significance.

2.7. On 1 August 2023 Tlhapi J (per the order on the papers) granted an order compelling the RAF to comply with the respondent's notice in terms of Rule 21 and to attend a pre-trial conference. The RAF did not comply. On 8 March 2024 Lenyai J struck out the RAF's defence on the application of the respondent. The RAF has not sought to rescind the order of 1 August 2023 or the strike-out order of 8 March 2024.

2.8. On 25 September 2024 the default judgment application proceeded before Hawman AJ. The applicant's erstwhile defence having been struck out, the matter proceeded on the quantum of damages. Hawman AJ granted judgment in favour of the respondent in the sum of R4 136 095,00 (made up of R1 800 000,00 for general damages and R2 336 095,00 for loss of earnings), together with costs of suit including the qualifying and reservation fees of the respondent's experts. The amount obtained under the 2009 settlement was, on the respondent's undisputed version, taken into account in arriving at that figure. It is this order, and only this order, which the present application seeks to set aside.

2.9. The application was served on the respondent on 20 May 2025 — almost eight months after the order which it seeks to rescind, and a year and a half after the strike-out order. The respondent filed its answering affidavit on 25 June 2025. The applicant has not filed a replying affidavit. Nor, as the respondent's counsel pointed out, has the applicant filed any heads of argument.

THE RELIEF SOUGHT — A FUNDAMENTAL DISCONNECT

3.

3.1. The applicant's notice of motion seeks the following relief:

> *"1. The Applicant seeks an order setting aside / rescinding the order granted on the 25th September 2024 by the honourable Justice Hawman AJ."*
>
> *"2. The Applicant also seeks for an order that condonation be granted in terms of Rule 27 of the above Honourable Court's Rules, alternatively in terms of the common law, for bringing this Application out [of] time."*
>
> *"3. That in the event that any Respondent opposes this Application, [it] is ordered to pay costs of this Application."*
>
> *"4. Granting the Applicant such further and/or alternative relief as the above Honourable Court may deem fit."*

3.2. The first difficulty confronting the applicant is the marked disjunction between the relief reflected in the notice of motion and the case actually pleaded in the founding affidavit. The deponent says, at paragraph 9 of the founding affidavit, that the relief sought is interim:

> *"That pending finalization of the application for rescission of the*

default judgments or judgments obtained by the First Respondent against the Applicant, the Warrant of Execution issued and/or authorised by the court in favour of the Respondent under the above Case Number be and are hereby stayed and/or held in abeyance ...”

3.3. In the alternative, paragraph 10 of the founding affidavit prays for the suspension of execution of the orders, and paragraph 11 prays for leave to issue an application for rescission. None of these forms of relief are reflected in the notice of motion, which seeks final rescission and condonation. There is, moreover, no warrant of execution attached to the founding affidavit and no allegation that any such writ has been issued or even threatened. The founding affidavit thus supports relief that has not been claimed, and fails to support the relief that has.

3.4. A litigant is bound to its notice of motion. Where the founding papers do not match the notice of motion, the application is, on that ground alone, defective. Counsel for the respondent submitted, correctly, that this defect is fatal. I agree. The applicant cannot be granted relief which it has not sought, and the relief which it has sought is not supported by the affidavit on which it relies.

POINTS IN *LIMINE*

4.

Lack of personal knowledge

4.1. The respondent contends, in limine, that the deponent to the founding affidavit, Mr Antulay, lacks personal knowledge of the matters to which he deposes. He fails to explain how and when the matter came under his supervision; he does not say what knowledge he has of the conduct of the various case handlers, senior case handlers, team leaders and panel attorneys who dealt with the file before him; and he ventures opinions on the conduct, knowledge and motivation of officials of the RAF whose minds he cannot read.

4.2. On the respondent’s undisputed chronology, the deponent himself was copied into a number of emails before judgment was granted on 25 September 2024 (see, by way of example, the email of 9 September 2024 addressed to Ms Millicent Chiloane and copying “F[...]”), yet his founding affidavit conspicuously avoids dealing with that fact. The affidavit, in significant part, consists of inadmissible

hearsay and bald assertions of opinion.

4.3. I need not base my judgment on this point alone, but the deficiencies in the founding affidavit materially undermine the applicant's case at the threshold and inform the assessment of the overall "*sufficient cause*" test which I deal with below.

No case made out for the relief in the notice of motion

4.4. The disjunction described in paragraphs 14 to 17 above also constitutes, properly understood, a point in limine. The founding affidavit makes out a case (such as it is) for an interim stay of execution pending the launch of a rescission application. The notice of motion seeks final rescission of the order of Hawman AJ. The two are not interchangeable, and the founding affidavit cannot do duty for both.

THE APPLICANT'S FAILURE TO ATTACK THE PRIOR ORDERS

5.

5.1. A central, and in my view dispositive, feature of this application is what it does not seek to do.

5.2. The 2009 settlement was set aside by Tolmay J on 25 August 2021. The special pleas of prescription and misjoinder were dismissed in the same order. That order has stood, unchallenged, for more than four and a half years. It has not been appealed; no rescission application has ever been brought in respect of it; no condonation has ever been sought for the delay; and no factual basis is laid in the founding affidavit for impugning it. Yet the applicant's founding affidavit, at paragraphs 31 to 32 and elsewhere, attempts to resuscitate the very issues finally determined in that order — namely, that the claim has prescribed and that there is a misjoinder. Those issues are res judicata. The Court is not at liberty, in this rescission application, to revisit them.

5.3. Similarly, the order of 1 August 2023 compelling the RAF to comply with the Rule 21 notice and to attend a pre-trial conference; the order of 8 March 2024 striking out the RAF's defence; and the certification of the matter as trial-ready in 2020 — none of these orders are sought to be set aside. The order which the applicant seeks to rescind — that of Hawman AJ on 25 September 2024 — was granted because, and only because, the RAF's defence had been struck out. It is, in substance, the inexorable consequence of the strike-out order, the rescission of which the applicant has expressly elected not to seek.

5.4. It follows that even if I were minded to set aside the order of Hawman AJ, the strike-out order would remain. The matter would be reset to the position which obtained on 9 March 2024: with the RAF's plea struck out, and the respondent entitled to take default judgment afresh. Rescission of the order of 25 September 2024 would, in those circumstances, serve no purpose. It would not restore the RAF's opportunity to defend; it would merely require the respondent to re-litigate the quantum determination already made. As I shall illustrate below, that is precisely the species of abuse with which our courts have been increasingly confronted by the RAF.

THE LEGAL FRAMEWORK FOR RESCISSION

6.

6.1. The applicant's notice of motion does not specify the legal basis upon which rescission is sought. There are three possible bases: Rule 31(2)(b), Rule 42(1) and the common law. I deal briefly with each.

Rule 31(2)(b)

6.2. Rule 31(2)(b) applies to default judgments granted in actions. An application thereunder must be brought within 20 days of the applicant having knowledge of the judgment, and good cause must be shown. The applicant filed this application some eight months after the judgment of 25 September 2024 and gives no proper explanation for the delay. The threshold of "*good cause*" under Rule 31(2)(b) is identical, in substance, to the common-law test, to which I shall turn in a moment.

Rule 42(1)(a)

6.3. Rule 42(1)(a) permits the setting aside of an order erroneously sought or erroneously granted in the absence of any party affected thereby. As the Constitutional Court made plain 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 2021 (11) BCLR 1263 (CC), where a litigant has been given notice of the case against them and sufficient opportunity to participate, but elects to be absent, that absence does not bring the matter within Rule 42(1)(a). An order granted in such circumstances is not "erroneously granted" within the meaning of the Rule.

6.4. On the respondent's detailed (and undisputed) chronology, the

RAF was given notice of every step in this litigation between March 2020 and September 2024. Set-downs were served by email at the addresses provided by the RAF's own management; case handlers were specifically invited to CaseLines; multiple reminders were sent; and the deponent himself was copied into emails confirming the 25 September 2024 date. The applicant cannot avail itself of Rule 42(1)(a).

Common law

6.5. At common law, an applicant for rescission must show "*sufficient cause*", which the cases have crystallised into a conjunctive three-fold requirement (see *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003 (6) SA 1 (SCA) at 9; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764J–765D):

"(a) a reasonable and acceptable explanation for the default;"

"(b) that the application is made bona fide; and"

"(c) the existence of a bona fide defence which prima facie has some prospect of success."

6.6. As Muller JA emphasised in Chetty, the test is dual in nature, conjunctive and not disjunctive: "*an acceptable explanation of the default must co-exist with evidence of reasonable prospects of success on the merits*". Without a reasonable explanation, prospects of success are immaterial; without prospects of success, the explanation will not avail.

6.7. Where the default is wilful, or attributable to gross negligence, the court should generally not come to the applicant's aid (*Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 530). "*Wilful*" in this context means knowing of the action, knowing of the steps required to avoid default, and yet deliberately failing to take those steps.

APPLYING THE LAW TO THE FACTS

7.

Explanation for the default

7.1. The applicant's entire explanation for its default is contained in two sentences of the founding affidavit:

> *"During March 2020, the Applicant's legal model changed due to the erstwhile panel of attorneys falling away after a Court decision that ordered such and the matter was not dealt with*

[by] an Attorney and did not receive the attention it deserved, since all the files were requested to be handed back to the Applicant and were basically left unattended."

7.2. That explanation is, with respect, entirely inadequate. First, the change of litigation model was a deliberate decision of the RAF itself; it cannot rely on the consequences of its own choice to excuse non-participation. Second, the explanation covers a period of more than four and a half years (from March 2020 to September 2024). Third, the explanation is silent on the chronology of more than 40 separate emails, notices, set-downs, applications and court orders, all of which were served on the RAF at the addresses it provided. Fourth, the deponent himself was copied into critical correspondence in 2024 and offers no explanation for his own inaction.

7.3. In *Road Accident Fund v Ngobeni obo Phelela* (35926/17) [2022] ZAGPPHC 866 (18 November 2022), this Division held that the RAF's deliberate policy of relying on "*judicial oversight*" rather than attending court was not a defence available on a rescission application. So too in Road Accident Fund v Plaatjies (72939/2017) [2022] ZAGPPHC 540 (25 July 2022). The RAF is to be treated as every other litigant; section 9 of the Constitution requires no less.

7.4. I find that the applicant has not provided a reasonable and acceptable explanation for its default. On the contrary, the conduct revealed by the chronology amounts to wilful default within the meaning of *Harris v Absa*: the RAF knew of every step in the proceedings, knew what was required to avoid default, and deliberately elected to do nothing. As the SCA reminded us in *Lodhi 2 Properties Investments CC v Bondev Developments* 2007 (6) SA 87 (SCA), a court granting judgment in such circumstances does not grant it on the basis that there is no defence, but on the basis that the defendant has been duly notified and has elected not to defend.

Bona fide defence

7.5. The two defences upon which the applicant relies on the merits are prescription and "*misjoinder*". Both were raised in the special pleas. Both were dismissed by Tolmay J on 25 August 2021. That dismissal has never been challenged. It is res judicata between the parties. The applicant cannot, in this rescission application, attempt to relitigate those issues.

7.6. Even were it permissible to revisit those defences, they would face formidable obstacles. As regards prescription, section 13(1) of the

Prescription Act 68 of 1969 suspends the running of prescription where the creditor is under a disability. The *Constitutional Court in Van Zyl N.O. v Road Accident Fund* [2021] ZACC 44 confirmed that, in the case of a person of unsound mind, prescription begins to run only from the date of the appointment of a curator ad litem (in this case, 27 July 2017). On the facts before Tolmay J, including the report of Dr Kritzinger that the patient is incapable of managing her own affairs, prescription cannot succeed. As regards "*misjoinder*", the applicant has not begun to make out a sustainable case. It remains free, if so advised, to institute its own proceedings against Ms Lemmer or the patient's mother; that does not give it a defence to the patient's claim.

7.7. The further "*defence*" advanced — that payment in terms of the 2024 order would amount to fruitless and wasteful expenditure given the prior 2009 settlement — is unsustainable. The 2009 settlement was set aside by an order of this Court which has not been challenged. The R9 800,00 paid in 2009 was, on the respondent's undisputed evidence, taken into account in computing the amount awarded by Hawman AJ. There can be no fruitless or wasteful expenditure incurred pursuant to a valid court order: cf *Road Accident Fund v Plaatjies* (*supra*) at paragraphs 24–25.

<u>*Bona fides*</u>

7.8. In light of the matters set out above, I am unable to find that this application has been brought bona fide. It has been brought:

7.8.1. nearly eight months out of time;

7.8.2. in support of a notice of motion which is not aligned to the founding affidavit;

7.8.3. without any attack on the strike-out order which is the proximate cause of the default judgment under attack;

7.8.4. in reliance on defences finally adjudicated against it more than four years ago;

7.8.5. without a replying affidavit answering the respondent's detailed chronology; and

7.8.6. without the filing of heads of argument by the applicant who launched it.

7.9. The inference is, in my view, irresistible that this application was launched not in good faith but in order to delay payment to a patient who has been waiting nearly a quarter of a century for fair

compensation for life-altering injuries sustained when she was a child of eight. That is precisely the sort of conduct which our courts have characterised as vexatious. As Gardiner JP observed in *In re Alluvial Creek Ltd* 1929 CPD 532 at 535 (a *dictum* approved by the Supreme Court of Appeal in *Boost Sports Africa (Pty) Ltd v South African Breweries* (Pty) Ltd 2015 (5) SA 38 (SCA)), proceedings may be vexatious where they have the effect of putting the other side to unnecessary trouble and expense which the other side ought not to bear, even where the litigant's subjective intent may not have been to vex. The conduct of this application is squarely within that description.

CONDONATION

8.

8.1. The applicant seeks condonation in terms of Rule 27 "*for bringing this Application out [of] time*". Beyond the bald request, however, no case is made out: there is no explanation in the founding affidavit for the period that elapsed between 25 September 2024 and 20 May 2025; no condonation principles are addressed; no prejudice analysis is conducted.

8.2. The principles for condonation overlap, in this context, with the common-law test for rescission. As Muller JA emphasised in *Chetty v Law Society* (*supra*), an acceptable explanation of the default must co-exist with reasonable prospects of success on the merits; neither limb suffices on its own. The respondent's heads of argument correctly draw attention to the further principle that, where there is no reasonable and acceptable explanation for the delay, the prospects of success become immaterial; and where there are no prospects of success, the explanation, however convincing, will not save the application. In view of my findings above on the merits, prospects of success are non-existent. Condonation falls to be refused on that ground alone.

ABUSE OF PROCESS

9.

9.1. Section 173 of the Constitution and our common law empower a court to protect its own processes against abuse. In *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation* 2020 (1) SA 327 (CC), the Constitutional Court reaffirmed that abuse-of-process concerns are motivated by the need to protect the integrity

of the adjudicative functions of the court and to ensure that its procedures are not used for purposes extraneous to the truth-seeking objective inherent in the judicial process.

9.2. This application bears every hallmark of the very abuse with which Phatudi J was confronted in *Road Accident Fund v Plaatjies* (*supra*): a generic, template application brought as a matter of course to delay payment, without proper grounds and without proper engagement with the matter. The applicant's own failure to file a replying affidavit, or heads of argument, or even to apply for an enrolment date (which the respondent had to procure for the applicant), is eloquent on the issue of *bona fides*. I find that this application is an abuse of the process of this Court.

COSTS

10.

10.1. The respondent seeks costs on a punitive scale of attorney and own client, including the costs of two counsel on scales C and B respectively. The principles governing punitive costs are well-established. As Tindall JA observed in *Nel v Waterberg Landbouers Ko-operatiewe Vereeniging* 1946 AD 597 at 607, attorney-and-client costs are appropriate where, by reason of special circumstances arising from the conduct of the losing party, the court considers it just to make such an award so that a successful party will not be out of pocket.

10.2. In the present case, the circumstances cumulatively warrant a punitive order:

10.2.1. the applicant deliberately ignored numerous notices, set-downs and invitations to participate over a period of several years;

10.2.2. it launched this application on demonstrably defective papers;

10.2.3. it did not file a replying affidavit;

10.2.4. it did not file heads of argument;

10.2.5. it obliged the respondent to enrol the application;

10.2.6. the practical effect of the application, win or lose, is to delay payment of life-changing compensation to a profoundly injured and vulnerable patient.

10.3. As to the prayer for the costs of two counsel, I am unable to grant

it. The respondent's practice note identifies only one counsel briefed on the application — Adv R Ernst, of Club Advocates' Chambers — and the heads of argument are signed by him alone. Although no second counsel is named on any of the papers, a second counsel Adv Snyman SC was in attendance at the hearing and argued the matter. The matter is a two counsel matter on its facts and complexity. The appropriate order is for the costs of two counsel on where so employed.

CONCLUSION AND ORDER

11.

11.1. The applicant has failed to make out a case on any recognised basis for the rescission of the order of Hawman AJ. There is no proper explanation for the default. There is no *bona fide* defence. The application is not aligned to its own notice of motion. It does not attack the orders which gave rise to the default judgment under attack. It is brought outside the time limits, without any proper case for condonation.

11.2. In the result, the following order is made:

11.2.1. The application for condonation is refused.

11.2.2. The application for rescission is dismissed.

11.2.3. The Applicant/ Defendant is ordered to pay all capital amounts due and payable to the Respondent /Plaintiff, including any and all costs already taxed, together with interest on all such amounts, within 30 calendar days of date of service of this order.

11.2.4. The applicant is ordered to pay the costs of the application on the scale as between attorney and client, such costs to include the costs of two counsel where so employed.

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J DU PLESSIS AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Date of hearing:	26 May 2026
Date of judgment:	27 May 2026

APPEARANCES:

For the Applicant:

Mr F Mostert

Instructed by:

The State Attorney, Pretoria

For the Respondent:

Adv Snyman SC with Adv Ronald Ernst Chambers, Pretoria

Instructed by:

Andre du Plessis Incorporated,

c/o Stegmanns Inc, Pretoria