


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2020/19373

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
17.6.2026	
DATE	SIGNATURE

In the matter between:

**CHARMAINE VUYELWA NZANZWA NO**

Applicant

(In her capacity as the Executrix in the Estate of  
the late Mabusha Bigvai Masekela  
Estate Number 021568/2023)

and

**MASEKELA AYANDA RAISIBE NO**

Respondent

(In her capacity as the Executrix in the Estate of  
the late Toto Maria Madi Masekela  
Estate number: 008348/2016)

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## JUDGMENT

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Van Aswegen AJ

### INTRODUCTION:

- [1] The Applicant, in her capacity as executrix of the estate of the late Mabusha Bigvai Masekela (the "Masekela estate")<sup>1</sup>, seeks an order rescinding and setting aside the Default Judgment granted by Molahlehi J on *20 January 2022* (the "Molahlehi J order").<sup>2</sup>
- [2] The order was granted against Mr Mabusha Bigval Masekela ("Mr Masekela") the executor, at the time, of the late Ms Toto Maria Madi Masekela's estate ("the Toto estate"). It arose from Mr Masekela's personal misuse of assets belonging to the Toto estate<sup>3</sup> and directed payment of *R1 114 495.67* plus interest.
- [3] The Rescission Application was issued on *9 April 2025* approximately three (3) years and two (2) months after the Default Judgment was granted.

### FACTUAL MATRIX:

- [4] It is common cause that:
- [4.1] On *15 April 2016*, Mr. Masekela was appointed as the executor of the Toto estate.<sup>4</sup>
- [4.2] On *07 June 2017*, the Master of the High Court, Johannesburg, sent Mr. Masekela a letter requiring him to lodge a Liquidation and Distribution account for the Toto estate. He failed to comply.

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<sup>1</sup> CVN 3at 015-32

<sup>2</sup> CVN 4 at 015-33

<sup>3</sup> Case Lines 003-1

<sup>4</sup> CVN 5 at 015-30

- [4.3] Consequently Mr. Masekela was removed as the executor of the Toto estate on *17 July 2017*<sup>5</sup> in terms of Section 54 of the Administration of Estates Act on *17 July 2017*.<sup>6</sup>
- [4.4] The Toto estate had no executor until *3 May 2018* when the Respondent applied for Letters of Executorship, which she received on *24 August 2018*.<sup>7</sup>
- [5] On *10 February 2020*, the Respondent's attorneys sent Mr. Masekela a letter recording his unlawful possession and use of the Toto estate's assets and demanding repayment of *R1 114 495.67* to the Toto estate.
- [6] Mr. Masekela on *11 February 2020* asked the Respondent's attorneys for their banking details, acknowledged that he owed the Toto estate *R1 114 495.67*, and undertook to repay that amount.<sup>8</sup>
- [7] On *25 February 2020*, following a further enquiry from the Respondent's attorneys, Mr. Masekela emailed them to say that he would be meeting a certain Mr. Geyser to arrange the transfer of the funds.<sup>9</sup>
- [8] The Respondent issued Summons on *21 August 2020* against Mr. Masekela for *R1 114 495.67*. It was pleaded that Mr. Masekela had:
- [8.1] taken possession and use of the assets of the Toto estate amounting to *R1 114 495.67* for his personal use, which was prejudicial to the heirs of the Toto estate;
- [8.2] had misrepresented that there were no assets in the Toto estate for distribution to the heirs;
- [8.3] failed to declare Toto's lineage of next of kin who had to share in the proceeds of the Toto estate.

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<sup>5</sup> CVN 6 at 015-36

<sup>6</sup> 003-26

<sup>7</sup> Annexure AM 1 at 015-139

<sup>8</sup> POC 3 at 003-24

- [9] The Summons and Particulars of Claim were served personally on Mr. Masekela.<sup>10</sup>
- [10] Mr. Masekela did not enter an appearance to defend.
- [11] The Respondent referred the case to the Registrar for Default Judgment on *29 September 2020*. Subsequently, the Registrar referred the case to open court on *25 March 2021*.
- [12] The Notice of Set Down of the Default Judgment was also twice served personally on Mr. Masekela – namely on *19 May 2021* and again on *10 December 2021*.
- [13] The Default Judgment was thereafter heard, and an order was granted by Molahlehi J on *20 January 2022*.
- [14] Five (5) months and two days after the Default Judgment was granted Mr. Masekela passed away on *24 June 2022*.<sup>11</sup>
- [15] Mr. Masekela died intestate, his only heir being the Applicant's daughter, Ms. Mokgadi Sasha-Lee Masekela who resides in China.
- [16] There was no executor of the deceased's estate for the period from *24 June 2022 to 25 July 2022*.
- [17] Ms. Mokdagi Sasha-Lee Masekela, not intending to return to the Republic of South Africa, could for practical purposes, not administer her father's estate. As a result, she nominated the Applicant as Executrix of the said estate.
- [18] The Applicant was appointed as executrix of the deceased's estate on *26 June 2022*<sup>12</sup> and she instructed attorneys to assist her in the liquidation and distribution of Mr. Masekela's estate.

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<sup>10</sup> 004-1

<sup>11</sup> CVN 8 015-43

<sup>12</sup> CVN 3 at 015-33

- [19] On the *19<sup>th</sup> day of October 2022*, the Applicant's attorneys received a letter from the Respondent's attorneys wherein they were informed that Default Judgment had been granted against Mr. Masekela.<sup>13</sup>
- [20] The Applicant pleaded that she was only financially able to instruct her attorneys only on *26 May 2023*.
- [21] On *31 May 2023*, the Applicant's attorneys wrote to the Respondent's attorneys, confirming that they had noted the Default Judgment and would address it once there was clarity on the estate's available assets. Importantly, they gave no indication that the Applicant intended to seek a rescission of that judgment.
- [22] The Applicant's attorneys further requested that the Respondent's brother who was occupying Mr. Masekela's immovable property situated at *10539 Wellem Street, Kwa-Thema, Gauteng Province* vacate the property and/or allow the Applicant entry in order to prepare a detailed inventory of the estate.<sup>14</sup>
- [23] The Applicant furthermore pleaded that:
- [23.1] the Respondent and her family had taken possession of Mr. Masekela's motor vehicles and documents, including his identity document, vehicle registration documents, and title deed;
- [23.2] on *3 July 2023*, the Respondent's brother allegedly misrepresented himself as executor of Mr. Masekela's estate and concluded a sale agreement disposing of one of Mr. Masekela's motor vehicles<sup>15</sup> and
- [23.3] that the Respondent's brother had unlawfully occupied Mr. Masekela's immovable property.

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<sup>13</sup> CVN 9 at 015-44

<sup>14</sup> CVN 11 at 015-48

<sup>15</sup> CVN 10 at 015-46

- [24] The Respondent and her family refused the Applicant access to the immovable property and made it clear that they would not cooperate. The Respondent's brother also refused to vacate the property.
- [25] The Applicant had instructed her attorneys to issue a formal letter of demand requiring the Respondent and her family to return all the assets belonging to Mr. Masekela's estate. The Respondent similarly failed to comply, prompting the Applicant to institute legal proceedings against them.
- [26] On the *20th day of July 2023*, the Applicant instituted an application for specific performance against the Respondent and her family in the court under case number *71462/2023*.<sup>16</sup> The Respondent and her family elected to oppose the relief sought.
- [27] The specific performance application sought to recover the deceased estate's assets so that a detailed and comprehensive liquidation and distribution account could be prepared, as the Respondent had repeatedly requested.
- [28] The Applicant pleaded that, whilst the Respondent's brother occupied the deceased's immovable property, she observed that the property was being neglected and falling into disrepair. She therefore launched an eviction application against him.<sup>17</sup>
- [29] The Respondent's brother subsequently proceeded to launch an application for a Protection Order in the Kwa-Thema District Court on *4 October 2023* under case number *229/2023*.<sup>18</sup>
- [30] By this stage, Mr. Masekela's estate was involved in three legal disputes with the Respondent and her family. Although aware that they held estate assets, the Respondent continued to demand a Liquidation and Distribution Account for Mr. Masekela's estate.

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<sup>16</sup> CVN 12 at 015-50

<sup>17</sup> CVN 15 at 015-55

<sup>18</sup> CVN 16 at 015-56

- [31] The Applicant prepared a Draft Liquidation and Distribution Account after the Respondent threatened to issue a warrant of execution if one was not provided.<sup>19</sup>
- [32] The Applicant was left with no choice but to rely on estimations of Mr. Masekela's assets. The Respondent was then supplied with an unsigned Draft Liquidation and Distribution account.<sup>20</sup> The Respondent's attorneys, were informed that it was merely a draft as the Applicant still did not have access to the Deceased's assets.
- [33] The Respondent's attorneys made it clear that their intentions were to continue holding onto Mr. Masekela's immovable property and that the Applicant was to surrender the estate in terms of the Insolvency Act 24 of 1936.<sup>21</sup>
- [34] The Final Liquidation and Distribution Account of Mr. Masekela's estate was finalized on the *9th day of November 2023*, and it lay for inspection from the *10th day of November 2023 to the 1st day of December 2023* at the Springs Magistrate's Court.<sup>22</sup>
- [35] The Respondent's attorneys then proceeded to launch an application for the provisional sequestration of Mr. Masekela's estate on the *30th day of January 2024*.<sup>23</sup>
- [36] The Applicant's attorneys proceeded to oppose the sequestration application and filed their answering papers.
- [37] On *21 February 2024*, the Applicant received information that would be vital to the administration of Mr. Masekela's estate from the Respondent's attorneys.<sup>24</sup> The Applicant's attorneys consulted with the Applicant and informed her of the new information they had received. The Applicant instructed them to amend the Liquidation and Distribution Account in accordance with the information regarding the Immoveable Property.<sup>25</sup>

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<sup>19</sup> CVN 17 at 015-57

<sup>20</sup> CVN 18 at 015-61

<sup>21</sup> CVN 19 at 015-66

<sup>22</sup> CVN 20 at 015-68

<sup>23</sup> CVN 21 at 015-74

<sup>24</sup> CVN 21.1 at 015-75

<sup>25</sup> CVN 21.2 at 015-76

[38] On 3 April 2024, the Applicant's attorneys sent an email to the Respondent's attorneys incorporating a Deed of Settlement conceding Mr. Masekela estate's liability to the Toto estate.<sup>26</sup> The settlement agreement contains a paragraph which reads:

*“AND WHEREAS the Estate of the Late Mabusha Bigvai Masekela is liable to the Estate of the Late Toto Maria-Madi Masekela in the amount of R1 114 495.67 (One Million, One Hundred and Fourteen Thousand, Four Hundred and Ninety-Five Rands and Sixty-Seven Cents) by virtue of a default judgement that was granted against the Late Mabusha Bigvai Masekela under case number 19373/2020;”*<sup>27</sup>

[39] On the 4<sup>th</sup> day of July 2024, a Court Order granting the eviction of the Respondent's brother by the 16<sup>th</sup> day of August 2024 was granted and a Warrant of Ejectment was served on him.<sup>28</sup>

[40] On the 16<sup>th</sup> day of August 2024, the Respondent's brother was evicted. The Applicant thereafter took possession of the Mr. Masekela's assets.

[41] Given the fact that the heir of the Estate resides in China and has no intention of returning to South Africa, it became apparent that the best course of action would be to sell Mr. Masekela's estate assets. This would allow the Applicant to pay off Mr. Masekela's creditors and distribute the balance to the heir.

[42] It came to the Respondent's Attorney's attention that the Applicant intended to sell the Immovable Property. In response thereto, they sent a letter to the municipality, and the Applicant was informed that the municipality could not release the clearance figures in respect of the Immovable Property pending the outcome of the sequestration application.<sup>29</sup>

[43] On the 11<sup>th</sup> day of December 2024, the Respondent's attorneys further lodged a complaint with the Master of the High Court, Johannesburg wherein they attempted to remove the Applicant as the Executrix of Mr. Masekela's Estate.<sup>30</sup>

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<sup>26</sup> AM 9.1 and AM 9.2 at 015-181 and

<sup>27</sup> 015-183

<sup>28</sup> Annexure CVN 22 at 015-81

<sup>29</sup> CVN 23 at 015-84

<sup>30</sup> CVN 24 at 015-85

- [44] On the *1<sup>st</sup> day of January 2025*, the Applicant received confirmation from the Master of the High Court that the removal of the Applicant from the office of Executrix is not possible due to the pending litigation. The Master also further confirmed that the Applicant had been granted an extension to lodge Mr. Masekela's Liquidation and Distribution Account.<sup>31</sup>
- [45] On the *17<sup>th</sup> of January 2025*, the Applicant consulted with her attorneys and advised them to proceed with the rescission application, however the Applicant had no means to financially instruct them at that point in time.
- [46] On the *11<sup>th</sup> day of February 2025*, the Applicant had the means to financially instruct her attorneys to proceed with the rescission application.

#### **CRUX OF THE MATTER:**

- [47] In order to seek a rescission, the Applicant has to allege default, reasons for the default and *good cause* (if necessary).
- [48] A judgment may be set aside in terms of the provisions of:
- [48.1] Rule 31(2)(b);
  - [48.2] Rule 42 and
  - [48.3] the Common Law.
- [49] I shall sequentially consider the two Rules and there after the Common Law.

#### **RULE 31(2)(b)**

- [50] Rule 31(2)(b) is unequivocal, it requires a defaulting party to make a rescission application within 20 days from the date of acquiring knowledge of the order and to demonstrate *good cause*.

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<sup>31</sup> CVN 26 at 015-92

- [51] The judgment must have been a default judgment granted under rule 31(2)(a) of the uniform rules of court. This means that it must have been a judgment granted by the court and not the registrar. It also means that the judgment by default must have been due to the failure to enter appearance or to file a plea.<sup>32</sup>
- [52] An application for rescission of judgment is not an inquiry about whether or not to penalise a party for the failure to follow the rules and procedures. The question always is whether or not the explanation for the default gives rise to a probable inference that there is no *bona fide* defence. The court has a wide discretion to grant or refuse rescission.<sup>33</sup> The discretion to rescind the judgment must always be exercised judicially and is primarily designed to enable courts to do justice between the parties. *Good cause*<sup>34</sup> means that:
- [52.1] the Defendant has a reasonable explanation for the default.
- [52.2] the application is *bona fide* and not made with the mere intention to delay the Plaintiff's claim.
- [52.3] the Defendant can show that he or she has a *bona fide* defence to the Plaintiff's claim and that he or she has a *bona fide* intention to raise the defence if the application is granted.
- [53] Wilful default is normally fatal<sup>35</sup>. "*Wilful*" in this context connotes knowledge of the action and its legal consequences and a conscious decision, freely taken, to refrain from entering an appearance, irrespective of the motivation.
- [54] It is common cause that the Summons as well as both the Notices of Set Downs were served personally on Mr. Masekela. Despite personal service, Mr. Masekela did not defend the action or appear in court when called upon.

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<sup>32</sup> *De Sousa v Kerr* 1978 3 SA 635 (W).

<sup>33</sup> 2017 1 ALL SA 116 (GP)

<sup>34</sup> *Madinda v Minister of Safety & Security* 2008 3 All SA 143 (SCA);

<sup>35</sup> *Trapel Farms CC v Rodel Financial Services (Pty) Ltd* 2013 JOL 29822 (KZP) par 20

- [55] The Applicant has proffered no sufficient explanation or any explanation at all for Mr. Masekela's default. The mere allegation that the Applicant was ill is not a reason for him not to act in terms of the Summons or the Notices of Set downs. Mr. Masekela's non action in not defending and opposing the relief claimed is consistent with Mr. Masekela's admission of liability to the Toto estate for the claimed amount.
- [56] The Applicant, in her capacity as executrix, became aware of the Default Judgment on *19 October 2022* but took no action until *11<sup>th</sup> day of February 2025*. Although she pleaded a lack of funds to instruct attorneys, it is clear that she had funded other litigation between the parties prior to *2025*. If there was a genuine, *bona fide* defence, the rescission application ought to have been pursued as a matter of priority.
- [57] There is also no indication that Mr. Masekela intended to seek rescission of the Default Judgment, or that the Applicant was aware of any such intention.
- [58] The Liquidation and Distribution Account of Mr. Masekela's estate dated *9 November 2023* furthermore reflects the indebtedness to the Toto estate in the amount of *R1 114 495.67*.<sup>36</sup> Even the Amended Liquidation and Distribution Account dated *23 February 2024* reflects this indebtedness.<sup>37</sup> This is a definitive and certain indicator of the Applicant's acknowledgment of Mr. Masekela's indebtedness to the Toto estate and acceptance of the Default Judgment.
- [59] Additionally, the Applicant during *April 2024* also entered into a settlement agreement with the Respondent where Mr. Masekela's indebtedness to the Toto estate was also admitted in the amount of *R1 114 495.67*.<sup>38</sup>

[59.1] The settlement agreement contains a paragraph which reads:

*“AND WHEREAS the Estate of the Late Mabusha Bigvai Masekela is liable to the Estate of the Late Toto Maria-Madi Masekela in the amount of R1 114 495.67 (One Million, One Hundred and Fourteen Thousand, Four Hundred and Ninety-Five Rands and Sixty-Seven Cents) by virtue*

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<sup>36</sup> 015-69

<sup>37</sup> 015-77

<sup>38</sup> 015-183

*of a default judgement that was granted against the Late Mabusha Bigvai Masekela under case number 19373/2020;*<sup>39</sup>

- [60] In *Nale Trading CC v Freyssnet Posten (Pty) Ltd*<sup>40</sup> Minnaar AJ, held that a person will be in wilful default if the following can be shown:
- [60.1] knowledge that the action is being brought against him or her;
  - [60.2] a deliberate refraining from entering an appearance, though free to do so and
  - [60.3] a certain mental attitude towards the consequences of the default.
- [61] It is clear that Mr. Masekela never disputed the indebtedness. To the contrary, he acknowledged same and conveyed that he planned to pay the debt.
- [62] Despite personal service of the Summons and Notice of Set downs on Mr. Masekela he sought not to defend the action. His actions are consistent with an individual who acknowledged and was aware of his indebtedness to the Toto estate.
- [63] Mr. Masekela had personal knowledge of the action and deliberately refrained from opposing same though he was free to do so.
- [64] The Applicant's delay in bringing the application was explained as follow:
- [64.1] Mr. Masekela died on *24 June 2022*, five (5) months and two (2) days after the judgment was granted against him. He was ill.
  - [64.2] There was no executor of the deceased's estate from *24 June 2022 to 25 July 2022*.
  - [64.3] The Applicant, as executrix became aware of the Default Judgment on *19 October 2022*.
  - [64.4] By *26 May 2023*, the Applicant was financially able to instruct her attorneys.

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<sup>39</sup> 015-183

<sup>40</sup> 2021 JDR 2153 (GJ).

[64.5] The Applicant however only on *11<sup>th</sup> day of February 2025* instructed her attorneys to proceed with the rescission application.

[65] The Applicant became aware of the Default Judgment on *19 October 2022*, but only proceeded with rescission on *11 February 2025*, some two years and four months later. Although she raised financial constraints, she had earlier opportunities to act, having already litigated against the Respondent and her family during *2023 and 2024*.

[66] If there was a genuine and *bona fide* intention to bring a rescission application the Applicant, represented by her attorneys, had to know and appreciate that time was of the essence. I am of the firm opinion that the delay is insufficiently explained in light of:

[66.1] Mr. Masekela's failure to act after the judgment was granted and

[66.2] the earlier history of litigation between the Applicant and the Respondent.

[67] Mr. Masekela had an opportunity to seek a rescission, as he died only four months after the judgment was granted. The application does not explain why he failed to do so. His alleged illness is simply not enough reason for not proceeding with a rescission. The only inference to be drawn is that he did not seek rescission because he knew he was indebted to the Toto estate. He never disputed that indebtedness, and his conduct confirms his awareness of the debt.

[68] As a defence, the Applicant sets out that Mr. Masekela as the executor of the estate had an amount of *R1 346 370.88* (One Million, Three Hundred and Forty-Six Thousand, Three Hundred and Seventy Rand and Eighty-Eight Cents) for distribution.<sup>41</sup> The late Toto had died intestate, and her estate was to be administered in terms of the Intestate Succession Act 81 of 1987 to her surviving descendants being her son, the Late Mr. Masekela and her two grandchildren' being Ayanda Raisebe Masekela (the Respondent) and Kagiso Selma Masekela. Whilst Mr. Masekela was

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<sup>41</sup> CVN 7 at 015-39

still alive, as the then Executor of the Estate of Toto and being an heir of the said estate, he distributed to himself his share of the inheritance.

[69] The Applicant asserts that in terms of the Intestate Succession Act 81 of 1987, the Toto Estate was to be divided as follows:

[69.1] 50% of the Estate was to be distributed to the late Mr. Masekela in the amount of *R673 185.44* (Six Hundred and Seventy-Three Thousand, One Hundred and Eighty-Five Rand and Forty-Four Cents);

[69.2] 25% of the Estate was to be distributed to the Respondent in the amount of *R336 529.72* (Three Hundred and Thirty-Six Thousand, Five Hundred and Twenty-Nine Rand and Seventy- Two Cents) and

[69.3] 25% of the Estate was to be distributed to Kagiso Selma Masekela in the amount of *R336 529.72* (Three Hundred and Thirty-Six Thousand, Five Hundred and Twenty-Nine Rand and Seventy- Two Cents)

[70] The Applicant pleads that the amount therefore claimable by the Respondent and Kagiso Selma Masekela is therefore *R673 185.44* (*Six Hundred and Seventy-Three Thousand, One Hundred and Eighty-Five Rand and Forty-Four Cents*) being their share of the inheritance or alternatively *R441 310.23* (*Four Hundred and Forty-One Thousand, Three Hundred and Ten Rand and Twenty-Three Cents*), being the Default Judgment award minus the Late Mr. Masekela's inheritance.

[71] The Applicant concluded that it is very evident that the Respondent and her brother erroneously sought not only their inheritance, but they also sought the inheritance of the Late Mr. Masekela which he had already distributed to himself. This much the Applicant pleads, is evident on the Liquidation and Distribution Account presented before the Court.

[72] The Applicant pleaded that the Respondent insisted that she was entitled to the full amount, the deceased (Mr. Masekela) was not present to correct her inaccurate assertion, and this had led the Court to grant the Respondent an award higher than what she is actually entitled to.

- [73] The Default Application was brought by the Respondent in her capacity as executrix of the Toto estate. In that role, she was responsible for administering the estate, including collecting its assets and debts, settling liabilities, and distributing the remaining property to the beneficiaries in accordance with the will or applicable law.
- [74] The Respondent was accordingly collecting Mr. Masekela's indebtedness due to the Toto estate. It is trite that the assets of a deceased estate do not belong to the executrix nor to the beneficiaries or heirs until they vest in such beneficiaries upon the confirmation of the Liquidation and Distribution Account by the Master of the High Court.
- [75] The legal position in respect of the vesting of the assets of a deceased's estate is set out in *De Leef Family Trust and Others v Commissioner for Inland Revenue*<sup>42</sup> where the Appeal Court, held as follow:

*"Besides, according to our modern system of administration of deceased estates, the heir or legatee of an unconditional bequest obtains a vested right (dies credit) to be entitled to the bequest on the death of the testator (a morte testatoris). Such a right is transmissible but his claim is enforceable only at some future time when the executor's liquidation and distribution account has been confirmed (dies venit). He then has an enforceable right to claim payment, delivery or transfer of his bequest (ius in personam ad rem acquirendam). Estate Smith v Estate Follett 1942 AD 364 at 383, Greenberg and Others v Estate Greenberg 1955 (3) SA 361 (A) at 364, Secretary for Inland Revenue v Estate Roadknight and Another (supra). It is pointed out in The Law of Succession in South Africa (1980) by Corbett, Hahlo, Hofmeyer and Kahn at 164 note 176 that, although these judgments speak of 'confirmation' of estate accounts by the Master, no provision is made for confirmation, as such, in the Administration of Estates Act 66 of 1965 (nor was there any such provision in the previous Act 24 of 1913). It is suggested that 'confirmation' in this context should be taken as a reference to the fact that the accounts had lain for inspection, without objection, for the statutory period.*

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<sup>42</sup> 1993 (3) SA 345 (A)

See also *Meyorowitz in his Law and Practice of Administration of Estates 5th ed at 261.*" (my emphasis)

- [76] It follows from the above that heirs do not acquire ownership of a deceased estate's assets merely upon the death of the person from whom they inherit. They acquire only a vested personal claim against the executor for payment, delivery, or transfer of the inheritance, and that claim becomes enforceable only once the liquidation and distribution account has been confirmed. An heir becomes owner of movable property only upon delivery, and of immovable property only upon registration. The same applies to a legatee. Accordingly, under the modern law, a beneficiary holds only a personal right, *jus in personam ad rem acquirendam*, against the executor and does not acquire ownership by virtue of a will alone. Ownership, or any lesser real right such as a usufruct, is acquired only upon delivery or transfer pursuant to testamentary disposition or intestate succession. Succession is therefore merely a *causa habilis*, or lawful basis, for the transfer of ownership.
- [77] In light of the above, Mr. Masekela had no right to distribute the property to himself. Similarly, the Respondent cannot take or claim ownership of the property until the Final Liquidation and Distribution Account has been lodged with and confirmed by the Master, after which distribution may lawfully take place.
- [78] The Respondent sought payment into the Toto estate solely for its administration and eventual distribution to the late Mr. Masekela according to his lawful entitlement.
- [79] The application of the Intestate Succession Act relating to the distribution to the heirs will only come into play once Mr. Masekela's indebtedness to the Toto estate had been recovered and the Final Liquidation and Distribution Account confirmed by the Master. The amount recoverable is therefore the full amount taken by Mr Masekela.
- [80] The Applicant's defence that a lesser amount should have been recoverable by the Respondent is incorrect, as Mr. Masekela took the amount of *R1 114 495.67 (One Million, One Hundred and Fourteen Thousand, Four Hundred and Ninety-Five Rands and Sixty-Seven Cents)*.
- [81] The Applicant's defence is therefore unsustainable and must fail.

[82] The Applicant further knew of the Default Judgment on *19 October 2022* and must, having been legally represented, known of the importance of bringing a rescission application as soon as possible. The explanation of the Applicant's delay in bringing this application is simply unsatisfactory in that:

[82.1] she fails to deal with the reason why Mr. Masekela did not bring a rescission after the Default Judgment was granted – the mere indication that he was ill is not sufficient reason for the failure to do so.

[82.2] failure to explain Mr. Masekela's deliberate refraining from appearing on the day of Default Judgment to oppose the relief sought where he clearly was served personally and had known of the date of Set down.

[82.3] she failed to explain why once she had funds to instruct attorneys in *2023*, she had not brought the rescission but had nevertheless engaged in other litigation with the Respondent and her family.

[83] The Applicant furthermore acknowledged Mr. Masekela's indebtedness to the Toto estate by the inclusion thereof in the Final Distribution and Liquidation Account of the estate and also entered into a settlement agreement with the Respondent and her family during *April 2024* where the indebtedness was once more accepted.

[84] There is also the clear absence of a *bona fide* defence. Any allocation of the distribution amount to the heirs in accordance with law of intestate succession would only follow once all the debts due to the Toto estate was recovered. The Default Judgment was obtained in the Respondent's capacity as executrix and not in her personal capacity or as a beneficiary.

[85] The unsatisfactory explanation of the delay in bringing the rescission application and the lack of a *bona fide* defence are indicators that a rescission cannot be granted in terms of Rule 31(2)(b) of the Uniform Rules of Court.

#### **RULE 42(1)(a)**

[86] The next question to be considered is whether a rescission should be granted in terms of Rule 42(1)(a) of the Uniform Rules of Court.

[87] Rule 42(1)(a) states that:

*"The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary-*

*(a) an order or judgment erroneously sought erroneously granted in the absence of any party affected thereby."*

[88] The purpose of a rescission under this Rule is to expeditiously correct an obviously wrong judgment or order. Relief will only be granted if there was an irregularity in the proceedings. The sub-rule applies typically to *ex parte* applications or other cases where an affected party is absent, to bring the true facts to the court's attention.

[89] An order is erroneously granted if it was legally incompetent for the court to have made such an order,<sup>43</sup> if there was an irregularity in the proceedings or if the court was unaware of facts which, if known to it, would have precluded it from a procedural point of view from making the order.<sup>44</sup>

[90] The Applicant's only attempt at raising an error is found at paragraph 8.3.3 of the Founding Affidavit, wherein the Applicant alleges that

*'...when the Respondent launched the Summons, she placed the facts in such a manner that the Above Honourable Court was misled thinking she and her brother were entitled to the full amount and thus an order for the full amount was erroneously granted.'*<sup>45</sup>

[91] The error raised cannot be accepted. The reason being that the Respondent sought Default Judgment against the Applicant in her capacity as the executrix of the deceased's estate. It was not brought by the Respondent in her personal capacity or by her brother.

[92] Mr. Masekela did not dispute taking the amount of R1 114 495.67. The alleged error is therefore not an error: the executrix sought to recover the full amount taken by him,

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<sup>43</sup> *Athmaram v Singh* 1989 3 SA 953 (D) 956D–E.

<sup>44</sup> *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 4 SA 411 (C);

<sup>45</sup> 015-23

which was necessary to finalise the estate for distribution to the heirs after confirmation of the Final Liquidation and Distribution Account.

[93] The amount claimed of R1 114 495.67 was not to be paid to the Respondent or her brother directly, it was to be paid to the Toto estate for purposes of administration, this is evinced by the Particulars of Claim as well as the court order by Molahlehi J.<sup>46</sup>

[94] 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*<sup>47</sup>, the Constitutional Court per Khampepe J for the majority had occasion to consider a rescission in terms of Rule 42(1) as well as the common law and stated that:

*"Mr Zuma's purported absence is not the only respect in which his application fails to meet the requirements of rule 42(1) (a). He has also failed to demonstrate why the order was erroneously granted. Ultimately, an applicant seeking to do this must show that the judgment against which they seek a rescission was erroneously granted because "there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment"."* (my emphasis)

[95] The Supreme Court of Appeal in *Lodhi 2 Properties investments CC and Another v Bondev Developments (Pty) Ltd*<sup>48</sup> held that:

*"Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on the merits is an*

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<sup>46</sup> 000-4

<sup>47</sup> 2021 JDR 2069 (CC).

<sup>48</sup> 2007 (6) SA 87 (SCA)

irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment." (my emphasis)

[96] The Respondent was procedurally entitled to seek the order and there was no error in the granting thereof. Mr. Masekela at no point in time disputed the indebtedness and also, as mentioned here in before, failed despite personal service to defend the Respondent's action. The Applicant, in subsequently raising, what she alleged a defence, is accordingly an irrelevant consideration and does not affect and transform the validity of the default judgment obtained into one obtained in error.

#### **COMMON LAW:**

[97] The last ground for rescission to be considered is whether the Default Judgment can be rescinded in terms of the common law.

[98] At common law a court is entitled to rescind a judgment obtained in default of appearance provided *sufficient cause* is shown. This includes:

[98.1] a reasonable and acceptable explanation for the default and

[98.2] that on the merits the party has a *bona fide* defence.<sup>49</sup>

[99] The application of this principle is limited to those few cases where the application does not fall strictly within the limits of Rule 31 or Rule 42.

[100] As a general rule a party cannot have a judgment set aside on the basis of evidence that was or ought to have been available to him or her before judgment.<sup>50</sup>

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<sup>49</sup>*De Wet v Western Bank Ltd* 1979 2 SA 1031 (A) 1042; *Chetty v Law Society, Transvaal* 1985 2 SA 756 (A) 764

<sup>50</sup>*CTP Ltd v Independent Newspaper Holdings Ltd* 1999 1 SA 452 (W) 462.

[101] This court has dealt with the fact that the delay in bringing a Rescission Application was not adequately explained in that:

[100.1] it does not account for and relay why Mr. Masekela failed to bring a rescission, the mere suggestion of his illness is simply not sufficient;

[100.2] the Applicant as executrix of the Toto estate had obtained knowledge on 19 October 2022. By 26 May 2023, the Applicant was financially able to instruct her attorneys. The Applicant however only on 11<sup>th</sup> day of February 2025 instructed her attorneys to proceed with the rescission application. Yet, there was funding for other litigation between the Applicant, Respondent and her brother.

[100.3] the Applicant's Final Liquidation and Distribution account reflects Mr. Masekela's indebtedness by virtue of the Default Judgment;

[100.4] the Applicant had settled other litigation between the Applicant and the Respondent and her family by acknowledging the Default Judgment and Mr. Masekela's indebtedness to the Toto estate.

[101] The object of rescinding a judgment is to ensure that a chance to air a real dispute is restored.<sup>51</sup> In this matter the defence raised is not *bona fide* in light of the acknowledgment of the indebtedness by both Mr. Masekela and the Applicant as referenced herein before.

[102] Mr. Masekela passed away on 24 June 2018. He had no defence to the action and in this respect did not defend same.

[103] The Applicant is aware of the absence of a defence as she acknowledged the indebtedness as manifested in the Final Liquidation and Distribution Account and also in the settlement agreement with the Respondent and her family.

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<sup>51</sup> Saphula v Nedcor Bank Ltd 1999 (2) SA 76 (W) at p79B-C

[104] The amount awarded under the Default Judgment belongs to the Toto estate before it can vest in any heirs. It may vest only after the Master of the High Court has accepted the Final Liquidation and Distribution Account and authorised distribution. Accordingly, there is no sustainable and valid basis to contend that the claim amount belonged to the heirs before vesting.

[105] In light of the above, the intention to reopen the litigation not only delays the administration of the estate, but it will not result in a different conclusion than the one already in existence, being that the Toto estate shall retain a right of claim against Mr. Masekela's estate for the claimed amount.

## **CONCLUSION:**

[106] In my view the history of the litigation, to which I have referred, demonstrates the absence of any clear intention and determined effort on the part of either Mr. Masekela or the Applicant to earnestly pursue the rescission

[107] The Applicant has failed to explain:

[107.1] why the action despite personal service was allowed to go by default in the first place;

[107.2] Mr. Masekela's or her delay as executrix in launching the rescission application;

[107.3] why the indebtedness arising from the default judgment was included in the Final Liquidation and Distribution Account and

[107.4] why the indebtedness was admitted for settlement purposes.

[108] In the circumstances, the ineluctable conclusion is that the Applicant is not serious about defending the action: her conduct points to a concerted effort to delay and protract the recovery of the amount and the administration of Mr. Masekela's estate.

[109] I conclude that the Applicant's application for rescission is not *bona fide*, as neither Mr. Masekela nor the Applicant had and have a genuine wish to put forward a bona fide defence to the action. The rescission application is merely part of an

overall *modus operandi* aimed at delaying and frustrating the Respondent's claim against the Toto estate.

[110] In all the circumstances, given my findings with regard to the Applicant's failure to put up a satisfactory explanation for Mr. Masekela and her own default, her lack of prospects of success in defending the Respondent's action, and her lack of *bona fides* in bringing the rescission application, I conclude that the Applicant has not made out a proper case for the granting of the remedy of rescission.

[111] The rescission application therefore falls to be dismissed.

#### **COSTS:**

[112] It is an established law that the general principle for awarding costs to a successful party is to indemnify such party for the expenses to which the party has been put through as a result of being compelled to either initiate or defend litigation.<sup>52</sup>

[113] In simple terms, costs should follow the event.

[114] The Applicant could not establish a valid basis for rescission. On this ground alone, the general rule imputes liability of costs of this application on the Applicant.

[115] Mr. Masekela had no defence against the action, to the contrary, he admitted the indebtedness. The Applicant, legally represented, must similarly have known that there is no defence that is available against the claim. The Applicant's acknowledgment and admission of the indebtedness as reflected in the Final Liquidation and Distribution Account and her admission of liability in a settlement agreement between the Applicant and the Respondent and her family point to the clear absence of a defence to the action.

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<sup>52</sup> Texas Co SA Ltd v Cape Town Municipality 1929 AD 467 at p.488

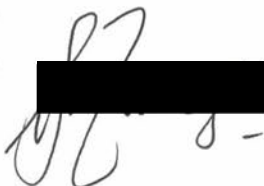
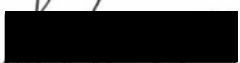
[116] Nevertheless, the Applicant pursued a rescission application which had no reasonable prospect of success. The Respondent furthermore did not litigate in her own personal capacity, but as the executrix of the estate to gather all the assets and indebtedness to the estate. The heirs to an estate are also only entitled to their inheritance once the Final Liquidation and Distribution Account had been approved by the Master.

[117] The Applicant's rescission application is an abuse of court process and, I consider that the only fitting costs order is a punitive costs order on the scale of attorney and client.

[118] The Applicant will therefore be ordered to pay the Respondent's costs of the rescission application on the attorney and client scale.

*Order*

1. The Rescission Application is dismissed with costs on an attorney and client scale.

  
  
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**S VAN ASWEGEN**  
**ACTING JUDGE OF THE HIGH COURT**  
**JOHANNESBURG**

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