REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case Number: 009328/2024

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

[redacted]

30 JULY 2026 ______________________

DATE SIGNATURE

In the matter between:

COLLEN TSHIFHIWA MASHAWANA	Appellant
AND	
ABSA BANK LIMITED	Respondent
In re:	
ABSA BANK LIMITED	
And	
COLLEN TSHIFHIWA MASHAWANA	First Respondent
PULENG DAVID MADISHA	Second Respondent
THWETHWE RICCA MADISHA	Third Respondent
THEMBA MAFINTO RIKHOTSO	Fourth Respondent
LYZANNE CARLEEN RIKHOTSO	Fifth Respondent

JUDGMENT

Mahomed, J

Introduction

[1] This is an application for the rescission of a default judgment granted by this Court on 10 February 2025. The judgment was granted in favour of the Respondent, Absa Bank Limited ("Absa"), and against the Applicant, Mr Colleen Tshifhiwa Mashawana ("Mr Mashawana"), as well as against the other respondents in the main application, jointly and severally, for payment in the sum of R28,769,031.65, plus interest and costs.

[2] The Applicant seeks to rescind and set aside that judgment in terms of Uniform Rule 31(2)(b) and/or under the common law. The Respondent opposes the application.

POSTPONMENT

[3] At the commencement of the hearing of this matter, advocate Vosloo De Witt for the applicant applied for a postponement of the matter. She contended that the client is entitled to a hearing, he is keen to put his case before the court and that he tenders costs on an attorney client scale. The applicant proferred that he was not aware that his counsel was not briefed for this hearing and that he relies on legal assistance in this matter, he will suffer grave prejudice should the postponement be refused. Advocate Horn for the respondent informed the court that minutes before he was due to address this court, there was "a flurry of activity," after his attorney had been served with an application for the postponement of this application. He was instructed to oppose the postponement, he contended that the applicant has tried this tactic earlier, at the hearing when the judgment was granted against him. He informed the court that the attorney on record is the fifth attorney for the applicant and the last attorney was forced to withdraw when she was not paid her fees. He contended

that blaming an attorney will not assist the applicant, he chose the attorney and he has a duty to remain informed of the status of his matter throughout. The tender of costs was “cold comfort” to his client who has been brought to these proceedings by the applicant, who was unable to pay monies he owed to his client. Mr Horn argued that it will not assist the applicant to be afforded more time, the die is cast. His client suffers grave prejudice in that it is unable to recover its monies, and a delay in the finailsation of the matter, will simply increase the debt as interest is payable on the debt. Furthermore, another date will take the matter a further six months and the interest on the amount outstanding can easily calculate to over R2.8 million on a judgment of R28 million.

[4] Ms Vosloo De Witt informed the court that she and her attorney were briefed in the matter the night before and that she was not in a position to address the court on the main application. She submitted that the applicant was entitled to legal representation and that she and her attorney had sought to assist the applicant overnight for the application for the postponement, however she was not sufficiently familiar with the main matter and could not effectively participate in the proceedings, should the postponement be refused. At the time she was not even invited to caselines, and could not refer to the papers in the file. I was informed that all the pleadings were finalised and before this court, including the heads of argument for both parties.

[5] In Myburg Transport v Botha t/a SA Truck Bodies, 1991(3) SA 310 (NmSC)at 314 to 15, the requirements for a postponement are clear. The court must consider the timing of the application, the defence or the prospects of success, weigh the prejudice suffered by the parties and consider the interest of justice.

[6] I refused the application, the explanation offered was weak and in my view the tender of costs was of no value to the respondent. The right to a hearing has been afforded this applicant, who simply delays the finalisation of the matter. It is noteworthy that he proferred earlier that had he known that he was permitted to represent himself, he would have done so on the last occasion. There is nothing before me as to why he could not do so now. Moreover, there was

nothing before me on the prospects of success, being a critical requirement for a postponement. In my view all the papers are before the court, the matter is ripe for a hearing and the prejudice to the respondent is palpable in the light of the judgment amount.

BACKGROUND

[7] The material background facts are largely common cause. In August 2018, Mokolokwane Civils CC ("Mokolokwane"), a close corporation in which Mr Mashawana held a 45% membership interest, was awarded a contract by the Gauteng Department of Human Settlements ("the Department") for the construction of 4,000 low-cost housing units in Palm Ridge.

[8] On 23 August 2019, Absa and Mokolokwane entered into a written facility agreement in terms of which Absa granted Mokolokwane an overdraft facility of R40 million ("the facility agreement"). The facility was subject to specific conditions, including that the Department would confirm payment directly to an Absa account, that invoices would be paid within 60 days, and that all contract income would be deposited into Absa accounts.

[9] On the same day, Mr Mashawana executed an unlimited deed of suretyship in favour of Absa for the indebtedness of Mokolokwane. The other members of Mokolokwane, Mr Puleng David Madisha and Mr Themba Mafinto Rikhotso, also signed identical deeds of suretyship.

[10] The main application for payment was instituted by Absa on 31 January 2024. Mr Mashawana initially opposed the application. He was represented by Gardee Godrich Attorneys, who filed an answering affidavit on his behalf in February 2024. Those attorneys withdrew on 8 August 2024.

[11] On 20 November 2024, Molefe Dlepu Attorneys ("MDA") came on record as Mr Mashawana's substituted attorneys. On 22 November 2024, the application was set down for hearing on the opposed motion roll for 10 February 2025.

[12] On 7 February 2025, MDA withdrew as Mr Mashawana's attorneys of record. Mr Mashawana did not attend court on 10 February 2025. No appearance was made on his behalf, and no request for a postponement was made. The matter proceeded in his absence, and this Court granted the default judgment as sought by Absa.

[13] Mr Mashawana became aware of the judgment on 18 February 2025 when Absa's attorneys sent him a copy by email. He launched the present rescission application on 18 March 2025, which was within twenty days of acquiring knowledge of the judgment.

THE FACTS

The following facts are common cause.

[15] Mr Mashawana executed a valid and binding deed of suretyship in favour of Absa. Clause 2 of the suretyship provides that the amount Absa may recover from Mr Mashawana shall be "all the present and future liabilities of the debtor to the bank from whatever cause arising". Mr Mashawana does not dispute the authenticity or validity of the suretyship.

[16] Absa advanced funds to Mokolokwane under the facility agreement. Mokolokwane breached the facility agreement by failing to maintain its primary transactional account with Absa and by failing to deposit all its contract income into its Absa accounts. Instead, substantial payments from the Department were diverted to Mokolokwane's account at First National Bank.

[17] On 1 February 2021, Absa addressed a letter of breach to Mokolokwane, requiring it to remedy its breaches within seven days. The breaches were not remedied.

[18] On 27 May 2021 Molokwane was provisionally wound up and finally wound up on 25 July 2022. Absa's claim against Mokolokwane was accepted by the liquidators and proved at a meeting of creditors on 12 June 2024.

[19] Mr Mashawana did not appear at the hearing on 10 February 2025, nor did any legal representative appear on his behalf. He has offered, as his explanation for his non-appearance, that his attorneys withdrew on the preceding Friday and that he was unaware that he could appear in person.

THE ISSUES

[20] The following issues arise for determination by this Court:

(a) Whether Rule 31(2)(b) of the Uniform Rules of Court applies to the judgment in question.

(b) Whether Mr Mashawana has established "good cause" under the common law for the rescission of the judgment, which requires: (i) a reasonable explanation for his default; (ii) that the application is bona fide; and (iii) that he has a bona fide defence to Absa's claim that carries some prospect of success.

(c) Whether the rescission application should be dismissed with costs on the scale as between attorney and client.

THE LAW

[21] Rule 31(2)(b) of the Uniform Rules of Court provides that a defendant may, within twenty days after acquiring knowledge of a default judgment, apply to court to set aside such judgment upon good cause shown. However, this subrule applies only to judgments granted under Rule 31(2)(a), which deals with default judgments in actions where the claim is not for a debt or liquidated demand and where the defendant is in default of delivery of a notice of intention to defend or a plea.

[22] The judgment sought to be rescinded in this matter was not granted under Rule 31(2)(a). It was granted in an opposed motion proceeding where the Applicant had filed an answering affidavit. Accordingly, the Applicant must rely on the common law.

[23] The common law requirements for rescission of a default judgment are well established. An applicant must show "good cause", which encompasses three elements: a reasonable and satisfactory explanation for the default; that the

application is made bona fide; and a bona fide defence which, prima facie, carries some prospect of success. See Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476; De Wet and Others v Western Bank Ltd 1979 (2) SA 103 (A) at 110E-H; Zuma and Others v Government of the Republic of South Africa and Others 2018 (2) SA 1 (CC).

[24] As the Constitutional Court held in Zuma, the explanation for the default and the existence of a bona fide defence are both essential requirements. A party who shows no prospect of success on the merits will fail in a rescission application, no matter how reasonable the explanation for the default. Conversely, a party who offers no reasonable explanation cannot succeed merely because there is a possible defence.

[25] The onus rests squarely on the applicant for rescission to satisfy the court that good cause exists. This Court retains a discretion, which must be exercised judicially.

THE CASES FOR THE RESPECTIVE PARTIES

The Applicant's Case

[26] Mr Mashawana submits that Rule 31(2)(b) applies because the judgment was granted in his absence and he acquired knowledge of it on 18 February 2025, with the application being brought within twenty days thereafter. Alternatively, he contends that he has shown good cause under the common law.

[27] His explanation for his default is twofold. First, he states that his newly appointed attorneys, MDA, withdrew on 7 February 2025 and that they had previously informed him that they did not have adequate time to prepare for the hearing. Second, he states that none of his previous attorneys informed him that he was permitted to appear in person at the hearing, and that as a "novice" he did not know that he could do so. He claims that had he known, he would have appeared and either argued the matter or sought a postponement.

[28] As to the merits, Mr Mashawana contends that he has a bona fide defence to Absa's claim. He argues that Absa breached the facility agreement by failing to implement its terms properly. In particular, he contends that Absa allowed funds to be released from the facility in the absence of signed invoices, allowed funds to be released in excess of invoice amounts, and continued to release funds notwithstanding that invoices had not been paid by the Department within sixty days. He submits that Absa's conduct altered the principal obligation under the facility agreement, with the result that he was released and discharged as a surety.

[29] Mr Mashawana further points to the unlawful conduct of his co-members, Mr Madisha and Mr Rikhotso, who he alleges unlawfully removed him as a member of Mokolokwane and misappropriated funds totalling over R27 million. He has laid criminal charges against them. He submits that Absa ignored his requests to freeze the account and continued to allow funds to be released, thereby assisting his co-members in their unlawful activities.

The Respondent's Case

[30] Absa submits that Rule 31(2)(b) has no application to the present judgment, as the judgment was not granted in terms of Rule 31(2)(a). Absa contends that Mr Mashawana must therefore rely on the common law, which he has failed to satisfy.

[31] In relation to the explanation for the default, Absa argues that it is neither reasonable nor truthful. Absa points out that MDA was instructed nearly three months before the hearing date, yet Mr Mashawana claims they could not prepare. Absa's attorney, Ms Lisa Silberman, contacted Ms Nisa Chan of MDA, who informed her that MDA did not withdraw due to a lack of time to prepare, that Mr Mashawana was repeatedly informed of the hearing date, and that MDA withdrew because of Mr Mashawana's failure to furnish instructions and make payment. Absa argues that Mr Mashawana's claim that he was unaware that he could appear in person is simply not credible, given that he is an experienced businessman familiar with litigation.

[32] On the merits, Absa submits that Mr Mashawana has no bona fide defence. Absa contends that it complied with the facility agreement: the Department provided confirmation of payment into the Absa account; funds were released only on the strength of signed and approved invoices; and when Absa realised that payments were outstanding for more than sixty days, it refused to release further funds in December 2020. The fact that Mokolokwane breached the agreement by diverting payments to its FNB account was not Absa's doing.

[33] Absa argues that the suretyship explicitly covers all present and future liabilities of Mokolokwane "from whatever cause arising". Absa had no control over how funds in the transactional account were utilised once advanced. Mr Mashawana's real complaint is against his co-members, who allegedly misappropriated funds. For that, he has remedies against them, but that does not absolve him of his liability as surety to Absa.

[34] Finally, Absa points out that even if it had called up the facility earlier for the breaches Mr Mashawana now complains of, his liability would have been greater than the judgment amount. The prejudice he claims to have suffered was therefore not caused by Absa but by his own business partners.

DISCUSSION

The Applicability of Rule 31(2)(b)

[35] This Court agrees with Absa's submission that Rule 31(2)(b) does not apply. The judgment of 10 February 2025 was not granted under Rule 31(2)(a). It was granted in an opposed motion proceeding where the Applicant had filed an answering affidavit. The fact that judgment was granted in the Applicant's absence does not convert the proceeding into a default judgment under Rule 31(2)(a). The rescission application must therefore be considered under the common law.

The Explanation for the Default

[36] The explanation proffered by Mr Mashawana is, with respect, wholly unsatisfactory and falls far short of what is required to establish good cause.

[37] The suggestion that MDA did not have adequate time to prepare for the hearing of 10 February 2025 is untenable. MDA came on record on 20 November 2024. They had nearly three months to prepare heads of argument and a practice note. All the affidavits had already been filed. Absa's heads of argument and practice note had been delivered on 7 October 2024. The only outstanding task was for Mr Mashawana's legal representatives to deliver their own heads of argument. The notion that three months was insufficient time to prepare is, on any reasonable view, without substance.

[38] The hearsay nature of this explanation is problematic. Mr Mashawana states that he was informed by Ntombi Mthembu of MDA that she did not have adequate time to prepare. The truth of that statement is not confirmed by Ms Mthembu or anyone from MDA. Moreover, the uncontested evidence from Ms Silberman, as confirmed by her confirmatory affidavit, is that Ms Chan of MDA informed her directly that the withdrawal was not due to a lack of time for preparation but rather due to Mr Mashawana's failure to provide instructions and make payment. This Court is entitled to take that evidence into account.

[39] His contention that he was unaware that he could appear in person at the hearing is simply not credible. Mr Mashawana is a businessman of substantial means. He has been involved in litigation before, including a successful application before Mokose J in which he was reinstated as a member of Mokolokwane. He is not a "novice" as he claims. It is difficult to accept that a person who has been a party to litigation, who has instructed several sets of attorneys, and who faces a claim of nearly R29 million, would not know that he is entitled to attend court proceedings to which he is a party. Unrepresented litigants appear in person before this Court on a daily basis. This explanation is, in the view of this Court, an afterthought.

[40] If Mr Mashawana genuinely believed he could not appear, he offers no explanation for what he did between the withdrawal of MDA on Friday, 7 February 2025, and the hearing on Monday, 10 February 2025. He did not attempt to contact another attorney. He did not attempt to contact the court. He did not attempt to contact Absa's attorneys to seek a postponement by

agreement. He simply did nothing. A party who abandons his own cause cannot later complain that judgment was granted in his absence.

[41] As the Supreme Court of Appeal held in De Wet v Western Bank Ltd, a litigant cannot divest himself of all responsibility for his matter and then complain that his agents have failed him. The inefficiency of a legal representative does not, without more, constitute a reasonable explanation for a party's default. The explanation here is particularly weak because Mr Mashawana has not even attempted to explain why he took no steps to protect his own interests after his attorneys withdrew.

[42] This Court therefore finds that Mr Mashawana has failed to provide a reasonable and satisfactory explanation for his default. That alone is sufficient to dismiss the rescission application.

The Bona Fide Defence

[43] Even if the explanation were adequate, Mr Mashawana has failed to establish a bona fide defence to Absa's claim that carries any reasonable prospect of success.

[44] The foundation of Mr Mashawana's defence is that Absa breached the facility agreement by failing to implement its terms properly. However, a careful reading of the papers reveals that the alleged breaches are either not established or are not breaches by Absa at all.

[45] Clause 8 of the facility agreement required that the Department confirm payment directly to an Absa account. Absa states, and this Court accepts, that confirmation was provided to its satisfaction before the facility was granted. The Department did commence making payments into the facility account. The fact that, months later, Mokolokwane's members changed the banking details back to an FNB account and diverted payments was not something Absa could control. It was a breach by Mokolokwane, not by Absa.

[46] The requirement that invoices be paid within sixty days was a condition that protected Absa's position. When Absa realised in December 2020 that payments were not being received, it refused to advance further funds. That is exactly what the facility agreement entitled Absa to do. There was no obligation on Absa to terminate the facility or to call up the existing indebtedness. The surety cannot complain that the creditor exercised its rights reasonably.

[47] Critically, Mr Mashawana's own case demonstrates that the real cause of his predicament is not any conduct by Absa but the conduct of his co-members. He alleges that they unlawfully removed him as a member, misappropriated over R27 million, and diverted payments to an FNB account. He has laid criminal charges against them. All of this is irrelevant to Absa's claim against him as surety.

[48] The deed of suretyship signed by Mr Mashawana is wide in scope. Clause 2 provides that Absa may recover from him "all present and future liabilities of the debtor to the bank from whatever cause arising". There is no limitation to liabilities arising from properly implemented facilities or to liabilities not involving misappropriation by co-members. Mr Mashawana assumed the risk that Mokolokwane might mismanage its affairs. That is the very nature of suretyship.

[49] Moreover, as Absa correctly points out, if Absa had called up the facility at any earlier stage for the very breaches Mr Mashawana now complains of, his liability would have been greater than the judgment amount. This Court accepts the evidence set out in Absa's answering affidavit: if called up at the end of September 2019, the indebtedness would have exceeded R32 million; if called up in February 2020, it would have exceeded R39 million. Mr Mashawana cannot claim that he was prejudiced by Absa's continued funding when that funding was, on his own version, used for the project until his co-members diverted it.

[50] This Court is not called upon to decide the ultimate merits of Absa's claim. The question is whether Mr Mashawana has a defence that carries some prospect of success. In this Court's view, he does not. The defence he advances is legally

unsound and factually unsupported. He has no answer to the clear and unambiguous terms of the suretyship. His recourse, if any, lies against his co-members, not against Absa.

Bona Fides of the Application

[51] This Court also has regard to the fact that Mr Mashawana has been represented by four different sets of attorneys over the course of this litigation. The pattern of withdrawing attorneys, failing to deliver heads of argument, failing to prepare for trial, and now seeking rescission on grounds that are not credible suggests a strategy of delay rather than a genuine attempt to defend the claim on its merits.

[52] The rescission application was brought only after judgment was granted, and only after Absa's attorneys sent a demand for payment. Mr Mashawana has not offered to pay the amount into court or to provide any security. He seeks to escape a judgment debt of nearly R29 million on the basis of an explanation that this Court has found to be wholly lacking in credibility.

[53] These circumstances support the conclusion that the application is not made bona fide but rather for the purpose of delaying the inevitable enforcement of the judgment.

CONCLUSION

[54] Having regard to all of the above, this Court concludes that Mr Mashawana has failed to establish good cause for the rescission of the judgment granted on 10 February 2025.

[55] He has not provided a reasonable and satisfactory explanation for his default. His claim that his attorneys could not prepare for the hearing is rejected as untrue. His claim that he did not know he could appear in person is rejected as not credible.

[56] He has not established a bona fide defence to Absa's claim that carries any reasonable prospect of success. The defence he advances is based on a misunderstanding of the facility agreement and the suretyship. The real cause

of his misfortune is the conduct of his co-members, for which Absa is not responsible.

[57] The rescission application accordingly falls to be dismissed.

COSTS

[58] The general rule in our law is that costs follow the result. This Court has a discretion as to costs, which must be exercised judicially having regard to the circumstances of each case.

[59] Absa seeks costs on the scale as between attorney and client. Clause 9.2 of the standard terms applicable to the facility agreement provides that, in the event of default, the debtor (and by extension the surety) shall be liable for costs on the attorney-client scale. Mr Mashawana agreed to these terms when he executed the suretyship. In addition, this Court considers that Mr Mashawana's conduct in bringing an application based on an explanation that is not credible and a defence that has no reasonable prospect of success warrants a punitive costs order. The application was brought without any proper foundation and has caused Absa to incur unnecessary legal costs.

[60] This Court therefore finds that an order for costs on the scale as between attorney and client is appropriate.

ORDER

In the premises, this Court makes the following order:

1. The application for rescission of judgment is dismissed.
2. The Applicant, is ordered to pay the costs of the application on the scale as between attorney and client.

[redacted]

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JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Date of Hearing:	17 APRIL 2026
Date of Judgment:	30 JULY 2026

Appearances

On behalf of the Appellant:	Adv Vosloo De Witt
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