

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 2023-101531

Date: 25.05.2026

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/ NO
(3) REVISED

SIGNATURE: *RJ Moultrie*

In the matter between:

BJORKMAN, IVAN NEWELL

First Applicant

10 **HER MAJESTY'S GUESTHOUSE CC**

Second Applicant

and

ABSA BANK LIMITED

Respondent

J U D G M E N T (Postponement)

MOULTRIE, J: This is an opposed application for the rescission of a summary judgment granted by Wanless J on 4 March 2024.

20 The rescission application was launched during April 2024, at which time the applicants were represented by Mary Jordan Attorneys. The answering affidavit was duly delivered in May 2024, and a replying affidavit dated 5 June 2024 was then delivered. The applicants' erstwhile attorney signed a notice of withdrawal as attorney of record on 10 June 2024. Subsequent to that, the matter was set down on the opposed roll before me today for hearing.

After the respondent delivered heads of argument, the first applicant delivered an affidavit which, it seems, was intended to serve as heads of argument, and participated in the preparation of the joint practice note during April 2026. That document was filed after it was signed by the first applicant on his own behalf and ostensibly also on behalf of the second applicant, which is a close corporation. At that stage, there was no suggestion that the matter would not be ripe for hearing today.

10 The applicants are represented today by Mr JA Krause, briefed by A Botha Attorneys, who served a notice of appointment on the respondent's attorneys by email on Friday, 22 May 2026. Mr Krause undertook to ensure that his attorneys would duly file that notice of appointment by uploading it onto the Court Online platform, and I expect he will do so.

 At the commencement of the hearing, Mr Krause indicated that he had been briefed yesterday, that is, Sunday 25 May 2026, to apply from the bar for a postponement of the
20 hearing. The grounds are as follows. Firstly, that the first applicant was ill and was barely coherent when he consulted with A Botha Attorneys last week (on either Wednesday or Thursday – Mr Krause was not quite certain). As such, it was difficult for A Botha Attorneys to obtain coherent instructions from the first applicant. The second and main ground

advanced by Mr Krause for the postponement is the contention that the application for rescission, as prepared at a time when the applicants were still represented by their previous attorneys, 'cannot succeed'.

In my view, neither of the grounds advanced by Mr Krause for the postponement is sustainable. It is simply not a justification for a postponement for a party to say that, upon briefing attorneys, those attorneys have advised them that the case as currently presented cannot succeed, and that it
10 would be necessary to obtain further instructions for the purposes of improving the case. While I am prepared to accept that instructions could not be obtained for the purposes of this hearing, that is irrelevant: even if such instructions could have been given, an intention to improve the case by means of the delivery of a supplementary affidavit would simply not justify the postponement.

There are other reasons why the postponement application is not sustainable. As I have indicated earlier, the first applicant participated approximately a month ago in the
20 process of preparing the pre-hearing joint practice note, and no indication was given at that time of his desire to appoint an attorney.

Ms Mitchell, who appeared for the respondent, informed me, as she was entitled to do given that this was an application made from the bar, that her attorneys had been

informed by the first applicant of his illness at some point earlier in 2026, but that there had at no stage been any suggestion of any desire to appoint attorneys to represent him and the second applicant at the hearing. In fact, the contrary intention appears from his participation in the process of preparing the joint practice note.

Given the time period that had passed since the withdrawal of Mary Jordan Attorneys and the absence of any indication that the applicants had any desire to be
10 represented in these proceedings (and the first applicant's repeated statements in the papers serving before me that he considered himself to be more informed than any legal representative could be of the details of the matter), it would appear to me that the applicants had no intention whatsoever of appointing attorneys. And that indicates that this application for a postponement is simply a variation of the proverbial 'oldest trick in the book', played in order to avoid the consequences of the admitted inadequacy of his case (cf. *Take & Save Trading CC v Standard Bank of SA Ltd* 2004 (4)
20 SA 1 (SCA) para 3; *Magistrate Pangarker v Botha and Another* 2015 (1) SA 503 (SCA)).

Ms Mitchell correctly submitted therefore that the illness of the first applicant is not relevant to these proceedings, and there is no reason given for the delay in instructing attorneys.

In addition, Ms Mitchell pointed out that A Botha Attorneys had communicated with the respondents' attorneys on Friday, 22 May 2026, intimating their intention to seek a postponement of the matter, to which the respondents' attorneys had replied indicating that should such a postponement be sought, it would be appropriate and necessary for a formal written application to be made. That, of course, is the standard practice. Despite that specific request from the respondent, no such application has been
10 forthcoming, and this is yet a further indication, in my view, that the application for a postponement is not seriously advanced and cannot be justified.

In the circumstances, the application for a postponement is dismissed. Costs will be costs in the cause.

J U D G M E N T (Merits)

MOULTRIE, J: This is an application for the rescission of
20 a summary judgment granted by my brother Wanless J on 4 March 2024. The applicants delivered papers in opposition to the summary judgment application but failed to appear on the date of the hearing.

In her written submissions, Ms Mitchell persuasively, and correctly in my view, argued that a rescission is not available in the current matter in terms of Rule 32 because

the summary judgment was not granted by default. The remaining legal bases on which the rescission could potentially be granted are thus twofold: while Rule 42(1)(a) of the Uniform Rules of Court is specifically mentioned, the rescission could potentially also be granted in terms of the common law.

The requirements for rescission under Rule 42(1)(a) are that the judgment should have been granted in the absence of the applicant for rescission and that the order was
10 erroneously sought or erroneously granted.

Surprisingly it seems to me the question of what constitutes “absence” for the purposes of Rule 42(1)(a) appears to be the subject of some debate amongst our appeal courts, as is most recently apparent from the judgment handed down by a divided bench of the Supreme Court of Appeal on Friday, 22 May 2026 in the matter of *Kingdom of Lesotho v Fraser Solar GmbH and Others* (438/2024) [2026] ZASCA 75 (SCA). However, I need not detain myself with regard to the first requirement, as Ms Mitchell was prepared
20 (as am I) to proceed on the assumption that the judgment in this case was indeed granted in the “absence” of the applicants for rescission as that concept is to be properly understood for the purposes of Rule 42(1)(a).

That then leaves the question as to whether the judgment was erroneously sought before Wanless J or

erroneously granted by him. It is well-established that in order to meet that requirement it must be shown that there was some procedural error in the manner in which the matter was considered. I use the term “procedural” broadly here. In the current instance, the hurdle facing the applicants for rescission is that they have not alleged any such error in the grant of the judgment by Wanless J based on the papers that served before him. Rescission can therefore not be granted in terms of rule 42(1)(a).

10 Moving then to a potential rescission in terms of the common law, it is trite that three requirements must be met. First, the applicant must show “sufficient cause”, which is often referred to as an absence of wilfulness in relation to the failure to appear. Secondly, the application must be made *bona fide*. Thirdly, there must be some prospect of success in relation to the merits of the matter. Only if all three requirements are established by an applicant for rescission may rescission be granted at common law.

20 In this instance, the facts alleged to justify the absence of the applicants from court on the day that the summary judgment was granted are, in summary, the following. The deponent to the founding affidavit (the first applicant, Mr Bjorkman) indicates that he had personally prepared the affidavit opposing summary judgment. After having delivered it, Mr Bjorkman was informed by the respondents’ then

attorney that the affidavit (which was somewhat confusing, to say the least) did not disclose any defence, and that the respondents would therefore be pursuing their summary judgment application.

It appears that Mr Bjorkman at that stage considered that he should take some legal advice. However, he did not instruct any attorney to come on record for him and the second applicant. Instead, he spoke to an acquaintance, Mr Summerly, who has deposed to an affidavit in this matter. In
10 summary, Mr Summerly alleges that he was informed by Mr Bjorkman, and that he wrongly accepted, that the respondent had agreed that it would not pursue a summary judgment application and would await the delivery of a further alternative affidavit that was correctly formatted and which set out defences in relation to the claim of the then plaintiff (i.e. the respondent in this application).

Importantly, as I have already indicated Mr Summerly accepts that that was in fact not the position and that Mr Bjorkman was at all times aware: (i) that the respondent in
20 the rescission application was pursuing the summary judgment; (ii) that it had been set down for hearing before Wanless J on 4 March 2024; and (iii) that a properly-prepared affidavit would have to be delivered prior to that date if it was to be opposed. Although Mr Summerly claims that he was informed that the hearing was scheduled for 18 March 2024,

this was a clear error, and he accepts it to be so. And it was an error which, in my view, did not create sufficient cause for the absence of the first applicant himself from court on 4 March 2024 in circumstances where the notice of motion itself indicates that the hearing would indeed take place on that date. The application for rescission of judgment should fail on this ground alone.

However, even if I am incorrect on the absence of sufficient cause for the failure to appear, I am not satisfied
10 that the applicants have demonstrated the existence of a *bona fide* defence to the claim advanced by the respondent, which forms the basis of the summary judgment granted by Wanless J. In considering this aspect it bears noting at the outset that the applicants do not dispute the indebtedness to the respondent in terms of the relevant agreements, and furthermore that it is well-established in law that a counterclaim holds no weight in a summary judgment application in circumstances where that counterclaim is an unliquidated one.

20 With that background, I move to consider the alleged defences that are raised in the application for rescission. The first is an allegation that the respondent wrongly failed to consent to a subdivision of the property that forms the security for the indebtedness that this the subject matter of its claim. The second is that the respondent misplaced the

title deeds, and that there was a delay in the conclusion of the loan.

Irrespective of whether the respondent's conduct in relation to either of these two allegations is culpable or could form the basis of any claim by the applicants (a matter on which I express no view), the fact is that both of those allegations, which might potentially constitute the basis of counterclaims, do not in themselves constitute any defence to the action that had been launched by the respondent, and
10 neither potential claim is a liquidated one.

In addition, Ms Mitchell submitted that such claims will in any event have prescribed and that it is the respondent's intention to raise the question of prescription should such claims be advanced. While I note that there is no indication that either claim has subsequently been advanced by the applicants in any proceedings, I once again make no finding in that regard, as it is not relevant.

In the circumstances, in addition to finding the absence of sufficient cause for the failure to appear in March 2024, I
20 also find that the applicants have failed to establish any prospects of successfully defending the claim that forms the foundation of the judgment sought to be rescinded. The rescission application therefore falls to be dismissed.

On the question of costs, I have considered the submission of Ms Mitchell regarding the terms of the relevant

loan agreement for the payment of costs on an attorney and client scale. She very correctly conceded before me that it is not necessarily the case that the provisions of that agreement would apply to the defence of a rescission application brought under the current circumstances. Ultimately, I am not satisfied that this is a matter that would justify the grant of costs on a punitive scale and consider that costs should be granted on party and party scale including the cost of counsel on scale "B" given the nature of the
10 matter.

In the premised, I make the following order:

1. The application is dismissed.
2. The applicants are ordered, jointly and severally, to pay the respondent's costs, including the costs of counsel on scale "B".

MOULTRIE J
JUDGE OF THE HIGH COURT, JOHANNESBURG

20 Date heard and decided: 25 May 2026
For the Applicants (postponement only): JA Krause, instructed by A Botha Attorneys
For the Respondent: K Mitchell, instructed by Tim Du Toit & Co Inc.