

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: A227/2025

In the matter between:

MINISTER OF POLICE

APPELLANT

and

OD SCRAP METALS (PTY) LTD

RESPONDENT

Neutral citation: *Minister of Police v OD Scrap Metals (Pty) Ltd* (A227/2025) [2026]
ZAFSHC 402 (27 August 2026)

Coram: GREYLING-COETZER J *et* MPAMA AJ

Heard: 4 May 2026

Delivered: The date and time for hand-down is deemed to be 10h00 on 27 August 2026.

Summary: Appeal against refusal to rescind a default judgment – default judgment void *ab origine* – appeal upheld

ORDER

On appeal from: Magistrates' Court for the District of Lejweleputswa, held at Odendaalsrus:

- 1 The appeal is upheld.
- 2 The order of the Magistrate's Court dated 11 November 2025 is set aside and replaced with the following:

 '1) The default judgment dated 10 October 2023 is rescinded.

 2) The applicant is ordered to pay costs of the rescission application.'
- 3 Each party shall bear its own costs.

JUDGMENT

Mpama AJ (Greyling-Coetzer J concurring)

[1] This appeal is directed against the refusal by the Magistrates' Court for the District of Lejweleputswa, held at Odendaalsrus (the court a *quo*), to rescind the default judgment per the order delivered on 11 November 2025. In terms thereof, the court a *quo* ordered 'Judgement – Def Judgment is granted. Setting aside dismissed'.

[2] The common cause facts leading to the present appeal can be summarised as follows. During May and June 2015, members in the employ of the appellant seized copper cables found in possession of the respondent. The copper cables were seized on allegations that the cables belonged to Eskom. Aggrieved by this conduct, the respondent, during 2016, issued a combined summons against the appellant claiming the return of the cables, alternatively payment of R49 462.00 to the respondent.

[3] On 14 July 2016, summons was served on the appellant. The appellant filed a

Notice of Intention to Defend during August 2016 and a plea in September 2016. In the plea, the appellant inter alia raised that the appellant had been erroneously cited as the Minister of Safety & Security instead of the Minister of Police. Furthermore, the appellant averred that the conduct of removing the copper cables was lawful as the respondent had been found in possession of the cable belonging to Eskom.

[4] Pleadings closed and during 2017, a pre-trial conference as contemplated in s 54 of the Magistrate's Court Act 32 of 1944 (the MCA) was scheduled. The parties during the same year delivered their respective discovery affidavits as contemplated in rule 23 of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts (the rules).

[5] From the record it appears that at some point in 2018 the respondent delivered an amended particular of claim, although the extent of the amendment does not appear from the record. It further appears that a notice of bar was prepared by the respondent in respect of the amended particulars of claim calling for the appellant to plead to the amended particulars of claim, but the record does not reveal when the notice of bar was delivered.

[6] Notwithstanding the aforesaid, the matter was certified ready for trial, and the respondent set it down for trial on 18 April 2023. On the said date, the matter was removed by agreement between the parties due to an electricity outage which affected the court operations.

[7] On 10 October 2023, the respondent submitted a 'No. RM 5 Request for Default Judgment'. In terms thereof, the respondent set out that the default judgment is applied for as follows:

- '(a) The Defendant having been duly served on 14 July 2016
- (b) The time for entering a plea having expired; and
- (c) The Defendant not having entered a plea to defend; judgment be given against the defendant.'

[8] On even date, the learned magistrate granted the default judgment to the respondent per the issued court order which reads:

'After having heard the attorney for the plaintiff, the Honorable Court to grant Rule 9(13)(a) of the

Magistrate's Court Act 1944 (Act 32 of 1944), against the Judgment Debtor:

1. An order in terms of which the Defendant is ordered to deliver the movable property to the Plaintiff;
2. In the alternative and if the defendant is unable to deliver the moveable property, then in that case the Defendant must be ordered to pay the amount of R49 462.00 to the plaintiff;
3. Moratore Interest calculated from 8 March 2016 until date of final payment;
4. Costs to be taxed
5. Further and/or alternative relief.'

[9] On 11 December 2024, the appellant instituted an application for the rescission of the default judgment granted on 10 October 2023. The respondent opposed the application.

[10] In the court a *quo*, the appellant contended that the rescission is sought in terms of s 36 of the MCA read with rule 49, in that the default judgment was obtained in its absence, that good cause exists for the rescission and that the default judgment was void *ab origine*.

[11] In summation, the factual basis set out by the appellant in support of the rescission application before the court a *quo* was that the matter was an opposed action and set down for trial on 18 April 2023. On that date, the matter was removed from the roll by agreement. It was further agreed that a suitable new trial date would be agreed on by the parties. Despite this agreement, the respondent obtained a default judgment on 10 October 2023, in the absence of the appellant and without notifying the appellant of the new set-down date.

[12] The appellant contended that if the notice of set down was emailed, it is possible that the set down for the new trial date of 10 October 2023 did not come to the appellant's knowledge as the email server of the Department of Justice during July, August, and September 2023 were not in proper working order.

[13] It was further stated that on or about 22 October 2024 the Sheriff served the appellant's national office with a writ which was forwarded by email to the appellant's provincial office on 7 November 2024. Ms Mbanga, the Legal Administrative Officer of the appellant's provincial office, receipted the writ and then approached the appellant's

attorney of record on or about 7 November 2024, informing him thereof and enquired as to the circumstances which may have led to the writ being issued.

[14] Mr Mtwebana, the State Attorney who dealt with the matter, in turn advised that the matter was opposed and, after removal from the trial roll on 18 April 2023, no further documentation was served. He undertook to make enquiries to the respondent's attorney of record, to establish the circumstances which led to the writ being issued.

[15] The following day, 8 November 2024, Mr Mtwebana wrote to the respondent's attorney of record, recording receipt of the writ, the agreement pertaining to removal of the matter from the roll of 18 April 2023, and that no further documents had been received since. He also confirmed instructions to seek a rescission of the default judgment. According to the appellant, Mr Mtwebana did not receive a response to the correspondence.

[16] Mr Mtwebana then took various steps directed at the Clerk of the Court in Odendaalsrus to obtain copies of the default judgment application notice of set down and proof of service. Some documents were received on 9 December 2024. On receipt and perusal of these documents, Ms Mbanga, on 10 December 2024, consulted with the relevant members of the appellant involved in the matter and Mr Mtwebana. The application for rescission of judgment was prepared and issued on 11 December 2024.

[17] The appellant acknowledged that, if the application was brought outside the prescribed time limit, in the alternative sought condonation for such non-compliance. The appellant addressed the merits and contended that the respondent was in unlawful possession of stolen copper cables belonging to Eskom, as supported by SAPS dockets CAS 123/05/2015 and CAS 77/06/2015.

[18] In opposing the application, the respondent denied the existence of any agreement that the matter would be re-enrolled on a mutually agreed date. The respondent contended that a notice of set down for the hearing on the trial roll was served on 24 July 2024 per email, subsequent to the allocation of a hearing date by the Clerk of the Court. According to the respondent, service took place by email per the election of the appellant, and no address for service in Odendaalsrus was designated. The respondent also contended that a copy of the default judgment was served by email on 18 October 2023

and no response was received from the appellant.

[19] The respondent admitted that correspondence was received from the appellant on 8 November 2024 and indicated that a reply was directed to the appellant by email on 13 November 2024. It was disputed that the respondent was in unlawful possession of the copper cables and that the said cables belonged to Eskom. It further contended that the rescission application was filed out of time and that condonation cannot be dealt with in the rescission application and should have been sought per a separate condonation application. The appellant did not deliver a replying affidavit.

[20] The learned magistrate, in an undated reply to a request for reasons for the refusal of the rescission application, was:

- '1. Notice of Bar was furnished on the 11 January 2019. (Copies attached)
2. A reply to the Notice of Bar was never replied to until 2025.
3. Rules indicate you have 20 days to rescind this. Period of time has wholly elapsed.

My judgment is available on request of the transcript.'

[21] In this court, the appellant challenges the court a *quo*'s findings and order of 11 November 2025 essentially on three grounds. Firstly, that the rescission application was filed late. Secondly, that the court a *quo* failed to apply the correct legal principles per the rules and authority. Thirdly, the finding that the default judgment was valid and properly obtained.

[22] The appellant contends in elaboration that the application was filed within the 20 days period prescribed in terms of rule 49(1) if regard is had to when the appellant obtained the documents from the Clerk of the Court, but additionally the default judgment is void as it was granted on the incorrect factual premise that the appellant had failed to file a plea and was therefore barred, where in fact, the appellant had filed a plea on 9 September 2016, pleadings had closed, and matter was trial ready.

[23] Crisply put, the issues for determination in this appeal are thus (i) Was the rescission application brought out of time and (ii) Was the default judgment properly entered against the appellant.

[24] The applications for rescission of judgments in the magistrates' court are governed by s 36 of the MCA and Rule 49. Section 36 (1) of the MCA provides:

'(1) The court may upon application by any person affected thereby, or, in cases falling under paragraph (c) suo motu-

- (a) rescind or vary any judgment granted in the absence of the person against whom that judgment was granted;
- (b) rescind or vary any judgment granted by it which was void ab origine or was obtained by fraud or by mistake common to the parties;
- (c) correct patent errors in any judgment in respect of which no appeal is pending;
- (d) rescind or vary any judgment in respect of which no appeal lies.'

[25] The relevant portions of rule 49 provide:

'(1) A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the court, may upon good cause shown, or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit: Provided that the 20 day period shall not be applicable to a request for rescission or variation of judgment brought in terms of sub-rule (5) or (5A).

(2) It will be presumed that the applicant had knowledge of the default judgment 10 days after the date on which it was granted, unless the applicant proves otherwise.

(3) Where an application for rescission of judgment is made by a defendant against whom the judgment was granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim.

(4) . . .

(5) . . .

(5A) . . .

(6) . . .

(7) . . .

(8) Where the rescission or variation of a judgment is sought on the ground that it is void from the beginning, or was obtained by fraud or mistake, the application must be served and filed within one year after the applicant first had knowledge of such voidness, fraud or mistake.

(9) '

[26] Rule 49 makes provision for two distinct time periods within a rescission application that should be brought depending on the circumstances applicable to each case. Rule

49(1) sets the time period to be within 20 days after obtaining knowledge of the judgment. This period of 20 days does not find application if the application is brought under sub-rule (5) or (5A). Equally, the 20 days' time period also does not find application where the application is brought on the ground that the judgment is void from the beginning, was obtained by fraud or mistake. In the latter instance, the application must be served and filed within one year after knowledge of such voidness, fraud or mistake had been obtained. Which subsection will find application will obviously depend on the grounds and facts relied on by the applicant.

[27] The appellant in the court *a quo* contended that the default judgment had been granted in its absence and was void *ab origine*, relying on the circumstances summarised above, thus invoking the provisions of rule 49(8). The appellant further contended that the rescission application had been instituted within 20 days of it becoming aware of the default judgment, thereby asserting the applicability of rule 49(1). It is apparent, however, that the court *a quo* approached the matter on the premise that rule 49(1) was applicable. That premise was erroneous on the facts of the matter and materially influenced the court *a quo*'s determination. Rule 49(8) was engaged, and the application was thus not brought out of time.

[28] Before dealing with the question whether the default judgment was void, a further manifest irregularity stands to be highlighted. The court *a quo*, in the reasons advanced for the refusal of the rescission application, relied upon facts and circumstances which did not appear *ex facie* the affidavits which were served before the court *a quo*. It was never alleged by the respondent in its affidavit opposing the rescission that the default judgment was sought on the basis that a notice of bar was filed on 11 January 2019 and that a reply to the notice of bar was never replied to until 2025. Nevertheless, the court invoked this consideration as a basis for refusing the application for rescission.

[29] A court is bound by the pleadings and, in this case, the affidavits placed before it. In *Minister of Safety and Security v Slabbert*¹ the court restated that the purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies, and it is impermissible for the trial court to have recourse to issues falling outside the pleadings when deciding a

¹ *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) para 11.

case.

[30] Turning to the question whether the default judgment was void *ab origine*. The appellant in this respect contends that the RM5 Request for default judgment materially misrepresented the facts in that the respondent represented that it applied for default judgment on the basis that the appellant had been served on 14 July 2016, that the time for entering a plea had expired and that the appellant had not entered a plea to defend. From the common cause facts which were served before the court *a quo*, it was clear that the matter was an opposed action having been enrolled for trial on 18 April 2023. From the record, it is further unavoidable that the appellant had already filed a plea in September 2016 to the summons served on 14 July 2016. It can thus not be sustained that as at granting of the default judgment, no plea had been filed to the summons served on 14 July 2016.

[31] Although the above finding is dispositive of the issues, the respondent contended during argument that amended particulars of claim had been filed, in respect of which a notice of bar was subsequently issued. The respondent accordingly submitted that it was entitled to default judgment on the basis set out in the RM5 Request for Default Judgment. The amended particulars of claim, however, do not form part of the record.

[32] For the sake of completeness, it is therefore necessary to consider whether the appellant was obliged to deliver a plea pursuant to the alleged filing of the amended particulars of claim and, consequently, whether the respondent was entitled to default judgment by reason of the appellant's alleged failure to do so following the notice of bar.

[33] Rule 55A is couched in identical terms to rule 28 of the Uniform Rules of Court. Rule 55A(8) provides:

'(8) Any party affected by an amendment may, within 15 days after the amendment has been effected or within such periods as the court may determine, make any consequential adjustment to the documents filed by him or her, and may also take the steps contemplated in rule 19.'

[34] In *Nqabeni Attorneys Incorporated v God Never Fails Revival Church*² it was held, with reference to Uniform Rule of the Court 28(8) that:

² *Nqabeni Attorneys Incorporated v God Never Fails Revival Church and Others* (40739/2017) [2019] ZAGPJHC 51 (7 March 2019).

‘(a) When a plaintiff accomplishes an amendment to a declaration, and no plea has yet been filed, the defendant is put on terms to comply with the rule 22(1) of the Uniform Rules of Court and thereby file a plea within 20 days (failing which a notice of bar would have to follow in order to compel delivery of the plea).

(b) The scope of subrule (8) is limited to circumstances where an amendment creates the risk of ripple effect on pleadings already filed, which risks rendering those pleadings non-responsive to the amended pleading and for that reason there may be a need of an adjustment to render them responsive.’³

[35] Rule 55A(8) did not impose an obligation upon the appellant to deliver an amended plea merely because of the filing of amended particulars of claim. The rule gives an election to the party affected by the amendment to decide if an adjustment is necessary. It does not follow as a matter of course that a litigant must effect consequential adjustments to its pleadings upon every amendment introduced by the opposing party.

[36] Unfortunately, further irregularities pertaining to the granting of the default judgment are apparent and warrant mention. The most obvious, but unexplained being the utilisation of the RM5 Request for default judgment form in circumstances where the matter was set down on the trial roll for 10 October 2025. Having enrolled the matter as such, and in circumstances where the appellant failed to appear at the hearing, the matter stood to be dealt with in terms of rule 32. Rule 32 provides:

‘Non-appearance of a party-withdrawal and dismissal

(1) If a plaintiff or applicant does not appear at the time appointed for the trial of an action or the hearing of an application, the action or application maybe dismissed with costs.

(2) If a defendant or respondent does not appear, a judgment (not exceeding the relief claimed) may be given against him or her with costs, after consideration of such evidence, either oral or by affidavit, as the court deems necessary.’

[37] There is no indication in the record that rule 32 and process in terms thereof was followed, no affidavit appeared to have been filed in support or evidence led. The relief sought by the respondent was principally an order for delivery of the movable property alleged to be owned by the respondent and, in the alternative, payment of the monetary sum of R49 462.00. The particulars of claim do not demonstrate how the amount claimed was calculated; as such, the alternative was not a liquidated demand and required

³ Ibid para 12.

evidence to support the granting of such an amount.

[38] The failure to determine and grant the default judgment in terms of rule 32 is further fortified by the judgment granted. The judgment records that it is granted in terms of rule 9(13)(a). Rule 9(13)(a) does not provide for the granting of judgment by default, nor does it prescribe the manner in which such judgment may be entered. Rule 9(13) provides:

'(a) Unless otherwise provided, where service of process may be effected by registered post such service shall be effected by the sheriff placing a copy thereof in an envelope, addressing and posting it by prepaid registered letter to the address of the party to be served and making application at the time of registration for an acknowledgement by the addressee of the receipt thereof as provided in regulation 44(5) of the regulations published under Government Notice R,550 of 14 April 1960'.

It is therefore difficult, if not impossible, to discern the basis upon which the court *a quo* relied upon this rule in granting the judgment.

[39] From the reasons advanced for the refusal of rescission, it appears the court *a quo* regarded the finding that the application had been brought out of time as conclusive and did not deal with the *bona fide* defence advanced by the appellant. The appellant contended that the copper cables were seized by the police pursuant to criminal investigations under CAS NO. 123/05/2015 and 77/06/2016, which constituted stolen property and were, in fact, the lawful property of Eskom.

[40] The standard for establishing a *bona fide* defence in a rescission application is not onerous. In *Van Heerden v Bronkhorst*⁴ the Supreme Court of Appeal held that:

'[a] *bona fide* defence needed to be established prima facie only. It was accordingly not necessary to deal fully with the merits of the case in order to prove the case. It would be sufficient to set out facts, which if established at the trial, would constitute a defence valid in law.'⁵

The appellant has done so.

[41] For the foregoing reasons, the rescission application was not brought out of time and in fact void *ab origine*. The court *a quo* thus misdirected itself in refusing the application for rescission of judgment.

⁴ *Van Heerden v Bronkhorst* (846/19) [2020] ZASCA 147 (13 November 2020).

⁵ *Ibid* para 26.

[42] The respondent in its papers lamented the delays attributable to the appellant in bringing the matter to finality. It is so that the action proceedings commenced in 2016 and the judgment was obtained by the respondent in 2023. While acknowledging that such delays and notwithstanding the frequently used maxim in our jurisprudence that 'justice delayed is justice denied', the inescapable reality remains that the judgment is marred with concerning irregularities and has been rendered void *ab origine*. Consequently, the appeal must succeed.

[43] The general rule is that costs follow the event. However, in the exercise of my discretion and having regard to the circumstances of this matter, I consider it just reasonable that each party bears its own costs.

[44] **On appeal from:** Magistrates' Court for the District of Lejweleputswa, held at Odendaalsrus:

1 The appeal is upheld.

3 The order of the Magistrate's Court dated 11 November 2025 is set aside and replaced with the following:

'1) The default judgment dated 10 October 2023 is rescinded.

2) The applicant is ordered to pay costs of the rescission application.'

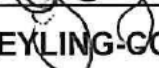
3 Each party shall bear its own costs.



 L MPAMA

ACTING JUDGE OF THE HIGH COURT

I concur:



 D GREYLING-COETZER

JUDGE OF THE HIGH COURT**Appearances**

For the appellant:

T Ntoane

Instructed by:

Office of State Attorney
Bloemfontein

For the respondent:

J Donnelly-Bornman

Instructed by:

Neuman Van Rooyen
Welkom
c/o Phatsoane Attorneys
Bloemfontein