REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE:

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHER JUDGES YES/~~NO~~

(3) REVISED: NO

19 January 2024

DATE SIGNATURE

CASE NR: 19982/2016

In the matter between:

ROAD ACCIDENT FUND **APPLICANT**

and

LISBETH RUELE **FIRST RESPONDENT**

MALEPE ATTORNEYS **SECOND RESPONDENT**

SHERIFF PRETORIA EAST **THIRD RESPONDENT**

THE LEGAL PRACTICE COUNCIL **FOURTH RESPONDENT**

Delivered: *This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 19 January 2024.*

JUDGMENT

MARUMOAGAE AJ

A INTRODUCTION

[1] This is an application for the rescission of the default judgment granted by Basson J on 15 February 2021 against the applicant in its absence. The rescission application is brought in terms of Rule 31(6)(a) of the Uniform Rules of Court which gives effect to section 23A of the Superior Courts Act.[1] Alternatively, the applicant relies on the common law grounds for rescission.

[2] This application is opposed and there is only one answering affidavit before the court which appears to have been filed on behalf of the first respondent. This answering affidavit is accompanied by a confirmatory affidavit deposed to by the attorney who practices as such at the second respondent. However, there is no indication whether this affidavit is also submitted on behalf of the second respondent.

[3] From the papers that the parties submitted to the court, it is clear that the first respondent is not represented by the second respondent, a firm of attorneys that represented her when she successfully brought a claim against the applicant. The first respondent is represented by Malatji S Legal Practitioners. However, during the oral argument, Mr Malepe who is an attorney at the second respondent argued the matter assisted by Mr Malatji who also made oral submissions. The third and fourth respondents did not participate in these

[1] 10 of 2013.

proceedings and there is no order sought against them. For convenience's sake, I shall refer to Mr Malepe as the second respondent throughout the judgment even though the actual second respondent is his law firm.

[4] The issue that calls for determination is whether there was an agreement concluded between the applicant and the first respondent through the second respondent to retry the first respondent's claim for loss of earnings, which agreement forms the basis of the applicant's application for rescission. If the court finds that such an agreement was concluded, it must then determine whether a case for rescission has been made and whether the applicant was obliged to make an application for condonation in this matter.

B BACKGROUND

[5] The first respondent was involved in a motor vehicle accident where she sustained injuries. She instituted action against the applicant for general damages, past medical expenses, future medical expenses, and loss of earnings. The applicant conceded 100% liability to pay the first respondent's proven heads of damages. The issue of general damages was also settled.

[6] The applicant was initially represented by one of the firms of attorneys that was part of its panel of attorneys. When the applicant dissolved its panel of attorneys, the mandate of this firm of attorneys was terminated on 30 May 2020. Initially, the first and second respondents engaged the applicant through this firm of attorneys where all court processes were served.

[7] On 15 February 2021, Basson J awarded the first respondent compensation in the amount of R 5 368 308.00 for loss of earnings. This order was granted in the applicant's absence. The applicant did not pay this amount to the first respondent. On 26 August 2021, the warrant of execution was issued against the applicant and duly served on the applicant by the third respondent. The applicant reassessed the first respondent's total loss of earnings and determined that only an amount of R 2 156 050.00 was due to her. This

amount was subsequently paid to the second respondent on 21 September 2021.

[8] The applicant launched an urgent application to suspend the operation of the warrant of execution and execution of the order granted by Basson J. The applicant also sought an order interdicting the third respondent from proceeding with the execution against its movable assets. On 30 September 2021, the second respondent obtained a second warrant of execution against the applicant.

[9] The applicant's urgent application was heard on 6 October 2021 by Davis J who granted an order that interdicted the second respondent from proceeding with the execution of the warrants of execution against the applicant's movable assets. In terms of this order, the warrants of execution granted in favour of the first respondent were suspended pending the institution of a rescission application by the applicant of Basson J's order within 20 days of Davis J's order.

[10] On 7 October 2021, the second respondent wrote an email to the applicant's attorneys wherein it was proposed that the matter should be retried on the condition that the applicant appoints its own experts. Part of this email read:

'Please notice that we propose that this matter be retried. On condition that you appoint your own experts, IP Actuary and others if necessary. Then you await for us to supply you with additional medical records of the claimant. Further, the Plaintiff's attorney will appoint new orthopaedic and physiotherapist. Then do the joint minutes and restart negotiations. If not possible of being settled parties, then go to court to determine final settlement'.

[11] On 2 November 2021, the second respondent requested the applicant to pay the balance of the outstanding amount of awarded damages. On 22 June 2023, the applicant was notified that the sheriff would execute the warrant on 25 July 2023. On 6 July 2023, the applicant instituted an application for rescission, several months after Davis J's order. The applicant also lodged an urgent application to stay the operation and execution of Basson J's order,

which was heard on 18 July 2023 by Labuschagne AJ. On 21 July 2023, Labuschagne AJ granted an order suspending the operation and execution of Basson J's order, pending the finalisation of the applicant's rescission application.

C THE PARTIES CONTENTIONS

i) Applicant's version

[12] According to the applicant, this matter was first enrolled for trial on 6 August 2018. On this date, the applicant conceded the merits and agreed to pay 100% of the first respondent's proven damages. All other heads of damages were settled, and the only outstanding issue was the determination of the quantum of the loss of earnings. The second respondent approached this court to set the matter down. On 21 May 2019, the applicant was served with a notice of set down that indicated that the matter would be heard on 30 November 2020. On 23 October 2020, a joint submission in support of certification and/or settlement/consent draft order was filed. This document indicated that the matter was ready to be heard on 30 November 2020.

[13] According to the applicant, on 21 May 2019, the first respondent delivered a further notice of set down to the applicant's attorneys of record at the time, where the applicant was notified that the matter was set down for 15 February 2021. The applicant contends that it is not certain what transpired on 30 November 2020. The matter was heard on 15 February 2021 on an unopposed basis and the amount the first respondent claimed for loss of earnings was awarded by Basson J.

[14] The applicant is of the view that the first respondent is not entitled to the amount of compensation awarded by Basson J. It submits that it reassessed the first respondent's total loss of earnings and determined that the amount that the first respondent should receive is R 2 156 050.00. This amount was arrived at with the assistance of actuarial valuation which was obtained on 02

September 2021. Based on this reassessment, the applicant paid this amount into the second respondent's bank account.

[15] The applicant contends that after efforts to enforce the order granted by Basson J and two urgent applications it successfully brought, the second respondent proposed that the matter should be retried. According to the applicant, this proposal was accepted. In this proposal, the second respondent required the applicant to appoint experts, if necessary, which the applicant claims it did not find necessary to do. Further, the first respondent failed to inform the applicant that, according to her, there was no agreement or that the applicant had breached the agreement because of its failure to brief experts. Further, to demonstrate that an agreement was reached, the first respondent waited for a period of eight months from November 2022 before executing her warrant.

[16] The applicant requested the second respondent to file a notice in terms of section 42 to abandon the order granted by Basson J. The applicant contends further that because of the agreement reached by the parties to retry the matter after the suspension of the default judgment and the stay of the warrant of execution, it did not proceed to launch its rescission judgment. First, on 21 July 2023, Davis J ordered that the warrant of execution be stayed and the applicant launch its rescission application within 20 days of that order. Secondly, Labuschagne J on 6 October 2023 ordered that warrants of execution should not be enforced pending the finalisation of the applicant's rescission application. According to the applicant, Labuschagne J also found that there was an agreement concluded between the applicant and the first respondent.

[17] The applicant contends further that the first respondent failed to enrol the matter for purposes of trial. The applicant is pursuing this rescission application on the strength of its agreement with the second respondent that the matter will be retried. The applicant argues that the proposal made by the second respondent for the retrial is tantamount to consenting to the rescission

of the default judgment by agreement. The applicant submitted that it accepted this proposal.

[18] According to the applicant, it was not in wilful default because its attorney of record at the time was served with two different notices of set down with two different trial dates on the same day. The first respondent's counsel at the time also confirmed 30 November 2020 as the date of trial to the court. The applicant contends further that it did not know that the matter was proceeding to trial on 15 February 2021 due to the confusion and uncertainty created.

[19] The applicant claims that it has a *bona fide* defence. Further, the first respondent failed to serve a notice of set down upon the applicant or its representatives. The applicant also argues that it is not clear why the second respondent would brief counsel to prepare a practice note and joint submission for 30 November 2020, when they knew on 21 May 2019 that the matter was not enrolled for 30 November 2020.

[20] The applicant contends further that the first respondent failed to inform the applicant that the date of set down was 15 February 2021. The applicant alleges that it would seem that the first respondent and/or the second respondent copied the acknowledgment of receipt by the applicant's erstwhile attorneys of record from the notice of set down for 30 November 2020 to create an impression that the notice that set the matter down for 15 February 2021 was duly and properly served. Further, the first and/or second respondent unlawfully and inappropriately obtained a trial date, an allocation for a hearing, and a judgment against the applicant. To 'support' this allegation, the applicant stated that:

[20.1] it would seem that the stamp and signature on the second notice of set down were uplifted and copied from the first notice of set down;

[20.2] the last page of each notice of set down, containing the signatures of the applicant's attorney of record at the time, looks decidedly like a

copy. This is an extremely serious allegation which I shall return to below.

[21] The applicant contends further that it is highly improbable that the second respondent would have obtained two different trial dates. Further, the Registrar would not have enrolled the matter for another date after providing 30 November 2020 as the date of the trial. It was argued further that once the first respondent had been allocated 30 November 2021 as the date of the trial, there was no need to acquire another trial date on the same day. Further, this demonstrates that the applicant was not informed or properly informed of the trial date of 15 February 2021.

[22] As part of the defence that it claims it has, the applicant submits that the sum of the first respondent's loss of earnings awarded by Basson J is not supported by the facts. According to the applicant, the educational psychologist used by the first respondent concluded that the first respondent would have passed Grade 12 and obtained a higher certificate. The applicant submits that the findings of this expert do not support the amount awarded by Basson J.

[23] Further, the quantum court order is vague, ambiguous, patently erroneous, and in conflict with the facts of the first respondent's case. The applicant also states that the quantum court order is contradictory in certain respects. On the one hand, it orders the creation of a trust because the first respondent cannot manage her own financial affairs. On the other hand, it directs the applicant to pay a portion of the award into an account nominated by the first respondent.

[24] The applicant argues that the formulation of Basson J's order is prejudicial to the first respondent. Further, there is a discrepancy between the amount claimed in the particulars of the claim, which is R 5 020 000.00, and the amount awarded by Basson J, which is R 5 368 308.00, and that necessary amendments were not effected. The applicant contends that the first respondent did not serve any notice to amend her particulars of claim in terms

of Rule 28 of the Uniform Rules of Court. Further, amended pages purporting to amend the first respondent's claim are defective and fatally flawed.

[25] The applicant noted that the first respondent failed to reply to its founding affidavit *ad seriatim* and also did not indicate that any specific allegation not responded to should be regarded as denied. As such, any specific allegation not addressed in the answering affidavit should be regarded as being admitted. According to the applicant, this application was not launched initially because the parties had reached an agreement to have the first respondent's claim for loss of earnings retried.

[26] The applicant also pointed out that the first respondent when replying to the concerns raised regarding the notices of set down, pointed out that she was unable to proceed with the matter on 30 November 2020 because the compliance affidavit was not timeously uploaded on caselines. This led to the first respondent to forfeit the trial date and apply for another date. According to the applicant, the requirement for the compliance affidavit was not a requirement on 21 May 2019. It only became a requirement on 18 September 2020. Based on this, the applicant submits that the first respondent's allegation is false. As such the matter was improperly set down for 15 February 2021. The applicant maintains that there was no need to make an application for condonation in this matter.

ii) First Respondent's version

[27] A point *in limine* was raised from the bar on behalf of the first respondent. This point was not raised in her answering affidavit. It was argued that the court does not have jurisdiction to entertain this application because the applicant did not make an application to be condoned to file its rescission application outside the 20 days from 15 February 2021 or soon after it became aware of Basson J's order. According to the first respondent, the applicant's application must be dismissed on this basis alone.

[28] In her answering affidavit, the first respondent states that she instructed Adv S Malatji to represent her in all post Basson J's order litigation. The first respondent alleges that the applicant terminated its panel of attorneys without putting in place sufficient measures to cater to the ongoing litigations that the firms of attorneys that were in its panel handled. The mandate of the firm of attorneys that represented the applicant against the first respondent was terminated. However, the second respondent served a notice of set down on that firm before the termination of its mandate.

[29] On 21 May 2019, the second respondent applied for a trial date and was allocated 15 February 2021. When the second respondent went to serve the notice of set down, he erroneously served a document that depicted an incorrect date of 30 November 2020. The first respondent also referred the court to the roll of 30 November 2020 which indicates that the matter between the parties was not on the roll. When the second respondent arrived at his office, he noted the mistake and immediately prepared a notice of withdrawal to withdraw the erroneous notice of set down. He went to the firm of attorneys that was representing the applicant at the time to serve both the notice of withdrawal and the 'revised' notice of set down which indicated the date of trial to be 15 February 2019.

[30] The first respondent alleges that the second respondent provided one of the applicant's claim handlers access to court online, which is a demonstration of her intention to notify the applicant of the proceedings in the matter and that the prosecution of the action was above board. The applicant elected not to obtain or file any expert report. The only evidence before the court was that provided by the first respondent. On the strength of this evidence, Basson J granted an order in favour of the first respondent. The applicant did not attend the proceedings. Basson J's order was emailed to the claims handler on 16 February 2021.

[31] Failure to make payment led to the first respondent obtaining a writ of execution against the applicant. The applicant successfully applied to have this writ stayed by an urgent court. According to the first respondent, this

application was fatally defective on the basis that the application was launched on 20 September 2021 but the founding affidavit was commissioned on 21 September 2021.

[32] The second respondent proposed a retrial on 7 October 2021. The applicant failed to communicate whether the proposal was accepted or not. Instead, the first respondent informed the second respondent to file a notice to abandon Basson J's order. According to the first respondent, this was a counterproposal and not an acceptance to have the matter retried. The first respondent alleges that in the absence of an agreement between the parties, the position before the proposal for a retrial was made still stands. A retrial was proposed on the condition that the applicant will appoint its own experts. This proposal was neither explicitly nor tacitly accepted. In its request for Basson J's order to be abandoned, the applicant did not indicate whether the condition stated in the proposal was accepted.

[33] The second respondent refused to file a notice to abandon Basson J's order. The first respondent contends that if the applicant was under the impression that the proposal constituted consent to the rescission application, it would have set up an appointment and invited the first respondent for assessment. According to the first respondent, on 25 November 202, the second respondent indicated to the applicant's current attorneys that there was no agreement between the first respondent and the applicant.

[34] It is contended further that the applicant also failed to apply for rescission of Basson J's order within 20 days of Davis J's order. Further, while this order allowed the applicant to bring its rescission application, it did not excuse it from explaining why it had not brought such an application within 20 days from 16 February 2021.

[35] The first respondent contends that the applicant must explain why it failed to attend court despite receiving the notice of set down through its attorneys at the time. Further, there is no merit to the allegation that the second respondent copied an acknowledgment of the erroneous notice of set down.

According to the first respondent, the applicant is out of time and its attack on the compensation order is without merit. Further, the applicant failed to appoint its own experts from the date the first respondent instituted her action to the day Basson J granted his order, to quantify each claim.

[36] The applicant contends further that because the second respondent served and filed a notice of withdrawal together with her revised notice of set down, the applicant was in wilful default. Further, the applicant does not have a *bona fide* defence as to why it did not attend court on 15 February 2021 and its failure to institute its rescission application within 20 days after being alerted of Basson J's order. According to the first respondent, the applicant cannot criticize the report of her educational psychologist without producing a contradictory report. Further, the applicant had ample opportunity to file any report before the date of trial by its own experts. The report of its actuary is dated 2 September 2021, and was never served on the second respondent.

[37] The first respondent contends that the applicant ought to have applied for the rescission of Basson J's order timeously. Further, the applicant's attack on Basson J's order is without merit because the applicant has already paid over R 2 000 000.00 into the second respondent's bank account. According to the first respondent, there is no merit to the applicant's contention that there is a discrepancy between what was claimed in the pleadings and what was ordered because necessary amendments were effected.

D APPLICABLE LAW AND ITS DEVELOPMENT

i) Common law

[38] Rescission of judgment is a common law remedy that empowers a court to cancel the order that was granted against the party that was not present in court when the order was made on a previous occasion to allow such a party to defend/oppose the matter. At common law, the court could only rescind the judgment when such a party demonstrates that there is sufficient cause for

the judgment to be rescinded.[2] To establish sufficient cause, the party that sought to rescind the judgment had to first, offer the court a reasonable and acceptable explanation for its failure to either defend/oppose the matter or attend in court.[3]

[39] Secondly, as the Constitutional Court confirmed in *Barnard Labuschagne Incorporated v South African Revenue Service and Another,* the party seeking rescission must also demonstrate *'… that on the merits it has a bona fide defence which prima facie carries some prospect of success'*.[4] In *Chetty v Law Society, Transvaal,* the Appellate Division (as it then was) held that the application for rescission runs the risk of being refused if the party against whom the order was made fails to meet one of these requirements.[5]

[40] When considering whether to rescind any judgment, the court is exercising its discretion which must certainly be exercised judiciously. In *Van Heerden v Bronkhorst*, Molemela JA (as she then was) emphasised that the

> *'court's discretion whether or not to grant rescission of judgment must be influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case'*.[6]

ii) Codification

[41] The law that regulates the rescission of judgments is duly codified in South Africa. The empowering statutes that regulate both the Magistrates Court and the High Court duly empower these courts to rescind their judgments when it is justified to do so. In the High Court, rescission applications are generally

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[2] See *De Wet and others v Western Bank Ltd* 1979 (2) SA 1031 (A) 1042.
[3] See *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) 765.
[4] 2022 (5) SA 1 (CC); 2022 (10) BCLR 1185 (CC) para 46. See also *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* 2021 (5) SA 327 (CC); 2021 (11) BCLR 1263 (CC) para 71.
[5] 1985 (2) SA 756 (A) 765.
[6] [2020] JOL 48938 (SCA) para 50

brought in terms of either Rule 42(1)[7] or Rule 31(2)(b).[8] Unlike in the former Rule, there are no explicit periods within which to bring rescission application in terms of the latter Rule. Nonetheless, it was held in *Mathebula and Another v Standard Bank of South Africa Limited and Others,* that:

'[i]n terms of Rule 42(1)(a) of the Uniform Rules of Court an order or judgement erroneously granted may be rescinded or varied on application. If the judgment or order was not erroneously granted it is trite that the applicants must show good cause and must not have been in wilful default. They must also have a bona fide defence'. [9]

iii) Rescission by consent

[42] While both the Magistrates Courts and the High Court could rescind their judgments, initially, only the Magistrates Court could do so when the judgment creditor had consented to such an application being brought by the judgment debtor. In terms of section 36(1) of the Magistrates' Court Act,[10] this court may upon application by an affected person rescind any judgment it has granted. The procedure that must be followed to implement the remedy provided for in this section is laid out in Rule 49 of the Magistrates Court Rules. This rule also provides the content that must be alleged for the court to exercise its discretion.[11]

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[7] This rule reads as follows '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 or erroneously granted in the absence of any party affected thereby; (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission; (c) an order or judgment granted as the result of a mistake common to the parties'.

[8] This rule reads as follows '[a] defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon
good cause shown, set aside the default judgment on such terms as it deems fit'.

[9] (2012/9223) [2018] ZAGPPHC 306 (26 April 2018) para 19. See also T.A.M v M.F.M (1275/2021) [2022] ZAFSHC 129 (12 May 2022) where it was stated that '[a]lthough rule 42(1) does not specify a time-limit, it is a discretionary remedy. Like all discretionary remedies, rescission under rule 42(1) must be sought within a reasonable period of time. The same applies to rescission at common law' (footnotes omitted). See further *Ledwaba N.O v Mthembu and Others* (25312/2016) [2021] ZAGPJHC 640 (4 November 2021) para 11, where it was correctly held that '[u]nlike rule 31(2)(b), rule 42, similar to the common law, does not specify a period within which a rescission application in terms thereof should be launched. However, a rescission application in terms of rule 42 or the common law must be launched within a reasonable period. What is a reasonable period depends upon the facts of each case.[9] The purpose of rule 42 is to correct expeditiously an obviously wrong judgement or order'.

[10] 32 of 1944

[11] *Minister of Police v Nongwejane* (CA&R63/2015) [2015] ZAECMHC 80 (20 November 2015) para 5.

[43] Most interestingly, Rule 49(5) of the Magistrates Court Rules makes provision for the person in whose favour a default judgment was granted to consent in writing for that judgment to be rescinded. Initially, there was no similar rule in the rules that regulates proceedings in the High Court. This rule raised several interesting questions relating to whether it created a new regime, different from that created under the common law, to the extent that the person against whom a default judgment was granted did not have to comply with the codified requirements of the common law such as to demonstrate good cause for the court to rescind its judgment. In *Venter v Standard Bank of South Africa*, it was held that:

'[w]hilst good cause or good reason is required in the first situation, in neither the second nor the third situation is good cause a requirement. The express wording of Rule 49(4) is quite inconsistent with the requirement of good cause, insofar as an element thereof is the existence of a bona fide defence. From the aforegoing it is apparent that Rule 49(4) and 49(5) constitute a departure from the previous requirement of "good cause" as embodied in Rule 49 prior to its amendment on 13 June 1997 and likewise constitutes a departure from the common law'.[12]

[44] Following the *Venter* decision, the legislature reacted by inserting subsection (2) in section 36 of the Magistrates Court Act, which provides that:

'[i]f a plaintiff in whose favour a default judgment has been granted has consented in writing that the judgment be rescinded or varied, a court may rescind or vary such judgment on application by any person affected by it'.[13]

[45] A different approach was adopted in *RFS Catering Supplies v Bernard Bigara Enterprises CC,* where it was stated that:

'[w]ith due respect to the learned Judge in Venter's case, I do not agree that the relevant provisions of the Magistrates' Courts Rules are not consonant with the common law. On the contrary, the wide discretion conferred on the courts in respect of rescinding judgments, recognised in Roman-Dutch law and interpreted by our Courts, is amply sufficient to accommodate this development. It is also preferable for

[12] [1999] 3 All SA 278 (W) 283.
[13] Judicial Matters Amendment Act 55 of 2002.

the common law to accommodate such a development rather than to resort to legislation to do so'.[14]

Further that

'Rule 49(1) retains the requirement of good cause, adding the requirement of good reason as an alternative, and is clearly intended to cover the situation where the application for rescission of judgment is opposed. This is amplified by Rules 49(2) and 49(3). Rule 49(4) deals with the situation where the defendant against whom judgment was granted does not wish to defend the proceedings but has satisfied the judgment within a reasonable time after it came to his knowledge. All that is required is that the defendant must show that he or she was not in wilful default. This does not envisage the consent of the plaintiff as does Rule 49(5) which has been analysed above'.[15]

[46] This case was followed in *Damon & another v Nedcor Bank Ltd*, where it was held that

'[t]here is no equivalent of rule 49(5) in the High Court rules of procedure, but it seems to me that if I am bound by the judgment in RFS Catering Supplies to accept that there is no inconsonance between the remedy which was held to be available in terms of rule 49(5) and the common law, I am equally bound to recognise the existence of an equivalent remedy in this jurisdiction notwithstanding the absence of any equivalent rule of court'.[16]

[46.1] However, despite following *RFS Catering Supplies,* the court expressed some reservations about the correctness of this decision as follows:

'I have considerable reservation about accepting that the judgment creditor's consent should by itself be determinative of the question. On the contrary, if the need for relief is established by the applicants' need not to unreasonably be denied access to credit, it is readily conceivable that a more compelling case might be made out in fairness and justice in a matter where the judgment creditor was unwilling, for no good reason, to furnish written

[14] 2002 (1) SA 896 (C) 903.
[15] 2002 (1) SA 896 (C) 903.
[16] [2006] JOL 18550 (C) para 8.

consent of the sort referred to in Magistrate's Court rule 49(5). It also appears to me that fairness and justice in this context must entail having regard not only to the interests of the applicant for rescission, but also to the economic and societal functions of accurate debt and credit records in modern commercial life. A further consideration must be whether the particular remedy sought is the appropriate one in the context of other potentially available common-law remedies, including remedies against the credit bureaux. The latter consideration did not enjoy consideration in RFS Catering Supplies because of the focus of the enquiry in that matter; viz whether rule 49(5) was consistent with the common law'.[17]

[47] The full court of the Western Cape Division in *Vilvanathan & another v Louw NO,*[18] held that *RFS Catering Supplies* was wrongly decided. The court reasoned that the well-established essential requirements of 'sufficient cause', reasonable and acceptable explanation for the default, and *bona fide* defence which, *prima facie*, carries some prospects of success are applicable even to Rule 49(5) rescission applications. Most significantly, the court held that these:

'… principles expounded … are still, of course, binding on any judge of a Provincial or Local Division: the territory onto which this Court ventured in the RFS Catering Supplies case, supra, was therefore not terra nova, and the court was not at liberty to depart in that case from the above-mentioned principles, which had long since been settled by the Appellate Division and the Supreme Court of Appeal. However, it seems to me, with respect, that the judgment in the RFS Catering Supplies is not compatible with those principles'.[19]

[47.1] The court concluded by stating that:

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[17] *Damon & another v Nedcor Bank Ltd* supra para 9.

[18] [2010] JOL 25198 (WCC).

[19] *Vilvanathan & another v Louw NO* supra 24. The court further reasoned that '*… it is my respectful view that where, as here, certain principles have been clearly laid down by the Appellate Division or the Supreme Court of Appeal it is not for a Provincial or Local Division of this Court to depart from them in the name of development or adaptation of the law so as to meet altered social circumstances, no matter how unpalatable or outdated such a Division may find those principles: in such circumstances, it seems to me, with respect, to be the exclusive prerogative of the Supreme Court of Appeal or, perhaps, of the Constitutional Court, to bring about any development or adaptation of the law which may be called for. Otherwise, in my respectful view, the time-honoured rules and conventions pertaining to the hierarchy of courts in South Africa and the principles of stare decisis would be at risk of being eroded with a resultant detrimental dilution of certainty in the law'.*

'[a]n application for rescission brought under rule 31 is doomed to failure unless the applicant can show "good cause" or "sufficient cause", and that means that he must establish, inter alia, that he has a bona fide defence to the plaintiff's claim against him. As I have said, the applicants in the present matter have not even attempted to satisfy this requirement. Consequently, in my judgment, their application must fail on this basis, too'.[20]

[48] The lack of a similar provision in both the Superior Courts Act and the Uniform Rules of Court that empowered various divisions of the High Court to rescind their judgments based on the judgment creditors' consent was highlighted in *Lazarus and another v Absa Bank LTD*.[21] In this case, the judgment debtors applied for the rescission of two default judgments granted against them. The judgment creditor did not oppose these applications and provided them written consent to bring these applications. The judgment debtors brought to the attention of the court the provisions of Rule 49(5) of the Magistrate Court Rules, in respect of which the court held:

'If rescission can be granted in the magistrate's court with the consent of the judgment creditor and without more … there would be an anomaly as the rights of a party in the magistrate's court would be greater than the rights of a party in the High Court. But any such anomaly would be due to the provisions of the Magistrates' Courts Rule and, in the absence of any similar provision in the High Court Rules, consent by the creditor cannot, without more, justify rescission in the High Court'.[22]

[49] In *Anoj Kalikhan t/a Tri-Star Logistics v Firstrand Bank Limited,*[23] the applicant brought an application to rescind the judgment. The respondent did not oppose the application and went on to provide consent in writing for the judgment to be rescinded. It was conceded on behalf of the applicant that the order sought was incompetent in the High Court, but an argument was made that the court should develop the common law *'… to include the situation such as arises in this matter when the judgment debt is discharged and the judgment creditor consents to the rescission of the judgment concerned'.*

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[20] Ibid 34.
[21] 1999 (2) SA 782 (W).
[22] Ibid 787.
[23] [2013] JOL 30450 (GSJ).

[49.1] Among others, it was argued on behalf of the applicant that because rule 49(5) of the Magistrates' Courts Rules allows for the rescission of a judgment in the Magistrate's Court by consent, this rendered the law relating to rescission of judgments discriminatory to the extent that rescission of judgments by consent was not allowed in the High Court.[24] The applicant contended that *'… the Court should develop the common law to include consent by the judgment creditor thereto as a ground constituting good cause to rescind a default judgment'.*[25] Further, *'… the effect of the amendment to the relevant rule of the Magistrate's Court placed litigants in that forum on a better footing when applying for rescission of judgment than those in the High Court'*.[26]

[49.2] In declining the invitation to develop the common law as requested, the court held that the:

> *'… discrimination that arises is not caused by the Rules of the High Court per se and the common law pertaining thereto at all. The discrimination is due entirely to the Legislature having amended the Rules of the Magistrates' Courts to enable default judgments in the Magistrate's Court to be rescinded by consent'.*[27]

[49.3] The court held further that:

> *'[i]n amending the Rules of the Magistrates' Courts, the Legislature enacted laws in accordance with its legislature objectives. Where the development of the common law goes beyond what is required to give full effect to the Bill of Rights in the Constitution, the Court may well be found to have usurped the constitutionally mandated powers of the Legislature unreasonably. This may amount to a breach of the doctrine of separation of powers'.*[28]

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[24] Ibid para 4.2.
[25] Ibid para 4.3.
[26] Ibid para 5.
[27] Ibid para 8.
[28] Ibid para 9.

[50] Given the obvious difference relating to how the Magistrates' Courts and the High Court dealt with applications for rescission by consent, there was a need for the legislature to intervene. In 2014, the Legislature inserted section 23A into the Superior Courts Act.[29] This provision specifically provides that:

'[i]f a plaintiff in whose favour a default judgment has been granted has agreed in writing that the judgment be rescinded or varied, a court may rescind or vary such judgment on application by any person affected by it'.

[51] This legislative intervention was followed by the amendment of the Uniform Rules of Court where Rule 31(6)(a) was inserted into these rules.[30] This Rule provides the procedural framework within which judgment debtors can apply for rescission of judgments in the High Court when they have received written consent to bring such applications from their judgment creditors. In terms of Rule 31(6)(a):

'[a]ny person affected by a default judgment which has been granted, may, if the plaintiff has consented in writing to the judgment being rescinded, apply to court in accordance with Form 2B of the First Schedule to rescind the judgment, and the court may upon such application rescind the judgment'.

E EVALUATION AND ANALYSIS

i) Point in limine

[52] Before dealing with the main issue of rescission by consent, it is perhaps necessary to first address the *point in limine* raised by the first respondent. According to the first respondent, the court does not have jurisdiction to entertain this matter because the applicant failed to apply for condonation to lodge its rescission applicant as it was required to do by the Rules. This point *in limine* was neither made in the first respondent's answering affidavit nor raised in the heads of argument submitted on her behalf. It was raised for the first time during oral hearing directly from the bar. This point *in limine* was

[29] Superior Courts Amendment Bill [B-2014].
[30] Gazette No. 36743, Notice No. 615 dated 12 August 2013.

based on Rule 31(2)(b) which prescribes that an application for rescission must be brought within 20 days as indicated above.

[53] The applicant did not receive notice from the first respondent that any point *in limine* would be raised. The applicant correctly objected to this point being raised. In any event, the applicant's application for rescission was not brought in terms of Rule 31(2)(b). This application is brought primarily in terms of Rule 31(6)(a) which does not prescribe any period for the lodging of the rescission application. Apart from this, there is no basis for courts to allow points *in limine* to be raised from the bar when such points should have been raised in the parties' affidavits. To do so will be to seriously prejudice the parties against whom these points *in limine* are raised who are now expected to think on their feet and deal with such points for the first time in court. To the extent that certain courts have allowed points *in limine* to be raised from the bar, I am of the view that such an approach amounts to an ambush, is not in the interest of justice, and is wholly inappropriate.

[54] In my view, any party that intends to raise any point *in limine* after its affidavit has already been served and filed should consider filing a supplementary affidavit to raise that point and give the other party sufficient time to respond thereto. Raising points *in limine* will lead to objections that may result in unnecessary postponements of matters that ought to be finalised. In this matter, none of the parties requested a postponement.

[55] I allowed the first respondent to argue the point *in limine*. However, her point *in limine* was based on the rule which was not part of the applicant's case. It was insisted on behalf of the first respondent that it was not compulsory to raise a point *in limine* in writing and that this point could competently be raised from the bar. Quite shockingly, it was argued that the applicant ought to have applied in writing for condonation for the late filing of its rescission application.

[56] Further, such an application cannot be made from the bar.[31] It was a bit surprising for a party that sought to make an application from the bar to

[31] *C.V v Commissioner for the South African Revenue Service* (A322/2019) [2020] ZAWCHC 140 (30 October 2020) para 25.

prevent the other party from bringing its application from the bar, even though the latter did not indicate that they wished to bring any application from the bar. I am of the view that there is no merit in this point *in limine* and it should be dismissed.

ii) Rescission by consent

[57] The crux of the first respondent's argument is that, in bringing this application, the applicant ought to have fully complied with the well-established requirements for rescission applications. Further, to the extent to which the applicant failed to do so, the applicant should have applied in writing for condonation. It is clear from the authorities referred to above that there are now different avenues provided for in the Rules that can be followed to bring rescission applications in the High Court in addition to the common law.

[58] The first respondent's approach appears to be in line with the decision of *Vilvanathan & another v Louw NO.*[32] This is a decision of the full bench of the Western Cape division and is not directly binding on this court. At best its reasoning may be of a persuasive value. However, it does not appear as if the full court fully appreciated, at least in the context of the rescission by consent in the Magistrates' Court Rules, that Rule 49(5) provided a further avenue upon which rescission applications can be brought in a democratic state where the state of the economy demands that some relief should be provided to those who have satisfied their obligations to their judgment creditors. This rule was intended to serve a different purpose.

[59] Similarly, section 23A of the Superior Courts Act which is given effect by Rule 31(6)(a) of the Uniform Rules of Court provides a different avenue that can be used to bring rescission applications which avenue is completely different from those provided by Rule 31(2)(b), Rule 42(1) and the common law. As is already the case in the Magistrates' Courts, judgment debtors in the High Court can now also apply to have judgments granted against them in default to be rescinded after obtaining their judgment creditors' written consent to do

[32] [2010] JOL 25198 (WCC).

so. This means that the applicants are well within their right to reflect on the different avenues and decide the most appropriate route to bring their rescission applications.

[60] The Rules Board did not make Rule 31(2)(b) and Rule 42(1) subject to the common law. These Rules remain independent from each other and the common law. They provide further avenues for which rescission of judgments can be applied. Most parties rely on either of these Rules and plead the common law in the alternative. Similarly, Rule 31(6)(a) is independent of the common law principles dealing with rescission of judgments and provides a further avenue for judgment debtors to have judgments granted against them rescinded. In my view, an applicant who applies for rescission of judgment under Rule 31(6)(a) does not need to comply with the requirements provided in Rule 31(2)(b), Rule 42(1), or the common law for that matter.

[61] There is no requirement at common law to bring a rescission application within a specific period. To prevent a situation where judgment debtors wait for unreasonably long periods before they approach courts with their rescission applications, Rule 31(2)(b) prescribes a period within which rescission applications should be made.[33] If a judgment debtor brings a rescission application under this rule outside the prescribed period, then an application for condonation must be made to seek the court's indulgence.[34]

[62] At common law, there is also no requirement that the judgment creditor can bring a rescission judgment with the judgment creditor's consent. The Supreme Court of Appeal and the Constitutional Court have not pronounced themselves on this issue. Contrary to what was stated in *Vilvanathan & another v Louw NO*, none of the divisions of the High Court are bound to insist on the common law requirements being complied with when judgment debtors

[33] In terms of section 6(1)(a) of the Rules Board for Courts of Law Act 107 OF 1985, 'The Board may, with a view to the efficient, expeditious and uniform administration of justice in the Supreme Court of Appeal, the High Court of South Africa and the Lower Courts, from time to time on a regular basis review existing rules of court and, subject to the approval of the Minister, make, amend or repeal rules for the Supreme Court of Appeal, the High Court of South Africa and the Lower Courts regulating the practice and procedure in connection with litigation, including the time within which and the manner in which appeal shall be noted'. The board is duly empowered by Parliament to amend the rule and some of the amendments will deviate from the principles of the common law.

[34] *Renwick v Botha* (35217/2019) [2023] ZAGPJHC 305 (8 March 2023) para 27.

approach them in terms of a Rule that allows judgment creditors to consent in writing to default judgments being rescinded.

[63] Rule 31(6)(a) of the Uniform Rules of Court is independent of all the Rules upon which rescission applications can be brought and the common law. Had the drafted of this Rule desired to make it subject to any of these rules and the common law they would have explicitly done so. In terms of this Rule, there is no requirement for the applicant to first bring rescission within any specified period. Secondly, there is no requirement for the applicant to demonstrate either good or sufficient cause. The only requirement in terms of this Rule is the judgment creditor's written consent. There is no need to import the requirements of other rules and the common law into this Rule.

[64] At best, courts can only insist as they have done when applying Rule 42(1) which does not specify the period within which rescission applications should be brought, that rescission applications in terms of Rule 31(6)(a) of the Uniform Rules of Court should also be brought within a reasonable time. In my view, the court does not have jurisdiction to refuse to implement Rule 31(6)(a) as it has been drafted given the fact that it informs section 23A of the Superior Courts Act that is directly binding on the courts.[35]

[65] The reason the legislature saw it fit to make provision for rescission by consent was, among others, to make it easier for judgment debtors who desire to expunge their negative credit records after satisfying their obligations to their judgment creditors to bring these applications so that these judgments can no longer impact their credit scores.[36] I am of the view that it is not justifiable for these categories of judgment debtors whose judgment creditors have duly consented in writing to the rescission of default judgments against them to be required to comply with the common law requirements for rescission. Rescission of judgments by consent has received academic attention. Bekker poses an important question:

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[35] I am aware as was stated in *Collatz and Another v Alexander Forbes Financial Services (Pty) Ltd and Others* (A5067/2020; 43327/2012) [2022] ZAGPJHC 93 (10 February 2022) para 23 that 'the rules are meant for the court, not the court for the rules'.

[36] See Smith 'Skaakmat? Tersydestelling van vonnisse en "skoonmaak" van kredietrekords in die landdroshowe?" (2000) Dec *De Rebus* 26 - 27.

'[w]ill the consent of a plaintiff to the rescission of a judgment granted in their favour automatically satisfy the requirement of "good cause", or will it be only one of the factors that a court will consider in deciding whether there is compliance with the "good cause" requirement?[37]

[66] Given the intended purpose of Rule 31(6)(a) of the Uniform Rules of Court which, in my view, is to come to the rescue of judgment debtors who satisfied their obligations to their creditors, the issue of good cause does not arise in the context of this rule. Had the Rules Board intended for this requirement to be part of this rule it would have explicitly done so as it did in Rule 31(2)(b). The fact that the Rules Board did not make good cause a requirement in Rule 31(6)(a) demonstrates that these two Rules were intended to serve two different purposes.

[67] According to Bekker *'[t]he High Court will therefore still have the discretion to refuse an application for the rescission of judgment by consent, even if the plaintiff consents thereto'*.[38] While one cannot doubt the fact that the court retains its discretion, it is difficult to understand why the court would refuse to grant a rescission judgment when the judgment creditor consents in writing to such a judgment being granted and where no prejudice will be suffered by any party.

[68] The fundamental question that arises is whether any judgment debtor at any time can bring a rescission application in terms of Rule 31(6)(a) of the Uniform Rules of Court even when such a judgment debtor has not fulfilled all its obligations to the judgment creditor and intends to raise a defence against the judgment creditor? Unfortunately, none of the authorities referred to above considered this question, at least in terms of Rule 49(5) of the Magistrates Court Rules which has been in operation for some time and interpreted by the courts.

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[37] 'Rescission of Judgments by Consent – Recent Developments and Lessons from England and Wales' (2023) 37 (1) *Speculum Juris* 118 at 128.

[38] 'Rescission of Judgments by Consent – Recent Developments and Lessons from England and Wales' (2023) 37 (1) *Speculum Juris* 118 at 128.

[69] The wording of both section 23A of the Superior Courts Act and Rule 31(6)(a) of the Uniform Rules of Court suggest that rescission applications can only be brought in terms of these provisions where there is no possibility of judgment creditors opposing these applications. Where written consent has been granted there will generally be no need for these matters to go back to trial or to be reconsidered by the courts. There will also be no need for judgment debtors to demonstrate that they have *bona fide* defenses. Surely, judgment creditors who are likely to consent in writing to these applications are those who are no longer pursuing claims against judgment debtors.

[70] It is clear to me that not every judgment debtor can rely on Rule 31(6)(a) of the Uniform Rules of Court. To allow every judgment debtor to rely on this rule will render Rule 31(2)(b), Rule 42(1), and the common law redundant by allowing judgment debtors to unreasonably delay bringing their rescission applications and excuse themselves from explaining to the court why they brought their applications late. This will make a mockery of rescission applications and lead to abuse of untold proportions.

[71] This will create a situation where judgment debtors who did not fully comply with their obligations to their judgment creditors and desire to have their matters retried or reconsidered not to satisfy the court that they have *bona fide* defences that can successfully be raised should they be allowed to oppose or defend their matters. Most importantly, this will incorrectly empower these judgment debtors not to apply for condonation when they eventually decide to bring their rescission applications to court. This cannot be allowed.

[72] In my view, judgment debtors who desire to have their matters retried or reconsidered are not entitled to approach the court in terms of this rule. They should approach the court in terms of Rule 31(2)(b), Rule 42(1), or the common law. In this case, given the fact that the applicant has not fully satisfied its obligations to the first respondent and claims to have a *bona fide* defense against the first respondent, the applicant cannot rely on Rule 31(6)(a) of the Uniform Rules of Court. If it was competent for the applicant to utilise this Rule, why did Davis J order the applicant to bring its rescission

application within 20 days of his order? In my view, Davis J's order implies that the applicant ought to have relied on Rule 31(2)(b). It is important to note that the applicant failed to comply with this order.

iii) Written Consent

[73] If I am wrong, and the applicant can validly approach the court based on Rule 31(6)(a) of the Uniform Rules of Court, I am not convinced that the consent to bring a rescission application in terms of section 23A of the Superior Courts Act as informed by Rule 31(6)(a) can be granted tacitly or can be implied from surrounding circumstances. In this case, on the one hand, the applicant argues that the second applicant's proposal for the matter to be retried is indicative of the first respondent's consent to this rescission application. On the other hand, the second respondent is of the view that the applicant failed to respond to his proposal by indicating whether the proposal was accepted.

[74] To establish the first respondent's consent, the applicant relies on the email written to it by the second respondent dated 7 October 2021. In this email, there is no indication that the second respondent is acting on the instructions of the first respondent. It is the second respondent, without indicating the authority upon which he is acting, who proposed that the matter should be retried. It is not clear whether the first respondent was aware of this proposal and that she authorized it.

[75] It seems like the applicant's officials simply assumed that because the second respondent was representing the first respondent at the time, the email communicated the instructions of the first respondent. From the plain reading of the email, it is clear to me that the first respondent did not instruct the second respondent to make this proposal and cannot be bound to a 'tacit' agreement that she did not conclude, assuming such agreement was

concluded. The applicant ought to have replied to this letter, first seeking clarity on the content of the proposal and most significantly, whether this proposal meant that it needed not to bring a rescission application.

[76] The applicant also relied on the judgment of Labuschagne AJ relating to the parties in this case.[39] Labuschagne AJ held that the second respondent proposed that the matter should be retried. Nothing was said about the first respondent who was rendered completely invisible despite being the person who was injured and at the centre of this dispute. Labuschagne AJ held further that the applicant accepted the second respondent's proposal in a communication where the applicant requested the applicant to abandon its judgment. Further, it was on the strength of this alleged agreement that the applicant proceeded to apply to rescind the order of Basson J.[40] I do not agree with the view expressed by Labuschagne AJ. In my view, these views are not supported by the evidence.

[77] With respect, a closer look at the letter dated 1 November 2021 that Labuschagne JA held demonstrated the applicant's acceptance of the second respondent's proposal for the retrial does not suggest what Labuschagne JA concluded. This letter reads:

'Dear sir

Please file a Rule 42 notice abandoning the previous judgment so we can start from a clean slate. Kindly indicate whether you have sent the plaintiff for additional expert reports yet? The RAF is arranging for its own expert, they should have contacted you by now. Regards'

[78] First, there is no indication that this email is responding to the second respondent's email dated 7 October 2023. Secondly, there is no reference to the second respondent's proposal to retry the matter. In my view, and contrary to what Labuschagne AJ found, this email does not constitute an acceptance of the second respondent's proposal. Even if it did, it certainly did not create

[39] *Road Accident Fund v Ruele and Others* (2016/19982) [2023] ZAGPPHC 602 (21 July 2023).
[40] *Road Accident Fund v Ruele and Others* (2016/19982) [2023] ZAGPPHC 602 (21 July 2023) paras 7 and 8.

an agreement between the applicant and the first respondent for the matter to be retried, let alone induce the first respondent's consent for the applicant's rescission application.

[79] The consent that was sought was that of the first respondent, not the second respondent. This is not consent that can be inferred from the conduct of the first respondent's legal representative. To constitute written consent in the context of Rule 31(6)(a), the judgment creditor's consent must be clearly and unequivocally made by the judgment creditor herself. In my view, consent that is required in this Rule is express and meaningful consent that must be duly completed and signed by both the judgment debtor and judgment creditor. If such consent is made through an agent, it must clearly be demonstrated that the judgment creditor duly authorised such consent.

[80] Judgment creditors must clearly indicate in writing that they consent to the judgment debtors bringing rescission applications. This will prevent any doubt as to whether the judgment creditor consented to the rescission application. I am of the view that in this case, the first respondent did not provide consent for the applicant to bring a rescission application.

v) Alternative relief

[81] While the applicant's application is primarily based on Rule 31(6)(a), the applicant also in the alternative relies on the common law. The heads of argument submitted on behalf of the applicant deal with the common law requirements for the rescission of default judgments. First, in an attempt to demonstrate that it was not in wilful default, the applicant argues that it was served with a notice of set down that indicated that the matter was to be heard on 30 November 2020.

[82] Further, this date was confirmed by the first respondent's counsel at the time. The applicant rejects the second respondent's explanation that this was an incorrect date that was duly rectified through a notice of withdrawal and

service of the new notice of set down on the same day. The applicant makes a serious allegation against the second respondent of tempering with notices.

[83] Even though the second respondent's explanation can be criticised to some respects, the applicant does not at all deal with the notice of withdrawal of the first court date. The applicant does not indicate whether its erstwhile attorneys did receive the notice of withdrawal together with the new notice of set down. Surely, this is not the most difficult factual position to establish. This could have simply been established by contacting the applicant's erstwhile attorneys to make a confirmatory affidavit explaining whether he received the two notices of set down and the notice of withdrawal. From the totality of the evidence before the court, it is difficult not to conclude that the applicant's erstwhile legal representatives did receive all these notices. Receipt of these documents makes it clear that the only court date that was alive was 15 February 2021.

[84] In my view, the applicant's attack on the notices of set down is not genuine. Every day this court hears matters where the applicant is duly served with notices of set down and decides not to brief any person to appear on its behalf. At times, lawyers are briefed on the eleventh hour and do not have full instructions to proceed. There is also a concerning trend where the applicant merely defends the matter, files a general plea, and fails to appoint its own experts to contradict those appointed by claimants as is the position in this case. The applicant only sought to appoint its experts after Basson J's order was granted. There is no explanation for why these experts were not engaged before this order was granted. In my view, the applicant was aware that the matter was going to be heard on 15 February 2021 because the corresponding notice of set down was duly served on its erstwhile attorneys.

[85] The applicant also claims to have a *bona fide* defence. If this is true, then the applicant ought to have brought its application within either 20 days or at the very least a reasonable time. An application for condonation would have allowed the applicant to provide reasons to the court why the application was either brought late or within a reasonable time. The applicant's rescission

application was only brought on 6 July 2023, after various court processes between the parties referred to above.

[86] This was contrary to Davis J's order where the applicant was directed to bring its rescission application within 20 days of that order. Davis J did not grant the parties leeway to negotiate anything contrary to his order that would lead to his order not being implemented. The applicant ought to have brought its rescission application and in the process engaged the second respondent on any aspect where the parties could reach an agreement. The second respondent's consent to bring this application was allegedly granted on 7 October 2021 after Davis J's order was granted. When the alleged consent was granted, the applicant was armed with Davis J's order and did not need any consent from the first respondent to bring its application.

[87] There is no explanation none whatsoever as to why the rescission application was not brought in terms of Rule 31(2)(b), Rule 42(1) of the common law between 16 February 2021 when the applicant was alerted of Basson J's order and 27 August 2021 when the first writ of execution was issued against the applicant. Much of the explanation that is offered covers events that unfolded from 27 August 2021. I am not convinced that the applicant has even met the common law requirements for the rescission of judgment.

v) Serious allegations against the second respondent

[88] Regrettably, the applicant decided to make serious allegations against the second respondent, who is an officer of this court. As demonstrated above, the allegations are that the second respondent tempered with court notices to suit his narrative that the matter was duly set down for 15 February 2021. In making these unfortunate allegations, the applicant did not bother to obtain a confirmatory affidavit from its erstwhile attorneys who received these documents to confirm or deny these allegations. There is also no report of a relevant expert that substantiates the applicant's allegations. All that the applicant did was to draw inferences based on the naked eye of some of its officials. This is unacceptable given the gravity of the allegations. Allegations

of this nature should only be made with the necessary proof because they run a risk of damaging the reputation of officers of this court.

F CONCLUSION

[89] I am of the view that the applicant relied on an incorrect rule in this application. In my view, by not applying for condonation, the applicant denied itself a golden opportunity to explain to the court why it could not file its rescission application from 16 February 2021. The applicant should have used a rule that would have allowed it to duly apply for condonation and ask the court's indulgence to bring this application. Basson J's order was granted on 15 February 2021. The applicant became aware of this order on 16 February 2021. On this basis, the applicant cannot succeed.

ORDER

[90] In the result, I make the following order:

1. The applicant's application for rescission is dismissed.

2. The first respondent's point *in limine* is dismissed.

3. The applicant is ordered to pay the first respondent's costs of this application.

C MARUMOAGAE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

COUNSEL FOR THE APPLICANT:	Adv CM Rip with Adv Jozana
INSTRUCTED BY:	Malatji & Co
COUNSEL FOR THE FIRST RESPONDENT:	Adv Malatji
INSTRUCTED BY:	Malatji S Legal Practitioners
DATE OF THE HEARING:	11 & 12 October 2023
DATE OF JUDGMENT:	19 January 2024