



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

In the matter between:

Case No: 596/2008

MEC FOR THE DEPARTMENT OF PUBLIC WORKS

First Applicant

MEC FOR THE DEPARTMENT OF HEALTH

Second Applicant

MEC FOR FINANCE, EASTERN CAPE

Third Applicant

and

IKAMVA ARCHITECTS (PTY) LTD

Respondent

JUDGMENT

BANDS J:

[1] As the platitude goes, all good things must come to an end. Contextually - *interest rei publicae ut sit finis litium* (it is in the public interest that litigation be brought to finality).

[2] This is an application for the rescission of two orders of this court, formulated as a constitutional challenge, granted some twelve and eight years ago on 10

November 2011 by Majiki AJ (as she then was) and on 1 December 2015 by Malusi AJ (as he then was).

[3] To say that the parties have been involved in a long and arduous, protracted legal battle is understated. The litigation between the parties, culminating in the present application, has endured for some 15 years, resulting in more judgments than the number of years spanned, having served before numerous judges in this division; the Supreme Court of Appeal; and the Constitutional Court. It has come at an inordinate and unnecessary cost to the public purse.

[4] Whilst this is the first occasion that a direct challenge has been brought against the order of Majiki AJ by the applicants;¹ they unsuccessfully sought a rescission of the order of Malusi AJ in 2017, relying on the provisions of rule 31(2)(b) of the Uniform Rules of Court and the common law; alternatively, the court's inherent jurisdiction to control its own affairs. The applicants, in their current application, once again seek to rescind the order of Malusi AJ, this time in accordance with rule 42(1)(a), some 6 years after their first failed attempt. Insofar as the applicants seek a rescission of the order of Majiki AJ, reliance is placed on the provisions of rule 42(1)(a); alternatively, the common law.

¹ Save for a challenge raised by the applicants in an application for leave to appeal the full court's finding regarding the validity of the order of Majiki AJ, made pursuant to queries raised by the court, *mero motu*, in proceedings dealing with the stay of execution of judgment in *MEC for The Department of Public Works and Others v Ikamva Architects and Others* 2022 (6) SA 275 (ECB), which presently awaits judgment from the Supreme Court of Appeal.

[5] The respondent,² in opposing the application, contends that the applicants seek to render nugatory the aforesaid orders of court, as well as all of the subsequent decisions which, in turn, were determined on their back, including two from the Supreme Court of Appeal and one determinative order of the Constitutional Court (two at the time of penning this judgment), which rendered the prior orders not, in law, susceptible to rescission. For this reason, the respondent contends that the applicants are unprocedurally and impermissibly endeavouring to constitute this court as an appeal court over all these prior courts. For reasons which shall become apparent later in this judgment, not only do I agree with the respondent's assessment of the matter, but I am also, in any event, of the view that the applicants have failed to meet the jurisdictional requirements entitling them to the rescission of either of the judgments in question.

[6] The timeline relevant to the launch of these proceedings, including the extent of the applicants' delay, is informed by the lengthy and complex history of the litigation between the parties. This requires consideration in some detail.

Litigation history and the timeline relevant to the rescission proceedings

[7] The history of the litigation can be gleaned from the papers before court, read together with the prior judgments leading up to the present proceedings, to which I was referred in the papers as well as during argument. I can do no better than to cite the origin of the matter as expressed by Gorven JA, writing for the Supreme

² Whilst the respondent was previously cited as Ikamva Architects CC, such entity was converted to a private company from a close corporation on 17 November 2022. Ikamva Architects (Pty) Ltd was thereafter duly substituted as the plaintiff in the main proceedings (and accordingly as the respondent herein).

Court of Appeal, in *MEC for the Department of Public Works, Eastern Cape and Another v Ikamva Architects CC* at paragraphs [5] and [6] as follows:³

“[5] In order to give perspective to this matter, it is necessary to deal in some detail with the history of the litigation leading to this point. Suffice to say, it has travelled a long and winding road. On 3 September 2003, the Department of Works offered to appoint Ikamva ‘as Consulting Architects/Principal Agent’ for the project described as ‘Frere Hospital (East London): Maintenance (Various): Masterplan, Upgrade’. The appointment was accepted on 15 September 2003 (the contract). The contract did not fare well. On 23 March 2007, the Department of Works appointed Coega Development Corporation (Coega) as implementing agent for the Frere Upgrade Project. Coega in turn appointed architects to do essentially the same work as Ikamva had been appointed to do. Through a series of events, which need not be detailed, an opinion was sought as to the legality of the appointment of Ikamva to the contract. The Department was advised that the appointment contravened the provisions of, inter alia, s 217 of the Constitution and the contract was accordingly invalid. As a result, on 9 July 2007 the Department wrote to Ikamva. It indicated that it had received legal advice and stated:

‘The procurement of the services of your firm was unlawful since, during the appointment process, there was a failure to act in accordance with a system that is fair, equitable, transparent, competitive and cost-effective, as required by the Provisions of the Constitution and the Preferential Procurement Policy Framework Act, 2000, and the Regulations promulgated in terms thereof.

Since the aforesaid appointment of your firm is invalid, I advise that the Department will henceforth not honour its obligations in terms of the aforesaid invalid appointment.’

[6] That letter caused Ikamva to accept the repudiation, to cancel the contract and, on 7 August 2008, to sue the Departments for damages incurred as a result of the cancellation. The action was defended and the Departments pleaded the invalidity mentioned above. The Departments were called upon to make discovery of relevant documents in terms of Uniform Rule 35(1). When they failed to do so, Ikamva applied for an order directing them to do so within ten days on pain of having their defences

³ (544/2021) [2022] ZASCA 184 (20 December 2022).

struck out. They then discovered. On 12 October 2010, Ikamva delivered a notice in terms of Rule 35(3) requiring further and better discovery by way of making additional listed documents available for inspection and copying. This notice was ignored. On 26 September 2011, Ikamva applied for an order compelling compliance with the Rule 35(3) notice...

[8] It is those proceedings that served before Majiki AJ, giving rise to the order of court on 10 November 2011, which the applicants seek to rescind. The order, which was granted unopposed, reads as follows:

“The Defendants be granted a period of ten (10) days from date of service hereof to reply to the Plaintiff’s Notice in terms of Rule 35(3) dated 12 October 2010, failing which the Defendant’s defence will be struck out and the Plaintiff will apply for judgment against the Defendants based on the same papers, amplified if necessary.”

[9] Given the applicants’ failure to comply with the order of Majiki AJ and on the strength of its wording, the respondent applied for default judgment. The proceedings served before Dukada J, who refused to grant the relief sought, holding that on a proper interpretation of Majiki AJ’s order, the respondent had to first apply to strike out the applicants’ defence prior to seeking default judgment.

[10] Aggrieved by this outcome, the respondent successfully appealed to the full court, which, in a judgment penned by Plasket J (as he then was), set aside the order of the court *a quo* on 22 August 2014. The court, departing from convention, gave guidance to the applicants on the way forward at paragraph [31] of its judgment, as follows:

“... the fact that in this case the defendants’ defence has been struck out does not mean that nothing can be done by them. They can, even at this late stage, still

comply with the order, give a full explanation of their default and apply for their defence to be reinstated. Rule 27 allows for this, even after the expiry of the ten day period stipulated in the order.”

[11] I interpose to mention that in addition to this guidance, the full court, already at that stage, some eight years prior to the launch of the present proceedings, expressed doubts as to competency of the order granted by Majiki AJ:

“[29] In my view, certainty and fairness dictate that the proper approach when a party does not comply with any of his or her obligations in terms of rules 35(1) to (6) is to apply to compel compliance in terms of rule 35(7) and that contemplates the striking out of a defence, not automatically on non-compliance, but on application on the same papers, amplified if necessary. It is only when the court has had the opportunity to decide that grounds exist for the striking out of the defence that an application for default judgment may be made.

[30] In the light of rule 35(7) – a purpose-made procedure to compel discovery – I have my doubts that an order striking out a defence automatically is competent but I express no firm view on that. If it is, then, in my view, it is the type of order that should be reserved for only the most unusual of cases, and then it would be expected of an applicant that he or she place facts before the court to justify the making of such an order.”

[12] I highlight this for the simple reason that the applicants, in attempting to justify their delay in launching these proceedings, contend that they were alerted to this aspect for the first time during the latter part of 2021 when the full court, in subsequent adjunct proceedings,⁴ to which I return, queried the validity of the order of Majiki AJ. A summary of the applicants’ principal submissions regarding the

⁴ MEC for The Department of Public Works and Others v Ikamva Architects and Others 2022 (6) SA 275 (ECB).

above can best be illustrated with reference to paragraphs [146] to [148] of their founding affidavit:

- “146. *While the applicants were alerted to the potential invalidity of the automatic striking out order arising from the full court’s issuing its directives on 18 May 2021, requesting inter alia the parties to address this issue, it was the Full Court’s judgment which clarified for the applicants, that an application under Rule 42 to rescind the automatic striking out order, was a competent and legitimate course to follow.*
147. *In a nutshell, it was the judgment of the full court which highlighted for the applicants the appropriateness of them relying on Rule 42 for the relief sought in this application.*
148. *Judgment of the full court was delivered on 15 March 2022. The applicants thereafter requested their legal team to prepare a memorandum of advice to enable them to carefully consider the implications of the full court judgment and to advise on any appropriate steps to be taken.”*

[13] Notably, on a reading of the full court’s judgment (per van Zyl DJP), the full court utilised, as its starting point, the *obiter dictum* of Plasket J. Perhaps even more significant is that the applicants themselves rely on the judgment of Plasket J in the development of their argument regarding the invalidity of the order of Majiki AJ.

[14] I return to the timeline of events.

[15] Notwithstanding the guidance of the full court, as per Plasket J, the applicants, some five months later in January 2015, launched an application to condone their non-compliance with the order of Majiki AJ and the reinstatement of their defences, without first having complied with the order or providing an

explanation for their default. Unsurprisingly, the application, which served before Lowe J, was withdrawn on the date of hearing (by agreement between the parties), with the issue of costs being left for the court to determine. The applicants, in recounting the events leading up to the withdrawal of their application, are less than candid with this court. Firstly, the applicants disavow any knowledge as to the reason for their election to withdraw the application; and secondly, they persistently contend that there had been compliance with the order of Majiki AJ “*by no later than 23 October 2012*”.⁵ That the above allegations are false is evident from paragraphs [8] to [10] of the judgment of Lowe J, which the applicants attached to their founding affidavit:

[8] ... it is clear that the applicants demonstrated substantial contumacy (in the face of a court order) of an egregious nature. To compound this, it would appear from the founding affidavit in the condonation application that there are indeed yet further documents available (in possession of applicants), being particularly a batch of documents produced on 12 December 2014 relating to payments made to the respondent in respect of the hospital development of the master plan and maintenance.

[9] Whilst counsel for applicants argues that arising from considerable staff changes those original role players in the matter were no longer in the employ of applicants, making it difficult to source documents, this can be no answer to applicants' failure referred to above.

[10] Indeed in this particular matter relevant to the application for condonation, it appears from the papers, and indeed is evidenced by applicants' withdrawal thereof, that there was no merit therein, and that respondent has been put to considerable unnecessary expense in this regard.”

⁵ And accordingly, prior to the matter having served before Dukada J for default judgment – not that this would, in any event, have assisted the applicants given the wording of the order issued by Majiki AJ.

[16] The applicants' withdrawal of the proceedings before Lowe J in June 2015, regard being had to the prevailing circumstances at the time, amounts to an abandonment of their attempt to reintroduce a defence.

[17] The respondent, thereafter (as it was entitled to), applied for default judgment for damages in the sum of R41,031,279.58 on 1 December 2015, which Malusi AJ granted – this being the second order forming the subject matter of the present proceedings. Despite the applicants' defence having been struck out, by operation of the order of Majiki AJ, the applicants' legal representative was present in court when the matter was dealt with.

[18] This is significant - but not for the reason alluded to by the applicants. I deal with this aspect when dealing with the rescission of the order of Majiki AJ.

[19] An application for leave to appeal the order of Malusi AJ was filed conditionally on 21 February 2016 whilst awaiting reasons for the order. It was thereafter supplemented on 9 May 2016. Following argument on 16 July 2016, leave to appeal was refused by Malusi AJ on 2 August 2016.

[20] In the interim, the applicants applied to rescind the default judgment on the legal basis set out in paragraph [4] above, citing certain alleged irregularities; misdirections; and mistakes on behalf of Malusi AJ when granting default judgment. The application, which was issued during June 2016, was eventually heard on 18 May 2017.

[21] The application served before Hartle J. I must mention (for reasons which shall become apparent momentarily) that the applicants, in order to obviate any concerns relating to the *in duplum* rule, and more particularly, to ameliorate any prejudice to the respondent given the passage of time since the granting of the default judgment, agreed to an order declaring that the *in duplum* rule would not apply to the judgment debt, which debt they accepted would be payable in the event that they were unsuccessful in the rescission proceedings. This was recorded by Hartle J at paragraph [21] of her judgment:

“... they agreed (which agreement was embodied in the order which I made), in the event of them not succeeding in respect of ... the rescission, that they would pay interest to the respondent at the legal rate on the sum owing in terms of the order as from the due date to date of payment, even though the accrued interest at that stage already exceeded the capital amount outstanding.”

[22] The application for rescission was dismissed. With leave of the court, the applicants appealed the dismissal of their application to the full court, which refused the appeal. Still dissatisfied, the applicants sought leave to appeal the order of Hartle J from the Supreme Court of Appeal and thereafter the Constitutional Court, both of which applications were refused.

[23] It is unquestionable that the application for rescission of the order of Malusi AJ had, at that stage, been disposed of definitively. This notwithstanding, and antithetical to their stance in relation to the payment of the judgment debt (together with interest as agreed) in the event of an unsuccessful outcome, no payment was forthcoming.

[24] Having exhausted the aforesaid remedies and faced with a writ of execution, the applicants once again sought to circumvent the judgment of Malusi AJ, this time by launching self-review proceedings to *inter alia* challenge the appointment of the respondent as consulting architects/principal agent, citing various alleged procurement failures (“*the self-review*”). The self-review served before Beshe J in December 2019. The applicants were transparent as to their objective and recorded in their replying papers that “*the Departments are resisting payment by way of self-review.*”⁶

[25] This too is evident from the relief sought in those proceedings, which was fashioned as follows:

- “1. *The decision of the Department of Public Works of 29 August 2002 to appoint Ikamva Architects CC (the respondent) . . . is reviewed and set aside;*
2. *The decision of the then Head of Department of the Department of Public Works of 3 September 2002 to contract with the respondent . . . is reviewed and set aside;*
3. *The contract concluded between the Department of Public Works and Ikamva Architects CC in September 2003 . . . is declared void ab initio;*
4. *The respondent is entitled to no further payments under the contract referred to in paragraph 3 above and in terms of the default order of Malusi AJ on 1 December 2015...;*
5. *Hearsay evidence contained in the founding and supplementary affidavits of Sabelo Mgujulwa of 2 and 25 September 2019 respectively is hereby*

⁶ *MEC for the Department of Public Works, Eastern Cape and Another v Ikamva Architects CC* 2023 (2) SA 514 (SCA) (20 December 2022) at paragraph 17.

admitted into evidence in terms of section 3(c) of the Law of Evidence Amendment Act, to the extent that it is necessary;

6. *The respondent is ordered to pay the costs of the application, only in the event of its opposition.”*

[26] It is irrefutable that the “*the object of the relief sought in prayers 1-3 of the notice of motion was the relief under paragraph 4*”,⁷ being the avoidance of payment.

[27] An order to stay the execution of the writ pending the outcome of the self-review proceedings was issued on 17 September 2019 by agreement between the parties.

[28] The self-review was dismissed on 16 February 2021. The respondent, once more, took steps to execute the default judgment, which had been granted more than five years prior. This precipitated a further urgent application to stay the execution of the judgment on 5 March 2021. The application was struck from the roll by Lowe J for lack of urgency and a further writ was issued on 10 March 2021 in respect of the second applicant’s bank account. This was met with, yet another urgent application launched by the applicants, this time seeking to set aside the notices of attachment, dated 11 March 2011; the writ of attachment, dated 10 March 2021; and the subsequent attachment in respect of the second respondent’s account on 11 March 2021. The application was postponed on various occasions, in part for the purposes of the Judge President to assemble a full court to hear the application as it, in his view, involved an important issue, namely the constitutionality of

⁷ *MEC for the Department of Public Works, Eastern Cape and Another v Ikamva Architects CC 2023 (2) SA 514 (SCA) (20 December 2022).*

attaching an organ of State's bank account, which had been left unresolved by the Constitutional Court.

[29] As foreshadowed in paragraph [12] above, the full court, in dealing with the stay of execution of Malusi AJ's order, requested the parties to provide argument on: (i) the validity of the order of Majiki AJ; and (ii) to what extent the invalidity thereof (if found to be invalid) would affect the order of Malusi AJ, which was granted in consequence of the striking out order.

[30] Prior to the hearing of the urgent application, the applicants' application for leave to appeal the dismissal of the self-review was refused by Beshe J on 30 April 2021. The applicants thereafter sought leave to appeal from the Supreme Court of Appeal.

[31] On 17 March 2022, the full court granted an order staying the further execution of the writs of attachment, including the removal of the attached movables, pending the final determination of the application for leave to appeal the order of Beshe J, including any consequent appeal/s. The court, in dealing with the validity of the order of Majiki AJ, found that whilst the order striking out the respondents' defence was granted erroneously as envisaged by Uniform Rule 42(1)(a), such order does not fall within the category of orders which, on the face of it, can be regarded as a nullity. It is this finding that the applicants contend crystallised the issues for determination for the first time between the parties, resulting in the present proceedings. Despite the applicants' success in obtaining a stay of execution, they applied for leave to appeal the full court's findings in respect of the validity of the

order of Majiki AJ,⁸ to the Supreme Court of Appeal,⁹ which leave was granted on 23 August 2022.

[32] The present rescission proceedings were launched on 15 September 2022.

[33] The application for leave to appeal against the dismissal of the self-review proceedings was referred for oral argument by the Supreme Court of appeal in terms of section 17(2)(d) of the Superior Courts Act, which proceeded on 21 November 2022. The application was dismissed on 20 December 2022 as per the unanimous judgment of Gorven JA, to which I have referred. Again, the applicant's applied for

⁸ As well as in respect of the court's findings in respect of the State Liability Act, 20 of 1957.

⁹ The applicants contend that the full court erred and misdirected itself in the following respects (regarding the order of Majiki AJ):

"1The Court, with respect, erred in not finding that the order of Majiki AJ was a nullity and, in this regard, more particularly erred in not finding that:

- 1.1 it cannot be said that Majiki AJ lacked jurisdiction to grant the order striking out the Departments' defence;*
- 1.2 inasmuch as Uniform Rule 35(7) gives a Court the authority or power to strike out a Defendant's defence, the incorrect exercise thereof, does not per se, render the order of Majiki AJ invalid;*
- 1.3 it cannot be found that Malusi AJ acted outside of his powers in granting the application for default judgment.*

2 Alternatively to the Court's finding as set forth in paragraph 1 above, the Court with respect, erred:

- 2.1 in not rescinding mero motu the order of Majiki AJ in the proceedings before it, given the Court's conclusion that the order of Majiki AJ had been erroneously granted in the absence of any party affected thereby and given the Court's power to make such order mero motu;*
- 2.2 in finding against the weight of the evidence, that it had not been placed in a position to make an informed decision as to the exercise of a discretion as envisaged in Uniform Rule 42(1)(a)."*

leave to appeal from the Constitutional Court, which application was refused on 23 May 2023, definitively disposing of the self-review proceedings.

[34] Whilst the applicants, in the present proceedings, abjure the relevance of the self-review, I cannot agree. Certain aspects of the self-review, including the findings of the Supreme Court of Appeal, are fundamentally significant.

[35] Exactly one year (to the day) after having been granted leave to appeal the full court's findings regarding the validity of the order of Majiki AJ, the appeal was argued before the Supreme Court of Appeal on 23 August 2023. Judgment is yet to be delivered.

[36] I accordingly give judgment being mindful that the order I intend issuing may ultimately be rendered moot should the court uphold the applicants' appeal.¹⁰ Conversely, should the applicants be unsuccessful in their appeal, my intended order shall remain binding on the parties, subject to any further appeal proceedings.

Issues for determination

[37] As foreshadowed above, the applicants seek a rescission of the orders forming the subject matter of this application on the grounds that the orders were erroneously granted in their absence. In respect of the order of Majiki AJ, they rely on rule 42(1)(a); alternatively the common law. Apropos the order of Malusi AJ, reliance is placed solely on rule 42(1)(a).

¹⁰ Which finding is thereafter not overturned in subsequent appeal proceedings.

[38] Whilst the applicants contend that the orders of Majiki AJ and Malusi AJ fall to be rescinded on their own accord, the main thrust of their argument, properly considered, is that the striking out order of Majiki AJ provided the legal basis upon which Malusi AJ subsequently granted default judgment. Accordingly, in the event of a finding by this court that the order of Majiki AJ falls to be rescinded on the basis that it was erroneously granted, it follows that the order of Malusi AJ so too should be rescinded.

Requirements for rescission

[39] Prior to turning to the requirements for rescission it is worth restating the well-established rule that once a court has duly pronounced a final judgment or order, it has no authority to set it aside. The reasons for this are self-evident. Firstly, a court becomes *functus officio*. Secondly, it is in the public interest that litigation be brought to finality. Rescission proceedings arising from rule 31(2)(b); rule 42(1)(a); and in terms of the common law are accordingly recognised exceptions to this general rule.

[40] The granting of rescission is a discretionary remedy. Before a court can exercise its discretion to rescind an order, whether it be under rule 42(1)(a) or in terms of the common law, a litigant must meet the jurisdictional requirements for rescission.¹¹ Put differently, even if the jurisdictional requirements are met, the court is not compelled to grant the rescission but is merely endowed with a discretion to do

¹¹ *Minister for Correctional Services and another v Van Vuuren and another; In re Van Vuuren v Minister for Correctional Services and others* 2011 (10) BCLR 1051 (CC) at para [7].

Zuma v Secretary of the Judicial Commission of Inquiry 2021 (11) BCLR 1263 (CC) at para [50].

so. Such discretion must be exercised judicially. In this regard, the Constitutional Court in *Zuma (supra)*, in approving the principles set out in *Chetty (supra)* stated as follows:¹²

“broadly speaking, the exercise of a court’s discretion [is] influenced by considerations of fairness and justice, having regard to all the facts and circumstances of the particular case.’. One of the most important factors to be taken into account in the exercise of discretion, so the court in Chetty found at 760H and 761E, was whether the applicant has demonstrated ‘a determined effort to lay his case before the court and not an intention to abandon it’ for ‘if it appears that [an applicant’s] default was wilful or due to gross negligence, the court should not come to his assistance’. And, as stated in Naidoo and another v Matlala NO and others 2012 (1) SA 143 (GNP)... at para [4], a court will not exercise its discretion in favour of a rescission application if undesirable consequence would follow.”

[41] I now turn to the respective orders of court and deal, in turn, with the requirements for rescission under rule 42(1)(a) and the common law, where applicable.

Order of Majiki AJ - Uniform Rule 42(1)(a)

[42] In terms of rule 42(1)(a), 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 an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. It is not disputed that the applicants are affected parties falling within the ambit of the rule.

¹² At para [53] read with fn 20.

[43] An applicant who seeks to rely on rule 42(1)(a) has the onus of proving the existence of both requirements enumerated therein; namely, that: (i) the order sought to be rescinded was granted in his/her absence; and (ii) it was erroneously sought or erroneously granted. It is of no assistance to an applicant if he/she is only able to discharge the onus in respect of one of these two requirements.

“[G]ranted in the absence of any party affected thereby”

[44] This requirement does not create a ground of rescission for litigants who opt to be absent despite having been afforded procedurally regular judicial process. Simply put, it exists to protect litigants whose presence was precluded and not those who elected to be absent.¹³

[45] The Constitutional Court in *Zuma*, in considering this aspect, stated as follows at paragraph [60]:

“...the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed. I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, ipso facto (by that same act), plead the “absent victim”. If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing absentia (absence).”

[46] The Court went on to state, at paragraph [61] of its judgment:

¹³ *Zuma v Secretary of the Judicial Commission of Inquiry* 2021 (11) BCLR 1263 (CC) at para [56].

“... Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted in absentia, into one erroneously granted.”

[47] Whilst the order of Majiki AJ was granted in the physical absence of the applicants, it is common cause that they were aware of the application which gave rise to the order from as early as 30 September 2011, and that a notice of set down for 27 October 2011 was served on the offices of the state attorney, representing all three applicants, on 14 October 2011. On the date of hearing, the application was postponed to 10 November 2011. That a further notice of set down in respect of the postponed hearing date was served on 7 November 2011, three court days prior to 10 November 2011, is of no consequence. On 10 November 2011, some six weeks following service of the application, Majiki AJ granted the order which the applicants seek to rescind.

[48] In the papers before me, the applicants' deponent, who has been their attorney of record throughout the preceding litigation, after setting out the common cause facts regarding the events recorded in paragraph [47] above, offers no more than the following tenuous explanation for the matter having proceeded unopposed:

“32. ... On Monday 7 November 2011, a notice of set down for 10 November 2011 (later that week, Thursday) was served on Shared Legal Services, which is the office of the Premier. The notice of set down afforded the applicants two business days (08 – 09 November) to appear at court. Shared Legal Services, despatched the papers to the office of the State Attorney on 7 November 2011 (the day it was received). The notice of set down having

come to my attention, I informed the respective legal advisors at the applicant departments that the matter was set down for hearing on 10 November 2011.

33. *I, however, did not get any instructions from the respective legal advisors at the applicant departments before 10 November 2011.*

34. *On 10 November 2011, in an unopposed application before Majiki AJ, the Court granted an order in the following terms:*

“...”

35. *A copy of the Majiki AJ order is annexed as “B” hereto. This order was not served on the applicants until Friday 30 March 2012 (four months later).*

36. *However, at the time the order was served on the State Attorney on 30 March 2012, the applicants were not in possession of the information and documentation to which the order pertained, and therefore were unable to provide those documents to the respondent, despite their best efforts, within the 10 (ten) day timeframe.”*

[49] Given the applicants’ obvious (and admitted) knowledge of the proceedings for weeks prior to the initial date of hearing, 27 October 2011, including knowledge of such date, their reliance on the alleged short service of the subsequent notice of set down is opportunistic. The applicants had undoubtedly been afforded procedurally regular judicial process and had every opportunity to be present in court on 27 October 2011 (on which date the application was postponed to 10 November 2011), having already received notice of the application and set down. They were in no way precluded from participating in the proceedings, physically or otherwise.

[50] Explanations as to: (i) what attempts were made by the applicants’ legal representative to obtain instructions during the period of 30 September 2011 to 7

November 2011; (ii) why the applicants had failed to oppose the application during the aforesaid period; (iii) and why their legal representative elected not to attend court on the date of hearing to oppose the application; alternatively, to seek a postponement of the matter had he or the applicants required more time, are glaringly absent on the papers before me.

[51] Implicit in the above is that the decisions: (i) not to oppose the application; and (ii) to not attend court on the date of hearing, were deliberate.

[52] A further aspect under this sub-heading requires comment. In addition to the issue of short service, the applicants go to great lengths to place reliance on the parties' initial misunderstanding as to the effect of the order of Majiki AJ (this being the automatic striking out of the applicants' defence), to prove that the order was granted in their absence. The main thrust of the argument is apparent from paragraph 162 of the applicants' founding affidavit which states that:

"As already set forth earlier herein, the State Attorney, the applicants, and the respondent's attorneys, assumed that the order handed down by Majiki AJ did not automatically strike out the applicants' defence and that a further legal process was required."

[53] Whilst that may be so, what the applicants do not state is that it was for this reason that they elected not to oppose the initial proceedings before Majiki AJ, allowing the application to proceed (and the order to be granted) unopposed in their absence. Moreover, they do not contend that had they been aware of the true nature of the relief sought at the relevant time, they would have opposed the proceedings and ensured their presence in court on the day in question. It is further

significant that since the granting of full court's judgment by Plasket J, in August 2014, in which the nature of the order was settled, the applicants have taken no steps up until now to seek a rescission.

[54] Accordingly, despite the applicants' vociferous assertions to the contrary, there is no basis upon which I can find that they were absent in the sense envisaged by rule 42(1)(a). This alone signals the end of the matter for the applicants insofar as they seek relief in terms of 42(1)(a) of the rules.

[55] However, given the circumstances of this matter and more particularly, the history of the litigation between the parties, I find myself constrained to consider a number of further aspects.

"Erroneously granted"

[56] An applicant seeking to prove this requirement must show that the order they seek to rescind was granted erroneously because:

*"...there existed at the time of its issue a fact which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment."*¹⁴

[57] This aspect was dealt with by the full court in the urgent application to stay the execution of Malusi AJ's order, to which I have referred. The basis for such finding appears from paragraphs [18] to [21] of the judgment:

¹⁴ *Nyingwa v Moolman NO 1993 (2) SA 508 (Tk) at 510D-G. Zuma (supra) at para [62].*

[18] *It must be accepted that the Majiki J order was erroneous on the basis that it followed a one- as opposed to two-stage procedure. Uniform Rule 35(7) does not contemplate the striking out of a defence automatically but rather on application on the same papers, amplified if necessary. As noted by Plasket J, it is only when a court has had the opportunity to decide that grounds exist for the striking out of a defence that an application for default judgment may be made. The dismissal of a claim or the striking of a defence is a drastic remedy, and the power to grant such a remedy is discretionary, a discretion that must be exercised judicially. The power to strike out a defence is derived from the Uniform Rules. The interpretation and application of a court rule often requires a consideration of the provisions of the Constitution. Section 34 is relevant in this respect, providing that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or tribunal in a fair public hearing. The striking out of a plaintiff's claim or a defendant's defence has a far-reaching impact on this right. It has the potential to deprive a litigant of a fair trial, bringing an end to a claim or defence. In the case of a defendant, the usual effect of a striking out is to prevent the presentation of a defence so that judgment will be entered for the plaintiff, subject to any further order of court.*

[19] *By following a one-step process, the court did not have the opportunity to consider whether it had been proved that the party concerned had failed to comply with the rule in question. There was then no option to remedy the breach by giving the party the opportunity to comply. The consequence was that the court did not have the opportunity to exercise its discretion in determining what, if any, procedural consequence should follow because the party had failed to remedy the breach. This was a discretion to be exercised judicially on the facts before court and bearing in mind that striking out should normally be a last resort, considering that it has the potential to deprive a litigant of an entrenched right to a fair trial. A virtue of the Uniform Rules is that it provides for flexible remedies for breaches of the Rules, giving the court the opportunity to make the sanction fit the breach. Importantly, the discretion should only be exercised after the defendant has been given an opportunity to be heard in compliance with the audi alteram partem rule.*

[20] *This did not happen in the present matter. The defence was struck out in the absence of the Departments and without:*

(a) *The applicant requesting the striking out having placed any facts before the court justifying the granting of such a far-reaching order;*

(b) *The Departments having first been placed in a position to either seek condonation for their failure to comply with the order to compel, or to convince the court not to strike out their defence and to make an alternative order that would ensure compliance with the order to compel discovery without the drastic step of striking out their defence.*

(c) *The court having been placed in a position to exercise its discretion judicially, as envisaged by Uniform Rule 35(7), and to make an informed decision.*

[21] *The order striking out the Departments' defence was therefore granted erroneously as envisaged in Uniform Rule 42(1)(a). Uniform Rule 42 provides for the rescission and variation of an order or judgment. In terms of this rule, the High Court has a discretion, in addition to any other powers it may have, to mero motu or upon application of any party affected, rescind or vary an order or judgment 'erroneously sought or erroneously granted in the absence of any party affected thereby'."*

[58] The parties are conflicted as to whether the above was part of the full court's *ratio decidendi* or whether the comments were merely *obiter*. The significance of the distinction being axiomatic. However, given that I am in agreement with the full court that the order striking out the applicants' defence was erroneously granted, for the reasons stated, it is unnecessary for me to resolve this impasse. This finding is however cold comfort for the applicants given their failure to prove that the order was granted in their absence.

Order of Majiki AJ – Common Law

[59] In the alternative, the applicants seek the rescission of the order of Majiki AJ in terms of the common law. In order to succeed, the applicants bear the onus of establishing that there is “sufficient” or “good cause” to warrant the rescission. Whether or not “sufficient” or “good cause” has been established depends on whether the applicants have: (i) furnished a reasonable and satisfactory explanation for their default of appearance; and (ii) shown that on the merits that they have a *bona fide* defence, which *prima facie* carries some prospect of success.¹⁵

[60] It is well established that the above test is dual in nature. In other words, it is conjunctive and not disjunctive. What this means is that an acceptable explanation of the default must co-exist with evidence of reasonable prospects of success on the merits.¹⁶ Accordingly, it is not sufficient if only one of the two requirements is met.¹⁷

As set out in Chetty (*supra*):

“It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain for the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.”

¹⁵ *Zuma (supra)* at para [71].

Government of the Republic of Zimbabwe v Fick and others [2013] ZACC 22, 2013 (5) SA 325 (CC) at para [85].

¹⁶ *Chetty (supra)* 765D – E.

¹⁷ *Zuma (supra)* at para [71].

[61] Having already found, in paragraph [51] of this judgment, that the applicants' decisions not to oppose the application; and to not attend court on the date of hearing, were deliberate (for the reasons stated) – it follows that the applicants have failed to provide a plausible or acceptable explanation for their default. Without wishing to belabour the point, which I have already dealt with in some detail above, this puts an end to the applicants' common law enquiry, and it is unnecessary for me to make a finding on, or to consider, the applicants' prospects of success.

[62] The effect of my above findings is two-fold. Firstly, the applicants have failed to establish the requirements for a rescission of the order of Majiki AJ, which order accordingly stands. Secondly, the only way in which the order of Malusi AJ can be rescinded is if the applicants have established the requirements for a rescission in terms of rule 41(1)(a) in respect of the order itself - they cannot rely on what they anticipated would be a domino effect, ultimately resulting in the rescission of the order.

Order of Malusi AJ - Uniform Rule 42(1)(a)

[63] I have dealt with the jurisdictional requirements for a rescission in terms of rule 42(1)(a) already.

"[G]ranted in the absence of any party affected thereby"

[64] There can be no question that the applicants received due and effective notice of the proceedings – this much is self-evident.

[65] It is difficult to understand on what basis the applicants contend that the order of Malusi AJ falls to be rescinded, should I decline to rescind the order of Majiki AJ (which I now have). I say this for the following reason.

[66] In short, the applicants argue that their default was not wilful or deliberate, which is evidenced by the fact that their counsel was present in court on the day on which the order of Malusi AJ was granted. Their absence, being “*absent in the legal sense*” given Malusi AJ’s view that the applicants’ counsel was not permitted to participate in the proceedings by reason of the applicants’ defence having been struck out.

[67] Let me first state that the decision of Malusi AJ was, in the circumstances, patently correct. Secondly, and somewhat disingenuously, what the applicants do not disclose is the limited basis upon which their counsel attempted to appear on the day in question. The following exchange is apparent from the record of proceedings:

“MR NYANGIWE: M’Lord insofar as the default judgment this is a two pronged approach, it is an application for a default judgment based on the quantum and then they are seeking damages arising from the quantum. M’Lord the defendant is not participating as to determining the merits, that has been done and dusted, but it is only insofar as the issue of quantum is concerned, which in fact we invite the court to hear the defendant in that regard.

...

MR NYANGIWE: The issue M’Lord as I have said is discretion and in fact insofar as the participation insofar as determination of the amount that has to be awarded then that part M’Lord, my submission is then there is nothing [inaudible]... it is not an issue to determine liability, it is not an issue to determine the liability that one is done and dusted, we had enough of that.

...

COURT: *What did you mean when you said it is done and dusted, because when you say it is done and dusted I thought any of the previous judges that dealt with this matter has given judgment on the merits and what is outstanding is quantum that is the impression I had.*

MR NYANGIWE: *All I mean M'Lord is insofar as that is concerned the defendant did not come out and say [inaudible] that is in that particular defence, insofar as the merits are concerned [interrupted].*

COURT: *Why can't, why can't the defendant do that?*

MR NYANGIWE: *Because the defence has been struck out."*

[68] *Ex facie* the transcript, at no stage during the proceedings before Malusi AJ did the applicants: (i) challenge the striking out order; (ii) attempt to apply for condonation and the reinstatement of their defences; or (iii) make submissions in respect of their purported defence on the merits, which issues they inarguably accepted had already been disposed of.

[69] The applicants had no entitlement to participate in the proceedings before Malusi AJ. They had, at that stage, been given ample opportunity to participate but instead elected to abandon their application for condonation and the reinstatement of their defence, which served before Lowe J. Insofar as they were in any manner precluded from participating in the proceedings, this was of their own doing. It ill behoves the applicants to now contend that they are the absent victims. Any finding in favour of the applicants in this respect would amount to an absurdity in the context of these proceedings.

[70] In such circumstances, the applicants could never be found to be absent in the sense articulated in *Zuma (supra)* and accordingly the application for rescission of the order of Malusi AJ must fail without the need to first consider the further requirement under rule 42(1)(a).

[71] I must add that even if the applicants had managed to prove the existence of the necessary requirements for the rescission of either or both of the orders in question, this would not have been sufficient for the granting of the relief sought. The reason for this is two-fold. Firstly, the applicants have failed to demonstrate a determined effort to lay their case before the court - to the contrary, they have shown a strong intention to abandon it. Secondly, given the circumstances of this matter, I am of the view that considerations of fairness and justice militate against the granting of rescission.

[72] I deal with these further aspects in turn.

Acquiescence in the orders of court

[73] The applicants contend that they have, at no stage, acquiesced in the orders that they seek to challenge, citing as proof of this proposition, their continuous endeavours to challenge the order of Malusi AJ, in one form or another. To my mind, it is clear that the applicants' efforts show no more than their persistent and contrived actions to render nugatory, the order of Malusi AJ, which constitutes a valid, binding, enforceable, extant order¹⁸ (in addition to the numerous judgments

¹⁸ See the comments of Gorvan JA at para [35] in the proceedings which served before the Supreme Court of Appeal (*supra*).

and orders granted thereafter), with the sole purpose of escaping liability for the payment of the judgment debt, together with interest thereon.

[74] It is impermissible to belatedly attack a judgment in circumstances such as the present, where the applicants have, by their conduct, demonstrated an acquiescence in the orders granted against them.¹⁹ The applicants repeatedly gloss over their conduct from which their acquiescence is clear.

[75] The applicants have been aware of order of Majiki AJ since 2011 and yet elected not to challenge the order by way of appeal or rescission prior to launch of the present proceedings. Thereafter, the applicants permitted the matter to proceed before Dukada J without challenging the existence or validity of the order. Notwithstanding that Plasket J, as long ago as August 2014, expressed doubts as to the competency of the order, the applicants again elected not to challenge the order. They thereafter brought and abandoned an application for condonation and the reinstatement of their defences. When the matter proceeded before Malusi AJ, the applicants irrevocably confirmed that they had abandoned any challenge to the order of Majiki AJ as can be seen from the transcript of proceedings.

[76] In the rescission proceedings before Hartle J, the applicants unambiguously placed on record, their acceptance that the judgment debt would be payable in the event of their lack of success in the rescission proceedings.

¹⁹ *Whitehead and Another v Trustees of the Insolvent Estate of Dennis Charles Riekert and Others* [2020] ZASCA 124 at para [22].

[77] Significantly, the applicants thereafter, in their papers filed in support of the self-review, conceded the definitive disposal of the rescission application. More importantly, the applicants' acceptance of the validity of the default judgment was recorded by Gorven JA at paragraph [9] of his judgment, in the following terms:

"It must be clearly stated at the outset that, during argument, any contention that the default judgment was anything other than competent, valid and binding was expressly abandoned. As such, this application for leave to appeal must be determined on that basis and on that basis alone."

[78] The applicants' acceptance of the default judgment as competent, valid and binding is further demonstrated by the content of paragraph [120] of their founding affidavit and paragraph [111] of their replying affidavit filed in the self-review, which respectively read as follows:

"120. Ikamva can suffer no prejudice other than the issue of finality. It will get interest on the money if successful (and the Departments have agreed to the payment of interest to ensure that the respondent is not prejudiced by the in duplum cap)."

"111. On 25 September 2019 the Eastern Cape Provincial Exco resolved that Provincial Treasury must take steps to comply with the terms of the court order should the review application be unsuccessful."

[79] Thereafter, on 15 March 2021, the then MEC for Finance for the Eastern Cape Provincial Government, granted an indemnity in terms of section 66(2)(b) of the Public Finance Management Act in respect of the self-review which provided that the Province of the Eastern Cape shall, in circumstances where an appeal of the

review application is unsuccessful and where the applicants are liable to pay the judgment debt and interest thereon, pay to the respondent the sum of one hundred and twenty million rand (R120,000,000.00) upon finalisation of the case in favour of the respondent.

[80] The applicants have, at least since August 2014, been aware of (or ought to have known) the legal basis upon which this application was brought. As intimated above, the comments of the full court, by Van Zyl DJP, upon which the applicants purportedly rely for the launching of this application, are merely an extrapolation of the comments of Plasket J, made some 10 years ago.

[81] It is irrefutable that the applicants have unequivocally and expressly, as well as by their conduct, conveyed their intention to be bound by the orders in question. This belated challenge, contextually, is not merely too late to be meaningful in any respect, but it is opportunistic in the extreme.

Considerations of fairness and justice and the finality of litigation

[82] The binding nature and the importance of giving effect to final orders (and judgments) of court is a central pillar of our Constitution and of the rule of law. This sentiment has repeatedly been expressed by the Constitutional Court, for example in *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni*,²⁰ wherein the court quoted from its prior decision *Secretary of the Judicial Commission*

²⁰ 2023 (4) SA 421 (CC).

*of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others*²¹ as follows:

“If the impression were to be created that court orders are not binding, or can be flouted with impunity, the future of the judiciary, and the rule of law, would indeed be bleak.”

[83] More pertinently, contextually, Gorven JA, writing for the Supreme Court of Appeal in the self-review proceedings, in considering whether it would be just and equitable to grant the relief sought in paragraph 4 of the applicants’ notice of motion (ie that the respondent is entitled to no further payments under the contract and in terms of the default order of Malusi AJ on 1 December 2015), stated as follows at paragraph [35] of the court’s judgment:

“In prayer 4, the Departments attempted to enlist the assistance of the court in their efforts to undermine ‘the dignity and authority of the courts’ by rendering nugatory a perfectly valid, binding, enforceable, extant judgment. In my view, this can and should not be countenanced. I am fortified in this conclusion by what was said in Bengwenyama to the effect that, in arriving at a just and equitable order under s 172(1)(b) of the Constitution, ‘[t]he rule of law must never be relinquished . . .’. It seems to me that the relief sought strikes at the very heart of the Constitution and the rule of law. In these circumstances it cannot be just and equitable to grant prayer 4 of the notice of motion.”

[84] Albeit that the above comments were made in the context of review proceedings; that the relief sought strikes at the heart of the Constitution and the rule of law, is of equal relevance in the context of the present rescission proceedings and I accordingly align myself therewith. There is a strong public interest in both

²¹ 2021 (9) BCLR 992 (CC).

certainty and finality, hence the requirement that applications for rescission are required to be brought either within specific time periods (as is required by rule 31(2) (b)); alternatively, within a “*reasonable time*” where such application is brought on the grounds relied upon herein.

[85] What is meant by the phrase “*reasonable time*” was considered in the context of review proceedings by the Supreme Court of Appeal in *Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality*.²² Such time period is reckoned from when the applicants knew or ought to have known of the grounds upon which reliance is placed. The core contention advanced by the applicants is that the delay is reasonable because: (i) of their persistent challenge regarding the respondent’s entitlement to judgment; (ii) of the clarificatory directives issued by the full court and its subsequent judgment “*which crystalised the issues for determination for the first time between the parties*”; and (iii) they had at no stage been “*advised to bring an application in terms of Rule 42(1)(a) to set aside the order of Majiki AJ.*” I cannot agree with the aforesaid reasoning.

[86] I have already dealt with the applicants’ motivation behind their persistent challenge. This is of no assistance to the applicants. Contextually, whether or not the applicants had or had not previously been advised to bring rescission proceedings in terms of rule 42(1)(a) to rescind the order of Majiki AJ, is singularly irrelevant. It is simply not open to a litigant to keep revisiting extant judgments over and over on the basis of newly obtained legal knowledge. And perhaps more importantly, as I have already shown, on a factual level, the basis for attacking the

²² 2021 (3) SA 25 (SCA).

order of Majiki AJ, as relied upon by the applicants, was known; alternatively, ought to have been known, many years ago.

[87] I am further and in any event, of the view that highly undesirable consequences would follow should rescission of the orders be granted at this stage, being years after their granting and following their unsuccessful challenge in multiple courts. It will create legal uncertainty with potentially chaotic consequences in circumstances where litigants were entitled to assume that the party against whom the order was granted had accepted its finality.²³

[88] Accordingly, even if the applicants had succeeded in proving the jurisdictional requirements for rescission, which they did not, I would in any event have declined to exercise my discretion in favour of granting the orders sought.

Conclusion

[89] In light of the aforesaid, the applicants' application falls to be dismissed with costs. Given the conduct of the applicants, I am inclined to exercise my discretion in

²³ *MEC for The Department of Public Works and Others v Ikamva Architects and Others* 2022 (6) SA 275 (ECB) at para [29].

Department of Transport and Others v Tasima (Pty) Limited 2017 (2) SA 622 (CC).

favour of granting a punitive cost order as sought by the respondent. I am further of the view that the employment of two counsel was justified.

[90] In the circumstances, the following order is issued:

1. The applicants' application is dismissed.
2. The applicants are ordered to pay the respondents costs on a scale as between attorney and client, including the costs of two counsel.

I BANDS

JUDGE OF THE HIGH COURT

Coram:	Bands J
Date heard:	4 May 2023
Further documentation:	8 May 2023
Date of judgment:	25 April 2024

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