42 Variation and rescission of orders

RS 23, 2024, D1 Rule 42-1

(1) 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;

[Paragraph *(a)* substituted by GN R235 of 18 February 1966.]

(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.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

Commentary

General. The general, well-established rule is that once a court has duly pronounced a final judgment or order, it has itself no authority to set it aside or to correct, alter or supplement it. The reasons are twofold: first, the court becomes *functus officio* and its authority over the subject matter ceases; [1] secondly, the principle of finality of litigation expressed in the maxim

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interest rei publicae ut sit finis litium (it is in the public interest that litigation be brought to finality) dictates that the power of the court should come to an end. [2] The general rule does not apply to interlocutory orders. [3] The Constitutional Court and the Appellate Division have recognized a number of exceptions to the general rule. The exceptions are dealt with in the notes to rule 42(1)*(b)* s v 'An ambiguity, or a patent error or omission' below.

A judgment or order of the Constitutional Court could be set aside by the Court itself under rule 42 or on common-law grounds, provided that it is in the interests of justice, or, in truly exceptional circumstances, if the interests of justice warrant a rescission, [4] and provided,

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further, that the Court has first granted direct access to the applicant. [5]

An order of the Supreme Court of Appeal could be set aside by the Constitutional Court on appeal, provided the provisions of s 167(3) of the Constitution have been met. Unlike rule 29 of the Rules of the Constitutional Court, the Rules of the Supreme Court of Appeal do not make provision for the application of rule 42 of the Uniform Rules of Court to the proceedings in the court. [6] It is submitted that the Supreme Court of Appeal could set aside its own judgments or orders on common-law grounds.

Under rule 29 of the Rules of the Constitutional Court, read with rule 42 of the Uniform Rules of Court, the Constitutional Court has the power to vary, alter or supplement its orders. [7]

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The Supreme Court of Appeal has an inherent jurisdiction to correct an order which was granted in error by it. [8] The Supreme Court of Appeal can correct an order of the High Court in an application for leave to appeal even when such application is dismissed. [9]

A judgment or order of the High Court could be set aside under s 23A of the Superior Courts Act 10 of 2013, rule 42, rule 31(2)*(b)* and (6), [10] on appeal [11] and on common-law grounds. [12] A judgment or order could also be abandoned, in whole or in part, under rule 41(2). [13]

The inherent jurisdiction of the High Court does not include the right to interfere with the principle of finality of judgments, other than in the circumstances specifically provided for in the rules or the common law. [14]

An order of the High Court could be varied under rule 42 and on appeal. In terms of s 19*(d)* of the Superior Courts Act 10 of 2013 the High Court, in exercising appeal jurisdiction, may amend the decision which is the subject of the appeal and render any decision which the circumstances may require. See s 19*(d)* of the Act, and the notes thereto, in Volume 1 third edition, Part D.

An order of a court of law stands until set aside by a court of competent jurisdiction. [15] Until that is done, the court order must be obeyed even if it may be wrong; [16] there is a presumption

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that the judgment is correct. [17] An invalid order must be obeyed until set aside but an order given where the court has no jurisdiction is a nullity. [18] A person may even be barred from approaching the court until he has obeyed an order of court that has not been properly set aside. [19]

The doctrine of peremption (i e acquiescence) has been extended to applications for rescission of judgment. [20]

The purpose of rule 42 is 'to correct expeditiously an obviously wrong judgment or order'. [21] Rule 42 makes provision for the following distinct procedures:

(a) the rescission or variation of an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby, either by the court *mero motu* or upon the application of any party affected by such order or judgment (subrule (1)*(a)*);

(b) the rescission or variation of 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, either by the court *mero motu* or upon the application of any party affected by such order or judgment (subrule (1)*(b)*);

(c) the rescission or variation of an order or judgment granted as the result of a mistake common to the parties, either by the court *mero motu* or upon the application of any party affected by such order or judgment (subrule (1)*(c)*).

Subrule (1): 'The court.' As to the meaning of 'court', see the notes to rule 1 s v 'Court' above.

'May.' Rule 42 caters for mistake. Rescission or variation does not, however, follow automatically upon proof of a mistake, in other words upon all the jurisdictional requirements of rule 42(1) being present. The rule gives the courts a discretion to order rescission or variation,

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which discretion must be exercised judicially. [22] In *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* [23] the majority of the Constitutional Court stated (*per* Khampepe J — footnotes omitted):

> '[53] It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that a court "may", not "must", rescind or vary its order — the rule is merely an "empowering section and does not compel the court" to set aside or rescind anything. This discretion must be exercised judicially.' [24]

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. [25] A court will not exercise its discretion in favour of a rescission application if unfavourable consequences would follow. [26]

In *Van der Merwe v Bonaero Park (Edms) Bpk* [27] the court refused to rescind an order despite the jurisdictional facts required by rule 42(1)*(a)* being present. That was a provisional sentence action. Provisional sentence was granted eight days after service of the summons on the applicant's *domicilium citandi et executandi.* The minimum period in terms of rule 8 is, however, ten days. It was common cause that the order was erroneously sought or granted within the meaning of rule 42(1)*(a)*. The court exercised its discretion to refuse to rescind the order because, on the facts placed before it, if it rescinded the order and the matter was referred back for the hearing of provisional sentence, the court hearing the provisional sentence would most likely enter provisional sentence. The interests of justice would not be served if the provisional sentence order was rescinded. [28]

In *Nkosi v ABSA Bank Ltd* [29] the court exercised its discretion against rescission despite the fact that the applicant had met all the jurisdictional requirements of rule 42(1)*(a)* because a rescission would have had no practical effect and merely caused delay. The applicant in this case did not receive the notice required by s 129 of the National Credit Act 34 of 2005 under circumstances where it was diverted to the wrong branch of the Post Office. But he did receive the summons. The notice and the track and trace reports were attached to the summons. He entered an appearance to defend, but failed to plead. He was notified of hearings in court on three separate occasions before default judgment was entered against him, but he failed to attend court. He then waited until after default judgment was entered to raise only one defence, namely the failure to deliver the s 129 notice (i e a dilatory defence). He disputed neither his indebtedness to the respondent nor his breach of the loan agreements. He was absent at the hearing of his rescission application but his founding and replying affidavits were considered by the court. Vivian AJ found that it could hardly be said that the applicant had shown a determined effort to place his case before the court, [30] and held as follows:

> '36. Accordingly, it is a judicial exercise of the discretion to refuse to rescind an order where the rescission will have no practical effect and merely cause delay. The Court roll is notoriously busy. Litigants who do not exercise their right to be heard when properly notified cannot expect as of right to be granted rescission based on a dilatory defence when all that the rescission is likely to achieve is delay.
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> 45. The conduct of the Applicant creates the impression that the rescission of the order will cause delay, but no more. The Applicant shows no real intention to take advantage of the pause created by the notice. He does not say what he would have done if he had received the notice. It will simply be another matter clogging this Court's roll. It would not be in the interests of justice to rescind the order.
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> 46. Accordingly, I exercise my discretion to refuse to rescind the order.'

In *Williams v Shackleton Credit Management* [31] the applicant for rescission under rule 42(1)*(a)* raised four defences in support of the application:

(a) that the judgment was erroneously granted because he was no longer resident at the address where service took place, and this was made clear to the sheriff when the summons was served. The result, he contended, was that no proper service took place, prescription was not interrupted, and he therefore had a bona fide prescription defence to the plaintiff's claim;

(b) that the notice under s 129 of the National Credit Act 34 of 2005 (the 'NCA') was not delivered to him in compliance with the requirements of the NCA. That, he argued, was a defence to the plaintiff's action, which could not have proceeded until there was proper delivery of the s 129 notice. It also meant that the order was erroneously granted as envisaged in rule 42(1)*(a)*;

(c) that the court lacked jurisdiction because he was no longer resident in the Western Cape; and

(d) that the cedent had no authority to have ceded its rights under the credit agreement to the plaintiff.

In contradistinction to the *Nkosi* decision above, and despite, amongst others, the decision of the Constitutional Court in *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*, [32] and without referring to the *Zuma* case, Bishop AJ held that the court had no discretion to decline rescission in circumstances where the requirements of rule 42(1)*(a)* had been complied with:

> '[59] I have great sympathy with the pragmatic approach. Rescission for the sake of rescission serves nobody. The creditor is put to additional time and expense to recover its debt when there is no good defence. The consumer may buy a few more months' grace, but if he cannot pay up, settle or raise a good defence, he will only end up paying more in interest and costs in the long run. In this case, I am of the view that little is likely to be served by rescission. The applicant has not yet identified any substantive defence. He has already had an opportunity to settle (albeit after judgment), and that has failed. It seems likely that rescission will merely delay the inevitable, at great cost to the parties' pockets and the court's time.
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> [60] And yet I find myself constrained to grant it. My understanding of rule 42(1)*(a)* is that if there was an error that is evident from the papers that precluded the grant of default judgment, then the judgment was erroneously sought and erroneously granted. Rescission must follow. The absence of a defence is irrelevant, and I have no discretion to refuse rescission.'

The purpose of the rule is 'to correct expeditiously an obviously wrong judgment or order'. [33] It would, accordingly, be a proper exercise of the court's discretion to say that, even if the applicant for a variation of an order of court proved that subrule (1) applied, he should not be heard to complain after the lapse of a reasonable time. [34] What is a reasonable time depends upon the facts of each case. [35] The court does not, however, have a discretion to set aside an order in terms of the subrule where one of the jurisdictional facts contained in paragraphs *(a)–(c)* of the subrule does not exist. [36]

The trend by the courts over the years is not to give a more extended application to the rule to include all kinds of mistakes or irregularities. [37]

The fact that the application for rescission of judgment is brought under this subrule does not mean that it cannot be entertained under rule 31(2)*(b)* or the common law, provided the requirements thereof are met. [38]

'In addition to any other powers it may have.' The powers referred to in this subrule are those under the common law and

rule 31(2)*(b)*. [39]

The common law. At common law a judgment can be set aside on the following grounds: [40]

(a) fraud; [41]

(b) *justus error* (on rare occasions); [42]

(c) in certain exceptional circumstances when new documents have been discovered; [43]

(d) where judgment had been granted by default; [44] and

(e) in the absence between the parties of a valid agreement to support the judgment, on the grounds of *justa causa*. [45]

An application on common-law grounds must be brought within a reasonable time. [46]

Fraud. In order to succeed on a claim that a judgment be set aside on the ground of fraud [47] it is necessary for the applicant to allege and prove the following: [48]

(i) that the successful litigant was a party (i e privy) to the fraud; [49]

(ii) that the evidence was in fact incorrect; [50]

(iii) that it was made fraudulently and with intent to mislead; [51] and

(iv) that it diverged to such an extent from the true facts that the court would, if the true facts had been placed before it, have given a judgment other than that which it was induced by the incorrect evidence to give. [52]

It is submitted that to the above may be added the requirement that it must be alleged and proved that, but for the fraud, the court would not have granted the judgment. [53]

If rescission of a default judgment is sought on the ground of fraud, the defendant, in addition to the requirements set out above, needs to provide a satisfactory explanation as to why he did not raise his defence timeously. [54]

***Justus error*.** Rule 42 does not deal exhaustively with the powers of a court to rescind its own final judgment. Thus, it does not exclude the setting aside of a judgment on the ground of *justus error*. [55]

In *Childerley Estate Stores v Standard Bank of SA Ltd* [56] it was held that a non-fraudulent misrepresentation inducing *justus error* on the part of a court is not a ground for setting aside its judgment. It has been held that rule 42 does not alter the common law in this regard. [57]

New documents. In *Childerley Estate Stores v Standard Bank of SA Ltd* [58] De Villiers JP concluded that a judgment could be set aside on the ground of the discovery of new documents after the judgment has been given in certain exceptional circumstances only. These include:

(i) testamentary suits in which judgment has been given on a will and subsequently a later will/codicil has been discovered;

(ii) cases in which it was in consequence of the fraud of the opposite party that the relevant document was not found or produced at the trial;

(iii) cases in which it was without the slightest fault on the part of the applicant seeking to introduce the new document or his legal representative(s) that the document was not found and produced before judgment; [59]

(iv) cases in which the judgment was founded on a presumption of law, on the opinion of a *jurisconsult* or on expert evidence.

Default judgment. In order to succeed, an applicant for recission of a judgment taken against him by default must show good/sufficient cause. [60] This generally entails that the applicant must:

(i) give a reasonable (and obviously acceptable) explanation for his default;

(ii) show that his application is made bona fide; and

(iii) show that on the merits he has a bona fide defence which prima facie carries some prospect of success. [61]

The courts, however, retain a discretion which must be exercised after a proper consideration of all the relevant circumstances. [62]

Consent judgments. A consent judgment (including a compromise/*transactio*) cannot arbitrarily be repudiated or withdrawn. It may, under certain circumstances, be set aside on the ground of *justus error* [63] or fraud. [64]

A judgment given by consent may be set aside on 'good and sufficient cause', an inquiry to be determined in accordance with the same principles as are applicable to the rescission of a default judgment in terms of rule 31(2)*(b)*. [65] In setting aside a judgment by consent the courts have regard to the following factors:

(i) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered;

(ii) the bona fides of the application for rescission;

(iii) the bona fides of the defence on the merits of the case which prima facie carries some prospect of success; a balance of probability need not be established. [66]

All these factors must be viewed in conjunction with each other and with the application as a whole. A very strong defence on the merits may strengthen an unsatisfactory explanation. [67]

'Upon the application.' In terms of subrule (2) the application must be on notice to all parties whose interests may be affected by any variation (and, it is submitted, rescission) sought. In terms of subrule (3) the court does not have the power to make an order rescinding or varying any order or judgment unless it satisfied that all parties whose interests may be affected have notice of the order proposed.

'Any party affected.' It is submitted that an applicant under this subrule need not necessarily be the affected party in whose absence the order or judgment was erroneously sought or granted. Thus, it is conceivable, for example, that the party who

had initially sought or obtained the order or judgment could be the party to proceedings who is affected by the order or judgment which it erroneously sought or obtained in the absence of another party to

the proceedings who is affected by such order or judgment, or in the absence of a third party who is affected by such order or judgment. In *Absa Bank Ltd v Prinsloo Familie Trust* [68] Farber AJ, however, came to a different conclusion:

> '[66] In short, the words "in the absence of any party affected thereby" are in my judgment of a limiting nature. It confines the remedy under rule 42(1)*(a)* to the absent party only, and thus not to the party who had initially sought and obtained the judgment.
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> [67] This approach is consonant with the approach which was adopted in *Stander and Another v Absa Bank* 1997 (4) SA 873 (E), where Nepgen J at 882E–F had this to say on the subrule:
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> > "It seems to me that the very reference to 'absence of any party affected' is an indication that what was intended was that such party, who was not present when the order or judgment was granted, and who was therefore not in a position to place facts before the Court which would have or could have persuaded it not to grant such order or judgment, is afforded the opportunity to approach the Court in order to have such order or judgment rescinded or varied on the basis of facts, of which the Court would initially have been unaware, which would justify this being done. Furthermore, the rule is not restricted to cases of an order or judgment erroneously granted, but also to an order or judgment erroneously sought. It is difficult to conceive of circumstances where a Court would be able to conclude that an order or judgment was erroneously sought if no additional facts, indicating that this is so, were placed before the Court."
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> [68] The approach of Nepgen J was endorsed by HJ Erasmus J in *President of the Republic of South Africa v Eisenberg & Associates (Minister of Home Affairs Intervening)* 2005 (1) SA 247 (C) at 264D–J.
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> [69] It would thus seem to me that rule 42(1)*(a)* is designed to afford a remedy to the party who is absent when a judgment which affects that party's interests is taken, provided only that the judgment was erroneously sought or erroneously granted. This remedy does not extend to the party who sought the order and who was thus present when it was moved and granted.
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> [70] Ms Prinsloo was absent when Judge Makume granted the default judgment against her. Notionally then, she enjoyed the right under rule 42(1)*(a)* to institute proceedings for the rescission of that order, provided she could demonstrate that the order was either erroneously sought or granted. The Bank was not the absent party and could consequently not rely on the subrule to secure the required rescission.
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> [71] I remain unpersuaded that the Bank had the necessary locus standi to institute proceedings for the rescission of the default judgment. This then disposes of the rescission application, insofar as it is based on rule 42(1)*(a)*. I merely add that, but for the locus standi issue, I would have been disposed to rescind the default judgment.
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> [72] The Bank's reliance on the common law in grounding its application for rescission is equally misplaced. It in this regard seems to me that the common-law remedy is confined to persons who, in consequence of some or other default, have been saddled with a judgment against them (see in this regard *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1041A–1043A).'

The difficulty with the approach of Farber AJ is that he did not consider the meaning and effect of the words 'any party affected' in subrule (1) which precede the words 'in the absence of any party affected thereby' in paragraph *(a)* of the subrule. Clearly, there is a distinction

between these phrases. It is submitted that the words 'sought' and 'granted' therefore also relate to 'any party affected', in other words, 'any party affected' by an order or judgment that it 'sought' or obtained in the absence of any other party would have *locus standi* to approach the court in terms of subrule (1) for the rescission or variation of the order or judgment that it erroneously 'sought' or obtained in 'the absence of any party affected thereby'. The *Stande*r and *Eisenberg* decisions similarly only dealt with the words 'absence of any party affected thereby' in paragraph *(a)* of subrule (1) and not with the words 'any party affected' in subrule (1). Both of these decisions also dealt with applications for rescission brought by affected parties who were absent when the orders against them were erroneously sought and granted. They are therefore distinguishable on the facts from the case that Farber AJ dealt with. However, it is well established that an affected party who was absent at the time when the order or judgment was erroneously sought or granted against it also has *locus standi* to approach the court in terms of subrule (1).

An applicant under this subrule must show, in order to establish *locus standi*, that he has a direct and substantial interest in the subject matter of the action or application which could be prejudicially affected by the order or judgment which was erroneously sought or granted in the action or application. This means a legal interest in the subject matter of the action or application which could be prejudicially affected by the order or judgment of the court. [69]

In *Ex parte Jooste* [70] it was held that the subrule also covers the case where there is only one party, such as in an *ex parte* application in which the order does not affect the rights of any other party. In *ABSA Bank Ltd v Prinsloo Familie Trust* [71] Farber AJ pointed out that the decision in *Jooste* is not free from difficulties:

> '[65] I am mindful of the decision in *Ex parte Jooste* 1968 (4) SA 437 (O), where it was held that rule 42(1)*(a)* is in its terms wide enough to permit a party who had obtained a judgment in an ex parte application to subsequently apply for the rescission of that judgment. This gives rise to an incongruent result. If the application is ex parte in nature, the applicant who sought and obtained the order may seek to rescind it. However, the applicant who sought and obtained the order in an application where others were party to it would not enjoy that competence. Rescission in the latter situation would only be available if one of those parties was absent, and then only at the instance of that absent party. This incongruence is perhaps due to the fact that the words "in the absence of any party affected thereby" in subrule *(a)* will have no application where the application is ex parte in nature.'

The approach of Farber AJ must be read in the context of the notes to subrule (1) above where the *Prinsloo* decision is discussed. As pointed out in those notes, the said approach is not free from difficulties.

A fugitive from justice has the right to defend legal proceedings brought against him and if a summons is not served on him, he has *locus standi* to apply for rescission of a judgment erroneously granted against him. [72]

Acquiescence in the execution of a judgment will normally bar an application for rescission in terms of this subrule. [73]

'Rescind or vary.' The rule deals exclusively with the rescission and variation of judgments and orders; it confers no jurisdiction on a court to grant an amendment of pleadings after judgment. [74] A court may clarify its judgment or order if, on a proper interpretation, the meaning remains uncertain and it is sought to give effect to its true intention. [75] Even in such instance, the sense and substance of the order must not be altered. [76]

Rule 42 contemplates final orders. At common law an interlocutory order may at any time before final judgment in the suit be varied or set aside by the judge who made it or by any other judge sitting in the same court and exercising the same jurisdiction. [77] While the courts are generally reluctant to allow variation of interlocutory orders granted by them, [78] they will do so where good cause is shown [79] , for example, where: [80]

(a) the variation sought is purely procedural or incidental; [81]

(b) fresh facts have arisen since the granting of the order; [82]

(c) the order did not reflect the intentions of the then applicants; [83]

(d) the order did not serve the object for which it was sought; [84]

(e) variation will not affect the final judgment; [85]

(f) where the order was based on an incorrect interpretation of a statute which only became apparent later; [86] or

(g) where unforeseen results would follow from the order. [87]

Once a judgment has been rescinded, the consequences thereof (for example, the issue of a writ of execution, a writ of ejectment, the attachment of property and ejectment from property) fall to be set aside. [88]

Subrule (1)*(a)*: 'An order or judgment.' There is no essential difference between an 'order' and a 'judgment': an 'order' refers to a decision given upon relief claimed in an application on notice of motion or on summons for provisional sentence, while a 'judgment' is said to be a decision of a court of law upon relief claimed in an action. [89] The Supreme Court of Appeal has suggested [90] that the distinction between 'order' and 'judgment' is formalistic and outdated, and that it performs no function and ought to be discarded. It is submitted that in this subrule the words 'order' and 'judgment' are both used in the sense of 'the pronouncement of the disposition'. [91]

'Erroneously sought or erroneously granted . . . in the absence of any party affected thereby.' [92] There are three ways in which a judgment taken in the absence of one of the parties may be set aside, namely (i) in terms of this subrule; or (ii) in terms of rule 31(2)*(b)*; or (iii) at common law. [93]

In *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* [94] the Constitutional Court held [95] that the words 'granted in the absence of any party affected thereby' in this subrule existed to protect litigants whose presence had been precluded and not those who had been afforded procedurally regular judicial process, but opted to be absent. The Court held, further, [96] that the subrule provided for two separate requirements (although one could give rise to the other in certain circumstances): *(a)* a party had to be absent; and *(b)* an error had to be committed by the court. In this case Mr Zuma brought an application to rescind the judgment and order that the Court handed down in respect of contempt of court proceedings launched against him for his failure to comply with an order of the Court. The Court found

that Mr Zuma had neither been absent when the order was granted nor had he demonstrated that the Court's order that he was in contempt of court, and committing him to imprisonment, had been erroneously granted. The following was said in this regard by Khampepe J, writing for the majority (footnotes omitted):

> '[60] . . . As I see it, 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).
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> [61] The cases I have detailed above are markedly distinct from that which is before us. We are not dealing with a litigant who was excluded from proceedings, or one who was not afforded a genuine opportunity to participate on account of the proceedings being marred by procedural irregularities. Mr Zuma was given notice of the contempt of court proceedings launched by the Commission against him. He knew of the relief the Commission sought. And he ought to have known that that relief was well within the bounds of what this Court was competent to grant if the crime of contempt of court was established. Mr Zuma, having the requisite notice and knowledge, elected not to participate. Frankly, that he took issue with the Commission and its profile is of no moment to a rescission application. Recourse along other legal routes were available to him in respect of those issues, as he himself acknowledges in his papers in this application. 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. I need say no more than this: Mr Zuma's litigious tactics cannot render him "absent" in the sense envisaged by rule 42(1)*(a)*.
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> Was the order erroneously sought or granted?
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> [62] Mr Zuma's purported absence is not the only respect in which his application fails to meet the requirements of rule 42(1)*(a)*. He has also failed to demonstrate why the order was erroneously granted. Ultimately, an applicant seeking to do this must show that the judgment against which they seek a rescission was erroneously granted because "there existed at the time of its issue a fact of 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".

> [63] It is simply not the case that the absence of submissions from Mr Zuma, which may have been relevant at the time this Court was seized with the contempt proceedings, can render erroneous the order granted on the basis that it was granted in the absence of those submissions. As was said in Lodhi 2:
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> > "A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous one."
>
> [64] Thus, Mr Zuma's bringing what essentially constitutes his "defence" to the contempt proceedings through a rescission application, when the horse has effectively bolted, is wholly misdirected. Mr Zuma had multiple opportunities to bring these arguments to this Court's attention. That he opted not to, the effect being that the order was made in the absence of any defence, does not mean that this Court committed an error in granting the order. In addition, and even if Mr Zuma's defences could be relied upon in a rescission application (which, for the reasons given above, they cannot), to meet the "error" requirement, he would need to show that this Court would have reached a different decision, had it been furnished with one or more of these defences at the time.' [97]

In *Kgomo v Standard Bank of South Africa* [98] the applicants sought rescission of a judgment under this subrule based on the fact that the bank did not comply with the notice requirements of s 129(1) and the relevant provisions of s 130 of the National Credit Act 34 of 2005. The bank's non-compliance was plainly an error which was apparent from the particulars of claim and the annexures to it on the basis of which the judgment was granted. In granting the application and setting aside the judgment, Dodson J, with reference to *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* [99] and *Lodhi 2*

Properties Investments CC v Bondev Developments (Pty) Ltd [100] held [101] that the following principles govern rescission under rule 42(1)*(a)*:

(a) the rule must be understood against its common-law background;

(b) the basic principle at common law is that once a judgment has been granted, the judge becomes *functus officio*, but subject to certain exceptions of which rule 42(1)*(a)* is one;

(c) the rule caters for a mistake in the proceedings; [102]

(d) the mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment;

(e) a judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment; [103]

(f) the error may arise either in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court; and

(g) the applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)*(b)*.

In order to obtain a rescission under this subrule the applicant must show that the prior order was 'erroneously sought or erroneously granted in the absence of any party affected thereby'. [104] It is not necessary for a party to show good cause for the subrule to apply. [105] As to the court's discretion, see the notes to subrule (1) s v 'May' above.

In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment. [106] It follows that if material facts are not disclosed in an *ex parte* application or if a fraud is committed (i e the facts are deliberately misrepresented to the court) the order will be erroneously granted. [107]

It has been held that an order granted in an application brought *ex parte* without notice to a party who has a direct and substantial interest in the matter is an order erroneously granted. [108]

An order or judgment is also erroneously granted if there was an irregularity in the proceedings, [109] or if it was not legally competent for the court to have made such an order. [110] In *Morudi v NC Housing Services and Development Co Limited* [111] the main issue for determination by the Constitutional Court was whether a procedural irregularity had been committed when the order was made. The concern arose because the High Court ought to have, but did not, insist on the joinder of the interested applicants and, by failing to do so, precluded them from participating. It was because of this that the Court concluded that the High Court could not have validly granted the order without the applicants having been joined or without ensuring that they would not be prejudiced. [112] The Court concluded thus:

> '[I]t must follow that when the High Court granted the order sought to be rescinded without being prepared to give audience to the applicants, it committed a procedural irregularity. The Court effectively gagged and prevented the attorney of the first three applicants — and thus these applicants themselves — from participating in the proceedings. This was no small matter. It was a serious irregularity as it denied these applicants their right of access to court.' [113]

The Court accordingly found that the irregularity committed by the High Court, insofar as it prevented the parties' participation in the proceedings, satisfied the requirement of an error in this subrule rendering the order rescindable. [114]

The subrule does not cover orders wrongly granted. [115]

Though in most cases the error concerned would be apparent on the record of the proceedings, it has been held that in deciding whether a judgment was erroneously granted a court is not confined to the record of the proceedings. [116] Only in cases where the court acts *mero motu* or on the basis of an oral application made from the bar for rescission or variation of the order is it necessary that the error must appear *ex facie* the record: the court would only in such cases have before it the record of the proceedings. [117] The same interpretation cannot apply to cases where the court is called upon to act on the basis of a written application by a

party whose rights are affected by an order granted in his absence. In this instance, the court would have before it not the record of the proceedings, but also facts set out in the affidavits filed in support of the application. [118]

Judgments have been rescinded under this subrule where, for example, the capital claimed had already been paid by the defendant; [119] where the summons had not been served on the respondent; [120] where counsel for the applicant in an *ex parte* application had led the court mistakenly to believe that the respondent had deliberately decided not to consult his attorney or to appear at the hearing; [121] where a final order had been granted in an *ex parte* application which had not been served on the respondent whose rights were affected by the order; [122] where parties had not been represented at an application for leave to appeal because they had no knowledge of the set down of the application; [123] where the judgment was granted by consent but in the absence of the respondents and their legal representative in circumstances where the legal representative had no authority to agree to a consent judgment; [124] where, for want of an averment in the pleadings, there is no cause of action with the result that the order was without legal foundation; [125] where an order was sought and granted in the absence of the President who, as head of the Executive, was clearly affected thereby; [126] where notice of proceedings to a party was required but was lacking; [127] where the summons on which the judgment was based lacked averments to sustain a cause of action; [128] where a notice of intention to apply for default judgment was defective; [129] where an eviction order was granted on the purported consent of all the parties whereas 180 of the unlawful occupiers had never consented to the order and were not bound by anybody present in court when the order was granted; [130] where default judgment was obtained without prior notice to the opposite party after the matter became opposed; [131] where the registrar granted default judgment against a consumer in favour of a credit provider for, *inter alia*, confirmation of termination of the credit agreement which fell under the National Credit Act 34 of 2005 and the return of the vehicle concerned and, once the vehicle had been repossessed, assessed, valued and sold on public auction, granted a further default judgment for payment of damages and further

expenses ostensibly incurred when the net proceeds of the sale of the vehicle were insufficient to discharge the applicant's obligations under the credit agreement; [132] where a defence was struck out under rule 30A under circumstances where that rule was not applicable. [133]

When an affected party invokes rule 42(1)*(a)*, a material question is whether the party that obtained the order was procedurally entitled to it. [134] If so, the order could not be said to have been erroneously granted in the absence of the

affected party. An applicant or plaintiff would be procedurally entitled to an order when all affected parties were adequately notified of the relief that may be granted in their absence. The relief need not necessarily be expressly stated. It suffices that the relief granted can be anticipated in the light of the nature of the proceedings, the relevant disputed issues and the facts of the matter. [135]

A judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously within the meaning of this subrule by reason of facts of which the court was unaware at the time of granting the judgment. [136]

A judgment to which a plaintiff is procedurally entitled in the absence of the defendant cannot be said to have been granted erroneously as contemplated in this subrule in the light of a subsequently disclosed defence. [137] Such a defence cannot transform a validly obtained judgment into an erroneous one. [138]

Rescission was refused where the applicant had failed to notify the registrar of companies of a change of address and a summons had been served in accordance with the rules at the office properly notified to the registrar as the applicant's registered head office. [139] The courts have also consistently refused rescission where there was no irregularity in the proceedings and the party in default relied on the negligence or physical incapacity of his attorney. [140]

In *Ex parte Jooste* [141] the court varied the order granted in an *ex parte* application where the applicant had, upon the insistence of the registrar of deeds, consented to the inclusion in the court's order of a proviso which was based on an incorrect view of the legal position.

An order for the rescission of a judgment erroneously granted in the absence of a party affected thereby is not appealable. [142]

Subrule (1)*(b)*: General. The purpose of this subrule is to correct expeditiously an obviously wrong judgment or order. [143]

'Any party affected thereby.' See the notes to subrule (1) s v 'Any party affected' above.

'An order or judgment.' See the notes to subrule (1)*(a)* s v 'An order or judgment' above.

'An ambiguity, or a patent error or omission.' It is a fundamental principle of our law that a court order must be effective and enforceable, and it must be formulated in language that leaves no doubt as to what the order requires to be done. [144] Not only must the order be couched in clear terms, but its purpose must also be readily ascertainable from the language used. [145]

An ambiguity or a patent error or omission has been described as an ambiguity or an error or omission as a result of which the judgment granted does not reflect the real intention of the judicial officer pronouncing it; in other words, the ambiguous language or the patent error or the omission must be attributable to the court itself. [146]

The general principle is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased. [147] The Constitutional Court and the Appellate Division have, however, recognized a number of exceptions to this rule: [148]

(a) **Supplementing of judgment.** The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant. [149]

(b) **Clarification of judgment.** The court may clarify its judgment or order if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter 'the sense and substance' of the judgment or order. [150]

The proper court to determine the interpretation to be placed upon a judgment or order is the court which made it (albeit not the same judge). [151]

The basic principles applicable to construing documents apply to the construction of a judgment or order. This includes settlement orders. [152] In a long line of cases the position has been held to be as follows:

(i) The court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the well-known rules. [153]

(ii) As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. [154]

(iii) If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it. In such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it. [155]

(iv) If any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it. [156]

(v) If the meaning of the order is, however, clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment. [157]

In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [158] the present state of the law regarding the interpretation of documents is expressed as follows by the Supreme Court of Appeal (*per* Wallis JA): [159]

> '[18] . . . Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must

> be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language

of the provision itself", read in the context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[20] Unlike the trial judge I have deliberately avoided using the conventional description of this process as one of ascertaining the intention of the legislature or the draftsman, nor would I use its counterpart in a contractual setting, "the intention of the contracting parties", because these expressions are misnomers, insofar as they convey or are understood to convey that interpretation involves an enquiry into the mind of the legislature or the contracting parties. The reason is that the enquiry is restricted to ascertaining the meaning of the language of the provision itself.

Despite their use by generations of lawyers to describe the task of interpretation it is doubtful whether they are helpful. Many judges and academics have pointed out that there is no basis upon which to discern the meaning that the members of parliament or other legislative body attributed to a particular legislative provision in a situation or context of which they may only dimly, if at all, have been aware . . . The same difficulty attends upon the search for the intention of contracting parties, whose contractual purposes have been filtered through the language hammered out in negotiations between legal advisors, in the light of instructions from clients as to their aims and financial advice from accountants or tax advisors, or are embodied in standard form agreements and imposed as the terms on which the more powerful contracting party will conclude an agreement.

[24] The sole benefit of expressions such as "the intention of the legislature" or "the intention of the parties" is to serve as a warning to courts that the task they are engaged upon is discerning the meaning of words used by others, not one of imposing their own views of what it would have been sensible for those others to say. Their disadvantages, which far outweigh that benefit, lie at opposite ends of the interpretive spectrum. At the one end, they may lead to a fragmentation of the process of interpretation by conveying that it must commence with an initial search for the "ordinary grammatical meaning" or "natural meaning" of the words used in isolation, to be followed in some instances only by resort to the context. At the other, they beguile judges into seeking out intention free from the constraints of the language in question, and then imposing that intention on the language used. Both of these are contrary to the proper approach, which is from the outset to read the words used in the context of the document as a whole and in the light of all relevant circumstances. That is how people use and understand language and it is sensible, more transparent and conducive to greater clarity about the task of interpretation for courts to do the same.

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[25] Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However, that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning; a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by the apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity.

[26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'

In *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* [160] the Supreme Court of Appeal, in dealing with the appellant's interpretation of the order of the court *a quo* in the application for leave to appeal, and without any reference to the decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [161] in which the interpretative process of ascertaining 'the intention' was described as 'a misnomer', [162] applied the process under that description (*per* Brand JA): [163]

'The flaw in the argument, as I see it, is that it loses sight of the principle that a court order, as in the case of any other document, must be read in the context of the judgment as a whole and particularly in the light of the court's reasons for that order (see e g *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304D–F). Approached in this way, it is clear to me that the court a quo *never intended* to and never did afford Newlands leave to appeal on the just and equitable isssue or, for that matter, on the issue whether or not the share sale agreement could be characterised as *contra bonos mores*.' (Emphasis added.)

In *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance* [164] the Constitutional Court stated: [165]

'The order with which a judgment concludes has been described as the "executive part of the judgment", because it defines what the court requires of the parties who are bound by it. For this reason, it was said in *Ntshwaqela* [166] that although the order must be read as part of the entire judgment, and not as a separate document, the order's meaning, if clear and unambiguous, cannot be restricted or extended by anything else stated in the judgment. The modern approach is not to undertake interpretation in discrete stages but as a unitary exercise in which the court seeks to ascertain the meaning of a provision in the light of the document as a whole and in the context of admissible background material. This principle applies to the interpretation of court orders, as decisions of this Court make plain.'

The basic principles governing the interpretation of contracts apply to the construction of a settlement agreement which was made an order of court. [167]

(c) **Correction of errors in judgment.** The court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance. [168]

(d) **Costs not argued.** Although a party has the right to have a costs order reconsidered if costs were not argued at the oral hearing, its argument relating to costs had to be based upon the finding of the court and not upon argument that the court was wrong in its finding. [169] Thus, if counsel has argued the merits and not the costs of a case, but the court has made an order regarding the costs, it may thereafter correct, alter or supplement that order. [170]

(e) **General powers.** It further appears that the court may have a general discretionary power to correct other errors in its judgment or order, but this should be exercised sparingly. [171]

The High Court has the inherent competence to correct an incorrect typed version of an order so that it corresponds to the order which was, in fact made by the court. [172] It is also entitled to amend, supplement or explain its judgment, provided that the sense or substance thereof is not affected. [173]

If the parties agree to the terms of additional orders and consent to their being made orders of court, the court would be entitled to supplement its judgment by the grant of such additional orders. [174]

In the application of the above principles the courts have, for example, granted the following: [175] an order allowing qualifying fees in respect of expert witnesses; [176] an order to include interest where the court had overlooked the plaintiff's claim for interest; [177] an amendment of its order as to costs where an order for costs had been made without hearing argument thereon; [178] an order directing that the (now repealed) tariff of maximum fees for counsel should not apply; [179] an order altering the amount of damages awarded where the court had made its original award on a basic figure different from that which had been agreed upon between the parties. [180]

'Only to the extent of such ambiguity, error or omission.' This subrule does not allow the court to revisit the whole of its order or judgment. It limits the powers of the court to the removal of the ambiguity, error or omission concerned.

Subrule (1)*(c)*: 'An order or judgment.' See the notes to subrule (1)*(a)* 'An order or judgment' above.

'A mistake common to the parties.' This means that both parties are mistaken as to the correctness of certain facts; such a mistake occurs where both parties are of one mind and share the mistake. [181] A typical case would be where the parties had agreed upon a statement of facts which was afterwards found to be incorrect. [182]

A common mistake was found to have existed where both parties believed that a settlement agreement had been made an order of court in circumstances where no such order had been made. As a result of their mistake, a subsequent order for contempt was made. In such a case where at least a substantial part of the latter order was due to the common mistake of the parties and the order is indivisible, it is appropriate to set aside the order. [183]

A common mistake would cover the case of a judgment entered by consent where the parties consented in *justus error*. [184] It is not sufficient, however, if the error is that of —

(a) **one of the parties only:** in other words, if a litigant by mistake of himself or his legal advisers abandons relief to which he is or may be entitled, the court has no power to recall or amend the order it has in consequence deliberately made, in the absence of fraud of the other party in the course of the proceedings; [185]

(b) **the court:** the general rule is that if the court has given judgment on mistaken facts, the judgment can be set aside only if the error was due to fraudulent misrepresentation, [186] but if the court is in error because of innocent misrepresentation, the vanquished party is not entitled to have the judgment rescinded even if the error was *justus*, except in certain rare and exceptional cases; [187]

(c) **a legal representative:** [188] where a legal representative consents to judgment under the mistaken belief that his client had authorized him to do so, the client is entitled to have the judgment rescinded, for any judgment by consent may, generally speaking, be set aside upon any ground which will invalidate an agreement between the parties. [189]

The mistake must relate to and be based on something relevant to the question to be decided by the court or to something in the procedure adopted: it cannot be founded on material which was irrelevant at the time of the grant of the judgment sought to be set aside. This means that there must be a causative link between the mistake and the grant of the order or judgment; the latter must have been 'as the result of the mistake'. [190]

Subrule (2): 'Any party desiring any relief . . . shall make application.' An application under this subrule must be brought within a reasonable time; [191] inordinate delay in making the application is in itself good reason for refusing relief. [192] See further the notes to subrule (1) s v 'May' above.

Subrule (3): 'All parties whose interests may be affected have notice.' See the notes to subrule (1) s v 'Any party affected' above.

1 *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 176, 178, 186–7 and 192; *Estate Garlick v CIR* 1934 AD 499 at 502; *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F; *Raydean Investments (Pty) Ltd v Rand NO* 1979 (4) SA 706 (N) at 710H; *Seatle v Protea Assurance Co Ltd* 1984 (2) SA 537 (C) at 541E–F; *Van Zyl v Van der Merwe* 1986 (2) SA 152 (NC) at 156D–E; *Sundra Hardware v Mactro Plumbing* 1989 (1) SA 474 (T) at 477B; *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 (11) BCLR 1263 (CC) at paragraphs [68] and [84]; *MEC for Public Works, Eastern Cape v Ikamva Architects CC* 2023 (2) SA 514 (SCA) at paragraph [28]; *Percy Mosuetsa v Derrick Mosuetsa* (unreported, SCA case no 746/2022 dated 1 December 2023) at paragraph [12]. In *S v Wells* 1990 (1) SA 816 (A) at 820A–D Joubert JA refers to this as the 'strict approach' and contrasts it with 'the more enlightened approach', which permits a judicial officer to change, amend or supplement his pronounced judgment, provided that the sense or substance of his judgment is not affected thereby. See also *Transvaal Canoe Union v Butgereit* 1990 (3) SA 398 (T) at 403F–404E; *Tshivhase Royal Council v Tshivhase* 1992 (4) SA 852 (A) at 862I; *First National Bank of South Africa Ltd v Jurgens* 1993 (1) SA 245 (W) at 246J–247A; *Bekker NO v Kotzé* 1996 (4) SA 1287 (Nm) at 1290H–J; *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) at 780C–F and 781J; *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) at 748H–749C; *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2002 (1) SA 82 (SCA) at 86C–D; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 5I–G; *De Villiers and Another NNO v BOE Bank Ltd* 2004 (3) SA 459 (SCA) at 462H–463F; *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at 12F–G; *Minister of Social Development, Ex parte* 2006 (4) SA 309 (CC) at 318F; *Adonis v Additional Magistrate, Bellville* 2007 (2) SA 147 (C) at 154E–155A; *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (CkHC) at 276A–J; *Brown v Yebba CC t/a Remax Tricolor* 2009 (1) SA 519 (D) at 524I–525A; *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 465A; *Speaker, National Assembly v Land Access Movement of South Africa* 2019 (6) SA 568 (CC) at 578A–C; *Thobejane v Premier of Limpopo Province* (unreported, SCA case no 1108/2019 dated 18 December 2020) at paragraph [6]; *Mukhinindi v Cedar Creek Estate Home Owners Association* (unreported, GP case no 81830/2018 dated 10 May 2021) at paragraph [19]; *Tahilram v Trustees, Lukamber Trust* 2022 (2) SA 436 (SCA) at paragraph [19]; *Obiang v Van Rensburg* [2023] 2 All SA 211 (WCC) at paragraph [22]; *Hulisani Viccel Sithangu v Capricorn District Municipality* (unreported, SCA case no 593/2022 dated 14 November 2023) at paragraph [16]; *BNS Nominees (RF) (Pty) Ltd v Arrowhead Properties Ltd* 2023 (1) SA 478 (GJ) at paragraph [11]; *Standard Bank of South Africa Ltd v Swartz* (unreported, SCA case no 1175/2022 dated 22 March 2024) at paragraph [21].
In *Polokwane 28 Joint Venture v Development Bank of South Africa* (unreported, GP case no A369/19 dated 31 May 2021) the court *a quo*, amongst other things, summarily dismissed an application by the third respondent for a postponement of the main application without hearing any of the parties. When counsel for the applicant commenced to address the court *a quo* on the merits of the main application, counsel for the third respondent interjected and drew the court's attention to the fact that the third respondent was not granted the opportunity of addressing that court on the merits of the application for a postponement. The approach by the court *a quo* to that point of order was startling. The court *a quo*'s retort was merely '[t]hen consider what I have said up to now is a prima facie view. If you want to argue it, please do'. The content and context of that passage was the crux of the appeal before the full court (at paragraphs [9]–[12]). The full court held that when the court *a quo* pronounced upon the application for postponement, it was *functus officio*; the travesty of justice was merely perpetuated when the court *a quo* gratuitously granted the third respondent the opportunity to argue its application for a postponement, if it so wished. The order dismissing the application for postponement stood until set aside, rescinded, or recalled (at paragraph [13]). The appeal against the order accordingly succeeded, the order was set aside and the matter was referred back to the court of first instance, differently constituted, to hear it *de novo* (at paragraph [16]).

2 *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at paragraph [28]; *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 465A–B; *Thobejane v Premier of Limpopo Province* (unreported, SCA case no 1108/2019 dated 18 December 2020) at paragraph [6]; *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 (11) BCLR 1263 (CC) at paragraphs [88] and [97]; *Obiang v Van Rensburg* [2023] 2 All SA 211 (WCC) at paragraphs [22]–[23]; *MEC for Public Works, Eastern Cape v Ikamva Architects CC* 2023 (2) SA 514 (SCA) at paragraph [28]; *L.T v N.A.T* (unreported, GJ case no 2021/56157 dated 11 July 2023) at paragraph 9; *BNS Nominees (RF) (Pty) Ltd v Arrowhead Properties Ltd* 2023 (1) SA 478 (GJ) at paragraph [11].

3 *Bell v Bell* 1908 TS 887; *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 550H; *Sayprint Textiles (Pvt) Ltd v Girdlestone* 1984 (2) SA 572 (ZH) at 574H–575H; *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at 13A–14G; *Brown v Yebba CC t/a Remax Tricolor* 2009 (1) SA 519 (D) at 525A–D. See also *Duncan NO v Minister of Law and Order* 1985 (4) SA 1 (T) at 2E–J; *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 465A.

4 *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 (11) BCLR 1263 (CC) at paragraphs [50] and [86]–[90]. In this case, Mr Zuma submitted that if he failed to establish the requirements for rescission under rule 42 or the common law, the Court nevertheless had to reconsider its order on the basis that the meaning of a rescindable error, as captured by rule 42, had to be expanded to permit for rescission applications in which a litigant impugned the constitutionality, or part thereof, of an order of court. He submitted that this was so because of the inclusion of the words 'with such modifications as may be necessary' in rule 29 of the Rules of the Constitutional Court, which incorporated rule 42 into the proceedings of the Court (at paragraph [78]). The Court rejected the submission (at paragraphs [79]–[85]). The Court did, however, consider whether the interests of justice warranted the rescission of its order (at paragraphs [86]–[93]). As far as truly exceptional circumstances were concerned, it came to the following conclusion (*per* Khampepe J, writing for the majority — footnotes omitted):
'[93] The first difficulty with which I am confronted, in considering this enquiry, is the fact that Mr Zuma failed to make a proper case for this exceptional ground of reconsideration. This failure cannot be regarded as insignificant because . . . Mr Zuma was comfortably represented by attorneys and a team of six counsel, including two senior counsel, throughout these proceedings. Although the jurisprudence of this Court favours substance over form, it is also trite that parties are expected to plead a clear cause of action, and that "[h]olding parties to pleadings is not pedantry". In oral argument, the Commission rightly pointed out that Mr Zuma has failed to cogently plead this ground of reconsideration in this Court.
[94] In any event, from where I sit, there is nothing in Mr Zuma's case that can be construed as "truly exceptional" to the extent that this Court should depart from the underlying principles and ordinary tenets of the rule of law. By now it is quite clear that the only possible inference that can be drawn from Mr Zuma's conduct in these proceedings is that this application constitutes an effort to backtrack on a failed, but deliberate, litigious strategy. Moreover, he has failed to place any new information before this Court that could have a bearing on the issues that formed the substance of the contempt proceedings, which enjoyed lengthy and rigorous engagement through two judgments. There is no modicum of exceptionality at issue that justifies a relaxation of the doctrine of *res judicata*. In fact, a relaxation of this doctrine under these circumstances would undeniably damage the integrity of this Court and render the finality of its orders laughable in the eyes of the public.'
As far as the interests of justice were concerned, Khampepe J said (footnotes omitted):
'Finality and legal certainty: the linchpins of the interests of justice enquiry
[97] I am overwhelmingly persuaded that the rule of law requires not only that litigation must come to an end, but that this Court affirms itself as the final arbiter of disputes of law. After all —
"[t]he principle of finality in litigation which underlies the common law rules for the variation of judgments and orders is clearly relevant to constitutional matters. There must be an end to litigation and it would be intolerable and could lead to great uncertainty if courts could be approached to reconsider final orders made."
[98] There is a reason that rule 42, in consolidating what the common law has long permitted, operates only in specific and limited circumstances. Lest chaos be invited into the processes of administering justice, the interests of justice requires the grounds available for rescission to remain carefully defined. In Colyn, the Supreme Court of Appeal emphasised that "the guiding principle of the common law is certainty of judgments". Indeed, a court must be guided by prudence when exercising its discretionary powers in terms of the law of rescission, which discretion, as expounded above, should be exercised only in exceptional cases, having "regard to the principle that it is desirable for there to be finality in judgments".
[99] The Commission, HSF and CASAC all persuasively demonstrated that any development of the grounds of rescission would have profoundly detrimental effects on legal certainty and the rule of law. I too, cannot see how it would be in the interests of justice for this Court to expand the definition of "error" to provide for any allegation of unconstitutionality. We must ponder the possible outcomes of doing so carefully, for if we do not, this Court might soon find itself inundated with similarly unmeritorious applications, all raising any number of allegations of unconstitutionality. Lest we wish to invite every litigant who has enjoyed their day in this Court, but nevertheless found themselves with an order against them, to approach us again armed with a so-called rescission application that would have us reconsider the merits of their case, it is sagacious to entertain this matter no further. The principles of finality and legal certainty lie at the heart of this case, and I fear that significant damage has already been done to these principles.
[100]–[103] . . .
[104] The above analysis can lead me to only one conclusion. Taking into account the importance of the principles of finality and Mr Zuma's conduct displayed throughout these proceedings, the interests of justice can only be served by the dismissal of this application.'

5 *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 (11) BCLR 1263 (CC) at paragraphs [48]–[50].

6 Rule 29 of the Rules of the Constitutional Court, amongst other things, provides that rule 42 of the Uniform Rules of Court shall, with such modifications as may be necessary, apply to proceedings in the Constitutional Court. See also *Baphalane ba Ramokoka Community v Mphela Family, In re : Haakdoornbult Boerdery* CC 2011 (9) BCLR 891 (CC) at paragraph [26]; *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 (11) BCLR 1263 (CC) at paragraphs [78]–[85] and [98].

7 *Ex parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC) at paragraph [4]; *Minister for Correctional Services v Van Vuren; In re Van Vuren v Minister for Correctional Services* 2011 (10) BCLR 1051 (CC) at paragraphs 7–9. See also F Snyckers 'Civil and Constitutional Procedure' 2001 *Annual Survey* 753.

8 See, for example, *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 307A–308A; *The* Fonarun Naree: *Afgri Grain Marketing (Pty) Ltd v Trustees, Copenship Bulkers A/S (In Liquidation)* 2024 (1) SA 373 (SCA) at paragraph [6]; *Oosthuizen v S* (unreported, SCA case no 180/2018 dated 21 January 2020) at paragraph [1]; *LA Group (Pty) Ltd v Stable Brands (Pty) Ltd* (unreported, SCA case no 650/2020 dated 25 November 2022) at paragraph [2].

9 *Sechoaro v Kgwadi* 2023 (5) SA 420 (SCA) at paragraphs [22]–[23].

10 See rule 31(2)*(b)* and (6) and the notes thereto above; and see *Mukhinindi v Cedar Creek Estate Home Owners Association* (unreported, GP case no 81830/2018 dated 10 May 2021) at paragraph [22].

11 In terms of s 19*(d)* of the Superior Courts Act 10 of 2013 the High Court, in exercising appeal jurisdiction, may set aside the decision which is the subject of the appeal and render any decision which the circumstances may require (see s 19*(d)* of the Act, and the notes thereto, in Volume 1 third edition, Part D; and see *Mukhinindi v Cedar Creek Estate Home Owners Association* (unreported, GP case no 81830/2018 dated 10 May 2021) at paragraph [22]). The grounds for rescission of a judgment are particularly, and deliberately, narrow in scope in order to preserve the doctrine of finality and legal certainty. By contrast, an appeal is considerably broader and is premised on the allegation that a court made an error in fact or law in reaching a decision and granting an order (*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 (11) BCLR 1263 (CC) at paragraph [9] footnote 7).

12 *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229D–E; *Mukhinindi v Cedar Creek Estate Home Owners Association* (unreported, GP case no 81830/2018 dated 10 May 2021) at paragraph [22].

13 See rule 41(2) and the notes thereto above; and see *Mukhinindi v Cedar Creek Estate Home Owners Association* (unreported, GP case no 81830/2018 dated 10 May 2021) at paragraph [22].

14 *De Wet v Western Bank Ltd* 1977 (4) SA 770 (T) at 780H–781A, approved in the majority decision of the Constitutional Court in *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 (11) BCLR 1263 (CC) at paragraph [83]; *Swart v Absa Bank Ltd* 2009 (5) SA 219 (C) at 221B–D and 223A–B.

15 *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229B–C; *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at 242C–244A; *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (CkHC) at 277C; *Jacobs v Baumann NO* 2009 (5) SA 432 (SCA) at 439G–H; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd* [2013] 2 All SA 251 (SCA) at paragraph [17]; *Minister of Home Affairs v Somali Association of South Africa* 2015 (3) SA 545 (SCA) at 570F–H; *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at 667G–675F; *Whitehead v Trustees, Insolvent Estate Riekert* (unreported, SCA case no 567/2019 dated 7 October 2020) at paragraph [18]; *LM v DM* 2021 (5) SA 607 (GP) at paragraphs [31]–[36]; *Munsamy v Astron Energy (Pty) Ltd* 2022 (4) SA 267 (GJ) at paragraph [46]; *Percy Mosuetsa v Derrick Mosuetsa* (unreported, SCA case no 746/2022 dated 1 December 2023) at paragraphs [10]–[11] and the cases there referred to. See further the notes to s 21 of the Superior

Courts Act 10 of 2013 s v 'Lack of jurisdiction' in Volume 1 third edition, Part D.

16 *Culverwell v Beira* 1992 (4) SA 490 (W) at 494A–C; *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229B–C; *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (CkHC) at 277B; *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 (1) SA 470 (W) at 473C; *Clipsal Australia (Pty) Ltd v GAP Distributors (Pty) Ltd* 2009 (3) SA 305 (W) at 311I–313E; *Mchunu v Executive Mayor, Ethekwini Municipality* 2013 (1) SA 555 (KZD) at 561D–E; *Minister of Home Affairs v Somali Association of South Africa* 2015 (3) SA 545 (SCA) at 570F–G; *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at 667G–675F and 670E–F; *Moraitis Investments (Pty) Ltd v Montic Dairy* 2017 (5) SA 508 (SCA) at 514A–C; *MEC for Co-Operative Governance and Traditional Affairs, KZN v Nquthu Municipality* 2021 (1) SA 432 (KZP) at paragraphs [21]–[25]; *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma* 2021 (5) SA 327 (CC) at paragraph [59]; *LM v DM* 2021 (5) SA 607 (GP) at paragraph [31]; *Mukhinindi v Cedar Creek Estate Home Owners Association* (unreported, GP case no 81830/2018 dated 10 May 2021) at paragraph [22]; *Munsamy v Astron Energy (Pty) Ltd* 2022 (4) SA 267 (GJ) at paragraph [46]; *Percy Mosuetsa v Derrick Mosuetsa* (unreported, SCA case no 746/2022 dated 1 December 2023) at paragraphs [10]–[11] and the cases there referred to.

17 Voet 44 2 1; *Bertram v Wood* (1893) 10 SC 177 at 180; *Makings v Makings* 1958 (1) SA 338 (A) at 349; *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564; *Le Roux v Le Roux* 1967 (1) SA 446 (A) at 462–3; *S v Ndou* 1971 (1) SA 668 (A) at 676; *Minister of Justice v Bagattini* 1975 (4) SA 252 (T) at 264; *Liley v Johannesburg Turf Club* 1983 (4) SA 548 (W) at 550H; *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (CkHC) at 277A–B and the authorities there referred to (confirmed on appeal in *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2010 (4) SA 122 (SCA)); *MEC for Co-Operative Governance and Traditional Affairs, KZN v Nquthu Municipality* 2021 (1) SA 432 (KZP) at paragraph [23]; *Mukhinindi v Cedar Creek Estate Home Owners Association* (unreported, GP case no 81830/2018 dated 10 May 2021) at paragraph [22]; *Munsamy v Astron Energy (Pty) Ltd* 2022 (4) SA 267 (GJ) at paragraph [46]; *Percy Mosuetsa v Derrick Mosuetsa* (unreported, SCA case no 746/2022 dated 1 December 2023) at paragraph [11].

18 See, in this regard, the notes to s 21 of the Superior Courts Act 10 of 2013 s v 'Lack of jurisdiction' in Volume 1 third edition, Part D.

19 *Byliefeldt v Redpath* 1982 (1) SA 702 (A) at 714; *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229B–C; *Minister of Home Affairs v Somali Association of South Africa* 2015 (3) SA 545 (SCA) at 570F–571A.

20 *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 (11) BCLR 1263 (CC) at paragraph [101] and the cases there referred to.

21 *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471E–F; *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 417B–I; *Kili v Msindwana in Re: Msindwana v Kili* [2001] 1 All SA 339 (Tk) at 345.

22 *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 7A, referring to *Theron NO v United Democratic Front (Western Cape Region)* 1984 (2) SA 532 (C) at 536G and *Tshivhase Royal Council v Tshivhase; Tshivhase v Tshivhase* 1992 (4) SA 852 (A) at 862J — 863A. See also *De Wet v Western Bank Ltd* 1977 (4) SA 770 (T) at 777F–G; *Van der Merwe v Bonaero Park (Edms) Bpk* 1998 (1) SA 697 (T) at 703G; *L.T v N.A.T* (unreported, GJ case no 2021/56157 dated 11 July 2023) at paragraphs 10–11.

23 2021 (11) BCLR 1263 (CC).

24 See also *De Wet v Western Bank Ltd* 1977 (4) SA 770 (T) at 777F–G; *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1034F–G; *Nkosi v ABSA Bank Ltd* (unreported, GP case no 53195/2019 dated 6 June 2023) at paragraphs 32–34; *TBS Management Consultant and Projects CC v Spar Group Ltd* (unreported, GJ case no 2019/9612 dated 27 July 2023) at paragraph [6]; *Elia v Absa Bank Ltd* (unreported, GJ case nos A5083/2021; 19617/2017 dated 6 June 2023 — a decision of the full court) at paragraph [16]. On the other hand, it has been held that once the court holds that an order or judgment was erroneously sought or granted as contemplated in rule 42(1)*(a)*, it should without further enquiry rescind or vary the order (*Tshabalala v Peer* 1979 (4) SA 27 (T) at 30D; *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471G; *Naidoo v Somai* 2011 (1) SA 219 (KZD) at 220F–G; *Rossitter v Nedbank Ltd* (unreported, SCA case no 96/2014 dated 1 December 2015) at paragraph [16]; *Gsasamba v Mercedes-Benz Financial Services SA (Pty) Ltd* 2023 (1) SA 141 (FB) at paragraph [29]; *Adams v Jugwanth t/a Jugwanth Attorneys* (unreported, GJ case no 4175/2020 dated 7 November 2023) at paragraph [41]; *Williams v Shackleton Credit Management* 2024 (3) SA 234 (WCC) at paragraphs [22]–[23] and [60]). It is submitted that in the light of the majority decision of the Constitutional Court in *Zuma*, decisions to the contrary are no longer good law.

25 *Chetty v Law Society, Transvaal* 1983 (1) SA 777 (T) at 761D, referred to with approval by the majority of the Constitutional Court in *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 (11) BCLR 1263 (CC) at paragraph [53] footnote [20]; *Elia v Absa Bank Ltd* (unreported, GJ case nos A5083/2021; 19617/2017 dated 6 June 2023 — a decision of the full court) at paragraph [17].

26 *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at paragraph [4], referred to with approval by the majority of the Constitutional Court in *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 (11) BCLR 1263 (CC) at paragraph [53] footnote [20].

27 1998 (1) SA 697 (T).

28 At 709D–F.

29 Unreported, GP case no 53195/2019 dated 6 June 2023.

30 At paragraph 42.

31 2024 (3) SA 234 (WCC).

32 2021 (11) BCLR 1263 (CC) at paragraph [53].

33 *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471E–F; *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 417B–I; *Kili v Msindwana in Re: Msindwana v Kili* [2001] 1 All SA 339 (Tk) at 345.

34 *First National Bank of Southern Africa Ltd v Van Rensburg NO: in re First National Bank of Southern Africa Ltd v Jurgens* 1994 (1) SA 677 (T) at 681B–G; *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306H; *Kisten and Another NNO v Absa Bank Limited* (unreported, KZP case no AR179/15 dated 23 August 2016) at paragraph [13].

35 *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 421G. See also *Roopnarain v Kamalapathy* 1971 (3) SA 387 (D).

36 *Van der Merwe v Bonaero Park (Edms) Bpk* 1998 (1) SA 697 (T) at 702H; and see *Swart v Absa Bank Ltd* 2009 (5) SA 219 (C) at 222B–C.

37 *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 7E; and see *Hossein NO v Adinolfi* (unreported, GP case no A390/2019 dated 8 November 2022 — a decision of the full bench) at paragraph 21.

38 *De Wet v Western Bank Ltd* 1977 (4) SA 770 (T) at 780H–781A; *Mutebwa v Mutebwa* 2001 (2) SA 193 (Tk) at 198C–E; *Swart v Absa Bank Ltd* 2009 (5) SA 219 (C).

39 In *Kunene v Minister of Police* (unreported, SCA case no 260/2020 dated 10 June 2021) the State Attorney, without authority of the Minister of Police, concluded settlement agreements with the appellant which were made orders of court by the High Court. The Minister subsequently obtained an order rescinding the orders. In an appeal against the rescission order, the Supreme Court of Appeal held that the settlement agreements had to be grounded on the principles of legality and the rule of law which outweighed the State Attorney's ostensible authority under circumstances where the conduct of the State Attorney resulted in the subversion of the administration of justice. The appeal was accordingly dismissed.

40 In *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A) at 939D–E it was held that 'any cause of action which is relied on as a ground for setting aside a final judgment, must have existed at the date of the final judgment'. In other words, there must be some causal connection between the circumstances which give rise to the claim for rescission and the judgment. See also *Swart v Absa Bank Ltd* 2009 (5) SA 219 (C); *Mukhinindi v Cedar Creek Estate Home Owners Association* (unreported, GP case no 81830/2018 dated 10 May 2021) at paragraph [23].

41 *Schierhout v Union Government* 1927 AD 94; *Makings v Makings* 1958 (1) SA 338 (A); *De Wet v Western Bank Ltd* 1977 (4) SA 770 (T); *Van Zyl v Van der Merwe* 1986 (2) SA 152 (NC); *Minister of Local Government and Land Tenure v Sizwe Development* 1991 (1) SA 677 (Tk); *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 511B–512B; *Port Edward Town Board v Kay* 1994 (1) SA 690 (D); *Simon NO v Mitsui and Co Ltd* 1997 (2) SA 475 (W) at 510I–511B; *Rowe v Rowe* 1997 (4) SA 160 (SCA) at166G–J; *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (CkHC) at 280D–282A; *Moraitis Investments (Pty) Ltd v Montic Dairy* 2017 (5) SA 508 (SCA) at 514G–515B; *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 465D; *Sitshoni v ASA Capital (Pty) Ltd* (unreported, GP case no 10726/18 dated 12 March 2021) at paragraph [24]; *Kunene v Minister of Police* (unreported, SCA case no 260/2020 dated 10 June 2021) at paragraph [27]; *N v N* (unreported, ECMk case no 2283/2021 dated 17 May 2022) at paragraph [30]; *Nodangala v Bradolf (Pty) Ltd* (unreported, ECMk case no 1494/2020 dated 13 December 2022) at paragraph [22].

42 *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 465D; *Nodangala v Bradolf (Pty) Ltd* (unreported, ECMk case no 1494/2020 dated 13 December 2022) at paragraph [22].

43 *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 465D; *Sitshoni v ASA Capital (Pty) Ltd* (unreported, GP case no 10726/18 dated 12 March 2021) at paragraphs [24] and [26]; *Nodangala v Bradolf (Pty) Ltd* (unreported, ECMk case no 1494/2020 dated 13 December 2022) at paragraph [22].

44 See *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042F–1043A; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765B–C; *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk); *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 528H–529A; *Naidoo v Matlala*

NO 2012 (1) SA 143 (GNP) at 152H–153A; *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 465E; *Nodangala v Bradolf (Pty) Ltd* (unreported, ECMk case no 1494/2020 dated 13 December 2022) at paragraph [22]; and see the notes to rule 31(2)*(b)* above.

45 *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (CkHC) at 283B–284B; *Nodangala v Bradolf (Pty) Ltd* (unreported, ECMk case no 1494/2020 dated 13 December 2022) at paragraph [22].

46 *Money Box Investments 268 (Pty) Ltd v Easy Greens Farming and Farm Produce CC* (unreported, GP case no A221/2019 dated 16 September 2021) at paragraph 7; *Nodangala v Bradolf (Pty) Ltd* (unreported, ECMk case no 1494/2020 dated 13 December 2022) at paragraph [22]; *Gsasamba v Mercedes-Benz Financial Services SA (Pty) Ltd* 2023 (1) SA 141 (FB) at paragraph [29].

47 Fraud as a ground for the rescission of an order may take any form and is not limited to perjured evidence or 'fraud committed during proceedings' (*Schierhout v Union Government* 1927 AD 94 at 98; *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 166H).

48 *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163 at 169; *Watson v Hunter* 1948 (3) SA 1106 (D); *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 758A–C; *Groenewald v Gracia (Edms) Bpk* 1985 (3) SA 968 (T) at 971E–G; *Minister of Local Government and Land Tenure v Sizwe Development* 1991 (1) SA 677 (Tk) at 679J–680C; *Simon NO v Mitsui and Co Ltd* 1997 (2) SA 475 (W) at 510H–511B; *Mabuza v Nedbank Ltd* 2015 (3) SA 369 (GP) at 374D–375A; *Fraai Uitzicht 1798 Farm (Pty) Ltd v McCullough* (unreported, SCA case no 118/2019 dated 5 June 2020) at paragraph [16]; *Sitshoni v ASA Capital (Pty) Ltd* (unreported, GP case no 10726/18 dated 12 March 2021) at paragraph [24]; *Ocular Technologies (Pty) Limited v AI Vision Consulting (Pty) Ltd* (unreported, GJ case no 43275/2019 dated 11 February 2022) at paragraph [15]; *Jacobs v Van Niekerk NO* (unreported, WCC case no 114/2023 dated 2 February 2024 — a decision of the full court) at paragraph [9]]. The onus is throughout on the party who seeks to set aside or amend the judgment affected by fraud (*Hotz v Hotz* 2002 (1) SA 333 (W) at 336J–337A; *Jacobs v Van Niekerk NO* (unreported, WCC case no 114/2023 dated 2 February 2024 — a decision of the full court) at paragraph [8]).
A litigant who seeks, under the common law, to have a judgment rescinded is not bound to seek such relief by way of action only (*Santos Erec v Cheque Discounting Co (Pty) Ltd* 1986 (4) SA 752 (W), and see *Motor Marine (Edms) Bpk v Thermotron* 1985 (2) SA 127 (E) at 130F–H).

49 *Makings v Makings* 1958 (1) SA 338 (A) at 344H–345A; *Groenewald v Gracia (Edms) Bpk* 1985 (3) SA 968 (T) at 971E; *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 166G–J; *Moraitis Investments (Pty) Ltd v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) at 514G–515B; *Fraai Uitzicht 1798 Farm (Pty) Ltd v McCullough* (unreported, SCA case no 118/2019 dated 5 June 2020) at paragraph [16]. Thus, a judgment will not be set aside on the ground that there has been perjured evidence unless it is shown that the successful litigant was a party thereto. The decision in *Botha v Muir* 1952 (2) SA 358 (E) must be read subject to this qualification.

50 *Fraai Uitzicht 1798 Farm (Pty) Ltd v McCullough* (unreported, SCA case no 118/2019 dated 5 June 2020) at paragraph [16].

51 *Minister of Local Government and Land Tenure v Sizwe Development* 1991 (1) SA 677 (Tk) at 680B; *Fraai Uitzicht 1798 Farm (Pty) Ltd v McCullough* (unreported, SCA case no 118/2019 dated 5 June 2020) at paragraph [16]. See also *Mabuza v Nedbank Ltd* 2015 (3) SA 369 (GP) at 374D–375A.

52 *Robinson v Kingswell* 1915 AD 277 at 285; *Swart v Wessels* 1924 OPD 187 at 189–90; *Smit v Van Tonder* 1957 (1) SA 421 (T) at 426H; *Groenewald v Gracia (Edms) Bpk* 1985 (3) SA 968 (T) at 971E; *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 166I; *Fraai Uitzicht 1798 Farm (Pty) Ltd v McCullough* (unreported, SCA case no 118/2019 dated 5 June 2020) at paragraph [16]. See also *Simon NO v Mitsui and Co Ltd* 1997 (2) SA 475 (W) at 517E–F.

53 *Robinson v Kingswell* 1915 AD 277 at 285; *Minister of Local Government and Land Tenure v Sizwe Development* 1991 (1) SA 677 (Tk) at 680B; *Fraai Uitzicht 1798 Farm (Pty) Ltd v McCullough* (unreported, SCA case no 118/2019 dated 5 June 2020) at paragraph [19].

54 See *Basson NO v Orcrest Properties (Pty) Ltd and two related matters* [2016] 4 All SA 368 (WCC) at paragraph [47]. See also *Ncwane v Ncwane NO* (unreported, KZD case no 12939/2015 dated 11 November 2016) at paragraph [22]. If an application was granted by the High Court and the respondent's subsequent appeal to the Supreme Court of Appeal dismissed, it would appear that the respondent could seek a rescission of the High Court's order on the ground of fraud without causing the order of the Supreme Court of Appeal to be set aside first. In other words, the order of the Supreme Court of Appeal dismissing the respondent's appeal would not impede its rescission application.

55 See, for example, *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163; *Bristow v Hill* 1975 (2) SA 505 (N) at 506A–507D; *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W) at 580G–581G; *De Wet v Western Bank Ltd* 1977 (2) SA 1033 (W) at 1037G–H; *De Wet v Western Bank Ltd* 1977 (4) SA 770 (T) at 776F–G; *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1039H–1043A; *Groenewald v Gracia (Edms) Bpk* 1985 (3) SA 968 (T) at 971H–972H; *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (CkHC) at 280D–284B.

56 1924 OPD 163 at 168; *Fraai Uitzicht 1798 Farm (Pty) Ltd v McCullough* (unreported, SCA case no 118/2019 dated 5 June 2020) at paragraph [20].

57 *Deary v Deary* 1971 (1) SA 227 (C) at 230.

58 1924 OPD 163 at 166–9. See also, for example, *Schierhout v Union Government* 1927 AD 94; *Makings v Makings* 1958 (1) SA 338 (A); *De Wet v Western Bank Ltd* 1977 (4) SA 770 (T); *Van Zyl v Van der Merwe* 1986 (2) SA 152 (NC); *Minister of Local Government and Land Tenure v Sizwe Development* 1991 (1) SA 677 (Tk); *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 511B–512B; *Port Edward Town Board v Kay* 1994 (1) SA 690 (D); *Bekker NO v Kotzé and Another* 1996 (4) SA 1287 (NmHC) at 1290H–J.

59 In *Fraai Uitzicht 1798 Farm (Pty) Ltd v McCullough* (unreported, SCA case no 118/2019 dated 5 June 2020) the appellant's argument that the only requirement for *justus error* on the basis of lost documents is that the documents must have gone missing through no fault on the part of the party seeking rescission was rejected and it was held that, at the very least, the documents should be of such significance that they would materially alter the outcome of the case (at paragraph [20]). In other words, the applicant for rescission must allege and prove that, had the new documents been placed before the court which gave judgment, this would have altered the outcome (at paragraph [20]).

60 *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9C. The phrases 'good cause' and 'sufficient cause' are synonymous and interchangeable (*Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352H–353A; *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 529D–E; *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 (11) BCLR 1263 (CC) at paragraph [71]; *Neelofar v Pahad* (unreported, GJ case no 5277/2020 dated 4 November 2021) at paragraph [27]). See also *Kisten and Another NNO v Absa Bank Limited* (unreported, KZP case no AR179/15 dated 23 August 2016) at paragraph [14] and the cases there referred to.

61 *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042F–1043A; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764J–765D; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9D–F; *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 152H–153A; *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at 350D; *Scholtz v Merryweather* 2014 (6) SA 90 (WCC) at 93D–96C; *Mukhinindi v Cedar Creek Estate Home Owners Association* (unreported, GP case no 81830/2018 dated 10 May 2021) at paragraph [24]; *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 (11) BCLR 1263 (CC) at paragraph [71]; *Sehube v City of Johannesburg Metropolitan Municipality* (unreported, GJ case no 42396/20 dated 13 October 2021) at paragraph [22]; *Neelofar v Pahad* (unreported, GJ case no 5277/2020 dated 4 November 2021) at paragraph [27]; *Mulder v Van Rensburg* (unreported, ECGq case no 2700/2008 dated 15 November 2022) at paragraph [9]; *Nodangala v Bradolf (Pty) Ltd* (unreported, ECMk case no 1494/2020 dated 13 December 2022) at paragraph [23]; *Estate Agency Affairs Board of South Africa v Krug* (unreported, WCC case no 2019/40670 dated 3 May 2023) at paragraph [18]; *Master of the High Court, Cape Town v Gore NO* (unreported, WCC case no 18748/2021 25 May 2023) at paragraph [2].

62 *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042G; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9B–D; *Mukhinindi v Cedar Creek Estate Home Owners Association* (unreported, GP case no 81830/2018 dated 10 May 2021) at paragraph [25].

63 In *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 922G–923A, discussed in *Moraitis Investments (Pty) Ltd v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) at 516B–H and applied in *Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) at 367B–G() the Appellate Division (*per* Miller JA) stated:
'It appears to me that a *transactio* is most closely equivalent to a consent judgment . . . Such a judgment could be successfully attacked on the very grounds which would justify rescission of the agreement to consent to judgment. I am not aware of any reason why *justus error* should not be a good ground for setting aside such a consent judgment, and, therefore also an agreement of compromise, provided that such error vitiated true consent and did not relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise . . .'
See also *Theodosio v Schindlers Attorneys* 2022 (4) SA 617 (GJ) at paragraph [7]; *Minister of Police v Van der Watt* (unreported, SCA case no 1009/2021 dated 21 July 2022) at paragraphs [23]–[24].

64 *Minister of Police v Van der Watt* (unreported, SCA case no 1009/2021 dated 21 July 2022) at paragraph [23].

65 *Georgias v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 (ZS) at 132G; *Creative Car Sound v Automobile Radio Dealers Association 1989 (Pty) Ltd* 2007 (4) SA 546 (D) at 554F–555E. See further the notes to rule 31(2)*(b)* s v 'The court may upon good cause shown' and 'Good cause' above.

66 *Georgias v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 (ZS) at 132G–I.

67 *Du Preez v Hughes NO* 1957 R & N 706 (SR); *Stockil v Griffiths* 1992 (1) ZLR 172 (S) at 173F; *Arab v Arab* 1976 (2) RLR 166 (A); *Georgias v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 (ZS) at 132I–J.

68 2024 (3) SA 80 (GJ).

69 *De Villiers v GJN Trust* 2019 (1) SA 120 (SCA) at 128A–129C; and see *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C); *Parkview Properties (Pty) Ltd v Haven Holdings (Pty) Ltd* 1981 (2) SA 52 (T); *Standard General Insurance Co Ltd v Gutman NO* 1981 (2) SA 426 (C) at 433H–436C; *Reyakopele Trading 117 v Wesbank, a Division of Firstrand Bank Limited* (unreported, GJ case no 27058 /2020 dated 17 October 2022) at paragraph 13; *Centaur Mining South Africa (Pty) Ltd v Cloete Murray NO* 2023 (1) SA 499 (GJ) at paragraph [7].

70 1968 (4) SA 437 (O).

71 2024 (3) SA 80 (GJ).

72 *Fraind v Nothmann* 1991 (3) SA 837 (W) at 841E–G.

73 *Schmidlin v Multisound (Pty) Ltd* 1991 (2) SA 151 (C).

74 *Govender v Hassim* 1994 (1) SA 304 (D) at 305G–I, not approving of the decision in *Dawson and Fraser (Pty) Ltd v Havenga Construction (Pty) Ltd* 1993 (3) SA 397 (BGD). See also the notes to rule 28(10) s v 'At any stage before judgment' above.

75 *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F–307A; *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2002 (1) SA 82 (SCA) at 86D. See further the notes to subrule (1)*(b)* s v 'An ambiguity, or a patent error or omission' below.

76 *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2002 (1) SA 82 (SCA) at 86D.

77 *Bell v Bell* 1908 TS 887; *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 550H; *Sayprint Textiles (Pvt) Ltd v Girdlestone* 1984 (2) SA 572 (ZH) at 574H–575H; *Brown v Yebba CC t/a Remax Tricolor* 2009 (1) SA 519 (D) at 525A–D. See also *Duncan NO v Minister of Law and Order* 1985 (4) SA 1 (T) at 2E–J and *Dalhousie Land Corporation (Pty) Ltd v Absa Bank Ltd and Five Other Cases* (unreported, GP case no 49241/12 dated 20 October 2016) at paragraph [4].

78 *Bell v Bell* 1908 TS 887 at 894; *Duncan NO v Minister of Law and Order* 1985 (4) SA 1 (T) at 3B–C; *Technical Systems (Pty) Ltd v RTS Industries* (unreported, WCC case no 17470/2014 dated 2 January 2024) at paragraph [55].

79 *Duncan NO v Minister of Law and Order* 1985 (4) SA 1 (T) at 3A; *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at 13A–B; *Technical Systems (Pty) Ltd v RTS Industries* (unreported, WCC case no 17470/2014 dated 2 January 2024) at paragraph [54].

80 The list is not exhaustive and may be extended to meet the exigencies of modern times (*Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at 13A).

81 *Sayprint Textiles (Pvt) Ltd v Girdlestone* 1984 (2) SA 572 (ZH) at 575F–H, with reference to *Bell v Bell* 1908 TS 887; *Attorney General v Birmingham, Tame, and Rea District Drainage Board* 1912 AC 788; *Meyer v Meyer* 1948 (1) SA 484 (T) and *Sandell v Jacobs* 1970 (4) SA 630 (SWA). See also *Technical Systems (Pty) Ltd v RTS Industries* (unreported, WCC case no 17470/2014 dated 2 January 2024) at paragraph [54].

82 *Sayprint Textiles (Pvt) Ltd v Girdlestone* 1984 (2) SA 572 (ZH) at 574H–575H, with reference to *Bell v Bell* 1908 TS 887; *Meyer v Meyer* 1948 (1) SA 484 (T) and *Sandell v Jacobs* 1970 (4) SA 630 (SWA). This was authoritatively held to be the case in *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at 13A–B.

83 *Sayprint Textiles (Pvt) Ltd v Girdlestone* 1984 (2) SA 572 (ZH) at 575B–E and 575H, with reference to *Meyer v Meyer* 1948 (1) SA 484 (T) and *Sandell v Jacobs* 1970 (4) SA 630 (SWA).

84 *Sayprint Textiles (Pvt) Ltd v Girdlestone* 1984 (2) SA 572 (ZH) at 575B–E and 575H, with reference to *Meyer v Meyer* 1948 (1) SA 484 (T) and *Sandell v Jacobs* 1970 (4) SA 630 (SWA). See also *Buthelezi v Zungu* (unreported, KZP case no 5048/2020P dated 26 November 2020) at paragraph [12].

85 *Sayprint Textiles (Pvt) Ltd v Girdlestone* 1984 (2) SA 572 (ZH) at 575F–576E, with reference to *Bell v Bell* 1908 TS 887; *Meyer v Meyer* 1948 (1) SA 484 (T) and *Sandell v Jacobs* 1970 (4) SA 630 (SWA). See also *Duncan NO v Minister of Law and Order* 1985 (4) SA 1 (T) at 2E–3A.

86 *Duncan NO v Minister of Law and Order* 1985 (4) SA 1 (T) at 3D; *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at 13B.

87 *Buthelezi v Zungu* (unreported, KZP case no 5048/2020P dated 26 November 2020) at paragraph [12].

88 *Naidoo v Somai* 2011 (1) SA 219 (KZD) at 221G–H.

89 *Dickinson v Fischer's Executors* 1914 AD 424 at 427 and 429; *Heyman v Yorkshire Insurance Co Ltd* 1964 (1) SA 487 (A) at 490D–E; *Desai v Engar and Engar* 1966 (4) SA 647 (A) at 653A–D; *Constantia Insurance Co Ltd v Nohamba* 1986 (3) SA 27 (A) at 42I–43E; *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A) at 40I–41F; *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A) at 580D; *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 715A–F; *Government Mining Engineer v National Union of Mineworkers* 1990 (4) SA 692 (W) at 694F; *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) at 622E.

90 *Zweni v Minister of Law and Order of the Republic of South Africa* 1993 (1) SA 523 (A) at 532E.

91 See *Constantia Insurance Co Ltd v Nohamba* 1986 (3) SA 27 (A) at 43A; *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 714J–715E; *Zweni v Minister of Law and Order of the Republic of South Africa* 1993 (1) SA 523 (A) at 532D.

92 The list of instances in which rule 41(2)*(a)* found application alluded to in this paragraph, which appeared in the predecessor of this work, was referred to with approval in *Minnaar v Van Rooyen NO* 2016 (1) SA 117 (SCA) at 121H–I.

93 *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W) at 578B; *De Wet v Western Bank Ltd* 1977 (4) SA 770 (T) at 776E; *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1038A; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A); *Topol v L S Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 651B–C; *Athmaram v Singh* 1989 (3) SA 953 (D) at 954E; *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 468H; *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 509I–510D; *Terrace Auto Services Centre (Pty) Ltd v First National Bank of South Africa Ltd* 1996 (3) SA 209 (W); *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 417J; *Weare v Absa Bank Ltd* 1997 (2) SA 212 (D) at 215E and 217B; *Ntlabezo v MEC for Education, Culture and Sport, Eastern Cape* 2001 (2) SA 1073 (Tk); *Kili v Msindwana In Re: Msindwana v Kili* [2001] 1 All SA 339 (Tk); *Swart v Absa Bank Ltd* 2009 (5) SA 219 (C); *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 465E–F.

94 2021 (11) BCLR 1263 (CC).

95 At paragraph [56].

96 At paragraph [57].

97 See also *Obiang v Van Rensburg* [2023] 2 All SA 211 (WCC); *L.T v N.A.T* (unreported, GJ case no 2021/56157 dated 11 July 2023) at paragraphs 11–14.

98 2016 (2) SA 184 (GP).

99 2003 (6) SA 1 (SCA).

100 2007 (6) SA 87 (SCA).

101 At 187F–188C.

102 See also *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 465G–H.

103 See also *Raymond Mhlaba Municipality v Coega Packing (Pty) Ltd* (unreported, ECMk case no CA 241/2022 dated 16 January 2024 — a decision of the full court) at paragraph [21]; *Centaur Mining South Africa (Pty) Ltd v Cloete Murray NO* (unreported, SCA case no 1334/2022 dated 28 March 2024) at paragraph [22].

104 See, in addition to the cases referred to in the text above, for example, *Duma v Absa Bank Ltd* 2018 (4) SA 463 (GP); *Obiang v Van Rensburg* [2023] 2 All SA 211 (WCC); *Raymond Mhlaba Municipality v Coega Packing (Pty) Ltd* (unreported, ECMk case no CA 241/2022 dated 16 January 2024 — a decision of the full court) at paragraphs [18]–[22]. The rescission of a summary judgment cannot be claimed under subrule (1)*(a)* when neither the defendant nor the defendant's legal representative appeared at the hearing of the application for summary judgment but an affidavit opposing the application had been duly filed (*De Beer v Absa Bank Ltd* (unreported, GP case no A882/2014 dated 6 May 2016); and see *Liphosa v FirstRand Bank Ltd t/a Westbank* [*sic*] (unreported, GP case no 70343/2020 dated 8 November 2021) at paragraphs [6] and [16]–[18]). The rescission of a summary judgment can, however, be claimed under subrule (1)*(a)* when neither the defendant nor the defendant's legal representative appeared at the hearing of the application for summary judgment, an affdavit opposing the application was not filed and the plaintiff did not bring an application condoning its late filing of the application for summary judgment (*Nel v Crystal Investments Trade Company Ltd* (unreported, WCC case no 18656/2018 dated 8 February 2022)).

105 *Topol v L S Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 650D–J; *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471H; *Dawson and Fraser (Pty) Ltd v Havenga Construction (Pty) Ltd* 1993 (3) SA 397 (BGD) at 399C–D; *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 417I; *Mutebwa v Mutebwa* 2001 (2) SA 193 (Tk) at 199E–H; *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA 587 (ECP) at 597I–598B and the further authorities there referred to; *Naidoo v Somai* 2011 (1) SA 219 (KZD) at 220F–G; *Rossitter v Nedbank Ltd* (unreported, SCA case no 96/2014 dated 1 December 2015) at paragraph [16]; *LLR Properties (Pty) Ltd v Sasfin Bank Ltd* (unreported, GJ case nos A5064/2021; 10763/2020 dated 14 June 2022 — a decision of the full court) at paragraph [18]; *S v S* (unreported, GJ case no 42712/2018 dated 14 September 2022) at paragraph [18] and the authorities there referred to; *Nimpuno v Ismail Ayob and Partners In re: Ismail Ayob and Partners v Nimpuno* (unreported, GJ case no 6825/2021 dated 2

November 2022) at paragraph [19]; *Hossein NO v Adinolfi* (unreported, GP case no A390/2019 dated 8 November 2022 — a decision of the full bench) at paragraph 23; *Gsasamba v Mercedes-Benz Financial Services SA (Pty) Ltd* 2023 (1) SA 141 (FB) at paragraph [29]; *Nkosi v ABSA Bank Ltd* (unreported, GP case no 53195/2019 dated 6 June 2023) at paragraph 2; *Mathatha General Trading CC v Head of the Department of Safety, Security and Liason Mpumalanga Province* (unreported, MM case no 2350/2022 dated 14 July 2023) at paragraph [8].

106 *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 510D–G; *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 153C; *Rossitter v Nedbank Ltd* (unreported, SCA case no 96/2014 dated 1 December 2015) at paragraph [16]; *Thomani v Seboka NO* 2017 (1) SA 51 (GP) at 58C–E; *Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) at 366E–367A; *Obiang v Van Rensburg* [2023] 2 All SA 211 (WCC) at paragraph [39]; *Raymond Mhlaba Municipality v Coega Packing (Pty) Ltd* (unreported, ECMk case no CA 241/2022 dated 16 January 2024 — a decision of the full court) at paragraph [19].

107 *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 153C–E; *Jacobs v Van Niekerk NO* (unreported, WCC case no 114/2023 dated 2 February 2024 — a decision of the full court) at paragraph [8].

108 *Clegg v Priestley* 1985 (3) SA 950 (W) at 953I–954I; *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 153E.

109 *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1038D; *Tshabalala v Peer* 1979 (4) SA 27 (T) at 30H–31A. See also *Wahl v Prinswil Beleggings (Edms) Bpk* 1984 (1) SA 457 (T) at 461D; *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 417H — I; *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA 587 (ECP) at 593F–594I; *Raymond Mhlaba Municipality v Coega Packing (Pty) Ltd* (unreported, ECMk case no CA 241/2022 dated 16 January 2024 — a decision of the full court) at paragraph [22]; *Jacobs v Van Niekerk NO* (unreported, WCC case no 114/2023 dated 2 February 2024 — a decision of the full court) at paragraph [8].

110 *Athmaram v Singh* 1989 (3) SA 953 (D) at 956D and 956I; *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 417G–H; *Leopard Line Haul (Pty) Ltd t/a Elite Line v New Clicks South Africa (Pty) Ltd; In re: New Clicks South Africa (Pty) Ltd v Leopard Line Haul (Pty) Ltd t/a Elite Line* (unreported, GJ case no 39276/2019 dated 16 July 2021) at paragraphs [23]–[24]. In *First National Bank of South Africa Ltd v Jurgens* 1993 (1) SA 245 (W) it is stated (at 247D), without reference to any authority, that the subrule only has operation where the applicant has sought an order different from that to which it was entitled under its cause of action as pleaded.

111 2019 (2) BCLR 261 (CC).

112 At paragraph [31].

113 At paragraph [33].

114 At paragraph [34].

115 *Seale v Van Rooyen NO; Provincial Government, North West Province v Van Rooyen NO* 2008 (4) SA 43 (SCA) at 52B–C and the cases there referred to; *De Beer v Absa Bank Ltd* (unreported, GP case no A882/2014 dated 6 May 2016).

116 *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at 93C–H; and see *Stander v ABSA Bank* 1997 (4) SA 873 (E), not following *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) in this respect; *Smit v Van Heerden* [2001] 4 All SA 451 (C) at 467*f–g*; *President of the Republic of South Africa v Eisenberg & Associates (Minister of Home Affairs Intervening)* 2005 (1) SA 247 (C) at 264D–H; *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA 587 (ECP) at 595B–D.

117 *Mutebwa v Mutebwa* 2001 (2) SA 193 (Tk) at 201A–B.

118 *Mutebwa v Mutebwa* 2001 (2) SA 193 (Tk) at 201B–C.

119 *Frenkel, Wise & Co (Africa) (Pty) Ltd v Consolidated Press of SA (Pty) Ltd* 1947 (4) SA 234 (C); *Holmes Motor Co v SWA Mineral and Exploration Co* 1949 (1) SA 155 (C); *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 510E.

120 *Custom Credit Corporation (Pty) Ltd v Bruwer* 1969 (4) SA 564 (D); *Fraind v Nothmann* 1991 (3) SA 837 (W); *Thomani v Seboka NO* 2017 (1) SA 51 (GP) at 57F–58F; *Interactive Trading 115 CC v South African Securitisation Programme* 2019 (5) SA 174 (LP) at 176D–F.

121 *Theron NO v United Democratic Front (Western Cape Region)* 1984 (2) SA 532 (C).

122 *Clegg v Priestly* 1985 (3) SA 950 (W).

123 *Topol v L S Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W).

124 In *Ntlabezo v MEC for Education, Culture and Sport, Eastern Cape* 2001 (2) SA 1073 (Tk) it was held (at 1082C–F) that in deciding whether to rescind a judgment granted by consent under the common law, regard had to be had to the circumstances in which the judgment was obtained, the bona fides of the application for rescission and the bona fides of the defence on the merits of a case which prima facie had some prospect of success.

125 *Marais v Standard Credit Corporation Ltd* 2002 (4) SA 892 (W).

126 *President of the Republic of South Africa v Eisenberg & Associates (Minister of Home Affairs Intervening)* 2005 (1) SA 247 (C) at 264E–F.

127 *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at 93H–94A; *Rossitter v Nedbank Ltd* (unreported, SCA case no 96/2014 dated 1 December 2015) at paragraph [16]; *Absa Bank Ltd v Mare* 2021 (2) SA 151 (GJ) (a decision of the full court); *Centaur Mining South Africa (Pty) Ltd v Cloete Murray NO* (unreported, SCA case no 1334/2022 dated 28 March 2024) at paragraph [22].

128 *Silver Falcon Trading 333 (Pty) Ltd v Nedbank Ltd* 2012 (3) SA 371 (KZP) at 373F–375E.

129 *Rossitter v Nedbank Ltd* (unreported, SCA case no 96/2014 dated 1 December 2015) at paragraphs [15]–[16].

130 *Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) at 366E–367A.

131 *Top Trailers (Pty) Ltd v Kotze* (unreported, SCA case no 1006/2018 dated 1 October 2019).

132 *Xulu v Standard Bank of South Africa Ltd* (unreported, KZP case nos 1570/21 and 2909/14 dated 23 August 2021).

133 *Katlou Boerdery v Matsepe N.O.* (unreported, WCC case no A79/21 dated 19 April 2022 — a decision of the full court) at paragraphs [29]–[32].

134 *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 465H and 467G–H; *Estate Agency Affairs Board of South Africa v Krug* (unreported, WCC case no 2019/40670 dated 3 May 2023) at paragraph [40]; *Absa Bank Ltd v Afeess Import and Export (Pty) Ltd* (unreported, GJ case no 2019/21032 dated 27 July 2023) at paragraph [7]; *TBS Management Consultant and Projects CC v Spar Group Ltd* (unreported, GJ case no 2019/9612 dated 27 July 2023) at paragraph [12]; *Raymond Mhlaba Municipality v Coega Packing (Pty) Ltd* (unreported, ECMk case no CA 241/2022 dated 16 January 2024 — a decision of the full court) at paragraphs [18], [20] and [21]–[22].

135 *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 467G–H; *Estate Agency Affairs Board of South Africa v Krug* (unreported, WCC case no 2019/40670 dated 3 May 2023) at paragraph [40].

136 *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at 94E; *Minnaar v Van Rooyen NO* 2016 (1) SA 117 (SCA) at 121H–122B; *Centaur Mining South Africa (Pty) Ltd v Cloete Murray NO* (unreported, SCA case no 1334/2022 dated 28 March 2024) at paragraph [22]. See also *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA 587 (ECP) at 594B.

137 *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at 95D–E; *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 465G–H and 467G–H. See also *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA 587 (ECP) at 598C–D; *Gsasamba v Mercedes-Benz Financial Services SA (Pty) Ltd* 2023 (1) SA 141 (FB) at paragraph [28]; *L.T v N.A.T* (unreported, GJ case no 2021/56157 dated 11 July 2023) at paragraphs 14–26; *Centaur Mining South Africa (Pty) Ltd v Cloete Murray NO* (unreported, SCA case no 1334/2022 dated 28 March 2024) at paragraph [22].

138 *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at 95E–F; *Centaur Mining South Africa (Pty) Ltd v Cloete Murray NO* (unreported, SCA case no 1334/2022 dated 28 March 2024) at paragraph [22]; and see *Eskom Holdings SOC Ltdv Akgwevhu Enterprise (Pty) Ltd* (unreported, GJ case no 4554921 dated 22 November 2022) at paragraph [18].

139 *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W).

140 *Bristow v Hill* 1975 (2) SA 505 (N); *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A); *Tshabalala v Peer* 1979 (4) SA 27 (T); *Athmaram v Singh* 1989 (3) SA 953 (D); *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E). See, however, *De Sousa v Kerr* 1978 (3) SA 635 (W) and *Topol v L S Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W).

141 1968 (4) SA 437 (O).

142 *Crockery Gladstone Farm v Rainbow Farms (Pty) Ltd* (unreported, SCA case no 592/18 dated 20 May 2019) at paragraphs [4]–[6].

143 *Royal AM Football Club v National Soccer League* (unreported, FB case no 21/27854 dated 26 July 2021) at paragraph [62], referring to *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471E–F.

144 *Eke v Parsons* 2016 (3) SA 37 (CC) at 65E–G. See also *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) at 364D; *Proxi Smart Services (Pty) Ltd v Law Society of South Africa* 2018 (5) SA 644 (GP) at 656A; *Monteiro v Diedricks* 2021 (3) SA 482 (SCA) at paragraphs [23]–[24]; *Association for Voluntary Sterilization of South Africa v Standard Trust Limited* (unreported, SCA case no 325/2022 dated 7 June 2023) at paragraph [15]; *Featherbrooke Homeowners' Association NPC v Mogale City Local Municipality* (unreported, SCA case no 1106/2022 dated 22 March 2024) at paragraphs [1], [3], [23]–[25], [33]–[43] and [45]; *Highway Junction (Pty) Ltd v Di-Thabeng Truck and Taxi (Pty) Ltd* (unreported, SCA case no 946/2022 dated 28 March 2024) at paragraphs [6]–[7] and [11]; *Ex parte Minister of Home Affairs* 2024 (2) SA 58 (CC) at paragraph [36]; *Featherbrooke Homeowners' Association NPC v Mogale City Local Municipality* (unreported, SCA case no 1106/2022 dated 22 March 2024) at paragraph [37].

145 *Eke v Parsons* 2016 (3) SA 37 (CC) at 58F. See also *Proxi Smart Services (Pty) Ltd v Law Society of South Africa* 2018 (5) SA 644

(GP) at 655E–F; *Monteiro v Diedricks* 2021 (3) SA 482 (SCA) at paragraphs [23]–[24]; *O'Brien NO v The Minister of Defence and Military Veterans* [2023] 1 All SA 341 (SCA) at paragraph [37], referring to *Minister of Water and Environmental Affairs v Kloof Conservancy* [2016] 1 All SA 676 (SCA) at paragraph [13]; *Association for Voluntary Sterilization of South Africa v Standard Trust Limited* (unreported, SCA case no 325/2022 dated 7 June 2023) at paragraph [15]; *Featherbrooke Homeowners' Association NPC v Mogale City Local Municipality* (unreported, SCA case no 1106/2022 dated 22 March 2024) at paragraph [37].

146 *Hanna v Mynhardt* 1935 TPD 63; *First Consolidated Leasing Corporation Ltd v McMullin* 1975 (3) SA 606 (T) at 608F; *Seatle v Protea Assurance Co Ltd* 1984 (2) SA 537 (C) at 541C; *Everson v Allianz Insurance Ltd* 1989 (2) SA 173 (C) at 179H–180D; *First National Bank of South Africa Ltd v Jurgens* 1993 (1) SA 245 (W) at 246F; *First National Bank of Southern Africa Ltd v Van Rensburg NO* 1994 (1) SA 677 (T) at 680J–681B; *Laduma Financial Services v De La Bat NO* 1999 (4) SA 1283 (O) at 1286F–1287G; *Adonis v Additional Magistrate, Bellville* 2007 (2) SA 147 (C) at 153G–I; *Hulisani Viccel Sithangu v Capricorn District Municipality* (unreported, SCA case no 593/2022 dated 14 November 2023) at paragraph [16]; and see *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2002 (1) SA 82 (SCA) at 86C–D.
In *Minister of Finance v Sakeliga NPC (previously Afribusiness NPC)* 2022 (4) SA 401 (CC) the Minister of Finance sought direct access to the Constitutional Court on an urgent basis for the variation of its order which had dismissed his appeal from the Supreme Court of Appeal. The Minister claimed that the order was ambiguous or lacked clarity and was thus susceptible to variation under rule 42(1)*(b)*. The Supreme Court of Appeal had declared the Minister's regulations made in terms of the Preferential Procurement Policy Framework Act 5 of 2000 invalid, and suspended the declaration of invalidity for 12 months to enable corrective action. The order of the Constitutional Court dismissed the appeal without any mention of any suspension of the order. In the minority judgment, in a footnote, it was said that '(t)he period of suspension expired on 2 November 2021'. The Minister contended that the fact that the majority did not address that footnote, resulted in a lack of clarity which was exacerbated by the order simply saying that the appeal was dismissed and not setting aside, replacing, substituting or in any way varying the order of the Supreme Court of Appeal. That confusion, according to the Minister, gave rise to different possible interpretations of the order (at paragraphs [2]–[6]). The Constitutional Court held that:
(i) The application warranted direct access; it would be inappropriate for any other court to entertain an application in terms of rule 42 pertaining to an order made by the Court (at paragraph [10]).
(ii) A minority judgment was just that. Unless parts of it were adopted either expressly or impliedly, it could not affect the meaning of an order granted by the majority. There was no basis whatsoever for suggesting that the majority judgment adopted the content of the minority judgment footnote. Therefore, the footnote could not have given rise to any confusion (at paragraph [11]).
(iii) The position was covered by s 18(1) of the Superior Courts Act 10 of 2013. Immediately after the order of the Supreme Court of Appeal was granted, the countdown on the 12-month period of suspension began but was halted by the lodgment of the application for leave to appeal. Because s 18(1) suspended the operation and execution of a judgment 'pending the decision of the application [for leave to appeal] or appeal', the countdown resumed after the Court had dismissed the appeal on 16 February 2022. There was no need for that clear legal position to be confirmed (at paragraphs [15]–[18]).
(iv) Confusion could only have arisen if the order was interpreted without due regard for the law, i e s 18(1). There was no merit in the Minister's submissions; the application had accordingly to be dismissed (at paragraphs [19] and [22]).

147 See the notes to rule 42 s v 'General' above.

148 The exceptions are listed by Trollip JA in *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306–7, and recognized in *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at 12G–H; *Minister of Social Development, Ex parte* 2006 (4) SA 309 (CC) at 318G–319A; *Speaker, National Assembly v Land Access Movement of South Africa* 2019 (6) SA 568 (CC) at 578C. A list of the principal authorities can be found in *Vilvanathan v Louw NO* 2010 (5) SA 17 (WCC) at 20F–31G. See also *Tahilram v Trustees, Lukamber Trust* 2022 (2) SA 436 (SCA) at paragraph [19]; *HLB International (South Africa) (Pty) Ltd v MWRK Accountants and Consultants (Pty) Ltd* 2022 (5) SA 373 (SCA) at paragraphs [19]–[23]. In *Seatle v Protea Assurance Co Ltd* 1984 (2) SA 537 (C) it was said (at 543A) that, save perhaps in so far as questions of costs are concerned, the list of exceptions is exhaustive. The better view is that the list is not exhaustive and may be extended to meet the exigencies of modern times (see *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at 12H–13A).

149 See, for example, *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173; *S v Wells* 1990 (1) SA 816 (A) at 820E; *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) at 748–9; *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at paragraph [29]; *BNS Nominees (RF) (Pty) Ltd v Arrowhead Properties Ltd* 2023 (1) SA 478 (GJ) at paragraphs [12]–[14].

150 *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 176 and 186–7; *Marks v Kotze* 1946 AD 29; *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 307A; *S v Wells* 1990 (1) SA 816 (A) at 820B–C; *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) at 748H–749C; *Cipla Vet (Pty) Ltd v Merial* (unreported, SCA case no 1068/2020 dated 11 January 2022) at paragraph [9]; *HLB International (South Africa) (Pty) Ltd v MWRK Accountants and Consultants (Pty) Ltd* 2022 (5) SA 373 (SCA) at paragraph [20].

151 *Geard v Geard* 1943 CPD 409.

152 *Eke v Parsons* 2016 (3) SA 37 (CC) at 50A–C; *Moraitis Investments (Pty) Ltd v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) at 514A–C; *Engen Petroleum Limited South Africa v Jai Hind EMCC CC* (unreported, GJ case no 11752/2020 dated 14 October 2021) at paragraphs [78]–[82]).

153 *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 188; *Garlick v Smartt* 1928 AD 82 at 87; *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304D–E; *Standard General Insurance Co Ltd v Gutman NO* 1981 (2) SA 426 (C) at 433A; *Muller t/a SA Trucking v Trencor Services (Pty) Ltd* 1985 (3) SA 213 (A) at 220E–F; *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 715G–H; *Simon NO v Mitsui and Co Ltd* 1997 (2) SA 475 (W) at 497A; *Amalgamated Telecommunications Contractors (Pty) Ltd v Telkom SA Ltd* [2005] 4 All SA 415 (T) at 422*g*–423*b*; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 75A–B; *Phillips v Van den Heever NO* 2007 (4) SA 511 (W) at 520H–I; *Ex parte Kelly* 2008 (4) SA 615 (T) at 619B–C; *Brown v Yebba CC t/a Remax Tricolor* 2009 (1) SA 519 (D) at 523F–H; *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* 2013 (2) SA 204 (SCA) at 209A; *Eke v Parsons* 2016 (3) SA 37 (CC) at 50A–F; *Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd* 2019 (3) SA 441 (SCA) at 448B–D; *Born Free Investments 247 (Pty) Ltd v Kriel NO* (unreported, SCA case no 1183/17 dated 26 March 2019) at paragraph [7]; *Martrade Shipping and Transport GmbH v United Enterprises Corporation* (unreported, SCA case no 1085/2019 dated 2 October 2020) at paragraph [2]; *MEC for Co-Operative Governance and Traditional Affairs, KZN v Nquthu Municipality* 2021 (1) SA 432 (KZP) at paragraph [17]; *Malatji v Ledwaba NO* (unreported, SCA case no 1136/19 dated 30 March 2021) at paragraph [13]; *Neves v Neves NO* (unreported, MM case no 2108/2017 dated 8 April 2021) at paragraph [9]; *Member of the Executive Council for Health, Gauteng Provincial Government v PN obo EN (Member of the Executive Council for Health, KwaZulu-Natal Provincial Government and others as amici curiae)* 2021 (6) BCLR 584 (CC) at paragraph [22]; *Notley v Great North Transport (Pty) Ltd* (unreported, LP case no HCAA 10/2020 dated 1 June 2021) at paragraphs [19]–[20]; *Da Cruz v Bernardo* 2022 (2) SA 185 (GJ) at paragraph [64]; *HLB International (South Africa) (Pty) Ltd v MWRK Accountants and Consultants (Pty) Ltd* 2022 (5) SA 373 (SCA) at paragraphs [24] and [26]. In *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* 2013 (2) SA 204 (SCA) at 209A and *Eke v Parsons* 2016 (3) SA 37 (CC) at paragraph [29] it was held that the starting point is to determine the manifest purpose of the order. See also *Martrade Shipping and Transport GmbH v United Enterprises Corporation* (unreported, SCA case no 1085/2019 dated 2 October 2020) at paragraph [3]; *HLB International (South Africa) (Pty) Ltd v MWRK Accountants and Consultants (Pty) Ltd* 2022 (5) SA 373 (SCA) at paragraph [26]; *Hulisani Viccel Sithangu v Capricorn District Municipality* (unreported, SCA case no 593/2022 dated 14 November 2023) at paragraph [23]; *Ex parte Minister of Home Affairs* 2024 (2) SA 58 (CC) at paragraphs [35]–[36].

154 *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304E; *Muller t/a SA Trucking v Trencor Services (Pty) Ltd* 1985 (3) SA 213 (A) at 220E–F; *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 715G–H; *Amalgamated Telecommunications Contractors (Pty) Ltd v Telkom SA Ltd* [2005] 4 All SA 415 (T) at 422*g*–423*b*; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 75B–G; *Phillips v Van den Heever NO* 2007 (4) SA 511 (W) at 520H–I; *Brown v Yebba CC t/a Remax Tricolor* 2009 (1) SA 519 (D) at 523G–H; *Mkhize v Umvoti Municipality* 2010 (4) SA 509 (KZP) at 516H–517G; *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO* 2011 (4) SA 149 (SCA) at 160D–E; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603F; *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* 2013 (2) SA 204 (SCA) at 209B; *Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd* 2019 (3) SA 441 (SCA) at 448C–D; *Speaker, National Assembly v Land Access Movement of South Africa* 2019 (6) SA 568 (CC) at 584B (where it was stated that the orders of the Constitutional Court 'must be interpreted in context and in terms of the judgment as a whole'); *MEC for Co-Operative Governance and Traditional Affairs, KZN v Nquthu Municipality* 2021 (1) SA 432 (KZP) at paragraph [17]; *Neves v Neves NO* (unreported, MM case no 2108/2017 dated 8 April 2021) at paragraph [9]; *Malatji v Ledwaba NO* (unreported, SCA case no 1136/19 dated 30 March 2021) at paragraph [13]; *Member of the Executive Council for Health, Gauteng Provincial Government v PN obo EN (Member of the Executive Council for Health, KwaZulu-Natal Provincial Government and others as amici curiae)* 2021 (6) BCLR 584 (CC) at paragraph [22] (at paragraph [25] it was held that a viable interpretation of an order which promotes constitutional values must be preferred to one that does not); *McMillan v Bate Chubb & Dickson Inc* (unreported, SCA case no 299/2020 dated 15 April 2021) at paragraph [33]; *Notley v Great North Transport (Pty) Ltd* (unreported, LP case no HCAA 10/2020 dated 1 June 2021) at paragraphs [19]–[20]; *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance* 2022 (1) BCLR 1 (CC) at paragraph [12]; *Da Cruz v Bernardo* 2022 (2) SA 185 (GJ) at paragraph [64]; *HLB International (South Africa) (Pty) Ltd v MWRK Accountants and Consultants (Pty) Ltd* 2022 (5) SA 373 (SCA) at paragraphs [24] and [26]–[30]; *Hulisani Viccel Sithangu v Capricorn District Municipality* (unreported, SCA case no 593/2022 dated 14 November 2023) at paragraph [16]; *Ex parte Minister of Home Affairs* 2024 (2) SA 58 (CC) at paragraphs [35]–[36].

155 *Postmasburg Motors (Edms) Bpk v Peens* 1970 (2) SA 35 (NC) at 39; *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304F; *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 715G–H; *Amalgamated Telecommunications Contractors (Pty) Ltd v Telkom SA Ltd* [2005] 4 All SA 415 (T) at 423c; *Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd* 2019 (3) SA 441 (SCA) at 448D–E; *MEC for Co-Operative Governance and Traditional Affairs, KZN v Nquthu Municipality* 2021 (1) SA 432 (KZP) at paragraph [17]; *Neves v Neves NO* (unreported, MM case no 2108/2017 dated 8 April 2021) at paragraph [9]; *HLB International (South Africa) (Pty) Ltd v MWRK Accountants and Consultants (Pty) Ltd* 2022 (5) SA 373 (SCA) at paragraph [24].

156 *Garlick v Smartt* 1928 AD 82 at 87; *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454–5; *Thomson v Beko (Pvt) Ltd* 1960 (3) SA 809 (D); *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304G–H; *Muller t/a SA Trucking v Trencor Services (Pty) Ltd* 1985 (3) SA 213 (A) at 220E–F; *Plaaslike Oorgangsraad, Bronkhorstspruit v Senekal* 2001 (3) SA 9 (SCA) at 18F–19A; *Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd* 2019 (3) SA 441 (SCA) at 448D–F; *MEC for Co-Operative Governance and Traditional Affairs, KZN v Nquthu Municipality* 2021 (1) SA 432 (KZP) at paragraph [17]; *HLB International (South Africa) (Pty) Ltd v MWRK Accountants and Consultants (Pty) Ltd* 2022 (5) SA 373 (SCA) at paragraph [24].

157 *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 716A–C; *Amalgamated Telecommunications Contractors (Pty) Ltd v Telkom SA Ltd* [2005] 4 All SA 415 (T) at 423*a*; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 76I–77A; *Phillips v Van den Heever NO* 2007 (4) SA 511 (W) at 520I; *Brown v Yebba CC t/a Remax Tricolor* 2009 (1) SA 519 (D) at 523H; *Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd* 2019 (3) SA 441 (SCA) at 448C–D; *HLB International (South Africa) (Pty) Ltd v MWRK Accountants and Consultants (Pty) Ltd* 2022 (5) SA 373 (SCA) at paragraph [24].

158 2012 (4) SA 593 (SCA) at 603F–610C (footnotes omitted). See also, for example, *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 (SCA) at 525G; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Son Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at 499F–500A; *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015 (3) SA 532 (SCA) at 537C–G; *Panamo Properties (Pty) Ltd v Nel and Others NNO* 2015 (5) SA 63 (SCA) at 73F–74C; *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC) at 111B–112B; *Roazar CC v The Falls Supermarket* CC 2018 (3) SA 76 (SCA) at 81D–E; *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper* 2018 (4) SA 71 (SCA) at 80E–F; *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* 2019 (5) SA 29 (CC) at 39D–40E; *Telkom SA SOC Ltd v Commissioner, South African Revenue Service* 2020 (4) SA 480 (SCA) at paragraphs [14]–[17]; *HLB International (South Africa) (Pty) Ltd v MWRK Accountants and Consultants (Pty) Ltd* 2022 (5) SA 373 (SCA) at paragraph [25]; *National Credit Regulator v National Consumer Tribunal* 2023 (3) SA 225 (GP) at paragraphs [34]–[35]; *Hulisani Viccel Sithangu v Capricorn District Municipality* (unreported, SCA case no 593/2022 dated 14 November 2023) at paragraph [16]; Dennis M Davis 'Interpretation of statutes: Is it possible to divine a coherent approach?' (2020) 3.1 *SAJEJ* 1.

159 Farlam JA, Van Heerden JA, Cachalia JA and Leach JA concurring.

160 2015 (4) SA 34 (SCA) at 39F–H.

161 2012 (4) SA 593 (SCA).

162 At 605B–C.

163 Lewis JA, Pillay JA, Dambuza AJA and Mayat AJA concurring.

164 2022 (1) BCLR 1 (CC).

165 At paragraph [12] (footnotes omitted).

166 *Author's note: Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 716B–C.

167 *Engelbrecht and Another NNO v Senwes Ltd* 2007 (3) SA 29 (SCA) at 32D. The approach to be followed was summarized in *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E–758E. See also the *Engelbrecht* case at 32D–33C. As to the present state of the law regarding the interpretation of contracts, see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603E–605A.

168 *Wessels & Co v De Beer* 1919 AD 172 at 174; *Randfontein Estates v Robinson* 1921 AD 515 at 520; *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 186–7. See also *International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd (2)* 1955 (2) SA 29 (W); *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) at 748–9.

169 *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) at 749D–G.

170 *Estate Garlick v CIR* 1934 AD 499 at 515; *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) at 748–9; and see *Jojwana v Regional Court Magistrate* 2019 (6) SA 524 (ECM) at 532A–533B.

171 *Ex parte Barclays Bank* 1936 AD 481 at 485; *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 308.

172 *Isaacs v Williams* 1983 (2) SA 723 (NC).

173 *S v Wells* 1990 (1) SA 816 (A) at 820C.

174 *Transvaal Canoe Union v Butgereit* 1990 (3) SA 398 (T) at 404E.

175 Further examples are listed in Jones & Buckle *Civil Practice* vol I 254 n 1.

176 *Lynmar Investments (Pty) Ltd v South African Railways and Harbours* 1975 (4) SA 445 (D).

177 *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173.

178 *Estate Garlick v CIR* 1934 AD 499; *Hart v Broadacres Investments Ltd* 1978 (2) SA 47 (N); and see *Jojwana v Regional Court Magistrate* 2019 (6) SA 524 (ECM) at 532A–533B.

179 *Pogrund v Yutar* 1968 (1) SA 395 (A) at 397D–F and 398B–C. See, however, *Ditshigo v Motor Vehicle Assurance Fund* 1983 (1) SA 838 (T) at 843B.

180 *Everson v Allianz Insurance Ltd* 1989 (2) SA 173 (C) at 179–80.

181 *Tshivhase Royal Council v Tshivhase* 1992 (4) SA 852 (A) at 863A; *R v R* 2023 (9) BCLR 1126 (CC) at paragraph [50].

182 See *Meintjes v Theunissen* (1895) 10 EDC 55; *Hayes' Executor v Hayes* (1897) 18 NLR 194; *Dewar v Sondheim* 1906 TH 230; *Naidoo v Mayville Local Administration and Health Board* 1928 (1) PH L17 (N). In *Ex parte Kruger* 1982 (4) SA 411 (SE) the court held that there can hardly be a more fundamental mistake than where a spouse seeks and obtains a divorce in bona fide ignorance of the fact that the other spouse is already dead.

183 *Road Accident Fund v Mouton* 2003 (5) SA 212 (W) at 216C.

184 See *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1039–43; *Groenewald v Gracia (Edms) Bpk* 1985 (3) SA 968 (T) at 971–2.

185 See *De Wet v Western Bank Ltd* 1977 (2) SA 1033 (W); *De Wet v Western Bank Ltd* 1977 (4) SA 770 (T) at 780; *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 922C–923D; *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1044; *Groenewald v Gracia (Edms) Bpk* 1985 (3) SA 968 (T) at 972; *Ntlabezo v MEC for Education, Culture and Sport, Eastern Cape* 2001 (2) SA 1073 (Tk) at 1077I–1078I; *Sibanyoni, KR Transport Services v Sheriff, Transvaal High Court* 2006 (4) SA 429 (T) at 432A–B.

186 *First Consolidated Leasing Corp Ltd v McMullin* 1975 (3) SA 606 (T) at 608. See also *N v N* (unreported, ECMk case no 2283/2021 dated 17 May 2022) at paragraph [29] footnote [37].

187 *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163. See also *Vellyammal v Winsner* (1928) 49 NLR 36; *Barry v Barry* 1943 EDL 316; *Seatle v Protea Assurance Co Ltd* 1984 (2) SA 537 (C); *N v N* (unreported, ECMk case no 2283/2021 dated 17 May 2022) at paragraph [29] footnote [37].

188 *Joseph v Joseph* 1951 (3) SA 776 (N); *Shield Insurance Co Ltd v Van Wyk* 1975 (4) SA 781 (NC), overruled but on other grounds in *Shield Insurance Co Ltd v Van Wyk* 1976 (1) SA 770 (NC).

189 *O'Neill v O'Neill* 1910 WLD 186; *De Vos v Calitz & De Villiers* 1916 CPD 465; *Pistorius v Cohen* 1928 TPD 162; *Moshal Gevisser (Trademarket) Ltd v Midlands Paraffin Co* 1977 (1) SA 64 (N).

190 *Seedat v Arai* 1984 (2) SA 198 (T) at 201D; *Tshivhase Royal Council v Tshivhase* 1992 (4) SA 852 (A) at 863B; *R v R* 2023 (9) BCLR 1126 (CC) at paragraph [50].

191 *Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) at 366E to 367A; *Money Box Investments 268 (Pty) Ltd v Easy Greens Farming and Farm Produce CC* (unreported, GP case no A221/2019 dated 16 September 2021) at paragraph 7; *Nkosi v Endlovini Communal Property Association In re: Endlovini Communal Property Association v Nkosi* (unreported, MM case no 1626/2020 dated 5 October 2021) at paragraph [19]; *Cherokee Rose Prop 100 CC v Absa Bank Ltd* (unreported, GJ case no 37071/2021 dated 21 October 2021) at paragraph [21]; *Gsasamba v Mercedes-Benz Financial Services SA (Pty) Ltd* 2023 (1) SA 141 (FB) at paragraph [29].

192 *Roopnarain v Kamalapathy* 1971 (3) SA 387 (D); *Cherokee Rose Prop 100 CC v Absa Bank Ltd* (unreported, GJ case no 37071/2021 dated 21 October 2021) at paragraphs [21]–[22].