REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes

_____ _____

DATE SIGNATURE

Case No.: 2018/11026

In the matter between:

M A SELOTA ATTORNEYS	First Applicant / First Defendant
M ALFRED SELOTA	Second Applicant / Second Defendant
and	
O[…] N[…] R[….]	First Respondent / First Plaintiff
THE SHERIFF OF THE HIGH COURT, KEMPTON PARK	Second Respondent
THE SHERIFF OF THE HIGH COURT, JOHANNESBURG CENTRAL	Third Respondent

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JUDGMENT

Gilbert AJ

1. The first respondent, a minor, was injured in a motor vehicle collision. The first respondent's mother, now deceased, approached the applicants in 2009 to represent her in instituting a claim on behalf of her son against the Road Accident Fund. The second applicant practices as a sole proprietor under the name and style of the first applicant.[1]

2. Action proceedings were initiated against the Road Accident Fund in January 2013 and culminated in an order in favour of the first respondent during February 2017 for *inter alia* a capital amount of R963,309.00. The capital amount was paid into the trust account of the applicants.

3. For the first respondent his journey for compensation did not end there. The applicants as his then attorneys did not make those monies available for his benefit. After deducting a contingency fee, the applicant transferred the balance of R722, 482.00 to a financial institution, ABSA.

4. The first respondent, assisted by his father as his mother had since passed away, was dissatisfied with the manner in which the applicants were handling his enquiries as to the fate of the funds and approached the first respondent's present attorneys for assistance. They were similarly unsuccessful in their engagements with the applicants.

[1] Although there is in law and in fact only one applicant, for purposes of continuity I will refer to the "applicants".

5. During March 2018, some six months after receiving the funds from the Road Accident Fund, the applicants initiated a process to form a trust, ostensibly for the benefit of the first respondent, and, once the trust been registered on 31 May 2018, to arrange for the monies to be paid into the trust's bank account.

6. The first respondent contends that the applicants had no mandate to form the trust or to otherwise deal with the monies in the manner that they did.

7. Whilst the applicants were taking steps to register the trust, the first respondent, assisted by his father, on 5 April 2018 instituted action against the applicants under the present case number seeking payment from the applicants as his erstwhile attorneys. The first respondent was successful on 27 August 2019 in obtaining an order against the applicants in their absence when the applicants failed to appear on the day the action was set down for trial.

8. The present proceedings are by the applicants as the defendants in the action seeking the rescission of the judgment that had been granted against them in their absence.

9. During argument the applicants confined their application for rescission to Uniform Rule 42(1)(a), which provides that a court may rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

10. Much of the applicants' papers is directed at demonstrating that the applicants have good cause for the rescission, asserting that they had given a reasonable explanation for their default in failing to appear at the trial, that their rescission application is *bona fide* and that they have a *bona fide* defence to the first respondent's claim. [2] But the applicant's counsel focussed on persuading the court to rescind the judgment under rule 42(1)(a). This approach by the applicants' counsel is understandable given the lack of merit in what the applicants put forward as a *bona fide* defence. An applicant for rescission in terms of rule 42(1)(a) is not required to show that there is good cause for the rescission.

11. An examination of the common cause facts, or those that cannot be seriously disputed, demonstrates that the applicants have not advanced a bona fide defence to the first respondent's action and that there is substance to the first respondent's contentions that there was something amiss with the manner in which the applicants went about dealing with the funds that had been received from the Road Accident Fund.

12. This raises the question whether a court retains a discretion to refuse a rescission of judgment under rule 42(1)(a), notwithstanding that the

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[2] The applicants erroneously refer in their papers to rule 31(2)(b) as the alternative basis for their rescission, and so seek to demonstrate good cause in the context of that sub-rule. When it was pointed out during argument that such rule could not apply as the applicants as defendants had not been in default of delivery of a notice of intention to defend or a plea but had rather failed to appear on the trial date, the applicants abandoned reliance on rule 31(2)(b). But a court may nonetheless consider the correct form of rescission if a proper case has been made out on the facts and the other parties are not prejudiced, although specific reference is not made to that form of rescission (see *Mutebwa* below, para 12).

requirements thereof have been satisfied, where it appears from the papers before the court that there is no bona fide defence. I will return to this issue later in the judgment, as it is first necessary to answer the antecedent question, namely whether the applicants have satisfied the requirements for rescission under rule 42(1)(a).

The requirements for rescission under rule 42(1)(a)

13. Dodson J in *Kgomo and another v Standard Bank of South Africa and others* 2016 (2) SA 184 (GP)[3] usefully extracted the following principles governing rescission in terms of Rule 42(1)(a), principally from the now oft-cited decisions of the Supreme Court of Appeal in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 6 SA 1 (SCA) and *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA):

    13.1. the rule must be understood against its common-law background;

    13.2. 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;

    13.3. the rule caters for a mistake in the proceedings;

    13.4. 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;

[3] Para 11.

13.5. 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;

13.6. 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

13.7. the applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission.

14. Applicant's counsel sought to emphasise the last principle, to which I will return later in this judgment.

15. It is not any error that would found a rescission in terms of rule 42(1)(a). As stated by Jones AJA in *Colyn*,[4] the real issue to be determined is the nature of the error in question.

16. An order is not erroneously granted or sought where the plaintiff was procedurally entitled to the order.[5] There must be a mistake in the proceedings.[6]

17. Most of the reported decisions engage with the requirement whether the plaintiff was procedurally entitled to the order, or whether the facts of which the court was unaware relate to whether the plaintiff was procedurally entitled to the order.

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[4] At 9 A/B.
[5] See, for example, *Lodhi*, para 17 and 25. See also *Freedom Stationery (Pty) Limited v Hassam* 2019 (4) SA 459 (SCA) at para 25.
[6] *Colyn* para 9.

18. In some instances, the procedural irregularity or error is clear, such as where the court grants an order notwithstanding that there was no service of summons or the plaintiff had failed to give notice of set down of the matter.[7] In other instances, it is far less clear whether there was a procedural error as compared to an error made by the court that relates to the substance of the dispute. An example is where the court grants an order in circumstances where no cause of action is made out in the particulars of claim.

19. The difficulty in the hard cases is deciding whether the error remains a procedural error for purposes of a rescission under rule 42(1)(a) or has become an substantive error, which is the domain of an appeal. In *Silver Falcon Trading 335 (Pty) Limited v Nedbank Limited* 2012 (3) SA 371 (KZP) the court was alive to the distinction and that a rescission court cannot sit as a court of appeal on its own judgment and cannot review it.[8] The court nonetheless found that an order granted on a simple summons which lacked averments to sustain a cause of action in the context of the National Credit Act, 2005 was not procedurally sustainable and so capable of being rescinded under rule 42(1)(a).[9] The court opined[10] that an order may be both appealable and subject to rescission, which was a position adopted by the applicants' counsel in the present matter.

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[7] *Lodhi* para 24, referring by way of example to *Fraind v Nothmann* 1991 (3) SA 837 (W).
[8] Para 4.
[9] At para 5, applying *Marais v Standard Credit Corporation Ltd* 2002 (4) SA 892 (W), where this Division found that a summons lacking the necessary averments to sustain a cause of action under the then Credit Agreements Act, 1980 resulted in an order that was capable of being rescinded under rule 42(1)(a).
[10] At para 4.

20. But what is also apparent from the reported decisions, although it does not feature prominently, is that the applicant for rescission must demonstrate that if the court that had granted the order in the absence of the applicant had been aware of the facts that the applicant contends it was not aware of, the court would not have granted the order. This requirement presupposes that the applicant for rescission can demonstrate that the court was unaware of those facts.

21. In *Nyingwa v Moolman* 1993 (2) SA 508 (Tk) the court held that "*a judgment has been erroneously granted if 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 he had been aware of it, not to grant the judgment*".[11]

22. To similar effect, in *Stander and another v ABSA Bank* 1997 (4) 873 (E) the court accepted[12] that an order would be erroneously granted where there existed at the time the order was made facts of which the court was unaware and which, if the court had been aware thereof, would have induced the court not to grant the order sought.

23. Subsequently the Supreme Court of Appeal in *Lodhi*, after referring to both *Nyingwa* and *Stander*, qualified the type of facts of which the court was unaware that would be relevant to a rescission under rule 42(1)(a), namely facts that would demonstrate whether the plaintiff was procedurally entitled to the order. An order to which a party was

[11] At 510G.
[12] At 880H.

procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the court was unaware at the time.[13]

24. None of the decisions that I have considered suggest that an order can be rescinded under rule 42(1)(a) where the court that granted the order if apprised of the facts would nonetheless still have granted the order. This would be contrary to the test as formulated in *Nyingwa* and *Stander*. Rule 42(1)(a) operates where the court was unaware of the facts relating to the procedural error and so granted an order or judgment to which the plaintiffs were not procedurally entitled and that the court would not have granted had it known of those facts.

25. For example, in *Silver Falcon*, a judgment heavily relied upon by the present applicants, there is no suggestion that should the court's attention have been drawn to the excipiable summons, and that it nonetheless persisted in granting the order, that that would remain an order erroneously granted within the ambit of rule 42(1)(a). The election suggested in *Silver Falcon* between a defendant appealing an order or seeking a rescission under rule 42(1)(a) does not extend to where the court would have granted the order anyway if it had been apprised of the plaintiff's contention that the simple summons was excipiable.

26. In *Van der Merwe v FirstRand Bank Limited t/a WesBank and Barloworld Equipment Finance* 2001 (1) SA 480 (ECG) the court

[13] At para 25.

rescinded an order that had been granted under rule 42(1)(a) in the absence of the defendant on the basis that the offer of settlement by the defendant upon which the order was granted had been signed by the defendant's attorney who was not authorised in writing to do so, contrary to rule 34(1).

27. The court had not been aware at the time of granting the order that there had been non-compliance with rule 34(1) and had it known, it would not have granted the order.[14] It was the court not having awareness of the fact that the defendant's attorney was not authorised in writing to sign the offer of settlement and that had the court known of that fact, that enabled the court to grant rescission under rule 42(1)(a).

28. *National Pride Trading 452 v Media 24* 2010 (6) SA 587 (ECP) is to similar effect. An order was granted against a respondent in motion proceedings when the respondent did not appear in court. The notice of set down had not been served on the respondent, and the respondent was unaware the matter was in court. The court found[15] that as the court that granted the order was unaware that the notice of set down had not been served on the respondent and that as the court would not have granted the order had it known of that fact, the order was to be rescinded in terms of rule 42(1)(a).

[14] Paragraph 26.
[15] Paragraph 14.

29. The Supreme Court of Appeal in *Rossiter & Others v Nedbank Ltd* [2015] SCA 196 (1 December 2015),[16] after affirming that *"[g]enerally a judgment is erroneously granted if there existed at the time of its issue a fact which the court was unaware of, 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*", found that had the Registrar, which granted the default judgment, been aware of the procedural defect in the rule 31(5)(a) notice, there was *"no doubt"* that default judgment would not have been granted. The unawareness of the Registrar of the defect and that had the Registrar known of the defect he or she would not have granted the default judgment is what rendered the default judgment capable of rescission under rule 42(1)(a).

30. I accordingly would add to the principles applicable to rule 42(1)(a) extracted by Dodson J in *Kgomo*, as listed earlier:

    30.1. the procedural error or irregularity must have arisen because of facts of which the court that granted the judgment or order was unaware; and

    30.2. had the court been aware of those facts, it would not have granted the judgment or order.

31. It is probably because these two principles, especially the latter, are largely self-evident that they do not feature prominently in the reported decisions, and are usually taken as a given. If the court would have

[16] Paragraph 16.

granted the order even if it had knowledge of the facts that the applicant contends demonstrates that the plaintiff was not procedurally entitled to the order, then to rescind that order would transgress on what is the domain of an appeal and not of a rescission. If the court that granted the order would have granted the order notwithstanding knowledge of the contended for facts, it follows that the court disagreed that the plaintiff was not procedurally entitled to the order, and so the subsequent court hearing the rescission application cannot sit on appeal of its own judgment and find that the court that granted the judgment erred.

32. Accordingly, the applicants must satisfy the court that there are facts that (i) were unknown to the court at the time order was made, (ii) by reason of which the first respondent as plaintiff was not procedurally entitled to the order, (iii) and if known to the court at the time the order was made would have resulted in the court not granting the order.

A consideration of the common cause facts

33. A more detailed consideration can now be given to the common cause facts or at least such facts as cannot be seriously disputed on the affidavits.

34. The applicants as defendants filed three affidavits in these rescission proceedings and so had multiple opportunities to explain their position. The importance of considering the applicants' asserted *bona fide* defence, notwithstanding that rescission is sought under rule 42(1)(a), impacts upon whether in the present instance the applicants can

demonstrate the requirements for rescission under rule 42(1)(a), particularly as to the court's knowledge, or lack thereof, of the contended for facts relating to whether the first respondent was procedurally entitled to the order and whether those facts if known to the court would have resulted in the court not granting the judgment.

35. The action instituted by the first respondent's mother on his behalf, in January 2013 culminated in an order by agreement in favour of the first respondent during February 2017 for *inter alia* a capital amount of R963,309.00. The applicants were the first respondent's attorneys of record. The order provided that the Road Accident Fund was to pay the capital amount into the applicants' trust account held at First National Bank.

36. During September 2017 the Road Accident Fund paid the capital amount of R963,309.00 into the applicants' trust account.

37. The order also recorded that "*the Plaintiff and the instructing attorney confirmed that there is no contingency fee agreement, and any costs to be recovered between them will be in terms of an attorney / client agreement*". Nonetheless the applicants relied upon a contingency fee agreement, and deducted R240,827.00, leaving the balance of R722 482.00, which is the subject matter of the present action proceedings.

38. After being challenged by the first respondent in the answering affidavit in the present proceedings on the deduction of the contingency fee, the applicants in their replying affidavit conceded that the recordal in the

court order was incorrect, as there is an contingency fee agreement in place. The applicants' attempt to distance themselves from this incorrect recordal, explaining that the Road Accident Fund's attorney' had prepared the draft order that would be made an order of court. But no explanation is given why the applicants as the then attorneys for the first respondent as plaintiff agreed to a draft order that contained a material error. I am not required to make any finding in this regard.

39. According to the applicants, on 27 October 2017 and at their offices the first respondent, represented by both his father and mother, orally agreed that the funds which had been received from the Road Accident Fund "*ought to be paid into a trust account for the benefit of the first respondent until the first respondent attains the age of majority*".

40. The applicants contend that pursuant to this oral agreement and acting in the best interests of the first respondent as a minor, they on 27 October 2017 paid the balance of R722,842.00 "*into the bank account of Absa segregated client's' monies trust account*". There is a dispute as to whether this was agreed, but I proceed on the applicants' version.

41. It is unclear as to what the applicants contend is their version of how they handled these monies, and on what was purportedly orally agreed. In terms of the order, the monies were to be paid by the Road Accident Fund into the applicant's trust account held at FirstRand Bank. At best for the applicants, as can be gleaned from their affidavits, the "*Absa segregated client's' monies trust account*" may be a separate trust savings or other interest-bearing account opened by the applicants in

terms of section 78(2)(a) of the Attorneys Act, 1979, which Act at that stage was still in force. But as interest earned on that account would be for the benefit of the Attorneys Fidelity Fund, and not for the benefit of the first respondent, that would not be an account to which the applicants refer in their averred oral agreement with the first respondent's parents. The applicants also expressly disavow that the trust account was a trust account as provided for in section 78(2A) of the Attorneys Act, where the interest earned would be for the benefit of the first respondent. But then what do the applicants intend to convey, on their version, is *a "trust account for the benefit of the minor"* or a "*segregated client's' monies trust account"*? The applicants cannot expect the court to afford them an opportunity to proceed to trial to explain what is clearly within their personal knowledge. The applicants have had three opportunities to explain their version of what had been agreed in relation to the monies received from the Road Accident Fund.

42. But what is clear is that the monies could not have been paid into the bank account of the trust that was subsequently registered by the applicants, ostensibly on behalf of the first respondent, as that trust would only be formed and registered many months later on 31 May 2018.

43. The first respondent's biological mother passed away on 26 November 2017. Although there is some dispute as to when the applicants became aware of this, I accept for present purposes the applicants' version, in their favour, that they only came to learn of this in January 2018.

44. The first respondent's mother had during October 2009 given the applicants a special power of attorney authorising the applicants as attorneys of record in the claim for compensation against the Road Accident Fund. The applicants rely on this power of attorney as justifying their handling of the funds. The special power of attorney is poorly drafted. It makes no reference to the first respondent and *ex facie* the document appears to relate to a claim by the first respondent's mother, rather than on behalf of the first respondent. But whatever is to be made of these deficiencies, with the death of the first respondent's mother, the applicants could no longer rely on that power of attorney to justify their handling of the funds.[17]

45. On the applicants' own version that they became aware of the first respondent's mother's death in January 2018. They could not thereafter continue to act as if they had a mandate from the first respondent's mother.

46. It appears that the first respondent's father approached the applicants enquiring what had become of the monies. The first respondent's version is that his father was fobbed off by the applicants. The applicants dispute this, contending that they were acting upon instructions of the first respondent's parents, including the first respondent's father, and in the best interests of the first respondent as a minor. The applicants do not explain how they could have been acting on behalf of the first respondent's mother in the first respondent's best

[17] *Incorporated Law Society, Transvaal v Meyer and another* 1981 (3) SA 962 (T) at 974D.

interests once they discovered in January 2018 that the first respondent had passed away. Nor do the applicants explain how they could have been acting on the instructions of the first respondent's father given the father's contention that he was being kept in the dark in relation to the monies.

47. Nonetheless, this issue need not be resolved because on the common cause facts the applicants' mandate was subsequently terminated by the first respondent and his father on 26 February 2018.

48. What transpired is that on 9 February 2018, the first respondent's present attorneys, who had been approached by the first respondent's father given that he had become dissatisfied with his interactions with the applicants, addressed a letter to the applicants in which demand was made for payment of the balance of R722,482.00 into their trust account, failing which summons would be issued and the matter reported to the then Law Society.

49. The applicants' written response on 15 February 2018 is that to the knowledge of the first respondent's father, they had already paid over the monies to "ABSA Trust" and so the monies were no longer in their "possession", that the first respondent was to address all issues to ABSA Trust and that they as the first respondent's attorneys had closed their file.

50. But no trust had yet been formed at this stage by the applicants. And the basis upon which the applicants had paid the monies to "*Absa*

segregated client's monies trust account" remained (and still remains) unclear. But whatever the position, absent the monies having been placed under the control of trustees of a duly registered trust (leaving aside whether such a trust had been formed within the ambit of the applicants' mandate), the applicants were duty-bound to have remained in control of the funds, and have been able to obtain the return of those monies if required.

51. On 26 February 2018 the first respondent's attorneys addressed a further letter to the applicants unequivocally recording that the applicant's mandate was terminated, that the first respondent did not wish the applicants to form any trust for the benefit of the first respondent and that the first respondent's attorneys would attend to do so, and that any further action taken by the applicants would be without any mandate and be unlawful. The first respondent's attorneys again demanded payment of the balance.

52. It does not appear that the applicants responded to the demand.

53. Notwithstanding the termination by the first respondent of the applicant's mandate, the applicants did not arrange for the balance to be paid to the first respondent's attorneys. Upon the termination of the mandate, the alleged oral agreement of 27 October 2017 that the monies were to be paid into a "trust account" for the benefit of the first respondent was no longer of consequence. As the applicants could not have divested themselves of control of the monies to the trust as the trust had not yet been formed, the applicants were duty-bound to recall the monies from

wherever they had transferred the monies and to pay the monies to the first respondent's attorneys. The applicants could not rely on a terminated mandate to retain control of those monies, or to excuse their failure to recall the monies and the pay the monies to the first respondent's attorneys.

54. Instead the applicants only then, after their mandate has been terminated, commenced steps to form and register what they contend is a trust formed in favour of the first respondent as beneficiary.

55. More particularly, the applicants recorded as follows in their founding affidavit:

> "*Pursuant to the First Respondent's biological mother's instructions I proceeded to register a trust to be known as the Ramolotja N O Trust. A copy of the deed of trust is annexed hereto as annexure "MAS7". I did this because I thought that this was in the first respondent's best interests and because the experts had advised that this should be done. I also gained the impression that Mr Buthelezi [the first respondent's father] wanted to have access to the first respondent's funds. I was fully aware that Mr Buthelezi and the mother did not live together as husband and wife.*"

56. The trust deed in relation to this trust was only signed on 12 March 2018. ABSA Trust would only consent to administering the trust on 25 April 2018 And the trust would only be registered by the Master and letters of authority issued on 31 May 2018.

57. All this is after the applicants had recorded on 15 February 2018 that they had closed their file and after the first respondent's attorneys on 26 February 2018 had unequivocally recorded that the applicants had no mandate to deal any further with the first respondent's affairs, including in relation to the funds. The applicants disregarded this, taking proactive steps to form and register the trust. The trust deed prepared by the applicants and signed on 12 March 2018 describe the applicants, as founders of the trust, as acting in their capacity as "legal advisor" of the first respondent. This is incorrect as the applicants' mandate had to their knowledge already been terminated on 26 February 2018. Yet the applicants relied on this document to obtain registration of the trust by the Master on 31 May 2018.

58. There accordingly is considerable merit in the contentions by the first respondent that the trust was deliberately formed by the applicants so as to constitute some or other basis for justifying the applicants' continued failure to make available the funds for the benefit of the first respondent. But this need not be decided. What is clear from the common cause facts is that the applicants proceeded to form and register a trust knowing that their mandate had been terminated. No sustainable explanation is advanced by the applicants why they did not recall the funds from whomever they had transferred the monies in October 2017 once their mandate was terminated in February 2018, and then pay those monies to the first respondent's new attorneys. Had they done so, that probably would have been the end of the matter, especially as the

applicants had already recorded on 15 February 2018 that they had "closed their file".

59. The applicants' explanation that they thought they were acting in the best interests of the first respondent or that experts had advised them to act as they did or that they wanted to avoid the first respondent's father laying his hands on the money does not pass muster. Nothing of the kind is said by the applicants of this in their response on 15 February 2019 to the first respondent's attorneys demand of 9 February 2019, or in any other correspondence. And with the termination of their mandate on 26 February 2019, it was no longer open for the applicants to continue to administer the funds, whatever the experts had advised them. The first respondent's attorneys letter of 26 February 2019 also makes it clear that the monies would not be handed over to the first respondent's father but would be administered in a trust to be formed by the first respondent's attorneys, acting within their mandate. It appears from the applicant' explanation that the applicants simply took it upon themselves, without any mandate, to decide what was best for the first respondent and what to do with the funds, namely to form and register a trust and arrange for the funds to be paid to that trust.

60. The first respondent as plaintiff attended to serve summons upon the applicants as defendants on 5 April 2018, seeking payment of the monies. That this summons was already served upon the applicants on 5 April 2018 further seriously calls into question the applicants' conduct in persisting with attending to the registration of the trust, bearing in mind that ABSA Trust only consented on 25 April 2018 to administer the

trust still to be formed and that the trust was only registered on 31 May 2018.

61. The applicants in a supplementary affidavit in the rescission proceedings attached a letter from ABSA Trust confirming that on 19 June 2018 ABSA Trust received an amount of R739,435.73 into the trust's bank account. The applicants in their supplementary affidavit assert that the date of receipt must be wrong, presumably as they contend that they had already paid the monies over to ABSA in October 2017. But as the trust was only formed on 31 May 2018, it makes sense that ABSA Trust would only have received payment on behalf of the Trust after that. This further calls into question the applicants' version that it had already paid the monies across to ABSA Trust in October 2017 and that it no longer had control thereof.

62. Against these common cause facts, the defence advanced by the applicants in their rescission papers has no prospects of success. That defence is that that the monies were paid by the applicants to ABSA Trust during October 2017 with the consent of the first respondent's parents, and that the applicants no longer were in possession of the funds. Even if the consent of the first respondent's parents as at October 2017 is assumed in favour of the applicants, the trust was only formed on 31 May 2018 and the monies only paid to ABSA Trust to held by that trust on 19 June 2018. By then, the applicant's mandate has been terminated. Upon termination of their mandate in February 2018, the applicants were duty-bound to obtain the return of the funds and transfer same to the first respondent's new attorneys. But the applicants did not

do so, and even after service of summons they persisted in forming and registering the trust and refusing to pay the funds.

63. From at least 26 February 2018 the applicants had no mandate to attend to the affairs of the first respondent, including in the formation of any trust. As the trust had been formed and had received the monies when the applicants had no longer had a mandate to either form the trust or arrange for the monies to be paid to the trust, it was of no concern to the first respondent what the applicants may have done with the funds. The applicants remained obligated to pay to the first respondent's attorneys the balance, regardless of where the applicants may have transferred those monies after receiving the funds from the Road Accident Fund. It would be for the applicants to seek to recover those monies from wherever they may have paid those monies, and that the applicants were no longer "in possession" of the funds cannot constitute a defence.

64. It is therefore not surprising that the applicants' counsel in argument did not rely on the applicants' having made out a *bona fide* defence that would have been necessary for the applicants to have demonstrated good cause for rescission and instead focussed only on a rescission in terms of the rule 42(1)(a). But in doing so the applicants cannot not insulate themselves from the common cause facts on the affidavits and which, as will appear below, remain relevant in determining whether the applicants had established grounds for rescission within the ambit of rule 42(1)(a).

Application of the requirements of rule 42(1)(a) to the common cause facts

65. Pleadings having closed and a pre-trial conference having been held on 18 March 2019, on 3 July 2019 the first respondent's attorneys served a bundle of documents in the action proceedings, which included a notice of set down of the trial for 14 August 2019. As the notice of set down was part of the bundle of documents consisting of some 130 pages, the applicants explain that although they acknowledged receipt of the bundle, they did not realise that the notice of set down was included amongst those documents. Consequently, the applicants did not appear at trial on 14 August 2019.

66. On 27 August 2019, Siwendu J granted the following order:

> "*1. That the Defendants in their capacity as founders of the Trust terminate the Trust referred to as O.N. RAMOLOTJA TRUST that was opened with no mandate and justification.*
>
> *2. The payment within 7 (seven) days from the date of judgment the capital amount of R722 482.00 (Seven hundred and twenty two thousand and four hundred and eighty two rand rand) plus interest @ 10% per annum with effect from September 2017 from the First and Second Defendants who are jointly and severally liable.*
>
> *3. To pay an amount of R722 482.00 (Seven hundred and twenty two thousand and four hundred and eighty two rand rand) at a rate of 10% per annum with effect from September 2017 to date of final payment be made into the Plaintiff's Attorneys Trust Account with the following details:*
>
> *ACCOUNT NAME: MUKWANI T ATTORNEYS TRUST ACCOUNT*
> *BANK NAME: STANDARD BANK OF SOUTH AFRICA*

BRANCH CODE: 002305
TYPE OF ACCOUNT: BUSINESS CURRENT ACCOUNT
BANK ACCOUNT NUMBER: 001[…]
BRANCH NAME: CARLTON CENTER

3.1 The monies shall be kept in an interest bearing account in terms of Section 86 of the Legal Practice Act of 2014 pending a creation of a Trust.

3.2 The reasonable costs of the creation of the said Trust referred to paragraph 3.1 shall be deducted from the capital amount of R722 482.00 (Seven hundred and twenty two thousand and four hundred and eighty two rand rand).

4. A Trust shall be established (which Trust Deed is attached hereto as "Annexure C" to this court order) in terms of the Trust Property Control Act 57 of 1988 (within 3 months of this order) and be administered on behalf of the Plaintiff O[…] N[…] R[…] to administer the nett proceeds received from the Defendants which shall be paid over to a special Trust to be created with the following provisions:

4.1 The plaintiff shall be the sole beneficiary thereof.

4.2 The Trustees shall include the biological father of the Plaintiff S[…] N[…] B[…] who shall recommend one professional Trustee to act as a co-Trustee together with him.

4.3 The Trust will administer the funds in a manner which will best taken into account the interests of the Plaintiff.

4.4. The Trust deed may not be altered without the consent of the Court.

4.5 Upon the death of the beneficiary, the Trust shall be devolve upon the Plaintiff's legal heirs.

5. *The Defendants conduct to be referred to the Gauteng Legal Practice Council for investigation and possible disciplinary action to be taken against them.*

6. *Costs of suit at attorney and client scale.*

7. *Further and / or alternative relief.*"

67. For reasons that do not appear from the papers, the order granted by the court in the absence of the applicants is dated 27 August 2019 although the trial was enrolled for 14 August 2019. Neither of the parties raise any issue in relation thereto. In any event, it is common cause that the applicants did not appear on the trial date on 14 August 2019 and were not before Siwendu J when the order was made. Although the first respondent contests the applicants' explanation as to why they were not in wilful default in failing to appear at trial, as the applicants are not persisting in seeking a rescission for good cause but are confining themselves to a rescission in terms of rule 42(1)(a), no finding need be made as to whether the applicants were in wilful default. The order was made in their absence.

68. It emerged during argument that the order was not made in open court but in chambers. The first respondent asserts on various occasions in his answering affidavit that Siwendu J "*judicially scrutinised*" the matter and that they received the order on 27 August 2019. The first respondent's attorneys filed a confirmatory affidavit, stating that the matter was decided on the pleadings before the Judge.

69. It is not clear from the papers as to precisely what Siwendu J took into account before granting the order on 27 August 2019 but it does not appear that any evidence was formally led.

70. As the matter had progressed to trial stage, it must be accepted that at the very least the pleadings were before the court, as stated by first respondent's attorneys, which would include the particulars of claim and the applicants' plea. The applicants assert that the plea was not before Siwendu J because it was not included in the trial bundle that was served upon them in July 2019. But that the plea does not appear in the trial bundle does not mean that it was not part of the court file. The applicants, or their present attorneys, do not assert personal knowledge that this was so. As the plea was theirs, they would have ensured that it had been filed. The likelihood that Siwendu J, having had time to consider the matter from 14 August 2019 to 27 August 2019, would have overlooked the plea is remote and there is nothing on the papers to suggest that that had occurred.

71. The applicants also complain that their affidavit resisting summary judgment also was not placed before the court. Again, they could not have personal knowledge thereof. The applicants say that their affidavit resisting summary judgment was not before the court because it was not part of the trial bundle that had been served upon them during July 2019. But this is incorrect as the bundle does contain the affidavit resisting summary judgment, as appears from the index to that bundle.

72. Notwithstanding the importance of these documents according to the applicants, they were not included as part of the rescission papers or in the court file that was made available to me in these rescission proceedings.

73. But, as will appear below, even if the applicants are correct and those documents were not before Siwendu J, given the nature of the procedural errors relied upon by the applicants those documents would not have made a difference.

74. The reasons advanced by the applicants why the first respondent was not procedurally entitled to the order on 27 August 2019 are twofold.

75. The first reason is that Siwendu J granted relief that went beyond that which is provided for in the particulars of claim.

76. The second reason is that the court granted judgment that directly affected ABSA Trust without ABSA Trust having been joined as a party to the action.

77. The first respondent as plaintiff in the action in his particulars of claim claimed payment of the sum of R722,482.00, interest, costs of suit and further and/or alternative relief.

78. The relief granted by the court does go beyond that which was claimed in the particulars of claim. In particular, the applicants contend that paragraphs 1, 4 and 6 of the order of 27 August 2017 go beyond that

which was claimed. This is clearly so when the relief granted is compared with that which was sought in the particulars of claim.

79. The court is not confined in granting relief to the four corners of what is claimed. But at the same time the court is not free to grant whatever relief it sees fit, particularly in the absence of a party.

80. Recently the Supreme Court of Appeal in *Freedom Stationery (Pty) Limited v Hassam* 2019 (4) SA 459 (SCA) considered in the context of a rescission in terms of rule 42(1)(a) whether a party had obtained an order that it was procedurally entitled to in the absence of an affected party where the relief that was granted had gone beyond that which was sought in the papers. The court accepted that the relief granted that went beyond that which was sought in the papers may, but not necessarily would, constitute an error falling within the ambit of rule 42(1)(a). What the court had to deal with was whether on the facts of that matter the particular relief that had been granted, although beyond that which was sought in the papers, was nonetheless relief that the court was competent to grant and therefore could not constitute an error for purposes of rule 42(1)(a).

81. Van der Merwe JA found as follows in paragraph 25:

> "*As I have said, when an affected party invokes rule 42(1)(a), the question is whether the party that obtained the order was procedurally entitled thereto. If so, the order cannot 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 where all affected parties were adequately notified of the relief that may be granted in their absence. The relief need not necessarily be expressly stated. In my view, 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. In this regard it would be useful to enquire whether the relief could have been granted without amendment of the process in question."

82. In my view the relief in paragraphs 4 and 6 is relief that may be reasonably anticipated in light of the nature of the proceedings, the relevant disputed issues and the facts of the present matter.

83. In this Division at least, since the decision of Fisher AJ, as she then was, in *Dube N.O. v Road Accident Fund* 2014 (1) SA 577 (GSJ), it should be reasonably anticipated that a court may grant relief requiring such funds to be paid as compensation for the benefit of an minor child to be administered by a trust, and stipulating for the basis upon which that trust is to be established. The approach in *Dube N.O.* is sensible. Litigants in the position of the parties in a matter such as this should reasonably anticipate that a court would be reticent to grant an order where the monies that are to be for the benefit of a minor are not safeguarded in some fashion, and that the court would take steps in framing its order to safeguard the interests of the minor child. As Fisher AJ said in *Dube N.O*,[18] it is common for courts, on application and *mero motu*, to order that moneys payable to minor children be administered by persons other than their guardians.

[18] At para 13.

84. A further reason why such relief is not objectionable at the instance of the applicants is that they have no concern in such relief requiring the establishment of a trust which would ultimately administer the funds on behalf of the minor child. The operative portion of the order insofar as it affects the applicants is paragraphs 2 and 3, which require the applicants to make payment of the capital sum plus interest into the trust account of the first respondent's attorneys. Once the applicants have done so, they have discharged their payment obligation. It is for the first respondent's attorneys to then comply with the court order in relation to the establishment of the trust and the payment of the monies into that trust once established.

85. This relief granted by Siwendu J also puts paid to the applicants' assertions that they are concerned that the first respondent's father was attempting to lay his hands on the funds. The applicants assert as the concluding motivation for the rescission that *"[i]t is important that this Honourable Court investigate the whole matter and determine exactly what [the first respondent's father] wishes to do with the First Respondent's money"*. But the applicants not only ignore that paragraph 4 of the order of Siwendu J specifically addresses this concern by requiring the monies be administered by a court-approved trust, but challenge that very relief as being granted procedurally in error.

86. As the issue of costs is in the discretion of a court, a litigant should reasonably anticipate that the court may grant those costs on a scale other than as sought in the initiating court process, as Siwendu J did in paragraph 6 of the order.

87. On the other hand, in my view, paragraph 1 of the order does not constitute relief that the applicants could reasonably have anticipated or which the court could have granted without an amendment of the application. I therefore accept, in the applicants' favour, that the first respondent was not procedurally entitled to that relief. But that is not the end of the matter. In addition, the applicants must establish that had Siwendu J been aware of certain facts relevant to that procedural error, she would not have granted such relief. If Siwendu J would have granted the order notwithstanding knowledge of the relevant facts, then such error as may have been made would not be capable of rescission but should be the subject of an appeal.

88. The applicants are not clear in their affidavits in particularising precisely what facts Siwendu J should have been aware of that if she had been aware thereof she would not have made the order that she did. As already stated, the applicants complain that their plea and affidavit resisting summary judgment was not before Siwendu J and had those documents been before her, she would have acted differently. But even accepting this to be correct, in respect of which there is doubt, what is contained in those documents would not be relevant to the applicants' complaint that the court went beyond the relief that was claimed in the particulars of claim. Whilst what may be contained in the plea and affidavit resisting summary judgment may be relevant to what substantive defence the applicants may have been contending for, the issue is not whether the applicants had a substantive defence but whether the court went beyond the particulars of claim in granting the

order. The applicant's complaints originate from the order, and the applicants could hardly have foreshadowed in their affidavit resisting summary judgment and their plea that the court would go beyond what was claimed in the particulars of claim. If the applicants had so foreshadowed, then they could not in the same breath contend that such relief as was granted was not anticipated, which, as appears above from *Freedom Stationery*, was a necessary requirement for there to be a procedural error in the first place.

89. In my view, apart from the applicants failing to establish as a fact that Siwendu J was unaware of their plea and affidavit resisting summary judgment or its contents, that fact is not relevant to whether the first respondent was procedurally entitled to the relief in paragraph 1 of the order.

90. In the absence of the applicants otherwise identifying the facts that they contend that Siwendu J was unaware of, but which if known to her would have resulted in her not granting the relief, I am left to assume that what the applicants are contending for is that Siwendu J was unaware as a fact that she was going beyond what was claimed in the particulars of claim when granting the order.

91. It was for the applicants to adduce facts from which this court is to be satisfied that the requirements for rescission under rule 42(1)(a) can be granted. The applicants were content that these rescission proceedings be decided on the affidavits before the court, and did not seek any referral to oral evidence. And from the facts that have been placed

before this court, in my view, Siwendu J could not have been unaware that the relief she was about to and did grant on 27 August 2019 went beyond the particulars of claim:

91.1. Siwendu J had before her the particulars of claim, which set out the relief that the first respondent as plaintiff was claiming;

91.2. the matter had been allocated to Siwendu J for trial on 14 August 2019. It was not the situation of a busy court perhaps not having had the opportunity to closely consider the particulars of claim and other papers before it, such as might have been the case in a busy unopposed motion court in this Division;

91.3. the first respondent assert, with a confirmatory affidavit from his attorneys, that the court did scrutinise the documents, consequent upon the first respondent's legal representatives attending upon Siwendu J in chambers on 14 August 2019;

91.4. Siwendu J did not immediately grant the order on 14 August 2019 but only on 27 August 2019, indicative of a consideration of and reflection upon the documents;

91.5. Siwendu J did not only grant the relief in paragraph 1, but also the punitive costs order in paragraph 6 and the direction in paragraph 5 that the matter be investigated by the Gauteng Legal Practice Council. This too is indicative of consideration of the papers. Siwendu J would hardly have made such orders

without considering the papers before her, and realising that the relief granted went beyond the particulars of claim.

92. In the unreported decision of this division in *FirstRand Bank v Winter*,[19] the court had issued a rule *nisi* and an order directing the manner in which personal service of summons in foreclosure proceedings was to be effected upon the defendant. The plaintiff bank did not comply with the directed form of service and did not attend to effect personal service. On the return date in the ordinary motion court, the court nonetheless granted a foreclosure order in the absence of the defendant. The defendant sought rescission of the order in terms of rule 42(1)(a) on the basis that the order had been granted in circumstances where the court was unaware that personal service of the rule *nisi* had not been effected as had been ordered by the court previously. Lamont J, who heard the rescission application, found that the court that granted the judgment had before it the documents, including the order directing the form of service and the documents evidencing that personal service had not taken place. Lamont J therefore held that as the court had granted judgment, the court must have been aware that personal service had not been effected and nonetheless in its discretion condoned that deficient service. Although there was no direct evidence of what the court had before it and what its state of knowledge was, Lamont J held that *"t]hese*

[19] Case number 6150/2011, 24 May 2012, per Lamont J.

facts must have been known and present to the mind of the judge at the time the judge made the order she did".[20]

93. *A fortiori* in the present instance, where Siwendu J having been allocated the matter on trial on 14 August 2019 and handing down the order some two weeks later on 27 August 2019 had sufficient time to consider the papers before her.

94. Based upon the material placed by the applicants before the court and after considering all the affidavits delivered in these rescission proceedings, I am unable to find that the applicants have demonstrated that (i) Siwendu J was unaware of the fact that she was granting relief beyond that claimed in the particulars of claim; and (ii) that if she had been so aware, that she would have not granted the relief. Rather I find, as Lamont J did in *Winter*, that Siwendu J must have known and had present in her mind at the time she made the order she did that the relief that she granted went beyond that claimed in the particulars of claim.

95. As the argument for the applicants progressed, the applicants' complaint became directed at the court not being competent as a matter of law to have granted the relief that went beyond that sought in the particulars of claim, whatever the state of knowledge of the court of the facts at the time. It may be that in relation to paragraph 1 of the order, the relief went beyond that which a court was competent to grant based upon the particulars of claim. But on the facts in the present matter that is not the

[20] In that matter, the court also found that there had been no procedural error as it was within the discretion of the court granting judgment to condone deficient service.

sort of error or mistake that would sustain a rescission under rule 42(1)(a) but would rather be the domain of an appeal. For this court to find that such error as may have been made by Siwendu J in granting that relief on 27 August 2019 is the sort of error envisaged by rule 42(1)(a) is to transgress upon the distinction between a rescission and an appeal, and would effectively result in this court sitting on appeal in relation to its own decision.

96. A similar analysis is applicable in relation to the applicants' second reason why Siwendu J procedurally erred, namely that the court could not have granted the judgment without ABSA Trust having been joined as a party. From the facts as they appear in the affidavits, the applicants have not established that Siwendu J would have acted any differently had this ground of complaint been drawn to her attention before she granted the relief in paragraph 1 of the order. This is reinforced by the fact that prayer 1 is not directed at ABSA Trust, who would not be bound by the order. ABSA Trust have not entered the fray, although it could have done so had it believed that it was a party affected by the order. Rule 42(1)(a) expressly permits *"any party affected"* to apply for the rescission or variation of the order.

97. The obligation in paragraph 1 is imposed upon the applicants as the founders of the trust created at their instance, who are parties to the action. As to whether it was competent of the court to require of the applicants to do that which is provided for in paragraph 1 of the order is a different issue and forms the basis of the applicants' first complaint, which I have already addressed.

98. In the circumstances, I find that the applicants have not established that the order of 27 August 2019 is to be rescinded under rule 42(1)(a).

The nature of and the exercise of the court's discretion under rule 42(1)(a)

99. To the extent that I am wrong in finding that the applicants have not established the requirements for rescission under rule 42(1)(a), I in any event in the exercise of my discretion would refuse the rescission, at least insofar as paragraphs other than paragraph 1 of the order are concerned.

100. The applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission. Typically, the Supreme Court of Appeal in *Lodhi*,[21] is cited as authority for this principle, along with the decisions of the High Courts in *Topol and others v LS Group Management Services (Pty) Limited* 1988 (1) SA 639 (W),[22] *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E)[23] and *Mutebwa v Mutebwa* 2001 (2) SA 293 (TkH).[24]

101. In *Mutebwa* the court went so far as to find[25] that notwithstanding the use of "may" in rule 42(1), the court's discretion to grant a rescission in

[21] At para 27.
[22] At 650I-J.
[23] At 471G : *"Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission. It is only when he cannot rely on an 'error' that he has to fall back on Rule 31(2)(b) (where he was in default of delivery of a notice of intention to defend or of a plea) or on the common law (in all other cases). In both latter instances he must show 'good cause'.*
[24] At para 16.
[25] In para 17, citing *Tshabalala and Another v Peer* 1979 (4) SA 27 (T) where Eloff J said at 30D:

> *'The Rule accordingly means - so it was contended - that, if the Court holds that an order or judgment was erroneously granted in the absence of any party affected thereby, it should without further enquiry rescind or vary the order. I agree that is so,*

terms of the subrule is narrowly circumscribed, meaning that *"[t]he Rule should, therefore, be construed to mean that once it is established that the judgment was erroneously granted in the absence of a party affected thereby, a rescission of the judgment should be granted"*.

102. The applicants relied heavily upon *Bakoven* and *Mutebwa* to argue that once it is established that the judgment was erroneously sought or erroneously granted, that the court must then rescind and that the court has no discretion to find otherwise.

103. Rule 42(1) by its express wording confers a discretion on the court. I do not read these decisions as going so far to hold that the absence of a *bona fide* defence on the merits is irrelevant to the exercise of the court's discretion under rule 42(1)(a). Rather I read these decisions as authority for the proposition that a rescission can be granted in terms of rule 42(1)(a) if the requirements of the subrule have been satisfied and that it is not required of the applicant for rescission in addition to demonstrate good cause, which includes a bona fide defence. In none of the decisions that I have considered did the court find that it was obliged to grant a rescission under rule 42(1)(a) where the requirements of the subrule had been satisfied yet it was plain there was no *bona fide* defence.

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and I think that B strength is lent to this view if one considers the Afrikaans text which simply says that: "Die Hof het benewens ander magte wat hy mag hê, die reg om . . ."."

104. In my view the court retains a discretion to refuse a rescission in terms of rule 42(1)(a) where although there is a cognisable error for purposes of the subrule, it is clear on the papers before the court that on the merits the defendant has no defence.

105. Ordinarily, the rescission court may not be in a position to assess whether the defendant had a defence and therefore would not take the defence into account in the exercise of its discretion under rule 42(1)(a). For example, as is often the case where orders have been granted in the absence of the defendant, the defendant has failed to deliver a notice of intention to defend or a plea and so the court is unaware of the defence on the merits.

106. But in the present instance the applicants in their three affidavits filed during the course of these rescission proceedings advanced what they contended is their defence on the merits. This court cannot disregard what is set out in those affidavits where it is plain from the common cause facts that emerge from those affidavits that the applicants have no *bona fide* defence to the first respondent's claim for payment. The present instance is distinguishable from the judgments relied upon by the applicants that hold that once an error is established, the court without more should proceed to grant the rescission. In none of those matters, insofar as I can ascertain, did the court have before it multiple affidavits in which the applicant unsuccessfully sought to advance his or her defence on the merits. The applicants have engaged the court and the first respondent in their affidavits, and in their heads of argument, in asserting a bona fide defence and cannot complain that the court takes

that into account in the exercise of its discretion under rule 42(1)(a). It was only during argument that the applicants retracted from asserting good cause as a basis for seeking rescission.

107. The statement by the Supreme Court of Appeal in *Lodhi* at the end of paragraph 27 – "*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 judgment"* – must be seen in the context of the rest of that paragraph, and the judgment as a whole. In that matter the defendants sought to rescind a judgment on the basis that they had a defence on the merits and that if the court that granted the judgment in their absence had been aware of that defence, it would not have granted the judgment, and so the judgment was erroneously granted. The court refused the rescission.

108. Paragraph 27 in its entirety reads:

"[27] Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. 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 judgment."

109. The existence of non-existence of a defence on the merits is irrelevant to a consideration of whether the plaintiff was procedurally entitled to the judgment. The paragraph is not authority for the proposition that the existence or non-existence of a defence on the merits is irrelevant in all respects for purposes of rule 42(1)(a). To the contrary, the paragraph itself limits the extent of the proposition to default judgments where a defendant with knowledge of the proceedings, fails to oppose the matter and to advance a defence. Such a defendant cannot subsequently seek rescission of the judgment as being erroneously granted because it then wishes to advance a defence. This differs from the present instance where the applicants did defend the matter, did file a plea and did take the opportunity in three sets of affidavits to assert a bona fide defence. Having done so, as stated above, the court cannot ignore the failure of the applicants to have made out a defence in those papers.

110. It is apparent from the then Appellate Division in *De Wet and others v Western Bank Limited* 1979 (2) SA 1031 (A) that ultimately a rescission of a default judgment is something that is within the ambit of the court's discretionary power. Whilst rules have been developed to enable the court to judicially exercise that discretion, such as the requirements for good cause in seeking a rescission of a default judgment under common law or those provided for in the Uniform Rules in rule 31(2)(b) or rule 42, the relief remains discretionary in nature. In my view, a court's discretion

is not so fettered that it is bound to grant a rescission in terms of rule 42(1)(a) even where it is clear that there is no defence on the merits.

111. I have already found that there is no *bona fide* defence to that portion of the order that requires the applicants to make payment, namely paragraphs 2 and 3. Had I found that the first respondent as plaintiff had obtained an order to which he was not procedurally entitled and that had Siwendu J been aware of facts that would have resulted in her deciding differently, in the exercise of my discretion the rescission would be limited to paragraph 1 of the order and not in relation to the remaining relief in the order.

112. This exercise of a discretion also manifests itself in the court's power to grant partial rescissions. Although there were conflicting decisions as to whether a court may grant a partial rescission where the applicants sought rescission in terms of rule 31, Fisher AJ, as she then was, in *Conekt Business Group (Pty) Limited v Navigator Computer Consultancy CC* 2015 (4) SA 103 (GJ) found[26] that a court acting under rule 31(2)(b) of the Uniform Rules may rescind part of a default judgment in order to allow that part to be defended provided that the judgment is divisible into discreet defensible and non-defensible parts.[27]

[26] In para 32 and 33.
[27] Following what had been held the Flemming DJP in the decisions of *Silky Touch International (Pty) Ltd v Small Business Development Corporation Ltd* [1997] 3 All SA 439 (W) and *Revelas and another v Tobias* 1999 (2) SA 440 (W).

113. Illuminating is what was stated by Levy J in *SOS Kinderdorf International v Effie Lentin Architects* 1993 (2) SA 481 (Nm) at 491 D-I and as cited with approval by Fischer AJ in *Conekt:*[28]

> "*The rules of court constitute the procedural machinery of the court and they are intended to expedite the business of the courts. Consequently they will be interpreted and applied in a spirit which will facilitate the work of the courts and enables litigants to resolve their differences in as speedy and inexpensive a manner as possible.*
>
> *…*
>
> *There is no reason why this pattern should be deviated from where a plaintiff has already obtain a default judgment in respect of more than one but separate claims, and the defendant shows a defence to some of plaintiff's claims, or to a part of the claim, which is divisible from the whole. For example, where a plaintiff is granted default judgment in respect of a payment of a sum of money as well as delivery of certain goods, and a defendant can show a bona fide defence to one or the other, there is no reason why the plaintiff should not be entitled to judgment in respect of the claim which the defendant cannot defend. The essential question is whether the claim or claims in respect whereof default judgment has been given is divisible.*"

114. There is no reason why the same will not apply in relation to a rescission in terms of rule 42(1)(a). In my view, for the court to exercise its discretion in granting rescission to parts of an order where there is no defence on the merits would not facilitate the work of the courts and would not enable the litigants to resolve their differences in a speedy

[28] In para 28.

and inexpensive manner. To the contrary, to rescind parts of an order which are indefensible would undermine the court process.

115. In the present instance, the relief granted by the court in paragraph 1, and for that matter the costs order in paragraph 6, is divisible. Should I have found that the applicants had made out a case for rescission in terms of rule 42(1)(a), the rescission would have been limited to the order in paragraph 1. The balance of the relief would stand, including that which requires of the applicants to make payment of the balance of R722, 482.00 with interest into the first respondent's attorneys trust account.

116. The application for rescission in Part B of the notice of motion is accordingly refused, with the applicants to pay the costs.

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Gilbert AJ

Date of hearing:	4 August 2020
Date of judgment:	21 August 2020
For the Applicants:	Advocate C A Da Silva SC
Instructed by:	Gildenhuys Malatji Inc.
For the First Respondent:	T Mukwani (Attorney)
Instructed by:	T Mukwani Attorneys