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The requirements for Rescission Applications, restated

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The requirements for Rescission Applications

The Constitutional Court recently handed down judgment in what was effectively a refresher course on the scope and requirements of rescission applications. While the matter generated public interest for its underlying political intrigue, the legal issues involved were relatively straightforward. For brevity, this article only deals with the requirements of rescission applications through the lens of the majority judgment.

The Constitutional Court is the highest court in South Africa's judicial hierarchy. This means, unlike other courts (excluding the Small Claims Court), no appeals can be made against its orders. A litigant may, however, apply to rescind an order of the Constitutional Court where certain requirements are met.

In appeals, courts are asked to reconsider the merits of a matter based on a litigant's submission that a decision was based on an error of fact or law, and should consequently be overturned – this entails a broad range of case-specific factual and/or legal considerations. A rescission application also seeks to set aside a decision. However, unlike an appeal, it is premised on a set of deliberately narrow requirements.

It is this latter route that former President Jacob Gedleyihlekisa Zuma relied on to challenge an order of the Constitutional Court in which he was convicted of the crime of contempt of court.

Rule 42(1) of the High Court

The court was required to determine whether Mr Zuma had met the requirements for rescission in terms of either: Rule 42(1) of the High Court Rules (read with Rule 29 of the Constitutional Court Rules – which provides that Rule 42 also applies in the Constitutional Court, with any necessary modifications); or the common law.

In relevant part, Rule 42(1) provides that the court may rescind:

> *"(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
>
> *(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;"*

In analysing this rule, the court reaffirmed that when relying on the rule, both grounds must be shown to exist; meaning that an applicant must show that the order sought to be rescinded was granted in their absence (first aspect) *and* that it was erroneously granted or sought (second aspect). It further noted that if the requirements are met, a court is merely endowed with a discretion – which must be influenced by considerations of fairness and justice – and is not compelled to rescind an order.

Rule 42(1)(a)

Applying the above principles, the court noted that the order was indeed granted in Mr Zuma's absence. It explained, however, that the word *"absence"* in Rule 42(1)(a) *"exist[s] to protect litigants whose presence was precluded, not those whose absence was elected"*. It therefore held that the requirements of the first aspect had not been met, given that Mr Zuma was given notice of the case against him, as well as sufficient opportunities to participate in the matter; but he nonetheless elected not to participate. Essentially, the court's finding was that a litigant's strategic election not to participate does not constitute *"absence"* for purposes of Rule 42(1)(a).

Regarding the second aspect, the court stated that to show that an order was erroneously granted an applicant seeking rescission must show that at the time the order was made, there existed a fact which, had the judge been aware of it, would have induced such judge not to grant the order. It observed that the issues that Mr Zuma intended to raise as possible defences had already been considered at length in the judgment of the contempt of court application. For that reason, it noted that Mr Zuma could not show that if not for the purported rescindable "errors" the court would have reached a different conclusion.

Ultimately, the court found that, Mr Zuma had failed to establish both aspects of Rule 42(1)(a).

Two-part test for rescission

Turning to the common law (Mr Zuma's alternative argument), the court reaffirmed the long-standing two-part test for rescission. First, the applicant must provide a reasonable and satisfactory explanation for its absence or default. Second, the applicant must show that it has a bona fide defence (or grounds for opposition) which exhibit reasonable prospects of success in the matter. The court stated that both requirements must be met before an order can be rescinded. The court found that Mr Zuma had failed to provide an acceptable explanation for his absence, and had also failed to show that he had reasonable prospects of success in challenging the contempt of court judgment.

For good measure, the court also considered a third basis on which Mr Zuma sought to have the order rescinded. He argued that due to the wording of Rule 29 (*"with such modifications as may be necessary"*) the court was obliged to modify or expand the meaning of what constitutes a rescindable "error" (in Rule 42) in circumstances where a litigant challenges the constitutionality of a court order. This was based on his allegations that by sentencing him to imprisonment, the court had infringed his fundamental rights, as encapsulated in sections 12, 34 and 35 of the Constitution. However, the court saw no reason to expand the requirements as suggested by Mr Zuma because the rule of law, as well as decades of jurisprudential development required a narrow approach. Additionally, the court noted that in any event, Mr Zuma's allegations that his constitutional rights had been violated had already been considered and were found to be without merit.

The court concluded by relaying the following message to all litigants: *"rescission as an avenue of legal recourse remains open, but only to those who advance meritorious and bona fide applications, and who have not, at every turn of the page, sought to abuse judicial process."* It follows that future litigants seeking to rescind court orders would do well to take heed of this message by ensuring that they have legitimate grounds for rescission, falling within the ambit of the requirements set out in any relevant rules or the common law.

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