IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION – MAKHANDA]

CASE NO.: CA112/2024

In the matter between: -

THANDEKILE THEMBA MNYIMBA	**APPELLANT**
and	
BONGIWE MASHALABA	**1ST RESPONDENT**
SANGO DABLATHI	**2ND RESPONDENT**
ZOLISWA NYEMBEZI	**3RD RESPONDENT**
MONGEZI MABECE	**4TH RESPONDENT**
NOXOLO FLORENCE XEGO	**5TH RESPONDENT**
ZOLANI MACUBA	**6TH RESPONDENT**
THE MEMBER OF THE EXECUTIVE COUNCIL FOR CO-OPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS, PROVINCE OF THE EASTERN CAPE	**7TH RESPONDENT**
THE EXECUTIVE MAYOR OF THE AMATHOLE DISTRICT MUNICIPALITY	**8TH RESPONDENT**

THE MUNICIPAL COUNCIL OF THE AMATHOLE

DISTRICT MUNICIPALITY **9TH RESPONDENT**

THE PERSONS LISTED ON ANNEXURE

"A" TO THE NOTICE OF MOTION **FURTHER RESPONDENTS**

AMATHOLE DISTRICT MUNICIPALITY **INTERVENING RESPONDENT**

APPEAL JUDGMENT

ROBERSON J:

Introduction

[1] The appellant was appointed as the municipal manager of the intervening respondent, the Amathole District Municipality (the ADM), at a special council meeting held on 16 May 2022. This appointment was for a second five-year term as municipal manager. The first to sixth respondents, and a further 118 applicants, employees of the ADM (the ADM employees), brought an application to review and set aside the appellant's appointment, and to set aside the contract of employment concluded between the appellant and the ADM. The respondents in the review application included the appellant, the ADM, the Member of the Executive Council for Co-operative Governance and Traditional Affairs, Eastern Cape Province, the executive mayor of the ADM and the ADM's municipal council. The grounds of review will be dealt with later in this judgment. On 28 June 2022 the relief claimed was granted by the East London Circuit Court Local Division. No notice of opposition to the review application had been served or filed, and there was no appearance by any of the respondents.

[2] On 30 June 2022 the appellant and the ADM launched an application, part A of which was to stay the implementation of the court's order, and Part B of which was for rescission of the order. On 12 July 2022 an order was made by agreement recording that the ADM and the appellant would not pursue Part A, the South African Municipal Workers Union (SAMWU) was granted leave to intervene, time frames were set for the filing of affidavits and heads of argument in part B, and the rescission application was to be heard on 11 August 2022. Part B was eventually heard by Smith J (as he then was) on 23 November 2023. By this time the ADM had withdrawn its participation in the application for rescission (on 7 November 2022) and was now an intervening respondent. In addition, a new municipal manager, Mr Bhekisisa Mthembu, had been appointed (on 16 March 2023). On 20 February 2024 Smith J dismissed the application for rescission with costs. (Unreported judgment, case number EL 841/2022.) This appeal is against this decision, with the leave of Smith J.

Rule 42 (1) (a) – judgment or order erroneously granted

[3] Although the application for rescission was purportedly brought in terms of Uniform Rule 32 (1) (b), the common law or Uniform Rule 42 (1) (a), it is apparent from Smith J's judgment that the application crystalised into one in terms of rule 42 (1) (a), which provides:

> **"42. Variation and rescission of orders**
>
> (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;"

[4] It is apposite to refer at this stage to the judgment of the Constitutional Court in *Zuma v Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC), where the following was stated at paragraph [53], one of the paragraphs in the judgment under the sub-heading "Rescission in terms of rule 42 of the Uniform Rules of Court" (footnotes omitted):

> "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." [1]

[5] Smith J found that the appellant had met the requirements of rule 42 (1) (a), in that the order had been erroneously granted in the absence of the appellant, but exercised his discretion against the granting of rescission. The core of this appeal is whether or not Smith J exercised his discretion properly.

[6] The appellant and the ADM employees were *ad idem* that the order had been erroneously granted but the ADM did not agree. It is necessary therefore to consider the circumstances in which the order was granted and Smith J's reasoning in finding that the requirements of rule 42 (1) (a) were met.

[11] With regard to the discretion given to a court in the rule, see also *Obiang v Janse van Rensburg and Others* [2025] ZASCA 30 (31 March 2025) at paragraph [16].

[7] In *Naidoo and Another v Matlala NO and* Others2012 (1) SA 143 (GNP) the following was stated at paragraph [6]:

> "In general terms a judgment is 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 aware of it, not to grant the judgment ……."

And in *Occupiers, Berea v De Wet NO and Another* 2017 (5) SA 346 (CC) at paragraph [22] it was stated that:

> "An order is erroneously granted where there was no procedural entitlement to it."

[8] The review application was brought in terms of rule 53 which provides:

> "(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected —
>
> *(a)* calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and
>
> *(b)* calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within 15 days after receipt of the notice of motion, to the registrar the record of

such proceedings sought to be corrected or set aside, together with such reasons as the magistrate, presiding officer, chairperson or officer, as the case may be is by law required or desires to give or make, and to notify the applicant that such magistrate, presiding officer, chairperson or officer, as the case may be has done so.

(2) The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.

(3) The registrar shall make available to the applicant the record despatched as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause.

(4) The applicant may within 10 days after the registrar has made the record available to the applicant, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of such applicant's notice of motion and supplement the supporting affidavit.

(5) Should the presiding officer, chairperson or officer, as the case may be, or any party affected desire to oppose the granting of

the order prayed in the notice of motion, such presiding officer, chairperson or officer, as the case may be, or such party shall —

(a) within 15 days after receipt of the notice of motion or any amendment thereof deliver notice to the applicant that such presiding officer, chairperson or officer, as the case may be, or such party intends so to oppose and shall in such notice appoint an address within 25 kilometres of the office of the registrar and an electronic mail address, where available, at either of which addresses such presiding officer, chairperson or officer,

as the case may be, or such party will accept notice and service of all process in such proceedings, as well as a postal or facsimile addresses where available: and

(b) within 30 days after the expiry of the time referred to in subrule (4) hereof, deliver any affidavits such presiding officer, chairperson or officer, as the case may be, or such party may desire in answer to the allegations made by the applicant.

(6) The applicant shall have the rights and obligations in regard to replying affidavits set out in rule 6.

(7) The provisions of rule 6 as to set down of applications shall *mutatis mutandis* apply to the set down of review proceedings."

[9] The review application was issued on 27 May 2022. In their notice of motion, the ADM employees called upon the ADM and the ADM Council to dispatch the record of decision, in terms of rule 53 (1) (b). They also referred in their notice of motion to their right, after receipt of the record of decision, to amend their notice of motion and deliver a supplementary affidavit. They further gave notice that if no notice of intention to oppose was given within the time period stipulated in the notice of motion, the application would be made on 28 June 2022. As already mentioned, the review application was moved and granted on 28 June 2022.

[10] The record of decision was delivered on 29 June 2022. As Smith J stated in his judgment, the time for the filing of a notice to oppose would have started to run from the date of the filing of an amended notice of motion and a supplementary affidavit. The respondents thus had fifteen days after that date to deliver a notice of intention to oppose, which would have given them until 4 August 2022 to do so. Smith J concluded that the ADM employees were not procedurally entitled to the order granted on 28 June 2022 because the time for filing an intention to oppose had not yet lapsed. This conclusion cannot in my view be faulted and is supported in any event by authority. For example, in *Fizik Investments (Pty) Ltd t/a Umkhombe Security Services v Nelson Mandela Metropolitan University* 2009 (5) SA 441 (SECLD) Jones J stated at paragraph [7.1]:

> "It is only after the applicant has received the record that it can amplify the notice of motion and affidavits in the light of its contents, and only then is it required to formulate its allegations and its relief in final terms. Only thereafter is the respondent called upon to give notice of intention to defend in terms of rule 53 (5)."

[11] It was submitted on behalf of the ADM that the proper course would have been for the appellant to appear at court on 28 June 2022 and demonstrate that the matter had been set down prematurely. He had, so it was submitted, been given notice that if he took no steps to oppose, the matter would be called on 28 June 2022. (A notice of intention to oppose on behalf of the appellant and the ADM had been prepared but not filed and served.) It may well have assisted the appellant to have appeared at court on 28 June 2022, but the fact that he (and at that time the ADM) did not appear does not undermine the clear time limits prescribed in the rule and the authorities such as *Fizik* (supra).

[12] Smith J was therefore correct in finding that the requirements of rule 42 (1) (a) had been met.

Application for condonation for the late filing of supplementary volume 9 in the appeal record

[13] Shortly prior to this appeal being heard, the appellant brought an application for condonation for the late filing of a supplementary volume which contained two affidavits which had not been included in the appeal record. One was the appellant's replying affidavit in the rescission application and the other was the ADM employees' affidavit in the application by the ADM to be joined in the rescission application as a respondent. This omission was pointed out by the ADM employees in their heads of argument filed prior to 18 November 2024. The appeal was originally to be heard on that date but could not proceed owing to the recusal of one of the appeal panel. According to the appellant's founding affidavit the omission of his replying affidavit was an error on the part of his attorney. The appellant did not refer to the omission of the ADM employees' affidavit. The application for condonation was opposed by the

ADM employees on the grounds that the explanation for the delay in filing the supplementary volume was unsatisfactory and there was no explanation relating to the ADM employees' affidavit which had also been omitted.

[14] In my view, despite the lateness of the application, there is no good reason to refuse condonation. The explanation for the omission of the replying affidavit was acceptable. The other omitted affidavit was that of the ADM employees themselves of which they were obviously aware. The omission of the affidavits did not cause any substantial inconvenience to this court or the other parties, who were already in possession of the affidavits and aware of their contents.

Application to dispense with security for costs

[15] In the same notice of motion the appellant prayed for an order dispensing with security in terms of rule 49. The non-provision of security for costs was also raised in the ADM employees' heads of argument filed prior to 18 November 2024.

[16] Rule 49 (13) provides:

> "(13) (a) Unless the respondent waives his or her right to security or the court in granting leave to appeal or subsequently on application to it, has released the appellant wholly or partially from that obligation, the appellant shall, before lodging copies of the record on appeal with the registrar, enter into good and sufficient security for the respondent's costs of appeal.
>
> (b) In the event of failure by the parties to agree on the amount of security, the registrar shall fix the amount and the appellant shall enter into security in the amount so fixed or such

percentage thereof as the court has determined, as the case may be."

[17] In his founding affidavit the appellant referred to a costs award made in his favour against the ADM employees in an interlocutory application for condonation for the late filing of the ADM's answering affidavit in the rescission application. His bill of costs in the total sum of R260 000.00 has not yet been taxed. He also referred to an agreement between him and the ADM, that R100 000.00 for security for costs would be deducted from a costs award in his favour against the ADM, arising from another interlocutory application.

[18] The appellant stated that the default order reviewing and setting aside his appointment as municipal manager had caused financial prejudice to him and his family. He has placed both his properties on the market for sale and also has to sell his two motor vehicles. He has received no income since the default order and the legal costs have increased exponentially. He maintained that to provide security would be unjust in the circumstances.

[19] The appellant further referred to a request for comment by the Rules Board for Courts of Law, Republic of South Africa, with regard to proposed amendments to rule 49 (13), on the basis that the current rule may be in conflict with s 34 of the Constitution. The draft amendments contain two options. The first is, and I summarise, that no party shall be required to provide security for the costs of an appeal, with the provision that a respondent may apply to the court granting leave to appeal or to the court of appeal upon good cause, for the provision by the appellant of security for costs. The second option is to the effect that a respondent shall upon

good cause apply to the court granting leave to appeal or to the court of appeal, for security for costs to be provided by the appellant.

[20] The point was taken by the ADM employees that this court does not have jurisdiction to dispense with security, such jurisdiction resting with the court which granted leave to appeal, as provided for in rule 49 (13) (a). In support of this stance, Mr Rorke, counsel for the ADM employees, relied on the full court judgment in *TR Eagle Air (Pty) Ltd v RW Thompson* [2020] ZAGPPHC 801 (13 November 2020), where leave to appeal had been granted by the court a quo. At paragraph [18] it was stated that:

> "The rule envisages an instance where the court granting leave to appeal may release the appellant wholly or partially from giving security."

[21] Mr Rorke further relied on *Strouthos v Shear* 2003 (4) SA 137 (T), a matter where leave to appeal had been granted on petition to the Supreme Court of Appeal. At 140G it was stated that:

> "Here it is provided that the Court in granting leave to appeal 'or subsequently on application to it….' (as opposed to the Court *to which appeal is made*, or the Court *hearing the appeal*) is the Court designated to order the release of the appellant from his or her obligations to lodge security."

[22] On the other hand, in *Allem Inc v Baard In re: Baard v Allem Incorporated* [2022] 1 All SA 680 (GJ) the view was expressed that where leave to appeal is granted by the Supreme Court of Appeal, rule 49 (13) does not find application (at paragraph [61]).

[23] There was some debate during argument as to whether or not the court envisaged in rule 49(13) (a), namely the court which may release an appellant from providing security, should be restricted to the individual judge of the division who granted leave, or could include a full court of the same division, hearing the appeal.

[24] In *Malomini Strategists (Pty) Ltd and Another v Amanda* [2022] ZAGPPHC 670 (15 September 2022) the following was said at paragraph [24]:

> "In my view, the answer lies in the wording of Rule 49(13): the present appeal is *sui generis* in that no leave to appeal is required and therefore there is no court *a quo* that can exempt that appellant from furnishing security. However, Rule 49(13) does not confine the exemption from security to the court granting Leave to Appeal as it provides that a court "*subsequently an application to it*" is entitled to release the appellant either wholly or in part, from that obligation. Whilst it is tempting to read these words restrictively, in my view the phrase is broad enough to encompass that it is not just the court hearing the leave to appeal that may release the appellant from this obligation, but any court on application to it."

[25] The appellant relied on the judgment in *Collatz and Another v Alexander Forbes Financial Services (Pty) Ltd and Others* [2022] ZAGPJHC 93 (10 February 2022). This was a full court appeal against the order of the High Court dismissing an application under s 30P of the Pensions Funds Act, 1956. The conduct of the appellants in the course of the litigation, including a disregard of the rules of court and delays necessitating condonation applications, was strongly criticised by the court. The appellants had not provided security for costs and the respondents sought

an order striking the appeal from the roll with costs. The court declined to do so, and heard and decided the merits of the appeal. There was no substantive application to dispense with security, and the question of the full court's jurisdiction to make such an order was not raised. Implicit however in the decision to hear the appeal on the merits, was, in my view, a decision that the failure to file security was condoned. Amongst the reasons given for declining to strike the appeal from the roll were: striking the appeal from the roll did not determine the merits; the appellants could seek to resume the appeal and there were strong indications that they would do so; further delays would ensue without the issues between the parties being resolved; and it was unfair to the respondents who had waited long enough and were entitled to finality.

[26] In proceeding to hear the merits of the appeal when security had not been provided, the court relied on the judgment in *PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa* 2013 (1) SA 1 (CC) at paragraph [30} where the following was stated (footnote omitted):

> "Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules."

[27] In my view it would be in the interests of justice to follow this approach. The facts in *Collatz* are in some respects different, but there are factors in

this appeal which I consider to be persuasive. The appellant has brought a substantive application for the dispensing with security for costs and has demonstrated his poor financial situation. The jurisdiction of this court to hear the application is the subject of different views. The proposed amendments by the Rules Board to rule 49 (13) appear to accept that currently it is only the court granting leave to appeal which can dispense with security, because the proposed amendments envisage an application, albeit by the respondent, to the court granting leave or to the court hearing the appeal. Smith J has since been appointed to the Supreme Court of Appeal. If the argument on behalf of the ADM employees is correct, another judge of this division, sitting alone, would have to hear the application, necessitating a further delay. If that is the case, this court is in as good, or even better, position to hear the application. Much time has passed since the application for rescission was launched. There have been interlocutory applications with accompanying costs. The appeal was initially to be heard on 18 November 2024 but did not proceed because of the late recusal of one of the appeal panel. I assume there were costs implications as a result. Costs have already been incurred in the enrolling and hearing of the appeal before this court, which has been fully argued on the merits. As was said in *Collatz*, if the appeal were to be struck from the roll with costs because of the failure to furnish security, such an order will not finally dispose of the dispute between the parties. The appeal may potentially be re-enrolled, with the accompanying costs implications.

To strike the matter would not serve the interests of any of the parties. Finality is in everyone's interests. The application to dispense with security for costs must therefore be granted.

[28] The constitutionality of rule 49 (13) was raised in argument on behalf of the appellant. This issue was not squarely before the court, having only

been raised in the application to dispense with the furnishing of security brought shortly before the hearing of the appeal.

Mootness

[29] It was submitted on behalf of the ADM employees that the matter was moot because the ADM had lawfully appointed a new municipal manager and there was no attack on the lawfulness of that appointment. Reference was made to the provisions of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act), in particular s 54A (1) (a) which provides that the municipal council must appoint a municipal manager as head of the administration of the municipal council, and s 54A (2) which provides that a person appointed as municipal manager must have the prescribed skills, expertise, competencies and qualifications. Reference was made to further statutory provisions which, so it was submitted, allowed for only one municipal manager. For example s 57 (1) of the Systems Act provides for the appointment of a municipal manager only in terms of a written employment contract and subject to a performance agreement. It was consequently submitted that there can only be one municipal manager at any given point in time. Since the municipality had already appointed a new municipal manager, so the submission went, the appellant could no longer lawfully be its municipal manager.

[30] In *Minister of Tourism and Others v Afriforum NPC and Another* 2023 (6) BCLR 752 (CC) the Constitutional Court stated:

> "A case is moot when there is no longer a live dispute or controversy between the parties which would be practically affected in one way or another by a court's decision or which would be resolved by a court's decision. A case is also moot when a court's decision would be of academic interest only."

[31] In my view the question of mootness should be considered discretely and objectively and not with regard to the factors which may be considered in the exercise of a court's discretion to grant or refuse rescission. Despite the default order setting aside the appellant's appointment, and leaving aside for the moment the merits of the review application, there is a live dispute between the appellant on the one hand, and the ADM employees and the ADM on the other. While the point of mootness is superficially appealing, it must be remembered that it is a rescission application which is under consideration, brought with the intention that the case be reopened so that the appellant has an opportunity to oppose the review application and be heard. He should not be barred from doing so, by way of a point of mootness, because of the appointment of another municipal manager. Such appointment does not negate the live dispute, which is the lawfulness or otherwise of the appellant's appointment as municipal manager. In my view, the appointment of a new municipal manager would be a matter to be considered by the court hearing the review application. The point of mootness therefore cannot succeed.

The review application

[32] In the ADM employees' founding affidavit, the appointment of the appellant as municipal manager was alleged to be unlawful on a number of grounds. It was alleged that he lacked the general and minimum competency levels required for his appointment. Reference was made to Regulation 3 of the Local Government Municipal Regulations on Competency Levels, 2007 which provides, *inter alia*, that the accounting officer of a municipality must be competent in the unit standards prescribed for financial and supply chain management competency areas. The regulation provides a list of categories requiring qualifications together with the corresponding required competency levels. The competency

levels for the category "Financial and Supply Chain Management Competency Area" are expressed in unit standards. The ADM employees alleged that as at May 2022, the appellant required further training in order to achieve some of the prescribed unit standards. These included cost management information, legislation framework, information systems, debt management and generally recognised accounting practices.

[33] It was also alleged that prior to the appellant's first appointment as municipal manager in 2017, the ADM received unqualified audit outcomes for the period 2010/2011 to 2015/2016. After his appointment the ADM received a qualified audit outcome for the period 2016/2017 and 2017/2018, a disclaimer of opinion in 2018/2019 and an adverse opinion in 2019/2020. In the result, so it was alleged, the appellant failed during his first term of office to comply with the various statutory and fiduciary responsibilities as prescribed in the Local Government: Municipal Finance Management Act 56 of 2003.

[34] There was a further allegation of misconduct on the part of the appellant, in that in appointing certain legal practitioners to render legal services to the ADM, he unlawfully deviated from procurement requirements.

[35] It was further alleged that the appellant's alleged lack of competency, breach of statutory responsibilities and misconduct were brought to the attention of the executive mayor by way of a letter from the ADM employees' attorneys dated 28 April 2022, after it became known that the appellant was the recommended candidate. The executive mayor ignored these allegations and they were therefore not brought to the attention of the ADM council when the decision to appoint the appellant as municipal manager for a second term was made. A further letter was addressed to the

executive mayor prior to the meeting of 16 May 2022. The executive mayor refused to table these two letters at that meeting.

[36] The applicants raised a further ground of unlawfulness of the appellant's appointment. This ground was contained in an article in the Daily Dispatch newspaper, which reported that opposition council members had not seen the interview panel's report which should have been circulated prior to the meeting. The report only became available to them after the decision to appoint the appellant had been taken.

The rescission application

[37] As already mentioned, the appellant and the ADM launched the two-part application, part A of which was not pursued. The appellant and his attorney, Mr Lionel Trichardt, deposed to affidavits in support of a rescission of the order. In his affidavit Mr Trichardt stated that the application was brought in terms of rule 31 (2) (b), the common law, and rule 42 (1) (a). In relation to a rescission application brought in terms of rule 42 (1) (a), Mr Trichardt stated that the respondents had failed to disclose to the court which had granted the order sought to be rescinded, that SAMWU had also brought an application to review and set aside the appellant's appointment and that it was opposed and pending. The SAMWU application was, so it was alleged, brought on behalf of its members, and some of the applicants in the review application were also SAMWU members. The order was therefore, so Mr Trichardt stated, erroneously granted.

[38] In his affidavit, the appellant stated that he had met the requirements for appointment as municipal manager and annexed a copy of his CV. He did not specifically respond to the allegation concerning his failure to achieve

the required number of unit standards for Financial and Supply Chain Management Competency Areas. With regard to the qualified audits, he stated that during his first tenure he had inherited various problems. He chose not to deal with the allegation that he departed from procurement requirement when appointing legal practitioners to provide services to the ADM, saying that this issue was the subject matter of High Court proceedings and thus *sub judice*. He stated that the Daily Dispatch article was hearsay.

[39] In their answering affidavit, deposed to by the first respondent, the ADM employees pointed out that there were two applications brought by SAMWU, the first of which they had become aware in April 2022. This application, so they had understood, challenged the process of selection of a new municipal manager. They had been advised to follow a different procedure from that of SAMWU. The second SAMWU application sought the review and setting aside of the appellant's appointment as municipal manager. The ADM employees only became aware of the second SAMWU application in July 2022, that is after the default order was granted. Nothing more need be said in this judgment about the SAMWU applications. They played no part in Smith J's finding that the requirements of rule 42 (1) (a) had been met.

[40] In furtherance of the ground of review that the appellant did not possess the requisite competency levels for the position of municipal manager, the ADM employees annexed a schedule prepared by the ADM in line with National Treasury requirements. The schedule reflected that of eighteen-unit standards required by National Treasury, the appellant had achieved twelve, leaving six outstanding. He had achieved five extra unit standards but these were not aligned to National Treasury regulations.

[41] The ADM employees persisted in their allegation that the appellant, as accounting officer, had failed to carry out his statutory and fiduciary obligations, and that the Council should have taken this into account in its deliberations when the appellant's appointment was considered.

[42] The ADM employees also persisted with their allegation of misconduct concerning the deviation from procurement requirements in appointing certain legal practitioners to render legal services to ADM. They expressed the view that the council ought to have investigated the appellant's conduct in order to determine his fitness for appointment.

[43] Mrs Jean Lombard, a Democratic Alliance (DA) councillor in the ADM, deposed to an affidavit concerning the events which took place at the council meeting on 16 May 2022. She stated that the agenda provided before the meeting did not include the appointment of a new municipal manager. (The appellant's tenure as municipal manager was due to expire on 31 May 2022.) At the meeting, the executive mayor raised the appointment of a new municipal manager, and a motion to amend the agenda accordingly was proposed by the majority party in the council, the African National Congress (the ANC). The motion was approved by a majority vote.

[44] Mrs Lombard further stated that the executive mayor informed the council that eight candidates had been shortlisted for the post and read out the scores from the report which had been compiled by the selection committee. At this point only the executive mayor and the speaker had a copy of the report. The appellant had the highest score. One of the ANC councillors proposed that the appellant be appointed, and the majority of the councillors, with the exception of the DA councillors, approved the

motion. Only after the motion was approved, was the report of the selection committee provided to opposition councillors.

[45] Mrs Lombard pointed out that what took place was in contravention of s 30 (5) (c) of the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act) which provides:

> "Before a municipal council takes a decision on any of the following matters it must first require its executive committee or executive mayor, if it has such a committee or mayor, to submit to it a report and recommendation on the matter—
>
> (a) …….
>
> (b) …….
>
> (c) the appointment and conditions of service of the municipal manager and a head of a department of the municipality."

[46] Mrs Lombard also referred to non-compliance with regulations 16 and 17 of the Local Government Regulations on the Appointment and Conditions of Employment of Senior Managers, 2014. Regulation 16 (1) provides that the candidates recommended for appointment to the post of a senior manager must undergo a competency assessment. Regulation 16 (5) provides that the selection panel must submit a report and recommendation to the municipal council on the selection process and the suitability of candidates who comply with the relevant competency requirements for the post. Regulation 17 (1) (a) provides that before making a decision on an appointment of a senior manager, a municipal council must satisfy itself that the candidate meets the relevant competency requirements.

[47] Mrs Lombard ultimately maintained that the council had failed to satisfy itself that the appellant had met the competency requirements for the position, that he had been properly screened, and that the necessary preconditions for the appointment had been met.

[48] An answering affidavit deposed to by the Superintendent General of the Department of Co-operative Government and Traditional Affairs, Eastern Cape, was filed on behalf of the seventh respondent. He explained that the seventh respondent had not opposed the review application and was content that it be granted. The deponent submitted that the application for rescission should be dismissed. The seventh respondent was not represented at the hearing before Smith J, or before this court when the appeal was heard.

[49] The answering affidavit of the ADM employees was filed three days outside the time frames which had been agreed. The appellant and the ADM brought an application in terms of rule 30 to set aside the filing of the answering affidavit as an irregular step. They brought a similar application against the seventh respondent. The ADM employees then applied for condonation for the late filing of their answering affidavit. The application was opposed by the ADM and the appellant. It was set down for hearing on 11 August 2022. An order dated 10 August 2022 (I think the date should have been 11 August 2022) recorded that the matter (presumably the rescission application and the condonation application) was postponed to a date to be arranged with the Registrar.

[50] On 4 October 2022 an order was made postponing the matter to 27 October 2022 and the ADM, now represented by different attorneys[2], was to file its application for a postponement on or before 11 October 2022. Time frames were stipulated for the filing of affidavits and heads of argument. On 27 October 2022 a further order was made in which it was recorded that the ADM withdrew its application for a postponement, the condonation application was to be heard on 25 November 2022 and the ADM was to pay the wasted costs of 11 August 2022, 4 October 2022, and 27 October 2022.

[51] The condonation application was heard on 25 November 2022 and judgment was delivered on 1 December 2022. Condonation was granted and the ADM employees were ordered to pay the costs of the application. Leave to appeal against the costs order was refused and the ADM employees petitioned the Supreme Court of Appeal for leave to appeal.

[52] The appellant filed his replying affidavit in the rescission application on 15 December 2022. He denied the allegations in the answering affidavit concerning his lack of competency levels, the audit outcomes, and his deviation from procurement requirements, and said that the ADM employees were seeking to argue the merits of the review application under the auspices of the issue of a *bona fide* defence for the purposes of rescission. In doing so, so he stated, the ADM employees were seeking to introduce evidence, including the affidavit of Mrs Lombard, which did not form part of the review application. He maintained that he had set out facts which constituted a *bona fide* defence.

[2] Mr Trichardt's authority to act for the ADM in the rescission application was disputed and his mandate was terminated.

[53] The appellant applied for a date for the hearing of the rescission application on 27 March 2023. The date allocated was 25 May 2023. It is not in dispute that the matter was not heard on that date because the court file had not been provided to the presiding judge timeously.

[54] More affidavits followed. On 26 April 2023 the ADM employees applied for permission to file a supplementary affidavit containing new facts, which application was to be heard on 25 May 2023. In this affidavit it was stated that during November 2022 the ADM had begun the recruitment process for the appointment of a municipal manager. According to the affidavit, the appellant was aware from 4 November 2022 that the recruitment process had begun. In a letter from his attorneys dated 4 November 2022, addressed to the executive mayor, he demanded that the resolution by the council to advertise the post be rescinded and that the advertisement for the post be retracted. The ADM declined to do so and ADM's attorneys wrote to the appellant's attorneys informing them that the recruitment process would continue.

[55] The appellant's attorneys wrote to the ADM's attorneys on 18 November 2022, noting that there had been an agreement between the parties which obviated the need for interim relief (part A of the application) because it was anticipated that the rescission application would be disposed of expeditiously. The letter further indicated that the appellant agreed to wait until 25 November 2022 before proceeding with an application to interdict the ADM from filling the post of municipal manager pending the finalisation of the rescission application. (The writer seems to have believed that the rescission application was to be heard on 25 November 2022 whereas this was the date for the hearing of the condonation application.)

[56] By letter dated 14 March 2023 the appellant's attorneys sought an undertaking from the ADM not to appoint a municipal manager until the finalisation of the rescission application.

[57] The appellant did not approach the High Court and the current municipal manager, Mr Mthembu, was appointed on 16 March 2023. Thus, according to the deponent to the affidavit, there was no live issue between the appellant and the ADM employees and the rescission application had become moot.

[58] In this supplementary affidavit the ADM employees specifically gave consent to the appellant to respond to the allegations contained in the affidavit.

[59] A further supplementary affidavit, deposed to by Mr Mthembu, was filed on 8 November 2023. By this time the ADM had brought an application to join the rescission application as a respondent and the affidavit was filed in the event that the joinder application was granted. Mr Mthembu stated that an ADM councillor and member of the mayoral committee, Mr Xhanti Mngxaso, was present at the council meeting of 16 May and confirmed that the meeting was chaotic and conducted with a preconceived outcome by those in favour of the appointment of the appellant. Because the council was divided on the appointment of the appellant, so it was stated, a vote should have been taken as provided for in s 30 (3) of the Structures Act[3]. No vote was taken and the chairperson effectively pushed through the appellant's appointment and signed the resolution. Mr Mthembu also stated

[3] This subsection provides that questions before a municipal council other than matters mentioned in s 160 (2) of the Constitution are decided by a majority of the votes cast, subject to s 34 of the Structures Act which deals with dissolutions of municipal councils.

that in terms of standing rules of council, 48 hours' notice was required to be given to councillors of an item placed on the agenda of a special council meeting. The appointment of the appellant as an item on the agenda was only adopted at the meeting.

[60] Mr Mthembu dealt further with the appellant's fitness for the post of municipal manager and referred to a judgment of the Western Cape High Court, delivered on 1 June 2012, in terms of which the decision of the Oudtshoorn Municipal Council to appoint the appellant as municipal manager and any contract concluded were declared to be null and void. Mr Mthembu said that the ADM selection committee did not consider this judgment and there was no indication that it was brought to the attention of the ADM council.

[61] Mr Mthembu also pointed out that the identity number of the appellant on his senior certificate differed from that on his CV, and this discrepancy was apparently not considered by the selection committee.

[62] Mr Mngxaso deposed to a confirmatory affidavit.

[63] There was no affidavit by the appellant in response to either of these two supplementary affidavits.

[64] The ADM's application to join the rescission application as a respondent was launched on 8 September 2023. It was initially opposed by the appellant. According to a timeline schedule annexed to the ADM employees' heads of argument, the appellant withdrew his opposition and the application was granted on 23 November 2023, when the rescission application was heard.

Exercise of discretion

[65] In the first footnote to paragraph [53] of *Zuma* (supra), in relation to the discretion given to a court in rule 42 (1) (a), the Court referred, *inter alia*, to *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at paragraph [5] where Jones AJA stated:

> "It is against this common law background, which imparts finality to judgments in the interests of certainty, that Rule 42 was introduced. The Rule caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The Rule gives the Courts a discretion to order it, which must be exercised judicially."

[66] For convenience, I reproduce the second footnote to paragraph [53], where it was stated that the discretion must be exercised judicially:

> "*Chetty*[4] id at 761D where the Court held as follows: "broadly speaking, the exercise of a court's discretion [is] influenced by considerations of fairness and justice, having regard to all the facts and circumstances of the particular case". One of the most important factors to be taken into account in the exercise of discretion, so the Court in *Chetty* found at 760H and 761E, was whether the applicant has demonstrated "a determined effort to lay his case before the court and not an intention to abandon it" for "if it appears that [an applicant's] default was wilful or due to gross negligence, the court should not come to his assistance". And, as stated in *Naidoo v Matlala N.O.* 2012 (1) SA 143 (GNP) at para [4], a court will not exercise its discretion in favour of a rescission application if undesirable consequences would follow."

[4] *Chetty v Law Society, Transvaal*,1985 (2) SA 756 (AD).

[67] These three quoted extracts attributed to *Chetty* in the footnote were, with respect, not contained in the *Chetty* judgment. The first was contained in the respondent's counsel's submissions which were published together with the judgment in the report. The submission was made in relation to the exercise of a court's discretion in a rescission application brought under the common law, where sufficient cause must be shown. The application for rescission in *Chetty* was one under the common law. The second and third extracts were also contained in counsel's submissions. The second related to an application for condonation, and the third to the requirement of sufficient cause.

[68] It must be accepted however that the Constitutional Court endorsed and approved these submissions as influencing the exercise of discretion in an application for rescission in terms of rule 42 (1) (a).

[69] The matter of *Naidoo v Matlala* referred to in the footnote involved an application for rescission in terms of s 149 (2) of the Insolvency Act 24 of 1936. In that matter the court referred to the judgment in *Storti v Nugent and Others* 2001 (3) SA 783 (W) at 806D-G where the relevant principles in considering such an application were stated, the last of which was: "A court will not exercise its discretion in favour of such an application if undesirable consequences would follow."

[70] In his judgment, Smith J stated that the nature of the discretion in a rule 42 (1) (a) rescission application was explained in paragraph [53] of *Zuma*. He described the nature of the discretion as a loose discretion.

[71] In *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC)

the following was said concerning the types of discretion and the extent to which a court of appeal may interfere with the court a quo's exercise of discretion, at paragraphs [85] to [87] (footnotes omitted):

> "[85] A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs, damages and in the award of a remedy in terms of section 35 of the Restitution of Land Rights Act. It is "true" in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.
>
> [86] In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in *Knox*, a discretion in the loose sense—
>
> > "means no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision."
>
> [87] This Court has, on many occasions, accepted and applied the principles enunciated in *Knox* and *Media Workers Association*. An appellate court must heed the standard of interference applicable to either of the discretions. In the instance of a discretion in the loose sense, an appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed

by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in the loose sense, it must be guarded."

[72] In my view the nature of the discretion as determined in *Zuma*, is a discretion in the loose sense. "Considerations of fairness and justice" and "all the facts and circumstances of the particular case" are in my view "disparate and incommensurable features".

[73] In exercising his discretion, Smith J took into account a number of factors. The relevant portions of his judgment are at paragaphs [26] and [27] as follows (footnotes omitted):

> "[26] The ADM also presented compelling facts to show that the decision to appoint Mr Mnyimba for another term was fundamentally flawed and unlawful. It appears that proper procedures were not followed and that the ADM's council did not endorse the appointment by formal majority vote, as it was required to do in terms of the law. Mr Mnyimba was unable to gainsay these allegations. In *Mlokoti v Amathole District Municipality*, Pickering J held that the failure by a municipal council to vote on the appointment of a municipal manager at a duly constituted council meeting fundamentally tainted the decision and rendered the appointment invalid. The learned judge relied on section 160 (3) of the Constitution, which requires a majority of council members to be present when a vote is taken on any matter and provides that all questions before the council must be decided by majority vote.
>
> [27] There is therefore compelling and undisputed evidence that Mr Mnyimba's appointment for a second term was unlawful.

> In my view it would not be in the interests of justice for him to be reinstated as municipal manager in circumstances where it is unavoidable that all his official acts will be tainted with illegality and invalidity. Furthermore, he will be resuming his official duties pending the finalization of a review application which, on the available evidence, will likely result in his appointment being declared unlawful. The situation is further complicated by the fact that the ADM has already appointed another municipal manager. It is therefore not difficult to conceive of the debilitating and disruptive effect that his reinstatement would have on the ADM's administration. These will be grave and undesirable consequences that will flow from the rescission of Hartle J's order. In my view, these compelling circumstances militate strongly against an exercise of the courts discretion to rescind the default judgment. I am accordingly of the view that the interests of justice demand that the rescission application should be refused."

[74] Mr Farlam, who appeared for the appellant, submitted that Smith J erred in having regard to the merits of the review application. He referred to the distinction between a rule 42 (1) (a) and a common law application for rescission, in particular what was said in various authorities that sufficient cause is not required to be established in a rule 42 (1) (a) application. For example, he relied on *Ferris and Another v Firstrand Bank Limited and Another* 2014 (3) SA 39 (CC) where Moseneke ACJ stated at paragraph [13]:

> "Mr and Mrs Ferris brought their rescission application in terms of Rule 42(1)(a) or the common law or Rule 31. I deal first with the requirements under Rule 42(1)(a). Unlike under the common law or

Rule 31, an applicant is not required to show good cause (including a bona fide defence) in order to succeed under Rule 42(1)(a). Instead, under this Rule, a court may rescind a default judgment if it is "erroneously sought or erroneously granted".

[75] Mr Farlam further relied on the judgment in *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA 587 (ECP) where Alkema J stated as follows at paragraphs [55] and [56]:

> "[55] The matter is now authoritatively settled by the judgment of the SCA in *Lodhi 2 Properties* (*supra*) where Streicher JA said at 95F:
>
> > "*The existence or non-existence of a defence on the merits is an irrelevant consideration ...*" (under Rule 42 (1) (a)).
>
> [56] There is, I believe, also a consideration of policy why it is not a requirement that an applicant has to show a *bona fide* defence under Rule 42 (1) (a), and that is this: Any order or judgment made against a party in his absence due to an error not attributable to him, is such a profound intervention in his right to a fair trial and right to be heard, that, for this reason alone, the judgment or order should be set aside without further ado."

[76] Mr Farlam submitted that *Zuma* and *Ferris* should be read together and were not irreconcilable because of the role that the merits play in the respective requirements for rescission. He however conceded that if earlier judgments were irreconcilable with *Zuma*, then they were tacitly overruled by *Zuma*. He further conceded that if there were exceptional circumstances it would be futile to grant rescission. He submitted that the appellant had set out a defence to the grounds of review as contained in the review

application and could not be faulted for the lack of response to the further affidavits filed by the ADM employees and the ADM. Various submissions were made as to why there was no response by the appellant to these further affidavits, including that they had not been formally admitted, that the appellant was not required to respond, sufficient cause does not have to be established in a rule 42 (1) (a) application and there were contradictory accounts concerning whether or not a vote was taken at the council meeting of 16 May 2022.

[77] On the question of delay on the part of the appellant, which was a point taken by the ADM employees, Mr Farlam submitted that the appellant did not delay in launching the rescission application, and referred to other factors which contributed to the delay in the eventual hearing of the application. In relation to this aspect, he said that the tight time frames for exchanging affidavits and heads of argument were a *quid pro quo* for not proceeding with part A of the application, as was stated by the appellant in his replying affidavit in the rescission application. The appellant stated in this affidavit that the abandonment of part A was pursuant to an agreement entered into between the parties regarding the hearing of part B on truncated time frames. Mr Farlam submitted that this was a factor to be taken into account in the exercise of the discretion to grant or refuse rescission. The ADM's conduct in appointing a new municipal manager while the rescission application was pending was, so it was submitted, a further factor to take into account in the exercise of the discretion to grant or refuse rescission.

[78] On this latter aspect, Mr Rorke submitted that it may have been understood that the truncated time frames led to the appellant not pursuing part A of the application, but that there was never an understanding that no new

appointment would be made pending the finalisation of the rescission application. If there had been, it would have been in the correspondence. On the merits of the review application, Mr Rorke submitted that the appellant's CV did not demonstrate that he possessed the requisite minimum competencies for the position of municipal manager. In relation to the appointment procedure, Mr Rorke referred to the failure to put relevant information before the council and the evidence that no vote was taken.

[79] Mr Osborne, who appeared for the ADM, submitted that the discretion involved was a broad discretion and that the case law prior to *Zuma* was swept aside by *Zuma*. With regard to the merits of the review, Mr Osborne submitted that the appellant took a conscious decision not to respond to allegations concerning the lawfulness or otherwise of his appointment. Mr Osborne emphasised two aspects of the merits: first, the appellant's lack of compliance with the requirements for office, and second, that no vote was taken when the appellant was appointed for a second term.

[80] The factors taken into account by Smith J in the exercise of his discretion must be considered in the light of what was stated in *Zuma* concerning this exercise. I should deal firstly with whether or not it was an improper exercise of discretion to take into account the merits of the review. As previously stated, various reasons were given for not responding to the supplementary affidavits of the ADM employees and the ADM. It must be accepted that they were before Smith J. It appears that there was no formal opposition to their admission and the appellant was not prevented from filing a response. He was aware of the contents of the affidavits which were extremely damaging to his opposition to the review application. It is important to note that Mrs Lombard's affidavit was in the answering papers

in the rescission application. The respondent had the opportunity to respond to Mrs Lombard's allegations in his replying affidavit, but did not do so. In addition, the ADM employees in their supplementary affidavit specifically consented to a response by the appellant. It is so that the appellant responded to the grounds of review in the review application and that the supplementary affidavits contained new allegations. Nonetheless these affidavits were part of the rescission papers for consideration by Smith J and they were left unanswered.

[81] I should deal with the apparently differing accounts of what took place at the meeting when the appellant was appointed, as contained in Mrs Lombard's affidavit on the one hand, and Mr Mthembu's on the other. It was submitted on behalf of the ADM employees that they were not irreconcilable. Mrs Lombard stated that the motion to appoint the appellant was approved by the majority of councillors, but she did not expressly say that there was a formal vote. Mr Mthembu stated in his affidavit, relying on Mr Mngxaso's account which was confirmed, that no vote was taken and the appointment was pushed through by the chairperson of the meeting. The minutes of the meeting, which were annexed to Mr Mthembu's affidavit, throw little light on what took place. In my view, on either account, it appears that the appointment of the appellant was planned to be achieved hurriedly and without the observation of the required formalities for a lawful appointment procedure. Mrs Lombard also referred to other material irregularities. The minutes reflect that the appellant was present at the meeting. It was therefore possible for him to have stated what happened, if according to him, a lawful procedure took place.

[82] Prior to *Zuma*, the distinction between a rule 42 (1) (a) and a common law application for rescission was recognised, in that sufficient cause, including

a *bona fide* defence, was not required to be established in the former (subject of course to the residual discretion). *Zuma* did not expressly state that this distinction no longer applied, but the expressions "considerations of fairness and justice" and "all the facts and circumstances of a particular case" are very broad and overarching and do not appear to distinguish a rule 42 (1) (a) applicant from a common law applicant when these considerations are applied in the exercise of the discretion. On the contrary, the Constitutional Court expressly determined these considerations as applying to the discretion to be exercised in a rule 42 (1) (a) application.

[83] Considerations of fairness and justice cannot be restricted to an applicant and must extend to other parties. In my view there is no reason why the merits of the case should be excluded as one of the "facts and circumstances" to be taken into account. On the available evidence, as Smith J found, the appellant's opposition to the review would not be successful. No purpose would be served in re-opening the case, and the time, resources and expenses of all concerned, including the court, would be wasted. An additional consideration in my view is the public interest in good governance by a local authority. Were rescission to be granted, an unlawfully appointed and unqualified person would potentially be managing a district municipality and controlling its finances. This would not be in accordance with fairness and justice and would amount to an "undesirable consequence".

[84] Insofar as the appointment of Mr Mthembu is concerned, my approach is a little different from that of Smith J. If for example, in a given case, the prospects of successfully resisting a review like the present one were good, the fact that a new municipal manager has been appointed should not on its own be a bar to rescission. The significance of Mr Mthembu's appointment

as a fact or circumstance to be taken into account is in my view the appellant's failure to take steps to interdict the appointment process. Even if it is accepted that he did not pursue part A of the application as a *quid pro quo* for the agreed time frames for the exchange of affidavits and an early hearing of the rescission application, he was alerted to the recruitment process of a new municipal manager and indicated in three letters that he intended to approach the court to halt the process. He took no steps to do so, despite knowing that an appointment would be made. In this way, he did not demonstrate "a determined effort to lay his case before the court", a factor to be taken into account in the exercise of the discretion. In these circumstances, a rescission which would result in two municipal managers would cause instability in the governance of the ADM and most certainly be an undesirable consequence.

[85] Delay is a factor which may be taken into account in the exercise of the discretion, where the requirements of rule 42 (1) (a) have been met. In *Eden v Ellis and Another* [2025] 1 All SA 314 (WCC) Rogers J (as he then was) stated at paragraph [65]

> "The discretion recognised in the cases is a discretion arising once it has been shown that an order was 'erroneously granted'. At the very least, delay must be a factor relevant to the exercise of that discretion, however narrow it otherwise is."

Rogers J concluded as follows, at paragraph [66]:

> "……. assuming that the dissolution order was erroneously granted, I would exercise my discretion against granting rescission, having regard to the gross delay and the unsatisfactory nature of Mr Eden's explanations."

[86] Delay was imputed to the appellant, chiefly because the application for condonation for the late filing of the ADM employees' answering affidavit delayed the hearing of the rescission application, and because he waited for three months before applying for a further date for the hearing of the application. It is apparent from the history of this matter recounted above, that other factors contributed to the delay in the final hearing of the matter. The appellant did act promptly in launching the application very soon after the default order was granted. Delay on the part of the appellant is therefore not a significant factor to take into account in the exercise of the discretion.

[87] Finally, a consideration of the merits of a defence and the futility or impracticality of granting rescission in applications where the requirements of rue 42 (1) (a) are met, is not without precedent. Pre-*Zuma,* in *Van der Merwe v Bonaero Park (Edms) Bpk* 1998 (1) SA 697 (T), rescission of a provisional sentence was refused. The court was of the opinion that there were good grounds for seriously doubting the viability of the applicant/defendant's defence to a claim based on an acknowledgment of debt. Given the facts before the court, it was probable that a court considering the claim for provisional sentence would find in favour of the plaintiff (at 709D-E). The court found that in the exercise of its discretion in terms of rule 42 (1), the interests of justice and fairness would not be served if the provisional sentence was set aside (at 709F).

[88] In *Nkosi v ABSA Bank Ltd* [2023] ZAGPPHC 431 (6 June 2023) judgment had been erroneously granted against the applicant for payment of monies lent and advanced, and an order was made declaring his immovable property executable. The judgment was erroneously granted because the notice in terms of s 129 of the National Credit Act 34 of 2005 had been directed to the wrong branch of the post office. The court considered the

fact that this was a dilatory defence and that the applicant did not dispute his indebtedness to the respondent or that he was in breach of the agreements. The court expressed the view that in the exercise of its discretion the practical effect of a rescission should be considered (at paragraph [38]). Rescission was refused.

[89] It may well happen in a rescission application where the requirements of rule 42 (1) (a) are met, that the merits, if canvassed, might better be left to be considered in the main application. In the present case however, the merits are so prominently and decisively in favour of the review succeeding, that a rescission would not be in the interests of justice.

Conclusion

[90] It follows that there are no grounds for interfering with Smith J's exercise of his discretion and the appeal cannot succeed.

Costs

[91] The costs of the appeal must follow the result. Counsel were agreed that scale C should apply. I am also of the view that the costs of the two-fold application for condonation for the late filing of the supplementary volume and the dispensing of security for costs should be borne by the appellant. The appellant was alerted to the omission of the affidavits in the appeal record and the non-provision of security, prior to the first hearing date of 18 November 2024. The application was issued and served on 22 January 2025, three court days before the hearing on 27 January 2025. The opposition to the application for dispensing with security for costs was not unreasonable. However, I am of the view that the costs should be on scale A.

Order

[92] The following order will issue:

1. **The application for condonation for the late filing of volume 9 of the appeal record, and for the dispensing of security for costs, is granted.**
2. **The appellant is to pay the costs of the application on scale A.**
3. **The appeal is dismissed with costs, including the costs of two counsel where so employed, on scale C.**

_____

J.M. ROBERSON

JUDGE OF THE HIGH COURT

I agree

_____

J.W. EKSTEEN

JUDGE OF THE HIGH COURT

I agree

_____

B. R. TOKOTA

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellant	:	**Adv. Farlam SC**
Instructed by	:	Wheeldon Rushmere & Cole Inc. Matthew Fosi Chambers 119 High Street MAKHANDA (Ref.: Mr Brody)
For the First to Sixth Respondents:		**Adv. Rorke SC with Adv. Appels**
Instructed by	:	Wesley Pretorius & Associates (Ref.: Mr Pretorius/ab/W108) c/o Netteltons Attorneys 118A High Street MAKHANDA
For the Intervening Respondent	:	**Adv. Osborne SC with Adv. Gabriel**
Instructed by	:	Y. Tsipa Attorneys (Ref. A47/CL/2022) c/o Yokwana Attorneys 10 New Street MAKHANDA
Matter heard on	**:**	**27 January 2025**
Judgement delivered on	**:**	**10 April 2025**