THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 098/2025

In the matter between:

MUNICIPAL EMPLOYEES PENSION FUND **APPELLANT**

and

NTABANKULU LOCAL MUNICIPALITY **RESPONDENT**

Neutral citation: *Municipal Employees Pension Fund v Ntabankulu Local Municipality* (098/2025) [2026] ZASCA 112 (28 August 2026)

Coram: Mbatha and Baartman JJA and Molitsoane AJA

Heard: 20 May 2026

Delivered: 28 August 2026

Summary: Civil Procedure – rescission of judgment – Uniform Rule 42(1)*(a)* – whether the appellant has met the requirements for rescission in terms of rule 42(1)*(a)* or the common law – requirements in terms of rule 42(1)(*a*) and the common law not met.

ORDER

On appeal from: The Gauteng Division of the High Court, Johannesburg per Mahalelo J (Sitting as a court of first instance.)

The appeal is dismissed with costs including costs of two counsel where so employed.

JUDGMENT

Mbatha JA (Baartman JA and Molitsoane AJA concurring):

Introduction

[1] This is an appeal against the judgment and order of the Gauteng Division of the High Court, Johannesburg, per Mahalelo J (the high court). The high court dismissed the appellant's application, brought by the Municipal Employees Pension Fund (MEPF), in which it sought an order rescinding the judgment and order granted in favour of the respondent, the Ntabankulu Local Municipality (Ntabankulu), on 3 September 2022, in the absence of the MEPF. The appeal is with leave of the high court.

[2] The issue on appeal is whether the high court was correct in dismissing the MEPF's application for rescission of judgment. More specifically, the issues are whether the default judgment was erroneously granted in the absence of the MEPF; whether in terms of the common law; the MEPF provided a reasonable explanation for its failure to defend the action; whether it had a bona fide defence to the action; and; whether the application was brought within a reasonable period.

Background facts

[3] This appeal is rooted in an intricate past. Prior to September 2013, the employees of Ntabankulu were members of the South African Municipal Workers Union Provident Fund (SAMWU Fund). Their contributions to the SAMWU Fund were paid in terms of the Pension Funds Act 24 of 1956 (the PFA). Pursuant to representations made by the MEPF, 101 of those employees terminated their membership of the SAMWU Fund. As of 1 September 2013, their pension contributions were paid over by Ntabankulu to the MEPF.

[4] The SAMWU Fund challenged the payment of the aforesaid contributions before the high court. The matter culminated before this Court at the instance of the MEPF. This Court, per Swain JA, upheld the decision of the high court and dismissed the appeal brought by the MEPF. This Court found that the transfer of funds in respect of the 101 employees was unlawful and invalid, as it bypassed the statutory process. Ntabankulu was ordered to pay the SAMWU Fund all arrear pension contributions pertaining to the 101 employees from 1 September 2013 to 30 June 2020.

[5] Ntabankulu complied with this Court's order and paid R45 968 219. 20 to the SAMWU Fund. On 23 July 2020, the MEPF refunded Ntabankulu R19 928 666.19 in respect of the contributions paid to it by Ntabankulu. On or about March 2024, Ntabankulu issued summons against the MEPF seeking to recover the shortfall of R5 127 149.63. Its claim was based on unjustified enrichment, alternatively, on contract. In addition, Ntabankulu sought payment of the investment return earned on the purported contributions, together with interest on that amount at the legally prescribed rate from 29 March 2019, alternatively from the date of judgment, and costs of suit.

The claim by Ntabankulu

[6] The summons issued by Ntabankulu was served on the MEPF on 25 March 2022. The MEPF failed to file a notice of appearance to defend. On 5 September 2022 Ntabankulu applied for default judgment, which was granted on 22 September 2022. The default judgment order was served by the sheriff on 10 October 2022 at the registered office of the MEPF. On 3 May 2023 the MEPF was served with a writ of execution. It was only on 11 July 2023 that the MEPF launched the application for rescission of judgment, which was opposed by Ntabankulu.

The high court findings

[7] The high court dismissed the application with costs. It found that the default judgment was not erroneously granted in terms of rule 42(1)*(a)*, nor did the MEPF establish any grounds for rescission under the common law.

[8] The high court found that a judgment is 'erroneously granted' only if, at the time it is granted, the court was unaware of the facts that would have prevented it from granting the order. The MEPF failed to show the existence of such an error on the record. As a result, the default judgment was procedurally regular and fell within the court's jurisdiction.

[9] It also found that the MEPF failed to establish grounds for rescission under the common law. The high court reiterated that, under *Chetty v Law Society, Transvaal (Chetty),*[1] rescission at common law is only available on the grounds of fraud, *justus error* or lack of jurisdiction. The MEPF did not allege fraud, nor did it show a fundamental error or jurisdictional defect. Its failure to act timeously was treated as negligence, which is not a valid ground for rescission. Furthermore, the

[1] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 762B.

high court stressed the importance of finality. It found that allowing rescission without proper grounds would undermine certainty in judgments and encourage endless re-opening of disputes. It also found that, even if the grounds were arguable, the MEPF's delay and lack of prospects of success weighed against the granting of the recission application.

Before this Court

Submissions by the MEPF

[10] Before this Court, the MEPF submitted that the default judgment was erroneously granted in terms of rule 42(1)*(a)* and that, at the time the order was granted, there existed material issues of which the high court was unaware, which if it had knowledge thereof, it would not have granted the default judgment. Alternatively, the MEPF submitted that good cause exists for the rescission of the default judgment on grounds that it has provided a reasonable explanation for the default and that it has a bona fide defence to the action with prima facie prospects of success.

[11] In sum, the MEPF accepted that the summons was properly served at its registered offices. The reason for its failure to defend the matter was the failure by one of its employees, Ms Juan Moodley (Ms Moodley), to instruct attorneys as directed by its officers. This failure was attributed to her hectic schedule. The delay in filing the application for rescission of judgment timeously was attributed to the fact that the newly appointed Strategic Legal Manager, Ms Merriam Cheue (Ms Cheue), had to acquaint herself with the background to the matter, investigate it, and consult with other employees to ascertain the relevant facts, before briefing attorneys. She also had to arrange for the reconciliation of the financial information

relating to Ntabankulu's claim before briefing the MEPF's attorneys. The application was finally launched on 11 July 2023.

[12] The MEPF raised a number of what it contends are bona fide defences or what purports to be bona fide defences. These included the non-joinder of the relevant employees of Ntabankulu; that no oral evidence was led in support of the application for default judgment, despite the claim being illiquid; and that the judgment was at odds with this Court's judgment per Swain J, in that the contributions made by the relevant employees were lawfully made to it. In addition, the MEPF challenged the calculation of the outstanding amount claimed by Ntabankulu based on the list of employees attached to its application for rescission of judgment. On that basis, it contended that it was not liable to repay Ntabankulu any amount exceeding that which had already been paid to it. The MEPF based this on the assertion that only 71 of the relevant employees remained active members of its fund. Lastly, it also raised prescription as a defence.

Submissions by Ntabankulu

[13] Conversely, Ntabankulu submitted that the MEPF failed to show that the judgment was erroneously granted, as both the summons and the default judgment order were served at its registered office. In addition, it contended that rule 42(1)(*a*) was improperly relied upon by the MEPF, as it relates to the procedure followed to obtain judgment in the absence of another party and not to the existence of a defence to the claim. The default judgment was procedurally obtained, as absence in the context of rule 42(1)(*a*) refers to a failure to follow proper procedure.

[14] Furthermore, the MEPF failed to present a reasonable explanation for its failure to defend the action. The delay in bringing the application was unreasonable,

as it was only after nine months after the service of the default judgment order that it brought the application for rescission of judgment.

[15] Ntabankulu submitted that, even under the MEPF's alternative grounds for rescission under the common law, it failed to present a reasonable and acceptable explanation for the delay. The proffered explanations for the delay were unacceptable. In fact, the MEPF had knowledge of the proceedings, but acted negligently. In addition, Ntabankulu was entitled to the refund of the shortfall in contributions paid to the MEPF because they had been paid to it in error, despite the existence of a valid contract.

[16] Ntabankulu contended that there was no need for the joinder of the relevant employees, as the claim did not encroach upon their rights. The employees' rights were settled by this Court in the judgment of Swain JA. In addition, the defence of prescription raised by the MEPF was flawed, as it could commence running only after Ntabankulu became aware of the primary facts of the case. As a result, its claim had not prescribed in terms of s 12(1) of the Prescription Act 68 of 1969 (the Prescription Act).

The Rule 42 application

[17] Rule 42 provides as follows:

'**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;

….'

[18] The law governing rule 42(1)(*a*) is trite. In *Naidoo and Another v Matlala NO and Others*, the high court held that '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'.[2] This principle was affirmed by this Court in *Rossitter v Nedbank Ltd*,[3] and by the Constitutional Court in *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another*.[4]

[19] In *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* (*Lodhi 2*), this Court held that:

> '…Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the sheriff's return of service wrongly indicates that the relevant document has been served as required by the rules whereas there has for some or other reason not been service of the document…'[5]

[20] In *Freedom Stationery (Pty) Ltd and Others v Hassam and Others* (*Freedom Stationery*), this Court stated that:

> '…[T]he phrase ''erroneously granted'' relates to the procedure followed to obtain the judgment in the absence of another party and not the existence of a defence to the claim… Thus, a judgment to which a party was procedurally entitled, cannot be said to have been erroneously granted in the absence of another party.'[6]

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[2] *Naidoo and Another v Matlala NO and Others* [2011] ZAGPPHC 165; 2012 (1) SA 143 (GNP) para 6.
[3] *Rossitter & Others v Nedbank Ltd* (96/2014) [2015] ZASCA 196 (1 December 2015) para 16.
[4] *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* [2017] ZACC 18; 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC) paras 68-69.
[5] *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; [2007] SCA 85 (RSA) 2007 (6) SA 87 (SCA) para 24.
[6] *Freedom Stationery (Pty) Limited and Others v Hassam and Others* [2018] ZASCA 170; 2019 (4) SA 459 (SCA) para 18.

[21] In *Freedom Stationery,* this Court made it clear that the existence or non-existence of a defence on the merits is irrelevant to whether a judgment was erroneously granted. The enquiry in terms of rule 42(1)*(a)* is procedural. A judgment to which a party was procedurally entitled cannot be said to be erroneously granted simply because the defaulting party later raises a defence, however strong that defence may be.

[22] Regarding the absence requirement, in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture,* (*Zuma),* the Constitutional Court expressed itself as follows:

'…As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed…'[7]

[23] It is common cause that the MEPF was served with the summons at its registered office, but it failed to file a notice of appearance to defend. The reasons advanced by it for Ms Moodley's failure to brief attorneys, due to her hectic schedule, do not amount to an election to be absent nor a failure of procedures that precluded it from participating in the proceedings. Nothing procedurally precluded it from participating, instead, it simply failed to act. In *Zuma*, the Constitutional Court confirmed that rule 42(1)(*a*) exists 'to protect litigants whose presence was precluded, not those whose absence was elected'.[8] The protection is not afforded to those who are precluded by their own administrative failures, like the MEPF. The

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[7] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28; 2021(5) SA 327 (CC); 2021 (11) BCLR 1263 (CC) para 60.
[8] Ibid para 56.

litany of woes listed by the MEPF was attributed to the negligence and nonchalant attitude of its employees.

[24] In *Van Heerden v Bronkhorst* (*Van Heerden*),[9] the majority of this Court applied these principles to facts almost strikingly similar to those of the present matter. In that case, the respondent filed a notice of intention to oppose but failed to file opposing papers. The applicant gave notice of the hearing date by email to the address provided. The email was not received because the secretary who operated the email address had resigned. The majority held:

'At the time of the issue of the order there was no fact of which the court was unaware, which would have precluded the granting of the order. In the circumstances I consider that the respondent was procedurally entitled to the relief which she obtained. In the result the order was not erroneously sought and erroneously granted.'[10]

The majority further held that the explanation for the default, namely the non-receipt of the email due to the secretary's resignation, was not reasonable.[11]

[25] The dissenting judgment in *Van Heerden* took a different view. The dissent held that the non-receipt of the email meant that proper notice had not, in fact, been given and that the judgment was therefore erroneously granted.[12] The dissent also held that the respondent had raised a bona fide defence and that the court's discretion should be exercised in favour of rescission in the interests of justice and fairness.[13]

[26] However, this Court is bound by its majority decision. As a result, the principles applied by the majority in *Van Heerden*, namely, that a judgment to which

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[9] *Van Heerden v Bronkhorst* (846/19) [2020] ZASCA 147 (13 November 2020).
[10] Ibid para 18.
[11] Ibid para 20.
[12] Ibid para 38.
[13] Ibid para 43.

a party was procedurally entitled is not erroneously granted and that non-receipt of notice due to internal administrative issues does not render the judgment erroneous, are binding on this panel.

[27] In applying the aforementioned principles, the MEPF was procedurally not entitled to any further notice after the service of the summons. It failed to file a notice of appearance to defend. This absence was not due to any procedural irregularity on the part of Ntabankulu. Ntabankulu also served the MEPF with the default judgment order. The service was on the same person, Mr Tom Tleane (Mr Tleane), who had previously been served with the summons. He was an authorised person who acted on behalf of the MEPF. Mr. Zamani Letjani (Mr Letjani) considered the summons together with Mr Tleane and decided to brief attorneys. However, not a single one of them remembered to make a follow-up. Ms Moodley failed to carry out the instructions given by Mr Tleane due to her unexplained hectic schedule. Oddly, no one followed up from the date of service of the summons until the service of the writ of execution. This confirms that there was nothing procedurally irregular on the part of Ntabankulu.

[28] Furthermore, there is no explanation as to what happened after the service of the default judgment order. After the service of the writ of execution on 3 May 2023, attorneys were briefed only in the second week of June. The application was finally filed on 11 July 2023. I find that there was undue delay on the part of the MEPF as it also became aware of the default judgment order on 10 October 2022, when it was served upon it. The MEPF can therefore not lay its absence at the door of Ntabankulu.

[29] The MEPF raised for the first time in its heads of argument an allegation that the return of service cited a different case number. Although this is true, this was not a ground of rescission relied upon in its founding affidavit. Recently, in *Botha v Smuts and Another* (*Botha*), the Constitutional Court held that:

'…An applicant is not permitted to make a new case in his or her replying affidavit. The reason why an applicant is required to make out his or her case in the founding affidavit is that that enables the respondent to know what case to meet in preparing his answering affidavit.'[14]

At paragraph 272, the Constitutional Court quoted with approval the statement that 'an applicant must stand or fall by his petition and the facts alleged therein'. The MEPF cannot now raise a new factual ground for rescission that was not set out in its founding papers. This allegation, therefore, cannot be considered. Apart from this, the incorrect case number did not procedurally affect the proceedings before the court that granted the default judgment. It is not the case of MEPF that the incorrect case number has prejudiced it in defending the claim of Ntabankulu, for instance in locating the court file in order to peruse it for the purposes of defending or applying for rescission.

The common law application

[30] The applicant relying on the common law for rescission must show that good cause exists for the grant of rescission. With regard to the common law alternative, the test is well established. In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* (*Colyn*), this Court held:

'…[T]he courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospect of success.'[15]

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[14] *Botha v Smuts and Another* [2024] ZACC 22; 2024 (12) BCLR 1477 (CC); 2025 (1) SA 581 (CC) para 270.

[15] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* [2003] 2 All SA 113 (SCA); 2003 (6) SA 1 (SCA) para 11.

[31] In *Chetty* this Court held:

'It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits…'[16]

[32] Recently, in *Deon Smith and Others v Sasfin Bank and Another* (*Deon*),[17] this Court confirmed that under the common law, the applicant must '(a) give a reasonable and satisfactory explanation for their default; and (b) show that on the merits there is a bona fide defence which prima facie carries some prospect of success'.

[33] The Constitutional Court in *Zuma* reiterated the common law test thus:

'…[T]he requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind…'[18]

Furthermore, the Constitutional Court held that 'an unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits'.[19]

[34] The MEPF's explanation is set out in its founding papers. Upon receiving the summons, the board authorised a defence. Mr Tleane, the Strategic Legal Manager

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[16] *Chetty* at 757.
[17] *Deon Smith and Others v Sasfin Bank and Another* (507/2024) [2025] ZASCA 198 198 (19 December 2025) para 26.
[18] *Zuma* para 71.
[19] Ibid para 76.

of the administrator of the MEPF, instructed Ms Moodley to obtain a reconciliation from the finance department and then instruct their attorneys to file a notice of intention to defend. Ms Moodley forgot to do so due to her hectic schedule. As a result, the instruction was not carried out. Five months passed, and no notice of intention to defend was filed. A default judgment was granted. The MEPF only became aware of the default judgment when the writ of execution was served on 3 May 2023, nearly eight months after the default judgment was granted.

[35] There are certain reservations about accepting that this explanation is reasonable. In *Colyn*, this Court held:

'…While the courts are slow to penalise a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys (Saloojee and Another NNO v Minister of Community Development). Even if one takes a benign view, the inadequacy of this explanation may well justify the refusal of rescission on that account...'[20] (Citations omitted.)

In *Grant v Plumbers (Pty) Ltd* (*Grant*), the court held: '[I]f it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.'[21]

[36] The MEPF's explanations are inadequate. The loss of memory on the part of all its employees and officials is unexplained and unpersuasive. It is unimaginable that not a single employee or official of the MEPF remembered to enquire about the progress of the matter after receipt of the summons and the default judgment order. Mr Tleane was in receipt of the default judgment order a month prior to his resignation but failed to act. The MEPF remained passive for a period of over 13 months, regardless of the consequences of the processes served upon it.

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[20] *Colyn* para 12.
[21] *Grant v Plumbers (Pty), Ltd* 1949 (2) SA 470 (O) at 476.

[37] The MEPF's explanation is not 'finely balanced'. It is plainly inadequate. The failure to take any step for over five months, without any follow-up or oversight, amounts to gross negligence. On the authority of *Grant*, this Court has no reason to come to the assistance of the MEPF. The Constitutional Court in *Zuma* made it clear that 'an unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits'.[22] Even if the MEPF's defence were strong, one will assume for present purposes that it is, that does not resuscitate an unreasonable explanation. The absence of a reasonable explanation should put an end to the common law enquiry.

[38] I have come to the conclusion that the MEPF failed to provide a reasonable explanation for its default. The high court correctly found as much. This finding alone is sufficient to dispose of the common law ground. It is dispositive of the appeal. It is therefore unnecessary for me to consider the merits of its defence. However, for the sake of completeness, I do so hereunder.

The delay

[39] There is a considerable delay between the service of the default judgment and the launch of the rescission application. The default judgment was served on the MEPF on 10 October 2022. Nine months later, on 11 July 2023, the rescission application was launched. In terms of the common law, an application for rescission must be brought within a reasonable time. In *Deon*, this Court reaffirmed the position that the only real difference between a rescission application in terms of rule 32(2)(*b*) and one in terms of the common law is the period within which it must be brought. In terms of the common law, it must be brought within a reasonable time.

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[22] *Zuma* para 76.

[40] A delay of nine months without a satisfactory explanation is, in itself, a further reason to refuse rescission. The MEPF's explanation for the delay, that Mr Tleane resigned a month after service and that a new legal manager required time to investigate, is thin. It does not explain why the MEPF did not take any steps between October 2022 and May 2023, nor why a further two months passed after the new Strategic Legal Manager of the MEPF's administrator, Ms Mirriam Chueu, joined before the application was launched. This delay, combined with the inadequate explanation for the default in the main action, reinforces the conclusion that the MEPF has not shown good cause.

The bona fide defence

[41] In considering whether the MEPF has a bona fide defence, I am drawn to *Colyn*, where this Court said:

'…[T]he weak explanation is cancelled out by the defendant being able to put up a bona fide defence which has not merely some prospect, but a good prospect of success...'[23]

[42] The MEPF raised several defences. First, it contends that the judgment of this Court, per Swain JA, held that employees could belong to more than one pension fund and specifically excluded the MEPF from liability. I cannot accept this submission as it is in conflict with the finding of the Court. Ntabankulu's action is based on enrichment, in the alternative, on contract.

[43] In addition, the MEPF contends that there is fatal non-joinder of the relevant employees. The test for non-joinder is trite. In *Judicial Services Commission and Another v Cape Bar Council and Another*, this Court confirmed that 'the joinder of a party is only required as a matter of necessity – as opposed to a matter of

[23] *Colyn* para 12.

convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned'.[24] In *Amalgamated Engineering Union v Minister of Labour*, this Court further held that joinder depends 'on the manner in which, and the extent to which, the Court's order may affect the interests of third parties'.[25]

[44] In *Absa Bank Limited v Naude N O & Others*, this Court reiterated that the test is 'whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined'.[26] In *Johannesburg Society of Advocates and Another v Nthai and Others*, this Court refined the test, confirming that the primary question is whether the order sought cannot be carried into effect without substantially affecting the interests of the third party and that 'it suffices if there exists the possibility of such an interest'.[27]

[45] The non-joinder issue raised as fatal to the claim brought by Ntabankulu has no merit. The legality of the transfer of contributions made in respect of the relevant employees from SAMWU to the MEPF was determined by this Court, per order of Swain JA. The Court found that the transfer of contributions from one fund to another was unlawful and invalid, as it was effected without following the procedures prescribed by the Pension Funds Act and without obtaining approval from the Financial Services Board (FSB). As a result, it dismissed the MEPF appeal and ordered Ntabankulu to make payment of all the arrear contributions to SAMWU. This order settled the rights of the relevant employees. The claim for unjustified

[24] *Judicial Service Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115; 2012 (11) BCLR 1239 (SCA); 2013 (1) SA 170 (SCA); [2013] 1 All SA 40 (SCA) para 12.
[25] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 at 657.
[26] *Absa Bank Limited v Naude N.O and Others* [2015] ZASCA 97; 2016 (6) SA 540 (SCA) para 10.
[27] *Johannesburg Society of Advocates and Another v Nthai and Others* [2020] ZASCA 171; 2021 (2) SA 343 (SCA); [2021] 2 All SA 37 (SCA) para 31.

enrichment has nothing to do with the relevant employees. Ntabankulu paid the arrear contributions and reinstated their membership with SAMWU. Moreover, Ntabankulu is not acting on behalf of the relevant employees.

[46] It is incorrect for the MEPF to suggest that this Court ruled that the relevant employees could retain the membership in both the MEPF and SAMWU simultaneously. Such a result would have been undesirable, as it would have required double contributions in respect of the relevant employees. The MEPF's contention was effectively dismissed by the Constitutional Court when it dismissed the MEPF's application for leave to appeal against Swain JA's judgment.

[47] The MEPF contends that it does not owe Ntabankulu anything and that the amount of R19 million that it paid back to Ntabankulu was gratuitous. Accordingly, it argued that the claim for R5 million is ill-conceived. However, the reimbursement made to Ntabankulu occurred as a direct consequence of Swain JA's judgment and not for any other reason, namely because of the unlawful and invalid contract. Pursuant to that judgment, Ntabankulu paid R45 million to SAMWU.

[48] I am therefore persuaded that there is no existing contract between Ntabankulu and the MEPF. If there had been a valid contract between them, arising from dual membership of the relevant employees, nothing would have prevented the MEPF from enforcing it.

[49] The same applies to the disputed claim. The annexures relied upon, do not explain who prepared them. The MEPF contends that it gratuitously paid R19,928,666.19 to Ntabankulu and that the remaining 30 employees had already

received their benefits. Ntabankulu disputes the calculation, as its claim is aimed at recouping amounts that were unjustifiably paid to the MEPF.

[50] The MEPF's defence of prescription is meritless. Ntabankulu correctly asserted that until this Court delivered its judgment in March 2019, per Swain JA, it was not in possession of the primary facts to institute an action. The debt arguably only became due after that judgment. Moreover, the payment of R19,928,666.19 by the MEPF to Ntabankulu on 23 July 2020 had the effect of interrupting prescription.

[51] It is trite that prescription commences to run as soon as the date is due.[28] Equally trite is knowledge of legal conclusions to be drawn from the facts, including which remedies may arise. It is not required for a debt to become due and for prescription to commence running. [29]

[52] Accordingly, for the aforementioned reasons, the appeal fails. It is ordered as follows:

The appeal is dismissed with costs including costs of two counsel where so employed.

Y T MBATHA

JUDGE OF APPEAL

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[28] *Links v Member of the Executive Council, Department of Health, Northern Cape Province* [2016] ZACC 10; 2016 (5) BCLR 656 (CC); 2016 (4) SA 414 (CC) para 17.

[29] *Mtokonya v Minister of Police* [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (5) SA 22 (CC) para 50.

Appearances

For the appellant:	V Movshovich
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Instructed by:	Thembinkosi Lubabalo Luzipho Attorneys, Mthatha
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