

SOUTH AFRICA / JUDGMENT

Milazi and Another v South African Legal Practice the Council and Another (45162/2019) [2024] ZAGPPHC 473 (22 May 2024)

[2024] ZAGPPHC 473

COURT

North Gauteng High Court, Pretoria

BEFORE

SJR Mogagabe

CASE / FILE NUMBER

45162/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 45162/2019

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED:

DATE:

22/05/24

SIGNATURE

In

the matter between: PHINDILE
PATRICIA MILAZI
First
Applicant
PP
MILAZI
INCORPORATED
Second
Applicant
And
SOUTH
AFRICAN LEGAL PRACTICE THE COUNCIL
First
Respondent
THE
SHERIFF ROODEPOORT SOUTH
Second
Respondent
In

re: SOUTH
AFRICAN LEGAL PRACTICE THE COUNCIL
Applicant
and
PHINDILE
PATRICIA
MILAZI First
Respondent
PP
MILAZI
INCORPORATED
Second
Respondent
This
judgment is deemed to have been delivered electronically by
circulation to the parties’ representatives via email and
the
same shall be uploaded onto the caselines system.

JUDGMENT
MOGAGABE AJ

Introduction

[1] This is an application by the applicants to rescind the judgment and order granted by Wesley AJ on 25 February 2021, in terms of which he appointed a curator bonis, to among other things, control and administer the applicants’ trust affairs.

- [2] The rescission application is resisted by the first respondent, the South African Legal Practice Council (the Council), as more fully outlined hereafter.

Background

- [3] The first applicant is a duly admitted attorney of this court and has practiced as such for almost twenty years and a director of the second applicant. The second applicant is a juristic entity and a law firm through which the first applicant conducts a legal practice as an attorney. The Council, which is cited as the first respondent herein, is a body corporate with full legal capacity that exercises jurisdiction and oversight over all legal practitioners as so contemplated in the Legal Practice Act 28 of 2014 (the Act).
- [4] The facts and circumstances of this case, that resulted in the granting of the judgment and order, forming the subject matter of the present rescission application, are comprehensively set out in the judgment of Wesley AJ, delivered on 25 February 2024.^[1] It is unnecessary for present purposes to rehash same, save where relevant and apposite for present purposes.

The applicants

opposed this application and belatedly filed, in compliance with a court order their answering affidavit with a condonation application. In the answering affidavit applicants amongst other things, tendered the inspection of their trust affairs. After the Council had filed its replying papers, and despite the aforesaid tender the applicants declined to co-operate with the Council's further attempt at inspection of their trust affairs.

- [5] On 15 February 2021, the matter served before Wesley AJ. Applicants' legal representative (attorney) requested a postponement of the matter based on the first applicant being booked off sick until 17 February 2021 and thus unable to give him (the attorney) instructions. Wesley AJ stood down the matter to 18 February 2021. On 18 February 2021 applicants' attorney again requested a postponement based on the first applicant's illness. Wesley AJ refused such postponement, whereafter the applicants' attorney withdrew as such, on the basis that he had no instructions to argue the merits of the application. The court proceeded to hear the matter, whereafter judgment was reserved.
- [6] On 25 February 2021, Wesley AJ delivered judgment on 25 February 2021, in terms of which he made the order as aforesaid.

- [7] This rescission application was served and launched on 19 April

2021. In May 2021 the Council filed its answering affidavit in opposition thereto. Since then, the applicants have not filed a replying affidavit or taken any steps in furtherance of the matter. The Council filed its Heads of Argument, Practice Note, Chronology and List of Authorities in August 2021 in compliance with the Practice Directive of this Division. On 30 October 2023, a court order was issued compelling applicants to file their Heads of Argument, Practice Note, Chronology and List of Authorities within ten days from the date thereof. In non-compliance thereof, applicants failed to do so. On 19 January 2024, the Council took

the

initiative to set the matter down for hearing on the opposed motion roll on 29 April 2024. The Notice of set down was served on the applicants' attorneys of record on the same day.

Supervening events before the hearing of the matter

- [8] On Friday 26 April 2024, I caused a directive to be issued advising the parties that the matter (which was set down for adjudication on Monday 29 April 2024) was allocated for hearing on Thursday 2 May 2024 at 14h00.
- [9] Applicants' attorneys of record, Maesela Incorporated filed a formal notice of withdrawal as applicants' attorneys on 26 April 2024, without furnishing any reasons for such withdrawal.
- [10] On the same day, the first applicant dispatched an email to the Council's attorneys, advising them that they intend removing the matter from the roll of 29 April 2024, due to the withdrawal of their attorney to "afford us time to instruct new attorneys to assist us in pursuing the matter further". On the same day, the Council's attorneys responded declining such a request.
- [11] On Monday 29 April 2024, the first applicant despatched an email for my attention via my Registrar, in terms of which she "sought permission of the court to remove the matter from the roll [of 2 May 2024] to another date in the near future as the is not urgent", on the basis that due to their attorneys of record having withdrawn from the matter they "are currently unrepresented and accordingly unable to proceed with the matter on 2 May 2024". I need to highlight the fact the first applicant was aware as per my directive of 26 April, that this matter was allocated for hearing on 2 May, having regard to the contents of para 1 of her email to the following effect: "We are the applicants in the above matter which is set down for hearing on 2 May 2024".
- [12] As such, the first applicant having the requisite notice and knowledge of the date of hearing of the matter, elected (as an attorney with more than twenty years of experience)[2] not to attend or participate in the proceedings.
- [13] Despite this informal and inappropriate procedure adopted by applicants in directly communicating with the court requesting the removal of the matter, I instructed my Registrar to address an email to the first applicant in response thereto (copying the Council's attorneys of record) declining such request and indicating that all parties are required to attend court on the day of the allocated hearing thereof (i.e. 2 May 2024 at 14h00) to deal with the matter. On 30 April, the Council's attorneys responded via email, taking serious exception to the first applicant addressing the letter to the court (via my Registrar, without copying them) and objected to the removal of the matter.
- [14] As the Council's attorneys had objected to the first applicant's request for the removal of the matter and in the absence of a formal notice on the part of the first applicant seeking leave of the court for the removal of the matter, there existed no basis to deal with the removal of

the matter from the roll ie grant or refuse the leave to remove the matter from the roll. Absent consent of the parties (i.e. agreement of the parties) the court retains a discretion whether to allow or refuse the removal of the matter from the roll after the set down thereof. Generally, an applicant is allowed or permitted to remove a matter from the roll, subject to the court's discretion and an appropriate order as to costs, unless the removal is prejudicial to the other party or constitutes an abuse of the process of the law or a disingenuous attempt to frustrate or delay the implementation of the judgment and order sought to be rescinded. Unless with the agreement of the parties, it is not permissible for a party to remove a case from the roll without leave of the court.

[15] On 2 May 2024 at 14h00, this matter was called. Mr Stoker appeared on behalf of the Council and there was no appearance on behalf of the applicants, despite their names being called three times outside the courtroom. In the absence of a formal notice of removal or an application for postponement, the matter proceeded, and Mr Stoker appeared on behalf of the Council.

[16] Insofar as it pertains to the issue of the election of a party to be present or absent, at the hearing of a matter, it is apposite in the circumstances to refer to the pronouncement of the Constitutional Court to the following effect:

"...As I see it, the issue of presence or absence has nothing 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, physical or otherwise, may be entitled to rescission in the event that an error is committed, I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then ipso facto (by that same act), plead the 'absent victim'. If everything turned on actual presence, it will be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing absentia (absence)."[3]

[17] It bears mentioning that since the improper and unprocedural communication via email by the first applicant requesting the removal of the matter, there is nothing on record indicating that she was precluded or prevented from attending court on Thursday 2 May 2024.

The merits of the rescission application

[18] After this somewhat protracted prelude, I turn now to deal with the merits of the rescission application. I deem it apposite upfront to point out that this rescission application falls to be decided based on two sets of affidavits i.e. the founding affidavit of the applicants and the answering affidavit of the Council, the applicants having failed or elected for almost three years (since May 2021), not to file a replying affidavit. The position in such instances in applying the Plascon-Evans rule is that these being motion proceedings, in the event of factual disputes arising on the affidavits, "a final order can be granted only if the facts

averred in the applicants' affidavits, which have been admitted by the respondent ..., together with the facts alleged by the latter, justify such an order,"[4] unless the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is

palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting such version on the papers.[5] In essence then given the failure by the first applicant to file a replying affidavit disputing or gainsaying the material allegations contained in the answering affidavit, such material averments or assertions, falls to be accepted as undisputed or uncontroverted in the circumstances, unless the version of the Council is "so far-fetched or clearly untenable that the court is justified in rejecting it merely on the papers.[6]

[19] It is important to bear in mind that the applicants seek the rescission of the said judgment by Wesley AJ based on the common law and not based on Rule 42(1)(a) or Rule 31(2)(b) of the Uniform Rules of Court.

Principles governing rescission.

[20] Under the common law, to succeed an applicant for rescission of a default judgment is required to show good cause. Although the authorities emphasise that it is unwise to give a precise meaning to the term "good cause", the courts generally expect an applicant to show good cause: by giving a reasonable explanation of his/her default and by showing that the application is made bona fide and by establishing or showing that he or she has a bona fide defence to the claim, which prima facie has some prospect of success. A court has a wide discretion in evaluating "good cause" to ensure that justice is done, and such discretion must be exercised after a proper consideration of all the relevant circumstances.[7] Failure to meet one of them is fatal to the rescission application. In other words, a party who fails to show prospects of

success on the merits, will not succeed in a rescission application, even though he/she has furnished a reasonable and satisfactory

explanation for the default.[8]

[21] The primary question for determination is whether the applicants have satisfied the requirements under the common law, to rescind the said judgment and order of Wesley AJ.

[22] The first applicant contends that her failure to attend court on 15 and 18 February 2021, was due to the fact that she had contracted the Covid-19 virus at her late mother's funeral, who died of COVID-19-related complications on 27 January 2021. Subsequent thereto she consulted a certain Dr Tharique Bux who diagnosed her as suffering from Covid pneumonia and booked her off sick until 17 February. On 17 Feb she once more consulted Dr. Bux who diagnosed her as suffering from "post COVID- 19 malaise and weakness". Further, she diagnosed her as "being totally indisposed for duty". In her founding affidavit, she refers to annexures "PPM2" and "PPM3" thereto, as copies of Dr. Bux's medical certificates in support thereof. However, same are not annexed to the founding affidavit. I share some reservation in the absence of proof thereof. However, I am of the considered view that (a) having regard

to the undisputed evidence of the first applicant in her founding affidavit of being afflicted with the COVID-19 virus during the period when the main application was set down for hearing on 15 February 2021 and stood down for hearing to 18 February 2021; (b) the first applicant's undisputed assertion of her attorney having emailed the Council's attorneys the said medical certificate of Dr. Bux and (c) Wesley AJ confirmation in his judgment of attorney Maesela (applicants' erstwhile attorney) being in possession of the medical certificates of Dr. Bux on 15 and 18 February, when he addressed Wesley AJ regarding first applicant's COVID-19 related illness and as such requested the postponement of the matter[9], I am of the view that such doubt should redound to the benefit of the first applicant regarding the explanation for the default. This being so, I thus accept in favour of the first applicant she has given a reasonable explanation for the default.

- [23] I turn now to deal with the other requirements, namely whether the applicants have shown or established that the application is made bona fide, and they have a bona fide defence to the claim (main application) which prima facie has some prospects of success.
- [24] In this regard, the applicants contend that the main application suffered from several substantive and procedural defects, arising from the Council's non-compliance or failure to comply with the statutory requirements of the Act as more outlined hereafter.
- [25] It is noteworthy to highlight that most of the defences raised by applicants in support of the rescission applications ie on the merits of the rescission application are substantively similar or the same as those raised in opposing the main application that served before Wesley AJ as aforesaid. In essence, the defences raised or advanced by applicants on the merits of the matter i.e. in support of the rescission application are substantively a rehash or repetition of substantively the same defences so dealt with by Wesley AJ in the main application. As such, in disposing thereof, reference will be made to the judgment of Wesley AJ delivered on 25 February 2021 where necessary, to avoid repetition and prolixity.
- [26] I point out that rehashing or replicating same by applicants in support of their rescission application does not make them look better nor lend any credence to their validity or propriety or for that matter magically render them bona fide or meritorious defences. These grounds are more relevant or apposite for appeal purposes i.e. for purposes of appealing the judgment and order of Wesley AJ and not for purposes of a rescission application, as more fully demonstrated hereinafter.

The purported defences

The Council's non-compliance with the provisions of section 87(2)(a) of the Act

- [27] Section 87(2)(a) of the Act provides that:

"The Council or the Board may, itself or through its nominee, at the cost of the Council or the Board, inspect the accounting records of any trust account practice in order to satisfy itself that the provisions of section 86 and subsection (1) are being complied with."

[28] The applicants contend that the Council ought to have followed the provision of section 87(2)(a) by first inspecting the accounting records of the applicants' trust account practice to satisfy itself that the first applicant has complied with the provisions of section 86(1) of the Act, instead of launching the section 89 application (main application). As such applicants assert that the main application was in the circumstances premature in that the Council acted prematurely by firstly launching the main application instead of first inspecting applicants' accounting records. For the reasons set out by Wesley J in paras 18 to 22 of his judgment, this purported defence is in the circumstances misplaced and thus unmeritorious. In any event, nowhere in section 87 and in particular section 87(2)(a) of the Act is reference made of a section 89 application being preceded by an inspection of the accounting records of a trust account practice, as so contemplated in section 87(2)(a) of the Act.

Non-compliance with the provisions of section 90 of the Act

- [29] Section 90(4) of the Act provides that a court may only grant an application made by inter alia a Council appoint a curator bonis to control and administer the trust account of a legal practitioner on good cause shown by the Council and after having given the trust account practice an opportunity to respond to such application in writing.
- [30] The defence advanced by the applicants in this regard is that the Council launched the main application (section 89 application) for the appointment of a curator bonis in non-compliance with the provisions of section 90(4) of the Act, by failing to afford the applicants an opportunity to respond in writing to the section 89 application, before an order can be made in terms of subsection (1) or subsection (2) of section 90 of the Act. Allied thereto is the contention that the Council has nonetheless failed to establish "good cause" for the grant of such application as so contemplated in section 90(4) of the Act.
- [31] This purported defence is likewise misconceived and without substance whatsoever, simply on the basis that the main application (section 89 application) is substantively different from an application contemplated in terms of section 90(1) or (2) requiring the trust account practice to be afforded an opportunity to respond in writing thereto before an order can be made pursuant to the provisions of section 90(1) or (2) of the Act. Wesley AJ in paras 22 to 24 of his judgment also rejected such an argument on the same basis.

Non-compliance by the Council with the provisions of sections 5, 37, 38, 39, 40 and 43 of the Act

- [32] In a desperate attempt to bolster the rescission application and for purposes of showing a bona fide defence to the main application, the applicants raise the purported defences of non-compliance by the Council with the provisions of sections 5, 37, 38, 39, 40, and 43 of the Act before launching or initiating the main application. Such purported reliance on these provisions of the Act is in the circumstances not only misguided, and misconceived, but also unsound in fact and law, in that all these provisions have no application or relevance in casu. This is so in that section 5 deals with the objects of Council; section 37 deals with the establishment of disciplinary bodies by the Council; section 38 relates to the procedure for

dealing with complaints of misconduct by legal practitioners and/or legal practice accounts; section 39 deals with the procedure to be followed and the rights of a legal practitioner summoned to any disciplinary hearing by a disciplinary committee where or when charged with misconduct and to be afforded an opportunity to inter alia be heard, to call and cross-examine witnesses tendered or led in support of the misconduct charged; section 40 relates to the procedure to be followed after a disciplinary hearing and sanctions meted out; and finally section 43 dealing with urgent legal proceedings and the suspension of a legal practitioner.

- [33] In a nutshell, the contentions advanced herein are to the effect that the Council did not comply with the principle of audi vis-à-vis the applicants, before initiating or launching the main application. Such purported reliance on the part of applicants on these provisions of the Act for purposes of showing bona fide defences to the main application is demonstrative of a desperate attempt on the part of applicants to salvage a lost cause if not to shore up misguided or misconceived defences. There existed no need in the circumstances for the Council to conduct a disciplinary hearing against applicants before initiating the main application. Same may, if need be, be conducted in due course.

In any event, it ill behoves applicants and in particular first applicant to contend that she was not afforded audi i.e. an opportunity to respond to the complaints against her. On the contrary, she was afforded such an opportunity and filed answering papers opposing the main application in which she traversed and engaged with the allegations so levelled against her in the main application. It also ill behoves the first applicant to contend that she was found guilty by the Council or that her constitutional rights have been violated by the Council launching the main application. In essence, these factually and legally unsound defences merely need to be restated to be rejected.

Accounting records

- [34] Insofar as it pertained to the applicants and in particular first applicant's accounting records, Wesley AJ correctly found amongst other things, that her accounting records were not available for inspection and she failed to make same available to the Council and to its inspector Ms Mpete, coupled with the fact that first applicant failed to co-operate with Ms Mpete during such inspection. Furthermore, Wesley AJ correctly found that the first applicant initially tendered to make her accounting records available to the Council for inspection, whereafter she reneged on such tender and declined to do so. Such reneging demonstrates not only bad faith on the first applicant's part but also a disingenuous tactic designed to frustrate or delay the inspection of her accounting records.

Further or Miscellaneous defences

- [35] In para 7.19 of the founding affidavit, the first applicant asserts that "part of the reasons we are applying for rescission of this judgment is the very fact that the Court condones without just cause, the first respondent's inclination to act with impunity in [the] administration of the Act". It is important to highlight the fact that this is one of the general accusations

levelled against the Council, without specifying in what respects the council has “acted with impunity in the administration of the Act” and the extent thereof. In the absence of any specific evidence substantiating this complaint, same does not constitute a defence let alone a bona fide defence to the main application, entitling applicants to the relief sought herein.

- [36] In para 14 of the founding affidavit, the first applicant contends with reference to para 54 of the judgment, that Wesley AJ misdirected himself by granting an order not prayed for by the council, without the council amending its notice of motion, which conduct constitutes an irregularity on his part. Such complaint, likewise, is misguided if not misplaced in that a proper reading and analysis of para 54 of the judgment clearly indicates that Wesley AJ correctly declined to grant the relief sought by the council in the notice of motion, on the basis that same fell outside the ambit of a section 89 application. As such, Wesley AJ declined to grant the alternative relief sought in prayer 1 of the Notice of motion, authorising Mr Johan van Staden, the envisaged curator bonis, to nominate a curator bonis, on the basis that the power or competence to do so, vests in the court in terms of section 89 of the Act. The first applicant does not state or specify the order that Wesley AJ granted, which was not prayed for by the Council. There existed no need in the circumstances to amend the notice of motion.
- [37] In para 16 of the founding affidavit, the first applicant avers that the order granted in para 58 of the judgment is inconsistent with the provisions of the Constitution in that the court is not vested with such powers in terms of the Act and the common law. Once more, the first applicant does not specify which provision of the Constitution has been infringed. Furthermore, the order so granted by Wesley AJ was in accordance with the provisions of section 89 of the Act. The Act grants the court wide powers to protect the interests of the general public.
- [38] Insofar as it pertains to the contention that the council has failed to show “good cause” in support of the section 89 application, this aspect was comprehensively dealt with by Wesley AJ as per paras 27 to 49 of his

judgment.

- [39] The complaint that Wesley AJ’s judgment “deprives the first applicant of her rights as provided in the Bill of Rights and particularly section 33 thereof”, is likewise unfounded and misguided for the following reasons. Firstly, she does not specify in what respects her constitutional rights and in particular the section 33 rights had been violated. Secondly, she was afforded an opportunity to respond to the allegations in the founding affidavit of the council and filed the answering affidavit in response thereto.

COSTS

- [40] Wesley AJ granted the applicants' condonation application for failure to file their answering affidavit timeously and ordered the applicants to pay the costs thereof. Furthermore, he ordered the applicants to pay the costs of the main application on an attorney and client

scale, including the costs reserved on the 15th of February 2021. The first applicant challenges both costs orders. In respect of the costs relating to the condonation application, the first applicant merely contends that same should be rescinded, without advancing any basis or grounds to set aside same. Absent any basis or grounds for setting aside such a costs order, the challenge concerning such a costs order must fail. In any event, in seeking condonation for the late filing of their answering papers, the applicants were seeking the court's indulgence and generally should be liable for the costs of such application.

- [41] Insofar as it pertains to the costs order in respect of the main application, the first applicant contends that same should be rescinded on the basis that her non-appearance on the 18th of February 2021, was not due to any wilfulness on her part but as a result of her illness as aforesaid. This argument is misplaced in that this costs order was not awarded based on her non-appearance on the 18th of February, but by virtue of the fact that the Council had prayed for same in the notice of motion and was successful in obtaining the relief sought against the applicants ie costs followed the result.
- [42] It cannot be gainsaid that the analysis of the founding affidavit of the applicants in support of the rescission application, shows that the first applicant has raised unmeritorious, misconceived and misguided defences, designed to frustrate if not delay the implementation of the judgment and order of Wesley AJ. Such a disingenuous stratagem, designed to frustrate or delay the implementation of the judgment and order of Wesley AJ, cannot in the circumstances be countenanced.
- [43] As such, this demonstrates that the application is not made bona fide and that the applicants have failed to show that they have a bona fide defence(s) to the main application ie have failed to show prospects of success on the merits to have the main application re-litigated. In other words, the applicants' prospects of success in casu are so remote, with the attendant consequences that same cannot be regarded as constituting bona fide defence(s). In any case, the insurmountable hurdle confronting the applicants, particularly the first applicant is that in terms of the law governing rescission applications, it is impermissible for a litigant to seek to invoke the rescission process to secure a rehearing of the merits (ie to re-litigate the main application), simply because in the case of a final and definitive judgment (as is in casu), whether by default or not, after the merits had been traversed, the court is regarded as functus officio.[10]
- [44] In the circumstances, the applicants have failed to show "good cause" as so required for a rescission order in terms of the common law.

CONCLUSION

[45] In the result, I make the following order:

[45.1] The application for rescission of the default judgment issued against the applicants on 25 February 2021 is dismissed.

[45.2] The applicants jointly and severally to pay the costs of this application, on scale B.

SJR MOGAGABE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for applicants: no appearance. Attorney for applicants: R E Maesela (attorney) of Maesela Inc (withdrawn) Counsel for the first respondent: Mr R Stoker Attorney for the first respondent: R W Attorneys Inc Date of hearing: 2 May 2024 Date of Judgment: 22 May 2024.

[1] Caselines Judgment sec 012-899 & 936-941.

[2] CaseLines sec 15-0003-6 FA of first applicant para 6.1.

[3] 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 (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) para [60]. (Zuma rescission case).

[4] Plascon-Evans Paints v Van Riebeek Paints [1984] ZASCA 51; 1984

(3) SA 623 (A) paras 634E-635C.

[5] Plascon-Evans supra; National Director of Public Prosecutions v Zuma

[2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 26.

[6] Botha v Law Society, Northern Provinces 2009

(1) SA 277 (SCA) para 4.

[7] Chetty v Law Society, Transvaal 1985 (2) SA 756 (A); Colyn v Tiger Foods Industries Ltd t/a Meadow Feeds Mills (Cape) 2003 (6) SA 1 (SCA) paras [11] – [12]; Dombo Community v Tshakuma Community Trust

[2018] ZASCA 190 (19 Dec 2018) para 10.

[8] Zuma rescission case paras [71]-[73].

[9] See Judgment of Wesley AJ sec 012 pp728-729 paras 6 & 7

[10] Zuma rescission case para [68]

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