



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 036958/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>12/06/2023</u>	
DATE	<u>[Signature]</u>
	SIGNATURE

In the matter between

MINISTER OF POLICE

First Applicant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Applicant

And

NOMBULELO GLADYS DONDOLO

Respondent

JUDGMENT

PEARSE AJ:

AN OVERVIEW

1. A default judgment order in an action for damages for unlawful arrest and malicious prosecution was granted by this court (per Senyatsi J) on 31 May 2022. This matter involves an application in terms of rule 42(1)(a) *alternatively* rule 31(2)(b) to have the order rescinded or set aside. There is also a counter-application in terms of rule 42(1)(b) to have the order varied to clarify its terms.
2. For the reasons set out below, I consider that the rescission application should be granted and the variation application should accordingly be dismissed. In the circumstances of the case, I do not regard either side as deserving of the costs of the litigation.

THE PROCEEDINGS

3. The Minister of Police (the Minister) and the National Director of Public Prosecutions (the NDPP) are the applicants in the rescission application, the respondents in the variation application and the defendants in the underlying action.

4. Nombulelo Gladys Dondolo (Ms Dondolo) is the respondent in the rescission application, the applicant in the variation application and the plaintiff in the underlying action.

The arrest, detention, release and acquittal

5. As pleaded in the particulars of claim referred to in paragraph 9 below, it is alleged by Ms Dondolo that:

- 5.1. on 21 July 2017, in the course of "*a police trap operation*" relating to alleged bribery and corruption at her place of employment, she and a colleague were arrested and detained at the Brixton Police Station;
- 5.2. she was charged as an accessory to alleged contraventions of the Prevention and Combating of Corrupt Activities Act 12 of 2004 and only released from custody, on warning, after a second bail hearing on 27 July 2017;
- 5.3. her employment was suspended on 07 August 2017 and reinstated on 23 January 2019; and
- 5.4. she appeared in court on several occasions between 30 August 2017 and 18 July 2019, when she was acquitted under section 174 of the Criminal Procedure Act 51 of 1977.

6. These facts are confirmed on behalf of the Minister and the NDPP in an affidavit referred to in paragraph 39 below.

The notice

7. On 14 and 15 September 2020 Ms Dondolo's attorneys served on the offices of the Minister, the National Commissioner of Police, the Provincial Commissioner of Police and the NDPP a notice in terms of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act) outlining facts underpinning their client's "*intention to institute legal proceedings against your organisation(s)*" claiming damages in the sum of R1,000,000.
8. The record contains no response to the section 3 notice by or on behalf of the Minister or the NDPP.

The summons

9. Ms Dondolo issued summons against the Minister and the NDPP on 09 November 2020. The particulars of claim articulate two claims by the plaintiff against the defendants. Claim 1 contends for damages for unlawful arrest in the sum of R406,000. Claim 2 contends for damages for malicious prosecution in the sum of R1,000,000. Notably, paragraph 1.4 of the particulars of claim alleges compliance with the provisions of the Act.

10. Returns of service reflect that the summons and particulars of claim were served on the offices of the Minister on 25 November 2020 and the NDPP on 22 February 2021.
11. Ms Dondolo's attorneys wrote to the office of the NDPP on 02 July 2021 recording that the second defendant was yet to serve or file a notice of intention to defend the action and a plea to the particulars of claim and advising that, should the NDPP fail to do so by close of business on 07 July 2021, the plaintiff would deliver a notice of bar in terms of rule 26.
12. A materially identical letter was sent to the provincial head of legal services of the South African Police Service (SAPS) on 22 July 2021 in respect of non-delivery by the Minister of any such notice or plea. It required compliance by 29 July 2021.

The notices of bar and intention to defend

13. On 29 July 2021 Ms Dondolo's attorneys served a (first) notice of bar by email apparently addressed to an employee of SAPS and two employees of the National Prosecuting Authority. The notice required the defendants "*to deliver its notice to defend / notice of intention not defend within 5 (five) days after the date of service of this notice of bar upon it, failing which the defendant shall be barred from delivering any pleading thereof.*" It appears to be common cause that the notice was irregular and inoperative.

14. The state attorney served on the attorneys for Ms Dondolo a notice of the Minister's and the NDPP's intention to defend the action on 03 September 2021. The notice is dated 21 August 2021.
15. On 06 September 2021 the state attorney asked Ms Dondolo's attorneys for a further copy of the combined summons so that a plea could be prepared on behalf of the Minister and the NDPP. It seems that the summons and related notices were delivered to the office of the state attorney on the following day.
16. On 07 September 2021 Ms Dondolo's attorneys replied to the state attorney:
 - 16.1. stating that their client had served a notice of bar on 29 July 2021 and the defendants were "*supposed to file its notice to defend and/or plea by 05 August 2021*";
 - 16.2. submitting that "*[t]he Defendants in all instances failed to comply with all the above-mentioned time limits, in particular the notice of bar, and as such you have been barred from filing any pleading. Therefore, your notice of intention to defend served to our office on 03 September 2021 is an irregular step*";
 - 16.3. advising that, "*[i]n terms rule 27 of the Uniform Rules, removal of a notice of bar is achieved either by agreement between the parties and/or upon court application*"; and

- 16.4. concluding that, “[a]s a consequence, we will continue to pursue our default Judgement application.”
17. A second notice of bar dated and signed by Ms Dondolo’s attorneys was served on the Minister and the NDPP, care of the state attorney, on 20 September 2021. The notice required the defendants *“to deliver its plea within 5 (five) days upon receipt of service of this notice of bar, failing which the Defendant shall be barred from delivering any other subsequent pleadings.”*

The ‘first’ plea

18. On account of a clerical error by the typist of the responsible employee of the state attorney (Busani Mbomvu), the plea of the Minister and the NDPP was served on 27 September 2021 on an unrelated firm of attorneys whose office is in the same building as that of the attorneys for Ms Dondolo. Thus, the plea was delivered just in time but to the wrong place.
19. On 30 September 2021 Ms Dondolo’s attorneys served on the state attorney and filed with the registrar of the court a notice requesting that the matter be set down for default judgment. The notice outlined the procedural events recorded in paragraphs 10, 13 to 15 and 17 above but stated that *“till to date the defendant has not filed its plea”* and *“the defendants till to date have not served and filed its plea”*.

20. A (first) notice of set down of the matter for default judgment on 18 January 2022 was served on the state attorney on 11 October 2021. It seems to have been removed from the roll due to an administrative error in enrolment.
21. A second notice of set down of the matter for default judgment on 20 April 2022 was served on the state attorney on 11 January 2022. It seems also to have been removed from the roll due to an administrative error in enrolment.
22. When Mr Mbomvu discovered the error in delivery of the plea, he called and spoke to Ms Morwasehla of Ms Dondolo's attorneys on 18 or 19 April 2022, who advised that a plea had not been received. It is disputed on the affidavits whether Ms Morwasehla added that, if they wished to avoid default judgment, the Minister and the NDPP would need to approach the court to uplift the bar.

The 'second' plea

23. On 19 April 2022 the state attorney emailed to the attorneys for Ms Dondolo "*the attached plea that was served on the 27 [September] 2021.*" The email contains the following explanation and request:

"Kindly note that our typist made an error by putting the wrong address on our plea as the results of that it was served to the wrong address

Note further that the attached plea will be served again by had to your office

You are kindly requested to remove the matter from the role for the default judgment so that we can proceed with this matter and finalise it expeditiously and amicable”.

24. On 20 April 2022 the state attorney hand-delivered to Ms Dondolo’s attorneys the Minister’s (and presumably also the NDPP’s) (special and general) plea to the particulars of claim of Ms Dondolo.

25. The first version of the plea contained in the record (albeit not in this order) – seemingly that emailed per paragraph 23 above – appears to comprise:

25.1. a special plea on original pages 1 and 2;

25.2. a general plea beginning on original page 3;

25.3. the general plea ending on original page 4, with that fourth page being dated 20 September 2021 and signed for the state attorney; and

25.4. an original page 5 bearing the incorrect details of Ms Dondolo’s attorneys and no indication of the plea’s service at their office.

26. The second version of the plea contained in the record (albeit not in this order) – seemingly that hand-delivered per paragraph 24 above – appears to comprise:

26.1. a special plea on original pages 1 and 2;

- 26.2. a general plea beginning on original page 3;
- 26.3. the general plea ending on replacement page 4, with that fourth page being dated 19 April 2022 and signed for the state attorney; and
- 26.4. a replacement page 5 bearing the correct details of Ms Dondolo's attorneys and confirmation of the plea's service at their office.
27. In both versions of the plea, the Minister (and presumably also the NDPP) admit the factual averments pleaded in respect of Mr Dondolo's arrest and prosecution; but:
- 27.1. contend for non-compliance with the provisions of the Act; and
- 27.2. deny that Ms Dondolo suffered damages on account of any unlawful arrest and/or malicious prosecution.
28. On 21 or 22 April 2022 Ms Dondolo's attorneys wrote to the state attorney in response to the plea served on their office on 20 April 2022. Paragraphs 2, 3, 4 and 6 of the letter advises as follows:

"Kindly take notice that our office served a notice of bar on 20 September 2021 to your office, and you made mention to the writer herein that the defendant's plea is ready for service, but unfortunately it was never served to our office. and neither was it filed on Caselines.

In your email you stated that the plea was served to the wrong firm on 27 August 2021, and that cannot be accurate because the date of signature on the plea is 20 September 2021, and the date of receipt reflected by the other firm's stamp is 27 September 2021.

Our office was served with the said plea by email on 19 April 2022 and also by hand on 20 April 2022. The served pleadings reflect different dates of signatory, and in both dates that our office and the wrong firm was served the defendant had already been barred from filing any pleading thereof.

...

Therefore, on the above premises, please be advised that the plaintiff does not acknowledge and/or accept the service of the pleadings served, and the defendant must first make an application to court for an order granting the defendant an extended period to serve its pleadings."

The default judgment application

29. According to Ms Dondolo, a further telephonic discussion along the lines of that mentioned in paragraph 22 above took place on 13 May 2022.
30. Inexplicably, she submits, the Minister and the NDPP did not approach the court to uplift the bar and avoid default judgment. Nor were they represented at the hearing on 31 May 2022.
31. Meanwhile, it seems that in mid-May 2022 the office of the state attorney embarked on a procurement process aimed at engaging the services of counsel to act on behalf of the Minister and the NDPP.

32. A third notice of set down of the matter for default judgment on 31 May 2022 was served on the state attorney on 19 May 2022.

33. On 25 May 2022 counsel for Ms Dondolo uploaded on CaseLines a practice note in support of an application for default judgment set down for hearing on the court's unopposed motion roll of 31 May 2022. Paragraph 11 records the following:

"The Defendants was served with the second notice of bar on 20th September 2021, and indicated that the plea will be served, but it was never served to the plaintiff neither filed on Caselines.

The Plaintiff did not receive the plea and set the matter down for default judgment on 17 of January 2022, however the matter was never placed on the roll due to the mixed up of the dates given by the Registrar and was thereafter set down for hearing on 20 April 2022.

On or about 18 April 2022, the defendant's representative called to enquire on why the matter is set down for hearing as they have filed their plea, and it was explained that the plaintiff never received the said plea. Thereafter sent the plea by email on the day.

The defendant served the plea to the wrong attorneys, and never filed it on Caselines. If the defendant had filed, the plea on caselines after service the Plaintiff would have been notified of it.

On 20 April the matter was missed from the roll, and it was then set down for the current date of 31 May 2022.

On 20 April 2022 the defendant served again the plea by hand. In all instances the Defendant served the plea without first obtaining a court order to uplift the notice of bar and/or receiving indulgence from the plaintiff, of which it was

explained to the defendant that they need to first make an application to court in order to serve and file its plea.

The defendant has been invited on Caselines in all instances and has been possibly receiving notifications of the in and out uploads on caselines but yet with no communication."

34. I return in due course to whether the practice note provided an adequate disclosure of the plea-related facts referred to in paragraphs 18, 23, 24 and 27 above, including that the plea:

34.1. contends for non-compliance with the provisions of the Act in that the section 3 notice was delivered outside the prescribed six-month period and more than 12 months after the acquittal completed her cause of action; and

34.2. denies that Ms Dondolo suffered damages on account of any unlawful arrest and/or malicious prosecution.

35. It is not pertinently disputed in the rescission application that, by the end of May 2022, neither the exchange of correspondence quoted in paragraphs 23 and 28 above nor the plea itself had been uploaded on Caselines or included in the bundle of papers that served before the default judgment court.

36. Hence that court would have been aware that a plea had been delivered just in time but to the wrong place; but the court would not have known that the plea

denies that Ms Dondolo complied with the provisions of the Act and/or suffered damages on account of any unlawful arrest and/or malicious prosecution.

The default judgment order

37. As appears from an order date-stamped 08 June 2022, the court ordered on 31 May 2022 that Ms Dondolo be paid the sum of R180,000 in terms of claim 1 and R280,000 in terms of claim 2 together with interest thereon and costs of suit. The order does not state whether the claimed sums and consequential amounts are to be paid by the Minister, the NDPP or both the Minister and the NDPP.
38. The state attorney engaged counsel on 06 or 08 June 2022 and only became aware of the order on 01 July 2022, when Thabani Mpulo assumed responsibility for the matter after Mr Mbomvu was admitted to hospital on 22 June 2022.

The rescission application

39. A rescission application in terms of rule 42(1)(a) *alternatively* rule 31(2)(b) was initiated by notice of motion issued on 19 or 21 July 2022, within the 20-day time period specified in the latter rule. The Minister and the NDPP seek an order setting aside the default judgment order granted on 31 May 2022 and, in the event of opposition, directing Ms Dondolo to pay the costs of the application on the attorney and client scale. The application is supported by a founding affidavit deposed to by Mr Mpulo on 21 July 2022. The contentions in the affidavit include that:

- 39.1. the order is null and void in that it does not state whether the claimed sums and consequential amounts are to be paid by the Minister, the NDPP or both the Minister and the NDPP;
- 39.2. it is averred in the particulars of claim that Ms Dondolo complied with the provisions of the Act whereas the section 3 notice was delivered outside the prescribed six-month period and more than 12 months after the acquittal completed her cause of action, a default for which condonation was and is not sought;
- 39.3. the rescission application is brought in good faith: the delay and error in delivery of the plea are explained on behalf of the Minister and the NDPP and Ms Dondolo is not prejudiced by either default; and
- 39.4. the Minister and the NDPP have *bona fide* defences to Ms Dondolo's claims.
40. On 25 July 2022 Ms Dondolo's attorneys delivered a notice of intention to oppose the rescission application.

The variation application

41. On 16 and 17 August 2022 Ms Dondolo's attorneys delivered, by email and thereafter by hand, her:

- 41.1. answering affidavit in the rescission application, which takes the point that, despite the discussions between the parties' attorneys in April and May 2022, the Minister and the NDPP did not approach the court to uplift the bar and avoid default judgment. Nor were they represented at the hearing on 31 May 2022; as well as
- 41.2. notice of motion and founding affidavit in a counter-application in terms of rule 42(1)(b) for an order varying the order of 31 May 2022 by the insertion of words intended to clarify that the claimed sums and consequential amounts are to be paid by the Minister *alternatively* the Minister *and* the NDPP. Ms Dondolo deposed to a founding affidavit on 16 August 2022 in support of the variation application. It submits that such a variation would be consistent with the relief sought in the particulars of claim and correct a typographical omission in the draft order presented to the court.
42. Mr Mpulo deposed to a replying affidavit in the rescission application and an answering affidavit in the variation application on 07 September 2022. The latter application is opposed on grounds including that:
- 42.1. the section 3 notice was delivered outside the prescribed six-month period and more than 12 months after the acquittal completed her cause of action, a default for which condonation was and is not sought; and

42.2. there is no cause of action or legal basis for the “[c]osts of order” and “[i]nterest on the taxed costs” relief.

43. A replying affidavit in the variation application was deposed to by Ms Dondolo on 22 September 2022. It joins issue with the contentions of the Minister and the NDPP.

44. Heads of argument and a practice note on behalf of the Minister and the NDPP were delivered on 02 February and 18 April 2023. For the reasons summarised in paragraph 42 above, it is submitted that the order should be:

44.1. rescinded on the basis that it was erroneously sought and/or granted in the absence of the Minister and the NDPP, as contemplated in rule 42(1)(a), in that the default judgment court was unaware of Ms Dondolo’s non-compliance with the provisions of the Act, a fact that, had it been known to the court, would have precluded the grant of the order; *alternatively*

44.2. set aside on the basis of good cause shown, as contemplated in rule 31(2)(b), in that there is a reasonable explanation for the default in delivery of their plea and *bona fide* defences to Ms Dondolo’s claims that enjoy *prima facie* prospects of success, including that the default judgment court was not presented with oral or affidavit evidence in support of her alleged unliquidated damages as required by rule 31(2)(a).

45. Heads of argument and a practice note on behalf of Ms Dondolo were delivered on 08 February and 05 April 2023. The submissions in respect of the rescission application include that:

45.1. the notice of motion is non-compliant with rule 6(5)(b)(iii) because it fails to specify a date on which the application would be heard in the absence of opposition and thus breaches her constitutional right to be heard; and

45.2. the Minister and NDPP do not meet the requirements of rule 42(1)(a) (or the common law) because their failures to uplift the bar and be represented at the hearing amount to wilful default on their part.

46. In response to a directive issued by this court, counsel for the parties delivered a joint practice note in advance of the hearing on 31 May 2023.

GENERAL PRINCIPLES

Rule 42(1)(a)

47. Rule 42(1)(a) entitles a court to rescind or vary a judgment erroneously sought or granted in the absence of an affected party.

48. A party seeking to rely on the rule need not show good cause.¹ It must however show that, but for the contended-for error, the court hearing the default judgment application would not have granted the order.² The error must thus be something that the court was not aware of, which, had the court been aware of, would have precluded the grant of the order.
49. In *Colyn*³ the Supreme Court of Appeal did not consider a summary judgment order to have been erroneously sought or granted in circumstances where no opposition was noted due to the application's not being brought to the attention of the defendant or his attorney. The grant of summary judgment was due to the defendant's failure to oppose rather any error or irregularity in process.
50. The same approach was adopted by the SCA in *Lodhi*.⁴
51. A pivotal question in this matter is thus whether Ms Dondolo was entitled to the default judgment or whether there was a fact, existing at the time, that would have precluded the grant of judgment had the court been aware of it.

¹ *Rossitter and Others v Nedbank Ltd* (96/2014) [2015] ZASCA 196 (01 December 2015) [16]

² *Daniel v President of the Republic of South Africa and Another* (CCT 34/13) [2013] ZACC 24 (27 June 2013) [6]

³ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* [2003] 2 All SA 113 (SCA) [5]-[10]

⁴ *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) [25]-[28]

52. In *Kgomo*⁵ the court rescinded a default judgment on the basis that a bank had failed to comply with the notice requirements of section 129(1) of the National Credit Act (NCA), in that it had dispatched a notice to an incorrect address. The court noted that, while the error was apparent from the record (through a comparison of addresses), it is not necessary for purposes of rule 42(1)(a) that the error be apparent from the record.⁶ The court found that, absent compliance with sections 129(1) and 130(1)(a) of the NCA, the order was “*erroneously sought*”. The court was required, in terms of section 130(4)(b)(i) and (ii), to adjourn the matter and direct steps to be taken by the bank before the matter could resume. The order was therefore also “*erroneously granted*”.⁷

Rule 31(2)(b)

53. Rule 31(2)(b) entitles a defendant, against which default judgment for a claim (other than a debt or liquidated demand) is granted due to the defendant’s failure to deliver a notice of intention to defend or a plea, within 20 days of acquiring knowledge of the judgment, to apply for it to be set aside. The court may, on “*good cause shown*”, set aside the judgment on such terms as it deems fit.
54. Good cause is generally shown by: (i) providing a reasonable explanation for the default; (ii) demonstrating that the rescission sought is *bona fide* and not merely to

⁵ *Kgomo and Another v Standard Bank of South Africa and Others* 2016 (2) SA 184 (GP) [35]-[55]

⁶ *Kgomo supra* [56]

⁷ *Id*

delay the plaintiff's claim; and (iii) showing a *bona fide* defence to the claim that *prima facie* has some prospect of success, i.e. the existence of a triable issue.⁸

THE ISSUES

Should the rescission application be granted?

55. Ms Dondolo's point *in limine* is that the notice of motion in the rescission application is non-compliant with rule 6(5)(b)(iii) because it fails to specify a date on which the application would be heard in the absence of opposition and thus breaches her constitutional right to be heard. But the relief sought by the Minister and the NDPP is opposed and so the omission of an unopposed hearing date is irrelevant. In any event, since there is no prejudice to Ms Dondolo, I condone any non-compliance with rule 6(5)(b)(iii).

56. The Minister and the NDPP submit *in limine* that the order is null and void in that it does not state whether the claimed sums and consequential amounts are to be paid by either or both of them. Whilst it is correct that the order does not specify whether the claims were to be paid by the Minister or the Minister and the NDPP, the context would probably suffice to clarify that the Minister was liable for claim 1 whilst the NDPP was liable for claim 2. However, since I am minded to grant the

⁸ *EH Hassim Hardware (Pty) Ltd v Fab Tanks CC* (1129/2016) [2017] ZASCA 145 (13 October 2017) [12]; *Colyn supra* [11]

rescission application on its merits, it is unnecessary to decide whether the order is null and void.

57. Ms Dondolo submits that the rule 42(1)(a) rescission application is meritless because the Minister and the NDPP disclose no *bona fide* defence to either claim that enjoys *prima facie* prospects of success. However, what the Minister and the NDPP say in paragraphs 61 to 65 of the founding affidavit about having *bona fide* defences to the claims is not answered in Ms Dondolo's answering affidavit. In any event, the denials that she complied with the provisions of the Act and/or suffered damages on account of any unlawful arrest and/or malicious prosecution – coupled with the denials of unlawfulness and maliciousness – are not obviously without merit.
58. According to Ms Dondolo, the delays on behalf of the Minister and the NDPP between receiving notice of set down for default judgment on 11 October 2021 and contacting her attorneys on 18 or 19 April 2022 or seeking to engage the services of counsel in mid-May 2022 are unexplained and inexcusable; hence they do not show good cause as required by rule 31(2)(b). She argues further that the Minister and the NDPP were aware of the default judgment application and should have been represented at the hearing. There is force to these submissions, in my view. In particular, the state attorney should have displayed greater vigilance and diligence in attending to the matter. But I am not convinced that its missteps are attributable to the Minister and the NDPP or should impact the public purse without trial.

59. It was argued on behalf of Ms Dondolo that the default judgment court was aware of the irregularly served plea of the Minister and the NDPP. That is so. But that court was in possession of paragraph 1.4 of the particulars of claim, which alleges compliance with the provisions of the Act, yet unaware that the plea denies that Ms Dondolo complied with the provisions of the Act and/or suffered damages on account of any unlawful arrest and/or malicious prosecution.
60. Finally, Ms Dondolo argues that the court's application of mind is evidenced by the fact that the order granted payment of lesser amounts than those claimed in the particulars of claim. Again, that is so. But the default judgment court was not presented with oral or affidavit evidence in support of her alleged unliquidated damages as required by rule 31(2)(a).
61. Whether the rescission application is tested against the requirements of rule 42(1)(a) or rule 31(2)(b), I consider the combination of:
- 61.1. the non-disclosure of the contents of the plea (that the Minister and the NDPP deny that Ms Dondolo complied with the provisions of the Act and/or suffered damages on account of any unlawful arrest and/or malicious prosecution); and
- 61.2. the absence of evidence in support of damages claimed by Ms Dondolo
- sufficient to have the order rescinded or set aside.

62. In the result, the rescission application succeeds.

Should the variation application be granted?

63. Had I dismissed the rescission application, I would have been minded to grant the variation application; although I would have been concerned about the imprecision of the wording proposed to be inserted into the order. As proposed to be varied, it would have remained uncertain whether the claimed sums and consequential amounts were to be paid by the Minister or the Minister and the NDPP. And there appears *prima facie* to be force to the submissions that:

63.1. the NDPP could not be held liable for claim 1 since his office is not responsible for the arrest of Ms Dondolo; and

63.2. the Minister could not be held liable for claim 2 since his office is not responsible for the prosecution of Ms Dondolo.

64. Be that as it may, given the success of the rescission application, the variation application falls away and fails.

What order should be granted in respect of costs?

65. It is submitted on behalf of the Minister and the NDPP that this court should grant the rescission application and dismiss the variation application with costs on the

attorney and own client scale. The basis for the submission is that Ms Dondolo was unreasonable in refusing to agree to the upliftment of the bar and persisting with a default judgment application that was irregular and meritless.

66. By contrast, it is submitted on behalf of Ms Dondolo that this court should dismiss the rescission application and grant the variation application with costs on a joint and several basis, on the basis that the litigation was caused by the failures on the part of the Minister and NDPP to uplift the bar and be represented at the hearing.

67. In my view, neither side is blameless in the conduct of the litigation. The Minister and the NDPP should have taken effective and timely steps to uplift the bar and, having failed to do so, to be represented at the hearing of the default judgment application. Even if minded not to agree to the upliftment of the bar, Ms Dondolo should have disclosed to the court the plea-related facts referred to and set out in paragraph 34 above. The intransigent attitudes of the parties and their attorneys necessitated and protracted opposed litigation that could and should have been avoided.

68. I consider that the parties should bear their own costs of the applications.

The outcome and order

69. For the reasons set out above, I consider that the rescission application should be granted and the variation application should accordingly be dismissed. In the

circumstances of the case, I do not regard either side as deserving of the costs of the litigation.

70. In the circumstances, I grant the following order:

70.1. The rescission application in terms of rule 42(1)(a) *alternatively* rule 31(2)(b) launched by the applicants (the defendants) on 19 or 21 July 2022 is granted.

70.2. The default judgment order granted by the court (per Senyatsi J) on 31 May 2022 is set aside.

70.3. The variation counter-application in terms of rule 42(1)(b) launched by the respondent (the plaintiff) on 16 or 17 August 2022 is dismissed.

70.4. The parties are to bear their own costs of the rescission and variation applications.

A handwritten signature in black ink, appearing to read 'P. Pearse', is written over a horizontal line.

PEARSE AJ

This judgment is handed down electronically by uploading it to the file of this matter on CaseLines. It will also be emailed to the parties or their legal representatives. The date of delivery of this judgment is 12 June 2023.

Counsel for Applicant:	Advocate M Mavhungu
Instructed By:	Office of State Attorney (Johannesburg)
Counsel for Respondent:	Attorney N Morwasehla
Instructed By:	Morwasehla Attorneys
Date of Hearing:	31 May 2023
Date of Judgment:	12 June 2023