

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

CASE NO: 13227/2017

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 12 /01/2024

SIGNATURE

In the matter between

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

Applicant

and

T[...] M[...]

Respondent

JUDGMENT

WANLESS AJ

Introduction

[1] In this matter the Minister of Justice and Correctional Services (*“the Applicant”*) seeks the rescission of an order of this Court granted on the 25th of April 2022 (*“the order”*) in favour of

one T[...] M[...], an adult male (“*the Respondent*”). The order was granted by default and pursuant to the defence of the Applicant having been struck out by this Court.

[2] The Applicant originally sought the rescission of the order in terms of the common law, *alternatively*, the provisions of subrule 42(1)(a). At the hearing of this application, Counsel for the Applicant specifically abandoned any reliance whatsoever on subrule 42(1)(a). In the action instituted by the Respondent against the Applicant the Respondent claimed damages in the total sum of R1 000 000.00 based on general damages for, *inter alia*, pain, suffering, and emotional stress as a result of two (2) rapes suffered whilst in custody and in the protective care of the Applicant during March 2016 and January 2017 at Johannesburg Correctional Centre, Medium B. It was alleged in the Respondent’s Particulars of Claim in the action that, as a direct result of the aforesaid rapes, the Respondent had contracted the HIV virus. Arising therefrom, this Court (Malindi J) awarded the Respondent general damages, by default, in the sum of R750 000.00.

[3] It was always the intention of this Court to deliver a written judgment in this matter. In light of, *inter alia*, the onerous workload under which this Court has been placed, this has simply not been possible without incurring further delays in the handing down thereof. In the premises, this judgment is being delivered *ex tempore*. Once transcribed, it will be “converted”, or more correctly “transformed”, into a written judgment and provided to the parties. In this manner, neither the quality of the judgment nor the time in which the judgment is delivered will be compromised. This Court is indebted to the transcription services of this Division who generally provide transcripts of judgments emanating from this Court within a short period of time following the delivery thereof on an *ex-tempore* basis.

The law

[4] It is trite that a judgment cannot be allowed to stand where same has been obtained by fraud.¹ Moreover, a judgment should be set aside where the facts presented to the Court diverged from the truth to such an extent that the Court would have given a different judgment had it known the true state of affairs.²

The facts

[5] On the application papers before this Court, it was common cause that:

5.1 whilst incarcerated and under the care of the Applicant during 2011 the Respondent underwent a test for HIV at Mangaung Correctional Services Health Centre and tested positive;

5.2 the Respondent's positive HIV status was confirmed by the fact that during 2012 he received antiretroviral treatment from the Respondent whilst incarcerated and in the Respondent's care;

5.3 in the premises, the Respondent could not have contracted HIV from the alleged rapes which took place during 2016/2017 as set out earlier in this judgment.

[6] These facts are common cause insofar as the averments made in the Applicant's Founding Affidavit and the documents put up as annexures in support thereof are only dealt with by a single bald denial by the Respondent in his Answering Affidavit. In the

¹ *Schierhout v Union Government* 1927 AD 94 at 98

² *Makings v Makings* 1958 (1) SA 338 (AD)

premises, there are no genuine or *bona fide* disputes of fact on these application papers in respect of the foregoing. In fact, the Respondent does not deal with these averments at all but, rather, concentrates all of his efforts on the fact that the Applicant's defence was struck out as a result of the Applicant's failure to make timeous discovery.

Conclusion

[7] From the foregoing, it is abundantly clear that the order of this Court cannot stand and must be rescinded. When it was granted (by default) the true facts were clearly not placed before Malindi J. The Respondent must have known that he was HIV positive prior to the alleged rapes upon which his entire cause of action is premised. As such, he has perpetrated a fraud and it must follow that the application should be granted, with costs.

Costs

[8] It is trite that costs fall within the general discretion of this Court. In light of, *inter alia*, the nature of the manner in which the order was obtained; the persistence of the Respondent in opposing the relief sought despite the opportunity of simply agreeing thereto and the fact that this Court has been burdened therewith (to the detriment of other litigants) it is the opinion of this Court that it should, in exercising that discretion, order the Respondent to pay costs on a punitive scale (as sought by the Applicant).

Order

[9] This Court makes the following order:

1. The order granted under case number 2017/13227 on 25 April

2022 by Malindi J is hereby rescinded and set aside.

2. The Respondent (T[...] M[...]) is to pay the costs of this application on the scale of attorney and client.

B.C. WANLESS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date of hearing: 30 August 2023

Date of *ex tempore* judgment: 19 December 2023

Date of revised (written) judgment: 12 January 2024

Appearances

On behalf of the Applicant:	Adv. M. Mulovhedzi
Instructed by:	Suping (PM) Attorneys
On behalf of the Respondent:	Adv. R. Poee
Instructed by:	State Attorney