



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

2021-02-12

DATE

J Mabuse

SIGNATURE

CASE NUMBER: 22758/11

DATE: 12 February 2021

MINISTER OF POLICE

Applicant

V

NM NKANYANI

Respondent

JUDGMENT

MABUSE J

[1] The applicant seeks an order in the following terms:

- "1. That the order striking out the Applicant's defence granted by honourable Judge Collis on the 2nd day of March 2019 be and is hereby rescinded and set aside.
2. That the default judgment on merits granted in favour of the Respondent by the honourable Acting Judge Bam on the 7th of August 2019 be and is hereby rescinded and set aside.

3. *That the Applicant's defence contained in the plea dated the 4th of November 2011 duly served and filed, be and is hereby reinstated.*
4. *That the Respondent be ordered to pay the costs of this application only in the event of opposition.*
5. *Further and/or alternative relief."*

- [2] This application, brought by Nokuthula Suzan Mahlangu in the name of the Minister of Police, is opposed by the Respondent. The Applicant is the First Defendant in the main action from which the current interlocutory application has its genesis. He, and he alone, is involved in this application.
- [3] The Respondent instituted legal proceedings for damages arising from an alleged defamation against the Applicant, the Second and Third Defendants in the main action in April 2011. According to the summons, the Applicant's liability is allegedly based on vicarious liability. The alleged perpetrators of the defamation in the main action are the Second and Third Defendants. At all material times they were employees of the Applicant. The Respondent is also an employee of the Applicant.
- [4] Immediately after service of a copy of the summons on the Defendants, the Applicant, the Second Defendant and the Third Defendant entered an appearance to defend. It is apparent on the Notice of Intention to Defend that the Applicant and other Defendants were represented by the State Attorney, Pretoria.
- [5] The three Defendants delivered a composite plea in terms of which all of them denied liability. In fact, the Second and Third Defendants denied publishing any defamatory words against the Respondent. The Applicant denied in the plea that he is vicariously liable for the alleged defamation, if it is proved that the Second and Third Defendants did publish the alleged defamatory words with an intention to injure the reputation of the Respondent.

- [6] It is clear from the particulars of claim that the Respondent's case is that the said defamatory words were allegedly uttered by the Second and Third Defendants. It is the Respondent's case, furthermore, that the Applicant's liability is predicated on the allegation that at the time they uttered the alleged defamatory words, the Second and Third Defendants were acting within their course and scope of their employment with the Applicant. In their plea, the Defendants denied that the Second and Third Defendants ever uttered those words. The pleadings were closed after the Defendants had delivered their plea.
- [7] Pre-trial meetings were held and eventually the matter was set down for hearing on 19 August 2013. The parties subpoenaed their witnesses for that purpose.
- [8] On 6 June 2013 the Respondent delivered on the Applicant a notice in terms of Rule 35(3) for the discovery. In this Rule 35(3) notice, the Respondent required the Applicant to discover the following documents:
- 8.1 Content of the disciplinary investigation file containing the Second and Third Defendants;
 - 8.2 Investigation file with reference number S32/4/2(2)(667);
 - 8.3 Application, notes, questionnaire and file content applicable and used during the Plaintiff's top secret clearance vetting process.
- It is the Respondent's case that the application for further discovery was made on 30 July 2013. The Applicant was not present. The Applicant has failed to disclose this in his affidavit.
- [9] The Applicant failed to comply fully with the Respondent's notice in terms of Rule 35(3) in that he failed to furnish his supplementary discovery affidavit in respect of the investigation file with reference number S32/4/2(2)(667). As a result of such failure the Respondent launched an application to compel under Rule 35(7). The Applicant opposed it. The application was heard on 30 July 2013. An order compelling all the three Defendants to

discover that document was granted. Because of the interlocutory application, the trial of the matter was removed from the roll.

- [10] Seemingly the Defendant failed to comply with the court order. I must pause here and remark that no reasonable explanation was furnished by the Applicant failed to comply with the court order or to ask the Respondent for an extension of time or to approach the Court to extend the period within which to comply with the court order. The Respondent then launched an application in terms of Rule 35(7) and sought an order in terms of which the Defendant's defence was struck out due to the Applicant's failure to comply with the court order.
- [11] This notice in terms of Rule 35(7) was served on the Defendant's attorneys on 23 August 2013 and was to be heard on 22 October 2013. The Defendant filed a notice to oppose the application in terms of Rule 35(7). On 3 February 2014, the Defendant's attorneys delivered the Defendant's opposing affidavit. The said application in terms of Rule 35(7) was enrolled for hearing on the opposed roll of 20 April 2014. But on 8 April 2014 the Respondent's attorney removed the application from the roll of 10 April 2014. The notice to oppose the Respondent's Rule 35(7) application was only filed on 3 February 2014. It is not known from the papers what happened on 22 October 2013 and why the notice to oppose the Respondent's application in terms of Rule 35(7) was only filed on 3 February 2014.
- [12] The application was set down for hearing on 20 April 2014. The Applicant complains about two things, firstly, that the Respondent's attorneys furnished no reason whatsoever why a matter that had been properly enrolled for 20 April 2014 was removed from the roll and secondly, why the Respondent tendered no costs. The contention by the Applicant that the Respondent did not inform him why the matter was removed from the roll appears to have no merit. The Applicant was informed by the Respondent's new attorneys of record, Messrs van Andel-Brink in an email dated 4 April 2014, that *"we intend removing the matter from the roll as none of the parties have (sic) filed heads of argument"*.

[13] The matter was on the opposed roll of 20 April 2014. In terms of the practice manual of Gauteng Division, heads of argument are required and must be filed in all the opposed applications. The matter would not have been heard by any Judge if no heads of argument were filed. So, the Respondent's attorneys were correct in removing the matter from the roll. With regard to costs, neither of the parties was entitled to any order of costs since they have both failed to comply with the practice manual. At any rate, nothing turns on this point.

[14] According to the Applicant, the Respondent's attorney set the matter down for hearing on 10 November 2014 only to remove it again from the roll. The Defendant was, on this occasion, ordered to pay the Applicant's costs. The Respondent disputes this allegation. She denies that the application was enrolled again for hearing on 10 November 2014 and furthermore that it was removed from the roll. 'RA7' to the founding affidavit states that:

"This case which was on the roll for trial on 10 November 2014".

Quite clearly it was the case, the main case, that was removed from the roll and not the Rule 35(7) application. It is clear that the legal officer of the Applicants had incorrectly conflated the main case and the application in terms of Rule 35(7) and has thereby misstated the facts. Again, nothing turns on this misstatement of facts. Again, the application was re-enrolled on the unopposed roll of 21 November 2014 but was immediately thereafter removed from the roll by notice of removal dated 12 November 2014 which was delivered on 18 November 2014. In a telefax dated 13 November 2014 the Respondent's attorneys had furnished reasons why the application in terms of Rule 35(7) was removed from the roll. That reason was that neither counsel nor attorney would be available on 21 November 2014. There is amongst the papers a court order dated 10 November 2014 by which Ledwaba DJP removed the matter from the roll and ordered the Respondents, as Plaintiffs, to pay the Defendants wasted costs.

[15] After the notice of removal of 12 November 2014, there was a lull of 4 years during which nothing took place. At the end of that period of 4 years, the Respondent's attorney served

the Applicant's attorneys with the heads of argument. The Respondent denies that there was a lull of 4 years and points to the fact that on 9 June 2016 the Applicant's attorneys were served by the then Respondent's attorneys with a notice of withdrawal as attorneys of record.

[16] On 18 December 2014 the Respondent served the State Attorney with a notice of set down in terms of which the Respondent's application in terms of Rule 35(7) would be heard on 14 March 2019, a long time after the attorney, who had been handling the matter in the State Attorney's office had left the State Attorney's employment. The matter had to be assigned to another attorney.

[17] Upon perusing the file, the new attorney, whose names have not been disclosed, noticed that indeed the Applicant had not complied with the court order. In the opposing affidavit furnished by the Second and Third Applicants the new attorney had observed that both of them had stated that they were not in possession of the documents the Court had ordered them to furnish the Respondents with but that such documents were in the custody of the First Applicant. On this basis they insisted that their defence as contained in the plea could not be struck out. The Applicant's attorneys submitted that the said documents sought were classified documents and had been classified and which required reclassification order for them to be available.

[18] On 1 March 2019 the Applicant's attorneys complied with both the Respondent's request in terms of Rule 35(3) and the court order of 13 August 2013 by delivering a further discovery affidavit. A copy of such supplementary discovery affidavit is annexed to the founding affidavit as 'RA10'. This affidavit was deposed to by a certain Mudau Isaac Tladi, a legal officer in the office of the State Attorney. He had stated that the facts stated in that affidavit were within his personal knowledge and that he had been duly authorised to make the affidavit on behalf of the Applicant. He had further stated that the Defendants were not in

possession of the documents mentioned hereunder and did not know their whereabouts.

Those documents were:

18.1 the content of the disciplinary investigation file against the Second and Third Defendants;

18.2 the investigation file reference number S32/4/2(2)(667);

18.3 application, notes, questionnaire and file containing the application and used during the Plaintiff's top secret clearance vetting process.

[19] The Applicant's legal officer contends that for the reasons disclosed hereunder the Court order of Collis J, dated 7 May 2019 and of the Acting Judge Bam of 9 March 2019 should be rescinded and set aside for having been erroneously sought and erroneously granted. Despite the fact that the Applicant had complied with the order of Sithole J of 13 February 2013, the Respondent proceeded nevertheless to move for an order to strike out the Applicant's defence on 7 March 2014. The Respondent had alleged that the Applicant had failed to comply with the order of Sithole J.

[20] The Respondent accepted the affidavit and did not complain. The Respondent contends that the Applicant did not disclose this aspect in the discovery affidavit. He never claimed that such documents were justified.

20.1 This affidavit of Mudau Isaac Tladi, annexure 'RA10', contradicted the following affidavit or was incomplete. In paragraph 11 of the founding affidavit a submission was made by the deponent that *"the documents the Respondent sought were classified documents for which in order for them to be availed they required an internal process for declassification."* This fact was not included in the affidavit of Mudau Isaac Tladi. No explanation was furnished by the said attorney why the explanation was not contained in the affidavit.

20.2 The Respondent denies that the Applicant had complied with the court order in as much as the affidavit, 'RA10', was not served on the Respondent's attorneys. According to proof of service, the said affidavit was served on 1 March 2019 on DJ

Swanepoel and Associates Inc at 84 Regency Drive, Route 21, Corporate Park, Irene, 0062. This is despite a notice of appointment of attorneys of record served on the applicant's attorneys on 8 April 2014 in which the Respondent's current attorneys were appointed and the Applicants were duly notified thereof.

20.3 It is contended furthermore by the Respondent that even on 7 March 2019, when the Rule 35(7) application came before Court the said affidavit was not even before the Court. The attorneys acting for the Applicant had a duty to ensure that the affidavit was filed with the registrar of the Court.

20.4 Another complaint raised against 'RA10' is that the deponent did not state or indicate of the Applicant and the Defendants who was making the affidavit or on whose behalf was the affidavit made.

20.5 Furthermore, the said affidavit, so it has been contended by the Respondents, was in direct contradiction with the affidavit filed on behalf of the Second and Third Applicants. In the opposing affidavit filed on behalf of the Second and Third Applicants, they had stated clearly that the First Applicant was in possession of the documents requested by the Rule 35(3) notice.

20.6 The Applicant's attorney, having read the answering affidavit of the Respondent and having noticed his arrest**, when and delivered on 4 *** 2014 an affidavit. This was of course done prior to the hearing of the application in terms of Rule 35(7). Seemingly there was a problem with the said affidavit. That problem was drawn to the attention of the Applicant in an email that the Respondent's attorneys sent to the Applicant's attorneys. The said email, referred to the supplementary discovery affidavit, went to enquire as follows:

"It is unclear from the affidavit on behalf of which defendant/respondent affidavit is done.

Kindly clarify."

The Applicant's attorney did not respond to this email.

20.7 Now in the replying affidavit, the Applicant's attorneys have failed to deal with the Respondent's allegation that on 1 March 2019 they delivered the supplementary

discovery affidavit to the attorneys who were not on the roll for the Respondent. They kept quiet about it. They failed to acknowledge or accept that they had made a mistake about it. They failed to apologise for that mistake. Secondly, they failed to explain why they did not respond to the email dated 4 March 2019, annexure 'NMN11', to the opposing affidavit.

20.8 On 5 March 2019, the Respondent's attorneys sent another email to the Applicant's attorneys. Again, they requested clarity the Defendant's attorneys on whose behalf the affidavit of 4 March 2019 was filed. Still the Applicant's attorneys did not respond to the said email, annexure 'NMN12'. The Applicant's attorneys failed not only to respond to 'NMN12' but also to attend to Court, or to make any appearance arrangements for Court on 7 March 2019, or to furnish the Court with any explanation.

20.9 As indicated somewhere above, when the Respondent's application in terms of Rule 35(7) came before Collis J on 7 March 2019, Ms Boucher appeared for the Respondent for the purpose of moving the application. For inexplicable reasons, there was no appearance for the Applicant. This was despite the fact that a notice of set down for the Rule 35(7) application had been served by the Respondent's attorneys on the Applicant's attorneys on 18 December 2018. Therefore, the Applicant's attorneys knew fully well that the application was on the roll; it has not been removed; there was never an intention on the part of the Respondent to remove the application from the roll, that the Applicant's attorneys were never misled or informed that the application would be removed or postponed.

20.10 Despite alleging that he has read the answering affidavit, the Applicant's legal officer failed to explain in his replying affidavit why there was no appearance for the Applicant on 7 March 2019. He regards this important matter as unimportant. The conduct of this legal officer is disappointing.

[21] **WHAT HAPPENED AT COURT ON 7 MARCH 2019**

21.1 The Court had regard to the affidavits that opposed the Rule 35(7) application. It was satisfied that the application had been properly enrolled and that the Applicant's

attorneys were properly notified. It was aware of the opposing affidavit of the Second and Third Respondents. It was explained by Ms Bouwer to the Court that the opposing affidavit was only in respect of the Second and Third Defendants and that no such opposing affidavit was filed in respect of the First Applicant. It was explained furthermore to the Court that the application in terms of Rule 35(7) was only in respect of the Applicant. No one was present for the Applicant to explain why the Applicant had not complied with the Court order. So, from this point the Court understood that the Applicant did not oppose the Respondents' Rule 35(7) application.

21.2 It was further explained by Ms Bouwer to the Court that there was an attempt by the Applicant to file a supplementary discovery affidavit. That supplementary affidavit was emailed to the Respondent's attorneys on 28 February 2019. It contained an allegation that the Applicant or Defendant was not in possession of the document requested. The problem with the said supplementary affidavit was that it failed to indicate the Defendant on whose behalf it was made. There was no one on behalf of the Applicant to assist the Court or to clarify this issue to the Court.

21.3 The Court observed that the supplementary discovery affidavit that Ms Bouwer referred to was not even in the court file. A copy was handed over to the Court for its perusal. She also informed the Court that that was a copy of the supplementary affidavit that was not served on the Respondent's attorneys but on a certain Swanepoel Attorneys on 1 March 2019.

21.4 The Court also noted that the affidavit by Tladi failed to state that the documents requested in terms of Rule 35(3) or the court order that ordered the Applicant to furnish the Respondents were privileged and that he did not have them in his possession. The Court was aware that in the affidavit it was only stated that they were not in the possession of the Defendants. No one appeared for the Defendants to explain this anomaly. The Court remarked that, as the Rule required a party to indicate the person in whose possession the documents are, to keep quiet about the whereabouts of the documents, is not sufficient. It is tantamount to failure to respond.

21.5 The Court correctly concluded that in the face of failure to comply, a party that had requested to be furnished with the documents was entitled to approach the Court for an order compelling the party that had failed to furnish the documents to do so, has nevertheless confirmed that the Respondent obtained such an order, showed the Court the order and informed the Court that it was served on the Defendant. The Court was informed, furthermore, that after the order had been served, the Defendants had to respond within the period stated therein. In this case, there was no response from the Defendants.

21.6 The Court was satisfied that the outstanding documents were in the possession of the Applicant because the Second and Third Defendants stated so. The Second and Third Defendants tried unsuccessfully to obtain those documents from some of the employees of the First Applicant.

21.7 Furthermore, the Court was satisfied that in their notice to oppose the State Attorney had indicated that it was acting for all the three Defendants.

21.8 The Court also found grounds to reject the affidavit of Tladi. It contained material inconsistencies and furthermore the document was not properly before the Court. Lastly, it had not been filed with the Registrar of the Court, that is why it was not even in the court file.

21.9 The Court was satisfied that the Applicant's attorneys failed to respond to the emails, one dated and sent on 4 March 2019 and the other one dated and sent on 5 March 2019 in which the Respondent sought clarity.

21.10 The Court saw no reason to deny the Respondents the order it sought. It was satisfied that the Respondent had made out a good case for the relief that he sought, and that the Applicant had put up no valid defence against the application. It granted the order accordingly. This Court bemoans the lackadaisical manner in which the State Attorney handled the Applicant's case. The matter was handled slovenly and unprofessionally.

[22] Then on the basis of the order of 7 March 2019, on 7 August 2019 Bam AJ granted judgment on the merits against the Applicant in favour of the Respondent. The quantum of

the Plaintiff's claim was postponed *sine die* and the First Applicant was ordered to pay the wasted costs of the merits of the Defendant's claim on a party-and-party scale.

- [23] The legal officer contends, erroneously so, that the Respondent's legal representatives concealed at the hearing of the Rule 35(7) application on 7 March 2019 that a further discovery affidavit was furnished, although late. According to the legal officer, this fact alone would have prevented the Court from granting the order of 7 March 2019.
- [24] This contention by the legal officer is, as already pointed out, wrong. If anything, it shows that it was made by someone who had not read a copy of the transcript of the proceedings of 7 March 2019. It is clear from the said record that Ms Bouwer had mentioned this supplementary discovery affidavit to the Court and that the Court considered it. Therefore, the allegation by the Applicant's legal officer that the legal representatives of the Respondent failed to disclose to the Court that a supplementary discovery affidavit had been furnished, lacks merit. The legal officer of the Applicant avoided informing the Court how, and to whom the supplementary affidavit was "furnished". This was done deliberately. Secondly, the Applicant's legal officer failed to explain to the Court why there was no appearance for the Applicant at Court on 7 March 2019 and also on 7 August 2019.
- [25] The Applicant's legal officer stated that the default judgment granted by Bam AJ stands to be rescinded and set aside for having been sought erroneously and granted erroneously. At the stage the Respondent applied for the default judgment, the Applicant had no defence against the Respondent's case. I agree with the Respondent that the Applicant had the opportunity to raise his argument in respect of both the order and the judgment but failed to attend Court.
- [26] It is known that a failure to file the necessary documents, like in the instant matter, the supplementary discovery affidavit, should not be used by the parties to grab on the slip of the opposite party. A discretion whether or not to grant default judgment is always for the

Court to exercise judicially. A judicial officer must be sure that the party that is in default is definitely not pursuing his litigation. In deciding or arriving at a decision it is important that the judicial officer have regard to all the documents in the court file; see in this regard **Geyser v Nedbank Ltd; in Re Nedbank Ltd v Keyser 2006 (5) SA 355 (E)** at paragraph 40 the conduct of the defendant upon being served with documents by the plaintiff, i.e. whether he reacts with the immediacy that such documents require and where he fails to do so, whether he furnishes a reasonable explanation for his delay or whether he approaches the other side or the court for an indulgence.

[27] The order of Collis J granted on 7 March 2019 and the judgment of Bam AJ granted on 7 August 2019 were both granted in the absence of the Applicant. They are therefore default judgments. There was no appearance on both occasions for the Applicant. The State Attorney did not deem it necessary to explain why there was no appearance for the Applicant on both occasions.

[28] The basis on which the Applicant seeks to rescind the order of Collis J on 7 March 2019 and the judgment of Bam AJ on 7 August 2019 is that both the order of Collis J and the judgment of Bam AJ were erroneously sought and erroneously granted. The judgment of **Rossiter and Others v Nedbank Ltd (96/2014) [2015] ZASCA 196 (1 December 2015)** paragraph [16] sets out the law governing an application for rescission under Rule 42(1)(a) of the Uniform Rules of Court. In paragraph 16, the Court had the following to say:

“The law governing an application for rescission under uniform rule 42(1)(a) is trite. The Applicant must show that the default judgment or order had been erroneously sought or erroneously granted. If the default judgment was erroneously sought or granted, a Court should without more, grant the order for rescission. It is not necessary for a party to show good cause under the sub-rule. Generally, a judgment is erroneously granted if there existed at the time of its issue, a fact, which the Court was unaware of, which would have precluded the granting of the judgment and which would have induced the Court, if aware of it, not to grant the judgment.”

The test to be applied, therefore, is whether there existed at the time of its issue a fact which the Court was unaware of, which would have precluded the granting of the judgment and which would have induced the Court, if aware of that, not to grant the judgment.

See also **Promedia Drukkers Uitgewers (Edms) Bpk v Kaimowitz and Others 1996 (4) SA 411 CPD** as regards the effect and meaning of Rule 42(1) had the following to say at page 417 G-H:

"Relief will be granted under this rule if there was an irregularity in the proceedings (see De Wet and Others v Western Bank Ltd (supra) at 1031 AD; Tshabalala and Another v Peer 1979 (4) SA 27 T at 30 H to 31 A; Bakhoven Ltd GJ Howes (Pty) Ltd (supra at 471 H); Dawson and Fraser (Pty) Ltd v Havenga Construction (Pty) Ltd 1993 (3) SA 397 (at 399 B-C); if the Court lacked legal competence to have made the order see Afmaram v Singh and if the Court at the time the order was made was unaware of facts which, if known to it, would have precluded the granting of the order."

In my view, there was no irregularity in the proceedings. It is not necessary for an Applicant to show good cause.

[29] At common law a Court has a discretion to grant the rescission of judgment where sufficient cause or good cause has been shown. But it is clear that in principle and in the long-standing practice of our Courts, two essential elements of "sufficient costs" for rescission of a judgment by default must be satisfied namely:

1. that the party seeking relief must present a reasonable and acceptable explanation for his default and;
2. that on the merits such party has a *bona fide* defence which prima facie carries some prospects of success. Such defence must appear *ex facto* the papers.

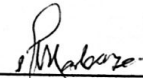
See in this regard **Chetty v Law Society, Transvaal 1985 (2) SA 756 A at 765 B-C**. It is not sufficient if only one of these elements is established.

[30] Now in the instant application the Applicant has failed to explain his default of both 7 March 2019 and 7 August 2019. There exists no valid reason whatsoever why the State Attorney

failed to attend Court on those dates on which Collis J struck the Applicant's defence out. The State Attorney had been notified about the date and the nature of the application that would be made on 7 March 2019. There is no explanation by the State Attorney why there was no representation for the Applicant on the said date. Similarly, there was no representation for the Applicant on 7 August 2019. No explanation has been proffered for such a failure.

[31] The Applicant has not made out a good case for the relief that it seeks. This Court is disinclined to come to his assistance. The following order is accordingly made:

1. **The application is dismissed.**
2. **With regards to costs, the officers of the State Attorney who dealt with this matter are hereby ordered to furnish this Court with reasons why they should not be ordered to pay the costs of the application for rescission in their personal capacity.**
3. **The reasons must be furnished by uploading them within 20 days of this order.**



PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant: Adv K Toma
Instructed by: The State Attorney

Counsel for the Defendant: Adv M Bouwer
Instructed by: Mostert Attorneys

Date on the opposed roll before Mabuse J: 17 November 2020
Date of Judgment: 12 February 2021