

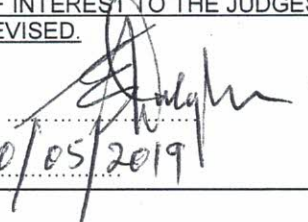
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO: HCAA 09/2018

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|----------------------------------------------------------------------------------------------|------------------------------------------|
| (1)                                                                                          | <u>REPORTABLE: YES/NO</u>                |
| (2)                                                                                          | <u>OF INTEREST TO THE JUDGES: YES/NO</u> |
| (3)                                                                                          | <u>REVISED.</u>                          |
| Signature  |                                          |
| Date <u>10/05/2019</u>                                                                       |                                          |

In the matter between:

**MINISTER OF POLICE**

**APPELLANT**

**and**

**JACOBUS FREDERICK KRITZINGER**

**RESPONDENT**

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## JUDGMENT

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### MAKGOBA JP

[1] This is an appeal against the judgment and order granted by Kgomo J, dismissing with costs the Appellant's application for the rescission the judgment and order granted by MG Phatudi J, dismissing with costs an application brought by the Appellant for the rescission of a default judgment granted in favour of the Respondent against the Appellant by Raulinga J. The appeal to the Full Court of this Division is with leave of the Supreme Court of Appeal after Kgomo J dismissed the Appellant's application for leave to appeal.

[2] For the sake of convenience, the default judgment granted by Raulinga J on 8 September 2014 will hereinafter be referred to as the **default judgment**. The application for rescission before Phatudi J on 10 August 2016 will hereinafter referred to as the **first rescission application** and the application for rescission before Kgomo J on 6 February 2017 will hereinafter be referred to as the **second rescission application**.

- [3] On the 26 June 2013 the Respondent instituted an action for damages against the Appellant in this Court in which the Respondent sought judgment against the Appellant in the amount of R 600 000.00 together with the interest and costs. The Respondent's claim against the Appellant was based on the fact that the Respondent was unlawfully arrested without a warrant by a member of the South African Police Services, acting within the course and scope of his employment as a policeman in the South African Police Services, for being in possession of stolen goods namely copper and aluminum.

The Respondent alleged in the particulars of claim that he was released on bail, seven and half hours after being arrested and the criminal case was provisionally withdrawn against him on the 4 November 2011 when he attended Court.

- [4] On the 4 July 2013 the combined summons was served at 7<sup>th</sup> Floor, Wachthuis, 231 Pretorius Street, Pretoria allegedly being the place of employment of the Appellant upon a certain Ms R A Setlani (Legal Services) as envisaged in terms of Uniform Rule 4(1)(a)(iii).
- [5] On the 25 August 2014 the Respondent filed a request for default judgment with the Registrar of this Court, which application for default

judgment was enrolled for hearing on the 8 September 2014 at 10H00. The Appellant had not entered an appearance to defend the action against him. The Notice of Set Down of the default judgment for the 8 September 2014 was not served on the Appellant but only filed with the Registrar of this Court. On the 8 September 2014 Raulinga J granted the default judgment. Raulinga J did not hear evidence in regard to the quantification of the Respondent's claim against the Appellant and relied on a damages affidavit which had been filed by the Respondent.

[6] On the 26 June 2015 the Appellant instituted the first rescission application. The Respondent opposed the first rescission application on the 1 July 2015 and delivered his answering affidavit on the 17 July 2015. On the 26 May 2016 the Appellant delivered the Notice of Set Down of the rescission application for hearing on the 10 August 2016. On the 10 August 2016 Phatudi J dismissed with costs the first rescission application on the basis that the Appellant was in default by not appearing at the first rescission application.

[7] On the 2<sup>nd</sup> September 2016 the Appellant instituted the second rescission application in terms whereof the Appellant sought an order rescinding and setting aside the first rescission application by Phatudi J

and the default judgment granted by Raulinga J. The second rescission, which was opposed by the Respondent, was enrolled for hearing on 6 February 2017 and after argument was dismissed with costs by Kgomo J.

- [8] The Appellant's application for leave to appeal against the order and judgment of Kgomo J was dismissed with costs by Kgomo J on the 12 May 2017. It is to be noted that the Appellant failed to appear in Court on that day and the dismissal order was granted in default. On the 29 May 2018 the Supreme Court of Appeal granted the Appellant leave to appeal to the Full Court of this Division against the judgment and order of Kgomo J.

### **Issues to be determined**

- [9] The issues to be determined in this appeal are:
- 9.1. Whether Kgomo J erred in dismissing with costs the Appellant's application for the rescission of the judgment and order granted by Phatudi J on 10 August 2016.
  - 9.2. Whether the Appellant was entitled to have the order granted by Phatudi J rescinded in terms of Rule 42(1)(a) or common law.

9.3. Whether the default judgment granted by Raulinga J on 8 September 2014 falls to be rescinded in terms of Rule 42(1)(a) or Rule 31(2)(b).

### **Appeal against judgment and Order of Kgomo J i.e**

#### **Second Rescission**

[10] When Kgomo J dismissed the second rescission application, the learned Judge did not deal with the first rescission application at all. The learned Judge was enjoined to hear and determine the first rescission application, on its merits, and thereafter should have considered the rescission application to set aside the default judgment. The Appellant sought to rescind and set aside the order granted by Phatudi J in the first rescission application in terms of the provisions of Uniform Rule of Court 42(1)(a) and / or the common law.

This second rescission application was set down for hearing on 6 February 2017 and after hearing argument, the second rescission application was dismissed with costs by Kgomo J.

[11] If regard is had to the contents of the judgment by Kgomo J, it is respectfully hard to understand and comprehend the reasons and basis upon which he dismissed the second rescission. Kgomo J made a

finding that the second rescission application and subsequent order granted by Phatudi J was not in the absence of the Appellant and therefore subject to an appeal and not an application for rescission of judgment. This in my view is a misdirection.

[12] If Kgomo J had correctly and properly had regard to the contents of the Appellant's founding and supplementary founding affidavits, it would have been clearly apparent to the learned Judge that when Phatudi J granted the order dismissing the first rescission application, neither the Appellant nor his legal representative were in Court and accordingly the only finding that the learned Judge could have made in this regard was to the effect that the order of Phatudi J had been granted in the absence of the Appellant and his legal representative.

[13] Having made a finding that the order of Phatudi J was made in the presence of the Appellant's legal representative and not in default, Kgomo J made a finding that a rescission application was not the appropriate remedy for the Appellant to file but that the Appellant should have noted an appeal against the order of Phatudi J. The learned Judge erred in this regard. Accordingly the appeal against the judgment and order of Kgomo J should succeed.

### **Appeal against judgment and Order of Phatudi J i.e First rescission**

[14] It is common cause that Phatudi J, when dismissing the first rescission application, did not have regard to nor consider the merits of the first rescission application. It is further common cause that the Respondent's legal representative did not address argument to Phatudi J on the merits of the first rescission application. It is apparent that Phatudi J dismissed the first rescission application due to the fact that neither the Appellant nor his legal representative appeared at the hearing on 10 August 2016. In fact Phatudi J's order was granted in the absence of the Appellant and his legal representative and it therefore constitutes a default judgment. The order was not a final order and in the premises it was not appealable and was capable of being rescinded by the Court that granted it<sup>1</sup>.

[15] The facts upon which the Appellant sought to rescind the order granted by Phatudi J are set out hereunder.

[16] The first rescission application was set down for hearing on 10 August 2016. On Friday the 5<sup>th</sup> of August 2016 the Appellant's attorney's served

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<sup>1</sup> Pitelli v Everton Gardens Projects CC 2010 (5) SA 171 (SCA) at para 27

a notice of removal from the roll dated the 4<sup>th</sup> of August 2016 which notice was served on the Respondent's attorneys. The Respondent's attorneys never objected to the removal of the first rescission application from the roll. The aforesaid notice was filed with the Registrar on Monday the 8<sup>th</sup> of August 2016.

[17] The reasons why the Appellant sought to remove the first rescission application from the roll was that the Court file had not been properly indexed and paginated, the Appellant's supplementary affidavits and amended notice of motion and heads of argument and practice note had not been served and filed and the Respondent's heads or argument and practice note had not been served on the Appellant's attorneys. The application was accordingly in the Appellant's view not ripe for hearing as there had not been compliance with certain practice directives of this Court.

[18] On the date that the first rescission application had been set down for hearing, namely the 10<sup>th</sup> of August 2016, the attorney for the Respondent attended Court to proceed with the hearing of the application. The legal representative of the Appellant was not in attendance when the application was called before Court. The

Appellant's Counsel did not attend Court on that date as he had been advised that the first rescission application had been removed from the roll by notice. The legal representative of the Respondent requested the Court to dismiss the application and the Court granted the dismissal order with costs.

[19] It is not apparent from the record whether the Court was informed that the matter had been removed from the roll by notice or whether such notice of removal was filed of record in the Court file. In my view the order for dismissal of the rescission application was erroneously granted. A judgment is erroneously granted if there existed at the time of its issue, a fact of which the Court was unaware, 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<sup>2</sup>.

[20] An order erroneously sought and / or erroneously granted in the absence of an affected party falls to be rescinded in terms of Rule 42(1)(a) of the Uniform Rules of Court.

Rule 42(1)(a) provides that:

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<sup>2</sup> See *Rossitter & Others v Nedbank Ltd* 96/2014 (2015) ZASCA 196 at para 16

*“The Court may, in addition to any powers it may have mero motu or upon the application of any party affected, rescind or vary:*

*(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.”*

[21] The law governing an application for rescission of judgment 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<sup>3</sup>. It is not necessary for a party to show good cause under the subrule<sup>4</sup>. 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<sup>5</sup>.

[22] As already stated above, it is common cause that Phatudi J's order dismissing the first rescission application with costs was granted in the absence of the Applicant and / or his legal representative. Phatudi J's

<sup>3</sup> Bakoven Ltd v G J Howes (Pty) Ltd 1992 (2) SA 466 E at 471G

<sup>4</sup> National Pride Trading 452 (Pty) Ltd v Media 24 Ltd 2010 (6) SA (ECPD at 597I – 598B

<sup>5</sup> Erasmus: Superior Court Practice 2 ed (Revision Service 1, 2005) Vol 2 at D1 – 567  
See also Naidoo v Matlala NO 2012 (1) SA 143 (GNP) at 153 C

order was erroneously sought and / or erroneously granted as it was clear both to the Respondent's legal representative and Phatudi J at the time when he dismissed the first rescission application, that the Appellant still intended to proceed with the application but had only removed same from the roll. The learned Judge should therefore not have dismissed the application but should have simply struck the application from the roll because of non-appearance of the Appellant and / or his legal representative.

- [23] For all of the aforesaid reasons, Kgomo J should have found that the order granted by Phatudi J dismissing the first rescission application with costs was erroneously sought and / or erroneously granted and therefore falls to be rescinded and set aside in its entirety.

### **Rescission of default judgment by Raulinga J**

- [24] It is trite that the High Court has the inherent power to protect and regulate its own process if it is in the interest of justice to do so<sup>6</sup>. Having upheld the appeal in respect of the second rescission application and setting aside the order of Phatudi J in respect of the first rescission application, it is our view that it will be in the interest of justice that the

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<sup>6</sup> Section 173 of the Constitution of the Republic of South Africa, 1996

rescission of the default judgment granted by Raulinga J be considered by this Court in order to avoid further delay in the finalization of the case by the Court *a quo*.

[25] The rescission and setting aside of the default judgment granted by Raulinga J was brought in terms of the provisions of Rule 42(1)(a) alternatively in terms of Rule 31(2)(b). As stated above when considering the first rescission application, an order erroneously sought and / or erroneously granted in the absence of an affected party falls to be rescinded in terms of Rule 42(1)(a). *In casu*, it is common cause that the order granted by Raulinga J was granted in the absence of the Appellant.

[26] In general terms, a judgment is erroneously granted if there existed at the time of its issue, a fact of which the Court was unaware, 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<sup>7</sup>.

[27] The Appellant relies on the following grounds in his contention that the default judgment was erroneously sought and / or granted:

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<sup>7</sup> *Rossiter & Others v Nedbank Ltd* (96/2014) ZASCA 196 (1 December 2015) at para 16

27.1. That the service of the summons and particulars of claim on the Appellant was improper. The Sheriff's return of service indicates that summons was served at the place of employment of the Appellant at Wachrhuis Pretoria, upon Ms R A Setlani. Firstly, the said address is not the place of employment of the Appellant and secondly it is not competent in terms of the Rules to serve a summons on the place of employment of a Minister. Rule 4(9) provides that in every proceeding in which a Minister in his official capacity is the defendant or respondent, the summons are served on the Office of State Attorney situated in the area of jurisdiction of the Court from which the summons has been issued. In the circumstances there has not been compliance with Rule 4(9) when the summons was purportedly served on the Appellant.

27.2. In terms of section 5(1)(b) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 any process by which legal proceedings are instituted against the Minister of Police may be served on the National Commissioner of South African Police Services or the Provincial Commissioner of the South African Police Services. Needless to say that *in casu* the summons was not served in this manner.

27.3. Section 2(2) of the State Liability Act 20 of 1957 provides that a plaintiff must, within seven days after a summons instituting proceedings and in which the executive authority of a department is cited as a nominal defendant, serve a copy of that summons on the State Attorney. The aforesaid provisions of the State Liability Act are peremptory and failure to comply with same renders the service of summons defective.

[28] In my view if Raulinga J had been aware of the aforesaid defects in regard to the service of the summons, the learned Judge would not have granted the default judgment on 8 September 2014. Accordingly the default judgment was erroneously sought and / or granted and falls to be rescinded in terms of Rule 42(1)(a).

[29] Rule 31(2)(b) provides that a defendant may, within 20 days after he or she has acknowledged the judgment, apply to Court upon notice to the plaintiff, to set aside such judgment and the Court may, on good cause shown, set aside the default judgment upon such terms as it seems

meet. The requirements for an application for rescission under this sub rule are trite and have been stated to be as follows<sup>8</sup>:

29.1. The applicant must give a reasonable explanation for the default, which default must not be willful;

29.2. The application must be *bona fide* and not be made with the intention of delaying the plaintiff's claim;

29.3. It must be shown that there is a *bona fide* defence.

[30] It is common cause that the summons in this matter was not served at the Office of State Attorney, National Commissioner of Police or Provincial Commissioner of Police. By virtue of this fact the institution of the action did not come to the knowledge of the State Attorney and the other two offices. In the premises, it cannot be said that the Appellant was in willful default in not delivering a notice of intention to defend the Respondent's action against him.

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<sup>8</sup> Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) [2003] 2 ALL SA 113 (SCA)

- [31] It is apparent that if regard is had to the facts as set out in the affidavits filed in the first rescission application, (for the sake of brevity I need not repeat the facts) the Appellant has a *bona fide* defence to the Respondent's claim against him. This is so in the sense that it is sufficient if a *prima facie* defence is made out by setting out averments which, if established at the trial, will entitle the defendant to the relief asked for. The defendant need not deal fully with the merits of the case and produce full evidence that the probabilities are actually in his favour.
- [32] The Respondent's claim against the Appellant is based on the fact that the Respondent was unlawfully arrested without a warrant by a member of the South African Police Service for being in possession of stolen goods, namely copper and aluminum, and as a result of his unlawful detention, suffered damages in the amount of R 600 000.00.
- [33] The Appellant has raised a defence based on section 40(1)(b) of the Criminal Procedure Act 51 of 1977 which provides that a peace officer may, without a warrant, arrest any person who he reasonably suspects of having committed an offence referred to in Schedule 1. The offence of receiving stolen property knowing it to be stolen is an offence referred to in Schedule 1.

A further defence which the Appellant has against the Respondent's claim is the fact that the amount awarded in terms of the default judgment, namely R 600 000.00, can never be justified on any basis, let alone on the facts as set out in the damages affidavit filed with the request for default judgment.

### **Costs**

- [34] Legal costs normally follow the event and the costs order is in the discretion of the Court. In this case the Appellant has been successful in his applications for rescission as well as on appeal but we are of the view that the Appellant should be deprived of his legal costs due to the lackadaisical manner in which he conducted the litigation.
- [35] It was only after almost a year that the Appellant filed his first rescission application. When the application was already set down and was to be argued on 10 August 2016 before Phatudi J, the Appellant without consultation with the Respondent's attorney removed the matter from the roll. Among the reasons for removal of the application from the roll was the Appellant's failure to index and paginate the Court file and file heads of argument. The dismissal of the application on 10 August 2016 gave rise to the second rescission application.

[36] A belated second rescission application was argued before Kgomo J on the 6 February 2017. After the dismissal of the second rescission application by Kgomo J, the Appellant served and filed an application for leave to appeal. The Appellant and / or his legal representative failed to attend Court on 12 May 2017 to argue the application for leave to appeal. Consequently this application was dismissed with costs.

The Appellant then approached the Supreme Court of Appeal for a special leave to appeal which was granted on 29 May 2018.

[37] In its judgment granting the Appellant leave to appeal to this Court, the Supreme Court of Appeal on page 5 of the judgment remarked:

*"Although the appellant's procedural failures have been deplorable they are not such as to warrant the refusal of condonation (my underlining)."*

I cannot agree more.

In the circumstances it is only fair and just that the Appellant should be deprived of the costs in respect of the first and second rescission applications as well as the costs of appeal. The costs in respect of the first and second rescission applications should be the costs in the course.

**Order**

[38] The appeal succeeds and the following orders are made:

1. The appeal against the judgment and order of Kgomo J is upheld.
2. The order granted by Kgomo J on 6 February 2017 dismissing with costs the Appellant's application for rescission of the judgment and order by Phatudi J on 10 August 2016 is set aside in its entirety and replaced with the following order:
  - 2.1. The judgment and order granted by Phatudi J on 10 August 2016 is rescinded and set aside in its entirety.
  - 2.2. The default judgment granted in favour of the Respondent against the Appellant by Raulinga J on 8 September 2014 is rescinded and set aside in its entirety.
3. The costs in respect of the application for the rescission of default judgment, including the costs in respect of the applications before Phatudi J and Kgomo J shall be costs in the course.

4. Each party shall pay his own costs of the appeal.



**E M MAKGOBA**  
**JUDGE PRESIDENT OF THE**  
**HIGH COURT, LIMPOPO**  
**DIVISION, POLOKWANE**

**I agree**



**G C MULLER**  
**JUDGE OF THE HIGH COURT,**  
**LIMPOPO DIVISION,**  
**POLOKWANE**

**I agree**



**L G P LEDWABA**  
**ACTING JUDGE OF THE HIGH**  
**COURT, LIMPOPO DIVISION,**  
**POLOKWANE**

**APPEARANCES**

**Heard on** : 18 April 2019

**Judgment delivered on** : 10 May 2019

**For the Applicant** : Adv. S.P Pincus SC  
Adv. C Kwindu

**Instructed by** : State Attorney  
Polokwane

**For the Respondent** : Mr N Bosman

**Instructed by** : Bosman Attorneys  
Polokwane