



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1)	REPORTABLE: YES/NO	(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.		
6/8/2019		<i>[Signature]</i>	
DATE		SIGNATURE	

Case No: 23000/2013

In the matter between:

THE MINISTER OF SAFETY & SECURITY

APPLICANT

and

MORAKE ISAAC MATSEKE

RESPONDENT

JUDGMENT

INTRODUCTION

1. This application concerns the manner in which this matter was attended to and dealt with by the State Attorney. The manner in which the State Attorney dealt with this matter can at best be described as unacceptable, shocking and horrific. It seems

that the State Attorney did very little to attend to this matter as one would expect from a responsible, diligent and reasonable attorney.

- 1.1. The Minister of Police, formerly known as the Minister of Safety and Security, is the Applicant in this application. The Applicant is confronted with a claim, on face value, in an amount of R147 615 000,00.
- 1.2. Mr Morake Isaac Matseke is the Respondent in this application. The Respondent is the Plaintiff in the pending action that was initiated by him in this Court on 18 April 2013.
- 1.3. The Applicant is the First Defendant in the pending action.
- 1.4. Warrant Officer Stone Maboko is the Second Defendant in the pending action.
- 1.5. The State Attorney is the Applicant's attorney of record.
2. The Applicant applies in this application for an order in the following terms:

- "1. That this Honourable Court's order striking the Applicants/Defendant's defence be and is hereby rescinded;*
- 2. That Applicant/Defendant be and is hereby granted leave to put up a defence to the Respondent/Plaintiff's claim/action;*

3. *That costs occasioned by this application be costs in the main action; and*
4. *That Applicant/Defendant be and is hereby granted such further and/or alternative relief as this Honourable Court deems fit."*

3. This application was issued by the Registrar of this Court on 28 June 2017 and delivered at the offices of the Respondent's attorney of record on 29 June 2017.

4. In the event that the Respondent decides to oppose this application, he is called upon to do the following:

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- 4.1. To file his notice of intention within a period of 10 days after service of the application; and
 - 4.2. To file his answering affidavit, if any, within 15 days thereafter.

5. The Respondent filed and delivered his:

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- 5.1. Notice of intention to oppose this application on 14 July 2017, i.e. one day late; and
 - 5.2. Opposing affidavit on 7 August 2017, also one day late.

The Respondent made no effort or attempt to apply for condonation for the late filing of either the notice of intention to oppose, or his opposing affidavit.

6. The Applicant made no effort or attempt since it received the Respondent's opposing affidavit on 7 August 2017, to pursue this application. In particular:
 - 6.1. The Applicant failed and omitted to file a replying affidavit;
 - 6.2. The Applicant made no effort to set this application down for hearing. The Respondent's attorney filed and delivered a notice of set-down on 5 June 2019, in terms of which this application was set-down for hearing on Monday, 5 August 2019;
 - 6.3. The Applicant made no effort or attempt to file its practice note and heads of argument as provided for in this Court's practice directive. The Respondent filed and delivered his practice note and concise heads of argument on 31 May 2019; and
 - 6.4. The Applicant provided me with its heads of argument on 22 July 2019 electronically (via e-mail).
7. Paragraph 18.14 of the code of conduct for all legal practitioners which was published in the Government Gazette, Notice 198 of 2019, on 29 March 2019 provides for the following:

"An attorney shall perform professional work or work of a kind commonly performed by an attorney with such a degree of skill, care or attention, or of such a quality or standard, as may reasonably be expected of an attorney."

It will appear from this judgment that the State Attorney did not comply with this standard of professional conduct.

THE RESPONDENT'S CAUSE OF ACTION

8. The Respondent (as Plaintiff) initiated legal action against the Applicant (as the First Defendant) and Warrant Officer Maboko (as the Second Defendant) in this Court on 18 April 2013. On a proper interpretation and analysis of the allegations contained in the Respondent's particulars of claim, the following is evident:

- 8.1. Members of the South African Police Services arrested the Respondent on 23 January 2005, allegedly for the hijacking of a motor vehicle;
- 8.2. The Respondent was detained at the Barberton Maximum Prison from 12 June 2008 until 18 April 2011; and
- 8.3. The Respondent allegedly suffered damages for the loss of freedom, trauma and damage to his dignity and reputation in an amount of R6 million.

9. The combined summons was served by the Sheriff of this Court at the office of the State Attorney on 19 April 2013. The combined summons was not served on Warrant Officer Maboko. As a matter of fact, Warrant Officer Maboko is not implicated in the Respondent's arrest on 23 January 2015. Warrant Officer Maboko's name is, apart from his citation in paragraph 2 of the particulars of claim, not mentioned anywhere else in the Respondent's particulars of claim.
10. The Applicant instructed the State Attorney to represent it in this matter and to defend the Respondent's claim on its behalf. The State Attorney filed and delivered a notice of intention to defend on behalf of both the Defendants, the Applicant and Warrant Officer Maboko, on 29 April 2013. I assume for purposes of this judgment that the State Attorney decided to file and deliver a notice of intention to defend on behalf of both the Applicant and Warrant Officer Maboko, by reason of the fact that the Respondent claims judgment against the Applicant and Warrant Officer Maboko jointly and severally, the one to pay the other to be absolved. It appears that Warrant Officer Maboko is totally unaware of the existence of the claim that was instituted by the Respondent against him. The Respondent claims a substantial amount of money from Warrant Officer Maboko, notwithstanding the fact that the combined summons was not served on Warrant Officer Maboko, but the State Attorney has decided to file a notice of intention to defend on behalf of the Applicant and Warrant Officer Maboko.

11. To add insult to injury, the Respondent instructed his attorney to amend the amount of damages he claims from the Applicant and Warrant Officer Maboko. The Respondent amended the amount which he claims on 30 April 2015. The initial amount of R6 million was amended to no less than R147 615 000,00. The State Attorney did not file an objection to this amendment.

12. The Respondent's cause of action against the Applicant and Warrant Officer Maboko is formulated as follows:

"The Plaintiff was detained at Barberton Maximum Prison from 12 June 2008 until 18 April 2011, in total my client spent 6 years, 2 months and 3 weeks in prison for no just cause.

At all material times, the policeman were acting within the cause and scope of employment of South African Police Services."

13. The State Attorney instructed counsel to prepare a plea on behalf of, ostensibly, the Applicant and Warrant Officer Maboko. The plea was delivered at the offices of the Respondent's attorney on 13 May 2013 and filed at the Registrar of this Court's office on 20 June 2013. On a proper reading of the plea it seems that the author thereof was instructed to formulate the plea on behalf of the "Defendant". Counsel made the following averments in the plea:

13.1. *"The Defendant has read the Plaintiff particulars of claim and replies*

thereto as follows."

- 13.2. *"In the premise the Defendant prays that the Plaintiffs claim be dismissed with costs."*
- 13.3. *"The Defendant has no knowledge of the information contained herein and therefore can neither deny nor admit same."*
- 13.4. *"Wherefore the Defendant prays that the Plaintiffs claim be dismissed with costs."*
- 13.5. *"Dated on this the 15th day of May 2013*
Tracey Williams
Counsel for the Defendant."

14. The State Attorney initiated an amendment of the Applicant's plea and a notice of the Applicant's intention to amend its plea was filed and delivered on 26 September 2013, in terms of which the Applicant intended to introduce a special plea of non-joinder. I accept for purposes of this judgment that the amendment was effected, as envisaged in Rule 28(5) and (7) of this Court's rules.

15. The State Attorney introduced no less than four special pleas. The purpose of this judgment is not to pronounce on the merits of any of the special pleas. It seems, however, that the special pleas which were introduced by the Applicant are formulated or drafted in the form of an exception. The Respondent's particulars of claim seems, *prima facie*, to be excipiable. The purpose of this judgment is not to pronounce on whether or not the Respondent's particulars of claim is excipiable.

What is important is the fact that the Respondent's entire claim is premised on the fact that he was incarcerated and detained at Barberton Maximum Prison for "*no just cause*".

THE ESSENCE OF THIS APPLICATION

16. The Respondent initiated an application to compel the Applicant and Warrant Officer Maboko to file and deliver their discovery affidavit, as envisaged in Rule 35 of this Court's rules. The application to compel discovery was delivered at the offices of the State Attorney on 30 April 2015. From a proper reading and interpretation of the application it seems that the Respondent's attorney intended to set the application down for hearing on 10 June 2015 at 10h00, in the event that no notice of intention to oppose the application is delivered.

17. It seems that the application to compel discovery was not:

- 17.1. opposed by either the Applicant or Warrant Officer Maboko; and
- 17.2. set-down for hearing on 10 June 2015.

18. This Court (Koovertjie AJ) made an order on 23 June 2015 (and not on 10 June 2015) in terms of which the Applicant and Warrant Officer Maboko were ordered to

file and deliver their discovery affidavit within a period of 10 days after the service of the order on their "attorneys" of record. Upon a proper analysis and investigation from the documents which are contained in the Court file, the following issues are of paramount importance:

- 18.1. Was a notice of set-down delivered at the offices of the State Attorney, in terms of which the application to compel discovery was set-down for hearing on 23 June 2015, instead of 10 June 2015?
 - 18.2. Was the order that was granted by Koovertjie AJ on 23 June 2015 properly "served" on the Applicant and Warrant Officer Maboko's "attorneys of record", as provided for in the Court order dated 23 June 2015?
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19. It is, on the papers before me, evident that the Applicant and Warrant Officer Maboko failed or neglected to comply with the Court order dated 23 June 2015. This resulted in an application that was initiated by the Respondent's attorney on 6 October 2016, in terms of which the following relief was applied for:

- "1. That the Respondents' defence be strike out and/or alternatively dismissed;
2. That the Respondents' be ordered to pay the costs of this application on the scale of attorney and own client;
3. Further and/or alternative relief."

20. The application to strike out the Applicant's defence was delivered at the offices of the State Attorney on 6 October 2016. The State Attorney deliberately and intentionally failed and omitted to:

- 20.1. file and delivered a notice of intention to oppose this application;
- 20.2. file an answering affidavit; and
- 20.3. instruct counsel to attend the hearing of the application on 20 January 2017.

21. The State Attorney did absolutely nothing to oppose the application or to file and deliver an opposing affidavit prior to the hearing of the application on 20 January 2017. The State Attorney knew that the Applicant was faced with a claim in the amount of R147 615 000,00, but notwithstanding this astronomical claim, the State Attorney decided to turn a blind eye on the application. This Court (Maumela J) made the following order on 20 January 2017:

- "1. The Respondents' defence is struck out;
- 2. That the Respondents are ordered and directed to pay the cost of this application on a scale as between attorney and his own client jointly and severally."

22. On a proper reading of the papers before me, the following aspects must be canvassed and addressed:

- 22.1. When and how was the Court order which was made on 20 January 2017 brought to the attention of the Applicant and Warrant Officer Maboko?
- 22.2. Did the Respondent's attorney serve the Court order which was made on 20 January 2017 on the Applicant, at the offices of the State Attorney, or on Warrant Officer Maboko?

23. The answers to the aforementioned questions are important for purposes of this application which serves before me today. The Respondent raises a "*special point in limine*", in terms of which he suggests that this application is "*out of time and 113 days late*". The Respondent asks this Court to dismiss this application and to order the State Attorney to pay the costs of this application *de bonis propriis*. The following important evidence is unfortunately absent from the Respondent's opposing affidavit, namely:

- 23.1. Was the order that was made by this Court on 20 January 2017 served on either the Applicant or Warrant Officer Maboko?
- 23.2. If so, how (in which manner) was the aforementioned Court order served?

24. The aforementioned aspects are addressed by the Respondent in the following manner in his opposing affidavit:

- "2.1.19 *On the 14th of February 2017, my attorney advised the Applicant's attorneys an order striking the Applicant's defence was granted, which the Applicant's attorney advise my attorney that his client's discovery affidavit was served on the my attorney's of record, I annex hereto a copy of the file note, marked Annexure "MM4".*
- 2.1.20 *On the 15th of February 2017, a letter was addressed to the Applicant's attorneys first confirming that the order was granted and secondly denying that such affidavit was served on my attorney's of record, a copy is annex hereto marked Annex "MM5".*
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- 2.1.21 *On the 27th of February 2017, the Applicant's attorney addressed a letter to my attorney advising that the discovery affidavit was served on my erstwhile attorneys, Mokgatle Leshole Attorneys, however my attorneys enquire from my erstwhile attorneys and no discovery affidavit was found, I annex hereto a copy of letter marked Annexure "MM6".*
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- 2.1.22 *On the 28th of February 2017, a letter was addressed to the Applicant's attorneys advising him that an order was granted, a copy of the letter is annex hereto marked Annnexusure "MM7"."*

25. The Respondent furthermore relies, insofar as service of the order that was granted on 20 January 2017 is concerned, on a letter which his attorney addressed to the State Attorney on 28 February 2017. This letter is attached to the Respondent's opposing affidavit, marked Annexure "MM7". It is, however, not clear from the letter whether or not a copy of the Court order dated 20 January 2017 was attached thereto. The Respondent's attorney directed the State Attorney's attention to the following:

"Kindly be advised that we have already advised you that we have obtained a date of hearing of the default application, which date will be served on your office in due course.

We once more advise that your client's defence was struck out on the 20th of January 2017.

Kindly note that we strictly reserve our client's rights.

We trust you find the above to be in order and await your offer of settlement."

The Respondent's intention is clear : he intends to apply to this Court for default judgment in the amount of R147 615 000,00 in due course.

THE MERITS OF THIS APPLICATION

26. Lt Colonel Tubane deposed to an affidavit in support of the relief applied for by the Applicant in this application. Lt Colonel Tubane is a legal administration officer in the employ of the South African Police Service. One of her responsibilities is to attend to the litigation on behalf of the Applicant. The State Attorney decided not to file any affidavit in this application which serves before me today. In my view this was a tactical decision to avoid an unpleasant or uncomfortable situation. The State Attorney had sufficient opportunity to explain himself/herself, but has decided to remain silent. This silence is in my view compelling and decisive.

27. It is difficult to understand the reason why an attorney would do nothing to avoid a crisis. The State Attorney is duty bound to protect its client's rights vigorously without any fear or favour. The State Attorney did nothing to oppose the application in terms of which the Applicant's defence was struck out. The Applicant is therefore confronted with a claim in an amount of R147 615 000,00.

28. Lt Colonel Tubane concedes the following important aspects in her affidavit:

28.1. The Applicant failed to comply with an order that was made by this Court on 23 June 2015, in terms of which the Applicant was ordered to file its discovery affidavit;

28.2. The Applicant's initial plea constitutes "*a bare denial*";

28.3. The Applicant, or the State Attorney, made no effort or attempt to oppose the application in terms of which the Respondent applied for the Applicant's defence to be struck out; and

28.4. The manner in which this matter was dealt with is unacceptable and the Applicant acted in a manner which can be described as "*tardy*".

29. Lt Colonel Tubane submits in her affidavit that:

29.1. The Applicant has a *bona fide* defence against the Respondent's claim; and

29.2. The order that was granted on 20 January 2017 was granted in the Applicant's absence.

30. The Respondent opposes this application for the rescission of the order that was made by this Court on 20 January 2017 vigorously. It is the Respondent's case that this application constitutes an abuse of this Court's process and that the Applicant is the author of its own misfortune.

31. The Applicant, on the other hand, raises the following important issues:

31.1. The Respondent was arrested by members of the South African Police Service on 23 January 2005. It is, on the papers before me, uncertain whether or not the Respondent initiated a bail application. It is furthermore

uncertain whether or not the bail application was successful. Be that as it may, it is, on the papers, evident that the Respondent was charged with no less than 14 counts. The Respondent was accused no. 2 and he was found guilty on counts 2, 3, 4, 5, 8, 12 and 14. The Magistrate imposed the following sentence:

- Counts 2, 4, 5, 8 and 12 : 15 years imprisonment on each of the aforementioned counts.
- Counts 3 and 14 : 5 years imprisonment on each of the aforementioned counts.

31.2. The Magistrate furthermore made an order in the following terms:

"The Court orders that the sentences be served in such a fashion that the accused serves an effective term of 35 years imprisonment in terms of Section 280(2) of the Criminal Procedure Act, No 51 of 1977."

31.3. The Respondent was released from prison on 18 April 2011, ostensibly after he successfully appealed the convictions referred to herein *supra*;

31.4. The Applicant did not detain the Respondent at Barberton Maximum Prison;

- 31.5. The Respondent's cause of action, i.e. "*unlawful arrest and detention*" arose on 23 January 2005, i.e. the date upon which he was arrested by members of the South African Police Service;
- 31.6. Warrant Officer Maboko is not implicated in the manner in which the Respondent was arrested or detained. The Respondent has, *prima facie*, failed to sustain a cause of action against Warrant Officer Maboko;
- 31.7. The Respondent's claim against the Applicant has *prima facie* become prescribed;
- 31.8. The Respondent has failed and omitted to join the Minister of Justice and the Minister of Correctional Services in the main action. The Respondent was detained at Barberton Maximim Prison which falls under the auspices of the Minister of Correctional Services. The Applicant did not detain the Respondent;
- 31.9. The Respondent was sentenced to imprisonment by virtue of an order that was made by a competent Court. The allegation that the Respondent was detained for "*no just cause*" is therefore without any merit and fundamentally misconceived; and
- 31.10. The police docket is missing. It cannot be obtained, notwithstanding a diligent search. The transcript of the Court proceedings in the Regional Court was subsequently obtained. The record is, to say the least, a mess. It is incomplete and the following certificate appears on the record:

"The following problems were experienced while transcribing this matter and as a result there are "indistincts/inaudibles" in the record:

- 1. Prosecutor mic off or faulty.*
- 2. Background noise – screaming.*
- 3. Witness mic off or faulty.*
- 4. Defence mic off or faulty."*

HAS A PROPER CASE BEEN MADE OUT FOR THE SETTING ASIDE OR THE RESCISSION OF THE ORDER THAT WAS MADE ON 20 JANUARY 2017 IN THE APPLICANT'S ABSENCE?

32. The Applicant brings this application in accordance with the common law principles for the rescission of a judgment that was granted by default. Counsel on behalf of the Applicant submits that it is only expected from the Applicant to demonstrate that it has a *bona fide* defence against the Respondent's claim. Counsel furthermore submits that it is unnecessary to demonstrate "*good cause*" in the event that an application for the rescission of default judgment is initiated. These submissions are, unfortunately, fundamentally misconceived and bad in law. Rule 31(2)(b) of this Court's rules provides for the following:

"A defendant may within 20 days after he or she has knowledge of such judgment apply to Court upon notice to the plaintiff to set-aside such judgment and the Court may, upon good cause shown, set-aside the default judgment on such terms as to it seems meet."

33. The Respondent, in his heads of argument, relies, *inter alia*, on an unreported judgment in the matter of E H Hassim Hardware (Pty) Ltd v FAB Tanks CC (1129/2016) [2017] ZASCA 145 (13 October 2017) in which the Supreme Court of Appeal held as follows:-

*"13. Equally trite is the principle that even when all the requirements set out above have been met, it is still within the **discretion** of the Court whether or not to rescind the judgment. That discretion must be exercised judicially in the light of all the facts and circumstances of the case."*

34. The fact that the Applicant made no effort to explain what it did since it became aware of the existence of the order that was made on 20 January 2017 is a factor that I should consider in the broad spectrum of this application. The Applicant did little, or nothing, to bring this application within a period of 20 days after it became aware of the existence of the order. This omission is not decisive.

35. The manner in which the State Attorney dealt with this matter is unacceptable and shocking. Policy considerations and commonsense dictate that the Applicant should be afforded an opportunity to defend a claim of this magnitude. The Respondent has decided to increase the amount which he claims from the Applicant from R6 million to R147 615 000,00. In the event that judgment is eventually granted by default against the Applicant, the taxpayer will be responsible for the payment of the amount which the Respondent claims. The Respondent's claim seems to be excessive and exorbitant.
36. The Applicant has succeeded in demonstrating that it has a *bona fide* defence against the Respondent's claim. The State Attorney could have done much more to avoid the order that was made by this Court on 20 January 2017. The State Attorney could have filed a discovery affidavit, on the same basis as the Respondent formulated his discovery affidavit. The Respondent deposed to a discovery affidavit on 12 February 2014. The Respondent discovered, apart from the pleadings and notices filed under case no. 23000/2013, absolutely nothing. The Respondent discovered no documents in support of its claim in the amount of R147 615 000,00.
37. I am therefore satisfied that the Applicant has made out a proper case for the rescission of the judgment that was made by this Court on 20 January 2017. The Registrar of this Court issued the following notice on 11 September 2014, which notice is on the Court file:

"With reference to the above matter please be advised that the office of Chief Justice has decided to embark on a case flow management project and your file has been identified as one of the files which will be used to pursue conduct phase 1 of the case flow management project. The purpose of the project is to reduce unnecessary delays in finalization of matters and advance greater efficiency in the case flow management.

Any documents that you need to file from now onwards must be filed in office no. 8.41 on the 8th Floor at the High Court of South Africa, Gauteng Division, Pretoria and please quote our reference number in all your pleadings, correspondence preferably underneath the case number."

38. It seems that the parties ignored the aforementioned directive. The purpose of the directive is to ensure that this matter forms part of a formal case flow management process, presided over by a Judge and to avoid any unnecessary delays in the finalization of the matter. I am of the view that a Judge should be appointed as a case flow manager and to assist the parties in the expeditious finalization of this matter.

CONCLUSION

39. The State Attorney is not a party in this application. I considered to make an order in terms of which the State Attorney is called upon to submit reasons why he/she should not pay the costs of this application *de bonis propriis*. An order in this regard will result in a further delay. It is not in the interests of justice to delay this matter

any further. Lt Colonel Tubane conceded that the Applicant's attorney could have done more to avoid the predicament in which the Applicant finds itself in. It therefore follows that the Applicant should be held responsible for the costs occasioned by this application.

40. I am therefore satisfied that a case has been made out for the rescission of the order which was made by this Court on 20 January 2017 in terms of which the Applicant's defence was struck out with costs on the scale as between attorney and own client. It is furthermore in the interests of justice that the Applicant should be afforded an opportunity to present and canvass its defences in relation to the Respondent's claim as formulated and pleaded in his particulars of claim. It will be an absolute travesty of justice in the event that the Respondent is allowed to pursue his claim for damages on an unopposed basis, i.e. by default. Logic and commonsense dictate that the Applicant should be afforded an opportunity to contest the Respondent's claim for the damages he allegedly suffered as a result of him being arrested on 23 January 2005.

41. The Applicant seeks an indulgence. The Applicant did not comply with the order that was made by this Court on 20 January 2017, by virtue of the fact that its attorney (the State Attorney) made no, or little, effort to do what is expected from an officer of this Court. The State Attorney's attitude can therefore be described as "*laissez faire*". The Applicant should therefore be held responsible for the costs occasioned

by this application, such costs to be paid on the scale as between attorney and client.

42. In the premise I make an order in the following terms:

1. The order made by this Court on 20 January 2017 in terms of which the Applicant's defence was struck out with costs on the scale as between attorney and own client, is set-aside and rescinded;
2. The Applicant (as First Defendant) is ordered to file its discovery affidavit within a period of 10 days from date hereof;
3. The parties are ordered to comply with the cash flow management notice that was issued by the Registrar of this Court on 11 September 2014. The parties should therefore address a letter to the office of the Deputy Judge President of this Court within a period of 10 days from date hereof, to apply for the appointment of a case flow manager in the person of a Judge to facilitate the expeditious finalization of this matter; and
4. The Applicant is ordered to pay the costs of this application on the scale as between attorney and client.

F W BOTES

**ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA**