



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

6/3/15

CASE NO: 61719/13

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

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

(3) REVISED.

29/03/15. 

DATE

SIGNATURE

IN THE MATTER BETWEEN

MINISTER OF POLICE

Applicant

and

MOSIMA GIVEN PHALAFALA

First Respondent

NOMSIZI BRENDA MOTEBU

Second Respondent

JUDGMENT

LEGODI J

[1] In this matter, the Minister of Police asks for relief as follows:

"KINDLY TAKE NOTICE that the defendant intends to bring an application for rescission of the following orders:

- (i) The order granted on 8 April 2013 by His Lordship Chetty AJ, compelling applicant to provide documentation as requested in respondents' Notice in terms of Rule 35(3), and ordering Applicant to pay the costs of said application;*
- (ii) The order granted on 3 September 2013 in terms of the rule nisi granted on 2 August 2013;*
- (iii) Any order granted on the 1 November 2013 under the above-mentioned case number;*
- (iv) The order granted on 13 March 2014, directing applicant to pay first respondent in respect of herself and her two minor children, Wesley and Moitheri, the sum of R1 222 156.18, and directing Applicant to pay second Respondent in respect of the minor child McRoy the sum of R202 633.47 and directing Applicant to pay the costs of the action;*
- (v) Further and or alternative relief".*

[2] The relief is sought after the respondents, Ms Mosima Given Phalafala and Ms Nomsizi Brenda Motebu had obtained an order by default dismissing the applicant's defence and judgement granted also by default in terms of which, the applicant was to pay in damages an amount of R1 222 156.18 to the first respondent and R202 633.47 to the second respondent. The latter had sued in her capacity as the biological mother and guardian of her minor child. The respondents in this matter instituted action proceedings against the applicant on the 2 October 2012. They will henceforth be referred to as in the main action. The respondents will be referred to as the first and second plaintiffs respectively and the applicant as the defendant.

[3] The claim was for the loss of support arising from the death of the first plaintiff's husband, one Patrick Phuti Leshaba (hereinafter referred to as the deceased). The deceased also had a child with the second plaintiff. The deceased died on the 15 June 2012 at a hospital after he was arrested and taken into custody on the 14 June 2012. The plaintiffs blamed the police for the death of the deceased, alleging that they assaulted the deceased and that he died of the injuries arising therefrom and or that the police failed in their legal duty by not preventing members of the police from assaulting the deceased.

[4] After the close of the pleadings, and on the 5 February 2013, the plaintiffs delivered a notice purporting to be in terms of Rule 35 (3) of the Uniform Rules. Sub-rule (3) provides as follows:

"If any party believes that there are in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring to make the same for inspection in accordance with sub-rule(6), or to state on oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him."

[5] In addition to the delivery of the notice aforesaid, and on the same date, the plaintiffs also delivered notices in terms of sub-rules (1), (6) (8) and (10) of Rule 35. These notices were contained in one document.

[6] On the 8 April 2013, Chetty AJ made an order against the defendant in terms of which the defendant was ordered to provide certain documents purportedly requested in terms of Rule 35(3). The order was made after a notice to compel in terms of Rule 35(7) was served on the defendant on the 28 February 2013. On the 16 April 2013 the plaintiffs were provided with some of the documents. At that time, the defendant had not as yet known of the order of the 8 April 2013. The order was only brought to the attention of the defendant on the 30 April 2013.

[7] On the 3 September 2013 the defendant was served with a notice of application to have its plea or defence struck out for failure to comply with the order of 8 April 2013. On the 1 November 2013 the application was granted by Molopa-Sethosa J. The order was granted in the absence of the defendant.

[8] On the 14 January 2014 the defendant was served with notice of set down for the hearing of the matter on quantum. The case was scheduled for the 13 March 2014. On the 13 March 2014 an application for postponement of the trial was refused. The defendant's counsel walked out of court after the application for a postponement was refused. Judgement by default was then granted against the defendant in the amount of R1 222 156.18 and R202 633.47. It is this judgment and the striking out of the defendant's defence granted on the 1 November 2013 which became the subject of a fierce dispute before me. The judgment and the striking out are branded as products of unprocedural and improper conduct which flew from improper and complete irregular service of sub-rule (3).

Application of Rule 35(3)

[9] Sub-rule (3) is quoted in paragraph [4] of this judgment. On the other hand, sub-rule (1) provides as follows:

"Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within twenty days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings".

[10] Reading sub-rules (1) and (3) in context, a question raises, whether one can serve notice in terms of sub-rule (3) at the same time with notice in terms of sub-rule (1) and before discovery. For the following reasons, I do not think so. Sub-rule (3) allows a party to require any party to either make available for inspection or disclose the whereabouts of other documents he or she believes are in possession or have been in possession of the other party. However, a party giving such a notice is only

entitled to do so, after discovery in terms of sub-rule (1). The wording of the sub-rule (3), points to this direction. That is, “ if any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid”.

[11] The underlining is my emphasis. It is clear that one cannot before discovery in terms of sub-rule (1), proceed to deliver sub-rule (3) notice. The dies in both sub-rules (1) and (3) make it even clearer that it cannot be done. For example, discovery in terms of sub-rule (1) read with subsection (2) gives twenty days grace within which to comply. However, in terms of sub-rule (3), the dies are ten days. The effect of this was that the defendant was required to respond to sub-rule (3), before discovery and before the twenty days in terms of sub-rule (1) read with sub-rule (2) had expired. There is another concern about the notice delivered by the plaintiff in terms of sub-rule (3). It required the defendant, ‘to deliver ... a written statement setting out what documents of the following nature you have presently or had previously in your possession’. The documents were then set out in the notice. The underlining is my emphasis.

[12] It is clear from the wording of the notice, that the defendant was not required to either make available for inspection or disclose the whereabouts, of other documents, the plaintiffs believed were in possession or have been in possession of the defendant. To deliver a written statement setting out what documents of a specified nature in possession or previously in possession of the defendant as indicated in the notice quoted above, does not come closer to requiring to make certain documents or whereabouts of certain documents as envisaged in sub-rule (3) available for inspection. The notice on this ground is also flawed.

[13] Sub-rule (3) provides the procedure for a party dissatisfied with discovery of another party¹. The intention of the sub-rule is to provide a procedure to supplement discovery which has already taken place, but which is alleged to be inadequate². It requires the other party to give notice to the party who discovered in terms of sub-

¹ *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 T.

² *The MV Urgup: Owners of the Urgup v Western Bulk Carriers (Australia) (PTY) Ltd* 1999 (3) SA 500 (C) at 515 D

rule (1) to make the documents or tape recordings available for inspection in accordance with sub-rule (6).

[14] Sub-rule (6) reads as follows:

“Any party may at any time by notice as near as may be in accordance with Form 13 of the First Schedule require any party who has made discovery to make available for inspection any documents or tape recordings disclosed in terms of sub-rules (2) and (3). Such notice shall require the party to whom notice is given to deliver to him within five days a notice as near as may be in accordance with Form 14 of the First Schedule, stating a time within five days from the delivery of such latter notice when documents or tape recordings may be inspected at the office of his attorney or, if he is not represented by an attorney, at some convenient place mentioned in the notice, or in the case of bakers’ books or other books of account or books in constant use for the purposes of any trade, business or undertaking, at their usual place of custody. The party receiving such last-named notice shall be entitled at the time therein stated, and for a period of five days thereafter, during normal business hours and on any one or more of such days, to inspect such documents or tape recordings and to take copies or transcriptions thereof. A party’s failure to produce any such document or tape recording for inspection shall preclude him from using it at the trial, save where the court on good cause shown allows otherwise”.

[15] It is also clear that the notice in terms of sub-rule (6) can only be invoked after discovery in terms of sub-rule (1). ‘At any time’, in sub-rule (6) can only apply after discovery in terms of sub-rule (1). Therefore ‘at any time’ in sub-rule (6) should be understood to mean ‘at any time’ after discovery. The plaintiff did give a notice in terms of sub-regulation (6). The difficulty is that it was delivered at the same time and in the same document containing sub-rule notice (1). That means, the defendant was given 20 days to discover in terms of sub-regulation (1) and at the same time, the defendant was given 5 days to comply with notice in terms of sub-rule (6).

[16] In my view, the delivery of notices under sub-rules (3) and (6) at the same time with notice in terms of sub-rule (1) was a blatant disregard and abuse of the procedural process designed in rule 35. This then brings me to another issue.

WHETHER THE DEFENDANT WAS OBLIGED TO COMPLY WITH NOTICES IN TERMS OF SUB-RULES (3) AND (6)?

[17] In paragraph 27 of the answering affidavit, the first plaintiff states:

“On 5 February 2013 a notice on the applicant’s attorney in terms of Rule 35(3) requesting the applicant to make available certain document. The applicant failed to comply with the notice within the prescribed time periods whereupon the respondents served and filed an application to compel in terms of Rule 35(7) on the 28 February 2013”. The underlining is my emphasis.

I must immediately say, I do not think that the defendant was obliged to respond to the notices in terms of sub-rules (3) and (6) before discovery in terms of subrule (1).

[18] The prescribed time periods under sub-rule (3) and (6) would never have kicked in before discovery in terms of sub-rule (1). But most importantly, instead of seeking to compel the defendant to comply under sub-rule (2) read with sub-rule (1), the plaintiffs elected to compel the defendant to comply with sub-rule (3), by invoking sub-rule (7). As I said, that they could not do. In terms of sub-rule (7), if any party fails to give discovery as aforesaid or, having been served with notice under sub-rule (6) omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that sub-rule, the party demanding discovery or inspection may apply to a court, which may order compliance with this rule and failing such compliance, may dismiss the claim or strike out the defence. The next question is, whether the defendant was obliged in law to comply with the notice in terms of Rule 35(7) regarding failure to comply with a notice in terms of sub-rule (3). I do not think so for the reasons already alluded to in this judgment, save to say, the defendant should have, there and then, invoked the provisions of Rule 30. The notice in terms of sub-rule (7) was therefore another product of a blatant and irregular procedural process. This raises another issue.

WHETHER THE ORDER OBTAINED ON THE 8 APRIL 2013 BEFORE CHETTY AJ CAN BE VARIED OR RESCINDED IN TERMS OF RULE 42?

[19] The order in this regard was as follows:

- “1. *The Respondent is compelled to, within 10(ten) days form (sic) today provide the following documentation as requested by virtue of Rule (35(7) to the Plaintiffs:*
 - 1.1 *A certified copy of the contents of the Police case docket at the SAPS Manopane as registered under CAS number 174/06/2012;*
 - 1.2A *certified copy of the post mortem results for the late P.P. Leshaba;*
 - 1.3 *A certified copy of the Garankuwa Forensic Mortuary results for the late P.P. Leshaba;*
 - 1.4 *A certified copy of the video footage of the incident under investigation in this case as collected by D F Stassen;*
 - 1.5A *certified copy of the IPID (Internal Police Investigation Department) finding;*
2. *That the Respondent will pay the costs of this application.”*

[20] The order was obtained by default. The record of the proceedings of the 8 April 2013 have not been made available to this court, and the plaintiffs’ counsel did not argue that when the order was granted, Chetty AJ was fully appraised of the irregularity or defect in the services of notices in terms of subrules (3) and (6). Rule 42 deals with variation and rescission of orders. It reads as follows:

- “(1). *The court may, in addition to any other powers it may have, mero motu or upon the application if any party affected, rescind or vary;*

(a) An order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) An order or judgement in which there is an ambiguity, or patent error or omission; but only to the extent of such ambiguity, error or omission;

(c) An order or judgement granted as the result of a mistake common to the parties.

2. Any party desiring any relief under this order shall make application thereof upon notice to all parties whose interest may be affected by any variation sought.

3. The court shall not make any order rescinding or varying any order or judgement unless satisfied that all the parties whose interest may be affected have notice of the order thereof."

[21] Sub-rule (1)(a) of rule 42 is critical. In order to obtain a rescission under this sub-rule, the applicant must show that the prior order was erroneously sought or granted. Once the court holds that an order or judgement was erroneously sought or granted, it should without further enquiry rescind or vary the order³. It is not necessary for a party to show good cause for the sub-rule to apply. In general terms, a judgement is erroneously granted if there existed at the time of its issue, a fact of which the judge was unaware of, which would have precluded the granting of the judgement and which would have induced a judge, if aware of it, not to grant the judgement or order⁴. An order or judgement is also erroneously granted if there was an irregularity in the proceedings. I must pause for a moment to deal with this. The principle must be found to apply in the present case. There was procedural irregularity both with regards to the notices in terms of sub-rules (3) and (6) of Rule 35. I have already dealt with this. There is no suggestion that Chetty AJ was alluded

³ *Tshabalala v Peer* 1979 (4) SA 27 (T) at 30D; *Naidoo v Somai* 2011 (1) SA 219 KZP at 220 F-G.

⁴ *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 153 C.

to or was aware of the procedural flaws in the service of the notices in terms of sub-rules (3) and (6) particularly sub-rule (3).

[22] A judgement to which a party is procedurally entitled, cannot be considered to have been granted erroneously within the meaning of subrule (1)(a) of Rule 42 by reason of facts of which the judge who granted the judgement was unaware of. The plaintiffs were not entitled to file sub-rules (3) and (6) notice and then obtain the order of the 8 April 2013. Failure to comply with discovery in terms of sub-rule (1), could only have entitled them to invoke the provisions of sub-rule (7).

[23] It looks like the plaintiffs in seeking the order on the 8 April 2013 as they did, were also unaware that their notices in terms of sub-rules (3) and (6) were unprocedural, particularly sub-rule (3). If that is so, they too erroneously sought the order that they obtained on the 8 April 2013. Therefore a relief sought in the present application, up to sofar, conforms to what is envisaged in Rule 42(1) (a). I am satisfied that, had Chetty AJ been aware of these procedural flaws, he would not have granted the order of the 8 April 2013. That being so, I turn to deal with the other issue directly connected hereto.

WHETHER THE ORDER TO STRIKE OUT THE DEFENDANT'S DEFENCE GRANTED ON 1 NOVEMBER 2013 WAS ERRONEOUSLY GRANTED?

[24] The order was granted by Molopa-Sethosa J. It was granted after the order quoted in paragraph [19] of this judgment was granted on the 8 April 2013. That order as I said, was erroneously granted. The simple question is whether, the order of the 1 November 2013 can survive the application of Rule 42(1)(a). I do not think so. There is no suggestion that Molopa-Sethosa J was aware that the order of 8 April 2013 was erroneously granted. Had she have been aware, I am satisfied that she would not have granted the order for the reasons already mentioned regarding the irregularities in the service of the notices in terms of sub-rules (3) and (6).

[25] The order of the 8 April 2013 was brought to the attention of the defendant in a letter dated the 18 April 2013. The letter and the order were only delivered to the defendant on the 30 April 2013. Before that, the defendant had served on the plaintiffs notice of amendment of the plea and Rule 35(1)(6)(8) and (10) notices on the 12 and 16 April 2013 respectively. In addition, on the 16 April 2013, the plaintiffs received a letter from the defendant's attorneys. The letter is dated 12 April 2013. In the letter, the police docket, and SAPS 10 and 14 register extracts were included, but not as a response to the order of 8 April 2013. By that time the defendant had not been made aware of the order.

ORDER AND JUDGMENT OF 13 APRIL 2014

[26] Two important things had happened before Makgoka J on the 13 April 2014. Both have a bearing on rules 42 and 30 of the Uniform Rules. He was made aware of the irregularities regarding the service of Rule 35(3) and the subsequent order obtained on 8 April 2013 and 1 November 2013. Secondly, he made a finding that the defendant acquiesced with those irregularities.

[27] The matter before Makgoka J started with an application for a postponement at the instance of the defendant. The application was opposed. The basis for the opposing that the defendant's defence had been dismissed. Counsel for the defendant took the court through the papers pointing to the irregularities in the service of subrule (3). Makgoka J refused the application for postponement and then granted judgement by default against the defendant in the amount of R1 222 156.18 and R202 633.47. Having reconsidered judgment by Makgoka J, on the 9 February 2015, I requested the parties to file supplementary heads of argument to deal with the question:

"Whether Makgoka J made a factual finding of irregular procedural steps by the plaintiffs and that the subsequent orders of the 8 April 2013 and 1 November 2013 had been condoned or cured by the defendant's conduct? And if so, whether such a finding does not fall outside the purview of Rule 42? And if so, whether this court can rescind and or vary the judgment and or order made on the 13 April 2014 in terms of Rule 42.

[28] I have received further heads in this regard and I am greatly indebted to the parties. On page 25 of the judgment, line 20 Makgoka J expressed himself as follows:

“I need to revert to the procedural aspects relating to the orders that were sought, in particular the order that was granted on 08 April 2013, because much was made of the supposed irregularity in granting the order. To a great extent I agree that that order should probably not have been granted, for the simple reason that Rule 35(3) was not, at that stage applicable. It was not applicable because the defendant discovery affidavit had not been served, and as a result that application was premature. But as would later emerge, this issue becomes irrelevant in the light of what I would consider in the course of the judgment”.

[29] There can be no doubt that the court was alive to the procedural irregularities. Then on page 26, lines 10 to 20, Makgoka J proceeded as follows:

“The proper course for the defendant to have taken at that stage would have been to bring an application to set aside the Rule 35(3) application as an irregularity. That was not done, and as correctly connected by Mr Kruger, for the plaintiffs, a party who takes a further step in a situation where an irregular step had been granted, cannot later be heard to complain. There was, therefore, acquiescence on the part of the defendant in the supposed irregularity. This is confirmed by the following. In April 2013 the defendant gave notice of intention to amend his plea. In the same month, particularly on 12 April 2013, the defendant’s attorney wrote to the plaintiffs’ attorneys and stated the following:

“Attached please find copies of case docket Mabopane CR142/06/2012, the SAP10 register extract. The remainder of the required documentation has been requested, and you will be furnished with copies thereof as soon as possible. You will also be receiving a notice of amendment in due course.

Now this is clear demonstration of an attempt to comply with the order that was made on 08 April 2013. In addition to that, on 17 February 2014 the defendant paid the taxed costs relating to all the applications referred to

earlier, in the amount R43 548.70. The defendant's attorneys also attended a pre-trial conference with the plaintiff's attorneys in preparation for trial. Therefore it is my view that it no longer matters whether the order on 08 April 2013 was irregularly granted. The defendant acquiesced in that irregularity and therefore cannot be heard to complain, having taken all the steps that I have mentioned, and form that as a basis for seeking a postponement of the matter".

[30] Now whether or not Makgoka J was correct in his finding is not for this court to decide. Refusal for a postponement was after he had found that the defendant acquiesced in the irregularities. The question is whether the judgment by default granted on 13 April 2014 was erroneously granted as envisaged in sub-rule (1)(a) of Rule 42. I do not think so. He made a factual finding that has direct bearing on the application before me. One of the steps taken by the defendant after the order was served on it on the 30 April 2013 as per the letter of the 12 April 2013, was the holding of pre-trial conference, preparation of pre-trial minutes and payment of costs. Indeed had it not have been for the finding by Makgoka J, I would have been required to determine whether the defendant acquiesced with the irregularity. That is, whether after he became aware of the irregularity, it took further steps in the cause.

[31] Rule 30 deals with irregular proceedings. It provides as follows:

- "(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.*
- (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if-*
 - (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;*
 - (b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;*

- (c) *the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2)”*
- (3) *If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.*
- (4) *Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order”.*

[32] A further step in the cause is some act which advances the proceedings one stage nearer completion⁵. Steps taken in preparation of trial, such as requesting particulars for trial, serving a notice to produce, convening and attending a pre-trial conference, are further steps in the cause⁶. The defence of acquiescence was pertinently raised in the answering affidavit. The defendant in its replying vehemently denied any such acquiescence. For example, the defendant denies knowledge of the irregularity. That is, before he became aware of the irregularities, he had already taken steps in the cause. The real issue is however whether this court is competent to deal with the issue in terms of Rule 42 read with relevant to the provisions of Rule 30. I do not think so. Makgoba J was aware of the irregularities when he refused the postponement and when he granted judgment by default. Therefore, relief sought in terms of Rule 42 cannot be granted. However, that is not the end of the road for the police.

COMMON LAW RESCISSION

[33] In terms of section 34 of the Constitution everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or where appropriate, another independent and impartial

⁵ *Market Dynamics (Pty) Ltd t/a Brian Ferris v Grogor* 1984(1) SA 152 (W) at 153C.

⁶ *Klein v Klein* 1993 (2) SA 648 (BG)

tribunal or forum. On the other hand, section 39(2) of the Constitution provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. Subsection (3) thereof provides that the Bill of Rights does not deny existence of any other rights or freedom that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill of Rights.

[34] In applying the principle as enriched in the Constitution, and the requirements for rescission of judgment under common law, the facts leading to the present application have already been alluded to. The wanting conduct of the State Attorney's offices had contributed mainly to the granting of the orders of the 8 April 2013, 1 November 2013 and the judgment granted by Makgoka J 13 April 2014. At common law, the court is entitled to rescind a judgment obtained in default of appearance provided sufficient cause is shown. This includes a reasonable and acceptable explanation for the default and that on merits, the party has a bona fide defence. It is the latter requirement that I am concerned about. Whilst I am not satisfied with the explanation for the default, it cannot be said that the defendant has no bona fide defence.

[35] At the time the defendant's plea was drafted, certain information on merits was still outstanding. The video footage of the incident where the deceased was arrested was not viewed. The information has now come to light and the deceased can be seen on the video footage been assaulted by members of the public. At the scene, and before the deceased was taken into custody, members of the emergency services attended to the deceased. He was certified not to be seriously injured. There were no visible injuries to alert the police of the danger of keeping the deceased in custody. It was only discovered in the morning of 14 June 2012 that the deceased was seriously ill. He was taken to hospital where he was admitted and died a day thereafter.

[36] The plaintiffs' cause of action in the particulars of claim is pleaded as follows:

During the early hours of 14 June 2012 at or about 01:00 unidentified members of the South African Police Services, acting in the course of their employment, unlawfully assaulted and seriously injured the deceased during his arrest at the Morula Sun Casino near Mabopane, alternatively allowed bystanders to assault the deceased when there was a duty on the members to protect the deceased from assault.

10.

The deceased was taken to the Terminus Police Station in Mabopane where he was left unattended in the reception area and later in a holding cell, despite being seriously injured.

11.

Members of the South African Police Services negligently failed to ensure that the deceased timeously received medical care and only took the deceased to the Odi Hospital in Mabopane where he was admitted at 12h08 on 14 June 2012".

[37] Counsel for the plaintiffs contended that the defendant's plea that was dismissed did not allege what is now said be the basis for the bona fide defence. That might be so, but it does not mean that if judgment and the orders referred to in this judgment are rescinded and or set aside, the defendant will not be entitled to amend its plea to accord with the evidence it intends to rely on. The defendant's defence was dismissed on procedural technicalities. Merits of the case were never ventilated. Therefore, to deny the defendant its opportunity to put its side of the story, in my view, would negate against consideration of justice and the changing times and circumstances of the case. It would be unfair to do so. This is not a trivial matter. Judgment by default in the amounts of R1 222 156.18 and R202 633.47 and is not trivial. It is one case where justice demands that the defendant should be

given the opportunity to present its case. The prejudice that the plaintiffs may suffer, in my view, is outweighed by the potential prejudice to the defendant.

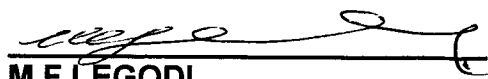
COSTS

[38] For the purpose of this application, the defendant is asking for the indulgence of the court and therefore costs order should be used as a safe guard for the inconvenience and prejudice caused to the plaintiffs. I must reiterate, the defendant's attorney did not diligently handle this matter. The history of the matter points to this. I have expressed my displeasure in some of other matters handled by the State Attorney. In other matters, I demanded that an explanation be given as to why costs order *de bonis propriis* should not be made against whoever might be responsible. Almost in every unopposed motion roll, you find an order been sought because the State Attorney did not stick to its obligations in terms of the Rules. It is a great concern that so much of the public funds go into a waste in the form of costs orders been made against government departments and other organs of state due to the inefficiency and inability by the State Attorney to properly deal with cases entrusted to his office. This case is therefore no exception to such conduct by the office of the State Attorney. A punitive costs order in the circumstances of this case is appropriate. The defendant could long have invoked the provisions of Rule 30.

[39] Consequently, I make an order as follows:

- 39.1 The orders granted on 8 April 2013, 3 September 2013, 1 November 2013 and judgment granted by default on the 13 March 2014 in the amount of R1 222 156.18 and R202 633. 47 are hereby rescinded and set aside;
- 39.2 The defendant's defence struck out on the 1 November 2013 is hereby reinstated;

39.3 The applicant/defendant to pay the costs of the application on an attorney and client's scale such costs to include costs of two counsel.



M F LEGODI
JUDGE OF THE HIGH COURT

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MATTER HEARD ON: 04 FEBRUARY 2015
JUDGMENT HANDED DOWN: 06 MARCH 2015