Reportable:	**YES** / NO
Circulate to Judges:	**YES** / NO
Circulate to Magistrates:	**YES** / NO

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape High Court, Kimberley)

Case No:	**CA & R 64/2010**
Heard:	**15 / 08 / 2011**
Delivered:	**02 / 12 / 2011**

In the matter between:

SECURIFORCE **Appellant**

v

LUCAS RUITERS **Respondent**

Coram: Kgomo JP et Pakati AJ

JUDGMENT ON APPEAL

KGOMO JP

1] The appellant, Securiforce CC, a close corporation and security entity, is the second defendant in an action in which the plaintiff, Mr Lucas Ruiters, sues it and five others jointly and severally, the one paying the others to be absolved *pro tanto,* for damages in the amount of R90,000.00 (ninety thousand rand) made up as follows:

1.1	Unlawful arrest	R20,000.00
1.2	Unlawful detention	R60,000.00
1.3	Unlawful[SIC] prosecution	R10,000.00

R90,000.00

2] The appellant is held vicariously liable in that it is alleged that its employee, Mr Jacob Ramabodu, the first defendant, laid false charges with the police against plaintiff and in doing so acted within the scope and authority of his employment with the appellant. Relief was not sought against Mr Ramabodu because the summons was not served on him – there was a return of non-service. This appeal does not concern the other four defendants.

3] The appellant sets out the following grounds of appeal from the rulings and judgment of Magistrate (Ms) C M Adams.

"*(1) The honourable Magistrate erred in dismissing the application for condonation for the late-filing of the plea, which was enrolled to be heard on an urgent basis on the 8th of February 2010, immediately prior to the granting of the default judgment.*

(2) The honourable Magistrate made an error in judgment by finding that no urgency was established for the said condonation-application, thereby dismissing the said application for condonation on this ground alone, without granting the appellant <u>*any*</u> *further opportunity, even with an appropriate cost-order, to approach the honourable court for such condonation.*

(3) The honourable Magistrate erred in granting the default judgment for the amount claimed on the evidence produced, thereby finding that the respondent has properly quantified his claim.

(4) *The honourable Magistrate subsequently and after the granting of the default judgment, without having heard the condonation-application on its merits, made a serious error upon a request for reasons, to state that "**The correct procedure is to apply for a rescission of judgment"**, only thereafter to dismiss such an application for the rescission of the judgment for the sole reason that "**The granting of this application for rescission would be of no force or effect**", based upon the fact that condonation for the late-filing of the plea should first [have been] granted.*

(5) *The honourable Magistrate should, with respect, have rescinded the judgment on the merits of the application before it (and not solely on the consequences thereof), thereby granting the appellant the opportunity to again approach the honourable Court with an application (on a non-urgent basis) for condonation of the late-filing of the plea (which was indeed filed, although nominally and non-materially late), as the initial application was only dismissed on the fact that the honourable Court did not find urgency, and not on the merits thereof. However, such an application could only have been filed, should the judgment have been rescinded.*

(6) *The honourable Magistrate therefore made a series of errors in judgment by literally closing all the doors of court on each and every occasion to the appellant, thereby depriving the appellant the opportunity to state his case before court, and furthermore thereby not*

hearing the main case on its merits at all, despite various attempts by the appellant to convince the honourable Court thereof that the late-filing of the plea was not as a result of any omission to act, by the appellant himself."

4] Lacock AJP assigned the appeal to Pakati AJ and Hughes-Madondo AJ who entertained the matter on Monday 15 August 2011. As the Court files were empty an attempt was made by the appellant's attorneys to sneak the court records into the files on Thursday 11 August 2011. For the late filing of the record (in fact for the failure to file the record) in terms of Rule 49(7) of the Rules of Court and due to the fact that there was no application for condonation and that it was highly inconvenient for the Court to work through the record at such late stage the case was, deservedly struck from the roll, as the appeal had lapsed.

5] How this appeal came to serve before us a mere two months later is not explained by the appellant. In other words, there is no substantive application for the re-enrolment of the appeal in which the non-observance of the Court Rules is explained and condonation sought for such failure. What we can make out is that the very next day, on 16 August 2011, the appellant set the matter down for hearing for 17 October 2011. This was done without an application to the Registrar for a date of hearing. The effect of what was done was that the appellant arrogated to itself an accelerated date of hearing and thereby overtook cases which had been waiting in the queue for dates of hearing. This is inexcusable and cannot be countenanced.

6] It is worthwhile to quote Rule 49(7)(a) to (d) for guidance:

"(a) At the same time as the application for a date for the hearing of an appeal in terms of sub-rule (6)(a) of this rule the appellant shall file with the registrar three copies of the record on appeal and shall furnish two copies to the respondent. The registrar shall further be provided with a complete index and copies of all papers, documents and exhibits in the case, except formal and immaterial documents: Provided that such omissions shall be referred to in the said index. If the necessary copies of the record are not ready at that stage, the registrar may accept an application for a date of hearing without the necessary copies if—

i) the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or

(ii) failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal.

(b) The two copies of the record to be served on the respondent shall be served at the same time as the filing of the aforementioned three copies with the registrar.

(c) After delivery of the copies of the record, the registrar of the court that is to hear the appeal or cross-appeal shall assign a date for the hearing of the appeal or for the application for condonation and appeal, as the case may be, and shall set the appeal down for hearing on the said date and shall give the parties at least 20 days' notice in writing of the date so assigned.

(d) If the party who applied for a date for the hearing of the appeal neglects or fails to file or deliver the said copies of the record within 40 days after the acceptance by the registrar of the application for a date of hearing in terms of sub-rule (7) (a), the other party may approach the court for an order that the application has lapsed."

7] From the above recital of Rule 49(7) it will be noted that the appellant has flouted it in many respects. In an endeavour to find a way to dispose of this case once and for all (including on the merits) we allowed Adv W J Groenewald, for the appellant, to argue the merits of the appeal as well to enable us to assess the prospects of success. Mr Kgotlagomang for the plaintiff/respondent, whilst not condoning the appellant's failures, was not averse to the proposed process.

8] A synoptic history of where this saga comes from is as follows: Summons was issued against the defendants in the Magistrate Court Kimberley on 31 October 2008. The appellant entered an Appearance to Defend on a date that does not appear from the record. A request for Further Particulars dated 22 December 2008 was filed with the Clerk of Court on 08 January 2009 and was received by the attorneys of the plaintiff, Barend Titus/Desmond Appie Inc on the same date (08/01/2009). The Further Particulars furnished are dated 13 February 2009, were received by plaintiff's attorneys on 18 February 2009 and filed with the Clerk of Court only on 19 March 2009 (a month later).

9] On 14 July 2009 plaintiff's attorneys wrote to appellant's attorneys that "*graag ontvang ons 1ste en 2de Verweerders* [appellant's] *se Verweerskrif binne 3 dae van datum hiervan by versuim waarvan: pleitbelet.*" When being placed on terms was not heeded by the appellant the plaintiff issued a Notice of Bar against first defendant and the appellant on 29 July 2009 calling upon them to deliver their plea within five days failing which they will be *ipso facto* barred from pleading. The notice was served on the appellant's attorneys and also filed with the Clerk of Court on the same date.

10]The appellant's plea is dated (typed) 07 August 2009 and was received by plaintiff's attorneys on 11 August 2009 and filed with the Clerk of Court on 13 August 2009.

11]It is common cause that the appellant was barred, properly so. It is also common cause that the appellant did not apply for the removal of Bar. Inescapable indications are that the plaintiff had the courtesy of notifying the appellant by letter dated 21 September 2009 that it intended to apply for default judgment and required the appellant to purge its default. There is no copy of this letter on file and the plaintiff only refers thereto obliquely in an opposing affidavit. What is startling is the appellant's indifferent attitude in response to that elusive letter. His attorneys wrote on 22 September

2009:

"*We acknowledge receipt of your letter dated 21 September 2009 and confirm that we have instructions that should you apply for default judgment we would apply for rescission thereof.*" (Translated)

12]The quoted statement is tantamount to the appellant informing the plaintiff that it is not interested in prosecuting its defence in the case but will adopt a reactive stance to frustrate the plaintiff's claim as soon as the plaintiff has taken the next step. The courts have held that condonation will be precluded where there has been deliberate omission or gross negligence. See **Van der Merwe v Steenkamp** 1925 OPD 179.

13]What followed the said event is muddled because the appellant's explanation is convoluted. It takes the reading of the plaintiff's papers to get a sense of chronology of the subsequent events and what the real position is. On 03 November 2009 the plaintiff applied for a trial date with notice to the appellant. In it is contained a notification that the plaintiff would adduce evidence to prove its damages. On 18 November 2009, for reasons that are not apparent, the hearing did not proceed. On 05 January 2010 the plaintiff set the matter down for the hearing of oral evidence on 18 January 2010. The Set Down was served on the appellant's attorneys and filed with the Clerk of Court on the same date (05/01/2010). On 18 January 2010 the case was postponed to 08 February 2010.

14]In the meantime on 03 February 2010 the appellant filed with the Clerk of Court and served on the plaintiff a "Notice of Application for Condonation" to be heard on 05 February 2010 at 08h30 for the following relief (translated):

"(1) That the time frames prescribed in Rule 55(1) of Magistrate Court Act, Act 32 of 1944 (the Act), be dispensed with and that the matter be heard on an urgent basis.

(2) That the time frames prescribed in Rule 19(a) read with Rule 12(1)(b) of the Act be extended to 17 November 2009, being the date on which the applicant [appellant] filed its plea, and that the late filing thereof be condoned.

(3) That the abovementioned matter, as set down for the adducing of oral evidence on Monday 08 February 2010 in this Honourable Court, be postponed sine die.

(4) That the applicant [appellant] pay the costs of this application, except in the event of opposition."

15]The plaintiff opposed the condonation application and notified that it would urge for costs *de bonis propriis* on an attorney and own client scale against the attorneys. The plaintiff confines himself to five points *in limine* (also translated):

"6.1 I suggest with respect that no grounds for urgency exists. Alternatively, the grounds for urgency were created by the applicant's [appellant's] own conduct. From his own mouth the applicant has known since 29 July 2009 that a Notice of Bar has been filed. This implies that it should have served its plea by 05 August 2009. According to applicant's deponent/attorney the plea was ready on 07 August 2009, "for dispatch to my correspondent attorney" (paragraph 2.7 of the founding affidavit). The applicant

should therefore have applied for condonation on that date.

6.2 I respectfully submit that applicant's application is not bona fide in that it has not made a full and frank disclosure of the facts.

6.3 A study of the record reveals that the plea was served on my former attorneys of record on 11 August 2009. See annexure 'A' hereto.

6.4 I therefore submit respectfully that the applicant's explanation in paragraphs 4.4 and 4.5 [of its founding affidavit] is a lie.

6.5 A Further confirmation of the lie is the letter by applicant's correspondent attorneys dated 22 September 2009 (marked annexure 'B') in which it is stated arrogantly that if default judgment is obtained its rescission will be applied for. This underscores the fact that applicant had knowledge that it was under bar and that plaintiff is in the process of obtaining default judgment."

16]Annexure 'A' is the court process (the plea) referred to in para 10 of this judgment and annexure 'B' is the letter translated and quoted in para 11 of this judgment. The lie that plaintiff says the applicant has told in paras 4.4 and 4.5 of its founding affidavit is captured in these terms (translated):

"*4.4 I have, however, discovered with shock that I have inadvertently, due to human error, omitted to dispatch the plea [from Bloemfontein] only when I had sight of the initial Notice of Set Down for trial. I refer to the Notice that the application would be heard on 18 January 2010.*

4.5 My failure therefore to dispatch the plea timeously is therefore not ascribable to any fault on the part of the applicant. The applicant was throughout desirous to prosecute its defence of the case against it in this Honourable Court".

17]I share the plaintiff's expression that the appellant has been caught in a lie. This is shameful and would ordinarily call for a costs order *de bonis propriis* against the Bloemfontein instructing attorneys irrespective of the outcome of this appeal. Be that as it may, the Appellate Division has cautioned in 1965 in **Saloojee v Minister of Community Development** 1965(2) SA 135(A) at 141 B-H that:

"*(I)t has not at anytime been that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has* *chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. (Cf. Hepworths Ltd v Thornloe and Clarkson Ltd., 1922 T.P.D. 336; Kingsborough Town Council v Thirlwell and Another, 1957 (4) SA 533 (N)). A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney (cf. Regal v African Superslate (Pty.) Ltd., supra at p. 23 i.f.) and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself."*

18]On 08 February 2010 the Court *a quo* made the following *ex tempore* ruling:

"Court …(inaudible). The point in limine is sustained. The application for condonation dated 02 February 2010 is dismissed. I am disinclined to make a costs order de bonis propriis. I make an order that [the appellant] pay the taxed costs on an attorney and client scale".

19]The Magistrate then ordered that the plaintiff proceed to prove his damages. This was done on the same day of the above ruling. At the close of the proceedings the Court ordered that: "*Judgment is granted as prayed for with costs*." In other words the plaintiff was awarded damages in the amount of R90,000.00. See paragraph 1 of this judgment.

20]On 09 February 2010 the applicant delivered a "*Notice in terms of Rule of Court 51(1)*" in which written reasons were requested for:

"*1. The dismissal by Presiding Magistrate of the Application for Condonation;*

2. The reasons for the Presiding Magistrate's award of the quantum of damages."

21]On 01 or 02 March 2010 the Magistrate furnished these reasons (said to be in terms of Rule 51):

1.) Ad application for condonation

On 8 February 2010 I dismissed the urgent application for condonation. I upheld the point in limine by the Plaintiff namely that no urgency has been made out in the application.

My reasons are as follows:

I agree that urgency had not been established. Since 29 July 2009 a notice of bar was in effect. No application for condonation was brought for late filing of the plea on 13 August 2009.

An application for allocation of a court date for hearing of oral evidence on a request for default judgment was filed and served on 3 November 2009.

2.) Ad judgment on quantum

A notice of bar was in effect since 29 July 2009.

The matter was set down for presentation of oral evidence on 18 January 2010. An urgent application for condonation for the late filing of the plea was dismissed. At the stage of hearing oral evidence the applicant/defendant was not a party to the proceedings.
The correct procedure was to apply for rescission of the default judgment within the prescribed time period and not to apply for reasons in terms of rule 51 as a default judgment is not appealable.
The above are the reasons for my decision and I have nothing more to add."

22]I hasten to make the following observation. When a losing party asks for reasons for the court's finding what is in fact being called for is a judgment. A proper judgment at that. I appreciate that Magistrates have to contend with heavy court rolls and that they work under tremendous pressure. See **S v Steyn** 2001(1) SA 1146(CC) at 1155F-1159D (paras 13 – 21). The aforesaid difficulties notwithstanding, a better judgment should have been produced particularly if regard is had to the wide ranging and comprehensive argument that was presented by the legal representatives before the presiding Magistrate as reflected in the transcribed record. Of note is what the applicable Rule 51(1) provides:

"51 APPEALS IN CIVIL CASES

1) Upon a request in writing by any party within 10 days after judgment and before noting an appeal the judicial officer shall within 15 days hand to the registrar or clerk of the court a judgment in writing which shall become *part of the record showing –*

(a) the facts he or she found to be proved; and

(b) his or her reasons for judgment."

23]The argument before the Magistrate was not confined to urgency only. However that may be, the fact that an application for condonation may not be urgent does not concomitantly mean that the application itself is devoid of any merit. The application, if not urgent, may be postponed to a later date for the hearing of the merits in due course with a costs order against an errant applicant.

24]In the application for rescission of the default judgment dated 03 March 2010 which was served on the plaintiff's attorneys and filed with the Clerk of Court on 05 March 2010 the appellant gave notice that on 29 March 2010 at 08h30 it would ask:

"1. That the default judgment granted under Case No 738/2008 in this Honourable Court be set aside;

2. That the applicant be granted leave to enter and defend the main case, Case No 7389/2008, and be permitted to file its plea within 10 days of the rescission of the default judgment;

3. That the respondent [sic] be ordered to pay the costs of the application for rescission, but only if the respondent opposes the application."

25]*Ex facie* the record the date on which argument relating to the rescission of judgment took place is not reflected. It seems though that it took place on 28 June 2010 or 06 July 2010. In her written "*Reasons for Judgment in terms of Rule 51 of Act 32 of 1944*" the Magistrate states:

"*The defendant [appellant] applied for rescission of the judgment which was granted on 8 February 2010. The plaintiff opposed the application for rescission. The court dismissed the application for rescission, with costs. Reasons are the following:*

On 8 February 2010 two applications served before the court:

1) *Application for condonation* ***for the upliftment of a notice of bar which is operational against the defendant*** *due to defendant's failure to file its plea timeously;*
   The application for condonation was dismissed with costs on an attorney and client scale.

2) *Request for default judgment.*
   Judgment was granted against the defendant.

Until such time as the court's decision relating to the application for condonation for the late filing of the plea is set aside or reversed by a court, no plea subsequently filed will have any force or effect as the notice of bar is still effective.

The granting of this application for rescission would be of no *force or effect.*

The above are the reasons for my judgment together with my ex tempore judgment given on 6 July 2010 and I have nothing further to add".

26]There was no *ex tempore* judgment purportedly delivered on 06 July 2010 or any other date in the court files. The record was therefore incomplete. We asked the parties, in particular the appellant who is *dominis litis*, to attend to the shortcoming and to supply supplementary written heads on the alleged outstanding *ex tempore* judgment – irrespective of whether it exists or not. The heads were also to cover the question whether the appellant's instructing attorneys (Horn & Van Rensburg, Bloemfontein) should be ordered to pay costs *de bonis propriis* should the appeal fail. The cryptic *ex tempore* judgment takes the matter no further and may as well not have been alluded to by the Magistrate.

27]The Magistrate states (in para 25 above) that the "granting of this application for rescission would be of no force or effect. This is incorrect. Once a default judgment has been rescinded the consequences thereof fall to be set aside. This is so because the applicant would have dealt with a conspectus of all legal processes of a warrant of execution, the attachment of property etc. See **Naidoo v Somai** 2011(1) SA 219 (KZP) at 221 G-H and 575G-D.

28]In light of the misdirection by the Magistrate we are at large in our fresh assessment of the merits to consider whether the defendant/appellant has proffered *bona fide* grounds to the plaintiff's claim which would entitle us to come to its rescue. A practical starting point to cut through the labyrinth to reach the kernel is to visit the merits.

29]The authors Jones & Buckle (Van Loggerenberg), the Civil Practice of the Magistrates' Courts, 10th Edition, the principles governing this issue as follows (at Rule 49-10):

"'The ground of the defendant's defence to the claim.' The grounds of defence to the action must be contained in the affidavit which constituted the application[1]. If, however, such grounds are contained in a previous affidavit or other document, they may be incorporated by reference and confirmed in the applicant's affidavit[2]. The applicant need not show a probability of success on the merits; it suffices if he shows a prima facie case in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for[3]. He need not deal fully with the merits of the case[4], but the grounds of defence must be set forth with sufficient detail to enable the court to conclude that there is a bona fide defence, and that the application is not made merely for the purpose of harassing the respondent[5]. If the merits of the action have been fully dealt

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1 **F&J Car Sales v Damane** 2003(3) SA 262 (W) at 266 E-G. See also **Taylor v Additional Magistrate, Vereeniging** 1984(4) SA 1 (T) at 4D.

2 **Kruger v Standard Krediet Korporasie Bpk** 1988(1) SA 570 (T).

3 **Grant v Plumbers (Pty) Ltd** 1949 (2) SA 470 (O) at 476-7; **Kritzinger v Northern Natal Implement Co (Pty) Ltd** 1973(4) SA 542 (N); **Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd** 1980(4) SA 573 (W) at 575; **Federated Timbers Ltd v Bosman NO**1990(3) SA 149(W) at 79C; **Santam Ltd v Bamber** [2006] 1 All SA 311 (W) at 315b-c; but see the comments in **Standard Bank of SA Ltd v El-Naddaf** 1999(4) SA 779(W) at 315b-c.

4 **Brown v Chapman** 1928 TPD 320 at 328; **Greenberg v Meds Veterinary Laboratories (Pty) Ltd** 1977(2) SA 277(T) at 279; **Kavasis v South African Bank of Athens Ltd** 1980(3) SA 394 (D) at 395.

5 **Schneider v Abel** 1916 CPD 346; **Grant v Plumbers (Pty) Ltd** 1949(2)SA 470 (O) at 476**; Kouligas & Spanoudis Properties (Pty) Ltd v Boland Bank Bpk** 1987(2) SA 414 (O)at 417C-D; **De Vos v Cooper & Ferreira** 1999(4) SA 1290 (SCA) at 1303A-C and 1304B-G.

with on the pleadings and it appears that the probabities with reference to the existence of an alleged prima facie defence and are manifestly in favour of the respondent, this is a consideration which the court may properly take into account[6]*."*

30]In giving oral evidence before the Magistrate the plaintiff testified in minute detail on how he was arrested and detained. I give a brief summary of these events.

31]On 17 January 2008 the plaintiff was employed at Diamond Pavilion Mall for a company called VMS as a stock controller. His work, which he had been doing for more than a year, also involved sales and merchandising. VMS deployed him to Checkers Wholesalers on this particular occasion. At 07h30 he checked in (clocked). He asked the appellant's employee, Mr Ramabodu, (the first defendant) to stick-tag his private pen as it is a policy required of Checkers that all private property must bear a distinctive sticker to distinguish it from the business stock-in-trade. Ramabodu informed him that he has run out of stickers and allowed him in with the understanding that the pen will be stick-tagged in due course.

32]Between 10h00 and 11h00 the plaintiff recessed for tea. He exited and returned past Ramabodu who still disclaimed having any identifying stickers. This happened throughout the day (even at lunch between 13h00 and 14h00). At 17h00 when the plaintiff knocked off duty Ramabodu accosted him and accused him of having stolen the pen and took him to the manager, a Mr Eugene Van Niekerk. The

6 **Du Plessis v Du Plessis** 1970(1) SA 683 (O).

police were summoned and he was arrested for his own pen (a Bic-type pen valued at R5-00). The arrest took place in full view of his co-workers and members of the public.

33]The plaintiff says he had R100-00 with him and would not steal a pen valued at R5-00. He asked the police to view the video footage that runs all the time (24/7) but he was told that he could make the request at court. He was taken to the Transvaal Road Police Station (in the Kimberley City Centre) and locked up. The following morning (18/01/2008) he was taken to court and locked up in the holding cells. At 12h00 his case was withdrawn.

34]The plaintiff's employers dismissed him but the CCMA declared that his dismissal was unfair and ordered that the employer compensate him three months' salary.

For present purposes it is unnecessary to deal with the quantum leg of the case.

<u>THE APPELLANT'S DEFENCE</u>

35]The appellant's deponent, Mr Stephanus Weydeman, on the merits refers to his plea and pleads that same be read as if therein incorporated. The plea is a bare denial and in my view excipiable. Mr Weydeman then continues:

"5.1 Voledigheidshalwe herhaal ek vir doeleindes van hierdie aansoek, die Applikant se verweer as synde dat Applikant as Tweede Verweerder onder saaknommer 7389/2008 in die bogemelde Agbare Hof pertinent ontken dat hy en/of enige werknemers in sy diens op die dag en datum in paragraaf 12 van die Besonderhede van Vordering wederegtelik en opsetlik `n valse klagte van diefstal by

die Suid-Afrikaanse Polisie Diens teen die Respondent as Eiser aanhangig gemaak het, of dat die Respondent as Eiser in die hoofsaak as gevolg daarvan gearesteer en aangehou was.

5.2 Applikant ontken verder dat Eiser enigsins skade gelyhet uit hoofde van `n aanhouding en/of arrestasie wat enigsins verband hou met die Tweede Verweerder in die Hoofsaak, as Applikant hierin, en ontken Applikant verder die kwantum van die Respondent se beweerde skade. Applikant sal die Respondent dus tot die bewys van eerstens die Applikant (Tweede Verweerder) se betrokkendheid by `n beweerde arrestasie en aanhouding plaas, ten tweedens sal die Applikant die Respondent enigsins suksesvol sou wees in die aksie teen die Applikant, ten aansien waarvan Applikant steeds enige betrokkenheid by hetsy `n arrestasie en/of aanhouding van die Respondent, ontken.

5.3 Verdermeer ontken die Applikant dat hy behoorlik gesiteer is in die Dagvaarding en sal die Applikant die Respondent boonop tot die bewys plaas van sy korrekte sitasie.

5.4 Applikant is ook gesiteer in die Besonderhede van Vordering as synde middelik aanspreeklik te wees vir die optrede van ene ***JACOB RAMABODU****, wie gesiteer is as `n sekuriteitsbeampte van beroep werksaam in diens van die Applikant, uit hoofde van die optrede van laasgenoemde persoon op/ongeveer 17 Januarie 2008 te Checkers, Diamond Pavilion, Kimberley.*

5.5 Applikant ontken verder die middelike band soos beweer in die Besonderhede van Vordering, en sal Applikant verlang dat die Respondent ten minste bewys dat daar *wel enigsins `n nexus bestaan tussen die person **JACOB RAMABODU** en die Applikant.*

5.6 Ondertussen egter is die vonnis nou reeds teen Applikant toegestaan, en beweer Applikant eerbiediglik dat hy reeds van die begin af `n bona fide verweer teen die eis gehad het. Applikant is steeds begerig om die aksie te verdedig en smeek die Agbare Hof eerbiediglik om aan hom die toestemming te verleen om wel die aksie te verdedig, ten einde eventueel sy saak behoorlik voor die Agbare Hof te plaas."

36]The above is the appellant's complete defence. The aforegoing is clearly demonstrative of the fact that the appellant tactically and studiously avoided attracting the onus to justify the arrest and detention, which would be the consequence of such an admission. See **Newman v Prinsloo & Another** 1973(1) SA 125(W) at 126H-127G and **Ramakulukusha v Commander, Venda National Force** 1989(2) SA 813 (V) at 836B. The technique adopted by the appellant is fatally flawed because evidence presented by way of affidavit is a substitute for both the pleadings and the oral evidence. The bland denial does not measure up to the name "facts" or "evidence" or to the requisite for recision set out in para 36 (above).

37]The appellant was ensnared in its own trap. Its lawyers overlooked the fact that the plaintiff had already testified when they brought the rescission application. Its deponent, Mr Weydeman, says that the appellant will put the plaintiff to the proof of his (plaintiff's) alleged unlawful arrest and detention as well as the damages he is said to have suffered.

But he had already done just that. There may have been something to say for the appellant had the claim not been for damages but a liquidated amount for which no evidence was required. The plaintiff's evidence therefore remains uncontroverted.

In the result, appellant has not shown that he has a *bona fide* defence on the merits.

38]To summarise the appeal must fail in the light of these catalogue of failures on its part:

38.1 The appellant's appeal was struck from the roll on 15 August 2011 because it had failed to file its record or do so timeously. The appellant set the matter down by itself (without applying for a date of hearing) and did not apply for re-enrolment and to explain its default by means of a substantive condonation application. In terms of Rule 49(7) (d) the appeal had lapsed;

38.2 The appellant was on more than one occasion urged by letter by the plaintiff to file its plea. It failed to do so and ironically warned the plaintiff that should he obtain default judgment the appellant would apply for its rescission and then did nothing until the plaintiff took the next step;

38.3 The appellant gave a false explanation why it did not plead or serve and file its plea timeously;

38.4 The appellant has no bona fide defence as pointed out here in before.

39]One matter remains. The appellant's ground that the damages awarded by the Magistrate are exorbitant and not justified. Mr Groenewald seems to suggest that if this ground is upheld then rescission of the entire case would be justified. This is amenable in particular where the issues are severable as in merits from quantum, as it is in this matter. See: **Silky Touch International (Pty) Ltd v Small Business Development Corporation Ltd** [1997] 3 ALL SA 439 (W).

40]Partial rescission being permissible the question is whether it is competent and in the interest of justice to determine whether the quantum awarded was exorbitant and if we found that it was whether we should assess what the appropriate amount should be or refer the matter back to the Magistrate for this purpose.

41]As shown in the opening paragraph of this judgment the plaintiff claimed R90 000-00. In addressing the Court on quantum Mr Titus, attorney for the plaintiff, stated that: *"Wat kwantum aanbetref Edelagbare, ek het nou nie gesag saam gebring nie---."* After being addressed perfunctorily the Magistrate merely contended herself with the order: "Die vonnis word toegestaan soos versoek." No comparative study was made nor were any reasons for the decision given. Even in her "Rule 51(1) Reasons, quoted the Magistrate is silent on how the amount of R90 000-00 was assessed and arrived at.

Of further relevance is **Road Accident Fund v Marunga** 2003(5) SA 164 (SCA) at 171D-172E where Navsa JA remarked:

"[31] Before considering whether the amount awarded by the

trial Court should be upset on appeal I return to an aspect touched on briefly earlier in this judgment, namely the lack of a reasoned basis for the determination of general damages. As a general rule a court which delivers a final judgment is obliged to give reasons for its decisions. In an article in (1998) 115 The South African Law Journal at 116 - 28 entitled 'Writing a Judgment' the former Chief Justice, M M Corbett, pointed out that this general rule applies to both civil and criminal cases. In civil cases this is not a statutory rule but one of practice. The learned author referred to Botes and Another v Nedbank Ltd 1983 (3) SA 27 (A) where this Court held that in an opposed matter where the issues have been argued litigants are entitled to be informed of the reasons for the Judge's decision. It was pointed out that a reasoned judgment may well discourage an appeal by the loser and that the failure to supply reasons may have the opposite effect, that is, to encourage an ill-founded appeal. The learned author stated the following at 117:

'In addition, should the matter be taken on appeal, the Court of appeal has a similar interest in knowing why the Judge who heard the matter made the order which he did. But there are broader considerations as well. In my view, it is in the interests of the open and proper administration of justice that the courts state publicly the reasons for their decisions. Whether or not members of the general public are interested in a particular case - and quite often they are - a statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of

justice.'

[32] Writing on the same subject in The Australian Law Journal (vol 67A 1993) at 494 - 502 the former Chief Justice of the High Court of Australia, the Rt Hon Sir Harry Gibbs, considering the same rule of practice in common-law countries, stated the following at 494:

'The citizens of a modern democracy - at any rate in Australia - are not prepared to accept a decision simply because it has been pronounced, but rather are inclined to question and criticise any exercise of authority, judicial or otherwise. In such a society it is of particular importance that the parties to litigation - and the public - should be convinced that justice has been done, or at least that an honest, careful and conscientious effort has been made to do justice, in any particular case, and the delivery of reasons is part of the process which has that end in view.'

[33] This is, of course, not a case in which no attempt has been made to provide reasons for judgment. It is a case in which the attempt has been inadequate. Even though courts have a wide discretion to determine general damages and even though it cannot be described as an exercise in exactitude, or be arrived at according to known formulae, a trial court should at the very least state the factors and circumstances it considers important in the assessment of damages. It should provide a reasoned basis for arriving at its conclusions. Regrettably, although the Court below stated the main injury sustained by the respondent and set out the envisaged corrective and further surgery it did not set out adequate motivation for the amount determined as damages."

See also: In **Minister of Safety & Security v Tyulu** 2009(5) SA 85 (SCA) at para 26.

42]Mr Groenewald's heads of argument does not state on what basis the quantum is exorbitant nor does the appellant's (Mr Weydeman's) affidavit address this issue. Even on this aspect a case has not been made out for rescission. Whether the amount appears to us to be high and that we would not have awarded that amount, is not the test. In any event, R90 000-00 for the unlawful arrest, detention and malicious prosecution is not over the top. I must caution, though, that this award must not be taken as a precedent.

43]On the question of whether costs should be ordered *de bonis propriis* against the appellant's attorneys and having considered the supplementary heads of argument I consider that this is not a case that calls for such an order nor would a punitive order against the appellant be justified.

44]In the result, for the aforegoing reasons, I make the following order.

ORDER

The appeal is dismissed with costs, to be taxed on a party and party scale.

F DIALE KGOMO
JUDGE-PRESIDENT
Northern Cape High Court, Kimberley

I agree.

B M PAKATI
ACTING-JUDGE
Northern Cape High Court, Kimberley

On behalf of the Appellant:	**Adv. W.J. Groenewald**
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On behalf of the Respondent:	**Mr C Kgotlagomang**
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