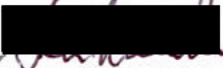


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2020/28180

(1)	<u>REPORTABLE: NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: NO</u>
(3)	<u>REVISED.</u>
30 January 2025	
DATE	 SIGNATURE

In the matter between:

THE NATIONAL DIRECTOR OF PROSECUTIONS

Applicant

and

MOGASHOA MALACHIA LEE SHIMANE

First Respondent

THE MINISTER OF POLICE

Second Respondent

**THE NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICES**

Third Respondent

THE PROVINCIAL COMMISSIONER OF THE

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand down is deemed to be 10h00 on 30 January 2025

JUDGMENT

S VAN NIEUWENHUIZEN AJ

INTRODUCTION

- 1 This matter came to me in the opposed motion court on 26 November 2024 and is an application launched by the National Directorate of Public Prosecution ("the NDPP") on 29 November 2023 for the rescission of an order granted by Windell J striking out the NDPP's defence in the main proceedings in the above case number on 15 May 2023.
- 2 The NDPP grounded its application *"in terms of Rule 42(1)(a) of the Uniform Rules Court alternatively, on justus causa grounds in terms of common law"*.
- 3 The notice of motion also seeks condonation for the inordinate delay in filing of the rescission application.

- 4 No relief is sought against the second to fourth respondents, who I will loosely refer to as the Minister of Police and other related police functionaries who elected to abide by the court's findings. They were notwithstanding the aforesaid election represented by counsel and supported the NDPP.
- 5 The application is only opposed by the plaintiff who is also the first respondent ("Mogashua") in the rescission application.
- 6 To contextualise the application, it is necessary to refer to the pleadings and events that gave rise to the present relief being sought.

PLEADINGS AND EVENTS GIVING RISE TO THE APPLICATION

- 7 Mogashua launched proceedings against the Minister of Police, claiming in terms of Claim "A" that on 1 November 2017 he suffered damages for unlawful arrest and detention by members of the South African Police Services. In addition he cited the Director of Public Prosecutions as second defendant and in terms of Claim "B" alleged that on 6 November 2017 the second defendant wrongfully, unlawfully and maliciously set the law in motion without fully applying his/her mind to the facts contained in the police docket whether to prosecute or not and in addition alleged that the second defendant did not have any reasonable belief in the truth of the information given. He claimed that he suffered R1,4 million rand damages under Claim "A" and R 2 million damages under claim "B".

- 8 He also claims that proper notice of the proceedings was given, and that condonation was sought in terms of section 3(1)(b) and section 3(4) of Act 40 of 2002 (“the Act”). Same is annexed as Annexures “A” and “B” to the particulars of claim. These notices were served on the State Attorney, and a plea was filed on behalf of the defendants on 28 September 2021. Save for admitting the names of the parties and the contents of paragraph 5 of the particulars of claim (which relates to the 3 notices under the Act), the plea amounts to a bare denial.
- 9 A notice of intention to amend the particulars of claim was filed on 22 September 2022 and amended particulars of claim was filed on 15 November 2022. It would appear that the state attorney did not exercise its right to amend consequentially and from this point onwards the pleadings remained static.
- 10 I should mention that with regard to the Director of Public Prosecutions the facts set out in the Section 3 notice are *prima facie* incomplete. This was not raised in the plea filed by the State Attorney on behalf of the Minister and the Director of Public Prosecutions nor was anything made of the fact that the notices were out of time. Mogashua’s counsel explained in his heads of argument filed in support of the rescission that no condonation application was formally launched given the admission in the plea.
- 11 On 19 January 2022 (prior to the amended pleadings following) Mogashua’s attorney of record delivered a document styled “NOTICES IN TERMS OF RULE 35(1),(6) (8) & (10)” to the State Attorney’s Offices.

- 12 The defendants filed their discovery affidavit on 5 April 2021 and the Plaintiffs filed their discovery Affidavit on 19 January 2022.
- 13 On 22 September 2022 Mogashua's attorney of record delivered a Notice in terms of Rule 35(3) to the State Attorney's offices calling on "*the Defendant*", without specifying which defendant is required to do so, to produce for inspection the following documents i.e. the Moroka Police docket Cas No:25/11/2017, Moroka SAP 10, 25/11/2017, Moroka SAP 14, 25/11/2017.
- 14 Whilst this was delivered on the same date as the Notice of intention to Amend and the amended particulars of claim were filed on 15 November 2022 (which means pleadings were reopened) neither party seemed to be concerned about this.
- 15 On 13 January 2023 Mogashua's attorney of record launched an application under Rule 35(7) of the Uniform Rules of Court to exact compliance with the Rule 35(3) Notice served on 22 September 2022. The relevant Rule 35(3) notice is annexed to the aforesaid application. The founding Affidavit of Mogashua's attorney make no mention of the fact that when the Rule 35(3) notice was served a Notice of intention to amend the Particulars of Claim was also served effectively re-opening the pleadings nor was any mention made of the filing of the amended plea on 15 November 2022.
- 16 On 16 January 2023 Mogashua's attorney delivered a Notice calling on the State Attorney to attend a pre-trial conference in terms of Rule 37(1), On 24 January 2023 he launched an application to compel the

attendance of the State Attorney at such a pre-trial conference within 5 days of the service of such an order and respond within 5 days from the service of *such order* on the respondents' attorneys.

17 The second paragraph of the Notice of Motion provides that the respondents are ordered in terms of Rule 37 to respond to the pre-trial minutes of the applicant within 5 days of the service of the order on the respondents' attorney of record.

18 Prayer 3 of the aforesaid Notice of Motion provides for a further order to the effect that the Applicant is granted leave to approach the Court, with duly supplemented papers, for an application to strike out the Respondent's plea should it be in default of the order above.

19 On 27 February 2023 Moorcroft AJ granted an order to compel the discovery sought in terms of Rule 35(7). The date stamp of the Registrar on this order is 3 March 2023. This order is not the subject matter of the present attack. The order reads as follows:

"HAVING read the documents filed of record, heard counsel, and considered the matter:

IT IS ORDERED THAT:

1. The respondents (defendant in the main action) are hereby ordered, in terms of Rule 35(7), to comply with the applicant's rule 35(3) notice and deliver the documents requested therein to the applicant (plaintiff in the main action) within 5 (FIVE) days from date of the service of this order on the respondents attorney of record.

2. Should the respondents be in default of paragraphs 1 above the applicant is granted leave to approach the above honourable Court, with duly supplemented papers, for an application to strike out the respondents' pleaded defence.

3. Ordering the respondents to pay the costs of this application on an attorney and client scale."

- 20 On the same date he also granted the order to compel attendance at a Rule 35(7) conference together with the relief set out above and specifically the relief referred to in paragraph 16 above.
- 21 On 24 March 2023 Mogashua's attorneys of record instituted proceedings to strike out the defendants' defence as contained in the plea and seeking leave that it may set down the matter for default judgment. This particular application was based on the failure to comply with Moorcroft AJ's order compelling discovery under Rule 35 (7). Although Moorcroft AJ signed the relevant order paragraph 13 of the founding affidavit states that the order was made by Strijdom AJ. This is clearly a typographical error and it was not in contention during the hearing of the matter.
- 22 On 13 April 2023 Mogashua's attorneys issued an application to compel the respondent (in the singular with no indication which respondent is being addressed) to respond to the pre-trial minutes within 5 days of date of service of "*this order*" on the respondents attorneys. Further relief was also sought to the effect that should the respondent (again singular and not specified) remain in default in respect of the relief sought, Mogashua is granted leave to approach the court with duly supplemented papers to for an application to strike out the respondent's plea (again singular and unspecified).
- 23 In certain parts of the founding affidavit the same error is repeated referring to "respondent" whilst in paragraph 9 of the founding affidavit where the deponent states that the pre-trial meeting was held with the

respondents (plural) attorneys on 24 March 2023 and the applicant's attorney sent the pre-trial minutes to the respondents' attorney on 30 March 2023 , giving them 5 days to sign and return same.

24 In paragraph 10 of the founding affidavit the deponent states that the respondent (again singular) failed to comply with the order and at the time the application was launched was still in contempt of the court order, referring to Moorcroft AJ's order, dealt with in paragraph 20 above.

25 It would appear that the application referred to in paragraph 22 was never pursued further and the next relevant event was that the 24 March 2023 application to strike out the respondents defence was set down for 15 May 2023 before Windell J who granted an order striking out the respondents defence in its plea in terms of rule 35(7) of the Uniform Rules of Court together with a costs order on the attorney and client scale (order signed 15 May 2023 and dated 16 May 2023 according to the registrar's date stamp. The order is premised on the respondents non-compliance with the order of Moorcroft AJ granted on 27 February 2023 bearing the date stamp of the registrar of 3 March 2023, ordering compliance with the rule 35(3) notice already referred to.

26 This opened the way for the applicant to seek a default judgment which it launched on 23 October 2023 claiming R4 193 000 plus interest on the aforesaid at the rate of 15,5% as from date of judgment to date of payment.

- 27 This application was set down for hearing on 30 November 2023. A copy of the notice of set down was served on the respondents' attorneys on 2 November 2023. On 10 November 2023 the defendants' attorneys gave notice of their intention to oppose same.
- 28 Apart from filing answering affidavits to the application for default judgment the NDPP on 29 November 2023 filed an application for Rescission of the order of Windell J striking in terms of which the NDPP's defence was struck out.
- 29 I should point out that the summons issued was originally aimed as far as the second respondent is concerned at the director of public prosecutions. By the time further and better discovery was compelled the second respondent was transmogrified into the NDPP. Neither party addressed me on this or objected to this state of affairs and hence I will not concern myself with the ostensible substitution of the Director of Public Prosecutions for the NDPP.

THE NDPP'S APPLICATION FOR RESCISSION

- 30 As already indicated this application is based on Rule 42 (1)(a) of the Uniform Rules of Court *alternatively* the *justus causa* common law grounds. The application is only directed against Windell J's order to strike out the defence, Rule 42 as a whole read as follows:

“(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

- (a) *An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; [Paragraph (a) substituted by GN R235 of 18 February 1966.];*
- (b) *an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
- (c) *an order or judgment granted as the result of a mistake common to the parties.*

(2) *Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.*

(3) *The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."*

31 The NDPP is thus bound to bring itself within the confines of Rule 42(1)(a) or the common law grounds.

32 The rule must be read against the well established principle that once a court has pronounced a final judgment or order it has no authority to correct, alter or supplement it. This is due to the fact that the court has become *functus officio*, and that its authority over the subject matter ceases. Another principle that comes into play is that of finality in litigation expressed in the maxim *interest rei publicae ut sit finis litium* .

33 It is, however, important to note that none of these principles come into play in interlocutory matters. For instance in *Freedom Stationery (Pty) Ltd and Others v Hassam and Others* 2019 (4) SA 459 (SCA) it was held that:

"[17] There are exceptions to this general rule. The requirements for relief under these exceptions depend on whether the judgment was given on the merits of the dispute between the parties after evidence

*had been led or whether the order was made in default of appearance of the party that seeks to have it rescinded. In respect of the first category the test is stringent. Such judgment can only be set aside on the ground of fraud or, in exceptional circumstances, on the grounds of justus error or the discovery of new documents. See Childerley Estate Stores v Standard Bank of South Africa Ltd 1924 OPD 163 at 168 and De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A) at 1040E – 1041B. A default judgment, on the other hand, may be set aside in terms of Uniform Rule 31(2)(b), rule 42 or the common law. ”*¹

- 34 An order or judgment obtained by default is in its very nature interlocutory and subject to Rule 42 and any common law grounds for rescission.
- 35 The deponent to the NDPP's founding affidavit makes it clear that the plaintiff's application for default judgment that was set-down for hearing on 30 November 2023 is opposed. The state attorney entered an appearance to defend on behalf of both the DPP and the Minister of Police on 10 November 2023.
- 36 The deponent claims that the documents sought in the rule 35(3) notice were not in its possession during the relevant period and hence the application for rescission is bona fide. She also points out that the amount claimed by the plaintiff is not trifling same being in excess of R4 million. She also states that the Rule 35(3) was never transmitted to the NDPP. It is also claimed that it was always the intention to defend the plaintiff's claim. Ms Sanda from the State Attorney's office was assigned to deal with the matter on behalf of the NDPP and the Minister of Police,

¹ See p 465 D-E

- 37 I have already referred to the pleadings filed by Ms Sanda and the various notices exchanged between the parties attorneys and more specifically the content of the rule 35(3) notice. The deponent contends that the Police officials at Moroka should have provided Ms Sanda with the documents outlined in the rule 35(3) notice. She also states that if the notice was transmitted to her, she would have deposed to an affidavit that the NDPP is not the custodian of the docket. She also points out that Mogashua was discharged under section 174 of the Criminal Procedure Act, Act 51 of 1977("the CPA") on 29 March 2019.
- 38 The criminal case against Mogashua's co-accused was only finalised on 12 September 2019. She also explains that when a criminal matter is finalised, the docket is immediately returned to the South African Police Services and in the present matter it was there and then returned to the South African Police station at Moroka. She contend that the officials of the NDPP and the Minister of Police treated the matter with the necessary attention and circumspection.
- 39 In support of the aforesaid the charge sheet in the criminal matter no 43/0014111/2017 is annexed to assist the court in the matter. In the event of the rescission application succeeding the NDPP intends to amend its plea setting out its defence in the matter. At present the defence amounts to a bare denial. It is also submitted that if the rescission is not granted it will lead to a payment of R4,4 million from the public purse (which the NDPP contend will be an illegality). It is also contended that had the court been addressed by counsel for the third respondent who was at that stage acting for the NDPP the striking out

of the order would never have been granted against the NDPP. It is alleged that the transmission of the case docket is not within the competence of the NDPP presumably because same was at the time in the hands of the South African Police.

40 She also acknowledges that the NDPP has not defended the main matter as is described in the rules and practice manual but that there is an absence of malice on the part of the National Prosecuting Authority and its officials.

41 It is further contended that it has a strong prospect of success on the merits against Mogashua and that the striking of its defence and a default judgment will amount to an injustice to the NDPP and the South African Police, whose members effected a lawful arrest of Mogashua within the provisions of section 40(1)(a) of the CPA on November 2017.

42 She also drew the court's attention to the reason for Mogashua's arrest which is confirmed by Inspectors Magagula and Mofokeng in consultation with officials of the NDPP in annexures "EB5" and "EB6" to the deponent's affidavit and in sworn statements in the relevant docket.

43 She also contends that Adv Job Masina, the Regional Court Control prosecutor at the Protea Regional Magistrate's Court in a consultation with the NDPP's legal representatives indicated that in placing the criminal case docket matter in the Regional Court roll, he harboured a belief and is still of the same view that there was sufficient evidence against Mogashua and his two co-accused. It is contended that there

was a reasonable prospect of a successful prosecution on the charges of Attempted Murder, Unlawful Possession of a Firearm and Ammunition and Possession of a Suspected Stolen Motor Vehicle, against Mogashua.

44 She states that:

"The First Respondent before the Honourable Court and his two co-Accused were arrested immediately following a high-speed car chase by the officers identified supra and a gun fire exchange with the two officers. The Plaintiff and the two co-accused were arrested, firstly inside the Hyundai Getz suspected to be stolen, and secondly a firearm with live ammunition was found inside the Hyundai Getz.

39, The First Respondent and his Co-Accused were charged with four serious offences, to wit, Attempted Murder, Unlawful Possession of a Firearm and Ammunition and Possession of Suspected Stolen Motor Vehicle, to avoid prolixity I annex hereto a copy of the charge sheet with the charges as annexure "E.07".

40, In the event that the Applicant is afforded an opportunity to set out its defence it will be denied that in setting the law into motion, and secondly the enrolment of the matter and keeping the First Respondent in detention until released by the Protea Magistrate Court on bail that such was unreasonable and that the Regional Court Public Prosecutor acted with malice at any stage in the criminal proceedings"

45 It is then submitted that the basis for the rescission application is that the NDPP has a *bona fide* defence in the main and that at the time there was a good cause for the arrest and detention of Mogashua and his co-accused irrespective of whether the matter was prosecuted or not.

46 The deponent also dealt with the application for condonation in the following way: She was advised that a file was opened at the State Attorney's office for this matter on during April 2021 and was allocated to Ms Sanda. The deponent states that there was not much interaction between her and Ms Sanda since that date and 8 November 2023. From my perspective this is telling and a clear indication that Ms Sanda did not keep the NDPP in the loop as the various interlocutory

applications detailed above played out and that the penny only dropped when an application for default judgment was sought. Due to a possible conflict of interest a separate counsel had to be briefed for the NDPP and a consultation could only be arranged between all the relevant parties on 27 November 2023. It is accordingly submitted that the delay in challenging the order (presumably that of Windell J) is not attributable to the NDPP or any form of negligence on its part and bearing in mind that the intent always was to defend the claim and that the delay in challenging the aforesaid order is not excessively late and that the NDPP has a case that is *prima facie* arguable, its delay should be condoned.

47 Interestingly enough a confirmatory affidavit is filed by Ms Sanda, with no detailed explanation as to the State Attorney's conduct in the matter in representing the NDPP.

48 Mogashua's attorney of record filed an opposing affidavit briefly setting out his clients contentions to the effect that he was arrested without a warrant of arrest, causing his arrest to be unlawful, and that he was detained at the Moroka Police Cells from the time of his arrest until his first court appearance on 6 November 2017. He was denied bail and and further detained at Johannesburg prison until 6 December 2017. Mogashua's attorney further states that on 29 March 2018 all the charges against him were "withdrawn" and he was discharged under section 174 of the CPA. Both the latter contentions cannot be correct given that a discharge under section 174 of the CPA may only follow after the State has closed its case which usually occurs after some

evidence is presented. The charges cannot be withdrawn after an accused has pleaded.

49 He sets out the events giving rise to the striking out of the NDPP's defence and also point out that service of the striking out application was effected by email and per hand. The Windell J order was served on the State Attorney on 18 October 2023. whereafter the application for default judgment was made on 23 October 2023. By now 5 Months had elapsed after the Windell J order was granted. It is also important to note that the Moorcroft AJ order and the Windell J order was granted with punitive costs.

50 The State Attorney only awoke from her slumber after a notice of set-down was served in respect of the application for default judgment on 2 November 2023.

51 The State Attorney demanded that the said application be removed from the roll but Mogashua's attorney of record refused. A notice of opposition to the application for default judgment were received on 10 November 2023 from the State Attorney and on 29 November 2023 an answering affidavit was received in response to the application for default judgment and ultimately the application for rescission on 30 November 2023.

52 Mogashua's attorney of record then states that this application for rescission is received six months and 15 days after the court order granted by Malungane AJ. Presumably he meant Windell AJ. He contends that the rescission application is a mere fishing expedition

and abuse of state resources *"in protection of its intentional violation of their Constitutional obligations"*.

- 53 In my view the criticism is at least in part justified given the fact that Moorcroft AJ's order was ignored and the defendants' plea for all practical purposes constitutes a bare denial. Accordingly, a dismissal of the rescission application is sought.
- 54 In his seriatim response to the NDPP's application for rescission the point is pertinently made that the application is opposed because the NDPP has failed to give a reasonable explanation for its failure to appear in Court, failed to give a full account of the lateness of the application, has no prospects of success in the matter and has failed to deal with the prejudice Mogashua has suffered if condonation is granted.
- 55 He also points out that a plea was only filed after a notice of bar was served and notwithstanding same being a bare denial no amendment was ever sought. Neither the NDPP or a representative of the Minister of Police ever attended court and it is only once the application for default judgment was made that the NDPP provided the information in its answering affidavit.
- 56 Neither the NDPP nor any official on behalf of the Minister of Police has made any affidavit as to the whereabouts of the documents sought in the Rule 35(3) application.

- 57 It is clear that after entering an appearance to defend on 6 May 2021 and being served with several procedural notices neither defendant bothered to attend to the matter.
- 58 He also points out that the defendants appointed an attorney of their choice (the State Attorney) and had a duty to follow up with the attorney (Ms Sanda). He also finds it confusing how come the earlier notices were not served on the NDPP but the application for default judgment was, yet no explanation for this state of affairs is put forward.
- 59 He also states that the Protea Regional Court found no evidence linking Mogashua to the crime in this matter (citing section 174 of the CPA) and that all the information now disclosed should have been placed before the court when the rule 35(3) notice was served on the NDPP's attorney.
- 60 He specifically denies paragraph 27 of the NDPP's founding affidavit. This includes a denial that the NDPP treated the matter with the necessary attention and circumspection and a denial that a case has been made out for the rescission of the Windell J order.
- 61 Similar sentiments are expressed in paragraph 78 Ad paragraph 29 of the founding affidavit.
- 62 He also points out that the NDPP has not made out a case for rescission in terms of rule 42(1)(a) and has not demonstrated why the order has been erroneously sought or erroneously granted. He also contends that no grounds for rescission on a common law basis have been demonstrated.

- 63 He contends that the NDPP must demonstrate a reasonable and satisfactory explanation for its default and demonstrate a *bona fide* defence which *prima facie* carries some prospect of success and such defence should not be raised *ex post facto*.
- 64 He also concludes (although this is one of the glaring and obvious gaps in the NDPP's founding affidavit) that the NDPP is blaming its chosen attorney whilst not explaining its own passive behaviour. Hence it is clear that the NDPP's left the entire matter into its own attorney's hands and pursued no enquiries of its own over an extended period.
- 65 He further contends that the NDPP' is an organ of state with a Constitutional duty to protect the dignity of the court and knew very well that Mogashua is seeking a vindication of his Constitutional rights, and that the aforesaid should have triggered the attention of the NDPP in the matter. Hence, he submits that it cannot escape the disobedience of the court orders and processes of its "chosen" attorneys.
- 66 He accordingly prays for the dismissal of the application with a punitive costs order.
- 67 The police respondents have filed a supporting affidavit for the rescission application deposed to by one Desre Grobler supposedly to assist the court and indicating that it does not oppose the relief sought by the NDPP . She states that in abiding the relief sought in the Notice of Motion same should not be construed as an admission to the submissions in the founding affidavit. These respondents consent to

the relief for condonation. They nevertheless seek to avoid any costs order to be granted against them.

68 She states in her affidavit that the police respondents made available the documents requested in terms of Mogashua's rule 35(3) notice by furnishing same to their legal representative. Crucially she does not state when this occurred.

69 The South African Police Service has according to her thoroughly investigated the whereabouts of the police docket and are still unable to locate same. A copy of the docket was, however, provided and such copy is annexed as "SA1" to her papers. The SAP 10 and SAP 14 was traced after an "*elaborative search*" but only after the Moorcroft AJ and Windell J orders were granted. A copy of same is attached as "SA3" and "SA4". The original will be made available on due notice.

70 She further implores the court to take into account the R4,4 million claim to be paid from the public purse which is already under serious constraints.

71 She contends that a striking-off of the NDPP's defence and a default judgment will amount to an injustice to the police respondents and the Department of Community Safety whose members on 1 November 2017 effected a lawful arrest of Mogashua "within the confines of section 41(a) of the" CPA).

72 She also states that a claim for this sum is not fair and reasonable as the amount "is not due and owing to" Mogashua. This is not for her or this court to decide but for the court ultimately hearing the matter.

- 73 She further states in paragraph 4.9 of her affidavit that:
- “The reasons and basis for the Rescission Application is that the Applicant and 2nd to 4th Respondents have a bona tide defence in the main action, and that at the time there was a good cause for the arrest and detention of the First Respondent and his Co-Accused, irrespective of whether the matter was prosecuted or not, which is not the standard to decide the unlawfulness of an arrest and detention.”*
- 74 It is unclear whether she is still only now abiding or now admitting the submissions in the founding affidavit for rescission (or at least some of them) in her affidavit. She made no attempt to supply a seriatim response to the NDPP’s affidavit.
- 75 The deponent to the NDPP’s affidavit also filed a replying affidavit. IT adds very little to the founding affidavit but seeks to avoid the consequences of the failure to abide the Moorcroft AJ and Windell orders. It also seeks to avoid the aforesaid consequences by stating that the NDPP is not the custodian of the documents in question and suggesting that the aforesaid judges should have taken it into account.
- 76 In stating this she displays an astonishing lack of knowledge of a litigant’s duties in terms of rule 35 and its subrules. It bears mentioning that a litigant has to discover all relevant documents in his/her possession at the time the discovery is made and all relevant documents that were in his/her possession. Rule 35(1) reads as follows:
- “(1) Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within 20 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."² (my underlining)

77 Rule 35(2) makes this even clearer. It reads as follows:

"The party required to make discovery shall within 20 days or within the time stated in any order of a judge make discovery of such documents on affidavit in accordance with Form 11 of the First Schedule, specifying separately—

(a) such documents and tape recordings in the possession of a party or such party's agent other than the documents and tape recordings mentioned in paragraph (b);

(b) such documents and tape recordings in respect of which such party has a valid objection to produce;

(c) such documents and tape recordings which a party or such party's agent had, but no longer has possession of at the date of the affidavit.
....."³ (my underlining)

78 Even if the deponent to the NDPP's affidavit is unaware of this it remains the attorney's duty to attend to the above obligation when discovery is called for.⁴

79 The fact that the NDPP is not the custodian of the documents sought are thus completely irrelevant. The mere fact that the replying affidavit reads in the terms referred to is a strong pointer that Ms Sanda is equally ignorant in this regard. The discovery affidavit filed on behalf of the South African Police Services requires a mere glance to show the lack of care and attention applied thereto and the NDPP has not even made formal discovery at all. The plaintiff's discovery affidavit is also subject to criticism. The lackadaisical approach demonstrated in every day litigation by attorneys to discovery affidavits (in this division at least) is to my knowledge shocking and unacceptable. The plaintiff's discovery affidavit is also not beyond criticism. One merely has to refer

² See Erasmus: Superior Court Practice, 3rd Edition, RS 22, 2023, D1 Rule 35-1

³ See above

⁴ See above where the author states: "*Indeed, attorneys are responsible for the technical side of litigation and it is an attorney's duty to ensure that his client appreciates fully the significance and importance of a discovery affidavit before it is drawn up.*"

to his employment contract utilised in the application for default judgment. Nevertheless Mogashua's attorney of record discovered the relevant police docket (same being incomplete).

80 The plea which effectively constitutes a bare denial and does not even advance the grounds for lawful arrest nor raise the issue of late institution of the proceedings against the Organs of State as a special defence is further evidence of sloppy work by Ms Sanda and strongly suggests that lawful arrest did not even cross the pleaders mind. She should have deposed to a full and extensive affidavit explaining her failures to respond to the various notices referred to and should be ashamed of signing a mere confirmatory affidavit to a main affidavit supporting the NDPP's in its founding affidavit. The disclosed fact that the NDPP intends to have the plea amended should this application succeed supports my view that sloppy work is at play.

81 As for the rest the replying affidavit does not really add anything and in fact repeats many of the facts and the arguments raised in the founding affidavit.

DID THE NDPP ESTABLISH GROUNDS FOR RESCISSION UNDER RULE 42(1)(a) OR THE COMMON LAW?

82 The NDPP has not demonstrated that the order was erroneously sought or granted in its absence. Leaving aside whether or not the NDPP was wilfully absent an applicant must demonstrate that:

".... but for the error he relies on, this Court could not have granted the impugned order. In other words, the error must be something this Court

was not aware of at the time the order was made and which would have precluded the granting of the order in question, had the Court been aware of it.”⁵

83 In *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* the Court per Streicher JA (and concurred in by the other members of the bench) held that:

“Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff’s claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment”⁶

84 The question of the absence of a party affected by an order is another pre-requisite to rule 42(1)(a).

85 Given the content of the affidavits of the NDPP and Ms Sanda’s failure to explain how it can be that her client remained unaware of the applications or orders of Moorcroft AJ and Windell J, the absence of the NDPP, in the sense that nobody appeared to oppose the applications that gave rise to the orders referred to, should also be taken into account. The admitted paucity of communication with Ms Sanda prior to the application for default judgment is indicative of the NDPP not making enquiries as to the state of the litigation and Ms Sanda also doing nothing in this regard.

⁵ See *Daniel v President of the Republic of South Africa* 2013 JDR 1439 (CC) para 6.

⁶ See 2007 (6) SA 87 (SCA) para 27.

86 In *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (Council for the Advancement of the South African Constitution and Democracy in Action Amicus Curiae)*⁷ Khampepe J writing for the majority of the court had to deal with an argument that the Commission of Enquiry into State Capture erroneously sought his imprisonment by way of motion proceedings rather than by invoking the Commissions Act, same being the prescribed route. This it was submitted to the court was an order erroneously sought within the meaning of rule 42(1) of the Uniform Rules of Court. The Commission opposed this argument on the basis that it did not meet the legal requirements for rescission and lacked prospects of success.

87 The court held that:

“It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that a court “may”, not “must”, rescind or vary its order – the rule is merely an “empowering section and does not compel the court” to set aside or rescind anything. This discretion must be exercised judicially. “

(footnotes excluded)

88 It further held that:

“54 As an affected party, Mr Zuma has a direct and substantial interest in the order sought to be rescinded. He has locus standi to approach this Court for rescission in terms of rule 42. However, of course, having standing is not the end of the story. Any party personally affected by an order of court may seek a rescission of that order. But these sorts of proceedings have little to do with an applicant's right to seek a rescission and everything to do with whether that applicant can discharge the onus of proving that the requirements for rescission are met. Litigants are to appreciate that proving this is no straightforward

⁷ See 2021 JDR 2069 (CC)

task. It is trite that an applicant who invokes this rule must show that the order sought to be rescinded was granted in his or her absence and that it was erroneously granted or sought. Both grounds must be shown to exist.

[55] Mr Zuma alleges that various rescindable errors were committed, and that both of the requirements in rule 42(1)(a) have been met. These allegations will now be addressed against the backdrop of rule 42(1)(a).

Was the order granted in Mr Zuma's absence?

[56] Mr Zuma alleges that this Court granted the order in his absence as he did not participate in the contempt proceedings. This cannot be disputed: Mr Zuma did not participate in the proceedings and was physically absent both when the matter was heard and when judgment was handed down. However, the words "granted in the absence of any party affected thereby", as they exist in rule 42(1)(a), exist to protect litigants whose presence was precluded, not those whose absence was elected. Those words do not create a ground of rescission for litigants who, afforded procedurally regular judicial process, opt to be absent.

[57] At the outset, when dealing with the "absence ground", the nuanced but important distinction between the two requirements of rule 42(1)(a) must be understood. A party must be absent, and an error must have been committed by the court. At times the party's absence may be what leads to the error being committed. Naturally, this might occur because the absent party will not be able to provide certain relevant information which would have an essential bearing on the court's decision and, without which, a court may reach a conclusion that it would not have made but for the absence of the information. This, however, is not to conflate the two grounds which must be understood as two separate requirements, even though one may give rise to the other in certain circumstances. The case law considered below will demonstrate this possibility.

[58] In Lodhi 2, for example, it was said that "where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him, such judgment is granted erroneously". And, precisely because proper notice had not been given to the affected party in Theron N.O., that Court found that the orders granted in the applicants' absence were erroneously granted. In that case, the fact that the applicant intended to appear at the hearing, but had not been given effective notice of it, was relevant and ultimately led to the Court committing a rescindable error.

[59] Similarly, in Morudi, this Court identified that the main issue for determination was whether a procedural irregularity had been committed when the order was made. The concern arose because the High Court ought to have, but did not, insist on the joinder of the interested applicants and, by failing to do so, precluded them from

participating. It was because of this that this Court concluded that the High Court could not have validly granted the order without the applicants having been joined or without ensuring that they would not be prejudiced. This Court concluded thus:

"[I]t must follow that when the High Court granted the order sought to be rescinded without being prepared to give audience to the applicants, it committed a procedural irregularity. The Court effectively gagged and prevented the attorney of the first three applicants – and thus these applicants themselves – from participating in the proceedings. This was no small matter. It was a serious irregularity as it denied these applicants their right of access to court."

[60] Accordingly, this Court found that the irregularity committed by the High Court, insofar as it prevented the parties' participation in the proceedings, satisfied the requirement of an error in rule 42(1)(a), rendering the order rescindable. Whilst that matter correctly emphasises the importance of a party's presence, the extent to which it emphasises actual presence must not be mischaracterised. As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed. I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, ipso facto (by that same act), plead the "absent victim". If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing absentia (absence).

(my underlining and footnotes excluded)

- 89 The Court continues as follows after dealing with Mr Zuma's election to absent himself from the relevant proceedings:

"[61]Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted in absentia, into one erroneously granted. I need say no more than this: Mr Zuma's litigious tactics cannot render him "absent" in the sense envisaged by rule 42(1)(a)"

- 90 Similarly the NDPP whose attorney Ms Sanda had been given appropriate notice of the application Windell J order granted on 15 May 2024, does not explain why the NDPP had no knowledge of same or

the NDPP who seems to simply abandon its case in her hands (see for instance the plea constituting a bare denial) cannot contend its absence causes the order to be erroneously granted.

91 The aforesaid Zuma – judgment also makes it clear that:

“[62].....Ultimately, an applicant seeking to do this must show that the judgment against which they seek a rescission was erroneously granted because “there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment”.

[63] It is simply not the case that the absence of submissions from Mr Zuma, which may have been relevant at the time this Court was seized with the contempt proceedings, can render erroneous the order granted on the basis that it was granted in the absence of those submissions. As was said in Lodhi 2:

“A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous one.”

[64] Thus, Mr Zuma's bringing what essentially constitutes his “defence” to the contempt proceedings through a rescission application, when the horse has effectively bolted, is wholly misdirected. Mr Zuma had multiple opportunities to bring these arguments to this Court's attention. That he opted not to, the effect being that the order was made in the absence of any defence, does not mean that this Court committed an error in granting the order. In addition, and even if Mr Zuma's defences could be relied upon in a rescission application (which, for the reasons given above, they cannot), to meet the “error” requirement, he would need to show that this Court would have reached a different decision, had it been furnished with one or more of these defences at the time.”

92 Once a party's obligations under rule 35 (1) are fully understood it is clear that the lack of custodianship of the documents required would

not have constituted a defence. What was required is the fullest and clearest form of discovery with a clear indication what the NDPP had in its possession and if no longer in its possession a clear indication of when it left its possession and to whom same was delivered.

93 Notwithstanding the NDPP's claim to valid defences it is of no help. The mere fact that it was not pleaded and is now invoked *ex post facto* demonstrates that Ms Sanda in her initial consultations with the NDPP did not canvas these defences with the NDPP (otherwise they would have been pleaded) and is unlikely to have made any proper discovery at all. I emphasise the word "proper" given that a party's discovery affidavit is supposed to be a function of the issues on the pleadings. Absent any explanation from Ms Sanda the NDPP's application simply cannot begin to meet the requirements of the relief sought.

94 As to common law grounds of relief the Constitutional Court had the following to say:

"[71] As an alternative to rule 42, Mr Zuma pleads rescission on the basis of the common law, in terms of which an applicant is required to prove that there is "sufficient" or "good cause" to warrant rescission. "Good cause" depends on whether the common law requirements for rescission are met, which requirements were espoused by the erstwhile Appellate Division in Chetty, and affirmed in numerous subsequent cases, including by this Court, in Fick. In that matter, this Court expressed the common law requirements thus—

"the requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.

Thus, the existing common law test is simple: both requirements must be met. Mr Zuma must establish that he had a reasonable and satisfactory explanation for his failure to oppose these proceedings,

and that he has a bona fide case that carries some prospects of success.” (my underlining and footnotes excluded)

95 Even if I assume the existence of a *bona fide* defence on the merits (which may not be raised after the event) the position remains that there is no reasonable and satisfactory explanation for the NDPP’s default. Given that Ms Sanda did not come clean with the court as to her shocking and negligent handling of the case the second requirement of a *bona fide* defence does not even require consideration.

96 It was held in *Chetty v Law Society v Transvaal* ⁸ that:

“And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.”

97 The Constitutional Court also accepted this approach in the above matter of Mr Zuma.⁹

98 This leaves the matter of condonation. Although Rule 42(1)(a) and the common law have no prescripts as to time periods it is safe to state any rescission application of the above nature should have been brought within a reasonable period. The requirements for condonation were exhaustively discussed in *Grootboom v National Prosecuting Authority and Another*¹⁰.

99 They are evident from the following passages:

“[22] I have read the judgment by my colleague Zondo J. I agree with him that, based on Brummer and Van Wyk, the standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not

⁸ See *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) on p765A-E

⁹ See para 74.

¹⁰ See 2014 (2) SA 68 (CC) para 22-23

capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default."

100 The failure of Ms Sanda to explain the delay between 15 May 2024 and the date the rescission application was launched on 29 November 2024 stands in the way. The NDPP's explanation for the delay is of no assistance. I can only concluded that to the extent condonation is required there is no acceptable evidence before me to justify condonation.

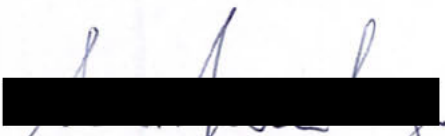
CONCLUSION

101 In the circumstances I am of the view that the application for rescission has no merit.

102 I therefore make the following orders:

1 The application for rescission of the order granted by Windell J on 15 May 2024 striking the Applicant's defence out, is hereby dismissed;

- 2 The Applicant is ordered to pay the First Respondents costs on a party and party basis with Scale "B" to apply.
- 3 The Second to Fourth Respondents – No order as to costs



**S VAN NIEUWENHUIZEN AJ
ACTING JUDGE OF THE HIGH
COURT**

Date Judgment reserved: 26 November 2024

Date Judgment delivered: 30 January 2025

Representation for applicant

Counsel: Adv S Moeletsi.

Instructed by: Office of the State Attorney,
10th Floor North State Building,
95 Albertina Sisulu Road,
Corner Kruis Street,
Johannesburg
Tel: 011 330 7600/23 or
011 330 7784
Cell : 073 004 0133
Email : NSanda@justice.gov.za
Fax No (011) 337 7180
REF: 1550/21/P59
MS N SANDA/MR H MNCUBE

Representation first respondent:

Counsel: Adv BM Khumalo,
Instructing Attorney HC Makhubele Inc,
109 - 9th Avenue,
Bezuidenhout Valley,
Johannesburg
Tel:(010) 880 7267
Email:reception@hcmakhubeleinc.co.
.za
Ref:CIV/MO330/20

Representation second – fourth respondent:

Counsel: Adv M Amoojee.
Instructed by: Office of the State Attorney,
10th Floor North State Building,
95 Albertina Sisulu Road,
Corner Kruis Street,
Johannesburg
Tel: (011) 330 7600/23 or
(011) 330 7784
Cell: 073 004 0133
Email: NSanda@justice.gov.za
Fax No (011) 337 7180
REF:1550/21/P59
MS N SANDA/MR H MNCUBE