



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CONSOLIDATED CASE NUMBERS: 28090/26 AND 28091/26

CASE NO: 28090/26

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

SIGNATURE

DATE

11 June 2026

In the matter between:

FH KHADAMBI

1ST APPLICANT

TK VALOYI

2ND APPLICANT

And

MINISTER OF POLICE

1ST RESPONDENT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2ND RESPONDENT

*This judgment was prepared and authored by the Judge whose name is reflected and is electronically circulated to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be **11 June 2026***

JUDGMENT

ENGELBRECHT AJ

1. Before this Court came two applications for default judgment, on behalf of Mr Tshikane Dennis Valoyi (Mr Valoyi) and Mr Frans Humulani Khadambi (Mr Khadambi) respectively (the Default Applications). In both Default Applications, the respondents are the Minister of Police (Police Minister) and the National Director of Public Prosecutions (NDPP), who are the defendants in separately instituted claims for damages for alleged unlawful arrest and detention, and malicious prosecution.¹ I refer to the Police Minister and the NDPP as “*the Defendants*”.
2. It is necessary at the outset to record the basis upon which the Default Applications were brought.

2.1. In the notices of motion, it is recorded in both instances that the applicants “*obtained an order to compel the Respondent in terms of*

¹ Messrs Khadambi and Valoyi, both Tshwane Metro Police Officers, together with other colleagues, had been arrested on allegations of assault and theft in October 2021. They were prosecuted, but, after various postponements, the charges were withdrawn on 9 May 2022.

Rule 41A as read with Mediation Directive Protocol of the 22 April 2025 of this Division", that "*the Respondent ... failed, refused and/or neglected to comply with the Order of 11 November 2025*", and that the applicant in each case "*therefore becomes entitled to approach this court for an Order as in the particulars of claim and to strike the defence of the Respondents*". Against the backdrop of the recordal, the relief claimed is for an order holding the Defendants liable for the damages suffered by Messrs Khadambi and Valoyi as a result of their alleged unlawful arrest, detention and malicious prosecution.

- 2.2. In the founding affidavits in each case, it is alleged that the Defendants failed to file notices of intention to defend and that, despite follow-up, nothing was done, leaving the applicants with no option but to bring the Default Applications in December 2025. The remainder of the founding affidavits is devoted to a discussion of the merits of Messrs Khadambi and Valoyi's claims. Notwithstanding the background reference in the notices of motion to orders issued by His Lordship Mr Acting Justice Brand (Brand AJ), which allow for default applications to be made in the event of non-compliance with those orders, the founding affidavits make no mention of the orders, nor is a case of non-compliance with those orders pleaded in either case.
3. The content of Default Applications assumes significance in light of the facts.
4. It is indeed so that, in October 2025, Messrs Khadambi and Valoyi were moved to bring applications to compel compliance with the Mediation Protocol

(the Compelling Applications). This was on the premise that the Defendants had not replied to the Rule 41A notices issued on their behalf. The Compelling Applications were not opposed, but on 4 November 2025 the Defendants served their replies to the Rule 41A notices, consenting to mediation. It is not known whether this fact was brought to Brand AJ's attention when the Compelling Applications were argued before him. What is known is that he issued identical orders in the following terms:

- "1. The Respondent is declared delinquent because of its default in failing to engage in Mediation in terms of the Mediation Directive and Protocol of 22 April 2025 (and its revision) and that it failed to refer the matter to mediation in terms of Rule 41A.*
- 2. The Respondent is ordered to comply with its obligations to refer the matter to Mediation in terms of Rule 41A within 15 (fifteen) days of service of this order.*
- 3. In the event that the Respondent fails to comply as ordered in paragraph 2 above, the Applicant shall be excused from engaging in mediation and be forthwith entitled to obtain a default judgment date and seek:*
 - 3.1 An order striking out the Defense of the Respondent.*
 - 3.2 An order granting relief in terms of the particulars of claim.*

4. *The Respondent must pay the costs of this application on a Party and Party scale B."*
5. In rule 6(5)(d)(iii) notices served in response to the Default Applications, the Defendants asserted, in the case of Mr Valoyi, that the Compelling Application had been premature, and in the case of Mr Khadambi, that the Compelling Application ought not to have been granted in circumstances where the reply to the rule 41A notice had been filed prior to the issue of the order compelling compliance. These arguments ought to have been raised before Brand AJ or, the Defendants ought to have invoked available procedures (rescission or appeal) to have the orders set aside. An order stands until it is set aside by a court of competent jurisdiction. Until that moment, it must be obeyed, even if incorrectly granted.²
6. In those circumstances, if Messrs Khadambi and Valoyi came to the conclusion that the orders of Brand AJ had not been complied with, it was fully open to them to seek enrolment on the default roll as envisaged in the orders, and to have explained the basis upon which they contended that the orders had not been complied with. The Defendants would not have been entitled to rely on any defence that attacked the Brand AJ orders.
7. But that is not what happened.

² *Clipsal Australia (Pty) Ltd v GAP Distributors* 2010 (2) SA 289 (SCA) paras 21 – 22, and the authorities there cited.

8. As I have indicated, the premise of the applications as set out in the founding affidavits was the Defendants' failure to file a notice of intention to defend, *not* non-compliance with the Brand AJ orders.

8.1. In the case of Mr Khadambi, a default application based on that premise cannot be sustained. A notice of intention to defend was indeed filed on 5 July 2022, followed by a plea on 18 December 2022, well before the application before me was launched on 10 December 2025.

8.2. In Mr Valoyi's case, it is true that no notice of intention to defend was issued prior to the launch of the current Default Application, but it was indeed filed on 13 February 2026. Pursuant to a notice of bar, the plea was filed on 15 April 2026. In other words, the basis advanced for the grant of default judgment in the founding papers no longer prevailed by the time the application came before me.

9. The upshot of this is that, in the case of Mr Khadambi, the factual basis for the Default Application relied on in the founding affidavit simply did not exist at the time the application was launched. In the case of Mr Valoyi, rule 19(5) of the Uniform Rules assumes significance: it provides that a notice of intention to defend may be delivered after an application for default is launched, but before default judgment has been granted, in which case all that a plaintiff is entitled to is costs.

10. Faced with the absolute defence that the case made out in the founding affidavits provided no basis for the grant of judgment by default, counsel for Messrs Khadambi, in particular, sought to persuade me that the Default Applications ought nonetheless to be granted on the basis of non-compliance with the Brand AJ orders. They cannot.

10.1. In any application, the case for relief must be made out in the founding affidavit.³ Recording a prior order in the notice of motion does not constitute the presentation of evidence that can be relied on to found relief.

10.2. Even if the content of the notice of motion could be relied on, the notices of motion in the present case simply record that the orders were obtained in the Compelling Applications, and then assert a failure, refusal and/or neglect to comply. Nothing is said at all about what the orders meant in the circumstances, and why there was non-compliance. The basis for the asserted non-compliance is not provided, and no facts are brought forward to sustain the bold claim. Of course, in the answering affidavits, highlight that, even before the matters came before Brand AJ, a reply to the Rule 41A notice had been filed. The orders nonetheless compelled compliance with "*obligations to refer the matter to mediation in terms of rule 41A*". What are those obligations? In what way were they breached? Since no case was pleaded, no answer to these necessary questions was

³ Setlogelo v Setlogelo 1914 AD 221 at 227 – 228.

provided. It is not for this Court to speculate, to analyse the Mediation Protocol, and to draw conclusions about what the Defendants might have been required to do, which they did not do, when the applicants did not put up a version. The applicants had to make out their case; the Court only serves the function of adjudication.

11. There is a further problem. In both cases, the Court has now been presented with draft orders seeking a separation of merits and *quantum*, postponement of the *quantum* determination, and an order confined to a declarator that the Defendants are liable for 100% of the damages suffered as a result of the alleged unlawful arrest, detention and malicious prosecution. What this highlights is that the procedure followed was completely the wrong one.

- 11.1. Rule 31(2)(a) provides that:

“Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit.”

- 11.2. Default judgment by way of application, as contemplated in rule 31(5) is only available where each of the claims is for a debt or liquidated demand.

- 11.3. An action for damages for unlawful arrest and detention, and for malicious prosecution, is a delictual claim for unliquidated damages. It is not a debt or other liquidated amount. The proposed draft orders underscore this fact, because they recognise that the calculation of quantum needs to be done separately. This means that, even if there had been a default as complained of (failure to file a notice of intention to defend), the actions ought to have been set down on the default trial roll for the trial court to receive evidence.
- 11.4. Default judgment cannot be sought piecemeal, in respect of portions of a claim in the manner that was sought to be done here.
- 11.5. It would have been no different if the default judgment had been properly sought on the basis of the Brand AJ orders. The orders spoke of obtaining a “*default judgment date*”, ostensibly referring to a set-down on the trial default roll, not an application for default judgment to be heard on the opposed motion roll. This is the only way in which the order can be understood, given the content of paragraph 4.9.3.2 of the Mediation Protocol of April 2025, which entitles an aggrieved party to “*enrol the matter on the Default Judgment roll*”.
12. Given this analysis, there is no need to address the Defendants' remaining grounds for opposition raised in response to the Default Applications. The Default Applications fall to be dismissed.
13. All that remains is the issue of costs.

14. Mr Toma, appearing for the Defendants, characterised the litigation as a “*comedy of errors*”. But this is no comedy. It is a tragedy. It is a tale of Defendants who, at various stages, simply did not comply with their obligations, standing in the way of the progression of the matter. It is a story in which valuable Court time was wasted on arguments over non-compliance with the Mediation Protocol, rather than engaging in mediation in accordance with the Mediation Protocol's intention to resolve matters without Court intervention, where possible. And ultimately, it is a chronicle of two individuals whose legal representatives invoked an improper procedure and otherwise committed serious errors. This Court cannot but grant the costs order sought by the Defendants in the case of Mr Khadambi. Although Mr Valoyi would ordinarily be entitled to costs, given that the notice of intention to defend was only filed after the default application, this Court must take note of the wrong procedure that was followed. The best way to balance the default and the use of wrong procedure is for each party to pay its own costs in respect of Mr Valoyi's application.

15. A final word is apposite. The Defendants' success in thwarting the Default Applications for the reasons I have given should be no cause for celebration. As the Constitutional Court explained in *Kirland*:⁴ “*there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary*

⁴ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC).

agent. It must do right, and it must do so properly".⁵ It is shocking that the Defendants have repeatedly failed to comply with their obligations. I was told from the Bar that the Defendants are now in receipt of the *curricula vitae* of mediators proposed by the applicants. It is my hope that the mediation option will now swiftly be exhausted and, if it fails, that the matters can proceed to trial.

16. In light of the foregoing, I make the following orders:

In case number 28090/2022

The application is dismissed with costs, including the costs of counsel on Scale B.

In case number 28091/2022

1. *The application is dismissed.*
2. *Each party shall bear its own costs*
3. *The application is dismissed.*
4. *Each party shall bear its own costs*

⁵ *Kirland* at para 82. Emphasis supplied.



M ENGELBRECHT

ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

APPEARANCES

FOR THE APPLICANT: ADVOCATE VAN RYNEVELD

INSTRUCTED BY: MASHAO ATTORNEYS

FOR THE RESPONDENT: ADVOCATE TOM

INSTRUCTED BY: THE STATE ATTORNEY