REPUBLIC OF SOUTH AFRICA

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

CASE NUMBER: 25067/2017

DELETE WHICHEVER IS NOT APPLICABLE	
1.REPORTABLE:	NO
2.OF INTEREST TO OTHER JUDGES:	NO
3.REVISED	NO
12 August 2022	**Judge Dippenaar**

In the matter between:

THE MINISTER OF POLICE First Applicant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Second Applicant

And

THEMBA MFIHLELWA PHUNGULA Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 12th of August 2022.

DIPPENAAR J:

[1] The applicants seek rescission of a judgment granted by De Kok AJ on 17 May 2019 in terms whereof she granted judgment against the first applicant for R300 000 and against the second applicant for R70 000, together with interest at 10.25% from 17 February 2017 and costs. The respondent's claim was predicated as against the first applicant on his unlawful arrest and detention on 6 January 2014 and, as against the second applicant, on malicious prosecution pursuant to his acquittal on all charges on 6 February 2017.

[2] The background to the application is not in dispute. The respondent's action was launched on 12 July 2017. The respondent twice amended his particulars of claim by way of notices served on the applicants on 16 April 2018 and 29 March 2019. In the latter amendment, the plaintiff rectified various deficiencies in his particulars of claim, complained of by the applicant in the present proceedings. The applicants did not object to the amendment. The defendant originally delivered a plea which contained bare denials, which was never amended. This issue was raised at a pretrial conference on 19 February 2019, at which the applicants recorded that they had no version and undertook to amend their plea. No amendment was however effected. The notice of set down of the trial was served on the state attorney on 25 September 2018, some 8 months before the hearing.

[3] In its founding papers, the applicants attached a large volume of documents pertaining to the merits of the respondent's claim. It was common cause that those documents had not been discovered during the trial proceedings and that the applicants had only discovered the notices and pleadings in the action. On the applicants' own version, those documents had only been procured shortly before

the launching of the present application and pursuant to investigations conducted by the applicants after service of the taxed bill of costs.

[4] It was further undisputed that at the trial on 9 May 2019, the applicants were legally represented by Mr Sekwati of the State attorney's office. Mr Sekwati was an admitted attorney with right of appearance in the High Court. At the commencement of the trial, application was made from the bar by Mr Sekwati for a postponement on the basis that the applicants were not ready for trial. That application was dismissed in terms of an ex tempore judgment delivered by De Kok AJ. Pursuant to the dismissal, Mr Sekwati withdrew as legal representative for the applicants. The matter proceeded in his absence. At the trial, the respondent delivered an opening address and after evidence was presented by the respondent, presented legal argument. Judgment was reserved. A comprehensive written judgment was delivered by De Kok AJ on 17 May 2019 in which a full motivation was provided for the damages awarded against the respective applicants in respect of the respondent's claims. In respect of each claim, substantially less was awarded than claimed by the respondent in his particulars of claim[1].

[5] Mr Sekwati unfortunately passed away on 9 September 2019, some four months after judgment was granted. The present application was launched on 26 February 2020.

[6] The applicants' case is that they only became aware of the judgment pursuant to receipt of the respondent's taxed bill of costs on 23 October 2019 and the application was launched 33 days later. The notice of intention to tax the bill of costs was served on the State attorney on 11 September 2019. That bill of costs was taxed on 26 September 2019. According to the applicants, consultations were conducted during October 2019 and documents and recordings amounting to some 1450 pages pertaining to the matter were furnished to the State attorney

[1] In the amended particulars of claim R950 000 was claimed against the first applicant and R850 000 against the second applicant.

during November and December 2019. No explanation was tendered why those documents were not obtained and provided to the State attorney earlier and after institution of the action proceedings in July 2017. It was contended that there was an attempt to substantially comply with the rules of court and no flagrant disregard and the delay was inadvertent and not wilful or negligent.

[7] The applicants' further contended that they have various bona defences set out in the affidavit and they would lose their right to a fair trial if the rescission application is refused. The defences raised were :(i) that the respondent's particulars of claim were excipiable; (ii) that the respondent's claim had prescribed and (iii) that the respondents' claims lacked merit on the facts. In support of their defences the 1450 pages of documents referred to, were attached. The documents included fifteen witness statements, certain representations from the National Prosecuting Authority ("NPA") and a report from a senior member of the NPA.

[8] The applicants contended that they would suffer prejudice if the condonation application were to be unsuccessful as *"there is a real prospect of the Respondent attaching the Applicants' movables to secure its judgment granted in the absence of the Applicants"*.

[9] The respondent opposed the application on the basis that the applicants made out no case for either condonation or rescission of the judgment and did not meet any of the requirements. He contended that there was no proper explanation for the substantial delay on the part of the applicants in launching the application. It was further argued that the delay on the part of the applicants were wilful and that they had not established any bona fide defences with any prospect of success.

[10] In reply the applicant raised a point *in limine* that the respondent's answering affidavit was late and no condonation had been sought and thus that the answering affidavit should be ignored. It is apposite to first deal with this issue. No formal condonation application was launched by the respondent and the issue was only dealt with in his heads of argument. Although the respondent in his heads of

argument sought to place the blame for the delay at the door of the applicants', and I agree that a portion of the delay can be attributed to the applicants, it does not explain the entire period of the delay.

[11] The applicants sought to distinguish *Pangbourne Ltd v Pulse Moving CC*[2]*("Pangbourne")*, relied upon by the respondent to excuse his failure to launch a substantive condonation application for the late filing of his answering affidavit. The fact that in the present instance, the applicants raised the condonation issue in their replying affidavit, does not render the applicable principles distinguishable and I am in respectful agreement with the principles enunciated in *Pangbourne.* It is clear that the paramount factors are those of prejudice and the interests of justice[3].

[12] The applicants did not contend for prejudice and on the facts of this matter, there was no prejudice as the applicants were able to respond to the answering affidavit and fully deal with the issues raised therein. Although the respondent can be criticised for not launching a substantive condonation application, it would not be in the interests of justice to disregard the answering affidavit under those circumstances[4].

[13] I conclude that condonation should be granted to the respondent for the late filing of his answering affidavit.

[14] The applicants further argued that if condonation was granted to the respondent, it should also be granted to the applicants and the application should be determined on its merits. It is in my view self-serving for the applicants to argue that condonation should be granted to them simply on the basis that condonation be granted for the lateness of the respondent 's answering affidavit. The applicants' conduct in relation to the matter stands on a very different footing and strikes at

[2] An unreported judgment of Wepener J in this division under case number 2009/37649
[3] Ibid paras [16], [30]
[4] Ibid paras [13], and [16]-[18]

the heart not only of whether condonation should be granted but also whether they have established that there was no wilful default on their part, one of the elements of illustrating good cause for purposes of rescission.

[15] Significantly, the applicants did not in their notice of motion seek condonation for the late launching of the rescission application. The issue was however addressed in their founding affidavit under headings of: (1) degree of lateness; (ii) the reasons for the lateness; (iii) any prejudice to the other party and (iv) any other relevant factors. I deal with the basis of the application later. Suffice it to state at this stage that at common law, a rescission application must be brought within a reasonable time[5] of the applicants becoming aware of the judgment.

[16] In summary, the applicants' case pertaining to the need for condonation and the absence of wilful delay are intertwined to the extent that it relates to Mr Sekwati and the late procurement of the voluminous documents referred to earlier. The applicants contended that the delay in launching the application was occasioned by the death of Mr Sekwati and their lack of knowledge regarding the judgment. Reliance was further placed on the lateness of the provision of the substantial new documents, already referred to, to the State attorney and the consequent delays occasioned by the need to consider and consult on the documents. I have already referred to the applicants' case on the issue and the prejudice contended for by the applicants.

[17] Condonation was opposed by the respondent who correctly pointed out that one of the factors which must also be taken into account is a party's interest in the finality of litigation.[6] The interests of the respondent, as successful party in the litigation has to be taken into account. It is also in the interests of justice and a public interest in bringing litigation to finality.

[5] Pikwane Diamonds supra para28-35
[6] Zondi v MEC, Traditional and Local Gocvernment Affairs and Others 2006 (3) SA 1 (CC) at 12E-G

[18] As the applicants' explanations for the delay are intertwined with their argument that they are not in wilful default and are substantially based on Mr Sekwati, it is apposite to also consider the facts presented in the context of whether the applicants have illustrated good cause for rescission to be granted.

[19] It is undisputable that there was a substantial and unexplained delay on the part of the applicants to launch the application timeously and within a reasonable time after it was granted. Mr Sekwati only passed away some four months after the judgment of De Kok AJ. It appears that no steps were taken by the applicants or their attorneys after the hearing of the matter on 9 May 2019 to establish what had transpired and no explanation has been tendered in this regard. It does not avail the applicants purely to place the blame at the door of Mr Sekwati, considering the supine attitude they adopted in relation to the matter. The failure on the part of the State attorney to take notice of the various documents served on it, subsequent to the delivery of the judgment which led up to the taxed bill of costs and to take steps to establish what had occurred, cannot be justified by the applicants' reliance in their replying affidavit of the volume of work with which that office has to contend.

[20] Even if a benevolent interpretation were to be adopted and the applicants' version is accepted that they only became aware of the judgment during October 2019, the delay is still substantial. Simply no proper explanation was tendered for why the extensive documentation (proffered as an explanation for their delay) was not and could not have been procured earlier. In addition, no explanation was tendered why those documents were not procured and provided to the State attorney during the course of preparation for the trial.

[21] However, our courts have held that even where a party did not appear at the hearing and its procedural failures were deplorable, such conduct did not warrant the refusal of condonation[7], a principle relied on by the applicants to argue that

[7] Minister of Police v Kritzinger (HCAA 09/2018) [2019] ZALMPPHC] 19 (10 May 2019) par 37

condonation should be granted. In my view, the applicants' conduct in relation to this matter was deplorable.

[22] I would have been justified in dismissing the application on this basis alone. However in balancing all the competing interests and on a benevolent interpretation, I conclude that it is in the interests of justice to grant the applicants condonation and to consider the application on its merits.

[23] The requirements for rescission are trite[8]: first, the applicants must give a reasonable explanation for the default, which default must not be wilful; second, the application must be bona fide and not be made with the intention of delaying the plaintiff's claim; and third, it must be shown that there is a bona fide defence with some prospects of success.

[24] The applicants did not in their founding papers state the grounds on which rescission was sought. In reply, reliance was placed on r 42(1)(a), r 31(2)(b) and the common law in the alternative. I agree with the applicants that the fact that the grounds were not expressly set out in their founding papers, is not fatal to the application[9], as argued by the respondent. On the averments in the founding papers, the applicants rely on the judgment having been granted in their absence. In their heads of argument, the applicants abandoned reliance on r 31(2)(b), thus leaving reliance on r 42(1)(a) and the common law.

[25] In my view, no case was made out by the applicants that the judgment was erroneously sought or erroneously granted as envisaged by uniform r 42(1)(a) or that there existed at the time of the judgment a fact which would have induced the court, if aware of it, not to grant the judgment. The respondent was procedurally entitled to the judgment and the applicants cannot rely on a subsequently disclosed defence[10]. The applicants correctly conceded this in their supplementary heads of

[8] Colyn v Tiger Foods Industries t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)
[9] Pikwane Diamonds (Pty) Ltd v Anro Plant Hire (2019) JOL 45868 (GP) par [21]
[10] Lodhi 2 Properties investments CC v Bondev Developments (Pty) Ltd [2007] SCA 85 (RSA)

argument. What is left is a consideration of whether rescission should be granted under the common law where judgment has been granted by default, which requires good cause to be shown. I have already referred to the need to bring a rescission application within a reasonable time of the applicants becoming aware of the judgment at common law.

[26] To determine whether the applicants' delay was wilful, an investigation must be conducted into the facts of the matter to enable a court to exercise its discretion[11]. The events which transpired before De Kok AJ are instructive on this issue.

[27] The applicants did not deal substantively with the reasons why Mr Sekwati was not able to proceed to trial but rather sought to place all blame for what occurred at his door. The applicants contended that Mr Sekwati's conduct was inexplicable, including his failure to appoint counsel and that as a result of his death, no explanations could be provided. In reply, reliance was further placed on the State attorney being overwhelmed and inundated with instructions from state owned departments.

[28] The applicants' founding papers placed the blame squarely at the door of Mr Sekwati, who it was alleged was negligent. in not properly prosecuting the applicants' defence in the trial proceedings. Their case was that Mr Sekwati was mandated to request a postponement of the trial during May 2019 as they were assured by him that the matter was not ripe for trial and the applicants need not attend the hearing. The applicants were not aware of the reasons for Mr Sekwati's withdrawal and were not aware of the judgment granted on 17 May 2019 and were of the reasonable belief that there would be a postponement and they could collate all documents and secure the relevant witnesses. No explanation was however tendered why nothing was done after providing Mr Sekwati with the mandate or why no steps were taken to do the necessary thereafter.

[11] Associated Institutions Pension Fund and Others v Van Zyl and Others 2005 92) SA 302 (SCA)

[29] Mr Sekwati was not able to respond to those allegations in this application, nor shed any light on what had transpired. The applicants' attempts to sully the reputation of Mr Sekwati in circumstances where he is not available to deal with the allegations are self-serving and do not pass muster.

[30] From the transcript of the proceedings before De Kok AJ, it appears that the main reason proffered for the need for a postponement was that Mr Sekwati had not received any assistance or proper instructions from his clients, the applicants, and thus that he did not have witnesses available for the trial. Mr Sekwati informed the court thus:

> *"..As I have indicated to your ladyship and my learned colleague my instructions today are to apply for a postponement. As you will see our plea remains a bare denial and this is because of the fact that up to, until this time we have not had an opportunity, we were not afforded the opportunity by our clients to meet with the witnesses who were involved in this matter, and I only got an opportunity to get one witness today and that is another who is somewhere waiting, but this are not all real material witnesses who can take the matter any further, the defence any further. I have not been able to see the National Prosecution people who were also who are also defendants in this matter. I the one witness who is with me in court has actually had an opportunity to peruse the docket and he informs me that in fact his statement is not even included in the docket and the incident happened in 2014. He can barely recall…the matter is quite complexed and the sense that there is also a confusion. According to the witness that is behind in the court here, he recalls the plaintiff was actually convicted while in fact according to the charge sheet that we got from the plaintiffs the plaintiff was acquitted. So this are all the facts which are loose and they need thorough investigation M'Lady. In these circumstances I request that your Ladyship grants a final postponement and my instructions are to tender the wasted cost occasioned by the postponement to tender".*

[31] During the debate which ensued, Mr Sekwati confirmed that whilst he received instructions to oppose the matter he was not given any instructions on the defence. The reason the plea was a bare denial was because the applicants had given no instructions. When queried by the court what was done by the applicants since the notice of set down was served, Mr Sekwati responded:

> *"All I notice is that the notice of set down were sent to the plaintiff's attorney to our respective clients, and we did try to communicate with them, to notify them about the set down obviously and then my colleague who was then handling the matter, Mr Maile has been requesting instructions but to no avail. When I got involved in his office because he was …moved to another office, I found a lot of trial matter(s) on the roll. It is a big practice and the only time I got seriously involved in the matter was, at around the time when they had a pre- trial. That is when I started looking for witnesses in earnest. T*he only defendant that came to me albeit on the last occasion it is the police up to today the second defendant has not given you any instructions to meet with one witness the docket does not have all the documents that are required.

[32] It is clear from the transcript that De Kok AJ formed the impression that Mr Sekwati was let down by his clients, the applicants, who failed to provide him with instructions. In her ex tempore judgment the court found:

"..He motivated the application by indicating that the office of the state attorney since their appointment not been provided with proper instructions by the defendants as to their defence. Specifically, in relation to the second defendant, Mr Sekwati indicated that his office has not been provided with any instructions as to what the second defendant's clients {defence is} who simply failed to give any attention to the matter. That in the circumstances is not a reasonable explanation. Similarly, as to the reason why a postponement is required what would have been required for the applicant for postponement is to show that if a postponement is granted, it would, or that a postponement is necessary in order for the defendant to properly advise its defence. The difficulty faced at the moment is that there is in fact no indication that the witnesses, that there will be witnesses available who will be able to advance a valid defence on behalf of the defendants. In the circumstances the applicants for postponement have not satisfied me that there is a sufficient and reasonable explanation for their default and that they legitimately require a postponement. In the circumstances the application for postponement is dismissed with costs.

[33] Pursuant thereto, Mr Sekwati stated:

"In these circumstances my instructions are that I should withdraw from this matter as attorney of record. ...And may I be excused".

[34] Mr Sekwati thus expressly placed on record that his instructions were to withdraw. Moreover, Mr Sekwati was fully aware that the trial would proceed in his absence and that the respondent intended to obtain a judgment.

[35] In any event, the applicants cannot hide behind their attorney to excuse their own remissness. In *Salojee and Another NNO v Minister of Community Development*[12], in the context of condonation for non-observance of its rules, the (then) Appellate Division cautioned:

"In Regal v Superslate (Pty) Ltd[13], also, this court came to the conclusion that the delay was due entirely to the neglect of the applicants' attorney and held that the attorney's neglect should not, in the circumstances, debar the applicant, who was himself in no way to blame, from relief. I should point out, however that it has not at any time been held 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 result 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 the Appellate Division…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

[12] 1965 (2) SA 135 (A)
[13] 1962 (3) SA 18 (AD) p23

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 p23 e-.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 on the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case. In these circumstances I would find it difficult to justify condonation unless there are strong prospects of success (Melane v Santam Insurance Co Ltd 1962 (4) Sa 531 (AD) at p532)/".

[36] These principles are particularly apposite to the present matter. The delays cannot squarely be placed at the door of the applicants' legal representatives. On the facts, even if Mr Sekwati was remiss, which is not supported by the submissions made by Mr Sekwati at the hearing, the applicants were equally if not more so.

[37] The delays and inactivity on the part of the applicant are egregious, evidenced by not only the delays in launching the rescission application but also in relation to their defence of the action. This stretches back even beyond the trial date of 9 May 2019 and at least from when the matter was set down for trial in September 2018. Even after the applicants became aware that the trial had to be postponed during May 2019, they still made no effort to get their house in order and to obtain witnesses and provide the necessary documents until October 2019, when execution was looming. Even then it took some two months to get the necessary documents, which were only provided to their attorneys during November and December 2019. From the lacunas in the documentation provided, the necessary witnesses have still not been procured. Here, as in *Salojee*, there is no acceptable explanation, not only of the delay in providing instructions and the relevant documentation to their attorneys to prepare their defence for trial, but also no acceptable explanation for the delay in launching the application.

[38] The applicants have never sought to properly explain their lack of preparation in relation to the matter. From all the available facts, it can reasonably be accepted that Mr Sekwati's submissions that he was not provided with proper instructions by the applicants pertaining to the defences to respondent's claim, were correct. This is corroborated by the lack of proper discovery and the applicants' own version

that the relevant documents and recordings were only obtained during November and December 2019.

[39] In argument, the respondent relied on *MEC for Economic Affairs, Environment and Tourism v Kruisenga and Another*[14] *("Kruisenga")* to support his argument that the applicants were estopped from denying the authority of Mr Sekwati. *Kruisenga* dealt with the authority of counsel and the state attorney to compromise certain claims and estoppel. Although it is not directly on all fours with the present facts as there is no agreement in issue, the relevant principles are still applicable to the present matter.

[40] One of the relevant principles is that the office of the State attorney, by virtue of its statutory authority as a representative of the government, has a broader discretion to bind the government to an agreement than that ordinarily possessed by private practitioners, although it is not clear just how broad the ambit of this authority is[15].

[41] In my view, the same would apply to the State attorney seeking a postponement and thereafter withdrawing from a matter on instruction, more so where those instructions are confirmed by counsel (or their attorney, as in the present instance) in open court[16].

[42] It was not the applicants' case that Mr Sekwati's withdrawal was not in their best interests, but only that his conduct was inexplicable. As against this bald averment stands Mr Sekwati's express statement in open court that he was withdrawing on the instructions of his clients, the applicants. On the facts it cannot be concluded that Mr Sekwati's withdrawal was in conflict with his mandate. Moreover, as is evidenced from the transcript of the proceedings before De Kok AJ, both the court and the respondent's legal representatives were reasonably led to believe that Mr Sekwati acted on instruction and had no reasonable basis to question his

[14] 2008 (6) SA 264 (Ck), confirmed on appeal in MEC for Economic Affairs, Environment and Tourism v Kruisenga [2010] 4 All SA 23 (SCA)
[15] Kruisenga paras [10]- [11]
[16] Ibid para [6]

authority[17]. The applicants did not present any evidence that this was not the case, but instead simply averred that they had no knowledge of what transpired in court[18].

[43] The case made by the applicants relies on a lack of knowledge of why Mr Sekwati conducted himself as he did on 9 May 2019 after the postponement application was refused. That version is contradicted by what Mr Sekwati expressly placed on record in the proceedings, being that he was instructed to withdraw if a postponement was not granted. There is much in the conduct of the applicants which remains unexplained and their attempt to simply hide behind Mr Sekwati in light of his unfortunate demise, does not bear scrutiny.

[44] On a conspectus of all the facts, and applying the relevant principles, I conclude that there was willfulness in the delay and conduct of the applicants, at the very least in exhibiting a wilful disregard of the consequences of their negligent and supine approach to the matter.

[45] It is a well known stratagem for attorneys to withdraw when the shoe pinches and postponements are not granted, where a party is not ready to proceed to trial. In my view, it is doubtful whether the applicants can honestly contend that judgment was granted in their absence in the circumstances of this case, where the applicants were legally represented and given the express decision of their attorney of record to withdraw if a postponement is not granted, and Mr Sekwati placing on record that he held instructions to do so. Moreover, the extreme dilatory conduct and lack of interest shown by the applicants in relation to the matter cannot be overlooked or condoned.

[46] A finding of willfulness is however not dispositive of the matter. It must be considered whether the applicants are bona fide and have raised defences with

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[17] Ibid para [20]

[18] It was the respondent who obtained and provided a transcript of the proceedings before De Kok AJ. The applicants did not do so.

some prospects of success as one of the factors in considering whether it is in the interests of justice to grant rescission. A court is enjoined to examine whether the defence raised by the person who seeks relief shows (at least) the existence of an issue which is fit for trial[19].

[47] As stated by Jones J in *De Witts Autobody Repairs (Pty) v Fedgen Insurance Co Ltd*[20], endorsed in Harris:

> *"An application for rescission is never simply an enquiry whether or not to penalise a party for failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not bona fide. The magistrate's decision to rescind the judgments of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties…he should also do his best to advance the good administration of justice"*

[48] The applicants relied on cases such as *S v Ndlovu*[21], *Government if Republic of South Africa v Fick and Others*[22] and *Melane v Santam Insurance Co Ltd*[23] in support of the principle that good prospects of success may remedy or compensate for an inadequate explanation for the delay or an inordinate delay. It is now well established that the pertinent question to consider is whether it would be in the interests of justice for condonation to be granted.[24]

[49] The applicants must only illustrate a prima facie case and need not illustrate that the probabilities are in their favour[25]. Put differently, the applicants must illustrate a bona fide defence with some prospects of success.

[50] The first defence raised by the applicants is that the respondent's particulars of claim are excipiable and that the amendment of March 2019 constituted new

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[19] Harris v Absa Bank Ltd t/a Volkskas [2002] 3 All SA 215 (T); Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd 1980 (4) Sa 573 (W) 576 A-C; Revelas and another v Tobias 1992 (2) SA 440 (W)
[20] 1994 (4) SA 705(E)
[21] [2017] JOL 38060 (CC)
[22] CCT 101/12 (2013)
[23] 1962 (4) SA 531 (AD) at 532B-E
[24] Ndlovu v S par [32]
[25] Minister of Plolice v Kritzinger supra par 31

claims, which were premature. This defence lacks merit. The respondent did not object to the amendment and it was effected. That amendment cured any deficiencies in the respondent's particulars of claim. Those particulars of claim as amended were considered by De Kok AJ, who did not find any deficiencies on the pleadings.

[51] The second defence is that the respondent's claim had prescribed. This issue was never raised on the pleadings by the respondent. In response, the respondent contended that the applicants had waived their right to rely on prescription. The issue of prescription was not raised prior to judgment being granted. It is not an issue which a court may raise *mero motu*. Moreover, considering the available facts and the dates of the respondent's arrest, his release on bail and his acquittal on the criminal charges, it cannot be concluded that such defence has any prospects of success, even if it were open to the applicants to raise such issues at this stage.

[52] Third, on the merits the applicants sought to raise various issues, based on the documents attached to the founding papers to dispute the respondent's claims. Despite the voluminous allegations and documentation, I am not persuaded that the conclusions sought to be drawn by the applicants are borne out by the documents or are supported by any primary facts. I am further not persuaded that the applicants have illustrated strong prospects of success.

[53] In addition, glaringly absent from the documentation relied on by the applicants are witness statements of those persons who have personal knowledge on the facts and can prove first, the lawfulness of the respondent's arrest and second, refute that the respondent was maliciously arrested.

[54] In my view, the applicants have failed to establish on the merits that they have strong or even some prospects of success in the action. The documentation provided, albeit voluminous, have glaring lacunas in establishing a bona fide defence to the respondent's claims.

[55] Moreover, as appears from her judgment, De Kok AJ carefully considered the evidence presented at trial and measured it in the context of the relevant case law in determining an appropriate quantum in respect of the respondent's claims. As previously stated, the amounts awarded were substantially less than the amounts claimed by the respondent.

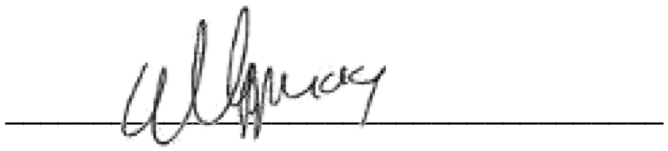
[56] On a consideration of all the facts, the applicants have in my view failed to establish that they have strong prospects of success, which could compensate for their wilful default.

[57] I conclude that the applicants have not on their papers met the necessary requirements to obtain rescission of the judgment or that it would be in the interests of justice to do so. It follows that the application must fail. In light of the conclusion reached, it is not necessary to deal in any detail with the remaining issues raised on the papers.

[58] There is no reason to deviate from the normal principle that costs follow the result. Despite the unsatisfactory manner in which the applicants conducted themselves in the matter, I am not persuaded that a punitive costs order should be granted.

[59] I grant the following order:

The application is dismissed with costs.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 17 May 2022
DATE OF JUDGMENT	: 12 August 2022
APPLICANTS COUNSEL	: Adv. D. Moodliyar
APPLICANTS ATTORNEYS	: The State Attorney
RESPONDENTS COUNSEL	: Adv. S. Maziba
RESPONDENTS ATTORNEYS	: Edward Sithole Attorneys