



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

CASE NO: 2019/41623

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

DATE
SIGNATURE

In the matter between –

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR
HEALTH OF THE GAUTENG PROVINCIAL
GOVERNMENT**

APPLICANT

and

MPHANE, THAPELO TREVOR

RESPONDENT

In re the matter between –

MPHANE, THAPELO TREVOR

PLAINTIFF

and

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR
HEALTH OF THE GAUTENG PROVINCIAL
GOVERNMENT**

DEFENDANT

Neutral Citation: *The Member of the Executive Council for Health of the Gauteng Provincial Government v Mphane* (Case No. 2019/41623) [2023] ZAGPJHC 588 (29 May 2023)

JUDGMENT

MOORCROFT AJ:

Summary

Rescission – interlocutory order – administrative problems at attorneys’ offices – defendant not to blame for such – medical negligence claim – rescission granted

Order

[1] I make the following order:

1. *The order granted on 14 June 2021 under the above case number is rescinded;*
2. *The plaintiff is ordered to file any amendment to its plea that it wishes to bring about within five days of the date of this order;*
3. *The plaintiff is ordered to file its discovery affidavit within ten days of the date of this order, failing which the defendant shall be entitled to apply for the plea to be struck out;*
4. *The costs are reserved.*

[2] The reasons for the order follow below.

Introduction

[3] This is an application for the rescission of an order granted in the Unopposed Motion Court on 14 June 2021 in terms of which the defendant was ordered to deliver its discovery

affidavit to the plaintiff within 5 days of the date of the order and that, should the defendant fail to do so, its plea in the main action be struck out. The plaintiff would then be in a position to apply for default judgment in order to finalise the matter.

[4] It is common cause that the defendant did not comply with the order and in June 2022 the defendant served an application for the rescission of the order. In the notice of the application the defendant sought an order rescinding and/or varying the order granted on 14 June 2021 and granting the defendant leave to oppose the application. This is no doubt intended to read "oppose the action".

[5] The action is founded on allegations of medical negligence relating to complications that arose after surgery performed in January 2019. The plaintiff claims R10 million in respect of future medical and related expenses and future loss of earnings and loss of earning capacity, as well as general damages in the amount of R15 million. The claim is disputed by the defendant both in respect of merits and quantum.

[6] The deponent to the founding affidavit informs the Court that the matter was allocated to her in September 2022. The deponent sets out the history of the matter. The file was originally allocated to an attorney who left the employ of the Department of Justice in August 2020 and the file was then allocated to a second attorney who similarly left in December 2020. Between December 2020 and 10 April 2021 there was no attorney allocated to the matter until the file was allocated to a third attorney in April 2021. This attorney had to take over a large number of matters allocated to various attorneys in the past and she had more 640 files on her desk. This attorney did not have the assistance of a candidate attorney. He did have a secretary and a break down occurred in their working relationship. Thee attorney resigned in August 2021 after which the matter was allocated to the deponent in September 2021.

[7] In the circumstances the set down for June 2021 never came to the notice of the defendant.

[8] Until mid-September 2021, attorneys were not allowed to attend physically at the State Attorney's office for 5 consecutive working days because of the Covid-19 Regulations that were in place. This caused a number of problems. A backlog developed.

[9] During September to November 2021, the computer server of the Department did not function properly and electronic documentation was lost. The CaseLines system replaced physical service with electronic service and attorneys at the State Attorney's office had to use their private email accounts to do their work. This caused further problems as their private email addresses and private telephone numbers were not always known to people outside the State Attorney's office.

[10] When the file in this matter was allocated to the deponent, she had very few documents at her disposal and had to approach the plaintiff's attorneys for documentation. The plaintiff's advised that the plaintiff was on the point of applying for default judgment and that unless the defendant wished to negotiate a settlement, the defendant's "*attempt to re-enter the matter again will not be entertained*". The deponent was invited onto the CaseLines system in February 2022 and was only then able to peruse the documentation. The Court order of June 2021 came to her notice. In discussions with the plaintiff's attorney it became apparent that electronic mails sent to one of the erstwhile attorneys who dealt with the matter were never given attention to by the State Attorney's office.

[11] It is quite obvious that there was a breakdown of communication not only within the State Attorney's offices but also between the State Attorney's offices and the plaintiff's attorney. On the case made out by the deponent who made a full disclosure to the Court I am satisfied that good reason has been shown to rescind the order of June 2021. The defendant and the Department had no control over the problems experienced by their Attorneys and never intended to abandon the defence to the action. The shortcomings can not be laid at the door of the defendant.¹

[12] It is regrettable that the finalisation of the claim was delayed by the State Attorney is not entirely to blame. The order compelling discovery was granted two years ago.

[13] Because the claim involves a claim for medical negligence, it is not possible to definitively deal with the merits of the matter. The deponent to the founding affidavit points out that there is sparse evidence in the record to enable the defendant to evaluate the viability or quantum of the claim. This is a matter to be decided with the help of expert evidence and in the absence of full medical reports one can only look at the pleadings. It would be impractical and not cost effective at all to require the defendant under these

¹ Compare *Regal v African Superslate (Pty) Ltd* 1962 (3) SA 18 (A).

circumstances to present comprehensive medical evidence on affidavit in support of this application and in the absence of an examination of the plaintiff himself by the defendant's experts, such an analysis might not even be of much use to the Court. The allegations in the particulars of claim of course do not constitute evidence and are not very helpful in this context.

[14] Similarly in the plea the defendant pleaded non-compliance with the provisions of Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002. The incident in question took place during January 2019 and the return of service indicates that summons was served in December 2019.

[15] As the pleadings stand, the defence based on non-compliance with Section 3(2)(a) of the Act is a good defence if accepted by the Court and for this reason a defence has been shown at least on this technical ground.

[16] For all of the above reasons I am of the view that the application should be granted and that costs be reserved. The plaintiff argued for a punitive cost order whereas the defendant's view was that, if the application succeeded, party and party costs only should be awarded. For these reasons it is appropriate to reserve the costs and allow the Trial Court when seized with the matter to also deal with the costs of the rescission application.

[17] As debated with the parties, I also make an order that the discovery affidavit be delivered within ten days of the date of this order and that the defendant, if it wished to do so, file and amended plea within five days from the date of this order. This is however not an order made by agreement.

[18] I therefore make the order in paragraph 1 above.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **29 May 2023**.

COUNSEL FOR THE APPLICANT /
DEFENDANT:

N NTOMBELA

INSTRUCTED BY:

STATE ATTORNEY

COUNSEL FOR THE RESPONDENT /
PLAINTIFF:

M B MHANGO

INSTRUCTED BY:

BAZUKA & CO INC

DATE OF THE HEARING:

23 MAY 2023

DATE OF JUDGMENT:

29 MAY 2023