IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION PRETORIA)

CASE NO: 47704/2017

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

29 May 2023 

DATE SIGNATURE

In the matter between:

MINISTER OF POLICE **FIRST APPLICANT**

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **SECOND APPLICANT**

And

TAKALANI DAVID MALINGA **RESPONDENT**

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 29 May 2023.

JUDGMENT

COLLIS J

INTRODUCTION

1.This is an opposed application brought in terms of the provisions of Rule 42(1)(a) of the Uniform Rules of Court, to rescind the judgment granted on 12 October 2021 in favour of the respondent. In addition, the applicant seeks an order setting aside the writ of execution (seeking to enforce the judgment) dated 3 December 2021.

ISSUES FOR DETERMINATION

2. This court was called to determine whether the judgment and/or order granted by the court on 12 October 2021 was erroneously sought and or granted as contemplated in Rule 42(1)(a).

RELEVANT FACTUAL BACKGROUND

3. The respondent were married to Eunice Malinga who is now decease (*the deceased*).

4. On 18 February 2000, the deceased was fatally wounded as a result of a gunshot during a domestic argument with the respondent.

5. At the time of the shooting incident, the deceased and the respondent were married. The respondent was subsequently arrested and charged for the deceased's murder.

6. The respondent as a result of the charges proffered against him was later convicted of murder and sentenced to 48 years imprisonment on 19 January 2001. He appealed his conviction and sentence to the Supreme Court of Appeal and the conviction and sentence were set aside on appeal.

7. Pursuant to the conviction and sentence being set aside on appeal, the respondent issued summons against the applicants for his unlawful arrest and detention, malicious prosecution and loss of income. The matter was set down for hearing on 21 October 2021.

8. The summons were served on the applicants on the 13th and 14th July 2017, respectively.

9. On 19 July 2017, the applicants entered an appearance to defend, but failed to file their pleas as provided for by the rules.

10. Subsequently, a notice of bar was served on them, calling for their pleas to be served by no later than the 28th September 2017. This they failed to do, and on the 24th July 2018 the respondent applied for default judgment, which application was set down for hearing on 8 November 2018.

11.Despite the default judgment application being served on the applicants, they failed to make an appearance at court and at the behest of the presiding Judge the matter was stood down to afford them an opportunity to make an appearance. This, in circumstances where the applicants had been served with the default judgment application and failed to make any appearance. The court nevertheless gave them an indulgence affording them an opportunity to make an appearance.

12. The applicants thereafter made an appearance at court whereafter the matter was postponed at their instance to give them an even further

opportunity to file an application to uplift the Notice of Bar[1] within ten court days.

13.The applicants failed to comply with this latter order of the Court, despite several reminders by the respondents. This caused the respondent to take steps to have the the default judgment enrolled again. On this second occasion the applicants appeared, represented by counsel who applied once again for a postponement without any substantive application which is a requirement in terms of the Practice Directive of this Division and on this occasion the application was refused by the Court. The application for default judgment was then proceeded with by the respondent, and it should be mentioned that this transpired in the presence of counsel for the applicants being in attendance.

14.The court considered the merits of the application for default judgment together with the affidavits filed in terms of Rule 38(2) of the rules of court and proceeded to grant default judgment against the applicants.

APPLICABLE LAW

15. The provisions of Rule 42(1) reads as follows:

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[1] Notice of Bar, annexure “TDM4” Index 095-56.

"(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;

(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."

16. In Kgomo v Standard Bank of South Africa 2016 (2) SA 184 (GP) Dobson J, held that the following principles govern rescission under Rule 42(1)(a):

"13.1 the rule must be understood against its common-law background;

13.2 the basic principle at common law is that once a judgment has been granted, the judge becomes functus officio, but subject to certain exceptions of which rule 42(1)(a) is one;

13.3 the rule caters for a mistake in the proceedings;

13.4 the mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment;

13.5 a judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment;

13.6 the error may arise either in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court; and

13.7 the applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)(b).”

17. A judgment is erroneously granted if there existed at the time of its issue a fact of which the Court was unaware, which would have precluded the granting of the judgment and which would have induced the Court, if aware of it, not to grant the judgment.[2]

THE APPLICANTS’ CASE:

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[2] Nyingwa v Moolman NO 1993 (2) SA 508 (Tk) at 510D-G; Naidoo v Matlala NO 2012 (1) SA 143 (GNP) at 153C; Rossiter v Nedbank Ltd (unreported, SCA case no 96/2014 dated 1 December 2015), paragraph [16].

18. As per the founding affidavit it is the applicants' contention that the Judge awarded damages notwithstanding the fact that there was no oral evidence led in support of the respondents claim.[3] In addition the applicants contend that the learned Judge merely relied on the allegations contained in the particulars of claim, without any evidence being led by the respondent in respect of both the unlawful arrest and detention claim as well as the malicious prosecution claim.[4] If this had been the case, the applicants representative being present at court would have been given an opportunity to participate in the proceedings, *inter alia*, to cross-examine the respondent and or his witnesses. In the absence thereof, the applicants contend that the respondent has failed to prove his case and further that the default judgment was granted in error.

RESPONDENTS' CASE

19. It is the respondents' contention that his pleaded case was properly proven with the affidavits filed by him in terms of Rule 38(2) of the rules of court. Thus, there was no need to present oral evidence in addition thereto. Furthermore, the respondent has in addition to his affidavit filed,[5] placed reliance on expert reports supported by their affidavits to quantify his claims before the court.[6]

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3 Founding Affidavit para 4.17 Index 095-13.
4 Founding Affidavit para 6.3 Index 095-16.
5 Answering Affidavit annexure "TDM9" Index 095-71.
6 Answering Affidavit para 38 Index 095-40.

20. It is on this basis that the respondent contends that his pleaded case was properly proven by way of the affidavits filed and that as a result thereof, there can be no question of the judgment being granted in error or by mistake that would warrant the setting aside of the judgment.

ANALYSIS

21. In determining the merits of the application, the starting point would be to take cognisance of the fact that the applicants had been successfully barred from participating in the proceedings. This failure to file a plea(s) on the part of the applicants, has resulted in there being no defence that had been placed before the court for consideration when evaluating the merits of the default judgment application. It also follows, that the respondent was entitled to apply for default judgment in the absence of any plea(s) having been filed.

22. This having been the position, in law there existed no basis for the applicants' legal representative, albeit being present at court, to further participate in the proceedings in any way.

23. The respondent as mentioned, made an election to prove his case by employing the provisions of rule 38(2). Having made this election it follows that the merits of his case is presented by way of affidavit and as such no need existed, to in addition, also call these witnesses to present

oral testimony. This, however, does not mean that a court would be precluded from hearing oral testimony from any witnesses who have deposed to affidavits, if it deemed it necessary or where clarification was sought by the Court. In the present instance the court did not deem it necessary to do so.

24. The election made by the respondent to employ the provisions of rule 38(2) was entirely permissible and it cannot be said that a judgment made pursuant thereto, was erroneously sought or granted.

ORDER

25. Consequently, it must follow that the application falls to be dismissed with costs, including the costs of two counsel.

COLLIS J

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant : Adv. M. Rantho

Attorney for the Applicant : The State Attorneys Pretoria

Counsel for the Respondent	: Adv. F. Baloyi and Adv. L. Mukome
Attorney for the Respondent	: Nkangala Attorneys
Date of Hearing	: 01 November 2022
Date of Judgment	: 29 May 2023

Judgment transmitted electronically