IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No. 28210/2012

DELTE WHICHEVER IS NOT APPLICABLE

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

DATE: **SIGNATURE:**

In the matter between:

JOHANNESBURG ROAD AGENCY First Applicant

CITY OF JOHANNESBURG MUNICIPALITY Second Applicant

And

NDABA: PUNKI ELIZABETH First Respondent

MINISTER OF PUBLIC WORKS Second Respondent

AND

Case No. 28220/2012

In the matter between:

NDABA: PUNKI ELIZABETH Applicant

And

JOHANNESBURG ROAD AGENCY First Respondent

CITY OF JOHANNESBURG MUNICIPALITY Second Respondent

JUDGMENT

VAN DER LINDE, AJ:

1 These are two applications brought under two case numbers, respectively 28210/2012 and 28220/2012, in this Division. The first application is by the Johannesburg Road Agency and the City of Johannesburg Municipality for the dismissal of an action which had been instituted by Ms Punki Elizabeth Ndaba against the Johannesburg Road Agency, the City of Johannesburg Municipality, and the Minister of Public Works. I will refer to this application as the dismissal application.

2 The second application is by Ms Punki Elizabeth Ndaba against the Johannesburg Road Agency and the City of Johannesburg Municipality for the rescission of a judgment handed down on 5 December 2012 by Acting Judge Myburg in which he upheld an exception which the Johannesburg Road Agency and the City of Johannesburg Municipality had brought against Ms Ndaba's particulars of claim. In that judgment, Judge Myburg granted Ms Ndaba 10 days from date of service to amend her particulars of claim. She did not, and that led to the dismissal application. I will refer to this second application as the rescission application.

3 These two applications were heard together following an order on 15 August 2014 by Judge Weiner. The Learned Judge on that occasion

postponed the dismissal application and directed that it be enrolled together with the rescission application. She also directed Ms Ndaba's attorneys to furnish an affidavit setting out why they should not be liable for the costs of the dismissal application on an attorney and client scale *de bonis propriis*.

4 The factual history of these two applications is intertwined and in what follows I take the undisputed facts from the affidavits filed in both applications.

5 The matter started when Ms Ndaba, to whom I shall refer as the plaintiff, fell into a trench on 27 July 2009 at the corner of Rissik and Jeppe Street, Johannesburg. She sustained injuries and instructed her attorneys to claim damages from the Johannesburg Road Agency, the City of Johannesburg Municipality, and the Minister of Public Works.

6 The summons was issued under Case No. 28210/2012 on 26 July 2012. The setting out of the plaintiff's cause of action was, to the likes of the Johannesburg Road Agency and the City of Johannesburg Municipality, inadequate, and that led to an exception to which I return later.

7 In the meantime two notices of intention to oppose were delivered on 3 August 2012, an hour and 40 minutes apart. The first one delivered was by the State Attorney and it said:

> *"Be pleased to take notice that the defendant herein gives notice of its intention to defend the action."*

8 It was signed by *"The State Attorney, Attorney for the Respondents".* The case heading listed as respectively first, second and third defendants, the Johannesburg Road Agency, the City of Johannesburg Municipality and the Minister of Public Works.

9 It will have been seen that this notice of intention to defend could have given rise to confusion, because it gives notice of an intention to defend on behalf of *"the defendant"*, but by the *"Attorney for the Respondents"*.

10 The second notice of intention to defend gave the same case heading, but said that notice of intention to defend was being given on behalf of the first and second defendants, and by Webber Wentzel, *"First and Second Defendants' Attorneys."*

11 Webber Wentzel also delivered a notice in terms of Rule 36(4) on behalf of the first and second defendants, and on 10 August 2012 wrote a letter to the plaintiff's attorneys, requesting two alternative

dates and times when she would be available to meet with Webber Wentzel for an inspection in loco to be conducted.

12 That elicited no response. Instead, on 16 August 2012 the plaintiff's attorneys wrote to Webber Wentzel recording that a notice of intention to defend was first received from the State Attorney, and advising that they (the plaintiff's attorneys) would be proceeding on the basis that the State Attorney was representing all the defendants. That letter of 16 August 2012 was only dispatched by fax on 29 August 2012.

13 In the meantime on 22 August 2012 Webber Wentzel on behalf of the first and second defendants gave notice of an exception to the plaintiff's particulars of claim on the basis that they were vague and embarrassing for four reasons which were set out in the notice. The plaintiff was afforded 15 days within which to remove the cause of complaint.

14 Next, on 17 September 2012 the State Attorney wrote to Webber Wentzel referring to a conversation between Mr Sekwati of the State Attorney and a representative of Webber Wentzel, and enclosing a copy of a letter by the State Attorney to the plaintiff's attorneys, together with a notice of withdrawal on behalf of the first and second defendants.

15 Attached to the letter of the State Attorney to Webber Wentzel, was a copy of a letter which was ostensibly sent, although this is disputed by the plaintiff's attorneys, on 17 September 2012 by fax to the plaintiff's attorneys in the following terms:

> *"Please note that we erroneously entered appearance on behalf of all defendants instead of only the third. We thus tried to serve a notice of withdrawal in respect of the first and second defendant, but unfortunately, one Philip refused to accept service. Herewith please find a copy thereof. Kindly advise how we should serve this notice."*

16 Attached was a notice of withdrawal as attorneys of record on behalf of the first and second defendants.

17 Next, on 20 September 2012 Webber Wentzel filed a fresh notice in terms of Rule 23(1) giving notice that the first and second defendants contended that the plaintiff's particulars of claim were vague and embarrassing.

18 There was no response to this notice and in October 2012, the precise date not having been disclosed, the first and second defendants delivered their exception.

19 On 9 November 2012 the plaintiff's attorneys gave a notice of intention to oppose to Webber Wentzel who were described in the notice as the *"Applicants' Attorneys"*, under a case heading which described as the applicants, all three of the defendants in the action. The contents of the notice was as follows:

> *"Be please (sic) to take notice that the respondent in this matter intends to oppose the above matter and she has appointed TM Selamolela Attorneys as her attorney to whom all processes, notices and pleadings in this matter be served at the address below."*

20 Two days later, on 11 November 2012, the plaintiff's attorneys wrote to Webber Wentzel in response to a letter by Webber Wentzel dated 21 September 2012 to the plaintiff's attorneys. The latter read as follows:

> *"We have received a telefax from the State Attorney's office, which states that it has withdrawn its notice of intention to defend that it erroneously filed on behalf of our clients, namely the first and second defendants.*
>
> *We therefore confirm the telephonic conversation between your Ms Selamolela and our Mr Candy on 12 September, where we confirmed that the filing of the notice of intention to defend by the State Attorney's office was filed in error.*
>
> *We have re-served our notice in terms of Rule 23 on your office and look forward to your response therewith."*

21 The letter from the plaintiff's attorneys to Webber Wentzel dated 11 November 2012 read as follows:

> *"We acknowledge receipt of your faxed letters and reply as follows.*
>
> *We advise that our Ms Selamolela from our offices never mentioned that, or confirmed the filing of the State Attorney's notice of intention to defend was filed (sic) by error. It is incorrect from Mr Candy to conclude as such.*
>
> *The correct and proper reply was that you sort your problems as defendants as it has nothing to do with us."*

22 The next event was that the exception had been set down for hearing two days later, on 13 November 2012. On that day Counsel

representing the plaintiff appeared and requested a postponement because he was not ready to argue the matter. By agreement between the parties the exception was removed from the roll on 13 November 2012 as a sign of courtesy to the plaintiff, and it was agreed that it would be set down in two weeks' time. The plaintiff's attorney also agreed to this. This was intended to afford the plaintiff's Counsel sufficient time to study the documents and to prepare heads of argument.

23 On 20 November 2012 Webber Wentzel wrote a letter to the plaintiff's attorney which read as follows:

> *"We confirm the telephonic conversation on even date between our Mr Candy and your Ms Selamolela where we confirmed that we will be setting down our clients' exception in two weeks' time.*
>
> *The date that we are looking at is 4 December 2012.*
>
> *We will serve a copy of the papers on your shortly."*

24 The matter was then set down for 4 December 2012 and came before Acting Judge Myburg on 5 December 2012. There was no appearance for the plaintiff and having read the documents and having considered the matter, Judge Myburg upheld the first and second defendants' exception dated 31 October 2012 and, as already stated, granted the plaintiff 10 days from date of service of the order on the

plaintiff's attorneys to amend her particulars of claim. The plaintiff was ordered to pay the costs of the exception.

25 On 10 January 2013 Webber Wentzel served on the plaintiff's attorneys a letter which enclosed a copy of the order of Myburg AJ and requested that the plaintiff amends her particulars of claim within 10 days. There was no substantive response to this letter and when by 25 July 2013 there was no notice of intention to amend the particulars of claim or an amendment, the dismissal application was launched. On 26 August 2013 the plaintiff's attorneys filed an answering affidavit and on 15 January 2014, some four and a half months later, the replying affidavit was served.

26 The dismissal application was then enrolled for hearing in August 2014. Just before it was heard, on 5 August 2014, the plaintiff launched the rescission application, asking for condonation for the delay in bringing the application, represented by the period from 10 January 2013 to 5 August 2014. The plaintiff also asked for a rescission of the judgment by Judge Myburg dated 5 December 2012.

27 When the matter came before Judge Weiner on 15 August 2014 she made the order to which I referred above, to the effect that the matters be heard together.

28 Thereafter, on 5 October 2014, the plaintiff delivered amended particulars of claim after having delivered a notice of intention to amend. In argument before me the Johannesburg Road Agency and City of Johannesburg Municipality contended that this action was inconsistent with the application to rescind the judgment which had set aside the particulars of claim.

29 Nonetheless this conduct elicited an application to set aside the particulars of claim as an irregular proceeding, in terms of an application the papers of which were not before me and which consequently was not moved before me. The only relevance for present purposes is that the 5th of October 2014 is the date on which the amended particulars of claim were first delivered, despite the order of Myburg AJ having come to the knowledge of the plaintiff's attorneys on 10 January 2013.

30 Next, on 20 October 2014 the answering affidavit in the rescission application was delivered and on 22 January 2015 the replying affidavit.

31 I deal first, against this background, with the rescission application and thereafter with the dismissal application. The rescission application is brought on three bases. The first is Rule 31(2)(b), the second is Rule 42(1)(a), and the third is the common law.

32 According to Cilliers, Loots and Nel, Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa, 5th Edition, Vol.1, p.715, an application under Rule 31(2)(b) can be used only for the rescission of default judgments granted in terms of Rule 31(2)(a). This is said with reference to De Sousa v Kerr, 1978 (3) SA 635 (W) at 637 D-E. In that matter default judgment was granted in favour of the plaintiff when the matter had been enrolled for trial. It was common cause before the Court that the rescission of judgment that was subsequently sought could not be brought under Rule 31(2)(b). On that basis the plaintiff's application for rescission of the judgment of 5 December 2012 cannot be brought under Rule 31(2)(b).

33 I prefer not to form a view on whether or not De Sousa was correctly decided. Even if it was correctly decided, and even if the plaintiff was not non-suited under that rule, on the basis that the Myburg, AJ judgment was not such, the requirement for success still is that *"good cause"* be shown. This observation is relevant because, as pointed out at 938 of Herbstein & Van Winsen, *"sufficient cause"* is required to be shown for a successful rescission under the common law.

34 I should remark in passing that under the common law what is potentially capable of being rescinded is a final judgment; and I doubt very much that the upholding of an exception such as the order made by Myburg AJ can be classified as a final judgment. Again, I will

assume in the plaintiff's favour that the judgment is capable of being rescinded under the common law and I will deal below with the requirement of *"good cause"* and *"sufficient cause"* interchangeably.

35 For now it necessary first to deal with the cause of action under Rule 42. The requirement is that the judgment ought erroneously to have been granted in the absence of a party affected thereby. In my view, having regard to the fact that the date of 4 December 2012 was agreed with the plaintiff's attorney and Counsel, that requirement is not satisfied and the application for rescission, to the extent that it relies on Rule 42(1)(a), cannot succeed.

36 I turn now to the issues of *"good cause"* and *"sufficient cause"* for the purposes respectively of Rule 31(2)(b) and the common law. It is in this context that the plaintiff puts up as the substantive reason for non-appearance the following paragraph in the founding affidavit in the rescission application:

> *"3.2 The applicant did not cause Counsel to appear before Court on the 5th December 2012 merely because of not having sufficient money to pay for the cover for the services that required Counsel."*

37 In addition to this point, the case for rescission is founded on the basis that the attention of Myburg AJ was not drawn to the fact, *"… that the State Attorney was the proper legal representatives for the first and second defendant which office withdrew only on the 21st of January*

2014. Had the attention of the Honourable Court, in particular Honourable Justice Myburg been drawn to the fact that the State Attorney was still acting for the first and second defendant, the Honourable Court would not have reasonably granted the default judgment dated 5th December 2012."

38 In my view neither the first nor the second causes have, in this matter, been established as good causes.

39 Concerning the lack of funds and the inability to instruct Counsel to appear on the 4th of December 2012, the problem for the veracity of the proposition is that the date was agreed. The plaintiff's Counsel and the plaintiff's attorney would not responsibly have agreed the date without having been placed in funds. It would have been far more likely, had they not been placed in funds, that they would have said that their agreement to the date two weeks hence was dependent upon them being placed in funds.

40 The second difficulty with this cause, is that no communication occurred before the 4th of December 2012 to advise either the Court or the legal representatives of the first and second defendants that the plaintiff would not be represented since the plaintiff's attorney could not be placed in funds. And the third difficulty is that this cause was not raised as the basis for the absence of representation on the 5th of

December 2012 until the filing of the founding affidavit in the rescission application, which affidavit was dated the 6th of August 2014.

41 Concerning the second cause, that is the assertion that the State Attorney was acting on behalf of the first and second defendants, there is no basis on which that finding can be made. It is correct that on 21 January 2014 the State Attorney actually served a notice of withdrawal as attorneys of record on behalf of the first and second defendants. But the truth of the matter is that the plaintiff's attorney knew long before then that the first and second defendants were being represented by Webber Wentzel. This appears from the following.

42 First, the plaintiff's attorney herself raised with Mr Sekwati of the State Attorney the issue of the two notices of appearance to defend on behalf of the first and second defendants. She herself says that she received a letter from the State Attorney to the effect that the State Attorney had the intention to serve a notice of intention to withdraw. Although she does not annex the letter, having regard to the documents that have been disclosed in the record of the two applications, it could only have been the letter of the State Attorney dated 17 September 2012 that she had in mind. She therefore knew in September 2012, as a matter of overwhelming probability, that the State Attorney was intending to withdraw.

43 Second, on the 21st of September 2012 Webber Wentzel wrote to the plaintiff's attorney, advising her of the receipt by Webber Wentzel of the fax from the State Attorney's office, which stated that the State Attorney had withdrawn its notice of intention to defend that it had erroneously filed on behalf of the first and second defendants, who were the clients of Webber Wentzel.

44 It is true that some two months later the plaintiff's attorney wrote saying that the two sets of attorneys should sort out their problems as this had nothing to do with the plaintiff's attorney. But, with respect, that response was foolhardy, particularly in the face of the fact that two days earlier the plaintiff's attorney had given notice of her intention on behalf of the plaintiff to defend the exception hearing, in a notice that described Webber Wentzel as the defendants' attorneys.

45 Third, there was the agreement reached between Counsel and attorney representing the plaintiff on 13 November 2014 on a hearing date for the exception. It is unlikely that the plaintiff's Counsel and attorney would have been prepared to agree a hearing date with Webber Wentzel and the Counsel instructed by them, were it not for the fact that the plaintiff's representatives were thereby accepting that Webber Wentzel had authority to represent the first and second defendants.

46 Apart from rejecting both bases which the founding affidavit sets up as causes justifying the rescission of 5 December 2012, there is also the inordinate delay in the bringing of the rescission application. On my calculation the delay is approximately one year and seven months. That delay has not been adequately explained and it is thus unavoidable, in my view, that the rescission application must be dismissed.

47 The first and second defendants have asked for a costs order against the applicant's attorney on an attorney and own client scale, *de bonis propriis*, as appears from the concluding prayer in the answering affidavit on p.135 of the rescission application.

48 Costs orders of this nature are not easily made. But there are two disconcerting facts which apply not only in the rescission application but also in the dismissal application. The first is that the plaintiff herself is plainly indigent. She is a pensioner, born on 21 July 1948, and is self-employed as a vendor. It is likely that she was in fact not in funds properly to instruct the plaintiff's attorney.

49 The second fact, following from the first fact, is that the plaintiff's attorney strung along the defendants without playing open cards with them. She was not entitled to keep stringing out the process waiting to be placed in funds without either conveying her predicament to the

defendants' attorneys; or without deciding to act either on contingency or pro bono.

50 Her conduct in these circumstances was, in my view, unreasonable, and unreasonable to the extent that the plaintiff herself should not be penalised by a costs order. I do not think that in this case the scale should be as between attorney and client.

51 I therefore dismiss the rescission application and direct the plaintiff's attorney to pay the costs of the rescission application *de bonis propriis* on the scale as between party and party.

52 I turn now to deal with the dismissal application. In Natal Fresh Produce Growers' Association & others v Agroserve (Pty) Ltd & others, 1991 (3) SA 795 (N), the plaintiffs' particulars of claim were set aside on exception, and they were granted leave to amend their particulars of claim within 20 days. The judgment was delivered on 19 January 1990, and on 8 August 1990 the plaintiffs applied for condonation for their failure to have amended particulars of claim timeously.

53 Hugo, J refused the condonation on the basis that he concluded that the plaintiffs concerned did not have a prospect of producing a non-excipiable particulars of claim. He was also able to conclude that the doors of the Court would not thereby be closed to the plaintiffs since

they were free to institute action afresh on a different cause of action. The Court was prepared, however, to accept that the period between January and August 1990 was not of itself a bar to the condonation being granted.

54 In this matter the failure of the plaintiff to have delivered amended particulars of claim within ten days of 10 January 2013 meant that she was automatically barred. No further notice of bar was required by the defendants. She was required, if she intended prosecuting her claim, to bring an application for condonation and for the lifting of the bar.

55 She did not do so and has still not done so. As pointed out above, the first time that the plaintiff delivered amended particulars of claim was on 5 October 2014, some year and eight months after the amended particulars of claim were due.

56 The basis of the resistance to the dismissal application is difficult to discern but it would appear that it is founded on the contention that the State Attorney was then still on record as acting for the first and second defendants.

57 This issue has been dealt with above in the context of the rescission application. The State Attorney did file a notice of withdrawal as attorneys of record only in January 2014, but this was only after the State Attorney had attempted to file a notice of withdrawal on the first

defendant's attorney in September 2012 but was unsuccessful in doing so.

58 More importantly however is the fact that any alleged uncertainty as to which attorney was acting for the first and second defendants still does not explain why by the time the dismissal application was brought in July 2013, the plaintiff had not yet applied for condonation and for the lifting of the bar.

59 On her case, of course, she was not prepared to apply for condonation and the lifting of the bar, because she had received advice that the court order which set aside her particulars of claim on exception, ought first to be rescinded.

60 But her rescission application was only brought on 5 August 2014 and, as I have held, it was unsuccessful.

61 In a sense one has therefore come the full circle. The rescission application having been unsuccessful, the plaintiff, obviously acting on advice, took her chances, and failed to apply for condonation to lift the bar and to file amended particulars of claim. This she has not done.

62 In the circumstances in my view it is inevitable that the dismissal application must be granted. Concerning its costs, the plaintiff's attorneys were directed to file an affidavit setting out why they should not be held liable for the costs of the application. Such an affidavit

was filed and appears at pp.44 to 80 of the paginated papers in the rescission application.

63 In that affidavit the plaintiff's attorney, after describing the nature of the matter and furnishing background in respect of the main action, raised the following contentions in her affidavit –

63.1 that the defendants acted in a manner that was irregular and had the effect of prejudicing the plaintiff;

63.2 that the attorney had taken steps to cause the first and second defendants to remove the irregular step;

63.3 that Counsel gave the attorney an opinion concerning the irregular step;

63.4 the particular advice which was received from Counsel in regard to the irregular step; and

63.5 that the first and second defendants launched the application for dismissal while knowing that the plaintiff was being embarrassed in not knowing who represented the first and second defendants.

64 The first point concerned the notices of intention to defend. The plaintiff's attorney relies on the fact that the notice of withdrawal on behalf of the first and second defendants was only served in January

2014 and that by that time the plaintiff had suffered serious damages and prejudice arising from the irregularity. She asserts also that the first and second defendants were employing a particular tactic, deliberately so, by using two addresses and attorneys at the same time.

65 In my view the reliance on alleged confusion arising from the notice of intention to defend which the State Attorney had filed on behalf of the first and second defendant, has no substance. The subsequent events in the second half of 2012 made it plain that the filing by the State Attorney of a notice of intention to defend on behalf of the first and second defendants was an error. The plaintiff's own conduct, as represented by her attorney, towards the end of 2012, particularly when agreeing a date for the hearing of the exception, belies the suggestion that there was any confusion.

66 Concerning the second point, the argument put up is simply that the plaintiff's attorney decided to take advice from Counsel. Of itself, this point takes the matter no further.

67 As regards the third point, which is that Counsel considered the issues placed before him, the plaintiff's attorney raises various possibilities that could have been inferred from the fact of the second notice of intention to defend by Webber Wentzel. The possibilities raised are all

created to underscore the ultimate submission of confusion that arose as a result of the two notices of intention to defend. She goes on to suggest, however, that Counsel advised that Courts are inclined to discourage the bringing of formal procedures to correct irregularities by other parties, under Rule 30A.

68 Rule 30A does not apply; it relates to the case where a party fails to comply with the rules. Rule 30 does apply, and it envisages the bringing of an application to set aside an irregular step. No doubt what the plaintiff's attorney had in mind was that such applications should not be brought without having invited the party who committed the irregular step, to rectify it.

69 But here the State Attorney says that he attempted to serve the notice of withdrawal, but was not able to do so. Although this is denied by the plaintiff, it is difficult to conceive why the State Attorney would have concocted such a version. After all, the State Attorney sent the notice of withdrawal to Webber Wentzel, and must have appreciated that Webber Wentzel could simply have passed it on to the plaintiff's attorney. I am constrained to dismiss the plaintiff's attorney's denial that there was a Philip, on the papers.

70 Moreover, the plaintiff's attorney actually did not write a letter to the State Attorney requesting the delivery of a notice of withdrawal, but sat

back, ostensibly waiting for the delivery of such a notice. As I have found above, however, she knew, as did her Counsel, by no later than 13 November 2012 that Webber Wentzel were acting on behalf of the first and second defendants.

71 The next point concerned the advice received from Counsel, but the affidavit here really deals with the plaintiff's attorney's own conduct. She explains that she communicated with the first and second defendants' legal representatives concerning the irregularity and ambiguity, and she points to the several telephone calls that she made to the two attorneys. She deposes to a discussion she had with the State Attorney as well as with Webber Wentzel, and she says that the response was that they would take the appropriate steps. She concludes by saying that no steps were taken.

72 Of course, this brings one back to the State Attorney's letter which says that service of the notice of withdrawal was attempted but was unsuccessful.

73 The final point concerns the argument that the application for dismissal was launched, *"notwithstanding that to their knowledge the embarrassment and irregularity were by then still subsisting."* This section of the argument is concluded with the submission that it is

established law that a party may not rely on its own acts of unlawfulness or irregularity to *"procure favourable judgment."*

74 One cannot help but form the impression that there is a deliberate attempt to blow completely out of proportion the fact that the State Attorney had erroneously filed a notice of intention to defend on behalf of also the first and second defendants. One leaves aside the fact that the State Attorney's notice of intention to defend may actually have been read as not being on behalf of the first and second defendants, since it referred to *"defendant"* in the singular.

75 But the point currently under consideration is whether the plaintiff's attorney has sufficiently dispelled the inclination which a Court instinctively has to protect the plaintiff against her legal representative, in the peculiar and particular circumstances of this case.

76 In my view, as already intimated above, the plaintiff ought not to be penalised by having to pay the costs of a procedure which was brought about by the inaction of her attorney. It follows that the costs of the dismissal application should be paid by the plaintiff's attorney, *de bonis propriis*.

77 The question of the appropriate scale arises. In particular, the order of Weiner, J refers to costs on an attorney and client scale. Costs on a special scale are awarded as a mark of the Court's displeasure. I

concluded, in the case of the dismissal application, not to order costs on a special scale, but there is a feature in this application which has swayed me differently. It is that the plaintiff herself is being severely prejudiced by the conduct of her attorney. Although she is not without remedy, in that she is able to institute action against her attorney for any loss she may have suffered, such an action is more difficult than the action she had embarked upon to begin with. She now has to prove not only the elements of her original cause of action, but now also in addition that her attorney was negligent.

78 I express no opinion on the latter issue that as it would be inappropriate. But it is, I believe, appropriate to take that into account when considering the appropriate costs order. In my view, having regard to these considerations, the costs should be on the scale as between attorney and client.

79 In the result I make the following orders:

1. The application by the plaintiff for rescission of the judgment of 5 December 2012 under Case No. 2012/28210 is dismissed.

2. Attorney Thesia Selamolela is directed to pay the costs of the application *de bonis propriis*.

3. The application by the first and second defendants for the dismissal of the plaintiff's action under Case No. 2012/28210 is granted, and the plaintiff's action is dismissed.

4. The costs of the application by the first and second defendants to dismiss the plaintiff's action are to be paid by attorney Thesia Selamolela *de bonis propriis*, on the scale as between attorney and client.

_____
WHG VAN DER LINDE
ACTING JUDGE OF THE HIGH COURT

For the 1st & 2nd Defendants':	Adv. M Majozi
Instructed by:	Webber Wentzel 1st & 2nd Defendants' Attorneys 10 Fricker Road Illovo Boulevard Johannesburg Tel. 011 – 530 5993 Ref: Merlita Kennedy/Rupert Candy/2319371
For the Plaintiff:	Adv. TJ Magano
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Date argued:	Monday, 31 August 2015
Judgment delivered:	Friday, 11 September 2015