REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No.: 2630/2012

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

[redacted]

25/03/2025

In the matter between:

MINISTER OF POLICE Applicant

and

H RAFIKI Respondent

In re:

Case No: 2630/2012

HERERIMANA RAFIKI Plaintiff

and

THE MINISTER OF POLICE 1st Defendant

CITY OF TSHWANE METROPOLITAN MUNICIPALITY 2nd Defendant

JUDGMENT

MNGQIBISA-THUSI J

[1] The respondent, Mr Hererimana Rafiki, instituted an action for general and special damages against the applicant, the Minister of Police (as first defendant) and the City of Tshwane Metropolitan Municipality (as the second defendant) after allegedly being shot with rubber bullets by members of the first and second respondents on 21 September 2011 (the main action). As a result of being shot in the eye, the respondent sustained a shattered cavity and eyeball.

[2] In pursuance of the prosecution of the claim against the applicant and the City of Tshwane, a pre-trial meeting was held on 12 May 2015. Counsel for the City of Tshwane posed certain written questions to the respondent's legal representative which were responded to in writing by the respondent's legal representative 13 May 2012.

[3] The trial proceeded in March 2018. However, during the trial proceedings, counsel for the respondent applied for a postponement of the trial as it appeared that instructions he received from the respondent with regard to when (in terms of time period) the shooting occurred, were inconsistent with the written answers given by the respondent's legal representative and recorded in the pre-trial minute. In granting the postponement, the court ordered the respondent to bring a substantive application for leave to amend the answers in the pre-trial minute.

[4] The respondent launched an application for leave to amend the pre-trial minute of 12 May 2015 in relation to the written responses referred to in paragraph 3 above. The application was granted by default on 22 February 2022 as neither of the defendants had indicated opposition to the application.

[5] The claim against the second defendant was withdrawn after the respondent and the City of Tshwane reached a settlement.

[6] The applicant now seeks the rescission of the default order of 22 February 2022 granting leave to the respondent to amend its answers as recorded in the pre-trial minute of 12 May 2015 and a declaration that the respondent's answers to the second defendant's questions at the pre-trial conference reduced to writing on 13 May 2015, are reinstated as the recorded answers to such questions.

[7] The applicant seeks the rescission of the default order on the ground that the order was granted erroneously granted or erroneously applied for, alternatively, under common law.

[8] Rule 42(1)(a) provides that:

> "A court may, in addition to any other powers it may have, *mero motu* or upon 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".

[9] This means that the applicant has to show that the court in granting the default judgment had committed an error "in the sense of a mistake in a matter of law appearing on the proceedings of a Court of record[1]. If the applicant can prove the error committed by the court, it is not necessary for him to explain his default.

[10] In *Kgomo and Another v Standard Bank of South Africa and others*[2], in relation to the application of uniform rule 42(1)(a), the court held that:

> "[11.1] the rule must be understood against its common law background;
>
> [11.2] 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;
>
> [11.3] the rule caters for a mistake in the proceedings;

---

[1] *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (ECD).
[2] 2016 (2) SA 184 (GP).

[11.4] 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;

[11.5] 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;

[11.6] 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

[11.7] 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)."

[11] Under the common law, in order for the court to grant an order rescinding a previous order or judgment the applicant has to show sufficient cause. In *Chetty v Law Society, Transvaal*[3] the court held that:

> "But it is clear that in principle and in the long standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:
>
> (i) That the party seeking relief must present a reasonable and acceptable explanation for his default; and
>
> (ii) That on the merits such party has a bona fide defence, which *prima facie* carries some prospect of success."

[12] The deponent to the applicant's founding affidavit alleges that the respondent was not aware of the amendment application or about the set-down for hearing of the application on 22 February 2022. It is the applicant's contention that the procedure

[3] 1985 (2) SA 756 at 765 B-C.

followed in the application to amend the pre-trial minute was flawed in that there was no proper service of the application on the applicant.

[13] Even though the applicant alleges that he was not aware of the amendment application and the set-down of 22 February 2022, as appears from the documents filed of record and uploaded on Caselines, it cannot be disputed that there is a notice of set-down with a date stamp of the office of the State Attorney's office, indicative of the fact that service of the notice of set-down was in fact effected on the State Attorney's office on 19 November 2021. It is further the applicant's contention that even if the notice of set-down bears the date stamp of the State Attorney's office, that is not proof that the notice of set-down was actually served on the State attorney's office as the signature on the date stamp was still being verified by the office of the State Attorney.

[14] According to the respondent, the notice of motion in the application to amend was served under the cover of the notice of set-down and that both documents were physically served on the State Attorney's office on 19 November 2021. Further that although the notice of set-down bears the State Attorney's date stamp, for whatever reason, the person who received service of the two documents, did not attach the date stamp of the office on the notice of motion of the application.

[15] Counsel for the applicant further submitted that based on the respondent's own admission that the notice of motion was served under cover of a notice of set-down when it was received at the State Attorney's office on 19 November 2021, such

service could not warn the State Attorney that there is a new application that was been brought against the State. Mr Govender who deposed to the founding affidavit on behalf of the applicant alleges that the application to amend the pre-trial minutes was never received by the State Attorney's office. Counsel argued that it does not make sense for a notice of set-down to be served when the main application has not been served. Counsel argued that under those circumstances there was no service of the application as it is apparent from the notice of motion that there is no date stamp of the State Attorney's office confirming receipt of the application.

[16] Counsel for the applicant argued that there was therefore no proper service of the application for leave to amend on the applicant and that the order granted allowing the amendment of the pre-trial minutes was erroneously granted.

[17] The applicant's contention is that the uploaded notice of set// down properly. It is common cause that the application seeking leave to amend the pre-trial minutes was served under the cover of a notice of set- down. As is apparent from the documents uploaded on Caselines the notice of set-down has the stamp of the State Attorney's office which is dated 19 November 2021.

[18] On behalf of the respondent the following submissions were made. On 14 September 2021 the following documents were uploaded on Caselines: the application was for leave to amend the pre-trial answers; a 'compliance declaration'; a 'Date Approval form and Date of Set Down-Provisional' form.

Counsel for the respondent conceded that the notice of motion for the amendment application was served, attached to the notice of set-down and that both were served on the State Attorney's office on 19 November 2021 and that the person receiving the documents only put a stamp on the notice of set-down to which the application for leave to amend the answers was attached. This submission is confirmed by Mr Henk Meyer who deposed to a confirmatory affidavit to the respondent's opposing affidavit in this application that he actually served the notice of set-down to which was attached the notice of motion in the application for the amendment of the pre-trial minutes on 19 November 2021. Counsel for the respondent further submitted that on 1 February 2022 prior to the order which is sought to be rescinded, was granted, and in accordance with the Practice Directive, the respondent's attorney attended the office of the State Attorney to serve an index together with a complete set of paginated papers of the application.

[19] Counsel argued that since the application was served on the State Attorney's office on 19 November 2021 and also on 2 February 2022, the applicant chose not to participate in the proceeding dealing with the application to amend the pre-trial minute. Council submitted that even if it were to be assumed that the applicant did not receive the notice of motion on 19 November 2021, on receipt of the index and the paginated papers of the application, the applicant still had the opportunity to oppose the amendment application by filing a notice of intention to oppose and appear in court on 22 February2022 to oppose the application.

[20] The second point of opposition raised by the respondent to the granting of the order sought by the applicant is that in terms of uniform 42(1)(a), an application of an order erroneously sought or granted must be launched without a unreasonable delay[4]. Counsel for the respondent further submitted that on 28 February 2022, a letter was sent by email to Mr Govender, the relevant State Attorney handling this matter which in part reads as follows:

> "Find attached hereto a draft order which was made an order of court on the 2 February 2022, allowing the plaintiff/applicant to amend its answers to the second defendant's pre-trial questions answered on 12 May 2015."
>
> ...
>
> "Also find attached hereto our amended answers and these documents, together with the endorsed court order will be served on your offices in due course. "

[21] Counsel further submitted that a further pre-trial was held between the parties on 20 September 2022 and in a joint pre-trial minute signed by the parties, the following is recorded:

> "The plaintiff obtained a court order to amend the answers to the pre-trial questions on 22 February 2022 and a formal amendment has been effected in accordance to the court order of Justice Van der Westhuizen."

---

[4] Reference in this regard was made to *Colyn v Tiger Foods Industries Ltd t/a Meadow Feed (Cape)* where the court held that the purpose of rule 42(1)(a) is to correct expeditiously.

[22] Counsel for the respondent argued that this is indicative of the fact that by 28 February 2022 the State Attorney's office was aware that a draft order had been granted. The amended answers were served on the State Attorney on 7 March 2022. Counsel submitted that it was disingenuous for the applicant to claim that it only got knowledge of the court order on the 23 May 2023.

[23] Counsel argued that despite the State Attorney's office having knowledge of the order on 28 February 2022, this application was only instituted approximately 16 months later.

[24] With regards to the arguments that service of the order on the 2 February 2022 did not provide or give the applicant sufficient time to oppose the application counsel for the respondent argue that the application and application to amend is an interlocutory application and it is does not mean that the long form needs to be used.

[25] It cannot be disputed that on 19 November 2021 the respondent effected service of the notice of set-down of the application on the office of the State Attorney as evidenced by the date stamp reflected. As contended for by the respondent, attached to that notice of set-down was a notice of motion of the application for leave to amend the pre-trial minute of 13 May 2015. The denial of receipt of the notice of set-down by the applicant is not plausible when one takes into account the date stamp put on the notice of set-down. Invariably, one would expect that when the state attorney responsible for dealing with the matter received the notice

of set-down, it would naturally be expected that he/she would peruse the papers and would have realised that a notice of motion was attached to the notice of set-down. Even if the State Attorney did not find the notice of motion as alleged to be attached to the notice of set-down, one would have expected the relevant state attorney to have inquired from the respondent's attorney as to what the served notice of set-down related to. Moreover, 01 February 2022 the respondent's attorney attended at the State Attorney's where the index and paginated complete set of the application were delivered. The papers delivered on that day all bear the date stamp of the State Attorney's office.

[26] Even if one was to accept that by 01 February 2022 there was insufficient time given to the applicant to file its notice of intention to oppose and its answering affidavit before the date of the hearing of the application on 22 February 2022, the applicant's representative could have appeared in court as directed so by the notice of set-down already served on the State Attorney's office on 19 November 2021 and 1 February 2022 and let the court hearing the matter be aware that the application was now opposed as the applicant had not been served with the application. The hearing of the application would not have proceeded by default under the circumstances.

[27] I am therefore satisfied that the applicant has not made out a case for the rescission of the order dated 22 February 2022 on the basis that the application was not served or not properly served on the applicant.

[28] Furthermore, the applicant must have become aware of the order granted on 22 February 2022 by at least the 7 March 2022 when the court endorsed draft order was served on the State Attorney's office but failed to apply for the rescission of the order within reasonable time and have failed to give a reasonable explanation for such failure. The applicant's explanation that it only became aware of the order in May 2023 is not plausible bearing in mind the chronology of events from the time the order was granted, including the contents of the joint signed pre-trial minute of 20 September 2022.

[29] In the result, the following order is made:

'The application is dismissed with costs, including costs of two counsel.'

[redacted]

NP MNGQIBISA-THUSI
Judge of the High Court

Date of hearing :30 October 2024
Date of Judgment :25 March 2025

Appearances

For the Applicant: Adv M Bothma (Instructed by The State Attorneys, Pretoria)

For the Respondent: Adv G Bester SC with Adv P A Venter (Instructed by Loubser Van Der Walt Inc