IN THE HIGH CURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

2/9/2014

Case No 12440/11

In the matter between:

MINISTER OF RURAL DEVELOPMENT

AND LAND REFORM **Applicant**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED. ✓

2/9/14 SIGNATURE

and

GRIFFO TRADING CC **Respondent**

In re

GRIFFO TRADING CC **Plaintiff**

and

MINISTER OF RURAL DEVELOPMENT

AND LAND REFORM **Defendant**

JUDGMENT

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1. This is an application for leave to appeal against the Court's refusal to allow an application for the rescission of a default judgment together with an application to withdraw an admission made in the plea filed on behalf of the applicant. Both these applications were opposed and were dismissed with a punitive costs order.
2. Before the merits of the application to grant leave to appeal can be considered, it is necessary to record the chronology of this litigation in some detail.

CHRONOLOGY

3. On the 25th February 2009 a letter of demand was sent to the then Department of Land Affairs, the applicant in these proceedings, by the respondent's (plaintiff in the principal matter) then attorney of record claiming payment for goods sold and delivered allegedly at the applicant's special instance and request. The goods allegedly delivered were said to be printer's ink cartridges.
4. On the 16th March 2009 Mrs Y Kleynhans, a legal officer in the applicant department, requested the Office of the State Attorney ("SA") to inform the respondent's legal representative that the applicant denied all liability as no order was issued to the alleged supplier. She informed the SA further that fraud was suspected, committed by issuing forged departmental requisitions. She sent the original documents that appeared to be relevant under cover of this letter to substantiate her suspicions.
5. On the 15th May 2009 Ms Thomas of the SA sent a fax to Kleynhans to confirm that the respondent's attorney had been duly informed of the applicant's denial that any transaction was entered into and that fraud was

suspected. Such a letter was indeed sent on that day to respondent's attorney. Thomas also enquired from Kleynhans whether the matter had been reported to the police. She added that a further consultation would be required if the matter did proceed, as she did not fully understand various references in the documents submitted to the SA.

6. On the 27th August 2010 Kleynhans informed Thomas that no charge had been laid. As no further developments had taken place, Kleynhans and the SA agreed to close their respective files, with Kleynhans being advised that she should collect her original documents from the SA.
7. During February 2011 the respondent issued summons under the above case number. It alleged that the respondent had agreed, while being represented by a certain Cazzavillan, with the applicant, represented by one Tshepo Sithole, to supply 480 ink cartridges. The relevant order was issued in writing, dated 30 January 2009. A copy thereof was annexed to the particulars of claim, which reflected the supplier as 'Marvic Printing". A further similar written order was placed on 6 February 2009 for another 550 cartridges. The order form was also annexed to the particulars of claim. Payment of the purchase price of R 621 591, 48 was claimed with interest and costs.
8. Service of the summons was apparently effected on the 2nd March 2011 on the Office of the SA.
9. On the 24th March 2011 the SA entered an appearance to defend. This was served on the respondent's attorney on the 31st March 2011, clearly out of time. On the same day appearance was entered a fax was typed, but only received by the applicant on the 28th March 2011, in which Ms Mbata on

behalf of the SA requested the relevant documentation and further instructions in order to instruct counsel to prepare a plea.

10. On the 31st March 2011 Kleynhans answered that she would get further instructions from the applicant's functionary responsible for the matter and would revert to her after the following weekend. She referred the enquiry to Ms Peggy Makofane with a request to identify the official who was in respondent's documents alleged to have been responsible for placing orders with the respondent.

11. On the 30th April 2011 the respondent obtained a default judgment against the applicant, which was rescinded on the 31st May 2011, apparently by agreement.

12. On 5 May 2011 Ms Mbata sent a reminder to the applicant to supply instructions and to choose a counsel to represent the latter in the proceedings that were to follow. Two names were suggested to the applicant. The applicant's copy of this message bears a manuscript annotation, apparently by Ms Kleynhans, that it was received on the same day and that she '*...phoned Peggy – not in. Spoke to Ellen her superior, they will get information and come back to me.*' From an affidavit sworn to by a certain Elvis Magagula, legal officer in the applicant department, to which affidavit further reference will be made below, it appears that "Peggy" is an officer in the applicant's finance department.

13. On the 10th May 2011 Kleynhans instructed Mbata to appoint any one of the two counsel that had been suggested. She requested Mbata to advise her of a date upon which they could meet and discuss the matter.

14. The first communication that passed between the SA and the applicant's offices after this date appears to have been the 21st July 2011 when Ms Mbata of the SA sent an e-mail to Kleynhans, informing her that a notice of bar had been served by the respondent during her leave. An extension was requested which was granted until the 8th July 2011. The official in the SA's office who requested the extension is not identified in this message, which continues to record that Mbata fell ill and apparently only returned to the office on or about the day the message was sent. She requested the respondent's attorneys not to take judgment consequent upon the failure to file a plea even after an extension of the bar had been granted. Respondent's attorneys demanded delivery of the plea not later than the next day, failing which default judgment would be taken.

15. Ms Mbata further recorded that she still had no instructions from the functionary who dealt with the matter on applicant's behalf, and that no counsel had been briefed as Ms Kleynhans' instruction in that regard never reached her desk.

16. To this assertion Kleynhans replied the following morning that she had sent the message of the 10th May 2011, recorded that the functionaries had no further information than that supplied to the SA already and added the following: '*You are again instructed to file a plea denying liability on the grounds that the goods were not delivered to the Department and none of our officials signed for such delivery.*'

17. To place the events that occurred after the above message had been sent in their proper perspective, it must be underlined that the entire correspondence conducted between Mbatha and Kleynhans until this moment was headed by

both on each occasion with the words "*Suspected fraud*" or expressions with the same meaning.

18. The applicant's plea was dated 22 July 2011 but, apparently, only filed on the 27th July 2011. It was signed by Adv M.I. Thabede and Ms Mbata on behalf of the SA. In the plea, the admission was made on behalf of the applicant that it did, in fact, place two orders for ink cartridges with the respondent. This unequivocal admission was followed by a denial that the goods ordered were ever delivered.

19. On the 3rd August 2011 the respondent's attorney delivered a notice to discover in terms of Rule 35 (1) and (8), which notice was not responded to.

20. A consultation with counsel was arranged for the 19th August 2011 with adv Thabede, which was attended by Mbata of the SA and Kleynhans, Ellen Ndlovu and Peggy Makofane of the applicant Department. According to the applicant's Mr Magagagula, whose affidavit was only filed on the 26th November 2013, counsel was fully instructed on all relevant facts at this consultation. This averment is confirmed by Mbata and Kleynhans in support of Magagula's averments.

21. In spite of full instructions having been given, nothing was done to address the state of the plea until the trial loomed large.

22. The respondent enrolled the matter for trial on the pleadings as they stood on the trial roll of the 8th August 2012. On 17th July 2012 – almost eleven months after counsel and attorney were informed of the fact that the plea was deficient and contained admissions hat needed to be withdrawn - the applicant gave notice of its intention to amend the plea by withdrawing the admission of having placed the order with the respondent. The application

was opposed. As it had not been finalised upon the trial date, the applicant was ordered to pay the wasted costs as the trial had to be postponed *sine die* because the applicant was not ready to proceed.

23. The applicant, as represented by the SA, failed to enrol the opposed application for the withdrawal of the admission and amendment of the plea within the time limit laid down in the Rules. In fact, nothing was done until respondent took the next step by applying for an order to compel discovery consequent upon the notice to that effect given on the 3rd August 2011, which notice had not been responded to.

24. The application to compel discovery was duly delivered to the SA's office on or about the 29th August 2012 but elicited no response whatever, in spite of the fact that it was preceded by a letter calling for compliance with the notice in terms of Rule 35, which letter had been delivered to the SA's offices on the 15th June 2012. The application to compel was set down for the 17th September 2012. There was no appearance on behalf of the applicant and the application to compel went by default.

25. A copy of the court's order to discover was delivered to the SA on the 20th September 2012, but still the SA was not galvanised into action.

26. Respondent thereupon applied for the striking of the applicant's defence and for default judgment. This application was delivered on the 5th November 2012. Still the SA did nothing. Applicant's defence was struck out and default judgment was granted on the 27th November 2012.

27. Ms Mbata was apparently advised by the respondent's correspondent attorney in Pretoria that default judgment had been granted on the 5th December 2012, after she had – to her alleged surprise – found the

application to dismiss the plea in her pigeon hole on that day. She phoned the respondent's instructing attorney in Johannesburg the next day, according to documentation made available by the latter in his affidavit opposing a condonation application for the failure to proceed timeously with the application to amend the plea, and an application to rescind the default judgment. Mbata appears to have been advised to put her request to the respondent to abandon the default judgment and the order to compel discovery in writing. In an e-mail dated the 7th December 2012 to the said attorney she requested respondent to abandon the order to compel and the order '*dismissing the respondent's claim*'.

28. On the 18th December 2012 she was advised by e-mail that respondent was not prepared to abandon the judgment. Again nothing further was done by the applicant until a writ of execution was issued at respondent's behest and was served and partially enforced against the applicant department on the 1st February 2013.

29. On being advised of the writ having been served, Mr Evis Magagula, legal officer in the applicant department, decided to take matters in hand, He could not establish in his own department who was responsible for the handling of the respondent's claim and, on or about the 5th February 2013, he phoned the respondent's Pretoria attorney who confirmed that the SA was representing the applicant, Mbata being the responsible attorney.

30. He phoned the SA and was told that Mbata was on medical leave. He struggled to make contact with Mr Chokwe of the SA, who was allegedly tasked with attending to the matter in Mbata's absence, but who, after having eventually been found, could not assist as the SA's file had gone missing.

Apparently the applicant's original documents handed to Mbata by Kleynhans were lost with this file. Magagula traced the court file in the Registrar's office and made copies of its contents, discovering to his 'shock' that the applicant had admitted placing orders with the respondent.

31. He instructed Chokwe to urgently attend to an application for the stay of the writ of execution and an application for rescission of the judgment. Chokwe refused to deal with the matter and Mr Silawe of the SA was instructed. He in turn briefed adv Masia to prepare both applications, but was informed that adv Thabede was already briefed to attend to the rescission application. The papers are silent on the date upon which Mr Thabede had been instructed. Even less is there any mention of any consultation with counsel for purposes of rescinding the judgment. Adv Masia then attended to the stay of the writ.

32. Mr Magagula demanded that Chokwe, who was apparently instructed by his superiors to deal with the rescission application, expedite the steps to apply for the rescission of the judgment. Still it took until the 5th March 2013 before Mr Magagula saw a draft affidavit that did not, according to his perception, correctly reflect the situation and contained uncorroborated hearsay allegations. He prepared changes to the draft in writing and sent same back to Chokwe. When Mbata returned to her office, she took control of the matter again, but in spite of an express request to this effect, Magagula did not receive another draft affidavit supporting a rescission application.

33. Mbata apparently received the draft affidavit as prepared by counsel, read it and signed it, confirming the correctness of its contents under oath. This she later admitted to being a big mistake, tendering an apology therefore, attributing her error to her medical state.

34. The application for rescission of the default judgment was eventually launched on the 26th March 2013, almost four months after applicant's attorney of record had become aware of it. The affidavit supporting the application was sworn to by Mbata only, who offered no explanation for the fact that only hearsay evidence was advanced to establish good cause for the setting aside of the judgment and presenting a *bona fide* defence. She also failed to indicate the sources of the factual information sought to be placed before the court by way of hearsay.

35. Her affidavit is deficient in many respects. It contains no reference to her initial correspondence with Kleynhans at all. No copies of the instructions she received are attached. There is no explanation how it came about that counsel was instructed by her to make admissions that were allegedly glaringly incorrect. There is no reference to the consultation with counsel on the 19th August 2011, even less is there an explanation why the application to withdraw the admission was not proceeded with expeditiously. (In an affidavit in support of the amendment to the plea, she relates that she and counsel failed to arrange who should prepare the application, and therefore it gathered dust.) There is no reference to the person in the SA's offices who was tasked to deal with Mbata's files while she was indisposed. No affidavit is annexed by such individual. There is no explanation why the application to compel discovery was ignored and why the correspondence preceding same was not replied to. There is no reference to the fact that the file went missing in the SA's offices. The official from whose desk the file disappeared is not identified. There is no explanation why the order to compel discovery and the subsequent application to strike the applicant's defence were left unattended.

The further delay in launching the rescission application is explained on the basis that the court recess intervened after Mbata realised that default judgment had been granted. Why officers of this court employed by the SA could not attend to urgent matters during the court recess is not explained, presumably because the fact that the court recess intervened is no excuse at all for doing nothing.

36. Magagula was left in the dark and in July 2013 he again inspected the court file, realising that the application had been allowed to be filed without any further input by himself – which fact is also unexplained.

37. This litany amounts to nothing less than a shocking record of failures to fulfil the SA's professional duties, of gross delay and indisputable incompetence coupled with a complete disregard of the SA's obligations toward its clients and toward the court.

38. The application for rescission was opposed – as was the accompanying application for leave to amend the plea – and was heard on the 4th November 2013. When the court enquired from Mr Thabede why Mbata was relying on hearsay evidence, he informed the court from the Bar that the applicant's officials had refused to swear to any confirmatory affidavit as they had not been – so it was said – responsible for the default judgment having been taken against the applicant.. The fact that the client's officials had refused to support the application was not touched upon in Mbata's affidavit at all. No official has at any stage of the proceedings confirmed that she or he refused to swear to an affidavit containing a true reflection of the facts testified to. There is no reference to Mr Magagula's involvement, who was certainly willing to assist counsel and Mbata to rectify what had gone wrong. Mr Thabede was

apparently unaware of Mr Magagula's role in the efforts to ensure a resolution of the embarrassment the applicant found itself in.

39. The applications were dismissed with attorney and client costs, the court expressing its severe displeasure with the manner in which the matter had been dealt with by the SA.

40. In *Tasima (Pty) Ltd v Department of Transport & Others* 2013 (4) SA 134 (GNP), the Full Bench of this Court was faced with a similar gross failure on the part of an officer of the S A's office to fulfil that office's professional duties to the State and the taxpaying public at large. Writing for the unanimous court Tuchten J said:

> *'36. I deprecate strongly the conduct of Ms Lithole as disclosed in her own affidavits before us and the correspondence admittedly sent and received. Her conduct seriously prejudices the administration of justice. Even more importantly, the dysfunctionality to which she refers demonstrates that the office of the State Attorney, Pretoria, an important organ of state, is presently unable to comply with its constitutional and statutory obligations.*
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> *37. To take but one, very important, function of the State Attorney: under rule 4(9), service of court process on the State and on ministers and deputy ministers in the national government as representative of the departments which they head may legitimately take place by service on the State Attorney. If that office is dysfunctional, a court cannot be confident that the process in question has come to the attention of responsible officers within the department concerned. Indeed, the experience of each of the members of this full bench has been that frequently and most disturbingly, civil litigation against the State in this division is allowed to go by default.*
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> *38. Under s 1(1) of the State Attorney Act, 56 of 1957, the several offices of the State Attorney are under the control of the Minister of Justice. This court too is an organ of state and subject to the duties under s 41 of the Constitution. With this in mind, it is appropriate that, as foreshadowed in argument, both the Minister of Justice and the parliamentary portfolio committee for justice be provided with copies of this judgment. In my view, too, the Law Society of the Northern Provinces should be sent a copy of this judgment with the request that the Law Society investigate the conduct of Ms Lithole and the office of the State Attorney, Pretoria, as disclosed in this judgment and the papers in the postponement application. I emphasise that while I consider the conduct of Ms Lithole, as disclosed in her own affidavits, to be worthy of censure, the primary purpose in publicising this judgment in the way described is to prompt those*

in a position to do so to ensure that the office of the State Attorney, Pretoria, fulfils its important constitutional and statutory obligations.

39. The court cannot function as a commission of enquiry. Its duty and function is to determine the specific dispute before it on the evidence presented to it by the parties and on facts of which the court may take judicial notice. I therefore cannot and do not presume to suggest how the shocking state of affairs I have described should be put right. The ultimate responsibility in law to put matters right and ensure that the office of the State Attorney, Pretoria, complies with its constitutional and statutory obligations rests on the Minister of Justice.

40. Counsel for the respondents initially tried to defend the conduct of Ms Lithole. But towards the end of their argument, counsel conceded that the conduct of Ms Lithole was not defensible and withdrew and apologised for the allegations of impropriety levelled in Ms Lithole's affidavits against Tasima and its representatives. Counsel disclosed that they had been responsible for the preparation and content of Ms Lithole's affidavits. Counsel also stated during argument that the respondents would not persist in the application for postponement of the appeal. The appeal then proceeded.

41. From counsels' concession it follows that I need not deal in any detail with the respondents' arguments that the appeal should be postponed. Suffice it to say, all their arguments are utterly without merit. The conduct of Ms Lithole, established from her own affidavits, entirely destroys any basis for good cause, without which no application for postponement can succeed.'

41. It is clear that the applicant department has been exceptionally poorly served by the legal representatives it is obliged to employ in terms of section 3 of the State Attorney Act, 56 of 1957. Nothing has changed since the court drew the completely unacceptable level of service delivery in the S A's office to the attention of the responsible authorities in the above quotation. The litany of failures evident in this case, to attend to the most elementary of administrative duties in an attorney's office, such as diarising files, observing deadlines set by the Rules and orders of court, protecting the integrity of files and of original documents entrusted to officers of this court by their clients' officials reflects the same chaotic state of dysfunctionality that attracted the full court's severe criticism. To this must be added the failure to render a professional service to

the department and the court, the unacceptable excuses proffered for failing to protect the litigant's interests and the unprofessional manner in which pleadings and affidavits were prepared. In addition it is clear that the SA's explanations and excuses for the repeated failures to comply with the duties of officers of this court fail to identify the individuals responsible for some of the worst neglects. There can be little doubt that this failure is deliberate to shield the attorneys concerned from being held personally liable for the costs incurred as a result of their misconduct. This court has had to express its disquiet over the generally very poor quality of work delivered by the S A's office in this Division on more than one occasion since the *Tasmina* judgment was delivered. (See, for instance, *Central Authority for the Republic of South Africa v R* [2014] ZAGPPHC 19 (not yet reported). Punitive costs orders have been granted against the SA's clients on numerous occasions as a direct result of the failure of its officials to perform their professional functions. It is a matter of very grave concern that nothing our courts have said appears to have been heeded by the Minister or the Department of Justice and Correctional Services. Courts cannot function effectively without the professional support of its attorneys and advocates. The State Attorney is involved most of the litigation affecting the State and is funded by the public purse. The present condition of this office causes significant unnecessary expenditure of public funds that are wasted by costs orders granted against organs of state because of the poor quality of professional service provided by these officers of the court. Eventually the very essence of the Rule of Law is endangered if regular litigants fail to observe the most basic principles that

protect the independence and quality of justice dispensed by our courts. It is high time that this malaise is addressed.

42. The numerous failures on the part of the SA's office in handling this matter are such that no proper explanation for the failure to prevent a default judgment being entered in respondent's favour was presented to the court, compare *Ferris & Another v Firstrand Bank Ltd* 2014 (3) SA 39 (CC) at para 24. Consequently, an appeal against the dismissal of the rescission application, restricted to the evidence relied upon in the application papers as they stand, cannot be found to have any prospect that another court would come to a different conclusion in regard to the finding that no acceptable explanation for the failure to prevent the default judgment being granted was provided. This is particularly the case in respect of the inexplicable failure to take the court into Mbata's confidence why no acceptable evidence was presented in the rescission application to establish the alleged fraud upon the applicant department.

43. This is not the end of the matter, however. The grounds upon which courts may grant leave to appeal have been amended since the introduction of the Superior Courts Act 10 of 2013. It lays down that leave to appeal may be granted, in terms of section 17 thereof,

> '(1) *... only...where the judge or judges concerned are of the opinion that –*
> *(a) i) the appeal would have a reasonable prospect of success; or*
> *(ii) there is some other compelling reason why the appeal should be heard, ...*
>
> *(5) Any leave to appeal may be granted by the court concerned subject to such conditions as such court may determine, including a condition –*
>
> *(a) limiting the issues on appeal, or*
>
> *(b) that the appellant pay the costs of the appeal.'*

44 The hapless taxpayers would in effect foot the bill if the applicant is compelled by a denial of an appeal against the refusal to rescind the default judgment, to honour a claim that is alleged to be based upon fraud. No admissible evidence was produced to substantiate the claim that the applicant was being defrauded when the application for rescission of was argued. Such evidence has now been produced in the application filed for leave to lead further evidence on appeal in Mr Magagula's affidavit and the annexures thereto. The question then arises whether this evidence sought to be led on appeal, coupled with the undeniable fact that the applicant was left in the lurch by its legal representatives, could be said to constitute a compelling reason, or compelling reasons, to grant leave to appeal.

45 To answer this question it must first be established whether the new dispensation applies to the present application for leave to appeal. The Superior Courts Act came into effect on the 23rd August 2013, after the application to rescind the default judgment had been launched already. The transitional provision that governs the application of the latter act is contained in section 52 thereof. It provides that pending proceedings not concluded by judgment at the commencement of the Superior Court Act are to be finalised as if the act had not been promulgated.

46. Judgment on the rescission application was given on the 4th November 2013. This concluded that application. The filing of the application for leave to appeal constitutes the initiation of fresh proceedings; see: *Wiseman v De Pinna & Others* 1986 (1) SA 38 (A) at 46D to 47D; *Video Parktown North (Pty) Ltd v Paramount Pictures Corporation* 1984 (2) SA 736 (T); *S v Absalom* 1989 (3) SA 154 (A). These new proceedings were commenced after the Superior

Courts Act came into effect. The transitional provision in section 52 of that act does not apply to the present applications for leave to appeal and for the presentation of fresh evidence on appeal. If a compelling reason exists to grant leave to approach another court leave could therefore be granted in this instance.

47. The term "*compelling*" has received judicial attention, notably in the context of the minimum sentencing regime. In *S v Malgas* 2001 (1) SA 469 (SCA) the phrase '*substantial and compelling circumstances*' was defined as circumstances constituting '*truly convincing reasons*' and as '*the impact of all circumstances relevant.... measured against the .... yardstick ... must be such as cumulatively justify a departure from the standardized response...*' (at par [25]). Applied to the statutory provision presently under consideration the word '*compelling*' clearly connotes circumstances that are so unusually different from the ordinary application for leave to appeal that the court may grant the relief sought, even though such leave would probably have been refused had it not been for the amended provision.

48. The present application clearly is one deserving of a response of this nature. The allegations against the respondent are grave and supported by evidence that *prima facie* is of substance. There is some documentary evidence to support the charge. Should leave to appeal be refused, the applicant would be deprived of the opportunity to seek to protect public funds extracted from the taxpayers' pockets. "'*Fraud unravels all*'. *The courts will not allow their process to be used by a dishonest person to carry out a fraud.*" as Lord Diplock said in *United City Merchants (Investments) Ltd v Royal Bank of*

Canada 1982 (2) All ER 720 (1983 AC 168) (HL); quoted in *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA !27 (SCA) at par [38].

49. The evidence sought to be adduced may not necessarily satisfy the test traditionally applied to a request to adduce further evidence on appeal, as formulated in *Colman v Dunbar* 1933 AD 141 at 161-2, followed *inter alia* in *Simpson v Selfmed Medical Scheme & Another* 1995 (3) SA 816 (A) at 825 C-E: '*(t)he new evidence sought to be adduced on appeal must be weighty and material and presumably to be believed, and must be such that if adduced would be practically conclusive, for if not, it would still leave the issue in doubt...*' It must be assumed that the charge of fraud will be disputed by the respondents, but it is clear that the applicant is seriously advancing this defence. There is no reason to doubt the sincerity with which the defence is advanced. The need to investigate the suspicious circumstances surrounding respondent's cause of action constitutes a compelling circumstance that allows the court to grant leave to appeal to allow the applicant to pursue its request to adduce further evidence.

50. There is another aspect of the present application that constitutes a compelling ground why the application for leave to appeal should be granted. The applicant has been left in the lurch by its statutorily imposed legal representatives, the SA. '*The attorney-client relationship imposes a duty on an attorney to advance the interests of his client...In Ross v Gaunter [1980] 1 Chh 297 Sir Robert Megarry V.C. said at 322 B-C:* 'In broad terms, a solicitor's duty to his client is to do for him all that he properly can, with, of course, proper care and attention. Subject to giving due weight to the adverb "*properly*", that duty is a paramount duty...' 'per Cloete JA in *Road Accident Fund v Shabangu & Another* 2005 (10 SA 265 at

271 G-H. The SA failed to comply with this duty. The applicant's fundamental right to legal representation is rendered nugatory if the attorney tasked with representing it is guilty of as grave a dereliction of duty as the SA is in this case. Legal representation must mean effective legal representation if that right is to be observed and respected in practice: *Thusi v Minister of Home Affairs & Another and 71 other cases* 2011 (2) SA 561 (KZP) at 607G-608D; *Beyers v Director of Public Prosecutions, Western Cape, and Others* 2003 (1) SACR 164 (C) (incorrectly attributed to the SCA) at 166I – 167b.

51. Leave to appeal against the judgment dismissing the application for rescission of the default judgment entered against the applicant is therefore granted. Although the matter involves the interpretation of a recently introduced statutory provision it is not of such complexity that it warrants the attention of the Honourable Supreme Court of Appeal. Leave is granted to appeal to the Full Bench of this Division. In as much as it may be necessary, such leave includes leave to apply to lead further evidence and to apply to withdraw an admission in the plea.

52. As far as costs are concerned, the respondent was evidently entitled to oppose the application for leave to appeal. Given the extraordinary circumstances of this matter it is only fair to ensure that the respondent is not out of pocket because the opposition was unsuccessful. The applicant is therefore ordered to pay the respondent's costs of opposition on the scale of attorney and client. It is furthermore ordered that the applicant must pay the respondent's costs of appeal on the party and party scale.

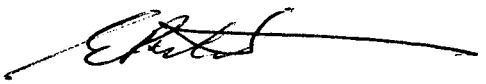
53. The court would have made an order holding the individual officers of this court employed by the SA liable if they had been properly identified. It is beyond question that Mbata was negligent to a very high degree, but it appears also to be common cause that she was on leave and on medical leave during critical periods when the matter was not given attention. It is unclear who was responsible for losing the applicant's file and original documents. The failure to identify these individuals appears to be deliberate to avoid the consequence of having to personally recompense the public purse for the waste of taxpayers' money because of the responsible attorneys' unprofessional conduct. The court can but express the hope that the authorities will take appropriate action against the delinquent individuals. A copy of this judgment will be sent to the Hon Minister of Justice and Correctional Services and to the chairperson of the Parliamentary Portfolio Committee on Justice for their information.

The following order is made:

1. Leave is granted to appeal to the Full Bench of this Division against the judgment dismissing the applicant's application for rescission of the default judgment granted against it in November 2012; such leave to include leave to apply for the leading of further evidence and the withdrawal of an admission in the plea;
2. The applicant is ordered to pay the respondent's costs of opposition to the application for leave to appeal on the scale of attorney and client;

3. The applicant is ordered to pay the respondent's costs of the appeal to the Full Bench on the party and party scale.

Signed at Pretoria on this 1st day of September 2014.



E BERTELSMANN

Judge of the High Court.