

**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

15/12/16

**Case Number: 69525/2013**

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

15/12/2016  
DATE

  
SIGNATURE

**THE MINISTER OF POLICE**

**THE NATIONAL COMMISSIONER,  
SA POLICE SERVICE**

**THE HEAD, CENTRAL FIREARMS REGISTER N.O.**

**FIRST APPLICANT**

**SECOND APPLICANT**

**THIRD APPLICANT**

**AND**

**ANDREW TONKIN GUNS & RIFLES CC**

**RESPONDENT**

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**JUDGMENT**

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**MOLEFE J**

[1] This is an application for rescission of the default judgment granted against the Applicants on 9 October 2015 and that the Applicants/Defendants' defence in the main action be reinstated. The application is brought in terms of the common law.

[2] For a rescission of an order in terms of the common law, sufficient cause must be shown, which means that:

2.1 there must be a reasonable and acceptable explanation for the default;

2.2 the applicant must show that the application was made *bona fide*;

2.3 the applicant must show that he has *bona fide* defence which *prima facie* has some prospects of success.

[3] It is settled law that the Court, by virtue of its inherent powers of rescission in terms of the common law, has the power to rescind a judgment or order obtained on default of appearance provided that sufficient cause for rescission has been shown. The term ‘*sufficient cause*’ “*defies precise or comprehensive definition, for many and various factors are required to be considered*”<sup>1</sup>.

### **Factual Background**

[4] The Respondent (plaintiff in the main action) claimed damages in the sum of R1 689 495, 00 arising out of the seizure by members of the South African Police Services (SAPS) of ammunition belonging to the Respondent which was kept in a strongroom at its business premises (“the Northriding strongroom”) on 13 July 2011. The Northriding strongroom was on that date, sealed by the SAPS thereby being rendered inoperative to the Respondent (“the seizure”).

[5] The Northriding strongroom and ammunition were returned to the Respondent on 31 October 2012. It is alleged by the Respondent that it suffered damages in the

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<sup>1</sup> Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 765 A-C

sum of R1 689 495, 00 by way of loss of business profit during the period 13 July 2011 to 31 October 2012 as a consequence of the seizure.

[6] On 9 October 2015, the Court in the absence of the Applicants (defendants in the main action) granted a default order in terms of which the Applicants' defence was struck out. The default order was granted pursuant to the Applicants having failed to comply with the Court order granted on 26 March 2015 in terms of which the Applicants were ordered to make the documents requested by the Respondent in terms of Rule 35 (3) of the Uniform Rules of Court available for inspection in accordance with Rule 35 (6), or to state under oath that such documents were not in their possession.

[7] The relevant facts with regard to the Defendants not having complied with the Plaintiff's notice in terms of Rule 35 (3) are as follows:

7.1 The Plaintiff's rule 35 (3) notice was served on the Office of the State Attorney on 21 January 2015. The Defendants were in terms of the rule 35 (3) notice required to make the following documents available for inspection within 10 days ie. on or before 4 February 2015:

7.1.1 South African Police Service Douglasdale docket CAS 370/07/2011;  
(item 1)

7.1.2 All documentation including applications, permits, authorisations, licences and correspondence held by the South African Police Service Central Firearms Registry relating to Andrew Tonkin Guns and Rifles CC (CFR No 100159); (item 2)

7.1.3 The internal file compiled and held by the South African Police Service Central Firearms Registry relating to Andrew Tonkin Guns and Rifles CC (CFR 100159); (item 3)

7.1.4 The investigation file and report compiled by the Independent Complaints Directorate of the SAPS in connection with investigations conducted into the conduct of Lieutenant Colonel Kemp during the period 2012 – 2014; (item 4)

7.2 Prior to the lapse of the 10 day period on 2 February 2015, at the second pre-trial conference, the Defendants' attorney (Mr Kobus Meier) undertook to make enquiries as to the documentation requested in terms of the rule 35 (3) notice. On 18 February 2015, the Plaintiff served an application to compel the discovery of the documents listed in the rule 35 (3) notice. The application to compel was enrolled for hearing on 26 March 2016;

7.3 By way of letters dated 4 March 2015<sup>2</sup>, 11 March 2015<sup>3</sup> and 17 March 2015<sup>4</sup> addressed to the National Commissioner and SAPS, the Defendants requested the documents requested in the rule 35 (3) notice. All these documents resort under different offices. On 26 March 2015 the Plaintiff obtained an order compelling the Defendants to make discovery of the documents and the order was served on the Office of the State Attorney on 8 April 2015.

7.4 The Central Firearms Registry documents (items 2 and 3) were forwarded by the Defendant's attorneys to the Plaintiff's attorneys under cover of their

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<sup>2</sup> Record page 32 Annexure "JM11"

<sup>3</sup> Record page 35-36 Annexure "JM2"

<sup>4</sup> Record page 35-40 Annexure "JM3"

letter dated 22 April 2015. It was stated in this letter that the Defendant's attorney had once again requested the SAPS Douglasdale docket (item 1) and that the SAPS were not in possession of it and did not have access to the Independent Complaints Directorate investigation file (item 4).

[8] Applicants' counsel<sup>5</sup> contends that in light of the foregoing, at the time of the granting of the default order on 9 October 2015 for the striking out of the Defendants' defence, items 2 and 3 had been furnished to the Plaintiff's attorneys and the Plaintiff's attorneys had been informed that the SAPS were not in possession of items 1 and 4, the investigation file and report of the Independent Complaints Directorate and the Douglasdale docket as it could not be traced.

[9] Applicant's Counsel submitted that it was however alleged in the founding affidavit deposed to by the Plaintiff's attorney in support of the application for striking out of the Defendants' defence that:

9.1 he had received no reaction to his letter to the Defendant's attorneys dated 20 April 2015 concerning non-compliance with the order to compel;

9.2 he had received no reply to his letter dated 11 May 2015 with regard to the discovery of the Central Firearms Registry documents requested;

9.3 the Defendants' failure to comply with the order to compel showed "*a distinct contempt of this court's order. . . and improper failure to ensure the speedy finalization of this matter*".

## **Wilful Default**

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<sup>5</sup> Advocate TWG Bester SC

[10] The explanation given by the Applicants for failure to comply with the order compelling discovery of the documents listed in the rule 35 (3) notice granted on 26 March 2015 is that the Defendant's attorney was still attempting to obtain a copy of the Douglasdale docket from the SAPS and the investigation file of the Independent Complaints Directorate, rather than simply to file an affidavit that these documents were not in the possession of the SAPS.

[11] It is submitted on behalf of the Applicants that at the time of the default order on 9 October 2015 for the striking out of the Defendants' defence, the Central Firearms Registry documents (items 2 and 3) had been furnished to the Plaintiff's attorneys. The Plaintiff's attorneys had also been informed that the SAPS were not in possession of the Douglasdale docket as it could not be traced and of the investigation file and report of the Independent Complaints Directorate. Applicants' counsel submitted that the Defendants were therefore not in willful default of the order to compel granted on 26 March 2015 which culminated in the granting of the default order.

[12] The Defendants' reasons for not having opposed the application for striking out their defence which was served on the Office of the State Attorney on 7 September 2015 are that:

12.1 The Defendants' attorney was involved in the Sudan's President Al-Bashir matter and also in the application for leave to appeal against the judgment since August 2015. Pursuant to the application for leave to appeal having been dismissed on 17 and 18 September 2015, he was then involved in the petition to the Supreme Court of Appeal for leave to appeal against the

judgment and this involved numerous daily consultations with seven (7) counsel representing different departments.

12.2 The defendant's attorney was tied up in the Al-Bashir matter until the application to the Supreme Court of Appeal was filed on 2 October 2015 and he then went on leave on the same day (2 October 2015). The application to strike out the Defendants' defence was "*the fish that shipped through the net*" due to his intense involvement in the Al-Bashir matter and not that he simply ignored the application.

[13] Respondent's counsel<sup>6</sup> contends that whatever the explanation, there was a contemptuous dragging of the feet by the Defendants' attorney and an improper delay in dealing with the reasonable request for provision of the requested documents. Counsel argued that the Defendants' attorney acted with wilful contempt, knowing of the application for striking out of the defence that was set down for 9 October 2015 but went on holiday without requesting for an extension of time, or for a postponement. It was therefore submitted that there is no proper explanation for the delay and for the default.

[14] A party applying for rescission of a default judgment is required to give a 'reasonable explanation' for the party's default, rather than an explanation whereby the party is absolved from all the blame for the default<sup>7</sup>. Although the explanation given by the Defendants' attorney does not absolve him from the blame for the default, in my view, the explanation for not opposing the application for striking out the Defendants' defence constitutes a reasonable and acceptable explanation for the default.

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<sup>6</sup> Advocate AJ Louw

<sup>7</sup> See *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003 (6) SA 1 (SCA) at para [11]

## **Bona Fide Defence**

[15] It is submitted on behalf of the Plaintiff that the Defendants have no *bona fide* defence to the Plaintiff's claim which *prima facie* carries some prospect of success. The Plaintiff's claim is based on damages arising from the seizure by members of the SAPS of the ammunition belonging to the Plaintiff and kept at its business premises at the Northriding strongroom. The Northriding strongroom and ammunition were returned to the Plaintiff on 31 October 2012 after the Senior Prosecutor declined to prosecute the Plaintiff.

[16] It is common cause that the Plaintiff had not been issued with a license to store ammunition at the Northriding strongroom, but notwithstanding the Plaintiff stored ammunition at the Northriding strongroom. It is also common cause that the Plaintiff supplied ammunition to Mr HJ Bekker ("Bekker") at the Northriding strongroom being a person who did not have a license to possess ammunition. It is therefore submitted by Defendants' counsel that the seizure was lawful in terms of section 20 of the Criminal Procedure Act 51 of 1977.

[17] The following legal principles are applicable in this case:

17.1 In terms of Section 20 (a) and (b) of the Act, the State may seize an article which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, or which may afford evidence of the commission or suspected commission of an offence;

17.2 Section 120 (1) (a) and (b) of the Firearms Control Act 60 of 2000, provides that a person is guilty of an offence if he fails to comply with any

provision of the Firearms Control Act, or any condition of a licence, permit or authorisation issued under the Firearms Control Act;

17.3 Section 34 (a) of the Firearms Control Act provides that the dealers' licence must specify the premises in respect of which the licence is issued;

17.4 Regulation 86 (2) of the regulations made under the Firearms Control Act provides that a dealer must store firearms and ammunition in a safe or strongroom at the place of business specified on the licence;

17.5 Regulation 110 (1) of the regulations made under the Firearms Control Act provides that any person who fails to comply with any provisions of the regulations shall be guilty of an offence;

17.6 Section 31 (1) (a) of the Criminal Procedure Act provides that if no criminal proceedings are instituted in connection with a seized article or if it appears that such article is not required at the trial for purpose of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized if such person may lawfully possess such article.

[18] In light of the above, Applicant's counsel submitted that pursuant to the seizure, the articles seized were lawfully retained under the control of the SAPS pending the decision by officials of the National Prosecuting Authority as to whether the Plaintiff and/or Andrew Tonkin (or any other person) was to be charged arising out of the seizure.

[19] On 31 October 2012, the Deputy Director of Public Prosecutions, Johannesburg (Advocate GL Roberts SC) declined to prosecute anyone on the Douglasdale docket, on which date, in pursuance of his decision not to prosecute,

the Northriding strongroom and the ammunition which had been seized were returned to the Plaintiff.

[20] Respondent's counsel submitted that the Defendants do not have a *bona fide* defence to the Plaintiff's action which *prima facie*, carries some prospect of success in that:

20.1 *"the Plaintiff committed no offence of whatsoever nature and there simply was at no time, . . . , any grounds to seize and refuse to return the ammunition to the plaintiff"*<sup>8</sup>;

20.2 having regard to the fact that the investigation officer ("Willemse") had a list of purchasers who had been supplied with ammunition from the Northriding strongroom, together with the addresses of such purchasers, *"the investigation of this alleged offence by the Plaintiff must have been the easiest that any member of the South African Police Service ever had to do"*<sup>9</sup>;

20.3 *"(the) Senior Prosecutor, Randburg declined to prosecute the Plaintiff during or about August 2011" (as a consequence of which the Defendants could not "sit on the matter until the 31 October 2012"*<sup>10</sup>);

20.4 *"out of sure (sic) vindictiveness the Defendants refused and failed to take any steps in order to get a speedy resolution of whether anybody could or should be prosecuted and indeed took 14 months before they obtained a decision from Adv. Roberts SC"*<sup>11</sup>;

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<sup>8</sup> Answering affidavit, p 65 of Record, para 14.2

<sup>9</sup> Answering affidavit, p 66-67 of Record, para 15.3

<sup>10</sup> Answering affidavit, p 67 of Record, para 15.4

<sup>11</sup> Answering affidavit, p 68 of Record, para 15.5.2

20.5 “there simply was no basis after August 2011 to withhold the Northriding strongroom and its contents of shotgun ammunition from the Plaintiff”.<sup>12</sup>

[21] Applicants’ Counsel submitted that it is correct that the investigating officer had a list of purchasers who had been supplied with ammunition from the Northriding strongroom, but the purchasers, in May 2012 declined to make any police statements to the investigating officer on the advice of their attorney. The Senior Public Prosecutor, Randburg declined to prosecute on charges arising out of the seizure but retained the Douglasdale docket for purposes of presenting it to the Director of Public Prosecution for a decision whether to prosecute the Plaintiff and/or Andrew Tonkin (or any other person) on charges arising out of the seizure. Only on 31 October 2012 did Advocate Roberts SC decline to prosecute on charges arising out of the seizure and the strongroom and ammunition were returned to the Plaintiff.

[22] The decision whether or not to prosecute does not vest in the Investigating Officer but on the National Prosecuting Authority. In my view, the allegations of *mala fide* and vindictiveness on the part of any member of the SAPS refusing and/or failing to have any person prosecuted on charges arising from the seizure are a triable issue which justifies the rescission of the default order<sup>13</sup>.

[23] It was further submitted on behalf of the Applicants that the Defendants have a *bona fide* defence on the basis that the Plaintiff failed to mitigate its damages by either bringing an application to compel the National Prosecuting Authority to make a decision as to whether to prosecute or not or an application for the return of the seized Northriding strongroom and ammunition.

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<sup>12</sup> Answering affidavit, p 68 of Record, para 15.8

<sup>13</sup> See *Grant v Plumbers* 1949 (2) SA 470 (O)

**Ad granting of the default order**

[24] Applicants' Counsel contends that the application for the striking out of the Defendants' defence was moved (and the order granted) on the strength of false allegations contained in the founding affidavit in support of the application in that:

24.1 The allegation on the part of the Plaintiff's attorney that he had no reaction to his letter dated 20 April 2015 is false. The Defendants' attorney did respond to the letter by way of a letter dated 22 April 2015 and on the same day had a telephonic discussion with the Plaintiff's attorney informing him that despite attempts to obtain the Douglasdale docket, the SAPS had not been able to trace it;

24.2 The allegation on the part of the Plaintiff's attorney that he received no response to his letter dated 11 May 2015 is also false. A copy of the Central Firearms Registry file was delivered at the Plaintiff's office on 12 May 2015;

24.3 The allegation on the part of the Plaintiff's attorney that Defendant's attorney showed "*a distinct contempt of this court order*" in not having complied with the compelling order of the rule 35 (3) notice does not accord with the facts in that:

24.3.1 the Central Firearms Registry file (item 2 and 3) was furnished to the Plaintiff's attorney;

24.3.2 the Plaintiff's attorney had been informed that the reason for the Douglasdale docket (item 1) not having been furnished to him was that the SAPS was unable to trace it;

24.3.3 the Plaintiff's attorney had likewise been informed that the Defendants were not in possession of the investigation file of the Independent Complaints Directorate (item 4).

[25] Based on the above-mentioned facts, Counsel for the Applicant submitted that the granting of the default order on the strength of false allegations constitutes sufficient cause for the rescission of the default order. I agree with this submission as at the time of granting the default order, the Court was not made aware of the true facts and circumstances giving rise to the application for the striking out of the Defendant's defence.

[26] The contention on the part of the Plaintiff that the application for rescission of the default order is out of time as it was not brought within reasonable time after 9 October 2015 is in my view, without merit. It is common cause that although the default order was granted on 9 October 2015, it was served on the Office of the State Attorney on 28 October 2015. The application for rescission of the default order was delivered on 22 December 2015. Furthermore, paragraph 3 of the order granted on 23 November 2015<sup>14</sup>, the Defendants were granted leave to deliver a rescission application within 20 days from date of the order (ie. on or before 22 December 2015). I am therefore satisfied that the application for rescission of the default order was brought within reasonable time without any unreasonable delay.

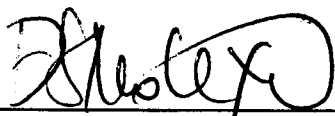
[27] I am satisfied that the Applicants' defences are sufficient to establish a *bona fide* defence that *prima facie* carries some prospect of success. The Applicants have made out a good case for the relief sought.

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<sup>14</sup> Answering Affidavit, p 90 of Record, Annexure "RES1"

[28] In the premises, the following order is made :

1. *The order granted by default on 9 October 2015 under case number 69525/2013 is hereby rescinded;*
2. *The applicants/defendants' defence in the main action is reinstated;*
3. *Costs of this application will be costs in the cause.*



**D S MOLEFE**  
**JUDGE OF THE HIGH COURT**

**APPEARANCES:**

<b>Counsel on behalf of Applicant</b>	<b>:</b>	<b>Adv. AJ Louw</b>
<b>Instructed by</b>	<b>:</b>	<b>State Attorneys</b>
 <b>Counsel on behalf of Respondent</b>	 <b>:</b>	 <b>Adv. TWG Bester SC</b>
<b>Instructed by</b>	<b>:</b>	<b>JWJ van Wyk Attorneys</b>
 <b>Date Heard</b>	 <b>:</b>	 <b>24 November 2016</b>
<b>Date Delivered</b>	<b>:</b>	<b>15 December 2016</b>