



**HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**CASE NO: 66073/2018**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 13 MAY 2022

SIGNATURE

In the matter between:

**THE PUBLIC PROTECTOR**

Applicant

And

**THE MINISTER OF POLICE**

First Respondent

**THE NATIONAL COMMISSIONER OF THE  
SOUTH AFRICAN POLICE SERVICES**

Second Respondent

**LESLEY STUTA**

Third Respondent

**THABISO ZULU**

Fourth Respondent

**THE PRESIDENT OF THE REPUBLIC  
OF SOUTH AFRICA**

Fifth Respondent

**THE MINISTER OF JUSTICE AND  
CORRECTIONAL SERVICES**

Sixth Respondent

**THE NATIONAL DIRECTOR OF PUBLIC  
PROSECUTIONS**

Seventh Respondent

Summary: Rescission of judgment – of an order in a review application – not granted by default – erroneously sought? – mistake common to parties? – granted in absence?

Rescission of Judgment – Rules 32(1)(b), 42(1)(a) or 42(1)(c) – failure by applicant to establish any of the requirements for such rescission.

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**ORDER**

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The application is dismissed with costs on the scale as between attorney and client, including costs of senior and junior counsel where so employed by the first, second and fifth respondents.

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**J U D G M E N T**

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*This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.*

**DAVIS, J**

[1] Introduction

On 10 August 2018 the Public Protector delivered a report wherein she made adverse findings against the Minister of Police (the Minister) and the

South African Police Service (SAPS) for allegedly having failed to provide protection to certain witnesses in respect of corrupt activities in the Umzimkhulu Local Municipality. On 3 June 2020 Hughes, J (as she then was) granted an order reviewing and setting aside the Public Protector's report and the remedial action directed by her. The Public Protector, in this application, applies for the rescission of the order of Hughes J on the basis that it was either granted by default (as contemplated in Rule 32(1)(b)) or that it was erroneously sought and granted in her absence (as contemplated in Rule 42(1)(a)) or that it was granted based on a mistake common to the parties (as contemplated in Rule 42(1)(c) of the Uniform Rules of Court).

[2] The Public Protector's report of 10 August 2018:

2.1 The abovementioned report was titled "*Report on investigation into allegations of undue delay, gross negligence, improper conduct and mal-administration by the Minister of Police and South African Police Service for failing to provide the whistle-blowers with security protection at the State's expense following the exposé of allegations of mal-administration, corruption and the unconscionable expenditure of public funds by the Umzimkhulu Local Municipality in connection with the restoration of the heritage of the dilapidated Umzimkhulu Memorial Hall*".

2.2 Apart from the already loaded content of the title of the report, the Public Protector, in her own words, made the following adverse findings against certain of the respondents in this application, being the Minister (first respondent) and the SAPS (represented by the National Commissioner as second respondent):

"1. *The Minister and the SAPS have failed to provide [the witness] with protection at the State's expense following*



*threats to their lives as a result of the exposé of alleged corrupt activities in the Umzimkhulu Local Municipality pertaining to the refurbishment of the Umzimkhulu memorial hall;*

2. *The Minister and the SAPS have failed to provide my office with the Security Threat Assessment Report conducted ...;*
3. *The Minister and the SAPS's conduct in dealing with my request to provide protection to the two whistle-blowers is grossly negligent;*
4. *The Minister and the SAPS's conduct constitute improper conduct as envisaged in section 182(1) of the Constitution and undue delay, gross negligence and mal-administration as envisaged in section 6(4) of the Public Protector Act".*

2.3 Pursuant to the above findings, the Public Protector issued a number of remedial action directives. Firstly, she directed the President of the Republic of South Africa (the President), being the fifth respondent in these proceedings, to "... *take urgent and appropriate steps to reprimand the Minister ... for his lapse in judgment ...*". Secondly she directed the Minister, not only to furnish her with a copy of the Security Threat Assessment, but to implement it and to provide the witnesses with protection at State expense and issue them with an apology. Thirdly she issued directives against the National Commissioner to adopt certain Standard Operating Procedures.

[3] The review application:

- 3.1 On 10 September 2018 the Minister and the National Commissioner launched an application in this court for the review and setting aside of the Public Protector's report and the remedial action directed by her.
- 3.2 The basis for the review application was that the Public Protector had not taken into account that the Protection and Security Services of the SAPS (the PSS), which is the only unit of the SAPS that provides protection and security services, is constrained by law and by Cabinet Memorandum 1A of 2004 to (only) protect those occupying senior positions in the executive, legislature and judiciary and the PSS's mandate does not extend to providing similar protection to ordinary citizens and whistle-blowers. Apart from the lack of authority and a mandate to do so, the PSS has neither the financial or human resources to extend such protection.
- 3.3 Instead, the two witnesses qualified for protection under the Witness Protection Act, 112 of 1998. A witness protection office with a budget had been created by this Act, specifically to protect persons such as the two whistle-blowers in question.
- 3.4 The Minister and SAPS, by way of an affidavit by the Brigadier in command of the PSS, commended the Public Protector for investigating the allegations of corruption at the Umzimkhulu Local Municipality. However, it appeared that during an interview with the two witnesses by the Public Protector, they expressed a fear for their lives, being whistle-blowers. At her own instance and, relying on media reports, the Public Protector thereupon decided to investigate the Minister and the SAPS for failing to provide protection for the witnesses. She requested the former Minister and Advocate Bongani Bongo (then Minister of State Security) to conduct a security threat assessment. Pursuant to this, the State Security Agency (the SSA) completed a report to the Public Protector, inter alia



recommending to her that the two witnesses be “... *protected by individual private protectors*”.

- 3.5 The aforementioned Brigadier pointed out that, due to various reasons, meetings between the Minister and the Public Protector never realized, either due to operational reasons or, in one scheduled instance, due to the Public Protector’s absence from the country. The Minister has, however, in public radio media indicated the availability of witness protection for the whistle-blowers in question. In terms of section 7 of the Witness Protection Act, any witness whose safety is threatened may apply to be placed in a witness protection program. This was indeed facilitated by the Minister’s legal advisor and the then National Director of Public Prosecutions on 18 June 2018, a date which pre-dates the Public Protector’s report. The witness protection offer was, however, rejected by one of the witnesses who insisted on PSS protection.
- 3.6 Upon receipt of the Public Protector’s report, the Minister wrote to her to advise her that implementation of the remedial action by the SAPS would be contrary to law and that the report would be taken on review.
- 3.7 The Public Protector, upon receipt of the review application, elected on 11 October 2018 in writing to abide the Court’s decision. In her current application for rescission, she states that the subsequently “changed her stance”. The reason for this, so she stated, was an allegation that the PSS had previously extended protection to Dr Nkosazana Dlamini Zuma after the end of her term as African Union Chairperson and while she was not a member of the legislature or the executive and prior to her becoming the Minister of Co-Operative Governance and Traditional Affairs. This change in stance caused the Public Protector to deliver an answering

affidavit in the review application and to instruct attorneys to represent her, who briefed counsel for the same purpose.

- 3.8 Apart from her expressed wish to appear to protect witnesses and whistleblowers, the Public Protector's opposition to the review application was predicated on the following extract from her answering affidavit:

*“The argument advanced by the applicants in the founding affidavit that the Minister or SAPS is not responsible for security protection of private citizens or witnesses is of no moment. The issue is not whether the SAPS is unable to offer protection because of absence of legislation to that effect. The issue is whether the State is exonerated from providing protection to a private citizen through SAPS if there is no legislative regime or policy to that effect. The government of the Republic of South Africa is unitary in nature”.*

[4] The witness' application

- 4.1 Prior to the hearing of the review application, the witness who had previously refused the protection arranged by the Minister's legal advisor, (the Public Protector contends it was the other witnesses, but this matters not as the principles in question apply to both witnesses equally) launched an urgent application in this court for an order to compel the SAPS to provide him with private security at State expense. This application was premised on the fulfilment of a Constitutional obligation as envisaged in section 205(3) of the Constitution. This section inter alia prescribed one of the “... objects of the police service ... to (be) ... to protect and secure the inhabitants of the Republic and their property ...”. As an alternative the witness sought protection under the Witness Protection Act.



4.2 The SAPS contended in its opposition to that application that the doctrine of subsidiarity precluded reliance directly on the Constitution where there is an act of Parliament giving effect to the Constitutional provision. The SAPS contended that the Witness Protection Act was the act that catered for the situation under consideration.

4.3 The urgent application came before Kollapen J (as he then was) who, after having heard argument, directed the parties to prepare a draft order providing that the witness be placed under temporary witness protection in terms of section 8 of the Witness Protection Act pending a formal application in terms of Section 7 of that Act. Such a draft was prepared and made an order of court on 24 March 2020. It has since been implemented.

[5] The hearing of the review application of the Public Protector's report

5.1 At the hearing of the abovementioned review application, the Minister, the SAPS and the Public Protector were all legally represented by attorneys and counsel. The hearing was on 3 June 2020 before Hughes J.

5.2 This court was provided with a transcript of that hearing and, due to the fact that what had transpired is central to the determination of the current application, it is repeated here in full:

*“CLERK: I now call the matter, the third court motion before the Honourable Lady Justice Hughes, The Minister of Police and one another versus the Public Protector and five others, case number 66073/2018.*

*MR MOTEPE [ADV Motepe SC]: As the Court pleases, M’Lady, I appear for the first and second applicant.*



COURT: Yes

MR MOTEPE: With Ms Ramaimela.

COURT: Yes, thank you ...

MR BRUINDERS [ADV Bruinders SC]: M'Lady, Ms Kazee and I appear for the President.

MR MOKHARE [ ADV Mokhare SC]: M Lady I appear with Ms Lithole for the Public Protector.

COURT: Thank you so much.

MR MOTEPE ADRESSES THE COURT: M'Lady I can happily announce that the parties have reached each other.

COURT: Okay

MR MOTEPE: So, we have agreed, but perhaps the issue of joinder, because there is no formal order given, perhaps Mr Bruinders want to deal with the aspect if it is necessary.

COURT: Mr Bruinders, you can remove your mask while you talk and put it on when you're talking. So, its is fine. Yes, how can I assist you with the joinder?

MR BRUINDERS: Apparently we have already been assisted. As I understand, Judge Potterill in the pre-trial made an order.

COURT: Did she make an order? Okay, thank you.

MR MOTEPE: As the court pleases.

COURT: Well, that is out the way? Do you have a draft?

MR MOTEPE: No, M'Lady. I beg leave to hand up this draft, this order, but I will explain its relevance.

COURT: Okay

MR MOTEPE: *We do not have a draft order here but the order is very simple. So, the parties have agreed that we get prayer one of the notice of motion and no order as to costs.*

COURT: *Okay, let me just look at the draft. Oh, you get prayer what, urgent?*

MR MOTEPE: *The order that I have just given.*

COURT: *Ja?*

MR MOTEPE: *It was given by Justice Kollapen on 28 March 2020. Basically, it confirms what we have always said that the Public Protector did not take into account the Witness Protection Act and that is what the Judge basically found and he ordered [the witness] must be given witness protection and then he must formally apply. So, he is at least you know, getting his security. But that is what we have always said.*

COURT: *Okay*

MR MOTEPE: *But the parties have now agreed that especially giving that order, there is no point in proceeding with this.*

COURT: *Yes*

MR MOTEPE: *So, we hence seek prayer one of the notice of motion.*

COURT: *Just wait a minute.*

MR MOTEPE: *It basically declares the entire report invalid and sets it aside.*

COURT: *Okay, prayer one and then saying no costs?*

MR MOTEPE: *No order as to costs, M'Lady. Mr Mokhare can confirm.*

COURT: *Oh but each party pays its own costs?*

MR MOTEPE: *As the court pleases.*

COURT: *Is that right, Mr Mokhare?*

MR MOKHARE ADDRESSES THE COURT: *Yes, each party pays its own costs, yes.*

COURT: *Okay, thank you.*

MR MOKHARE: *If fact, M'Lady, as Mr Motepe was saying, it was only brought to our attention last right. Actually it was brought to my attention by him that in March [the witness] who obtained the report of the Public Protector in his favour, he is the third respondent. He approached the Court on an urgent basis in March and he wanted an order that the police should provide him with protection.*

COURT: *With protection.*

MR MOKHARE: *And that is the same kind of protection that is in the Public Protector's report.*

COURT: *Yes*

MR MOKHARE: *So, apparently Judge Kollapen declined to grant that order, instead he granted an order that he be placed in witness protection.*

COURT: *Witness protection*

MR MOKHARE: *Although there is no judgment by Judge Kollapen, we can infer that for him not ... [intervenes]*

COURT: *But there is an order.*

MR MOKHARE: *Ja, just an order, but for him not to grant him the order that he wanted to be protected by the police, we can infer that basically then he has said that the appropriate avenue is witness protection. So, we do not want a situation where ... [intervenes]*

COURT: *Duplication*



*MR MOKHARE: Him have sat as a single judge and you as a single judge, you are deciding the same issue and you may come to a different conclusion. So, we then said that we will then simply withdraw our opposition and then they can then take the order ... and then we agreed on the costs, that each party pays own costs.*

*COURT: Oh, thank you so much. Thank you, gentlemen.*

*MR MOKHARE: As the court pleases.*

*COURT: I really appreciate that.*

*ORDER: Right, in the circumstances, having heard both counsel for the first applicant and counsel for the president and counsel for the respondents, I duly grant the order in terms of prayer one of the Notice of Motion and the order in respect of costs is that each party will pay their own costs”.*

5.3 The order which had then been granted and which accorded with prayer 1 of the Notice of Motion in the review application, reviewed and set aside the “*entire report No 12 of 2018/19 of the Public Protector*”.

5.4 It is this order which the Public Protector seeks to have rescinded, reliant on the Rules of Court mentioned in the introduction to this judgment.

[6] Ad Rule 31(2)(b) of the Uniform Rules of Court

6.1 This rule reads: “*A defendant may within 20 days after acquiring knowledge of such judgment, apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit*”.

6.2 The term “such judgment” refers to a judgment obtained in terms of Rule 31(2)(a), that is when a plaintiff applies for judgment when a defendant is

in default of the delivery of an intention to defend or a plea. The same applies *mutatis mutandis* (i.e with the necessary adjustment) to instances in motion proceedings where a respondent fails to deliver a notice of intention to oppose or, having done so, fails to deliver an answering affidavit. The matter is then dealt with on a court's unopposed motion court roll in the absence of a defaulting party.

6.3 Regarding the issue of whether a “default” judgment had been granted, the Public Protector relied on *Ferreiras (Pty) Ltd v Naidoo and another* (69094/2014) (2017) ZAGPJHC 393 (11 December 2017), which followed *Rainbow Farms (Pty) Ltd v Crokeny Gledstone Farm HCA* (15/17) (2017) ZALMPPHC 35 (7 November 2017). In the former of these two cases, six instances of “default” of a party at the hearing of a matter and the consequent granting of judgment were identified. These happen regularly and are all too familiar to the court. They are:

- (1) Where a party by election or failure does not deliver a notice of intention to oppose an application;
- (2) Where a party, having elected deliver a notice of intention to oppose an application but thereafter fails to deliver an answering affidavit;
- (3) Where a party delivers a notice in terms of Rule 6(5)(d)(iii) indicating that it intends to raise a point of law (only) but then fails to appear at the hearing;
- (4) Where a party delivers an answering affidavit but fails to appear at the hearing;

- (5) Where a party delivers an answering affidavit late but does not seek condonation (or does not obtain condonation) and fails to appear at the hearing;
- (6) Where a party fails to deliver an answering affidavit and then seeks a postponement for that purpose which is then refused.

6.4 Not only are the facts of the present matter to be distinguished from those in the two cases relied on, but none of the six scenarios listed above are applicable. In the present instance, after the Public Protector had decided no longer to abide the court's decision, she delivered her answering affidavit. Thereafter heads of argument were delivered on her behalf and senior and junior counsel, instructed by a private firm of attorneys appeared and represented her at the hearing of the review application. The order was therefore not obtained in circumstances of a default of the delivery of her version nor was it by default of appearance on her behalf.

6.5 The order in the review application was therefore not a "default judgment" in the contemplation of Rule 31(2)(b). The two judgments relied on by the Public Protector are against her, rather than supporting her application.

6.6 In addition, no "good cause" has been shown by the Public Protector for rescission under this Rule. "Good cause" in the context of a rescission application under this Rule, encompasses two elements. The first is a reasonable explanation for any default and the second is the existence of a *bona fide* defence. See inter alia *Wahl v Prensnil Beleggens (Edms) Bpk* 1984 (1) SA 457 (T) and *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003(6) SA 1 (SCA).



6.7 In respect of an explanation for the default, not only was there no default but, insofar as the Public Protector attempted to contend that she was not at the hearing represented by Adv Mokhare SC, I shall deal with that aspect under the rubric of “absence” in dealing with Rule 42(1)(a) hereunder.

6.8 In answer to the question whether the other element had been established, the fact that the Public Protector had ignored relevant statutory measures such as the Witness Protection Act, had ignored the principle of subsidiarity, had dictated remedial action which is contrary to the law, all so far surpasses her alternative contentions as referred to in paragraphs 3.7 and 3.8 above, that no *bona fide* defence has been disclosed. The remedial action directed was also not “appropriate” as discussed in *President of the Republic of South Africa v Public Protector and others* 2018 (2) SA 100 (GP) at [80], confirmed on appeal in *Public Protector and Others v President of the Republic of South Africa* 2021 (6) SA 37 (CC).

[7] Ad Rule 42(1)(a) of the Uniform Rules of Court

7.1 Rule 42(1)(a) entitles a party against whom an order was granted to apply to court for rescission of that order if it was “*erroneously sought or erroneously granted in the absence of a party*”.

7.2 Starting with the lastmentioned of the requirements, “absence” of a party, the representation of the Public Protector has been dealt with in paragraph 6.4 above, but is also clear from the record quoted in paragraph 5.2 above.

7.3 The papers also indicate that, prior to indicating to Hughes J that the Public Protector will no longer oppose the review application, Adv Mokhare SC had consulted his instructing attorney who had in turn consulted with a member of the Public Protector’s office. The Public Protector disclosed that her grievance is that she had not personally been consulted.

- 7.4 In this regard, the Public Protector contended in her affidavit in support of the rescission application as follows: “... *although my legal representatives were physically present in court in the 3<sup>rd</sup> of June 2020, the fact that my opposition was withdrawn, entailed that I was not present before court ... the reasons underpinning my absence was that my opposition was withdrawn the basis that the issues implicated in the review application had become **res iudicata** by virtue of the Kollapen order*”.
- 7.5 In a case where a party had been represented by an attorney, but the attorney had withdrawn once his application for postponement had been refused, this court, as long ago as in *Meer Leather Works Co. Ltd v African Sole and Leather Works (Pty) Ltd* 1948 (1) SA 321 (T) had determined that, in that sense, i.e withdrawal of legal representation, resulted that a party was “absent” by virtue of non-appearance, either by the party itself or by a legal practitioner on behalf of the party. The corollary, of course, is if the practitioners have not withdrawn, then the party is not “absent”, but remains present via representation. This is what had happened in the present instance. The Public Protector is wrong to equate a withdrawal of an opposition to a withdrawal of representation. The record also shows that, after the opposition to the rescission application was not persisted with, Adv Mokhare SC continued to address Hughes J on behalf of the Public Protector. She remained being represented and therefore, “present” in court. She was therefore not “absent” as contemplated in Rule 42(1)(a) on which she seeks to rely.
- 7.6 In *MEC, Economic, Environment & Tourism v Kruisenga and another, In re Kruisenger & another v MEC, Economic Affairs, Environment & Tourism* [2008] JOL 21 741 (CK) Van Zyl J (as he then was) also dealt with the issue of concessions or admissions made on behalf of a party. In



that case, during the course of the trial, the applicant sought a postponement, which the respondents agreed to on condition that the applicant's admission of liability in respect of some of the amounts claimed, be embodied in an order of court. That was done. During the hearing of a subsequent application for rescission, the applicant was held to be estopped from denying the authority of his legal representatives to have made the concessions.

7.7 In effect, this is also what the Public Protector is attempting to do - trying to overturn a consequence for which she blames her legal representatives but without even going so far as to allege that they have acted without a mandate (although she hints at it by saying that she has reported them (or at least Adv Mokhare SC) to "the appropriate forum".

7.8 The Public Protector further claims that the withdrawal of her opposition was done by her legal representatives by erroneously relying on the order by Kollapen J as having rendered the relief sought in the review application to have become *res iudicata*. She expressly put it as follows in her founding affidavit: "... during the hearing of the review application, it was stated to the presiding judge that as a result of the order handed down by Kollapen J ... the review application had become *res iudicata* and on the basis thereof, my opposition was withdrawn and the matter proceeded on an unopposed basis and the review application was granted. I am advised further that the review application was granted on the basis on the basis of the court having accepted that the order had rendered the review application *res iudicata*. This, I submit, was an error".

7.9 *Res iudicata* (also *res judicata*) is an exception relied on by a party based on the irrebuttable presumption that a final judgment upon a claim submitted to a competent court, is correct (excluding appeal proceedings).



For this to occur, the judgment must be definitive. An order given in interim interdict proceedings or an order that is subject to variation because of changed circumstances cannot be relied on for purposes of this exception. See: *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A). For the exception to succeed, the judgment relied on must be a judgment given in litigation to which the parties in both actions were the same and the same cause of action or relief must have been claimed. See *African Farms & Townships v Cape Town Municipality* 1963 (2) SA 555 (A) at 562.

7.10 It is clear that the principle of *res iudicata* was not applicable – the order of Kollapen J granted in the urgent court was interim, the Public Protector was not a party to that litigation and the relief claimed was different. The relevant issue to the present application is however that, contrary to the Public Protector’s contentions, factually, the counsel who appeared before Hughes J did not rely on the principle of *res iudicata* and neither did the court. In fact, they all contemplated the notional possibility that Hughes J may come to a different conclusion. For this reason and for practicality’s sake, the opposition was withdrawn. The record of proceedings quoted in paragraph 5.2 above, therefore indicates that the Public Protector’s allegations quoted in paragraph 7.4 above, are not supported by the facts.

7.11 It follows that the contention by the Public Protector that the order was “erroneously sought and erroneously granted”, cannot be upheld.

[8] Ad Rule 42(1)(c)

8.1 This rule proclaims that a court may, upon the application by an affected party rescind “*an order or judgment granted as a result of a mistake common to the parties*”.

- 8.2 The Public Protector is correct where she has analysed the *res iudicata* – principle along the lines as set out in paragraphs 7.9 and 7.10 above and concluded that it is not applicable, but she is factually incorrect when she stated the following in her founding affidavit: *“As stated before counsel for the respondents and my erstwhile counsel were of the common view that the matter was res judicata. This, as I have shown, was a serious mistake of law on their part. On this basis as well the order stands to be rescinded and set aside under Rule 42(1)(c) of the Uniform Rules”*.
- 8.3 Upon a reading of the record and on application of the law, the first and second respondents’ position set out in their answering affidavit was the correct one. There it was put as follows: *“Justice Kollapen found that reliance on section 205 of the Constitution was misplaced and the applicable legal prescript was the Witness Protection Act. I am advised that while this did not necessarily mean the point was res judicata, it was a factor that neither the Public Protector’s counsel nor Justice Hughes could ignore”*.
- 8.4 It is clear that there was no “mistake common to the parties” as alleged. This basis for rescission must therefore also fail.

[9] Conclusion

9.1 To sum up:

- Rule 31(2)(b) is not applicable – the judgment did not constitute a default judgment;
- The Public Protector was never “in default”;

- Rule 41(2)(a) is not applicable, the judgment was neither erroneously sought nor erroneously granted and neither was the Public Protector “absent” and
- Rule 41(2)(c) is also not applicable as its requirements were similarly not satisfied – the parties had not laboured under a “common error or mistake”.

9.2 In addition to the above and, insofar as Rule 31(2)(b) might have been applicable, no “good cause” has been demonstrated justifying a rescission – there is no *bona fide* defence as the report was clearly reviewable on the basis set out in paragraphs 3 and 6.8 above. It was on this basis correctly reviewed and set aside, irrespective of the withdrawal of opposition.

9.3 The Minister and SAPS, in particular, claims that the Public protector was not *bona fide* and that her conduct in this litigation amounts to such an abuse of process that not only should a punitive costs order be granted, but that it must be granted against her in her personal capacity. In support of this argument reliance is placed on the fact that the Public Protector initially delivered a notice to abide this court’s decision, she thereafter changed her mind and delivered an answering affidavit which the Minister and SAPS labelled “unmeritorious” and without substance. Then, at the hearing of the matter, her opposition was withdrawn and the review order was granted by agreement. Thereafter, she launched the rescission application to have that same order overturned.

9.4 While I find that the sequence of litigation amounted to a waste of public funds, particularly if one has regard to the merits upon which the review application had been based, one must also bear in mind that the withdrawal of opposition was prompted by litigation in which the Public Protector had




no part. Having regard to the principles discussed in *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) in this regard, I am unable to conclude that the Public Protector had acted with *mala fides*, unmeritorious though her application was or that this is proper case where a personal costs order should be granted.

- 9.5 Having said that, for a party to attempt to rescind a judgment to which that party had acquiesced, on the extremely tenuous grounds as done in this case merely to obtain a result with very little or no practical consequence, amounts to such wasteful litigation that the respondents should not be out of pocket for the attorney and client portion of the costs they had to incur in opposing the rescission application. In the exercise of my discretion, I find that this merits a costs order on that scale.

[10] Order

The rescission application is dismissed with costs on the scale as between attorney and client, including the costs of senior and junior counsel where so employed by the first, second and fifth respondents.

  
N DAVIS  
Judge of the High Court  
Gauteng Division, Pretoria

Date of Hearing: 22 November 2021

Judgment delivered: 13 May 2022

## APPEARANCES:

For Applicant: Adv Z Z Matebese SC together with  
Adv V D Mtsweni

Attorney for Applicant: Dyason Inc., Pretoria

For 1<sup>st</sup> & 2<sup>nd</sup> Respondents: Adv J Motepe SC together with  
Adv K Ramaimela

Attorneys for 1<sup>st</sup> & 2<sup>nd</sup> Respondents: The State Attorney, Pretoria

For the 5<sup>th</sup> Respondent: Adv T Bruinders SC together with  
Adv S Kazee

Attorneys for 5<sup>th</sup> Respondent: The State Attorney, Pretoria