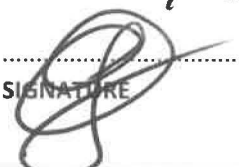




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 38530/2016

(1) REPORTABLE: YES/NO	(1) NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	(2) NO
(3) REVISED	yes
SIGNATURE	DATE
	28/10/2022

In the matter between

MINISTER OF JUSTICE

Applicant

and

PANES GEORGE PIERIDES

Respondent


JUDGEMENT

RIP AJ

Introduction

- [1] In this matter the Applicant, being the Minister of Justice, has brought a rescission application in terms of Rule 42(1)(a), alternatively Rule 31(2)(b) of the Uniform Rules of Court for an order rescinding the default judgment granted on 12 May 2020.

- [2] The Applicant contends that the judgment was erroneously sought, alternatively erroneously granted in the absence of the Applicant.
- [3] The Applicant's main contentions in support thereof is that firstly, the Applicant was not given notice of set down in respect of the application.
- [4] Secondly, that the Respondent/Plaintiff failed to join the National Director of Public Prosecutions (hereinafter referred to as "*the NDPP*").
- [5] Thirdly, that the claim that the Respondent brought in terms of its Particulars of Claim and as against the Minister of Justice should have been brought against the NDPP and consequently, the Particulars of Claim upon which the default judgment was granted lacked a cause of action.
- [6] The first ground can be taken care of quite simply in that the application for default judgment was served upon the State Attorney on 3 September 2019 as reflected by the return of service attached to the Respondent's Answering Affidavit.
- [7] Moreover, the Applicant never gave a Notice of Intention to Defend and consequently as per Rule 31(4) of the Uniform Rules of Court, the Respondent was not obliged to serve any Notice of Set Down.
- [8] It must be noted that the Applicant failed to file a Replying Affidavit.
- [9] It was contended on behalf of the Respondent that there was a cause of action set out in the Particulars of Claim in regard to the Minister of Justice, namely that such cause of action stemmed from the principle of vicarious liability and that ultimately the Applicant would be responsible for the actions of its employees, including the actions of the National Prosecuting Authority.
- [10] I was referred to both Sections 33 and 42 of the National Prosecution Authority Act, No. 32 of 1998 as well as Section 179 of the Constitution for the Republic of South Africa.

[11] The issue of the distinction between the role and function of the Minister of Justice vis-à-vis the NDPP was discussed by the Supreme Court of Appeal in the matter of Minister for Justice & Constitutional Development & 2 Others v Moleko¹.

[12] The Court in upholding an appeal by the Minister of Justice held that:-

“As far as the First Appellant, the Minister for Justice & Constitutional Development is concerned, the National Prosecuting Authority Act, 32 of 1998 provides that the Minister exercises final responsibility over the National Prosecuting Authority established in terms of Section 179 of the Constitution, but only in accordance with the provisions of that Act (s 33(1)). Thus, the National Director of Public Prosecutions (NDPP) must, at the request of the Minister, inter alia furnish her with information in respect of any matter dealt with by the NDPP or a DPP, and with reasons for any decision taken by a DPP, in the exercise of their powers, the carrying out of their duties and the performance of their functions (s 33(2)(a) & (b)). Furthermore, the NDPP must furnish the Minister, at her request, with information regarding the prosecution policy and the policy directives determined and issued by the NDPP (s 33(2)(c) & (d)). However, the prosecuting authority is “accountable to Parliament in respect of its powers, functions and duties under this Act, including decisions regarding the institution of prosecutions (s 35(1)). It is therefore clear that the Minister (the First Appellant) is not responsible for the decision to prosecute Mr Moleko and the appeal must also succeed as far as the First Appellant is concerned.”

[13] Counsel for the Respondent could not proffer any reasons as to why the decision of the Supreme Court of Appeal in Moleko was not applicable to the application before me and why I should not follow the conclusion reached therein.

¹ (2008) 3 ALL SA 47 (SCA)

- [14] I am accordingly of the view that such matter is applicable and that I am directed to follow the same rationale.
- [15] Accordingly, given the fact that the Respondent's claim is premised upon an alleged malicious prosecution carried out by the Prosecuting Authority, I am of the view that there is no cause of action disclosed in the Particulars of Claim dated 10 May 2016 against the Applicant.
- [16] Even if that were not to be the case, it is certainly a matter where the National Director of Public Prosecutions would have a material and direct interest in the proceedings and at the very least should have been joined as a co-defendant.
- [17] I am further of the view that this falls squarely within the grounds envisaged in terms of Rule 42(1)(a) and accordingly find that the judgment granted in favour of the Respondent was erroneously sought and granted.
- [18] Given the fact that the rescission application was brought within a reasonable time after the granting of the default judgment, I am enjoined to rescind such an order.
- [19] Counsel for the Applicant had also raised further points that were not contained in the papers or the Heads of Argument, namely that the summons was stale and that there was a lack of a signature in respect of the Notice of Motion in relation to the default judgment application.
- [20] Given my above view, such arguments are irrelevant and unnecessary to deal with.
- [21] Further, it is unnecessary to deal with the alternative grounds of rescission, namely Rule 31(2)(b).
- [22] The only issue remaining is the issue of costs.

[23] Counsel for the Respondent pointed out the lengthy time delay between when this matter began and the Applicant's inaction to properly defend it, as fact is to be considered in respect of the awarding of costs.

[24] It was further contended that the Applicant could have raised the point of non-joinder/lack of cause of action in the action proceedings instead of not defending the matter.

[25] The Counsel for the Applicant argued that the Applicant should be entitled to the costs of the application on a party and party scale.

[26] Given the nature and the long history of the matter, I am of the view that costs should be costs in the cause of the main action.

[27] Accordingly, the application before me stands to succeed and I make the following order: -

1. That the default judgment granted against the Applicant on 12 May 2020 is hereby rescinded;
2. That the costs of the application are to be costs in the main action.

**ACTING JUDGE C M RIP
JUDGE OF THE HIGH COURT GAUTENG
DIVISION, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 28 October 2022.

HEARD ON 24 OCTOBER 2022

JUDGMENT DELIVERED ON 28 OCTOBER 2022.

APPEARANCES

On behalf of the Applicant:

Adv. Nemukula

Instructed by:

The Office of the State Attorney

On behalf of the Respondent:

Adv. J A Van Wyk

Instructed by:

Jacobson & Levy Inc.