Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A81/2016

Before: The Hon. Mr Justice Binns-Ward
The Hon. Mr Acting Justice Canca

Date of hearing: 28 October 2016
Date of judgment: 2 November 2016

In the matters between:

THE MINISTER OF POLICE Appellant in the first appeal

and

GARTH LEONARD MURRAY Respondent in the first appeal

and

GARTH LEONARD MURRAY Appellant in the second appeal

and

THE MINISTER OF POLICE Respondent in the second appeal

JUDGMENT

BINNS-WARD J (Canca AJ concurring):

[1] There were two appeals before us in this matter. They both come from judgments of the Murraysburg magistrate's court and relate to different aspects of the same case. By arrangement between the parties, sanctioned by the court, both appeals were argued at a single hearing. The registrar has enlisted them both under the same case number. The first

appeal, in which the Minister of Police is the appellant, concerns the magistrate's refusal of an application to rescind the judgment for damages granted by default in favour of Mr Murray in respect of the latter's claim against the Minister arising out of his unlawful arrest and detention. The second appeal, which falls to be considered only in the event of the Minister's aforementioned appeal failing, is by Mr Murray against the quantum of the damages awarded to him by the magistrate. It is convenient for the purposes of judgment to refer to the parties as 'the Minister' and 'Murray', respectively.

[2] Dealing with the first appeal. The application for rescission of the judgment in favour of Murray was brought in terms of rule 49 of the Rules of the Magistrates' Courts. The approach to applications for the rescission of default judgments is well-established in principle. The *locus classicus* on the subject is the judgment in *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O). That judgment was given in respect of an application under rule 43 of the Orange Free State Provincial Division of the Supreme Court, but the approach formulated there holds good in respect of later iterations of the applicable rules, including that which applies in the current matter; viz. the applicant (a) must give a reasonable explanation of his default (if it appears that the default was wilful or due to gross negligence the court should not come to his assistance), (b) must show that the application is bona fide and not made with the intention of merely delaying plaintiff's claim and (c) must show that there is a bona fide defence to plaintiff's claim (it is sufficient if a prima facie defence is made out; it is not necessary to deal fully with the merits of the case and establish that it has good prospects of success). See *Grant v Plumbers* at 476-7, cited with approval in many subsequent judgments including *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764I-765F and *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at para. 11.

[3] The currently applicable rule required the Minister to show 'good cause' for the rescission of the judgment. Schreiner JA articulated the indefinable breadth of that concept in *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352-3, observing that '*The meaning of 'good cause' …, like that of the practically synonymous expression 'sufficient cause' which was considered by this Court in Cairn's Executors v Gaarn, 1912 AD 181, should not lightly be made the subject of further definition. For to do so may inconveniently interfere with the application of the provision to cases not at present in contemplation. There are many decisions in which the same or similar expressions have been applied in the granting or refusal of different kinds of procedural relief. It is enough for present purposes* [the appeal, like the current matter, concerned an application for rescission of a judgment

granted against the defendant in default of appearance at the trial of a defended action] *to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives.*'

[4] It has been remarked that some flexibility is indicated in the exercise of the court's discretion having regard to the nature of the case. So, in *Zealand v Milborough* 1991 (4) SA 836 (SE) at 838D, Jones J, after referring to *Grant v Plumbers* and *Silber* supra, stated '*I would only add that a measure of flexibility is required in the exercise of the Court's discretion. An apparently good defence may compensate for a poor explanation (Harms Civil Procedure in the Supreme Court 313 (K6)), and vice versa*'; see also *Wright v Westelike Provinsie Kelders Bpk* 2001 (4) SA 1165 (C) at para. 57. However, that should not be misunderstood to suggest that an apparently good defence may compensate for a woefully inadequate explanation or an attitude of inexcusable neglect or indifference in the conduct of its case by the litigant applying for rescission.

[5] The discretion exercised by the court below in its decision to refuse the Minister's application for rescission of the judgment in favour of Murray involved discretion in the wide sense of the concept. This court would therefore be within its powers to substitute its own decision in place of that of the magistrate if we were to be convinced that a different order should have been made on the basis of the evidence; cf. *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 360G-362E and *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) at paras. 82-92. It was nevertheless incumbent on the Minister to demonstrate that the magistrate's decision was wrong because, even when the court of first instance has exercised a discretion in the wide sense, the appellate tribunal should guard against an inclination towards too ready interference.

[6] Counsel for the Minister submitted that the magistrate had dismissed the application for rescission simply because there had been no affidavit by the employee at the office of the state attorney who had collected the registered postage item containing the copy of the notice of set down sent by Murray's attorney in respect of the trial and that the court a quo had been remiss in not weighing the broader picture. The judgment is capable of being read in the manner contended for by the Minister's counsel. My impression though is that the magistrate dismissed the application because she had formed the impression that the state had been grossly negligent. If my perception is well-founded, she might well have articulated her reasons for holding that opinion more fully. Because I do not differ from the conclusion

reached by the magistrate, it is convenient to consider the merits of the application afresh without having to make a finding that the court below was misdirected in the exercise of its discretion.

[7] According to his particulars of claim, Murray was arrested by the police at 16h05 on Monday, 23 May 2011. That happened when he had presented himself voluntarily at the police station in compliance with an undertaking given to the police by his mother earlier that afternoon that he would do so. It appeared from the evidence in the application for rescission that he was detained on a charge of assault with intent to do grievous bodily harm arising from a complaint laid by his girlfriend. Murray alleged that he was unlawfully arrested without a warrant and thereafter unlawfully detained without due cause in the cells at the police station for 67 hours. He claimed compensation in damages in the sum of R100 000.

[8] Murray gave notice of his claim to the Minister on 1 June 2011 in compliance with the requirements of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. The Minister acknowledged receipt of the claim on 9 June 2011.

[9] The action was thereafter instituted by service of the summons on the Minister at the office of the state attorney on 15 January 2014. The Minister entered an appearance to defend the action, but failed to deliver his plea timeously. A notice of bar in terms of Magistrates' Court rule 12 was served on 27 April 2014. Notwithstanding the notice of bar, Murray accepted service of the Minister's plea more than nine months later on 5 February 2015.

[10] The content of the plea was risible having regard to the evidence adduced by the Minister in support of the application to rescind the judgment. Save for admitting the identity of the plaintiff, the Minister pleaded that he had no knowledge of any of the facts alleged by Murray and put him to the proof thereof. It is evident, however, that the Minister must indeed have been aware that Murray had been arrested without a warrant, and that any ignorance about the circumstances of Murray's arrest and detention could only have been for want of proper use of the statutory opportunity to investigate the circumstances that is the object of the imposition on claimants against the state of the obligation to precede the institution of proceedings with notice given in terms of Act 40 of 2002. Notwithstanding the incidence of the onus on the defendant in cases when an arrest is affected without a warrant,[1] the Minister did not see fit to plead any positive defensive allegations in opposition to the

[1] See e.g. *Zealand v Minister of Justice and Constitutional Development* 2008 (2) SACR 1 (CC) at paras. 24 and 25.

claim. Those were first asserted in support of the application to rescind the judgment, made only in April 2016.

[11] By notice served on 10 February 2015, the Minister was called upon to make discovery in the action. He did not respond to the notice.

[12] Murray set his claim down for trial on 15 June 2015, but the matter did not proceed on that date. The trial was re-enrolled for hearing on 2 November 2015. A notice of set down for that date was emailed to the state attorney on 12 August 2015 (the parties had agreed that service could be effected by email) and on the same date a copy of the notice was sent to the Minister's attorney by registered post. An identified employee of the state attorney collected the registered item. It apparently did not make its way into the relevant file.

[13] There was no appearance for the Minister on 2 November 2015 when the matter was called before the magistrate for trial. After hearing the evidence of Murray, the magistrate gave judgment in his favour on 9 November 2015 and awarded him R10 000 in damages.

[14] The attorney in the employ of the state attorney who had been dealing with matter, Mr C. Buthane, resigned with effect from 30 September 2015. He reportedly declined to make an affidavit explaining whether he received the notice of set down, or if not, how that could have happened. There was no evidence from the person who collected the copy sent by registered post as to how she dealt with the item. There was also no evidence from the attorney at the office of the state attorney who took over the file from Mr Buthane.

[15] The Minister's counsel argued that that the Minister had not been at fault. If anyone were to blame for the Minister's failure to appear at the trial, it was Mr Buthane; and the Minister could not in fairness be prejudiced by Buthane's refusal to make an affidavit. The first that the Minister knew about the trial date and the judgment that had been given against him was when the Legal Administration Officer in the Legal Department of the South African Police Service at Cape Town was informed, on 31 March 2016, that Murray had given notice of his intention to appeal against the quantum of the award. Application had thereafter been made promptly for the rescission of the judgment. It was emphasised that the affidavit submitted in support of the application for rescission disclosed that the Minister had a cognisable defence; viz. reliance on s 40(1)(q) of the Criminal Procedure Act 51 of 1977. The essence of the argument sought to distance the Minister from the unexplained neglect of the matter by his legal representative in the office of the state attorney. The role of the apparently delinquent attorney as the Minister's agent was disregarded.

[16] The law reports are replete with examples of courts visiting the negligence of legal representatives on their clients.[2] The rationale for the approach is easy to understand. The conduct of litigation affects all the parties to it, and also the judicial system in which it takes place. A litigant chooses its representative and if it chooses badly or fails to ensure that its representative is effectively carrying out its mandate, the resultant prejudice is something that *it*, rather than the other litigants and the court system, should bear. The courts' approach is not a mechanical one, however; due regard is had to the interests of justice on the facts of the given case in deciding whether or not to be forgiving to the litigant for the sins of its legal representative. It is for that reason that in a case like the current matter the court exercises its discretion with regard to all aspects of the case.

[17] The explanation offered by Minister for his default in the current matter does not explain his conduct in relation to Murray's claim in the lead-up to judgment being taken against him. It does not explain why it took more than a year for his plea to be filed; why he did not comply with the notice to make discovery; or why, when the plea was eventually delivered, it was so vacuous and evasive. The Minister has not explained why the defence disclosed in his application for rescission was not incorporated in the plea. Did he not give his attorney proper instructions? If not, why not? If he gave proper instructions, why was he content with the plea that was delivered on his behalf? Did he not consider it and note how deficient it was? In the absence of an explanation full enough to address these obviously pertinent considerations bearing on his conduct in respect of the litigation, the court is left with the impression that the Minister and his legal representative treated the matter with utter indifference. In such circumstances, it will not avail an applicant for the rescission of a default judgment to say 'Only now that judgment has been given against me, would I like to

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[2] See, for example, the remarks of Trengove AJA in *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1043-4 in respect of the effect of the failure of a litigant to show sufficient interest in a case in which the conduct of their attorneys had been delinquent. After describing how the appellants' attorneys (Coligionis and Lebos) had let them down, the learned judge proceeded at p.1044B-E:

> *However, the appellants to cannot be absolved from blame. They appear to have manifested a complete disinterest in the conduct of the case after the interim settlement on 19 February 1973, and they have not proffered any acceptable explanation for their failure to keep in touch with Coligionis, or with Lebos for that matter, as to the progress of the proceedings during the three and a half year period subsequent to the interim settlement. In this regard I fully agree with Melamet J's observation … that the appellants*
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> > *"cannot divest themselves of their responsibilities in relation to the action and then complain vis-à-vis the other party to the action that their agents, in whom they have apparently vested sole responsibility, have failed them".*
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> *Having regard to all the relevant facts and circumstances, I am of the view that, on common law principles, this Court would not be justified in exercising its discretion in favour of granting the appellants the relief sought. They are, as Melamet J correctly remarked …*
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> > *"the authors of their own problems and it would be inequitable to visit the other party to the action with the prejudice and inconvenience flowing from such conduct".*

be given the chance to take the case seriously'; cf. *Chetty v Law Society, Transvaal* supra, at 765D-E.

[18] These considerations, in addition to the inadequate explanation for the state attorney's failure to have acted on either of two notices of set down given by Murray's attorneys on which the magistrate's reasons for judgment focussed, justified the decision of the court a quo to refuse to grant the application for rescission. This court would have made the same determination had it been seized of the application at first instance. The first appeal will therefore be dismissed.

[19] Turning now to Murray's appeal against the magistrate's determination of the quantum of his damages. Making an award in general damages entails an exercise by the trial court of a discretion in the strict or 'true' sense of the word. An appellate court may interfere only if it is demonstrated that the trial court was materially misdirected in the exercise of its discretion. Such misdirection may be inferred if there is a substantial variation or startling discrepancy between the award made by the trial court and that which the appellate court considers appropriate.

[20] Murray was detained in the cells at the Murraysburg police station for 67 hours from the time of his arrest until he was released on bail when he appeared in court. The charge against him was later withdrawn when the complainant failed to come to court to testify. His detention spanned more than two full days and three nights, during which time he was the only person held in the cell. He conceded that he was properly treated by the police while he was in detention. Murraysburg is a small town, and he was therefore acquainted with all the police details on first name terms. His only complaints were that he was given only a single thin blanket that was inadequate to keep him warm in the prevailing cold wet weather and that his family, who had brought blankets for him, were not allowed to see him. He conceded, however, that he had not asked for an extra blanket. He also admitted that he was no stranger to detention, having previously been held in custody twice before for drunkenness and assault, respectively. On those occasions he had been held for one or two days. He did not, however, have a criminal record. He was 22 years old at the time and in employment at a wage of R90 per day.

[21] In her reasons for judgment, the magistrate comprehensively summarised the evidence concerning Murray's personal circumstances. She held that no malice had been proved in respect his complaint about being given only one blanket because he conceded that

he had been generally well treated and had not asked for an extra blanket. That finding cannot be faulted.

[22] The magistrate recorded that she approached the question of quantifying the award mindful of dictum of Nugent JA in *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at para. 20: '*Money can never be more than a crude* ***solatium*** *for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss. The awards I have referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protectio*n'. She made reference to two reported judgments concerning damages awarded for unlawful arrest and detention, and having updated those awards to current value and calculated what they translated to at a *per diem* rate (R3715,08 in the one case and R4437,50 in the other), awarded Murray a comparatively slightly lesser amount. In fixing the award the magistrate had regard to the considerations that, as she put them, '[d]*ie arrestasie en aanhouding was nie gekenmerk deur buitengewone faktore soos byvoorbeeld beserings, marteling en fisiese geweld nie en het Eiser geen klaarblyklik newe effekte oorgehou as gevolg van die voorval; inteendeel dit blyk dat Eiser tans 'n beroep van hoër aansien bekleë as ten tyde van die voorval.*'

[23] As evident from the passage in *Seymour* quoted by the court a quo, it is indeed so that there can be no empirical measure for the damages involved in a claim of this nature, and thus it is not surprising that the learned judge of appeal was unable to identify any 'discernible pattern' in the earlier judgments in such matters to which he had given consideration. Criticism has been expressed in some quarters about the conservatism of awards in respect of loss of liberty; see, for example, T Nkosi, '*Balancing deprivation of liberty and quantum of damages*', *De Rebus* (April 2013). It has been suggested that low awards fail to afford proper recognition to the entrenchment of the rights to dignity and liberty in the Bill of Rights. It is especially significant therefore that Nugent JA's *dictum* at para. 20 of *Seymour*, to which the magistrate rightly had reference, enjoyed the unanimous endorsement of the Constitutional Court when the learned judge recently reiterated it in the course of delivering that court's judgment in *Minister of Home Affairs v Rahim and Others* 2016 (3) SA 218 (CC) (see para. 33).

[24] It is plain from what has been said thus far that previous awards provide nothing but a rough guide as to what might be an appropriate sum of damages in any case. The facts of

every case and the circumstances and effect of the arrest and detention on the claimants are bound to vary. The variations are infinite, which makes resort to comparability a crude tool that is useful only to give the court a broad sense of the appropriate range within which to work in determining an award.

[25] We were referred by Murray's counsel to a number of previous awards in support of his submission that the award made to Murray represented a substantial variation from what he contended was appropriate. The circumstances in those matters were starkly distinguishable. I do not propose to go through them individually. It will suffice to use one to demonstrate the point. Since it was singled out for discussion during argument, I have chosen the judgment of Plasket J in *Peterson v Minister of Safety and Security* [2009] ZAECGHC 65 (23 September 2009).

[26] In that matter the award for unlawful arrest and detention was R60 000, with an additional amount of R120 000 having been awarded for assault. We were informed that the amount of R60 000 in 2009 would translate to R86 000 in today's value. When making the award the learned judge recorded (at para. 19) that he had been mindful '*of the fact that the 'assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty' and that they should serve as no more than a 'useful guide to what other courts have considered to be appropriate*'.[3] He then proceeded (at para. 20) to explain his determination of the amount awarded as follows:

> Bearing that in mind, I proceed to consider the factors relating to the nature and seriousness of the infringement of the plaintiff's rights and the effect on him. The plaintiff is a seasonal fruit picker who works from time to time in the fruit orchards of the Boland. He was, when he was arrested, in the privacy of his own home. He was assaulted and dragged from his home clad only in a pair of shorts. This impairment of his dignity was compounded by the fact that people had gathered outside of his house and they witnessed his indignity as he was, in this state of undress, placed in a police van and driven away. At the police station, his humiliation continued and he was placed in a cell. Although it is not clear when precisely he was provided with the clothes that Ms Michaels brought for him, he spent some time in his shorts and nothing more. He was not provided with a blanket or a mattress and was forced to sleep on a hard concrete slab. He was released at 04h00, having spent about eight hours in custody. He was then required to walk home. In my view, when these factors are weighed, together with the malicious, highhanded, arrogant and brutal conduct of Sergeant Septoe, an award of R60 000.00 is justified.

[3] The learned judge quoted from the judgment in *Seymour* supra, at para. 17.

[27] Without in any way thereby detracting from the seriousness of the infringement of Murray's rights, it is obvious, I would suggest, that *Peterson*'s case was strikingly distinguishable on its facts. Murray was not treated in anything like the cruel, malicious and demeaning way that the plaintiff in *Peterson*'s case was. Had he been, the award of R10 000 would have impressed as obviously wanting. Just as the learned judge in *Peterson*'s case had careful regard to the peculiar circumstances of the arrest and detention, so too did the magistrate in this matter. Whilst the *legal* character of the delict and infringement of basic human rights was identical in the two cases, the *human* impact differed greatly; a notable disparity in the respective awards was therefore only to be expected. The disparity is certainly not indicative of any misdirection by the magistrate.

[28] *Rahim*'s case, mentioned earlier, came to the Constitutional Court on appeal by the Minister of Home Affairs from a judgment of the Supreme Court of Appeal (*Rahim and Others v Minister of Home Affairs* 2015 (4) SA 433 (SCA)). It concerned the unlawful arrest and detention of asylum seekers. The periods of detention involved varied between 4 and 35 days. There was no evidence that their arrests and detention had involved any element of brutality or confinement in inhumane conditions. The asylum seekers' claims for damages had been dismissed in the High Court, but that decision was overturned by the appeal court.

[29] The appeal court gave judgment on 29 May 2015. It awarded the asylum seekers damages in amounts varying between R3 000 and R25 000. Its reasons for making the awards in those amounts were articulated in paragraph 27 of the judgment (per Navsa JA):

> The deprivation of liberty is indeed a serious matter. In cases of non-patrimonial loss where damages are claimed, the extent of damages cannot be assessed with mathematical precision. In such cases the exercise of a reasonable discretion by the court and broad general considerations play a decisive role in the process of quantification. This does not, of course, absolve a plaintiff from adducing evidence which will enable a court to make an appropriate and fair award. In cases involving deprivation of liberty the amount of satisfaction is calculated by the court *ex aequo et bono*. Inter alia the following factors are relevant:
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> (i) circumstances under which the deprivation of liberty took place;
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> (ii) the conduct of the defendants; and
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> (iii) the nature and duration of the deprivation.
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> Having regard to the limited information available and taking into account the factors referred to, it appears to me to be just to award globular amounts that vary in relation to the time each of the appellants spent in detention. The third appellant spent the least amount of time in detention, namely four days. In my view a fair amount to be awarded to him as compensation would be R3000. The fifth and fifteenth appellants spent seven days in prison. In my view a fair amount in respect of their

> detention would be R5000. The fourth appellant spent 8 days in detention. In my view a fair amount in relation to his detention is an amount of R6000. The sixth appellant spent 13 days in detention. In my view a fair amount in relation to his detention would be an amount of R8000. The first and eighth appellants spent 16 days in detention. In my view a fair amount for them is R10 000. The second, tenth and eleventh appellants spent 18 days in detention. In my view an amount of R12 000 is appropriate. The fourteenth appellant spent 20 days in detention. In my view an amount of R14 000 is adequate. The thirteenth appellant spent 23 days in detention. In this regard an amount of R16 000 appears proper. The twelfth appellant spent 26 days in detention. In my view an amount of R18 000 is satisfactory. The seventh appellant spent 30 day in detention. An award of R20 000 seems in order. The ninth appellant spent 35 days in detention. In my view an amount of R25 000 appears fair.
> (Footnotes omitted.)

[30] A cross-appeal by the asylum seekers against the quantum of the awards made by the SCA was dismissed by the Constitutional Court. The latter court explained its unwillingness to intervene with reference to the principle that the power of an appellate court to interfere with decisions by a court below made in the exercise of a discretion in true sense of the word is narrowly circumscribed.

[31] Counsel did not refer to *Rahim*'s case in argument. I came across it when noting up *Seymour* in the course of preparing this judgment. Had counsel for the appellant been aware of the judgments in that matter, he might not have been as taken aback as he appeared to be when I suggested to him during the course of his address that the award in the current case did not strike me as startlingly inappropriate. It is true that he could have cited examples of arguably more generous awards in quite closely comparable circumstances,[4] but for the reasons discussed, their existence would not be enough, without more, to demonstrate a material misdirection by the trial court in the current matter.

[32] I am not persuaded that the court below was in any way misdirected in determining the amount of damages awarded to Murray. The second appeal will therefore also be dismissed.

[33] The following orders are made:

1. The appeal by the Minister of Police against the refusal of his application in Murraysburg Magistrate's Court case no 2/14 for the rescission of the judgment of that court against him given on 9 November 2015 is dismissed with costs.

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[4] See, for example, *Minister For Safety and Security v Scott and Another* 2014 (6) SA 1 (SCA), in which the award of R75 000 by the trial court was reduced to R30 000 by the SCA. The circumstances of the detention in that case were worse, but its duration was much shorter than in the current case.

2. The appeal by Garth Leonard Murray against the quantum of the damages awarded to him in his action against the Minister of Police in Murraysburg Magistrate's Court case no 2/14 in terms of the judgment of that court dated 9 November 2015 is dismissed with costs.

A.G. BINNS-WARD
Judge of the High Court

P. CANCA
Acting Judge of the High Court