IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: 911/2023

In the matter between:

MATJHABENG LOCAL MUNICIPALITY Applicant

and

PAKAMPHO ELECTRICAL First Respondent
THE SHERIFF, WELKOM Second Respondent
ABSA BANK LTD Third Respondent

CORAM: HEFER AJ

HEARD ON: 14 MARCH 2024

DELIVERED ON: 6 JUNE 2024

[1] The Applicant, the Matjhabeng Local Municipality, is applying for rescission of judgment in terms of Rule 42(1)(a) of the Uniform Rules of Court; in the alternatively for the rescission on the ground that the order was erroneously sought and granted in the absence of the Applicant in terms of the common law ground of *"substantial cause"*, in that:

(a) There is a reasonable explanation for default of appearance; and

(b) There are *bona fide* defences which the Applicant intends to raise at the hearing of the action instituted by the First Respondent against the Applicant.

[2] The rescission sought is against a default judgment granted by the Registrar of this division on 3 May 2005. The Applicant also seeks rescission in respect of a writ of execution as well as a garnishee order issued in terms of the Rule 45(12)(a).

[3] The default judgment originates from a simple summons issued on behalf of the First Respondent for services rendered to the Applicant together with interest as well as costs of suit.

[4] After service of the summons and the Applicant failing to enter appearance to defend, First Respondent applied for default judgment headed as *"Default Judgment in terms of Rule 31(4)"* subsequent to which default judgment was granted by the Registrar.

[5] Prior to the application for rescission of judgment serving before me now, the Applicant has obtained, on an urgent basis, an interdict restraining Respondents from paying the amount for which default judgment has been granted, currently being held by the Second and Third Respondents on behalf of the First Respondent.

[6] The Applicant relies on several grounds in support of its application for a rescission of judgment which can be summarised as follows:

(i) Breach of lawful procurement in terms of Section 217 of the Constitution, 1996;

(ii) That the Supply Chain Management (SCM processes) were deliberately flaunted and therefore *prima facie* defrauded the Municipality;

(iii) The procurement processes of the Applicant and the invoices issued by and payments made to the First Respondent are the subject of investigations by *inter alia* the Hawks.

(The Applicant indicating that the above are directly in dispute in the rescission relief and will be raised as defences in the main action.)

(iv) No peremptory prior notice had been given to the Applicant prior to the institution of legal proceedings against the Municipality as required in the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002;

(v) No proper service on the Municipality as provided for in Section 115 of the Local Government Municipal Systems Act 32 of 2000 which stipulates that service be effected on the municipal manager or a person in attendance at the offices of the municipal manager;

(vi) The default judgment by the Registrar was issued lacking jurisdiction on the part of the Registrar in that the order on its face was issued in terms of Rule 31(4), which is a procedure only available to a judge and not the Registrar; more in particular the Applicant alleging that the reason for First Respondent relying on Rule 31(4) is the same reason no proper service was effected on the municipal manager as required by the statute namely to deprive the Municipality of knowledge of the proceedings, thus depriving the Municipality of its right to access to Court protected by Section 34 of the Constitution of 1996;

(vii) The prerequisite for a default judgment issued by the Registrar was that the Registrar has jurisdiction *"... that there is a debt or liquidated demand:"*; according to the Applicant no such cause of action was apparent from the simple summons. Furthermore *"the order should be set aside as a nullity, alternatively upon rescission"*, the *bona fide* defence will be raised at the hearing of the main action that there is no valid contract and that there is no lawful authority for a *"certificate of balance"* to be issued;

(viii) The warrant of execution should be set aside as invalid and a nullity principally because it purports to execute an order the Registrar lacked jurisdiction to make; and

(ix) The warrant of execution is a warrant to execute against movable goods; it is not a garnishee order nor does it purport to be such an order and the Sheriff issued a garnishee order against emoluments without judicial supervision and is therefore unlawful.

[7] I now turn to consideration of the various grounds relied upon by the Applicant.

The provisions of Section 3 of Act 40 of 2002:

[8] In the First Respondent's answering affidavit, the deponent, Mr Kruger, the First Respondent's attorney of record, stated as follows:

> "As a result of this claim not being delictual in nature no service in terms of Act 40 of 2002 is necessary."

[9] Mr *Snijders*, appearing for the Applicant, is correct in his submission that this defence is wrong in law. However his reasons for this contention are not correct. According to him, the notice requirement in Section 3(1) applies to a debt which means *"any debt arising from the cause of action – which arises from delictual, contractual or any other liability"*.

[10] In the matter of **Vhembe District Municipality v Stewarts & Lloyds Trading (Pty) Ltd and Another**[1] referred to by Mr *Grobler*, appearing on behalf of the First Respondent, the Supreme Court of Appeal has confirmed that when a litigant's claim against an organ of state is not a damages claim, the Act does not apply.

[1] (397/13) [2014] ZASCA 93

[11] The claim by the First Respondent against the Applicant is not a claim for damages. In **International Harvester v Ferreira**[2], it was held that a claim for work done and material delivered is one for a debt or liquidated demand.

[12] In the present matter the claim by the First Respondent against the Applicant is also a claim for a debt or liquidated demand and the notice in terms of Section 3 of Act 40 of 2002 was therefore not a prerequisite.

Rescission in terms of Rule 31:

[13] Mr *Snijders*' first submission in this regard is that the Plaintiff has failed to set out its cause of action in such terms to enable the Defendant to know the cause against him and to satisfy the court that the Plaintiff has a valid cause of action entitling it to judgment.

[14] The wording of the simple summons in the present matter reads as follows:

> *"Payment of the due and outstanding amount of R844 100.00 in respect of goods sold and delivered and services rendered to the Defendant by the Plaintiff on Defendant's special instance and request."*

[15] In **Fatti's Engineering Co Ltd v Vendick Spares Ltd**[3] it was held that in a claim, based on a summons which contained similar wording as the present, the Plaintiff's case is to be regarded as a debt or liquidated demand within the meaning of the rules and that the Plaintiff is entitled to default judgment.

[16] In **Western Bank Bpk v De Beer en 1 Ander**[4] it was held that the simple summons need not set out the cause of action in full particularity as long as it contains a general indication of the cause of action.

> "Dit moet alleen 'n aanduiding gee van die saak wat die Eiser van voornemens is om in die deklarasie uit te maak."[5]

---

[2] 1975 (3) SA 831 (SE).
[3] 1962 (1) SA 737 (TPD).
[4] 1975 (3) SA 772 (TPA).
[5] at p. 277 A – B.

[17] I am therefore satisfied that the First Respondent was entitled to apply for default judgment in terms of the simple summons as it stands.

[18] The second stage of enquiry which needs consideration in this regard, is whether the Registrar was entitled to grant default judgment in terms of Rule 31(4).

[19] As already indicated, the notice of application for default judgment in fact referred to Rule 31(4) instead of 31(5).

[20] Rule 31(4) deals with default judgment in respect of claims not for a debt or liquidated demand and a Defendant is in default of delivery of a notice of intention to defend. Rule 31(5) on the other hand deals with claims in respect of a debt or liquidated demand.

[21] Whereas Rule 31(4) expressly and Rule 31(5) by implication, provide that no notice of default judgment shall be given of the application for default judgment where no intention to defend had been delivered and the Applicant in the present matter has failed to deliver such notice prior to the default judgment being granted, notice of such application need not be given in terms of either one of these rules. The submission by Mr *Snijders* to the effect that the First Respondent relied on Rule 31(4) instead of Rule 31(5) to deprive the Municipality of knowledge of the proceedings, can therefore not be accepted. Notice of the application for default judgment was not a prerequisite.

[22] Whereas the claim was indeed for a debt or liquidated demand, the Registrar was entitled to grant default judgment in terms of Rule 31(5). I agree in this regard with Mr *Grobler*'s submission that it does not matter – given the substance of such an application – if there is an error in the heading between the tramlines.

[23] In **Standard Bank of SA Ltd v Ngobeni**[6] Le Roux J stated as follows:

---

[6] 1995 (3) SA 235 (TKGD)

> "... to the Registrar the right (and duty) to grant or refuse judgment in uncomplicated default matters where he simply checks that all administrative and formal steps have been taken to justify a judgment."[7]

This brings me to the next point for consideration.

Service:

[24] In terms of Section 115(3) of the Local Government Systems Act 32 of 2000, any legal processes is effectively and sufficiently served on a Municipality when it is delivered to the municipal manager or a person in attendance at the offices of the municipal manager.

[25] This provision is also mirrored in the current Rule 4(1)(a)(viii).

[26] The return of service by the Deputy Sheriff in regards to the summons in the present matter, reads as follows:

> "On the 29th day of March 2023 at 08:55 I properly served a copy of the SUMMONS: IN RESPECT OF DEBT OR LIQUIDATED DEMAND on MRS BIANCA VAN DER SPUY – PA LEGAL DEPARTMENT a responsible person in the employ of the MUNICIPALITY OF WELKOM, at the place of business of the MUNICIPALITY OF WELKOM, after explaining the nature and contents thereof to the said person."

This service was apparently effected by *"Deputy-Sheriff: J van Zyl"*.

[27] According to the notice of attachment, the same person also executed the warrant of execution on 11 May 2023, pursuant to the warrant of execution being issued on 3 May 2023.

[28] It does not appear from any of the documents provided by any of the parties, when the court order pursuant to the default judgment have been served on the Applicant.

---

[7] p. 235 C – D.

[29] In respect of the warrant of execution and notice in terms of Rule 45(12)(a), there are two returns of service, the first of which reads as follows:

> "On this 23rd day of January 2024 at 10:30 I served the WARRANT OF EXECUTION AND NOTICE IN TERMS OF RULE 45(12)(a) upon MRS CLAUDIA MOLISE – CBOR, a person at the offices of the garnishee and apparently not less than 16 years of age, after the nature and content had been properly explained to her: Rule 45(12)(a)."

The second in this regard reads as follows:

> "On the 23rd day of January 2024 at 10:35 I served this WARRANT OF EXECUTION AND NOTICE IN TERMS OF RULE 45(12)(a) upon MS A NOHOLOZA – PA MUNICIPAL MANAGER, ostensibly a responsible employee and not less than 16 years of age of and in control of and apparently in authority at the place of employment of Respondent at 319 Stateway Welkom, the last-mentioned being temporary absent and by handing to the first-mentioned a copy thereof after explaining the nature and content of the said process. Rule 4(1)(a)(iii)."

[30] Both these latter returns of service were then signed by Mr Victor Mbambo, Deputy Sheriff. It is clear from the contents of these returns of service that Mr Mbambo did not even have the provisions of Rule 4(1)(viii) in mind when effecting service / or when compiling his returns of service.

[31] In a supplementary affidavit on behalf of the First Respondent deposed to again by Mr Kruger, pursuant to the interim order being granted by Van Zyl J, it was *inter alia* stated that Mr Kruger has spoken to the Deputy Sheriff of Welkom, Mr Mbambo on the 14th of February 2024 during which conversation he was informed that:

> "On each occasion he was called upon to serve legal process upon the Municipality, the municipal manager or his or her secretary would instruct that the process must be served upon Ms Van der Spuy, Mr Vanga (the head of the legal department of the Municipality) or someone at the legal department at the Municipality.
>
> The instruction was changed at the end of January 2024, whereby the deponent (to this application) had asked that all legal process henceforth be served on his office."

[32] This same supplementary affidavit further refers to a similar matter in which it was ascertained that the Municipality also alleged defective service of an application because it was not served upon the municipal manager or his office.

[33] In the Applicant's further supplementary affidavit, the municipal manager denies that he authorised Ms Van der Spuy to accept service of legal processes and maintained that he did not receive the summons at any stage, more in particular before the default judgment had been granted.

[34] Section 43(2) of the Superior Courts Act 10 of 2013 stipulates that the return of the Sheriff or a Deputy Sheriff of what has been done upon any process of a Court, shall be *prima facie* evidence of the matters therein stated. The return of service of the summons on the 29th of March 2023 merely shows that service had been effected on the said Ms Van der Spuy. It is not evident from this return of service that this person was authorised to accept service on behalf of the Applicant nor the municipal manager. Even if the hearsay evidence as contained in the Applicant's supplementary affidavit is to be accepted, no evidence was presented by the First Respondent in respect of the service by J van Zyl on the 29th of March 2023. There is also no explanation from the First Respondent why such information was not provided by J van Zyl. The evidence now produced by the present Deputy Sheriff, Mr Mbambo does not assist in rectifying the apparent defective service.

[35] The onus of proving proper service in accordance with the legislation as well as the Rules of Court, is on the First Respondent. The First Respondent did not succeed in proving that proper service had indeed been effected prior to the default judgment being granted.

[36] The facts show that in applying for default judgment, the First Respondent's attorney relied upon a return of service from which it appears that service has not been effected in terms of the rules nor the applicable legislation. Only

after the interim relief in favour of the Applicant had been granted, the First Respondent's attorney attempted to rectify the return of service and the service effected in terms thereof. This should have been done prior to the application for default judgment being lodged.

[37] More importantly, all indications are that the Registrar when granting default judgment also relied on the return of service in terms of which proper service had been not been effected. The *ex post facto* evidence now being placed before Court does not resolve the problem. It appears that the Registrar in granting default judgment, has failed to establish that all administrative and formal steps have been taken to justify default judgment.

[39] Judgments have been rescinded under Rule 42 where the summons had not been served on a Defendant.[8] The same should apply where proper service had not been effected .

In **Interactive Trading v SA Securitisation Program**[9] Mangena AJ said as follows:

> "The Court relies on the office of the Sheriff as one mechanism in the administration of justice to ensure that the process leading up to the granting of a judgment is fair and that the legal proceedings have been brought to the attention of the other party."

The purpose of the provisions of Section 3 of the Municipal Systems Act are clearly to ensure that all legal processes come to the attention of the municipal manager. If proper service had not been affected the process leading to the granting of default judgment can not be regarded to be fair .

[40] Whereas in the present matter, I am not satisfied that proper service had been effected both in terms of the applicable legislation as well as the Rules of Court and that the summons did not come to the attention of the municipal

---

[8] Custom Credit Corporation (Pty) Ltd v Bruwer 1969 (4) SA 564 (D);
Fraind v Tonhmann 1991 (3) SA 837 (W);
Thomani v Seboka NO 2017 (1) SA 51 (GP).

[9] 2019 (5) SA 174 (LP)

manager prior to the application for default judgment being granted, the default judgment is accordingly to be set aside.

[41] It follows that both the warrant of execution as well as the attachment by the Second Respondent of the Applicant's bank accounts in terms of Rule 45(12)(a) are also to be set aside.

Costs:

[42] The Applicant seeks a punitive cost order against the First Respondent that the First Respondent is ordered to pay the Applicant's costs on an attorney and client scale. Among the substantive reasons for such a punitive cost order Mr *Snijders* referred to the complete absence of compliance with the peremptory provisions of Section 34 of the Constitution, Section 3 of the Institution of Legal Proceedings against Certain Organs of State Act, Section 115(2) of the Local Government: Municipal Systems Act, Rule 17, Rule 35(1) and Uniform Rule 45(12)(a).

[43] The only reason for the Applicant being successful in this application, is the defective service in respect of the summons and upon which default judgment was granted. I do not however consider this as a substantial reason to grant a punitive cost order against the First Respondent. Although the First Respondent's attorney had the obligation and duty to ensure that proper service had been effected prior to the default judgment being granted, both the relevant Deputy Sheriff as well as the Registrar also had a hand in the defective default judgment being granted.

Therefore, I make the following order:

Order:

1. The default judgment granted by the Registrar of the High Court, Free State Division on 3 May 2023 under case number 911/2023 is rescinded and set aside.

2. The warrant of execution under case number 911/2023 by the Registrar of the Free State Division of the High Court on 3 May 2023 is set aside.

3. The attachment by Second Respondent of the Applicant's bank accounts with the Third Respondent by way of Notice of Motion in terms of Rule 45(12)(a) issued during January 2024 is set aside.

4. In the event of the amount already being paid by the Third Respondent, First Respondent is to pay the amount of R844,100.00 in the Applicant's bank account with the Third Respondent within 1 (one) business day of this order.

5. First Respondent is to pay the costs of the application on a party-and-party scale including the costs in respect of Part A of the application.

[redacted]

HEFER AJ

Appearances:

On behalf of the Applicant:	Adv JP Snijders
Instructed by:	Botes Mahlobogoane Van Heerden Attorneys c/o Pieter Skein Attorneys Bloemfontein
On behalf of First Respondent:	Adv S Grobler SC
Instructed by:	Kruger Venter Attorneys Inc. Bloemfontein