

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 47215/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
02 November 2023	

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY

Applicant

and

KHUMHOLD WHOLESALE FOODS & COMMODITIES CC

Respondent

ORDER

[1] The judgment granted against the applicant in this court by the Honourable Justice Keightley on 29 August 2022 is rescinded.

[2] The costs are to be in the cause.

JUDGMENT

Fisher J

Introduction

- [1] This is an application for the rescission of a judgment of Keightley J taken by default on 29 August 2022.
- [2] In the action the plaintiff (respondent in this application) claimed damages for pure economic loss allegedly suffered by the respondent because of the unlawful termination, alternatively restriction of electricity to its property from 13 April 2021 to 18 April 2021.

The dispute

- [3] The unlawfulness relied on for the claim is based on the alleged breach of a court order dated 30 September 2014 which was handed down in urgent court under case number 35355/2014 by Sutherland J (as then was). The order pertained to the interdicting of the termination of electricity supply to the respondent's business premises in Germiston (the premises). The parties have referred to this order as "the Sutherland order" and for the sake of continuity I will follow suite.
- [4] The relevant paragraph of the Sutherland order reads as follows:

"The respondent (The municipality) is hereby interdicted from terminating or restricting, or causing or instructing the termination or the restriction of the electricity and/or water supply to the applicants (Khumhold) premises located at No 35 Mansfield Avenue, Meadowdale, No 167 Rietfontein Road, Primrose, Germiston and No 169 Rietfontein Road, Primrose, Germiston for amounts owed, or purportedly owed, to the respondent, (The municipality) pending the outcome of the action being heard by this Honourable Court, under case number 23006/2014."
- [5] There has been ongoing and protracted litigation between the parties. The respondent refers to five cases which are pending before this court and which relate to disputes between the parties pertaining to the electricity supply to the premises.
- [6] Much of the litigation, including the action under this case number, is predicated on the interpretation of the Sutherland order.

- [7] Simply put, the dispute is this: the applicant contends that the Sutherland order relates to charges incurred for a finite period ending at 25 June 2014 and forming the subject matter of the cause of action under case 23006/2014. It argues that any charges for consumption after that date do not form the subject of case 23006/2014. The respondent, on the other hand, argues that the Sutherland order means that while case 23006/2014 remains unresolved the applicant is interdicted from terminating or restricting the electricity notwithstanding that the termination relates to charges which do not form part of the cause of action under such case.
- [8] The applicant says that it only became aware of the proceedings in this matter after the receipt of a notice of attachment issued pursuant to the order. In essence it says that the service of the summons was not registered on its system and thus did not come to the attention of the persons whose function it was to deal with the summons. The applicant alleges further that the number of cases brought by the respondent created confusion in relation to this fresh process.
- [9] The respondent argues that this is a poor explanation and should be rejected.
- [10] The applicant concedes that there are unsatisfactory elements to the explanation as to the default but contends that the defence is very strong and on balance makes up for the unsatisfactory explanation as to default.
- [11] The applicant argues also that the respondent's failure to bring to the attention of the court the extent of the litigation history of the parties is also a factor to be taken into account.

Legal principles

- [12] The requirements for an application for rescission under this subrule have been repeatedly confirmed by our courts to be as follows:
- “(a) He [the applicant] must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.

- (b) His application must be *bona fide* and not made with the intention of merely delaying plaintiff's claim.
- (c) He must show that he has a *bona fide* defence to plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."¹

Discussion

- [13] I agree that in light of a sheriff's return of service on the Municipality that it barely passes muster for it to simply rely on an undiagnosed system failure in relation to the capture of the summons.
- [14] Having said this, there has been a long-standing litigious relationship between the parties involving the same dispute which is at hand in this matter – being the correct interpretation of the Sutherland order.
- [15] The failure on the part of the respondent to bring this other litigation to the attention of the court when judgment was sought does not impress. It is to my mind unlikely that Keightley J would have granted the order or least done so without hearing oral evidence had she been told of these other cases.
- [16] Clearly the defence raises a triable issue.

Costs

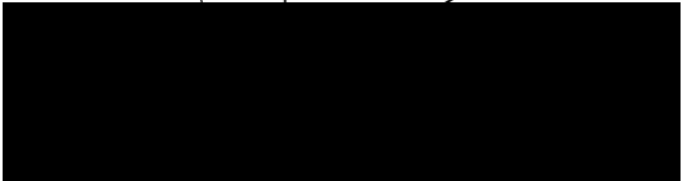
- [17] In light of the failure on the part of the respondent to place the claim in the broader context of the litigation between the parties when judgment was sought, it is my view that the costs are properly taken account of on the basis that they be in the cause.

Order

- [18] In the circumstances I grant the following order:

¹ See: *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (0) at 476 – 477.

- [1] The judgment granted against the applicant in this court by the Honourable Justice Keightley on 29 August 2022 is rescinded.
- [2] The costs are to be in the cause.



D FISHER
JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 2 November 2023

Heard: 17 October 2023

Delivered: 2 November 2023

APPEARANCES:

For the applicant: Adv M C Makgato

Instructed by: Mabece Tilana Attorneys

For the respondent: Adv L Norman

Instructed by: Diemieniet Attorneys