

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

CASE NO: 9200/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED
DATE: 2/2/2023
SIGNATURE

In the matter between:

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Applicant

and

SWART HILDA

First Respondent

KHUMALO COMMENT RAYMOND

Second Respondent

MDLULI GOODWIN KWANELE

Third Respondent

NCUBE TOPSON KUKUZA

Fourth Respondent

KHUMALO FIDRESS NOMSA

Fifth Respondent

In re:

SWART HILDA

First Plaintiff

KUMALO COMMENT RAYMOND

Second Plaintiff

MDLULI GOODWIN KWANELE

Third Plaintiff

NCUBE TOPSON KUKUZA

Fourth Plaintiff

KUMALO FIDRESS NOMSA

Fifth Plaintiff

and

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

First Defendant

**UNKNOWN JOHANNESBURG MUNICIPALITY
OFFICERS**

Second Defendant

JUDGMENT

VAN NIEUWENHUIZEN AJ

[1] The parties are referred to in the heading by the spelling of their names according to their identity documents. I point this out given the numerous documents bearing the incorrect spelling of the parties names filed on Caselines. It is also the spelling used by Wright J in the heading to his judgment date 21 February 2022.

[2] This is an application for rescission of a judgment delivered by Wright J on 21 February 2022.

[3] The Notice of Motion is dated 11 March 2022 and reads as follows:

“1. That the default judgement granted by the above Honourable

Court on 21 February 2022 order be rescinded and/or set aside.

2. That the Applicant be given an opportunity to file its plea within 20 (twenty) court days from the date of this order.

3. That the Respondents pay the costs of this application.

4. Further and/or alternative relief”

[4] The original summons with the particulars of claim was served:

“On the 13th DAY of MARCH 2018 at 15h30 and at [...] FLR, [...] BLOCK, M[...] CENTRE, 1[...] C[...] BOULEVARD BRAAMFONTEIN, JHB the annexed SUMMONS, PARTICULARS OF CLAIM & ANNEXURES was served on the 1ST DEFENDANT by delivering a copy to ME M MABASO THE LEGAL SECRETARY of the legal advisor (authority to accept service) and who is apparently over the age of 16 years and being a responsible employee of the 1ST DEFENDANT at the 1ST DEFENDANT’S place of business, upon exhibiting a certified true copy of the original and explaining the nature and contents thereof in terms of Rule 4(1)(a)(v)”

[5] Prior to the matter serving before Wright J, it came up for hearing before Makume J as an application for default judgment on 13 April 2021.

[6] Makume J made the following order:

“CLAIM 1

[1] This is a claim for Loss of Support pursuant to the death of first Plaintiff’s Customary Law husband in a shooting incident that took place on the 9th April 2017.

CLAIM 2

[2] *This is a claim by the second and third Plaintiffs for wrongful arrest by members of the Defendant.*

CLAIM 3

[3] *This is a claim by the fourth and fifth Plaintiffs for loss of support on the facts relied on in claim 1. They being the biological parents of the deceased in claim 1.*

[4] *The papers indicate that the summons and particulars of claim were served on an employee of the Defendant one M.E.M. Mabaso on the 13th March 2018. The person is described as the Legal Secretary of the Legal Advisor in that office.*

.

[5] *The Defendant entered no appearance to defend the action and on the 23rd March 2020 Plaintiff's attorneys addressed a letter to the City Manager informing him that they are proceeding with an application for default judgment.*

[6] *On the 10th November 2020 Plaintiff attorneys filed an affidavit in terms of Rule 31(5) and applied for default judgment.*

[7] *The matter served before me in the unopposed roll on the 13th April 2021.*

[8] *The Plaintiff will have to present evidence on liability as well as to prove the identity of the perpetrators namely why is it alleged that the people who shot and killed the deceased were in the employment of the Defendant.*

[9] *The third and fourth Plaintiffs must present evidence and proof that the deceased maintained them.*

[10] *The notice of set down must be served on the Head Legal Division of the City of Johannesburg by the Sheriff.*

(11) *The summons in this matter was served during 2018. I direct that same be reserved by the Sheriff as set out in paragraph 10 above before the Registrar allocates a date for hearing.”*

[7] As is evident from the above order he was quite concerned about service in the matter.

[8] All this was known to Wright J and, in his own judgment, he specifically refers to the fact that the plaintiffs notified the defendants, on 23 March 2020, by way of a courtesy letter, of the proposed service of the summons and indicated that an application would be made for default judgment.

[9] The re-service of the summons pursuant to Makume J’s order took place on 27 May 2021 on a certain Mr TS Kekana, a paralegal and ostensibly responsible employee not less than 16 years of age, of and in control of and at the principal place of business within the court’s jurisdiction of the City of Johannesburg Metropolitan Council at [...] Floor, [...] Block, 1[...] C[...] Boulevard, Braamfontein, Johannesburg, by handing same to the first-mentioned. This service also elicited no response from the City.

[10] Wright J took cognisance of Makume J’s order above, specifically as to the order for re-service. I observe that this service was not in accordance with the order of Makume J who made it clear that he required service on the “*Head Legal Division of the City of Johannesburg by the sheriff*”. There is no indication that the notice of set down for 21 February 2022 was served on the City by Sheriff as ordered by Makume J.

[11] It is evident from the return of service that were before Wright J that no service took place on the Head Legal Division of the City of Johannesburg as ordered.

[12] In the plaintiffs' particulars of claim, it is alleged that there was compliance with the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act").

[13] It is clear from the Wright J's judgment that he dealt with service and quantum and not with the Act.

[14] The City applied for the rescission of Wright J's judgment after they allegedly became aware thereof on 9 March 2022 and instituted the present proceedings on 16 March 2022 seeking the order of Wright J to be set aside under rule 42(1) as being erroneously granted and specifically seeking to raise the defence that there was no notice sent in terms of section 3 of the Act.

[15] The service of the Wright J judgment and order took place at the same address as in the previous service pursuant to Makume J's order and on the same Mr Kekana on 2 March 2022. More will be said about this below.

[16] Section 3 of the Act provides as follows:

"3. Notice of intended legal proceedings to be given to organ of state

(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless —

(a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

(b) *the organ of state in question has consented in writing to the institution of that legal proceedings —*

(i) *without such notice; or*

(ii) *upon receipt of a notice which does not comply with all the requirements set out in subsection (2).*

(2) *A notice must —*

(a) *within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4(1); and*

(b) *briefly set out —*

(i) *the facts giving rise to the debt; and*

(ii) *such particulars of such debt as are within the knowledge of the creditor.*

(3) *For purposes of subsection (2)(a) —*

(a) *a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and*

(b) *a debt referred to in section 2(2)(a), must be regarded as having become due on the fixed date.*

(4) (a) *If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.*

(b) *The court may grant an application referred to in paragraph (a) if it is satisfied that —*

(i) *the debt has not been extinguished by prescription;*

(iii) *good cause exists for the failure by the creditor; and*

(iii) *the organ of state was not unreasonably prejudiced by the failure.*

(c) *If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate."*

[17] It is clear that the above applies to municipalities as well. The City Council is a metropolitan municipality and a huge organisation. The order that Makume J made is specific and was not complied with.

[18] Wright J accepted the pleadings inasmuch as same asserts that proper notice of the facts giving rise to the event was given in terms of the Act. The actual notice that was sent and alluded to in the particulars of claim was, according to the date stamp on the registered letter, dated 24 January 2018. That is more than six months after 9 April 2017. In addition, the letter itself, purporting to give notice by registered post to the "*City of Johannesburg Municipality, P O Box 1[...] Johannesburg 2000*", purports to be dated 2 January 2017, some three months prior to the actual event, i.e. 9 April 2017. This is in all probability a typographical error.

[19] In the result, the City Council never had an opportunity to raise this defence. The fact that the letter was out of time is, of course, not in itself fatal

and the only difficulty the plaintiffs would have encountered was that they would have had to apply for condonation having sent the notice late.

[20] The allegation made in the particulars of claim, that proper notice was given in terms of the Act, is incorrect. Had the particulars of claim reflected it correctly, the whole issue of notice would have been part of the proceedings before Wright J and he would have been able to adjudicate thereupon.

[21] A further point taken by the City is that it was not notified of the matter and invited on CaseLines. This aspect does not take the issue any further. The right to be notified in terms of the relevant Directive only arises once there has been some act of participation by the City. *In casu* the City at no stage responded to any of the various means by which they were notified.

[22] It was argued before me that once the matter has been heard on the merits the court is *functus officio* and in the instance of a default judgment the court is only able to set same aside under Rule 42(1) on the narrow basis that judgment was erroneously granted. The applicant specifically relied hereon in his founding affidavit and replying affidavit.

[23] There is no doubt in my mind that the judgment was not erroneously granted. If Wright J had known about the issue in terms of the Act he would have applied his mind to it. The only inference I can draw is that it was not pointed out to him by plaintiffs' legal advisers because, if this was done, he would have applied his mind to same and there probably would have been an application for condonation. In the latter sense the *judgment may well have been erroneously sought*. This does not assist the applicant under rule 42(1).

[24] Is the failure to comply with Makume J's order fatal? I do not think so. Wright J applied his mind to the issue of service and clearly regarded it sufficient under the rules despite Makume J's order, and the subsequent events prove him to be correct.

[25] I find it suspicious that after the service of the judgment and order on the same Mr Kekana at the same address as before, the City suddenly responded.

[26] The deponent to the City's founding affidavit explains that he received the judgment on 9 March 2022. He does not say from whom or take the Court into his confidence how this came about. On the papers the only inference is that the service on the same Mr Kekana eventually resulted in the City responding.

[27] He also does not explain why the earlier attempts to serve on the same address did not result in a response. The ineluctable inference to be drawn is that despite the non-compliance with Makume J's order the City did receive the summons at the latest when it was served on 27 May 2021. That leads me to the further conclusion that the City was aware of the case and did nothing to raise any defence including the defence of no notice under the Act, the only substantive defence it now wants to raise.

[28] The City's attempt to rely on the service as ordered by Makume K is unconvincing especially in the absence of a full explanation as to how the judgment and order of Wright J came into its possession. It also smacks of opportunism.

[29] The following extract from Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA) at paragraph 27 seems apposite:

"Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence Court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant

does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment."

[30] In all the circumstances, I am of the view that the judgment was not erroneously granted and should not be set aside in terms of Rule 42(1) and hence the following order is made:

"The application for rescission of the judgment of Wright J dated 21 February 2022 is dismissed with costs"

VAN NIEUWENHUIZEN AJ

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