IN THE HIGH COURT OF SOUTH AFRICA
BOPHUTHATSWANA PROVINCIAL DIVISION

CASE NO: 1854/07

In the matter between:-

RUSTENBURG LOCAL MUNICIPALITY Applicant/Defendant

and

RENAISSANCE SECURITY AND CLEANING SERVICES CC Respondent/Plaintiff

CIVIL MATTER

COUNSEL FOR THE APPLICANT/DEFENDANT : ADV L J MORISON
COUNSEL FOR THE RESPONDENT/PLAINTIFF : ADV W R MOKHARE

DATE OF HEARING : 28 AUGUST 2008
DATE OF JUDGMENT : 25 SEPTEMBER 2008

JUDGMENT

HENDRICKS J

[A] Introduction:-

[1] This is an application for the rescission of a default judgment granted by the Registrar of this court, in terms of Rule 31 (5)(d) of the Uniform Rules of Court on 15 November 2007 in the amount of R601 927-61, plus interest at the rate of 15.5% per annum from 10 October 2007 to date of payment.

[2] The Notice of Motion entails the following prayers:-

> "1) Setting aside and/or rescinding the default judgment awarded against the defendant by this Honourable Court under the above case number on 15 November 2007.
>
> 2) Declaring that the service of the summons under the above case number on 10 October 2007 was bad service.
>
> 3) Declaring that the institution of the action under the above case number was premature in that prior to the institution of these proceedings the plaintiff had failed to give notice in terms of Section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 2002 ("the Act").
>
> 4) Directing the plaintiff to pay the costs hereof.
>
> 5) Further and/or alternative relief."

[B] **<u>Merits</u>**:-

[3] Applicant/Defendant bases this application primarily on the fact that the summons in the main action was not properly served.

[4] It is common cause that the Sheriff of the High Court, Rustenburg, served the summons according to the return of service on the *"10th October 2007 at 15H45 on <u>Ms Mercy Mokgophe</u> the archives administration clerk and responsible employee of the Defendant in attendance at the Municipal Offices, by showing her the original summons and annexures and by handing her a copy thereof. She undertook to hand same to the Municipal Manager".*

[5] The Applicant (Defendant in the main action) does not deny that the summons was indeed served as stated in the return of service though the Municipal Manager did not receive it timeously. The Applicant/Defendant's case is that the manner in which the summons was indeed served, is not in accordance with the applicable Rules of Court. At the hearing of this application, it was contended on behalf of the Respondent (Plaintiff in the main action) that the Applicant/Defendant alleges that this form of service is bad in law. Therefore, so it was submitted ***in limine***, the Sheriff of the High Court at Rustenburg, who effected the service, should have been cited in these proceedings.

[7] The non-joinder of the Sheriff, so it is further submitted, is a material defect and on this basis alone should the application be refused.

[8] In my view, the manner in which service was effected is undisputed. The Sheriff have no direct interest in the matter seeing that it is not disputed that service was indeed effected as reflected on the return of service. There is therefore no need to join the Sheriff to these proceedings. It is incumbent upon the attorney who give instructions to the Sheriff to see to it that service is effected in compliance with the Rules of Court.

[9] Rule 4 (1)(a)(viii) of the Uniform Rules of Court provides:-

> "4. Service
>
> 1(a) Service of any process of the Court directed to the sheriff and subject to the provisions of paragraph (a)(A) any document initiating application proceedings shall be effected by the sheriff in one or the other of the following matters:
>
> …….
>
> (viii) Where a local authority or statutory body is to be served, service shall be effected by delivering a copy to the town clerk or assistant town clerk or mayor of such local authority or to the secretary or similar officer or member of the board or committee of such body, or in any manner provided by law; …."

[10] It is clear that the summons was not served on any of the officers as referred to in this rule because:-

[i] It was not served on the town clerk (whose successor is now the municipal manager); or

[ii] the assistant town clerk (whose successor is now the assistant municipal manager); or

[iii] the mayor (whose successor is now the executive mayor); or

[iv] on the secretary; or

[v] on a similar officer (such as a secretary) or a member of the board or committee of the local authority.

[11] Section 115 (3) of the Local Government Municipality Systems Act 32 of 2000 provides as follows:-

> "115 Service of Document and Process
>
> …….
>
> (3) Any legal process is effectively and sufficiently served on a municipality when it is delivered to the municipal manager or a person in attendance at the municipal manager's office."

[12] If it is not so delivered, then it is not effective and sufficiently served.

[13] The return of service reflects that Ms Mokgophe is a person in attendance at the Municipal Manager's office. It is clear from the organogram that the office in which Ms Mokgophe works, namely the archives office, is a sub-unit within the administration support unit. The administration support unit is one of the units falling under the Directorate of Corporate Support Services. It is clear that a clerk in a support unit in one of the directorates, though it resorts under the office of the Municipal Manager, is far remote from the office of the Municipal Manager. It cannot be said that such a clerk is within the office of the Municipal Manager.

[14] Service of the summons on a municipality cannot be effected on just any employee of the said municipality. The rules are very clear.

[15] It is not difficult to imagine how problematic it may be if service on any employee of the municipality is regarded as proper service. There is good reason why the rule is drafted in such a way that service of court proceedings be effected in such a way that it comes to the knowledge of the responsible employee who has the authority to legally represent the municipality.

[16] This matter serves as a good example of the difficulties that may be encounter if service is not effected on an employee within the office of the Municipal Manager. By this I mean office of the Municipal Manager in the narrow sense of the word – meaning the physical office itself and not any office in the municipal building.

[17] The manner in which service was effected in this matter is not proper and consequently the default judgment must be set aside.

[18] On behalf of the Applicant/Defendant it was also submitted that the Respondent/Plaintiff encounter a further difficulty in that it failed to comply with section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, as amended ("LPA"). This act makes provision for notice requirements in connection with the institution of legal proceedings against ***inter alia***, local authorities for proceedings in respect of the recovery of debt.

[19] The Respondent/Plaintiff's claim is for the recovery of debt from a municipality, who is one of the organs of State in terms of section 151 of the Constitution of the Republic of South Africa, Act 108 of 1996.

[20] Section 3 of the LPA prohibits the institution of legal proceedings for the recovery of debt unless the creditor has

given the organ of State in question notice in writing in accordance with the provisions of the Act of its intention to institute the proceedings.

[21] Section 4 (1)(b) of the LPA provides that notice has to be given to the Municipal Manager appointed in terms of section 8 of the Local Government Municipal Structure Act 117 of 1998. The Municipal Manager is the head of administration and also the accounting officer for the Municipality.

[22] The notice in this matter was not addressed to the Municipal Manager but to "Rustenburg Local Municipality, Directorate: Public Safety" and does therefore not constitute proper notice.

[C] Conclusion:-

[23] Non-compliance with the statutory requirements as pointed out above renders the default judgment granted by the Registrar void and it must be rescinded.

[D] Costs:-

[24] Normally costs follow the result. However, in this matter, the Respondent/Defendant cannot be said to have acted wrongly in defending this matter especially due to the fact that it labeled under the impression that the service was proper.

[25] This, in my view, is a case where for the sake of fairness and justice, it must be ordered that each party pays its own costs.

[E] <u>Order</u>:-

Consequently, I make the following order:-

[i] The default judgment granted by the Registrar on 15 November 2007 is set aside.

[ii] The service of the summons on 10 October 2007 does not comply with the provisions in Rule 4 (1)(a)(viii) of the Uniform Rules of Court and section 115 (3) of the Local Government Municipal Systems Act 32 of 2000 and is declared null and void.

[iii] The notice instituting the action does not comply with the provisions of section 3 read with section 4 (1)(b) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.

[iv] Each party is ordered to pay its own costs.

R D HENDRICKS

JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE APPLICANT: MINCHIN AND KELLY ATTORNEYS