THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 30400/2015

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

.....26 May 2016..... .....
DATE SIGNATURE

In the matter between:

KEITH BLUMENTHAL **Plaintiff / Respondent**

And

THE CITY OF JOHANNESBURG **First Defendant / Applicant**

CITY POWER OF JOHANNESBURG **Second Defendant**

JUDGMENT

RATSHIBVUMO AJ:

1. This is an application in which the City of Johannesburg, the First Defendant in the main action (the Applicant), seeks a rescission of a default judgment granted in favour of the Plaintiff (the Respondent) by this court on 29 October 2015. The application is brought under Rule 31 (2) (b), alternatively Rule 42 (1) (a). The Respondent opposes the application. The judgment was for a payment by the Applicant, of the sum of R334 546.70 plus interest at the rate of 9 % per annum from 22 July 2015 to the date of the payment. The Applicant was also ordered to pay the costs of suit.

2. An affidavit by Mehmood Moola, a Legal Specialist in the employ of the Applicant confirms that there was no entry to defend the action after summons was served on his employer on 01 September 2015. The reason there was no such entry was elaborated as follows. Summons was received and noted in their receipt book before being allocated to the Applicant's Revenue Department, on 08 September 2015. Copies of the receipt book and the record for the referral to the said department were attached to his affidavit. He has no idea what happened to the summons, save to say it went missing. He however suspects it may have been erroneously attached to the back of one of two other matters that were delivered the same day and forwarded to the same department. As a result this matter was not allocated to anyone in that department to attend to.

3. The Applicant was only made aware of the judgment through an email from the Respondent's attorney sent on 12 November 2015. The search for the summons by various persons working for the Applicant and an ultimate decision to obtain copies from the court file resulted in further delays in the

Applicant bringing this application. The delay missed the 20 days deadline by a week. This explanation was submitted to show absence of wilful default and condonation for bringing the application outside the 20 day period. The condonation would however not be necessary if the court deals with the application based on Rule 42 (1) (a), which is the alternative basis of this application.

4. The Respondent does not dispute the Applicant's version. He however submits that this explanation is not enough to show lack of wilful conduct, emphasising that summons was delivered to the Applicant. The court's approach in *Kouligas & Spanoudis Properties (Pty) Ltd v Boland Bank Bpk* [1] was while a wilful default would be fatal to the rescission application, gross negligence is usually condoned. Given the size, nature and type of Applicant being a municipality, I allowed the condonation. While the Applicant may be be imputed some level of negligence or poor management, its conduct cannot be classified as wilful default. The court finds the explanation to be reasonable. The court is therefore satisfied that failure to enter the notice to defend was not due to wilful default on the part of the Applicant.

5. I now turn to consider if there is a *bona fide* defence to the claim. The judgment granted against the Applicant was for the amount allegedly overcharged in electricity meter readings for the period between 12 July 2010 and 01 May 2015. The Respondent lodged his claim for a period dating more than 5 years prior to instituting the claim. The Applicant submits therefore that the claim by the Respondent, or a part thereof, had prescribed already. The Respondent submits that the prescription of a debt starts running from the time the person becomes aware of the debt.

[1] 1987 (2) SA 414 (O) at 417C–D

6. Clearly this submission has no regard to the provisions of the Prescription Act, no. 68 of 1969 (the Prescription Act) which provides to the contrary. According to the Prescription Act, the prescription period for a debt is three years.[2] The Prescription Act further provides that "subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due."[3] It follows therefore that the Respondent was not legally entitled to claim and to be granted an order extending over a period longer than 3 years. A judgment granted for a period already prescribed was granted erroneously.

7. Counsel for the Respondent then makes an alternative submission to the effect that the court should consider giving a partial rescission of judgment in which the amount claimed would be limited to the three years that at the time the summons were issued, had not prescribed yet. While I accept that the court can grant partial rescission of judgments, I am not convinced that it would be warranted in circumstances of this case. I am in agreement with Flemming DJP in *Silky Touch International (PTY) LTD and Another v Small Business Development*[4] when he quoted the following passage from *SOS Kinderdorf International v Effie Lentin Architects*[5] with approval,

> "There is no reason why this pattern should be deviated from where a plaintiff has already obtained a default judgment in respect of more than one but separate claims, and the defendant shows a defence to some of plaintiff's claims, or to a part of the claim, which is divisible from the whole. For example, where a plaintiff is granted default judgment in respect of the payment of a sum of money as well as delivery of certain goods, and the defendant can show a *bona fide* defence to one or the other, there is no reason why the plaintiff should not be entitled to judgment in respect of the claim which defendant cannot defend. The essential question is

[2] See sec 11 of the Prescription Act. There are however exceptions that are not relevant for purposes of this judgment.
[3] See sec 12 of the Prescription Act
[4] [1997] 3 All SA 439 (W).
[5] 13 1993 (2) SA 481 (Nm).

whether the claim or claims in respect whereof default judgment has been given is divisible."

8. The Applicant further submits that even if it was to be accepted that the electricity meter box was faulty, it was not brought to the court's attention that the alleged faulty meter box was installed for the Respondent on 05 November 2013.[6] It should be accepted therefore that the meter box for the period prior to this date could not have been faulty, or at least, no complaint was lodged in respect thereof. The judgment was however awarded even for the period prior to 05 November 2013, when the meter box was not faulty.

9. Further to this, the Applicant referred to the by-laws which provide for the procedure that the Respondent was bound to follow the moment he suspected that his electricity meter box could be faulty.[7] According to these, the Respondent was supposed to have served a notice on the Applicant, paid a sum of money and then the Applicant would remove the meter box and have it tested by its engineering department subject to SABS approved conditions. This was not done by the Respondent. The Applicant avers therefore that any testing undertaken by the Respondent without following the by-laws was illegal.

10. Counsel for the Respondent seemed to struggle to understand Annexure D that explains that the meter box was recently replaced. He went as far as to question the basis on which counsel for the Applicant could tell with certainty that Annexure D refers to a replacement in a meter box for the Respondent's residential address; and the same was explained with

[6] Annexure D, p. 19 of the bundle.
[7] See Standardisation of Electricity By-Laws Gazette no. 16, Notice no. 1610 of 17 March 1999.

reference to the said Annexure D. It would therefore be unfair to expect him to meaningfully counter any submission in that regard.

11. In *RGS Properties (PTY) LTD v Ethekwini Municipality*,[8] it was held that default judgment is prima facie inherently unconstitutional and as such, courts should not scrutinise too closely to ascertain if the defence is well founded. The court is therefore satisfied that if proved, the defence raised by the Applicant would be successful. The Applicant has pointed to a number of defences which if successfully proved may result in the dismissal of the claim. I am therefore satisfied that the Applicant raised a bona fide defence and that this application is made bona fide.

12. The Applicant had tendered the costs for this application, unless it was opposed, in which case the application was for the party opposing the application to be ordered to pay the costs. I do not see any reason why the same should not be ordered for the Respondent who chose to oppose the application while aware of all the submissions made by the Applicant above.

13. For the reasons stated above, it follows that the following order is made:

    13.1 That the default judgment granted against the Applicant on 29 October 2015 under case no. 30400/2015 is hereby rescinded;

    13.2 The First Defendant is ordered to file a plea within 15 days of the granting of this order;

    13.3 The Respondent is ordered to pay the costs of this application.

[8] 2010 (6) SA 572 (KZD)

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Date Heard:	**18 May 2016**
Judgment Delivered:	**26 May 2016**
For the Applicant:	**Adv. Adv. Lee Franks**
Instructed by:	**Moodie & Robertson Attorneys** **Johannesburg**
For the Respondent:	**Mr. SB Friedland**
Instructed by:	**Beder-Friedland Inc** **Sandton**