

SOUTH AFRICA / JUDGMENT

Intsika Yethu Local Municipality v Unlawful persons unlawfully erecting structures on and unlawfully occupying that portion of remainder erf 1, Cofimvaba just next to Nyandeni Township and Another (3303/2014) [2017] ZAECMHC 33 (12 September 2017)

[2017] ZAECMHC 33

COURT

Eastern Cape High Court, Mthatha

BEFORE

Jolwana

CASE / FILE NUMBER

3303/2014

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO. 3303/2014

In the matter between

INTSIKA YETHU LOCAL MUNICIPALITY

Applicant

And

UNLAWFUL PERSONS UNLAWFULLY

ERECTING STRUCTURES ON AND

UNLAWFULLY OCCUPYING THAT

PORTION OF REMAINDER OF 1,

COFIMVABA JUST NEXT TO

NYANDENI TOWNSHIP

1st Respondent

STATION COMMISSIONER,

COFIMVABA POLICE STATION

2nd Respondent

JUDGMENT

JOLWANA AJ

[1] This is an application to declare the Rule 6 (11) application dated 10 November 2016 and Rule 41(1) (c) application dated 30 November 2016 irregular proceedings in terms of Rule 30 of the Uniform Rules of Court.

[2] Before delving into this application it is instructive that I deal first with the rather long history of litigation between the parties, even if just briefly so as to contextualize the issues involved and thus give a background to the two applications

sought to be declared irregular proceedings and set aside.

[3] On 18 November 2014 applicant issued papers out of this court in which the following orders were sought:

“1. Evicting the unknown persons comprising the first respondent from the structures and/or shacks and/or makeshift dwelling places which are situated on that portion of the remainder of Erf 1 Cofimvaba just next to Nyanisweni Township;

2. Interdicting and restraining the unknown persons comprising the first respondent from being in occupation of the subject land;

3. Interdicting and restraining the unknown persons comprising the first respondent and/or any persons acting on their behalf or stead from erecting structures, shacks and/or makeshift dwelling places on the subject land;

4. Directing the unknown persons comprising the first respondent to forthwith restore vacant possession of the subject land to the applicant;

5. Granting the applicant and/or the sheriff of the High Court, duly assisted by members of the South African Police Service, leave to demolish the structures and /or shacks and/or make shift dwelling places on the subject land, in the event of the first respondent failing and /or refusing to restore vacant possession of the subject land to the applicant;

6. Directing any member(s) of the first respondent, as can be identified, to pay costs of this application in the event that s/he opposes;

7. Such further and/or alternative relief as this court may deem fit.”

[4] On 27 August 2015 my sister Hartle J issued the following final order:

“1. Evicting the unknown persons comprising the “respondents’ from the structures and/or shacks and/or makeshift dwelling places which are situated on that portion of the remainder of Erf 1, Cofimvaba just next to Nyanisweni Township;

- (2) Interdicting and restraining the unknown persons comprising the “respondents” from being in occupation of the subject land;
- (3) Interdicting and restraining the unknown persons comprising the “respondents” and/or any persons acting on their behalf or stead from erecting structures, shacks and/or make shift dwelling places on the subject land;
- (4) Directing the unknown persons comprising the “respondents” to forthwith restore vacant possession of the subject land to the applicant;
- (5) Granting the applicant and/or the sheriff of the High Court, duly assisted by members of the South African Police Service, leave to demolish the structures and/or shacks and/or make shift dwelling places on the subject land, in the event of the first respondent failing and/or refusing to restore vacant possession of the subject land to the applicant;
- (6) The “respondents’ are to pay the costs of the application including costs previously incurred and further including the costs attendant in setting the matter down on the uncontested opposed scale;
- (7) The execution of this order shall be suspended for a period of 30 days from the date of service of the order on “the

respondents.”

- [5] There was no appearance for the respondents when this order was issued and no opposing papers had been filed.
- [6] The above order, obtained by default, resulted in the demolition of the homes of the respondents on 18 February 2016 and 22 March 2016.
- [7] It appears from the main application, the “eviction application”, that settlement in the area started in the late 1990s. However, this is not common cause as applicant’s version is that there were no buildings in the area before 2007.
- [8] This is how the applicant put its version at paragraph 6 of the opposing affidavit deposed to by its Municipal Manager,

Mr Shasha in opposition to the application for the rescision of the eviction order dated 27 August 2015:

“I reiterate that there were no buildings in the area before 2007 on the subject land. I challenge the 1st applicant to prove that there were structures on the land before 2007.”

- [9] Our locus classicus on disputes of fact is of course the well known case of Plascon-Evans Paints Limited vs Van Riebeeck Paints (Proprietary Limited 1984 (3) SA 623 where Corbett JA , writing a decision of the full court put the position as follows:

“It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent justify such an order. The power of the court to give such final relief on the papers before it is, however, not confirmed to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact.”

[10] Therefore based on the Plascon Evans case it may be accepted tentatively that the structures on the land started surfacing in 2007. However, this is one of the issues that would be best determined by the court hearing the main application.

[11] In the answering affidavit on the eviction application deposed to by the first respondent, Ms Zoleka Sipakisi-Olayi filed for all other respondents as well chronicles her own personal story as follows at paragraph 5:

“(5.1) I started residing at that area where the applicant seeks to evict us (Nyanisweni) in February 1997. I obtained authorisation to reside in the area from the chief of Mahlubini Administrative Area, Cofimvaba.

(5.2) Upon my arrival at Nyanisweni I was informed that the applicant on or about the year 1990 attempted to usurp the Nyanisweni

Administrative Area without success.

(5.3) During the year 1990 struggle court was approached but the municipality lost the case on the basis that it could not prove that the land belonged to it.

(5.4) When I built on the land with effect from the year 1997 I was aware that the land does not belong to the applicant.

(5.5) I built houses on the land and those houses were built from the year 1997 up to the year 2001. There have been improvements made on the property from time to time and over the subsequent years until the dismantling thereof by members of the applicant.

(5.6) However I set out a list of the houses I erected on the land as follows:

5.6.1) A house with eight rooms erected with face brick and building blocks.

(5.6.2) A house with an en-suite bedroom and a double garage,

(5.6.3) A smooth plastered four roomed shrine, temple or worshipping house, and

(5.6.4) A traditional house with some herbal medicines.

(5.7) I had furniture on the said houses and same was dismantled by the members of the applicant during the demolition of my homestead. The demolition of my homestead occurred on 22 March 2016. I was not given an opportunity to remove my personal belongings before the demolition of my homestead despite pleas to be given same.

(5.8) I was residing at my homestead with my two minor children one of whom is a learner at Daliwonga Senior Secondary School, situate in the outskirts of Cofimvaba and the other at Cofimvaba Village Junior Secondary School, situate in the Town of Cofimvaba.

(5.9) In light of the demolition of my homestead I and my children find it extremely difficult to survive.

(5.10) I point out that I am a soothsayer or a traditional herbalist hence I have a traditional house in the premises. This is a small rondavel and same was not demolished by the members of the applicant during dismantling of my home. This is where I perform some traditional ceremonies and where I engage in healing of my patients.

(5.11) Should I be evicted from the premises and should I have to remove my ancestors from my yard I would have to perform a ritual requiring slaughtering of four oxen and various other accompanying animals.

(5.12) I do not have money to purchase all these for the removal of my ancestors from my place to another place and I plead with the court to take into account this factor amongst others when adjudicating on this matter.

(5.13) Furthermore, a church is conducted in my premises and many residents from Nyanisweni used to attend church at my premises since I have a Temple.

(5.14) If I were to be relocated elsewhere I would be severely prejudiced since many followers or church goers would not be able to attend my church.”

[12] Other respondents who filed confirmatory affidavit have also briefly narrated their own stories. I will mention just a few of them:

(12.1) Welekazi Winart Mgwendu:

She says she started residing in the land in 1992. She had a two roomed house in which she lived with three children two of whom are still at school. She was not allowed to remove her furniture and other personal belongings when her home was demolished.

(12.2) Nosanile Mayeza

She says she was born in 1948 and started residing on the land in 1997. She had a three roomed house in which she lived with her three grandchildren who attend school in the city centre of Cofimvaba. She had to go and live with her neighbour after the demolition of her homestead. She was also not allowed to remove her furniture and personal belongings.

[13] There are many respondents who also have taken the trouble to narrate their stories in their confirmatory affidavits. I have cited these stories, to record that this case is about a story of human suffering that occurred on 18 February 2016 and on 22 March 2016 as a result of the eviction application having been launched and the execution of a court order that should never have been issued when it was.

[14] All this destruction occurred in execution of an order granted by this court by default. It is this destruction that spurred the respondents to apply for the rescission of this order after unimaginable damage had been done and human suffering occurred in the demolition of their homes. Respondents approached this court on 14 June 2016 seeking the following order in terms of Rule, 42(1)(a) on the basis that it was erroneously granted:

“(1) Condoning the late launching of this application in the interest of justice, should it be necessary.

(2) Rescinding, setting aside and/or varying the order granted by this Honourable Court on 27 August 2015:

(3) Directing the respondents to pay costs of this application only in the event of opposing the grant of the relief sought herein.

(4) Granting such further and/ or alternative relief as this court may deem fit.”

[15] In delivering a judgment in the rescission application Nhlangulela DJP made the following observations at paras 9 and 15 thereof:

“The fact that the applicants were not served with the papers and the orders made before 27 August 2015 is beyond debate. This fact was well conceded by both parties during arguments....”

‘The jurisdictional factors in Rule 42 (1)(a) have been proved by applicants who are evidently affected by the eviction order. I find that the court that granted the order dated 27 August 2015 would not have done so had the respondent in this matter placed the true facts before it. In the circumstances the eviction order was erroneously sought by the respondent and erroneously granted by the court as envisaged in the subrule....’

[17] Thereafter the Deputy Judge President granted the following order:

“(1) The late launching of this application be and is hereby condoned.

(2) The order granted by this Court on 27 August 2015 be and is hereby rescinded and set aside.

(3) The respondent to pay the costs of this application, the cost of the application for postponement and all reserved costs, if any.”

[18] This judgment was delivered on 11 August 2016. The respondents served their answering affidavit on the eviction application on 01 September 2016 on the 14th day from the date on which the order dated 27 August 2015 was rescinded. This was probably in compliance with Rule 6(5) (d)

(ii) of the Uniform Rules of Court which provides thus:

“Any person opposing the grant of an order sought in the notice of motion shall –

Within fifteen days of notifying the applicant of his intention to oppose the application, deliver his answering affidavit, if any, together with any relevant documents;”

[19] On 14 October 2016 applicant filed its replying affidavit. On 26 October 2016 respondents filed a notice of set down in terms of which the eviction application was being set down for hearing in the opposed motion court on 08 December 2016. The said notice of set down was filed on the 10 November 2016. A day later on 11 November 2016 respondents served a notice in terms of Rule 6 (11) of the Uniform Rules of Court indicating therein that respondents will, at the hearing of the application for eviction on 08 December 2016 apply for the following orders:

“ (1) Declaring the eviction of the applicants and the demolition of their homes or dwellings unlawful, inconsistent with the court order of Madam Justice Hartle dated 27 August 2015 and unconstitutional.

- (2) Declaring the applicants eligible to reconstituted restoration of their homes as soon as possible, on a permanent basis.
- (3) Directing the respondent to reconstruct permanent housing for the applicants at a place where they were demolished equivalent to those that were dismantled on 18 February 2016 and 22 March 2016 within a period of 90 days from the grant of this order.
- (4) Directing the respondent to liaise with the applicants, where necessary via their attorneys, and ascertain the make, kind or type of the houses they built on the land, the type of material used in the construction of the said houses or homes and any other issue pertinent to the houses at issue.
- (5) In the alternative, directing the respondent to immediately reconstruct temporary habitable houses that afford shelter, privacy and amenities at least equivalent to those that were destroyed and which are capable of being dismantled, at the site at which their previous houses were dismantled pending the permanent allocation of subsidy houses to the applicants.
- (6) Directing the costs to be costs in the main application unless the respondent opposes the grant of the relief sought herein in which event the respondent should be ordered to pay costs of this application.
- (7) Granting such further and /or alternative relief as this court may deem fit.”

[20] On 23 November 2016 applicant served a notice to remove cause of complaint demanding that the Rule 6(11) application be withdrawn failing which applicant will make an application in terms of Rule 30

- (1) for the setting aside of the Rule 6(11) application as an irregular proceeding. This was on the basis that the said application is not interlocutory or incidental to pending proceedings and that it is substantive, unrelated and distinct from eviction proceedings which were concluded when the eviction order of 27 August 2015 was set aside on 11 August 2016.
- [21] On the very same day, 23 November 2016 applicant filed a notice in terms of Rule 41 in which applicant sought to withdraw the eviction application set down by the respondents for hearing on 08 December
2016. The applicant also indicated therein that costs were not being tendered. On that same day applicant's attorneys penned a letter in which consent was sought for the withdrawal of applicant's eviction application with no order as to costs. It was indicated therein that should respondent not consent to the withdrawal of the eviction application leave of court for the withdrawal would be sought on 06 December 2016. I take it that the date of 06 December 2016 is an error as the eviction application was set down for hearing on 08 December 2016.
- [22] On 24 November 2016 respondents' attorneys penned a letter which was in response to applicant's attorneys letter referred to above and sought to persuade the latter to tender costs of the eviction application and a conditional withdrawal of the Rule 6(11) application if applicant undertook to rebuild respondents' demolished homes within a reasonable time.
- [23] When there was no positive response to respondents' attorneys letter respondents served a notice in terms of Rule 41 (1) (c) indicating therein that at the hearing of the eviction application on 08 December 2016 respondents would move an application for the applicant to be directed to pay cost of the eviction application. That notice was served on 30 November 2016. In that Rule 41(1)
- (c) notice some factual material was added which sought to lay a basis for the application under that subrule. More about this later in this judgment.
- [24] Respondents filed their heads of argument in respect of the Rule 41(1) (c) and Rule 6 (11) applications. This was obviously in preparation for the hearing set down for 08 December 2016. On 08 December 2016 the matter was postponed sine die and the applicant was ordered to pay the costs occasioned by the postponement. Presumably, this was because applicant had not filed its heads of argument which were only filed the following day on 09 December 2016.
- [25] On 08 February 2017 applicant filed an application in terms of Rule 30 in which it sought the following orders:
- "1. That the late filing of this application is condoned.*
2. That the respondent's application under cover of notice of motion in terms of Rule 6(11) dated 10 November 2016 be declared to be an irregular proceeding and set aside.

3. That the respondents' notice in terms of Rule 41(1)(c) dated 30 November 2016 be declared to be an irregular proceeding and set aside.

4. Further an alternative relief.

5. That the respondents pay the costs of this application."

[26] Having sketched out the background to all the litigation between the parties I now turn to deal with the Rule 30 application.

[27] The condonation application was, at the hearing of this application conceded to by Mr Matotie, counsel for respondents and therefore it was granted by consent.

Rule 41(1)(c)

[28] The main contention of the applicant about this notice is that it contains allegations of fact and submissions of law when it shouldn't. The prejudice that the applicant claims to suffer is that it is too difficult to tell if any evidential value should be placed on the factual material contained therein and the legal submissions that are contained therein. It faces a conundrum in that if it were to ignore the factual and legal submissions it could be prejudiced. If it returns the favour by filing a similar notice it would itself be committing an irregularity and could expose itself to an order for costs against it.

[29] I agree that the factual and legal submissions contained in the respondents' Rule 41(1)(c) notice are improper. I disagree with the applicant's solution to have it declared irregular. In fact Mr Quinn SC, applicant's counsel did concede that page one and four of the said notice is all that respondents needed to do in their quest for an order directing the applicant to pay costs of the eviction application. The other two pages are not provided for in our rules and therefore those two pages make the notice objectionable.

[30] I am in agreement with the sentiments expressed by Cloete J in *Uitenhage Municipality v Uys* 1974 (3) (ECG) 800 at 805 a decision of this division to which incidentally I was referred to by applicant's counsel in which

the court had this to say:

"The principle has repeatedly been laid down in our Courts that the Court is entitled to overlook, in proper cases, any irregularity in procedure which does not work any substantial prejudice to the other side"

[31] There is no obvious case than this one in which there is clearly no substantial prejudice, if prejudice exists at all, to applicant, and therefore an appropriate case to overlook the factual and legal submissions contained in respondents' Rule 41(1) (c) notice.

[32] It was not Mr Quinn's contention that the notice should not have been filed. His contention, as I understand it, is that it is a proper notice in terms of the rules but contains factual and legal material that make it imperfect. I disagree though with his solution, which is that the whole notice should be set aside as an irregular proceeding. The proper solution to the

problem is the one suggested by Mr. Quinn in his supplementary heads of argument. At paragraph 4.3.4 in the last sentence Mr Quinn makes the following submission, “The applicant would run the risk of being sanctioned by the court and being mulcted in costs.” I agree that respondent should be mulcted in costs for prejudicial irregularities in an appropriate case. However the application

to declare the whole Rule 41(1)(c) notice irregular must fail.

Rule 6 (11)

[33] This rule provides as follows:

“Notwithstanding the foregoing subrules , interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge.”

[34] The contention by the applicant is that the nature of the orders sought by respondents is such that Rule 6(5) proceedings should have been instituted in the stead of Rule 6(11). There are three reasons in the main for this contention given by applicant. The first is that Rule 6(11) is designed for interlocutory and other applications incidental to pending proceedings. The applicant’s submission in this regard is that the Rule 6(11) application cannot possibly be incidental to the eviction case because the eviction application is “a dead letter”. The oxford dictionary defines “a dead letter” in the following terms: “A law or treaty which has not been repealed but is ineffectual or defunct in practice or a thing which is unimportant or obsolete.”

[35] I am not sure that there is a fundamental difference between a matter being moot or academic and the term, dead letter, assuming there is a difference at all in what is sought to be conveyed about any of these terms or phrases. I venture to

express a view that there is none in import. Having said that, I must express a sense of disquiet that applicant found it necessary to raise the issue in this application. The disquiet stems, not so much from the fact that the term has been used as part of applicant’s weaponry but from the fact that it has been used after it had been rejected by this court in the rescission

application. I hasten to point out that a different term has been used in this application as against the mootness of the eviction application or it being academic in nature which were the terms applicant used previously.

[36] In the opposing affidavit to the rescission application deposed to by its municipal manager, this is how the issue was raised as a point in limine: “I submit with respect that the order which is being sought by the applicants is academic in nature. The order sought has already

been executed to completion and there is no way that what has been done can be reversed. The applicants had ample time to

challenge the order long before it was executed. I may mention that the demolitions were carried out in two stages. The first demolition was done on 11 February 2016 and it was not finished. The second one was done on 22 February 2016 and throughout the period in between applicants took no action and they have only decided to take a chance by approaching this Honourable Court more than three months after the event. It is trite that the courts do not entertain academic matters. Further legal argument on this aspect will be adduced by the respondent's counsel at the hearing of this matter."

[37] Rejecting the mootness argument Nhlangulela DJP had this to say in his rescission application judgment:

"It is in the philosophy built into the procedural rights in PIE that only upon having afforded a right of hearing to a litigant and a determination made on all his/her circumstances relevant to housing can a court deprive him/her a constitutionally protected right to housing. A proper resolution of landlessness was upper most in the mind of the legislature when it made s26 of the Constitution and PIE. The protection of the constitutional rights to housing, just as the deprivation thereof, affects not just the applicants but all landless citizen of the Republic. Above all, the defence raised by the applicants that they are the owners of the property is a material factor to be taken into account in the exercise of discretion vested in this court in terms of s16(2) (a)(i) of the Superiors Courts Act 10 of 2013. The ambit of the court's discretion was defined very clearly in the case of National Coalition, for Gays and Lesbians Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 CC where the highest court of our land said at 18 para 21: 'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law.'"

[38] I don't understand how it can, with any seriousness be contended that the eviction application is "academic",

"moot" or "a dead letter" when the issue of ownership of the land has not been resolved. The issue of the alleged violation of the constitutional rights of the respondents by the demolition of their homes has obviously not been resolved and if this matter is to be laid to rest it does need to be resolved. This is more so in this case if one has regard to the fact that the main reason that led to respondents' rights being violated is the impugned ownership of the land in question.

[39] Following the rescission judgement respondents filed their answering affidavit after which applicants filed their replying affidavit. This begs the question as to when did the eviction application become a "dead letter", was it after the rescission application, which the applicant fiercely opposed, or was it after applicant filed its replying affidavit and the matter was set down for a hearing? Clearly even based on applicant's conduct in relation to the eviction application,

the matter cannot be said to be a "dead letter". The idea of the matter being "a dead letter" appears to have been more of an afterthought that was unfounded during the rescission application when the mootness argument was

raised, as it is unfounded now when the Rule 30 application is being considered.

[40] The applicant's other argument for the Rule 6(11) proceedings to be declared irregular is based on the fact that Rule 6(11), in no uncertain terms makes it clear that for those proceedings to be permissible they must be interlocutory or incidental to pending proceedings. The submission is that the eviction application is no longer pending in that demolition has been done and completed.

[41] Supposedly this submission is premised on the first prayer sought by applicant in the eviction application having been the eviction of the respondents, and the demolition of the respondents which is the fifth order sought by applicant. Prayers two, three and four of the notice of motion are worth being quoted again for the sake of clarity and completeness. The orders read as follows:

"2. Interdicting and restraining the unknown persons comprising the first respondent from being in occupation of the subject land;

3. Interdicting and restraining the unknown persons comprising the first respondent and/or any persons acting on their behalf or stead from erecting/ structures, shacks and/or makeshift dwelling places on the subject land.;
4. Directing the unknown persons comprising the first respondent to forthwith restore vacant possession of the subject land to the

applicant;"

[42] Even if I were to accept that the eviction and demolition as prayed for in orders 1 and 5 of the notice of motion were completed, the orders prayed for in 2, 3 and 4 were unaffected by the eviction and demolition in as much as they comprised part of the court order dated on 27 August 2015 which was rescinded on the 11 August 2016. Therefore they remain pending until that matter is finalised. They are so pending that were the applicant to approach court on a new application seeking the orders under 2, 3 and 4 of the eviction application or similar orders, the respondents would be within their rights to raise the defence of *lis pendens*.

[43] In *Ceaserstone Sdot-Yam LTD v The World of Marble and Granite* 2000 CC 2013 (6) SA 499 (SCA) Wallis JA, writing a judgment of the full court, had this to say about this defence:

"As its name indicates, a plea of lis alibi pendens is based on the proposition that the dispute (lis) between the parties is being

litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality to litigation. The courts are concerned to avoid a situation in where different courts pronounce on the same issue with the risk that they may reach differing conclusion. It is a plea that has been recognised by our courts for over 100 years.”

[44] Applicant has placed reliance on the case of ABSA Bank limited v Xonti 2006(5) SA 289 (c) to underpin the argument that the orders sought by respondents are not interlocutory and therefore respondents should have followed form 2(a) of the first schedule in terms of Rule 6(5). Firstly, this case is clearly distinguishable from the ABSA Bank case in that in the ABSA Bank case applicant had obtained default judgement against respondent and therefore the court proceedings proper had come to an end. Nothing was or could be said to be pending. Applicant then under the pretext of a Rule 6 (11) notice, approached court by way of an urgent application, sought to have respondent’s, property declared executable. Urgent applications, are provided for in Rule 6(12) which is totally different to Rule 6(11). The propriety of bringing a Rule 6(11) application under Rule 6(12) is matter of a different debate to which I do not have to engage. In any event I do not consider the ABSA Bank decision to be binding to this court, assuming the matter was not distinguishable. At best it is merely persuasive and distinguishable as it is to the matter under consideration I am not persuaded by it.

[45] In this matter the eviction application is still pending and this application by the respondents brought under Rule 6(11) is therefore interlocutory and incidental to it. The argument that Nhlangulela DJP’s rescission judgement in it rendered the proceedings of the eviction application concluded is incorrect. Therefore the contention that the Rule 6(11) application is not interlocutory or incidental to it and that the Rule 6(11) application is substantive, unrelated and district from the eviction proceedings must fail.

[46] It is perhaps necessary that comment be made about the import of the rescission of a default judgement. In Erasmus Superior Court Practice Second Edition Volume 2 D1-369 the legal position is stated as follows:

“A rescinded default judgement is a nullity and neither advantage nor disadvantage can flow therefrom, the applicant is entitled to claim that the status quo ante the judgment be restored.”

[47] Among others the respondents seek, by way of Rule 6(11) notice the following orders:

“1. Declaring the eviction of the applicants and the demolition of their homes or dwellings unlawful, inconsistent with the court order of Madam Justice Hartle dated 27 August 2015 and unconstitutional.

2. Declaring the applicants eligible to reconstituted restoration of their homes as soon as possible, on a permanent basis.

3. Directing the respondent to reconstruct permanent housing for the applicants at a place where they were demolished equivalent to those that were dismantled on 18 February 2016 and 22 March 2016 within a period of 90 days from the grant of this order.”

[48] There are a fundamental mistakes that applicant has made up to and including the time when the matter, was argued before me. Those mistakes are not more crystalized than in the applicant’s supplementary heads of argument. The first mistake is that because the respondents captioned the Rule 6(11) application as a “Notice of Motion in terms of Rule (11), therefore the relief is substantive and should have been sought through Rule 6(5) proceedings. I have no difficulty in attaching no significance to the captioning of the notice concerned.

[49] Secondly at paragraph 4.2.7 of its supplementary heads of argument, the following submission is made:

“The applicant could not move for relief on the basis of the eviction application. It had been set aside. The applicant’s

remedy was on appeal. The applicant did not appeal. Even the issue of costs has been determined in the rescission judgment.

The court order made by Hartle J has been set aside. The costs of the rescission application including the costs of a postponement

and all reserved costs were to be paid by the applicant”.

[50] It is clear that ex facie the judgment of Nhlangulela DJP that what was set aside in his judgment was not the eviction application but the order dated 27 August 2015 which had been erroneously granted. Similarly with the issue of costs, the costs are clearly rescission application costs. I cannot see how the Deputy Judge President could by the same breath determine eviction application costs and at the same time say at paragraph 20 of his judgment:

“A decision concerning costs incurred through adjournments and the application for a postponement on 13 July 2015 has been made easy. The parties asked that the costs of the postponement should be awarded in the main application. I agree. Any other costs, reserved or not, will have to be awarded in favour of the successful party.”

[51] Having said this the Deputy Judge President than awarded costs as follows:

“The respondent to pay the costs of this application, the costs of the application for postponements and all reserved costs, if any.”

- [52] The prayers sought in terms of Rule 6(11) make it clear that not only are they incidental to the eviction application which is still pending but they are intractably linked and conjoined to the eviction application. In any event and by all accounts what the respondents seek is obviously a restoration of the status quo ante the default judgement of the 27 August 2015 which has since been rescinded.
- [53] It need not be over emphasized that the order obtained by default resulted in violations of the constitutional rights to housing in terms of section 26 of the Constitution of the Republic of South Africa, 1996. This is a matter that was part of the reason Nhlangulela DJP granted the rescission application so as to give respondents an opportunity to have the violation of the s(26) rights considered and pronounced upon. It is clear that the court that will be seized with the eviction application will have to pronounce itself on the issues raised in the Rule 6(11) application, if meaningful restoration of those rights and justice done in the matter is to be achieved.
- [54] There is, however, another equally important right that was, in my view, violated consequent upon the granting of the order by default erroneously. That is the section 34 constitutional rights. Section 34 of the Constitution reads as follows:
- “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum.”*
- [55] In RGS Properties (Pty) Ltd v Ethekwini Municipality 2010 (6) SA (KZD) at 575 G the court expressed the following sentiments with which I am in respectful agreement:
- “I may add to this principle that judgement by default is inherently contrary to the provisions of s34 of the Constitution. The section provides that everyone has a right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum.”*
- [56] There is no disputing that all these rights and many others that may have been affected or violated were affected or violated as a direct result of the eviction case. Rights that are violated must be restored. The court will therefore have to consider the rights that have been violated and the justification thereof and the possibility of restoration. Restoration or at least, its consideration cannot be done in vacuum but must be informed by the eviction case itself. This is why the Rule 6(11) proceedings are, in my view, the most appropriate route for the peculiar circumstances of this case.
- [57] It is apposite at this stage to quote the sentiments expressed by Cameron JA in Tswelopele Non-Profit Organisation and Others v City of Thswane Metropolitan Municipality and Others 2007 (6) SA 511(SCA) at 516 15-16 which are in my view, aptly applicable to what happened in the eviction of the respondents:

“That the wanton destruction of the occupiers dwellings violated the Constitution was not disputed. What must be owned is how far reaching and damaging the breach was. The governmental agencies violated not merely the fundamental warrant against unauthorised

eviction, but (given the implicit menace with which the eviction was carried out) the occupiers right to personal security and their right to privacy. It infringed not only the occupiers’ property rights in their materials and belongings, but trampled on their feelings and affronted their social standing. For to be hounded unheralded from the privacy and shelter of ones home, even in the most reduced circumstances, is a painful and humiliating indignity. And it is not for nothing that the constitutional entrenchment of the right to dignity emphasises that “everyone” has inherent dignity, which must be respected and protected.”

[58] I am of course moving from the premise that it is now common cause that the events of the 18 February 2016 and 22 March 2016 were not only reminiscent of the past human rights violations but were a heartless affront to the constitutional rights of the respondents. Therefore courts should, at every opportunity express themselves clearly without equivocation whenever constitutional rights are violated. Therefore, the manner of redressing violations of the constitutional rights, and therefore restoration thereof is to be found in the violation itself or at least in understanding the circumstances in which they were violated.

[59] These views were more eloquently and aptly expressed in the case of *Hoffman v South African Airways* 2001 (1) SA 1 (CC) where the Constitutional Court stated that:

“The determination of appropriate relief, therefore, calls for the balancing of the various interest that might be affected by the

remedy. The balancing process must at least be guided by the objective; first, to address the wrong occasioned by the infringement

of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining

appropriate relief, ‘we must carefully analyse the nature of the constitutional infringement, and strike effectively at its

source’.”

[60] In my view and in the interest of justice the orders sought by the applicant in the eviction application, should be considered together with the orders sought by the respondents under the Rule 6 (11) notice especially that applicant seems to be less than interested in the eviction application being heard. I simply cannot see how, in the circumstances of this case, it can be correct that the court that determines the alleged violation of the constitutional rights should be different from the one that determines whether it was proper that such

constitutional rights were infringed in the first place. This in light of the contestation about the ownership of the land and whether even if the respondents were to fail in their claim to ownership of the land, their rights should have been violated in the manner that they were through the mechanism of an erroneously granted court order that was wrongly executed.

[61] In my view the application must fail. Therefore the following order will issue:

1. That the applicant's application to declare respondents' notice in terms of Rule 41(1) (c) dated 30 November 2016 be declared to be an irregular proceeding and set aside is dismissed.
2. That the applicant's application under cover of Notice of Motion in terms of Rule 6(11) dated 10 November 2016 be declared to be an irregular proceeding and set aside is dismissed.
3. Applicant is ordered to pay cost of this application such costs to include costs reserved on 28 March 2017.

JUDGE OF THE HIGH COURT (ACTING)

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Matter heard on: 03 August 2017

Judgment

handed down on: 12 September 2017

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