

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)**

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

11/05/2022

SIGNATURE

DATE

CASE NO: 2822/2027

In the matter between:

ALBERT LUTHULI LOCAL MUNICIPALITY

First Applicant

MANDLA STANLEY DLAMINI

Second Applicant

and

ERWE 201 AND 207 GERMISTON West CC

First Respondent

CAMBRIDGE DLAMINI

Second Respondent

FOREVER RESORTS AVENTURA (PTY) LTD

Third Respondent

MEC FOR HUMAN SETTLEMENT: MPUMALANGA

Fourth Respondent

MINISTER OF HUMAN SETTLEMENT

Fifth Respondent

CHIEF LAND CLAIMS COMMISSIONER

Sixth Respondent

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] On 5 July 2011 and 4 April 2017 under case numbers 2011/21894 and 2016/582 respectively, this Court granted orders against the Applicants. I will traverse the orders as the judgment unfolds but it should suffice for now to state that this application traces its origins to those two orders granted in favour of the First Respondent ("Erwe 201"). The Applicants now seek an order to set them aside. Additionally, and only in the alternative, they are asking this Court to direct:

- 1.1 The sixth Respondent ("the Commissioner") to consider whether or not to grant authority for the eviction of the occupiers of The Remaining Extent of Portion 14 of the Farm Doornpoort 724, Registration Division JT, Mpumalanga ("the property");
- 1.2 The Commissioner to consider whether or not to grant authority for the demolition of the dwelling structures erected by the occupiers on the property;
- 1.3 The Third Respondent ("Forever Resorts") to apply to a competent Court for the eviction of the occupiers of the property only in the event that the consent of the occupiers to occupy the property has been lawfully withdrawn or set aside by a

competent Court and the Commissioner has granted written approval for such eviction;

- 1.4 The fourth and fifth respondents ("The MEC") and ("the Minister") to provide the necessary financial assistance which would be required by the First Applicant ("the Municipality") to provide alternative accommodation to the occupiers of the property in the event that an order for their eviction from the property is granted.

FACTUAL BACKGROUND

[2] The facts that preceded the granting of the 2011 order were that the Second Respondent ("Dlhamini"), ostensibly a traditional leader of the occupiers of the property, was marking out stands, which he subsequently either sold or let to members of the public. Once purchased or rented the stands, they proceeded to erect informal buildings and/or residential structures thereon. The farm on which these activities took place belongs to Forever Resorts and it is not a legally proclaimed township. The farmland is adjacent to the established town of Badplaas. Erwe 201 alleges that in demarcating and selling the stands to members of the public, Dlhamini did not have any right to do so.

[3] Erwe 201 owns immovable property that borders directly on the property. When it launched the application that led to the 2011 order, it alleged that it was entitled to proper, organized, controlled and legal development and use of fixed properties. In terms of Section 152 of the Constitution, the Municipality has a duty to protect rights and to enforce applicable legislation and regulations. It is in that context that it obtained the 2011 order against the Municipality.

[4] It is common cause that no plans were ever submitted or approved by the Municipality for the erection of these informal structures. No services were provided to the newly demarcated stands other than electricity. In 2010 Forever Resorts obtained an interdict restraining Dlhamini from marking out, selling and letting stands to members of the public or passing himself off as the owner of the property.

[5] It appears that the 2010 order referred to *supra* was subsequently abandoned when Erwe 201 obtained a court order on 5 July 2011 ("2011 order") against the Municipality. I will revert to this order fully below. That said, Erwe 201 alleges to have made written representations to the Municipality concerning the existence of the alleged illegal informal structures but the latter would not do anything about them. To come back to the 2011 order, it appears that Erwe 201 obtained an order against the Municipality. I say appears because the authenticity and as such, its validity is questioned by the Municipality.

[6] Having called the court order into question, the Applicants nonetheless proceeded to deal with its contents as though it is valid. The order does not conform to the normal insofar as it does not display the name of the judge who granted it thus giving the impression that it was the registrar of court who did so. Although I too have my own reservations, I will proceed as though it was validly granted and that its format is acceptable. This will be explained by the view that I take of the matter later.

[7] I will henceforth refer to the First and Second Applicants jointly as Applicants otherwise and depending on the context, as the Municipality and Municipal manager. The 2011 order was against the Municipality and its manager who was cited as the Fourth Respondent. It provided as follows:

"2.1 The third and fourth respondents are ordered to, within seven days after the granting of this order, commence with steps against the occupiers of the following property for an interdict to stop all building activities thereon: The Remaining Extent of Portion 14 of the Farm Doornpoort 724, Registration Division JT, Mpumalanga ...

2.2 The third respondent is ordered to, within seven days after the granting of this order:

2.2.1 Commence with action in terms of section 21 of the National Building Regulations and Standards Act, 103 of 1977 by making an application to the Magistrate's Court having jurisdiction for an order prohibiting the occupiers on the property from

commencing or proceeding with the erection of any building or structures on the property and an order authorizing the third respondent to demolish all buildings and structures already erected on the property, on the ground that such buildings or structures were erected contrary to or without compliance with the provisions of the said Act; and

2.2.2 *Apply for the eviction of the occupiers on the property in terms of Section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998."*

[8] It is not disputed or, at least not seriously so, that some of the allegations that Erwe 201 had to make in its founding affidavit to persuade the court in 2011 to grant the 2011 order as described *supra* are that:

- 8.1 The property belongs to Forever Resorts;
- 8.2 Forever Resorts has a legal duty to prevent the commission of any act or omission which constitutes a nuisance to such other owners or the public at large or which constitute a transgression of legislation and regulations applicable to the property;
- 8.3 The municipality is responsible for the enforcement of all legal requirements in respect of land usage and erection of buildings and structures on the property and to control the occupation of the property;
- 8.4 That Dhlamini, illegally and without any right or title to do so, took possession of the property and illegally measured out stands which he sold to members of the public, the proceeds of which he is pocketing for his own use;
- 8.5 Dhlamini gave people access to stands to erect informal houses, some of which he let to other people;

- 8.6 No building plans were ever submitted or approved by the municipality in respect of the structures erected and being erected on the property; and
- 8.7 Dhlamini "continued selling land or stands to members of the public at any price from R200.00 upwards" and that Forever Resorts "also has this information in its possession and indicated that it would bring a contempt of court application but has failed to do so to date.

[9] The Applicants allege that it is obvious that When the court granted the 2011 order, it had been swayed to believe, among other things, that Dhlamini had sub-divided the property into stands to facilitate sale and purchase of the stands from him the proceeds of which he kept for his personal gain. The purchase prices paid for the stands by the occupiers were for purposes of acquiring their ownership and subsequent occupation. The Applicants allege further that Forever Resorts, the owner of the property, was at all material times, cognisant of the conduct and actions of Dhlamini but would not intervene to thwart them.

[10] It is common cause that the occupation of the stands was sanctioned by Dhlamini. It is also indubitable that Forever Resorts knew or ought to have known or tacitly consented to the occupation of the stands because its conduct or omission or refusal to evict is reminiscent of a party that has done so. Moreover, the property has, since the advent of the restitution legislation, been the subject of pending land claims and is now in the Land Claims Court. The occupiers of the stands regard and recognised Dhlamini as their traditional leader. For that reason, they purchased the stands believing that he has the authority and right to sell the stands to them.

[11] On 4 April 2017 and following a contempt of court application that served before him, Thobane AJ granted an order allegedly in the absence of the Applicants declaring the Municipality to be in contempt of the 2011 order. I say allegedly because this is contested by Erwe 201, which states that the legal representatives of the Applicants went to see him in his chambers wanting to see the file, which he refused to do as he felt that

it was both improper and in any event, he was busy with it. He then went on to sentence its manager for the time being or its successor in title to sixty days imprisonment, which he suspended for a period of two years provided that the Municipality is not found guilty of contempt of court within the period of suspension. Lastly, the municipality was directed to comply with the 2011 order.

[12] The facts that served before Thobane AJ's court were that in 2009, Dhlamini took possession of the property, which he subsequently subdivided. He then proceeded to sell the stands to his subjects at a fee following which an informal structures emerged. Unperturbed by the 2011 order, Dhlamini proceeded to allocate stands without any inhibitions or limitations. This ultimately instigated the launching of the 2017 contempt proceedings against the Municipality and its manager.

[13] Thobane AJ remarks in his judgment that in the 2011 application Erwe 201 placed Forever Resorts and Dhlamini at the core of the land occupation dispute but shockingly sought no relief against the two. This behavior offered by Erwe 201 is inconsistent with the complaints raised in its founding affidavit when it sought the order. This is a passage that Thobane AJ uplifted from its founding affidavit:

"... The public at large, in particular the applicant, are entitled to protection against these activities and to proper, organized, controlled and legal development and use of fixed properties. The first, fifth and seventh respondents are obliged to protect the rights and to enforce applicable legislation and regulations. In the meantime, the fifth respondent turns a blind eye to the problem of illegal activities on their land."

[14] The conduct of Erwe 201 can only be understood against the background of the agreement that it concluded with Forever Resorts and Dhlamini, which is that notwithstanding the complaints against them no relief would be sought against both. The Applicants make the point that the Municipality is not a party to the aforesaid agreement and it does not concede that Dhlamini and Forever Resorts should not be held liable for the complaints upon which Erwe 201 relied when it obtained the two orders.

[15] Erwe 201, as an applicant in the 2017 application, which Thobane AJ granted on 4 April 2017, sought relief in the following terms:

- “11.1 That the Municipality Manager be joined as a respondent in the 2017 application as the successor in title of the Municipality’s previous Manager to make the orders granted under case number 2011/21894 and 2016/582 become applicable to him and that he then be bound by them;*
- 11.2 That it be declared that the Municipal manager, the municipality, Dlhamini and Forever Resorts are in contempt of the orders granted under case numbers 2011/21894 and 2016/582;*
- 11.3 That it be directed that the Municipality Manager and Dlhamini be committed to jail for a period of twelve months for contempt of court;*
- 11.4 That it be directed that the suspended sentence granted under case number 2016/582 be implemented;*
- 11.5 That the Municipal Manager and the Municipality are in breach of various constitutional obligations, amongst others, to provide alternative accommodation to the unlawful occupiers of Forever Resorts’ property;*
- 11.6 That Forever Resorts be directed to launch an eviction application for the eviction of the unlawful occupiers on its property;*
- 11.7 That the Municipality be directed to demolish all the illegal structures and buildings erected on Forever Resorts’ property.”*

[16] The appointment of the Municipality Manager against whom the prayers above are meant to apply only took effect on 1 October 2016. The upshot of the relief sought against the Municipality Manager was that, as the successor in title, he was then to be immediately committed to prison for a period of 60 days. This is as per the 2017 order granted under case number 2016/582. It is common cause that the Municipality Manager

was not a party to the application under case number 2016/582. Although it is apparent that the 2017 order was directed against the Municipality manager's predecessor, the order is specific that it is the successor in title would be incarcerated in circumstances where his predecessor has vacated office.

[17] The above constitutes the contextual foundation on which the court is to determine this matter. The Applicants are contending that the 2011 order, and inexorably the 2017 order, be set aside alternatively and only in the event that the court rejects their contentions, to grant the other prayers described *supra* under Paragraph 1. Needless to state that Erwe 201 would want the application dismissed in its entirety. To put the matter in its proper perspective though, it will be useful to set out the respective assertions of the parties and what the court makes of those assertions.

ASSERTIONS OF THE APPLICANTS

2011 ORDER

[18] The Applicants contend that the 2011 order should be rescinded and set aside for various reasons, amongst them, that it is unconstitutional and that the order directing the Municipality to take steps to interdict occupiers from erecting dwelling structures on the property is unlawful. The order directs that the Municipality must do this in terms of section 21 of the National Building Regulations and Standards Act 103 of 1977 ("The Building Regulations Act"). The Applicants state that this order is not alive to the fact that when the Building Regulations became law, some building structures had already been erected and people had taken occupation of the property.

[19] Since the property was not under the control of the Municipality and the Building Regulations had not come into law and there being no retrospectivity provision or argument that such should be read into the Building Regulations, so continues the argument, the Municipality cannot invoke Section 21 of the Building Regulations to interdict the erection of structures. Besides, the 2011 order fails to single out the structures to which the Building Regulations apply.

[20] Without a direction or provision in the 2011 order, it is impossible to know which structures to bring down. In any event, the structures which are now on the land in issue constitute improvements of the land. For this reason, their demolition is prohibited by Section 11(7)(c) of the Restitution Act for as long as the Commissioner has not given his written authority. Additionally, the Municipality cannot interdict because it does not know who intends to erect illegal structures on the property without prior approval thereby causing irreparable harm.

[21] A further assertion by the Applicants is that the people against whom eviction is being sought reside on land which belongs to Forever Resorts, which has given them consent to do so as envisaged in Section 1 of the Extension of Security Act, 62 of 1997 ("ESTA"). Since the property is not an established, approved or proclaimed township ESTA applies to it. Section 3 of ESTA provides that consent to an occupier to reside or use land cannot be terminated if not in accordance with the provisions of section 8. It being common cause that the consent that Forever Resorts has given is still extant and has not been withdrawn, the occupiers cannot be evicted.

[22] The 2011 order, maintain the Applicants, is contrary to the requirements of a court order, impossible to implement as it seeks to take away rights of occupiers that have been conferred upon them in terms of Sections 25 and 26 of the Constitution of the Republic of South Africa. Worst of all, it does so in circumstances where it has deprived them opportunity to respond to the proceedings that led to the orders that impact on their lives so profoundly.

[23] Lastly, the Applicants are adamant that to the extent that the 2011 order fails to specify the group to which it applies or leaves the Municipality a discretion to decide which group to target with the eviction or interdict not to erect structures on the property, it is invalid and unenforceable because some of those occupiers are on the property following adherence to legitimate procedures. Accordingly, for as long as it is not apparent to which group the 2011 order applies, it is incapable of execution.

ASSERTIONS OF ERWE 201

[24] The setting aside of court orders can be brought in three ways. They can be brought in terms of Uniform Rule of Court 31 or 42 or common law. The Applicants do not specify whether the setting aside that they seek is in terms of the Uniform Rules of Court, 31 or 42, or the common law. While that is so, it is manifest from the facts though that it can only have been launched with reliance on common law on the basis of just *causa*. Erwe 201 asserts that one of the grounds relied upon must have existed at the time when the order was granted. Erwe 201 concludes that as a result of that principle all the events that occurred subsequent to the 2011 order are irrelevant for its setting aside.

[25] Erwe 201 believes that its assertion is fortified by the statement in *Nomsa Dlamini v B Moloisane High Court of South Africa Gauteng Local Division*¹ where the following appears:

"In terms of the principal laid down in Swadi, rescission cannot be granted if the ground of rescission relied upon only came into existence subsequent to the judgment. The question is whether court was entitled to grant the judgment on the basis of the circumstances that existed at that time, albeit that the court or the parties did not then know of their existence. If the court was so entitled, then the underlying principle of finality of judgments must be upheld, and rescission is not permissible."

[26] Secondly, Erwe 201 argues that it is also a requirement in common law that the application must be brought within a reasonable time. Whether or not an application has been brought within a reasonable time depends entirely on the assessment of facts of each case. See *L Bezuidenhout v S Bezuidenhout TPD*² and *Meadow Glen Home Owners Associations v City of Tshwane Metropolitan Municipality*.³

¹ Case no: 10/30611 at para [40]

² Case no: 28997/04 at [13])

³ (767/2013 [201] AZASCA 209 (1 December 2014)

[27] There is no evidence at all that the Municipality took any steps to comply with the 2011 order at all. It has since the granting of the 2011 order on 5 July 2011 been 'dead to the world' until woken up by the contempt of court application against it whose hearing was set down for 21 August 2018. The Applicants, continues Erwe 201, have made no meaningful attempt to explain away the 7-year inordinate delay in launching this application. This is notwithstanding that the 2011 order was served on the Municipality as early as 23 August 2011. The Municipality therefore knew of the terms of the order and chose not to do anything about it.

[28] A further requirement is that the application must be *bona fide*. Erwe 201 contends that the setting aside of the 2011 order will relieve the Municipality of its judicial obligations imposed by the 2011 order. Moreover, it will eliminate the real prospect of imprisonment of the Municipality manager and that the Municipality admits that the relief it seeks against Forever Resorts, the MEC, the Minister of Human Settlement ("the Minister") and the commissioner is only in the alternative and only if it fails to set aside the two orders, is adequate proof of its mala fides. Lastly, Erwe 201 asserts that similarly, in respect of the demolition of the buildings, the Municipality will not observe its obligations unless directed to do so by a court order.

ISSUES

[29] The court is called upon to determine whether or not:

29.1 The 2011 and 2017 orders are unconstitutional;

29.2 The Applicants' order directing the Municipality to take steps to interdict occupiers from erecting dwelling structures on the property is unlawful in terms of section 21 of the National Building Regulations and Standards Act 103 of 1977 ("the Building Regulations Act");

- 29.3 The Municipality cannot invoke Section 21 of the Building Regulations to interdict the erection of structures;
- 29.4 The failure of the 2011 order to single out the structures to which the Building Regulations apply has any material effect on these proceedings;
- 29.5 Section 11(7)(c) of the Restitution Act finds application in this matter;
- 29.6 The provisions of ESTA finds application in this matter;
- 29.7 The 2011 order is impossible to execute;
- 29.8 The failure of the 2011 order to specify the group to which it applies makes it impossible to implement.

LEGAL FRAMEWORK AND EVALUATION

ORDER DIRECTING THE MUNICIPALITY TO COMMENCE WITH STEPS TO INTERDICT THE OCCUPIERS OF THE PROPERTY FROM BUILDING THEREON

[30] Section 152(1) of the Constitution of the Republic of South Africa describes the objects of local governments and it provides:

- “(a) to provide democratic and accountable government for local communities;*
- (b) to ensure the provision of services to communities in a sustainable manner;*
- (c) to promote social and economic development;*
- (d) to promote a safe and healthy environment; and*
- (e) to encourage the involvement of communities and community organisations in the matters of local government.”*

[31] The order above is informed by the fact that in terms of the Constitution, the Municipality takes overall responsibility to ensure provision of services to communities in a sustainable manner and to promote a safe and healthy environment. As such, all building activities on land under its control and occupation thereof must occur with due observance of all applicable laws and regulations. Accordingly, if illegal building activities happen on land under its control, it is expected to intervene and if it does not, it can be compelled to do so. This is what transpired here and the order is directed against the Municipality alone, not the occupiers.

[32] The argument on behalf of the Municipality that the order impacts directly on the rights of the occupiers must be rejected. This ought to be so because their rights are not affected at this stage such that they have a direct and substantial interest as envisaged by case authority. In this regard it is instructive to refer to the case of *City of Johannesburg v The South African Local Authorities Pension fund*⁴ where it was said:

"As to the relevant principles of law, it has by now become well-established that, in the exercise of its inherent power, a court will refrain from deciding a dispute unless and until all persons have a direct and substantial interest in both the subject matter and the outcome of the litigation have been joined as parties (see eg Amalgamated Engineering Union vs Minister of Labour 1949(3) SA 637 (A) at 657 and 659; Gordon v Department of Health, KwaZulu Natal 2008 (6) SA 522 (SCA) para 9). A "direct and substantial interest" is more than a financial interest in the outcome of the litigation. A test often employed to determine whether a particular interest of a third party is the one or the other, is to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be res judicata against that party, entitling him or her to approach the court again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first place (see eg amalgamated Engineering Union at 661; 8 Transvaal Agricultural Union v Minister of Agriculture and Land Affairs & others 2005 (4) SA 212 (SCA) paras 64-66)."

⁴ (20045/2014) [2015] ZASCA 4 (9 March 2015)

[33] To agree with the Municipality would indeed be to put the horse before the cart in the sense that the direct and substantial interest of the occupiers did not arise at the time as no remedy was sought against them. However, it will be appropriate to join them to proceedings foreshadowed in the 2011 order. It will be at that juncture that they will have direct and substantial interest in the matter. As such, it would have been premature to have sought their joinder to the case that led to the 2011 order because their unlawful occupation of the property, if there ever was, was not an issue before court and it was not decided.

[34] The 2011 order concerns buildings that have been erected contrary to the provisions of the National Building Regulations and Standards Act, 103 of 1977. While I take the point that the buildings that are said to have been illegally erected have not been identified, sight must not be lost of the fact that the general duty to find and isolate those buildings lies with the Municipality in the first place and not Erwe 201. Those structures that are legally constructed are not affected by the 2011 order. Besides, the buildings are still to be identified prior to their demolition. So, it is premature to state that they have not been pointed out in the order.

[35] The order requires the Municipality to initiate proceedings founded on Section 21 of the National Building Regulations and Standards Act, 103 of 1977 by applying to the Magistrates court having jurisdiction for an order prohibiting the occupiers on the property from firstly, commencing or proceeding with the erection of any building or structures and secondly, authorising the Municipality to demolish all the illegal buildings and structures already erected on the property.

[36] The key to all this is therefore that the Municipality must apply to court and be authorised before it can execute. It is fallacious to regard it as a means entitling the Municipality to stop the activities. In any event, it is anticipated that prior to obtaining the order argued in the 2011 order, the Municipality will notify all the affected parties by service of all the relevant papers. Understood in this sense, all parties are protected and there cannot be a risk of any illegal conduct arising. Whether or not the people against

whom the Municipality is expected to launch the application will successfully resist is irrelevant. The argument of the Municipality cannot find favour and it is rejected.

ORDER DIRECTING THE MUNICIPALITY TO APPLY FOR EVICTION

[37] The Municipality has also been directed to apply for the eviction of the occupiers of the property in terms of Section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. The Municipality has strongly asserted that since it is not the owner of the property, it lacks *locus standi* to apply for eviction in terms of PIE. This argument would hold if the order directs the Municipality to evict the occupiers. However, the order is that the Municipality must apply to evict the occupiers. Accordingly, the argument of the Municipality lacks merit.

[38] The rights of the occupiers are therefore not affected by the 2011 order at this point but it is expected that they will when the Municipality commences those proceedings eventually. Again, it could be that the occupiers will have a legitimate answer to the claim of the Municipality but that is not the concern of this Court for now. To characterize the order as one directing the Municipality to evict, as the Municipality does, is presumptuous and misguided.

FAILURE TO IDENTIFY THE OCCUPIERS

[39] It was argued on behalf of the Municipality that the 2011 order fails to identify the occupiers of the illegal buildings. It was held in *City of Cape Town v Yaya*⁵ that the test is whether or not the group of the unidentified people is one that is ascertainable. Accordingly, the issue here is ascertainability of the group of the occupiers. The occupiers comprise that group of people who are occupying the illegally erected structures and does not include those who are in occupation of those legally constructed structures. See also, *Rhodes University V Student Representative Council of Rhodes University*.⁶

⁵ [2004] 2 All SA 281 (C) [2 All SA 281 (C)]

⁶ [2017] 1 All SA 617 (ECG)

[40] The Municipality can therefore cite the occupiers as 'occupiers of illegally erected buildings and/or structures' on the property. This is a group that is identifiable as demonstrated above. Thus, it does not follow that where a party has not named people individually automatically its or his claim should fail. Whether a group is ascertainable as distinct and committing particular acts or not depends on the circumstances of each case. See, the Yaya case *supra*. The argument that a decision affecting the occupiers has been made without their participation must be rejected. I reiterate that the occupiers will have opportunity to plead their case before the court that will try the matter between the Municipality and them. In other words, this is raised prematurely.

[41] For similar reasons put forward above, the argument concerning ESTA cannot succeed. That said, it might well be triumphant when raised at the relevant moment. For now, it is totally inappropriate.

THE 2017 ORDER

[42] The 2017 order found the Municipal manager, as both a successor in title and a functionary responsible for the execution of acts of the Municipality, to be in contempt of the court order of the 2011 order and directed that he be committed to custody. The Municipal manager took office as a manager on 1 October 2016. There are a few pointers that suggest that the Municipal manager knew of the order against him granted by Thobane AJ in 2017. I proceed to explore them below.

[43] By way of background I need to introduce what will follow by stating that the Applicant unsuccessfully attempted to rescind the 2011 order. The application went before Bam AJ and she dismissed it. This matter also touches on the question of *res judicata*. Since I do not intend to dwell on it later in this judgment, I might as well state what my view is of the Applicants' argument. It should suffice to state that insofar as I am concerned, the defence of *res judicata* raised by Erwe 201 is solid and valid. This is a matter that was previously brought before court involving the same cause of action, the

same parties and seeks the same relief⁷. The Applicants cannot pretend that nothing has happened and that this court must ignore that a final decision was made on it.

[44] To go back then to the subject that I introduced in Paragraph 42 above. Firstly, on 31 May 2017, the Municipal manager is indicated as the deponent to a founding affidavit that commenced a rescission application launched by the Municipality against Erwe 201. The Municipal manager would have dealt with the 2011 and 2017 in his founding affidavit. Secondly, the rescission application was heard on 22 February 2018 and Bam AJ states at Paragraph 13 of her judgment that during the proceedings she made a few remarks aimed at the Municipal manager who **was** present in court. Thirdly, at Paragraph 16.32 of the answering affidavit in the rescission application, the deponent claims that the Applicants and their legal representatives were present when the matter was argued before Bam AJ. This allegation was left unchallenged consequently it stands as common cause.

[45] On 22 February 2018, both the 2011 and 2017 orders became central to the parties' arguments. It is inconceivable that the Municipal manager would not have heard as the assertions of the parties unfolded before Bam AJ that the rescission application concerned the setting aside of orders that involved him. Considering the above, there is little doubt that the Municipal manager **was** mindful of the orders yet he only launched the rescission application in September 2018 leaving an unconscionable delay of approximately seven months for which he chooses not to account.

[46] The Applicants argue that the order seeks to commit the Municipal manager to custody without having first made him part of the proceedings. This argument is misguided. It is not the Second Applicant in his personal capacity who is to be arrested and kept in custody but it is the current Municipal manager and successor in title of the previous manager. The duty to ascertain observance of court orders by the Municipality

⁷ Ascends Animal Health (Pty) Limited v Merck Sharpe Dome Corporation and Others 2020 (1) SA 327 (CC)

rests on his shoulders. He has failed to do so hence he was found to be in contempt and later his committal sought.

[47] The Applicants would have this court believe that every time a municipal manager vacates his or her position for whatever reason, the new incoming municipal manager should be served with court papers afresh. Needless to state that following that logic, this process may have to be repeated each time there is a recurrence. This could not have been the intention of the legislature hence it imposes the responsibility of ascertaining compliance of municipalities with court orders on the person occupying the office of municipal manager and not a particular individual. The office of the Municipal manager having been duly notified of the orders and there been no compliance, the successor in title takes the responsibility. There is nothing unconstitutional about this legislation and the order as such.

WHETHER OR NOT TO SET ASIDE THE ORDERS

[48] It is manifest from the discussion of the 2017 order *supra* that there is no merit to the argument that the 2017 order should be set aside because of its unconstitutionality. Similarly, the 2011 order deserves no different treatment because it has been found to be constitutionally sound. Fundamentally, the argument of the Applicants is that they delayed in bringing this application because their legal representatives were incompetent. So much for 'every bad carpenter having his tools to blame'. If that were the position, it is staggering that the Applicants endured the ineptitude of their erstwhile attorneys for approximately six years and yet never thought of terminating their mandate.

[49] This argument does not hold water because both Applicants became aware of the 2011 order as early as the 23rd of August 2011 and in the case of the 2017 order, the indication is that before the rescission application was argued and during the proceedings presided by Thobane AJ whose judgment he signed on the 4th of April 2017. Besides, the Applicants, assuming that their argument about their attorneys' incompetence is correct, were sleeping for all these years until woken up by the contempt application.

[50] Apart from the above, it is notable that the 2011 order was the result of an agreement between the Municipality and Erwe 201. Paragraph 16.16 of the answering affidavit of Erwe 201 is distinctive. It provides that the legal representatives of the Municipality indicated to the legal representatives of Erwe 201 that they would not oppose the relief sought in the 2011 application, which resulted in the 2011 order. I am at a complete loss why in reply the Municipality would, without elaboration, state that the allegation is irrelevant to the relief sought by it when in fact it had consented to it being granted. In those circumstances, it cannot be reasonable to set aside the orders. The application to set aside the orders therefore is refused.

LOCUS STANDI

[51] Whether or not the Municipal manager has *locus standi* to apply for the setting aside of the 2011 and 2017 orders granted against the Municipality is of little significance. I say this advisedly. If the Municipality is successful in the application for rescission of the orders, the Municipal manager, as an official responsible for the Municipality's compliance with court orders, will automatically be off the hook. That is because there will be no court order with which the Municipality will be expected to comply. Understood in this sense, the issue pertaining to *locus standi* is academic. That said, the Municipal manager has *locus standi* to apply for the rescission that seeks to have him committed to a correctional centre for violation of the orders. The finalisation of the setting aside application has paved a way for the consideration of the alternative orders proposed by the Applicants.

PROPOSED ALTERNATIVE ORDERS

[52] The principal issue here is whether or not the Municipality is correct to characterise the controversy between the parties as one concerning eviction of occupiers of land which belongs to Forever Resorts. Quite evidently, if the court agrees that the question of eviction constitutes the nub of the dispute between the parties then it is inescapable to traverse the issues pertaining to the alternative orders. The court has already refused to regard eviction as central to the controversy between the parties and that presupposes

that the Municipality ought to comply with the orders. For what it is worth, I proceed to outline why the orders in the alternative as sought by the Municipality will be superfluous.

THE COMMISSIONER TO CONSIDER WHETHER OR NOT TO GRANT AUTHORITY FOR THE EVICTION OF THE OCCUPIERS OF THE PROPERTY OR DEMOLITION OF UNAUTHORISED STRUCTURES

[53] Compliance with the 2011 order by the Municipality necessarily connotes the order that the Municipality wants. In other words, acting in line with the court orders implies that the Municipality will explore various means of legally evicting whoever could be on the property and/or preventing the unauthorised erection of structures and/or demolishing such buildings that have been established contrary to the governing legislation. To act in accordance with the orders might well include the Municipality approaching the Commissioner to consider whether or not to grant authority for the eviction of the occupiers or demolition of the illegal structures. In this sense, the first alternative order is gratuitous.

FOREVER RESORTS TO APPLY TO COURT FOR THE EVICTION OF THE OCCUPIERS OF THE PROPERTY ONLY IN THE EVENT THAT THE CONSENT OF THE OCCUPIERS TO OCCUPY THE PROPERTY HAS BEEN LAWFULLY WITHDRAWN OR SET ASIDE BY A COURT AND THE COMMISSIONER HAS GRANTED WRITTEN APPROVAL FOR SUCH

[54] The above is in fact an illustration of the measures that the Municipality ought to take to ascertain that it complies with the 2011 order. It ought to be noted that the Municipality, as a local government structure, is in control of the property, land owned by Forever Resorts. As such, it and the latter are at liberty to embark on a legally recognised process of evicting those in unlawful occupation of the property. If such measures entail making sure that the consent granted to the occupiers in terms of ESTA must first be obtained and that the Commissioner must have given written approval, then it is the order

that contemplates the process unfolding but the Municipality remains the driver of such process.

THE MEC AND THE MINISTER TO PROVIDE FINANCIAL ASSISTANCE FOR THE ALTERNATIVE ACCOMMODATION TO THE OCCUPIERS OF THE PROPERTY IF AN ORDER FOR THEIR EVICTION FROM THE PROPERTY IS GRANTED

[55] The duty to provide alternative accommodation in circumstances where the illegal occupiers of land are granted primarily rests with the local authority, the Municipality in this instance. Thus, whether the Municipality seeks financial assistance from the MEC and/or the Minister is completely not the concern of Erwe 201. From the aforesaid it is plain that the alternative orders were brought about by the fallacious characterization of the theme of the orders as being eviction. All the alternative orders are therefore refused.

COSTS

[54] This court was advised that the costs of 21 August 2018 in the main application were reserved and that I am required to determine which of them should be liable for payment thereof. Erwe 201 contended that such costs ought to be paid by the Municipality because its delay in launching the application was unconscionable. Moreover, it was for the second time that the Municipality sought postponement, the first having been in February 2018 and having been founded on the same basis on which it now seeks to postpone the application once again.

[55] Conversely, the Municipality is adamant that the main application should not have been enrolled for hearing on 21 August 2018 as it was not ready. Firstly, argues the Municipality, the court order of December 2017 envisages case management of the matter. In total disregard of the order, Erwe 201 neither ensured that the matter became case managed nor engage with the Municipality and the other respondents in the main application. Such agreement would have been on the future conduct of the matter,

amongst which would have been the filing of answering, replying affidavits and heads of argument before enrollment.

[56] Secondly, on 21 August 2018, the index provided to the court and parties was not consistent with the paginated papers. This was caused by the failure of Erwe 201 to update the index to bring about harmony between it and the paginated papers. Obviously, says the Municipality, Erwe 201's failure in that respect necessarily meant that the Municipality could not index and paginate its papers and ostensibly, the court too.

[57] Furthermore, the Municipality draws attention to Paragraph 8.1.5 of the founding affidavit where Erwe 201 undertakes to place papers under case number 2016/582 before the Court and that the contents thereof would be incorporated into the 2018 application as if they form part thereof. To the extent that Erwe 201 intended to rely on the papers under Case number 2016/582, the Applicants assert that they were entitled to be given opportunity to respond to the reconstituted papers. They could not do so as a result of Erwe 201's failure.

[58] It is trite that the duty to ascertain that a matter is ripe for hearing primarily rests on an applicant. While it may be true that the Applicants brought their application to postpone exceedingly late, the issues that they have raised are valid and in any event, the matter would not have proceeded with all the attendant problems described above. The question is, would the matter have gone ahead regardless of the challenges? The answer is indubitably in the negative and Erwe 201 must therefore bear the costs of the postponement.

[59] Insofar as the costs of this application are concerned, it is common cause that there is no foundation for departure from the principle that costs follow results. The Applicants will as such, be liable for the costs of Erwe 201 including those of two Counsel, if applicable.

CONCLUSION

[60] Both the 2011 and 2017 orders are constitutionally sound. As such, the application to set them aside on that basis and other grounds, which the court has explored *supra* are refused. The alternative orders cannot be granted because once the Municipality observes the orders, the alternative orders will be rendered unnecessary. Insofar as costs of the postponement are concerned, Erwe 201 has failed to ascertain that the matter was ready for hearing consequently it must bear the costs. With regard to the costs hereof, there is no departure to the generally accepted principle that costs follow result

ORDER

[61] In the result, I make the following order:

1. The application is dismissed with costs including those of two Counsel, where so employed;
2. Regarding the costs of the postponement, Erwe 201 is directed to pay the costs including those of two Counsel, where so employed.



B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 11 May 2022 at 10:00.

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Date of Judgment:

11 May 2022