

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

CASE NO. 2760/2019

In the matter between:

**NONTOMBI GCABA
PERSONS LISTED IN ANNEXURE “X”**

**1st Applicant
2nd to 85th Applicants**

and

**NTABANKULU LOCAL MUNICIPALITY
MAKHOSONKE DIKO
MBANGWENI TRIBAL COMMUNITY
PHIKO SECURITY SERVICES
LWANDLOLUBOMVU TRADITIONAL COUNCIL
CHIEF NDZULULWAZI F. SIGCAU**

**1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent**

JUDGMENT

MBENENGE JP:

[1] On 11 December 2018 the first respondent obtained an order under Case No. 5802/2018 interdicting and restraining Mr Sivuyile Mankahla and “*unknown persons demarcating sites and erecting structures [on] Erf 87, Ntabankulu*”¹ from-

¹ The property

- (a) carrying on the construction of any building activities on the property; and
- (b) soliciting the services of any person who had not been cited therein from conducting or carrying on any building activities on or in respect of the property.

[2] The order also embodied a *mandamus* which directed “*the respondents*” to “*demolish all illegal structures erected [on] the property,*” and authorized the Sheriff, duly assisted, if necessary, by members of the South African Police Service (the police), to give effect to the order “*by removing any person found in the property and demolishing all the illegal structures within the property.*”

[3] Ms Nontombi Gcaba and other fifty-four persons² listed in annexure “X” to the affidavit filed in support of the instant application (the applicants) had been resident in and comprised a community referred to as Ndakeni, located on the property, since, at the very least, August 2018.³

[4] It is common cause that on 26 June 2019, purporting to act on the strength of the order, the police, and the first and fourth respondents’ security guards, acting at the instance of the first respondent, caused the residential structures or houses occupied by the applicants erected on the property to be demolished. Few of the applicants’ belongings were saved from the onslaught.

[5] Discontent with the demolition, the applicants resorted to the instant proceedings seeking, in the main, an order declaring the demolition as also the order of 11 December 2018 unlawful. After the delivery of the answering and replying affidavits, the applicants amended their notice of motion to seek an order rescinding and setting aside the order of 11 December 2018, in terms of rule 42 (1) (a) of the Uniform Rules of Court.

² Even though there are eighty-four applicants the number of members of each household range between two and five, with the result that the total number of the affected persons approximated two hundred.

³ It is alleged that approximately 60% of the applicants had lived in the property for more than 8 months; 29% for more than 6 months, and 11% for almost 9 months.

[6] In effect, the order of 11 December 2018 confirmed a *rule nisi* that had been issued under Case No. 5802/2018 on 13 November 2018 which called upon the respondents therein to show cause, *inter alia*, why they should not be interdicted and restrained from, *inter alia*, carrying on the construction of any building activities on the property and directed the respondents to demolish all illegal structures erected on the property.

[7] The applicants contend that they had not been cited in the application that culminated in the grant of the impugned order. They also contend that the impugned order was never properly served on them or preceded by any notice in terms of section 4 (2) of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998.⁴

[8] The first respondent, the only litigant opposing the rescission application,⁵ seeks to justify its actions as follows:

- “16. On their own showing, the applicants were recent arrivals on the property at the time the order was executed on 26 June 2019. They themselves do not furnish any details pertaining to their individual times of arrival and the Municipality is unable to say when they did so arrive, on an individual basis.
17. One thing is certain, though, and that is the fact that the property is the subject of a pending land claim which has been duly published in accordance with the provisions of section 11 of the Restitution Act and to which, as set out above, section 11 (7) (d) of the Restitution Act applies.⁶
18. Once more on their own showing, the applicants were never permitted by the Municipality to invade or occupy the property. Indeed, as the manager of the Municipality, I must state here, most categorically, that they were never at any time so permitted by the Municipality to occupy the property, demarcate sites and erect structures thereon. No one, including the fifth respondent, had any authority to approve any demarcation of sites on the property at any material time and the applicants’ conduct in so doing is clearly unlawful . . .

⁴ PIE

⁵ The other respondents are Makhosonke Diko, Mbangweni Tribal Community, Phiko Security Services, Lwandlulubovu Traditional Council and Chief Ndzululwazi Sigcau cited as the second to sixth respondents, respectively.

⁶ Section 11 (7) (d) of the Restitution of Land Rights Act 22 of 1994 provides that once a notice has been published in respect of land subject to a claim in terms of that Act “*no claimant or other person may enter upon and occupy the land without the permission of the owner or lawful occupier.*”

20. It bears emphasising that they have no colour of right at all to any portion of the property.”

[9] Rule 42 (1)(a) gives the court the power, in addition to any other powers it may have, to, on its own, or upon the application of any party affected, rescind an order erroneously sought or erroneously granted in the absence of any party affected thereby.

[10] An order is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the order and which would have induced the court, if aware of it, not to grant the order.⁷

[11] It is also trite law that an order is erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for the court to have made such order.⁸

[12] The following remarks by Conradie J in *Kayamandi Town Committee v Mkhwaso and Others*⁹ are apt:

“A failure to identify defendants or respondents would seem to me to be destructive of the notion that a Court’s order operates only *inter partes*, not to mention questions of *locus standi in iudicio*. An order against respondents not identified by name (or perhaps by individualised description) in the process commencing action or (in very urgent cases, brought orally) on the record would have the generalised effect typical of legislation. It would be a decree not a court order at all . . .

The applicant alleges that it is impossible to identify the persons residing on the stands in question. There are too many of them and they constantly come and go. Accepting the correctness of this allegation I can only say that the applicant has other remedies. The Prevention of Illegal Squatting Act 52 of 1951 . . . , which was extensively amended in 1988, obliges a court which convicts any person of the offence of entering upon or into without lawful reason or remaining on or in any land or building without the permission of the owner or lawful occupier of the land or building to make an order for the summary ejectment of such person from the land or

⁷ *Nyingwa v Moolman* NO 1993 (2) SA 508 (Tk) at 510D- G; *Naidoo v Matlala* NO 2012 (1) SA 143 (GNP) at 153C.

⁸ *First National Bank of South Africa Ltd v Jurgens* 1993 (1) SA 245 (W).

⁹ *Kayamandi Town Committee v Mkhwaso and Others* 1991 (2) SA 630 (C) at 634 G, 635I-636D F- I (*Kayamandi*). Cf *Illegal Occupation Erven Phillipi v Monwood Investment Trust Company* (Pty) Ltd [2002] 1 All SA 115 (C) (*Monwood*).

building concerned. An owner of land may, without an order of Court, demolish an unauthorised structure on his land and remove materials . . . This is in substance what the applicant asks this court to do but which I hold the court cannot do.”

[13] Mr *Ntsaluba*, counsel for the first respondent, argued that the applicants fell within the purview of the impugned order and had been properly cited in that, at the time the impugned order was granted, they had already been occupying the property and that, therefore, reference to “*unknown persons demarcating sites and erecting structures*” on the property must be interpreted to include the applicants.

[14] In *Mpaka*¹⁰ this court had occasion to consider whether an order against specified respondents “*and other unknown occupants*” was competent. The court held:

“[13] Over the years the courts have, alive to the challenges associated with the sudden invasion of land by persons or group of persons whose details are lacking, adopted a more benevolent approach allowed the citation of an ascertainable group, even though their names might not be known.¹¹ However benevolent the courts have been, orders have not been granted against persons not occupying the land in question but “intending to unlawfully occupy” in due course because, said Budlender AJ, such persons are “not in any real sense an ascertainable group. . . who are properly before court against whom an effective order can be made; there [was] no prospect that they [would] be identified during the course of the proceedings . . . [t]he identity will change from day to day. Some people, who today have no intention to occupy the land, may subsequently decide to do so.”

[14] Addressing himself to challenges associated with serving persons “*intending to unlawfully occupy*” Budlender AJ went on to say:

‘If the Sheriff reads out the order today, it will be of no force or effect in respect of any person who is not present when he reads out the order, and who intends to occupy the land tomorrow or thereafter. It will be effective only in respect of any person who at the moment of announcement happens to be in the process of occupying the land, or visiting it. It will not give any notice of the order to any other people intending to occupy the land, and will be entirely ineffective as far as they are concerned . . .’

[15] In light of the foregoing, it could never have been, and never was, the intention of the court when granting the order it did on 17 November 2011 to make the order applicable to other surrogates and unauthorised invaders of the land in question in 2015.”

¹⁰ *Mpaka and Others v King Sabata Dalindyebo Local Municipality and Another* [2017] ZAECHMHC 24 (11 July 2017) (*Mpaka*) at paras 13-5.

¹¹ See for example *City of Cape Town v Stacy Yawa and Others* [2004] 2 AllSA 281 (C) per Budlender AJ; also see *Monwood* above n 9.

[15] The instant case is distinguishable from *Kayamandi* and *Mpaka*. “*Unknown persons demarcating sites and erecting structures [on] Erf 87 Ntabankulu*” is, in my view, an ascertainable group. In *Mpaka* the unspecified respondents were cited as “*other unknown occupants*.” This citation was less than precise and was no different from the wide and sweeping reference in *Kayamandi*, to “*persons intending to unlawfully occupy Erf 18332, Khayelitsha, in the City of Cape Town, Western Cape,*” which was found to have been inadequate.

[16] As at the time the impugned order was obtained, the applicants had, indeed, occupied the property and were, on their showing, constructing structures thereon. In my view, the citation met the threshold. This is, however, not the end of the matter.

[17] The provisions of PIE are, to the extent that the first respondent adopts the stance that the applicants are unlawful occupiers of the property, of relevance. Section 4(1) of PIE provides that notwithstanding anything to the contrary contained in any law or the common law, the provisions of the section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

[18] In *Cape Killarney Property Investments (Pty) Ltd v Mahamba*¹² it was held that section 4(1) of PIE makes it clear that the provisions of the sub-sections that follow are peremptory; section 4(2) requires notice of such proceedings to be effected on the unlawful occupier and the Municipality having jurisdiction at least 14 days before the hearing of those proceedings. The sub-section further provides that the notice must be effective notice; it has to embody information set out in sub-section (5) and must be served as directed by the court to ensure notice on the part of unlawful occupiers.

¹² 2001 (4) SA 1222 (SCA), para 11

[19] In these proceedings, it is not in dispute that the impugned order was not preceded by an invocation of the relevant provisions of PIE. That is a fact of which the court that granted the impugned order was not aware. Had this fact been brought to the attention of the court or enquired into by the court itself, the court would not have granted the order it did. An order obtained without such invocation is incompetent and falls to be set aside.¹³

[20] In *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and others*,¹⁴ the Constitutional Court said the following of and concerning orders obtained for the eviction of unlawful occupiers without the invocation of the provisions of PIE:

“[39] It is necessary to examine the duties of a court when dealing with proceedings for eviction from residences generally. . . The duties arise from the protection of the rights of the residents . . .

[40] The starting point is section 26(3) of the Constitution which provides that “[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances”. Accordingly, courts seized with eviction matters are enjoined by the Constitution to consider all relevant circumstances.

[41] The prohibition in section 26(3) is given effect to through the enactment of PIE. This Act goes further and enjoins the courts to order an eviction only “if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances” as contemplated in section 4(6) and (7)¹⁵ and section 6(1). . .

[47] It deserves to be emphasised that the duty that rests on the court under section 26(3) of the Constitution and section 4 of PIE goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in

¹³ *Cape Killarney* case, para 17.

¹⁴ [2017] ZACC 18; 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC)

¹⁵ These sub-sections provide that:

“(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.”

which the court is required and expected to take an active role. In order to perform its duty properly the court needs to have all the necessary information. The obligation to provide the relevant information is first and foremost on the parties to the proceedings. As officers of the court, attorneys and advocates must furnish the court with all relevant information that is in their possession in order for the court to properly interrogate the justice and equity of ordering an eviction. . .”

[21] The applicants were not before court on the date the impugned order was granted. For purposes of rule 42 (1)(a), they were absent. Because the information contemplated in sections 4 and 6 of the PIE was not placed before the court on that day, the court was unaware of essential issues of fact when granting the order it did. The order evicting the applicants was thus erroneously granted within the meaning and contemplation of rule 42 (1)(a). This conclusion renders the further reasons advanced for the setting aside of the impugned order unnecessary to consider.

[22] The order of 27 November 2017 incorporating the *rule nisi* was subsumed by that of 11 December 2018 confirming the *rule nisi*. Therefore, nothing more need be said about the November order.

[23] The applicants have been victorious. There is no reason why costs should not follow the result. The application for the delivery of an additional affidavit to supplement the allegations made in the applicants’ founding affidavit was not pursued. Indeed, the applicants made out a case for rescission on the papers initially filed. The costs occasioned by the filling of the additional set of papers ought to be disallowed.

[23] I, therefore, make the following order:

1. *The order granted by this court under Case No. 5802/2018 on 11 December 2018 is hereby rescinded.*
2. *Any warrant issued pursuant to the order is of no force or effect.*

3. *The first respondent shall pay costs of this application, such costs to exclude those consequent upon the delivery of the “notice of motion-interlocutory” dated 3 August 2020 and the supplementary affidavit annexed thereto attested on 3 August 2020.*

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

Applicants’ counsel	:	<i>L L Ngumle</i>
Applicants’ attorneys		Linyana & Somacala Incorporated C/o Manitshana Tshozi Attorneys Mthatha
First respondent’s counsel	:	<i>T M Ntsaluba SC</i>
First respondent’s attorneys	:	N T Vuba Incorporated C/o Mkata Law Officers Mthatha
Date matter heard	:	29 April 2021
Date judgment delivered	:	20 May 2021.