

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – MTHATHA**

**Case No: 3412/2017
Date Heard: 1/02/2018
Date Delivered: 27/02/18**

In the matter between:

NOMKHITHA NTANTANA

Applicant

and

MHLONTLO LOCAL MUNICIPALITY

First Respondent

**THE MUNICIPAL MANAGER:
MHONTLO MUNICIPALITY**

Second Respondent

JUDGMENT

MAKAULA J:

A. Introduction:

[1] The matter serves before me consequent upon an appeal judgment and order of the Full Court of this Division pursuant to the dismissal of the applicants' application by Mjali J.

B. Background:

[2] For purposes of completion, I shall refer to a brief background which serves to establish the genesis of the lis between the parties. The applicants brought about four different applications which were consolidated. It was after their homes were demolished (without a court order) allegedly by the respondents. Hartle J, in her appeal judgment dealt concisely with the essential averments contained in the various founding affidavits in support of the applications. I shall deal with facts as they appear in the appeal judgment but for reference to the parties.

[3] The essential allegations gleaned from the affidavits are as follows:

- 3.1 the applicants are all indigent persons, alternatively derive an income from informal sources;
- 3.2 each of them had moved to and informally settled in the area known as Chris Hani Park because they could not afford to pay rent to property owners in the nearby township;
- 3.3 the municipality never had any issue with them settling where they did;
- 3.4 some of the applicants have lived at the informal settlement together with their children for more than a decade;
- 3.5 on 5 November 2014 the speaker and mayor of the first respondent called a meeting with the residents of Chris Hani Park at the town hall;
- 3.6 the residents were informed by them that the municipality wished to build subsidy ("RDP") houses for them in Chris Hani Park;
- 3.7 an "agreement" or understanding was reached that the residents would not be without accommodation pending construction of the RDP houses;

- 3.8 the following day the mayor and the speaker instructed the residents to vacate their structures on or before 21 November 2014;
 - 3.9 the applicants claim that they did so in breach of the “agreement” reached on 5 November 2014;
 - 3.10 on 21 November 2014 Mr Hlabiso, a ward councillor of the first respondent, arrived with a TLB machine and started to demolish the appellants’ homes without a court order;
 - 3.11 some residents began demolishing their own structures with a view to salvaging materials;
 - 3.12 residents protested; and
 - 3.13 Mr Hlabiso said that he would return on 24 November 2014 to continue the demolitions. He did not do so on that day, but made reappearance on 25 November 2014.
4. The applicants contended generally in their founding affidavits that;
- 4.1 the demolishment and dismantling of their structures constituted illegal acts since the ward councillor and other unknown officials of the first respondent who displaced them from their homes in this manner did so without an order of court, in violation of the law and the Constitution;
 - 4.2 in respect of their evictions (made manifest by demolishing their structures) they were entitled to proper notice and alternative accommodation being put in place;
 - 4.3 the first respondent at whose instance the demolitions were effected was liable for the unlawful action and in any event liable on a statutory

and constitutional basis to facilitate their access to adequate housing under the circumstances;

- 4.4 an interdict would in the short term and pending the return date/finalization of the application in respect of the constitutional relief being sought restrain the respondents from demolishing their homes further or evicting them or removing their belongings without an order of court;
- 4.5 even in respect of the partly demolished houses, these were not conducive for habitation in such an un-reconstituted state;
- 4.6 none of the applicants were in a position to arrange alternative accommodation for themselves or for their families;
- 4.7 even though the respondents may have been acting in terms of a policy by seeking to address the constitutional rights of access of all the affected parties to adequate housing, the implementation of that policy, in the manner in which it was being undertaken, was not reasonable by virtue of the fact that it entailed the residents being removed from their homes without any alternative accommodation being provided in the interim while the subsidy houses were being built;
- 4.8 the conduct of the respondents amounted also to spoliation. The applicants had been in peaceful and undisturbed possession of their property, which the respondents had deprived of in a violent or unlawful manner and against their will”.

[4] The respondents in their answering affidavits aver, in a nutshell, that they did not demolish or intend to demolish the applicants' structures. The respondents deny that the first respondents' employees took possession of applicants' property or intended to do so and in any event, they cannot be held vicariously liable for the acts of its Mayor and Speaker, not being its employees. The respondents further contended that spoliation is not a remedy available to applicants since the demolishing had already occurred or was imminent.

C. The Order:

[5] In its judgment, the Full Court issued an order, which even though not entirely relevant for purpose hereof, reads:

- "1. A rule nisi issues calling upon the respondents to show cause, if any, on Thursday, the 5th day of May 2016 at 09:30, or as soon thereafter as the matter may be heard, why the following final relief should not be granted:
 - 1.1 that it be declared that the eviction of each appellant by the respondents by the demolition of their homes was unlawful;
 - 1.2 that the appellants are entitled to reconstituted restoration of their homes as soon as possible, albeit on a temporary basis pending the permanent allocation of subsidy ("RDP") homes to them, at a place where they can be accommodated in the interim;
 - 1.3 that the temporary structures (using such of the materials still at the appellants' disposal as can be employed towards this end) must be such that they afford shelter, privacy and amenities at least equivalent to the appellants' structures that were demolished, and which are capable of being dismantled upon the allocation of permanent RDP homes to them;

- 1.4 that the appellants and the first respondent must through their legal representatives, engage meaningfully with each other with a view to reaching agreement on the aspects referred to below and report on affidavit to the High Court on a date to be determined what they have agreed and under what time frame their agreement is to be implemented:
 - 1.4.1 the location where the appellants will be permitted to temporarily reconstruct their dwellings;
 - 1.4.2 the manner in which the appellants will be assisted by officials or agents of the first respondent in the substituted of their dwellings;
 - 1.4.3 the stage at which the appellants can expect to be accommodated in the permanent RDP homes and the time frames generally applicable to the expected milestone to be achieved in realizing their rights of access to adequate housing; and
 - 1.4.4 the availability of services to the appellants by the first respondent and the condition regarding payment under which these will be provided;
 - 1.5 that the court grant such other or further constitutional reparation to the appellants as may seem meet as a result of the unlawful eviction from their homes by the respondents; and
 - 1.6 that the respondents pay the costs of the application.
3. The appellants' representatives shall by the return date envisaged in prayer 1 above furnish to the respondents' legal representatives and to the High Court a comprehensive schedule (reflecting the names, ages and gender of each person who occupied the respective dwellings as at 25 November 2014 including whether they are scholars or adults and whether they are employed or not; the original site allotment number of each dwelling if applicable; the size of each dwelling (for e.g. 1 or 2 or 3 roomed structure) and what materials they were comprised of; the original date upon which each appellant took up occupation of their sites at the informal settlement and confirmation of the status of each appellant's application for subsidy assistance;

4. The respondents are ordered to pay the costs of the appeal which costs are to include consequent upon the employment of two counsel.
5. The interlocutory application to introduce further evidence succeeds, provided that the costs of this application shall be reserved for determination by the High Court upon finalisation of the entire matter”.

D. Argument;

[6] Mr Matoti, for the applicants, argued that the matter be referred for hearing of oral evidence on certain aspects, without arguing the merits of the matter. He submitted that the issue to be referred is whether the respondents were responsible for the demolition of the applicants’ structures as that is incapable of being resolved on the papers. To put a spanner in the works the applicants’ referred to a letter penned by the respondents’ attorneys dated 31 March 2015 addressed to the sheriff of the court, Tsolo which reads:

“Dear Sir

RE: CASE NO. 3407, 3412, 3414, 3415, 3424, 3434/14 vs MHLONTLO
LOCAL MUNICIPALITY

We refer to the above matter and confirm that we act on behalf of the above named client being Mhlontlo Local Municipality and further attach herein a Court Order by Judge Makaula and a Judgment by Ladyship Mjali and request yourself to visit Chris Hani, Tsolo District Eastern Cape under ERF 42 and evict everyone who has been situated in that area if necessary kindly request the assistance of Members of South African Police Station, Tsolo”.

The submissions by Mr Matoti are that included in the heading of the letter is the case number of this matter thus meaning the sheriff was instructed to evict the applicants from Erf 42 and implicit, the portion thereof.

[7] Mr Bodlani, for the respondents, premised his argument on three issues in opposition of referral to oral evidence. Firstly, he argued that the applicants elected to argue the main application and then in the alternative asked for it to be referred to oral evidence. I assume in this regard that Bodlani referred to the argument raised before Mjoli J and on appeal. I say so because, before me, Mr Matoti did not argue the merits of the matter other than submitting that there is a dispute of fact. Relying on *Law Society, Northern Provinces v Mogami*¹, Mr Bodlani argued that now that the applicants elected to argue the merits, they are precluded from asking the court to refer the matter to oral evidence. Secondly, in respect of the letter the respondents argued that the letter was written on 31 March 2015 and the application was issued on 26 November 2014. The demolition occurred on 21 November 2014. Thus, Mr Bodlani argued that the letter could not assist the applicants because it was sent four and half months after the demolition of the structures. He argued further that the letter talks to eviction from Erf 42 and not the remainder of Erf 42. If I understood Mr Bodlani well, the third leg of his argument basically states that there is no dispute of fact that cannot be resolved on the papers.

E. Analysis:

[8] Rule 6(5)(g) of the Uniform Rules of Court provides:

“Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that

¹ 2010(1) SA 186 SC; [2010] 1 All SA 315 (SCA).

oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise”.

[9] The application of Rule 6(5)(g) has been a subject of numerous decisions. In *Nkwetssha v Minister of Law and Order and Another*², Vivier JA said of Rule 6(5) (g):

“Our own Rule 6(5)(g), which is of application in the present case, is, however, of wide import and empowers the Court, whenever an application cannot properly be decided on affidavit, to ‘make such order as to it seems meet with a view to ensuring a just, and expeditious decision’. The Court is further empowered ‘in particular, but without affecting the generality of the foregoing’, to direct that oral evidence be heard on specified issues, and to that end the Court may order any deponent to appear personally or grant leave for him or any other, person to be subpoenaed.” (Emphasis added)

[10] In the matter, of *Mogami*³, at paragraph 23, Harms DP, as he then was, had the following to say about hearing of oral evidence in application proceedings:

“An application for hearing of oral evidence must, as a rule be made in *limine* and not once it becomes clear that the applicant failure to convince the Court on the papers or an appeal. The circumstances must be exceptional before a Court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail”.

² 1988(3) SA 99(A) at 117 C.

³ *Supra*.

[11] The court in *Mogami* refers to *De Reszke v Marais and Others*⁴ where Comrie J after reviewing some number of decisions concluded as follows:

“In the present case an application to refer for oral evidence should, in my opinion, have been brought *ab initio*. The evidence of testamentary incapacity was on record; the reply was that the deceased’s intellectual capacity fluctuated; given that the deceased was waning at the time, and nigh unto death, the evidence relating to testamentary incapacity was also relevant to the deceased’s intentions on 18 and 22 October 2001. I do not consider this to be a case where oral evidence should have been reserved as an alternative to argument on the affidavits. As I have recorded, oral evidence was mentioned for the first time on appeal, and then by the Court. It elicited no more than a conditional application. I think it is asking too much to expect this Court to express a second opinion of the affidavits and then, if the appellant fails, to request that the matter be referred for oral evidence. Some compelling reason would need to be present for us to follow such a course, and in my judgment no such reason is present”. (Emphasis added)

[12] It is to be noted that in both *Mogami* and *De Reszke* the issue of referral to oral evidence was raised on appeal. Such an issue did not come up in the court *a quo*. Similarly, in this matter the issue was not raised before Mjali J and on appeal. It is raised at this stage. Be that as it may, I am of the view that the principle would have been applicable even if it was raised before Mjali J. On the authority of *Mogami* decision, in order for me to refer the matter for hearing oral evidence, I have to find exceptional circumstances. As can be gleaned from the summary of averments contained in the applicants’ affidavits and determined by the Full Court, the matter raises constitutional issues which have far reaching constitutional

⁴ 2006(1) SA 401 at paragraph 34.

consequences for the parties. Hartle J made the following remarks, which I find apposite:

“The judgment of the court *a quo* reflects in my view a misconception as to the true nature of the appellants’ cause of action and the case made out in the papers. In the lead application it was not clearly spelt out in the notice of motion that, apart from the necessity to grant a spoliation order where the circumstances justified this, an enquiry in the long term into the illegality was also required but in the other applications orders were pertinently sought declaring the conduct of the respondents in interfering with or demolishing the property of the appellants to be unlawful. In the absence of any justification by the respondents for the eviction of the appellants such as that it was necessary, or unavoidable, or warranted on any particular basis, the question whether the alleged interference with the appellants’ right not arbitrarily to be deprived of their homes was unlawful as a precursor to the court then determining appropriate constitutional relief would certainly still require to be determined. There remains a need to interrogate, leaving aside the respondents’ denial that *they* are responsible therefor, whether there existed a valid reason for the evictions. Having had regard to the very valid considerations placed on the record by the appellants which militated against the precipitate demolition of their homes, it certainly seems necessary that the court’s reproof of the first respondent’s conduct be starkly stated, and attenuated by appropriate orders”. (My own underlining)

F. The dispute of facts:

[13] The applicant in their affidavits repeatedly make the point that the Ward Councillor, when he came to demolish their homes, was in the company of other officials of the first respondent whose full and further particulars are unknown to them. In answer, the first respondent avers that “neither the first respondent, nor its employees nor the second respondent were responsible for the eviction of the applicants from, or the demolishing of, their structures”.

[14] What comes out clearly from the respondents papers is that the applicants were in occupation of the land unlawfully and that the Department of Human Settlement of the Eastern Cape was to build low cost housing on that land. The respondent handed over the land to the Department. That is so in spite of the fact that the applicants have been in occupation of that land for more than a decade. Hartle J, in her judgment refers to an affidavit deposed to in support of an application for leave to appeal to the Supreme Court of Appeal, which I have not been priory to in which the first respondent averred that they 'never intended to demolish the appellants houses without following due process of the Law'. The dispute of facts in this regard cries out for oral evidence especially that the Constitutional rights of the applicants have been violated.

[15] The facts of this matter and a determination whether the respondents were responsible for the demolition of the applicants' structures constitute exceptional circumstances calling for the referral of the matter for hearing of oral evidence on that issue. I shall not deal in this judgment about which correct interpretation is to be given to the letter referred to in paragraph 6 above. Suffice to say that it indicates that dispute cannot be resolved on the papers.

[16] Consequently, I make the following order:

1. The issue whether the first and second respondents demolished the applicants' residential properties on the 21 November 2014 is referred for determination by way of oral evidence.

2. Parties will be entitled to call the evidence of all the witnesses who have already deposed to affidavits together with any other witness provided that a party who intends to call a witness who has not deposed to any of the affidavits that are already on record, shall first prepare and deliver such affidavit(s) on a date 30 (thirty) days before the hearing of the matter.
3. The rules relating to discovery procedures in terms of rule 35 shall apply.
4. Costs shall be payable in the cause.

M MAKAULA
Judge of the High Court

Counsel for the Applicant:

Adv Matoti
Mthatha

Instructed by:

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Mthatha

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