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	
ZOLEKA SIPAKISI-OLAYI & OTHERS	Respondents

JUDGMENT

MBENENGE JP:

[1] This matter has a longish history, but stripped of verbiage, the facts are, for present purposes, uncomplicated. On 18 November 2014 the applicant launched an application before this court seeking the eviction of "*unknown persons comprising the First respondent* [the respondents in the present matter] *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*" and other relief incidental thereto, including an order that the respondents restore vacant possession of the subject land to the applicant (the main application).

[2] This court[1] granted the order in the terms it had been sought, resulting in the respondents being evicted from the subject land on 18 February 2016 and the structures they had erected thereon demolished on 22 March 2016.

[3] Subsequent thereto, the respondents, lamenting that they had not been served with the relevant application papers, the ensuing court orders and notice of set down, sought and obtained an order rescinding and setting aside the order of 27 August 2015[2] on the basis that it had been erroneously granted in their absence within the meaning and contemplation of rule 42(1)(a) of the Uniform Rules of Court (the Rules). The resuscitation of the main application attracted the delivery of answering and replying papers by the respective parties, which, in turn, resulted in the respondents eventually taking the initiative, on 10 November 2016, and setting down the main application for hearing on 07 December 2016.

[4] Meanwhile on 23 November 2016, the applicant delivered a notice, purporting to be in terms of rule 41(1)(a) of the Rules, worded:

> "TAKE NOTICE THAT the Applicant hereby withdraws its Application under case number 3303/14 for an order in terms of the Notice of Motion dated 17th November 2014 which application has been set down at the instance of the Respondents for hearing on 8th December 2016.
>
> TAKE NOTICE FURTHER that the **applicant does not tender the costs."** (Emphasis added).

[5] Despite the clear wording of rule 41(1)(a)[3] and heedless of the fact that the main application had already been set down, the applicant neither sought the consent of the respondents nor the leave of the court before delivering the purported notice of withdrawal.

[1] Per Hartle J, on 27 August 2015
[2] Judgment by Nhlangulela DJP delivered on 11 August 2016
[3] Rule 41(1)(a) provides:

> "(1)(a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal an may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party."

[6] On 30 November 2016 the respondents, purporting to act in terms of rule 41(1)(c),[4] notified the applicant of their intention to apply for an order that the applicant be directed to pay the costs of the purportedly withdrawn application. That application attracted resistance from the applicant's camp.

[7] It also came to pass that, during November 2016, the respondents resorted to an interlocutory application seeking, in the main, an order declaring their eviction and the demolition of the structures they occupied inconsistent with the order of 27 August 2015 and therefore unconstitutional.

[8] The parties ended up being embroiled in yet another bout of litigation during which the applicant sought an order declaring –

(a) the respondents' rule 41(1)(c) notice; and

(b) the launch of the interlocutory application referred to above,

irregular steps and setting same aside.

[9] In a judgment delivered on 12 September 2017, the applicant's quest was unsuccessful, with Jolwana AJ (as he then was) pronouncing:

> "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 to declare respondent's notice 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. "

[10] Both the main application and the interlocutory application served before me after Mjali J had ordered, on 15 December 2017, that the applications be heard simultaneously.

[11] Against this background, at the hearing before me, the applicant adopted the stance that the main application, having previously been withdrawn, has fallen by the wayside with the result that the only issue remaining for determination is that of costs. It is the applicant's further view that, absent the main application, there is no

[4] In terms of rule 41(1)(c) if a party withdrawing proceedings does not, in its notice of withdrawal, consent to paying costs, the other party may apply to court on notice for an order of costs

interlocutory application to pronounce on as the proceedings to which the interlocutory application is incidental are no longer in existence. It is not available to the respondents, argued Mr *Bodlani* who appeared for the applicant, to contend that the main application remains extant in circumstances where the respondents' rule 41(1)(c) application is still alive.

[12] It was, in the alternative, contended on behalf of the applicant that, in the event of the court finding that the notice of withdrawal enjoys no status, the court should grant the applicant leave to withdraw the main application.

[13] The respondents, on whose behalf Mr *Matotie* appeared, argued to the contrary, asserting that the applicant's notice of withdrawal is inconsequential as it flies in the face of rule 41(1)(a).

[14] I am of the view that rule 41(1)(a) does not admit of any difficulty in relation to how it should be interpreted and applied. It is trite law that a person who has instituted proceedings is entitled to withdraw such proceedings without the other party's concurrence and without leave of the court at any time before the matter is set down.[5] The corollary of this is that once a matter has been set down for hearing, it is not competent for the party who has instituted such proceedings to withdraw them without either the consent of all the parties or the leave of court. In the absence of such consent or leave, a purported notice of withdrawal invalid.

[15] The question that confronts this court was answered, when applying a similar rule under the Rules governing the then Cape Provincial Division which were promulgated in 1965, in *Karoo Meat Exchange Ltd v Mtwazi,*[6] in the following terms:

> "Mr. *Dison*, who appeared on appeal for respondent, resisted this argument on the ground that Rule 29 (3) had no application. He contended that once the case was set down for hearing – as this one was on 12 August for hearing on 25th August – the filing of a notice of withdrawal did not have an automatic and final effect but left the court with a discretion to proceed with the hearing of the action.
>
> I am persuaded that the argument advanced by Mr. *Dison* is sound. I say this for several reasons. In the first place it seems to me

[5] *Franco Vignazia Enterprises (Pty) Ltd v Berry* 1983 (2) 290 (C) at 295H
[6] 1967 (3) SA 356 (CPD)

> important that the judicial officer should be in control of proceedings in his court. Once the case has been set down for hearing the court has an interest to see that justice is done both in regard to the merits of the dispute and in regard to costs. When the case has progressed to the stage of being set down for hearing, the parties can no longer do as they please. The court cannot be deprived of its control merely by reason of the fact that the plaintiff has served a notice of withdrawal. In the second place it seems to me wrong, in principle, that the plaintiff, having initiated the proceedings and put his opponent to inconvenience, trouble and expense, should, subject only to the payment of costs, at his mere whim have the right to withdraw the action at any time before the hearing. As was pointed out by counsel for the respondent, the defendant may have all his witnesses in attendance, and one or more of these witnesses may not be available in the future. He may have incurred expense not covered by the ordinary award of costs such as the qualifying expenses of an expert witness, or the cost of briefing counsel, or there may be some special circumstance, as in this case, which would call for an award of costs on an attorney and client basis. Or then again the action may be one in which the defendant's reputation has been attacked and where in consequence he is entitled to have his name cleared by a judgment given on the merits after evidence has been heard. These considerations persuade me that it is right and proper that once the stage of set down has been reached in litigation a discretion should vest in the judicial officer as to whether the proceedings should be terminated or not. To hold otherwise, to allow the plaintiff an absolute and not a qualified right to terminate the action at will, may lead to injustice."[7]

[16] In *Protea Assurance Co. Ltd v Gamlase and Others*[8] the following remarks were made:

> "Once the matter had been set down for hearing on 25th May, 1965 it was not competent for the applicants to withdraw such proceedings without the consent of the respondent or, after the promulgation of the new Rules of Court on 15th January, 1965, without leave of the Court. **Such consent was never obtained, nor was such leave ever applied for. It follows therefore that the purported notice of withdrawal on 31st October, 1969 was incompetent and invalid and must be set aside**." (Emphasis added.)

[17] I come to the same conclusion. The applicant seems to have arrogated to itself the right to withdraw the main application after it had been set down, without the consent of the respondents or the leave of court. That stance, which does not find

[7] *Ibid* at 359A-G
[8] 1971(1) SA 464(E) at 465G

support from the Rules, suggests that the court is powerless yet it has a discretion in relation to the future conduct of the proceedings.

[18] It therefore follows that the purported notice of withdrawal was not only incompetent but invalid and falls to be treated as *pro non scripto*.

[19] The existence of the respondents' rule 41(1)(c) notice does not, in my view, alter the position. It cannot serve to lend validity to a notice whose delivery was incompetent. In light of the view I take of the impugned notice of withdrawal, the delivery of the rule 41(1)(c) notice was fruitless and unnecessary. Nor can it be said that the notice advanced the proceedings one step nearer to completion.

[20] No substantive application was resorted to in pursuit of the applicant's quest for leave of this court to withdraw the main application. Mr *Bodlani* contented himself with merely pursuing such application from the bar. That approach is not envisaged in the Rules. It smacks of opportunism and promotes litigation by ambush. In any event, as submitted by Mr *Matotie*, the respondents would be prejudiced were the leave for the withdrawal of the main application to be granted. In light of the rights involved, rights of access to housing and the right not to be deprived of rights to property arbitrarily, it would not be prudent to grant the applicant leave to withdraw the main application.

[20] The question of costs remains to be considered. The respondents have been substantially victorious in their quest to demonstrate that the main application has not been withdrawn. There is no reason why costs should not follow that result.

[21] In the result, the following order is made:

1. *It is declared that the application launched by the applicant against the respondents on 18 November 2014 is still extant.*

2. *It is directed that the application and the related interlocutory application launched by the respondents against the applicant on 15 November 2016 shall be heard simultaneously.*

3. *The Registrar of this Court is hereby directed to enrol the applications for hearing on 27 March 2018.*

4. *The applicant shall pay the costs arising from the delivery of the notice of withdrawal as also the costs of the hearing on 08 February 2018.*

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S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

Counsel for the applicant	:	*A M Bodlani*
Instructed by	:	Zilwa Attorneys MTHATHA
Counsel for the respondents	:	*L Matotie*
Instructed by	:	S R Mhlawuli & Associates MTHATHA
Date heard	:	08 February 2018
Date judgment delivered	:	27 February 2018