



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

CASE NO.: 4978/2024

In the matter between:

VICTORIA VUYOKAZI NDOBENI

1st

Applicant

NONTYANTYAMBO OLPHA MATIWANE

2nd Applicant

QUEEN BOQWANA SOKO

3rd Appellant

and

UMZIMVUBU LOCAL MUNICIPALITY

Respondent

In Re:

UMZIMVUBU LOCAL MUNICIPALITY

Applicant

and

UNKNOWN ILLEGAL INVADERS

1st Respondent

**STATION COMMISSIONER OF MOUNT
FRERE POLICE STATION
NOMVUME ZANOLWAZI MAKAULA**

2nd Respondent

3rd Respondent

JUDGMENT

MHAMBI AJ

[1] This application concerns the rescission of an order granted by this court in favour of the respondent on 17 December 2024. The application is brought in terms of rule 42(1) of the uniform rules of this court. The order of 17 December 2024 is hereinafter referred to as “*the impugned order*”.

[2] The material terms of the impugned order are set out as follows:-

2.1 The first and third respondents and those acting in common cause with them be interdicted and restrained from erecting structures and fencing at the remainder of Erf 3[...], Papanana Location, in the district of Mount Frere.

2.2 The respondents are ordered and directed to demolish the structures built on the piece of land, being a portion of Erf 3[...], Papanana Location, Mount Frere.

2.3 The respondent is ordered to remove fencing on the remainder of Erf 3[...], Papanana Location, Mount Frere, within 10 days from the date of receipt of this order:

2.3.1 In the event the respondents fail to comply with paragraph 3 above within 10 days of service of this order, the applicant is granted leave to demolish the informal structures on the piece of land mentioned above and to remove fencing;

2.3.2 That the first respondent (acting through its members) and the other individual respondents be and are hereby forthwith interdicted and restrained from inciting violence, intimidating, threatening and or unlawfully interfering with the applicant's employees including service providers contracted by the applicant who are not its members and or do not make common cause with them from performing their duties to the applicant or its premises.

2.4 That in the execution of this order, if need be, the Sheriff of this court be assisted by members of the South African Police Service from Mount Frere Police Station under the eight respondents' command, (*sic* **the notice of motion**).

[3] The rescission sought is based on the grounds appearing hereunder:-

[4] The impugned order was sought by the respondent and granted in the absence of the applicants. The applicants averred that the impugned order should be set aside on the grounds that the respondent, “*the municipality*”, was not entitled to institute the proceedings, “**the main proceedings**”, and seeks for an order, as it did, in the absence of the affected parties.

[5] There is a history of litigation between the parties as follows:- This court issued an order under Case No: 5028/2023, which had directed that the dispute concerning Erf 3[...], Mvuzi or Panama location, to be referred to Mediation. The mediation proceedings are still pending. The applicants alleged that the municipality did not disclose the pending mediation proceedings in the main proceedings, because, by that, this court, acting on that nondisclosure, erroneously granted the impugned order.

[6] The applicants contend that they were not cited nor served with the papers of the main application. The impugned order, too, was not served on them. On 19 March 2025, the officials of the Municipality came to the applicants’ homes to execute the impugned order, the effect of which is the demolition of their homes, so contend the applicants.

[7] I need not deal with the merits and demerits of the dispute between the parties relating to the land that is the subject of dispute in the main application and the mediation proceedings. That is the issue to be determined in the main application or the pending mediation proceedings.

[8] The only issue for determination is whether the impugned order was erroneously sought and subsequently erroneously granted, as the applicants alleged. If this court is satisfied on that issue, this application ought to succeed.

[9] The approach to applications, generally, is that applications are not designed to resolve factual disputes between the parties and are decided on common cause facts. Probabilities on onus issues are not amenable to being determined in motion proceedings¹.

[10] As set out in Civil Procedure in the Supreme Court²:

“It is well established under the Plascon Evans rule that where in motion proceedings dispute of facts arise on the affidavits, a final order can be granted only if the facts averred in the applicants’ affidavits, which have been and admitted by the respondents together with facts averred by the latter justified such an order. It may be different if the respondent’s version consists of bald or creditworthy denials, raises fictitious disputes of fact, it is palpably implausible, farfetched or so clearly unattainable that the court is justified in rejecting them merely on the papers.”³

[11] The court has to accept more facts averred by the applicants that were not disputed by the respondent, and the respondent’s version, so far as it was plausible, tenable and credible.⁴

¹ Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd, [1984] ZASCA S1 1984 (3) SA 623 [A] 634-635. National Director of Public Prosecutions v Zuma, 2009 (2) SA 279 (SCA) para [26].

² Harmse (Butterworths) B.6.45.

³ Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd 2017 (2) SA 1 (SCA).

⁴ Airports Company South Africa SOC Ltd v Airports Bookshops (Pty) Ltd t/a Exclusive Books [2016] 4 ALL SA 66 5 (SCA).

[12] This, however, is not the end of the matter as pointed out by Harms: Civil Procedure in the Supreme Court⁵ as follows:-

“It is accordingly generally undesirable to endeavor to decide application upon affidavit where the material facts are in dispute. In such case it is preferable that oral evidence be led to enable the court to see and hear the witness before coming to a conclusion⁶. On the other hand, it is equally undesirable for a court to take all dispute of facts at their face value. If these were done the respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the applicant⁷. In every case the event should examine the alleged disputes of fact and determine whether in truth there is a real issue⁸ of fact that cannot be resolved without the aid of oral evidence⁹.

Whether a factual dispute exists is not a discretionary decision, it is a question of fact and a jurisdictional pre-requisite for the exercise of the discretion given by the rule¹⁰.

It is not a question of any difference of character between the various kinds of claims

⁵ Butterworths B.6 45

⁶ Frank v Ohlsson's Cape Breweries Ltd 1924 AD 289 @ 294, Plascon – Evans 634 – 639.

⁷ Peterson v Cuthbert and CO. Ltd 1945 AD 420 at 428. A hollow denial or detailed but fanciful and untenable version does not create a dispute of fact: Truth verification Centre CC, 1998 PSE Truth Detection CC, 1998 (2) SA 689 (W) 69D Rosen V Eskon [2000] 3 ALL SA 23 (W) 39, RIPOLL DAUSA v Middleton NO [2005] 2 ALL SA 83 (C), 2005 (3) SA 141 (C).

⁸ Rothman v Curr Vivier Inc, 1997 (4) SA 540 (C) 551, Peterson v Cuthbert and Co. Ltd Supra 429, President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA (CC) paras 234- 239. It has various been called a “genuine” or *bona fide*” dispute but the meanings are the same, whether the converse of “*a real dispute*” is a “*mala fide*” dispute of a fact is suggested in Von Steed v Von Steed 1984 (2) SA 203 (T) is open to doubt. Speculation do not create a real dispute of fact: Standard Credit Corporation Ltd v Smyth 1991 (3) SA 179 (W).

⁹ Peterson v Cuthbert and Co. Ltd Supra 428, Administrator, Transvaal v Theletsane [1990] ZASCA 156, 1991 (2) SA 192 (A)

¹⁰ Ismael v Durban City Council, 1973 (2) SA 362 (H) 374 A –B. Dupreez v NWK Ltd [2005] 3 ALL SA 551 (B).

being enforced, but a question of the proper method of determining in each case the facts upon which any claim depends.”¹¹

[13] I now turn to answer the question of whether the impugned order was erroneously sought and subsequently erroneously granted.

[14] In general terms, a judgment is erroneously granted if there existed, at the time it was granted, a fact which the judge was unaware, which would have induced the judge, if he had been aware thereof, not to grant the order.¹²

[15] The result is that the order was thus erroneously sought and erroneously granted, as envisaged in rule 42 (1) (a).

[16] In substance, rule 42 endows the applicant with the duty to prove two things: first that an order was erroneously sought; second, that an order was erroneously granted in its absence. The court will then exercise a judicial discretion of whether to rescind or not its order. In my assessment, rule 42 requires the court to do a double-edged consideration; other than rule 42 itself, the court has to consider the common law requirements for the grant of a rescission. The court has to be satisfied that the applicant has proffered a *bona fide* explanation for its absence in court when the impugned order or judgment was granted. The applicant need to proffer a genuine explanation for its absence when the impugned order was granted.

¹¹ Room Hire Co Pty Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) 1162; Ter Breek v United Resources CC 1997 (3) SA 315 (C) 329 D-E.

¹² Naidoo 2012 (1) SA 143 152 A – 153 A.

[17] The kind of discretion the court needs to exercise was clearly explained by the Constitutional Court in *Zuma v State Capture Commission*¹³:-

“{Once} an applicant has met the requirements of rescission; a court is merely endowed with a discretion to rescind its order. The precise wording of the rule, after all, postulates that a court “**may**”, not “**must**”, rescind or vary its order, in the rule is merely an “empowering section and does not compel the court to set aside or rescind anything. This discretion must be exercised judicially.”¹⁴

[18] It is axiomatic to deal with the consequences of: **first**, the applicants not being cited as a party or parties in the main application proceedings when the impugned order was granted; **second**, the applicants not served with the impugned order, which was enforced and executed in a manner materially affecting their rights. This requires a thorough scrutiny of the circumstances preceding the grant of the impugned order.

[19] In the proceedings of the main application, the 1st respondent is described as “*unknown illegal invaders*”. The question is whether that description is adequate for the grant of a competent order.

[20] The question is answered by reference to authorities referred to by Mbenenge JP, in *Nontombi Gcaba and Others v Ntabankulu Local Municipality and Others*.

¹³ *Zuma v Secretary of the Judicial Commission of Inquiry into allegations of State Capture*, 2021 (11) BCLR 1263 (CC).

¹⁴ *Supra* fn 13 para 53.

[21] Mbenenge JP referred to remarks by Conradie J in *Kayamnandi Town Committee v Mkhweselo and Others*¹⁵, apply as follows:-

- “(a) An order or judgment erroneously granted in the absence of any party affected thereby;
- (b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission.”

[22] Whereafter he referred to what Budlender AJ said in *Mpaka*¹⁶:-

“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....”

[23] Notably, in the main application proceedings, not only that the respondent was not properly described, there was no proper description of the erven concerned, I say this because, at that time, the Municipality was aware that the relevant erven, or property concerned is erf 3[...], there was no proper description of the place or area affected by that erven at that time it falls under Mvuzi or Papanana Location, within its area of jurisdiction.

¹⁵ Unreported judgment Nontombi Gcaba & others v Ntabankulu Local Municipality & others (2760/2019) [2021] ZAECHMHC 17, para 12, 14

¹⁶ *Mpaka and others v King Sabatha Dalindyebo Municipality and Others* [2017] ZAECHMHC 24 (11 July 2017) paras 13 – 15.

It was equally undesirable for the respondent not to cite the correct description of the property concerned in its notice of motion and only do so in the impugned order.

[24] Consequently, I conclude that at the time of instituting the main application proceedings, the municipality had all the facts necessary for a proper description of the 1st respondent in the main application; their description as “*unknown illegal invaders*” is inadequate, with the result that the impugned order was incompetent.

[25] It is my view that the order seeking for the demolition of a structure is drastic in nature, in circumstances where the structure affected by the demolition order is used as a “*home*” to house people, the demolition order has the same effect as the eviction order. It has an effect to render the occupants thereof homeless.

[26] The court should take an active role in adjudicating a matter involving demolition. The court must have considerations of justice and equity. In doing so, the court should consider adequate information and facts relating to whether or not, the structure to be demolished is a “*home*” to individual or group of persons whether, after the grant of a demolition order will those individuals or group of persons have an alternative accommodation, and also their personal circumstances, for example, whether there are disabled persons or children living in the structure to be demolished. It is only after consideration of these factors that demolishment order should be granted.

[27] In relevant circumstances, courts adjudicating over demolition proceedings should adopt the approach adopted in *Changing Tides*¹⁷, the SCA provided some guidance:-

“Where [unlawful occupiers are not represented, courts may consider issuing a rule nisi and causing it to be served on the occupiers (and if it is not present, the local authority). Together with a suitably worded notice explaining the right to temporary emergency accommodation, and inviting them to come to court to express their views on that issue at least”.

[28] I am mindful that the court in *Changing Tides* dealt with eviction, however, I find that consideration applicable to applicant seeking for demolition order.

[29] The bar to these considerations should be higher when it is the municipality seeking to demolish structures used as “home” by its dwellers. This is because, the municipality has a duty to give effect to the Constitutional right to adequate housing and accommodation to those dwelling within its area of jurisdiction if granting the demolition order will render homeless dwellers thereon, the municipality should advise the court of whether or not it has alternative or emergency accommodation, this aspect should not be left in the vacuum.

[30] In this case, the court when granting the impugned order was not aware of essential issues of fact. (i) The court was not aware that this court had already granted an order that the dispute relating to the land in question should be dealt with in mediation, as the court has ordered. (ii) The court was not aware that the applicants are the dwellers of the structures to be demolished, and that such a demolition will render them homeless. (iii) The court was not aware that the applicants were not served with the papers of the main proceedings despite the respondent being aware of their description, and that the impugned order was not served on them.

[31] The impugned order was thus erroneously granted in the absence, within the meaning of rule 42.

¹⁷ City of Johannesburg v Changing Tides deal 74 (Pty) Ltd, [2012] ZASCA 116, 2012 (6) SA 294 (SCA) see also Port Elizabeth Municipality V various Occupiers [2004] [2004] ZACC 7, 2005 (1) SA 217 (CC)

[32] I disagree with the respondent's submission that the issue relating to the grant of this rescission is mute on the basis that the structure are already demolished, an order or judgment stands valid and binding until it is set aside. That therefore means the grant of the rescission of the impugned order is a live issue.

Consequently, this application should succeed; I see no basis why I should depart from the common principle that costs follow the result.

Order

[26] In the result the following order is made:-

1. The order granted by this court on 17 December 2024 is rescinded and is hereby set aside.
2. The respondent is directed to pay costs of this application on scale "B".

M MHAMBI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES:

Attorney for the Applicant	:	Mr M Notyesi
Instructed by	:	Mvuzo Notyesi Inc.

MTHATHA

Counsel for the Respondent : Adv. N. Zilwa
Instructed by : P. Conjwa & Associates

MTHATHA

Heard on : 04 December 2025

Judgment Delivered on : 28 January 2026

DISCLAIMER : This judgment has been circulated
to the parties legal
representatives email addresses
the date of delivery is
deemed to be 28 January 2026 and
the time of delivery
is deemed to be 16h00