IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED

19 April 2023

DATE SIGNATURE

CASE NUMBER: 60177/2020

In the matter between:

VIRGINIA MOSHIDI MOAGI	FIRST APPLICANT
NTSHETSE KGOMO MOAGI	SECOND APPLICANT
NTLHOBOGI MMASEPHOMA MOAGI	THIRD APPLICANT
ITUMELENG MOAGI	FOURTH APPLICANT
And	
THE DEPARTMENT OF EDUCATION & TRAINING (North West Province)	FIRST RESPONDENT
THE SCHOOL GOVERNING BODY OF ENNIS THABONG PRIMARY SCHOOL	SECOND RESPONDENT

SUMMARY: *Notice of Motion- Two applications- Main application is in terms of Rule 6(12) (c) of the Uniform Rules- The proper approach to an application for reconsideration- Whether an application for reconsideration can be utilized by party who was given proper notice prior to the granting of the order. Counter application is in terms of Rule 30(1) of the Uniform Rules- Irregular step- The test for an irregular step.*

ORDER

HELD: The main application for reconsideration of the orders granted on 23 November 2020 and 18 March 2021 is dismissed with costs.
HELD: The counter application to declare the main application as an irregular step is dismissed.
HELD: Applicants are ordered to pay costs on the main application on party and party scale, one paying the others absolved.

JUDGMENT

MNCUBE, AJ:

INTRODUCTION:

[1] There are two opposed applications before this court. The main application is in terms of Rule 6 (12) (c) of the Uniform Rules in which the applicants are seeking the following relief-

'*1. That the order of Justice De Vos, dated 23 November 2020, under the above case number be reconsidered in terms of Rule 6 (12) (c) as follows:*

1.1 *That paragraph 2 specifically paragraphs 2.1 to 2.10 thereof be removed (deleted) therefrom.*

2. That the following order is made, in place and instead of the order referred to in paragraph 1 above:

2.1 That the Applicants' (the Respondents in the present application) non-compliance with the Rules of the of the above Honourable Court, concerning service and the time limits, be condoned and that this application be heard as one of semi- urgency in terms of the provisions of Rule 6 (12) of the Uniform Rules of Court.

3. That the reconsideration of such order be deemed to have taken place at the date of the initial order being granted.

4. Costs of this application for reconsideration on a party and party scale and only in the event of opposition by the Respondent so opposing the relief sought.

5. Further and/or alternative relief.'

[2] The respondents filed a counter application in terms of Rule 30(1) seeking the following orders-

'1. Declaring that the application in terms of Rules 6(12) (c) instituted on behalf of the applicants, for the reconsideration of the orders of Justice De Vos of 23 November 2020 and Justice Davis of 18 March 2021 constitutes an irregular step in terms of Rule 30.

2. Setting aside the application in terms of Rule 6 (12) (c) instituted on behalf of the Applicants, for reconsideration of the orders of justice De Vos of 23 November 2020 and justice Davis of 18 March 2021.

3. Directing the Applicants to pay for the application on a scale as between attorney and own client.

4. Granting the Respondents further and/or further relief.'

[3] The applicants are represented by Adv. Masilo and the respondents are represented by Adv. Arcangeli. For ease of reference, the parties in both applications are referred to as cited in the main application. The main application and the counter application are two distinct applications and I propose to deal with both applications separately.

FACTUAL BACKGROUND:

[4] There is a long history between the parties which can be traced to 2012 and it is necessary to set out the full background. In 1979 the applicant and her husband acquired the life time occupancy of a house which was built on the Plot 485JQ/252 Rietfontein. This plot was offered by a certain Sale family for the purpose of building a school for the benefit of the farming community following the closure of a school which had been administered by the Presbyterian Church. The Sale family built a school named Ennis Thabong Primary School as well as a house in the same premises. After the school was built it was managed by the Sale family and a house was occupied the applicant and her husband. On 11 September 2012 the applicant was approached by one Ms Lydia Masolo who was then the head mistress of the school, one Mr Zachariah Boikhutso who was the area manager and some members of the School Governing Body (SGB). The purpose of the visit was to ask the applicant to pay rent for occupying the house. The applicant's ailing husband refused to sign the lease agreement which was the start of the issues between the parties with allegations and counter-allegations resulting in litigations. The main issue was the ownership of the house. The respondents obtained an interdict against the applicants which settled the dispute.

[5] Then during the period 15 March 2019 to 29 September 2019 the respondents constructed toilets which reignited the issues once more and resulted in a court order issued by De Vos J on 23 November 2020. The court order interdicted the applicants, among others, from communicating in any manner with learners, staff, SGB, the principal or tenants in the Ennis Thabong Primary School premises and from interfering with the contractors and or service providers of the school. On 18 March 2021 Davis J issued another order in which he found the applicants in contempt of the order dated 23 November 2020 and sentenced each applicant to thirty days imprisonment for contempt of court. The sentence of imprisonment was conditionally suspended for twelve months.

(i) Main application:

ISSUE FOR DETERMINATION:

[6] The issue for determination in respect of the main application are whether or not the orders granted on 23 November 2020 and 18 March 2021 should be reconsidered.

SUMMARY OF EVIDENCE:

[7] The first applicant avers in the founding affidavit that the facts are within her personal knowledge true and correct. She sets out the history the issues between the parties and avers that no further litigious process was instituted after the granting of the order dated 23 November 2020 (the first order) and the order dated 18 March 2021 (the second order). However during the period of 15 March 2019 to 29 September 2020 the respondents constructed toilets on the school which affected the applicant's use, enjoyment and occupation of the property. She avers that the applicants incurred large bills by maintaining the bore hole at their own expense which was supplying the school with water.

[8] The first applicant addresses in her founding affidavit each of the orders that were granted on 23 November 2020 as follows-

[8.1] In respect to the order interdicting the applicants from entering the Ennis Thabong Primary School and from communicating with the learners, staff, SGB, principal, she avers that this order is not practically achievable. She states that they are using the same entrance for entry and exit the premises as the school and they cannot restrict communication.

[8.2] In respect to the order interdicting the harassment of the learners at Ennis Thabong Primary School when they use the lavatories, she avers that the lavatories situated next to the house have not been used in the last four years.

[8.3] In respect of the order interdicting harassment or interference with the educators during lessons at Ennis Thabong Primary School, she avers that it was the respondents who continually come to the Moagi resident and lists the relevant instances.

[8.4] In respect to the order interdicting the harassment, interference and or insulting the tenants of the Ennis Thabong Primary School, she avers that it was the tenants who are harassing the applicants.

[8.5] In respect of the order interdicting tampering with and or locking or changing the locks to the electricity metre box to the Ennis Thabong Primary School she avers that electricity supply to the house was switched off and the applicants were left without electricity. She states that the matter was reported to the police.

[8.6] In respect to the order interdicting tampering with and o interfering with the water pump to the Ennis Thabong Primary School, she sets out the instances in which the water pump was damaged at the instance of the custodian of the first respondent.

[8.7] In respect of the order interdicting tampering with and or interference with the contractors and or service providers of Ennis Thabong Primary School, she avers that the contractors are the ones coming to the house to ask for help.

[8.8] In respect to the order interdicting blocking access in any manner into Ennis Thabong Primary School, she avers that the gate gets closed by the school management which causes an inconvenience to the applicants. She avers further that this was an attempt to trap the applicants who may be deemed to have contravened the court order.

[8.9] In respect to the order interdicting tampering with and or interference with the donors of Ennis Thabong Primary School, she denies any interference with the donors or sponsors of the school.

[9] The first applicant avers that the orders effectively deny the applicants access to adequate supply of water and electricity to the premises. She states that the fourth order is to use the Court to assist the SGB to intimidate the applicants to vacate the premises and for these reasons the orders should be reconsidered. She avers that this (Rule 6 (12) (c)) approach provides due and proper respect for the orders of the Court, provides a safeguard to the rights of the learners, staff, educators. She alleges that the parents are lobbied to threaten, harass by means of threats to cut off electricity.

[10] Without the leave of the Court, the first applicant filed a supplementary affidavit and requests that this Court condones the filing of the supplementary affidavit. In the supplementary affidavit, the first applicant avers that the Moagi family appointed Advocate Tuke Tsepetsi who presented himself as an independent advocate. She states that at the time she was unaware that advocates do not deal directly with the members of the public without a trust account. She avers that the orders were granted against the applicants due to professional negligent of Adv. Tsepetsi who was given all the documents to draft opposing affidavits and to appear in court. She states that it was after the failure by Adv. Tsepetsi to execute the applicants' instructions that they became aware that Adv. Tsepetsi was not an admitted advocate with the LPC which prompted the appointment of the current legal representative.

[11] The second applicant avers in the confirmatory affidavit that the contents of the affidavit falls within his personal knowledge and are true and correct. He avers that he read the affidavit by Moshidi Virginia Moagi and confirms the correctness as it relates to him personally and to the other applicants.

[12] The third applicant avers in the confirmatory affidavit that the contents of the affidavit falls within his personal knowledge and are true and correct. He avers that he read the affidavit by Moshidi Virginia Moagi and confirms the correctness as it relates to him personally and to the other applicants.

[13] The fourth applicant avers in the confirmatory affidavit that the contents of the affidavit falls within his personal knowledge and are true and correct. He avers that he read the affidavit by Moshidi Virginia Moagi and confirms the correctness as it relates to him personally and to the other applicants.

THE APPLICABLE LEGAL PRINCIPLES:

[14] Rule 6 (12) of the Uniform Rules provides-

'(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules)as to it seems meet.

(b) In every affidavit or petition filed in support of any application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims he could not be afforded substantial redress at a hearing in due course.
(c) A person against whom an order was in his absence in an urgent application may by notice set down the matter for reconsideration of the order.'

[15] The jurisdictional facts establishing the discretion provided for are- (a) the granting of an order in the absence of a party affected thereby; and (b) by way of an urgent proceeding as intended under Rule 6 (12). The court exercises a wide discretion to redress injustices emanating from an order granted on urgent basis in the absence of the party affected thereby. See ***Sheriff North East v Flink and Another [2005] 3 All SA 492(T)***at 498. A reconsideration as envisaged by Rule 6 (12) (c) may involve a dismissal of the order granted ex parte or an amendment of the order. In an application to reconsider the order, the whole matter that led to the making of the order is considered afresh or anew. In such an application, the Court must only have regard to the application that led to the ex parte order.[1] The onus is on the applicant to justify the granting of the order.

[16] In ***Oosthuizen v Mijs 2009(6) SA 266 (W)*** at 267H-I the purpose of Rule 6 (12) (c) was held to afford an aggrieved party a mechanism to revisit and redress imbalances and the injustices flowing from an urgent application that was granted in his absence.

[17] In ***Competition Commission v Wilmar Continental Edibles Oils and Fats (Pty) Ltd and Others 2020 (4) SA 527 (KZP)*** para [17] it was held 'In terms of rule 6(12) (c) the respondents are entitled to have an order reconsidered on the presence of two jurisdictional facts: that the main application was heard as a matter of urgency; and that the first order was granted in their absence. The dominant purpose of the Uniform Rule is to afford to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from an order granted as a matter of urgency in his absence.'

[1] See *Ultimate Sports Nutrition (Pty) Ltd v Jurie Bezuidenhout, case 62515/2020 ZAGPPHC* (8 December 2020) para [13].

[18] The second order dated 18 March 2021 involves contempt. The contempt of Court is an issue between the Court and the party who has not complied with a mandatory order of Court. It is trite that an applicant who alleges contempt of court must establish the following –

(a) An order was granted against the alleged contemnor;

(b) The alleged contemnor was served with the order or had knowledge of the order;

(c) The alleged contemnor failed to comply with the order.

Once these elements are established, wilfulness and mala fide are presumed. The alleged contemnor bears the evidential burden to establish a reasonable doubt and the failure to establish such reasonable doubt, then contempt is established. See ***Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others 2021 (5) SA 327 (CC)*** para [37]. Cameron JA summarised the law on contempt of Court in ***Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)*** para [42] as follows-

(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such applications is not an “accused person”, but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order, service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.

(d) But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

(e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.

SUBMISSIONS:

[19] The main contention on behalf of the applicants is that there is merit to the application for reconsideration on the basis that the orders dated 23 November 2020 and 18 March 2021 were granted in the absence of the applicants. Counsel for the applicants argues that this court should have regard to the dictum in ***Natal Joint Municipal Pension Fund v Endumeni***

Municipal 2012 (4) SA 593 (SCA)[2] in relation to the correct interpretation of the Rule 6 (12) (c) which favours the present application. The submission further is that the respondent's ground that the application for consideration should not be granted on the basis that Rule 6 (12) (c) caters to applications granted ex parte is dispelled by Rule 6 (12) (8). The contention is that the applicants acted within the ambit of Rule 6 (12) (c) on the basis that all the requirements have been met. Counsel argues that the respondents submission that following the striking off the roll of the rescission application the applicants were getting a second bite of the cherry is nonsensical. Lastly it is submitted that there is no time provided within which to bring a Rule 6 (12) (c) application.

[20] Counsel for the respondents submits that the application for reconsideration in terms of Rule 6 (12) (c) constitutes an irregular step as it was filed after the orders dated 23 November 2020 and 18 March 2021 were served on the applicants. The argument is that the application for reconsideration is constitutes an irregular step as both orders were not obtained ex parte. Counsel contends that the procedure is not available to the applicants after the lapse of time after the orders were granted and served on the applicants. The contention is that the application for reconsideration is an abuse of process and prejudicial to the respondents. Counsel refers to ***Gardiner v Survey Engineering (Pty) Ltd 1993 (3) SA 549 (SE)*** at 551 C where it was held 'Proof of prejudice is a prerequisite to the success of an application in terms of Rule 30'. Counsel then refers to the matter of ***Oosthuizen*** and contends that Rule 6 (12 (c) was specifically designed to deal with instances wherein orders were obtained in an ex parte basis without prior notice to the other party and makes reference to ***Molaudzi v S 2015 (2) SACR 341 (CC).*** Counsel argues that the phrase 'in the absence of a party' in Rule 6 (12 (c) denotes ex parte applications and maintains that the application constitute an irregular step.

EVALUATION:

[21] As a starting point, I deem it prudent to decide upon the request made by the first applicant for condonation for the filing of the supplementary affidavit. It is trite that there are normally three sets of affidavits in motion proceedings, but the Court exercises discretion to

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[2]Para 18 it was held *'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. . . The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'*

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allow the filing of further affidavits. It is further trite that an applicant must make out his or her case in the founding affidavit and stands or falls by the founding affidavit.[3] The party that seeks the indulgence from the Court to file further affidavits must provide an explanation to the satisfaction of the Court that it was not malicious in filing a further affidavit. In ***Standard Bank of SA v Sewpersadh and Another 2005 (4) SA 148 (C)*** it was held that for a court to exercise its discretion in favour of a litigant who applies for leave to introduce an affidavit outside the rules, such litigant must put forward special circumstances explaining its failure to deal with the allegations within the parameters of the applicable rules. It must be remembered that the proper function of a Court is to try disputes between litigants who have real grievances and to see to it that justice is done.[4] On the facts in this matter, the respondents have not noted any objection to the filing of the supplementary affidavit. I am of the view that it will serve the interest of justice to grant the request to condone the filing of the supplementary affidavit as this will not cause prejudice to the respondents and more importantly it will lead to the full ventilation of issues.[5] Leave to file supplementary affidavit as requested is granted.

[22] Regarding the merits of the main application, there is firstly a legal argument between the parties whether the application in terms of Rule 6 (12) (c) constitutes a proper procedure. On the one hand, the contention made on behalf of the applicants is that the use of this procedure is correct when applying the correct principles of interpretation as highlighted in the ***Endumeni*** case. On the other hand the submission on behalf of the respondents is that the application is incorrect on the basis that notice was given to the applicants consequently the application constitutes an irregular step.

[23] It is unfortunate though understandable that the respondents opted to file a counter application in terms of Rule 30 (1) on the contention that the main application constitutes an irregular step rather than dealing with the issues that are raised by the applicants. This has the unintended effect of resolving the issue on the main application based on the founding affidavits deposed to by Mr Mohlala in the original applications giving rise to the orders dated 23 November 2020 and 18 March 2021 as well as to the legal arguments made in the current application. There are two pertinent questions to be asked when determining whether the current application for reconsideration has been corrected lodged under Rule 6 (12) (c) –

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[3] See *Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635H-636D.*

[4] See *Khunou & Others v Fihrer & Son 1982 (3) SA (WLD).*

[5] See *Four Tower Investments (Pty) Ltd v Andre's Motors 2005(3) SA 39 (N)* para [15] where it was held 'the function of the court is, of course, to resolve disputes between litigating parties, and justice can only be done if the real issues are defined in the pleadings and ventilated in court.'

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(a) Were the orders dated 23 November 2020 and 18 March 2021 made by way of an urgent application? The answer is yes.

(b) Were the applicants present at the relevant times when the orders were granted? The answer is no.

[24] Applying the ***Endumeni*** case principles of interpretation on the facts, I am persuaded that the main crux envisaged by Rule 6(12) (c) is that an order must have been made in the absence of a party. The submission by the respondent's Counsel that because notice was given to the applicants in this matter therefore Rule 6(12(c) does not apply, is in my view, inconsistent with the context of the Rule. It follows that the contention by the Counsel for the respondents that the phrase 'in the absence of the party' in rule 6 (12 (c) denotes an ex parte application is incorrect. I hold the view that as long as an order is granted in the absence of a party, reconsideration in terms of Rule 6 (12) (c) is a correct procedure. I am therefore persuaded that Rule 6 (12) (c) finds application in this matter in order to redress imbalances and injustices flowing from the order. Allowing reconsideration application safeguards the rights of access to court as envisaged by section 34 of the Constitution of the Republic of SA, 1996 and the right to have issues ventilated. One important factor in this matter which shifts the scales in favour of the applicants is that the order dated 23 November 2020, appears to be a final order which was granted without the benefit of the applicants' arguments. Reliance by the Counsel for the respondents to the matter ***of Molaudzi v S 2015 (2) SACR 341 (CC)*** is with respect misplaced.[6] It cannot be said that the doctrine of res judicata finds application on the facts of this matter for the simple reason that Rule 6 (12) (c) gives a party the right to set the matter for reconsideration. I find the contention that there is no time period that is specifically set within which to lodge an application for reconsideration persuasive. The lapse of time which the respondents rely upon as a ground against the application for reconsideration is without merit. It follows that the use of Rule 6 (12) (c) in main application is correct.

[25] The following facts are common cause-

[25.1] On 16 November 2020 the applicants were made aware that an application will be made for an interdict against them which was to be heard on 23 November 2020.

[25.2] The applicants did not appear in court on 23 November 2020 and an order was granted in their absence by De Vos J which order is the subject of this application for reconsideration.

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[6] *Molaudzi* was dealing with the doctrine of res judicata.

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[25.3] On 24 November 2020 the applicants were served with the order which was granted by De Vos, J.

[25.4] On 4 March 2021 the applicants were made aware that an application will be made on 18 March 2021 and failed to file opposing affidavits.

[25.5] On 18 March 2021 the applicants failed to appear in court and an order was granted against them by Davis, J which was served on them.

[25.6] On 15 April 2021 under case number 19026/21 the applicants served on the respondents notice of an application for rescission of the order granted by De Vos J dated 23 November 2020 which was set down on 28 April 2021.

[25.7] On 26 April 2021 the respondents filed answering affidavit in reaction to the rescission application.

[25.8] On 28 April 2021 the applicants failed to appear in court and the rescission application was struck off with costs by Van Der Schyff, J.

[26] In the original application, the respondents approached this Court seeking an interdict and relied on the founding affidavit deposed to by Johannes Nkhono Mohlala. The requirements for granting of an interdict are trite.[7] In ***Holtz v University of Cape Town 2017 (2) SA 485 (SCA)*** it was held ‘This understanding of the nature and purpose of an interdict is rooted in constitutional principles. Section 34 of the Constitution guarantees access to courts or where appropriate to some other independent or impartial tribunal for the resolution of all disputes capable of being resolved by the application of law. The Constitutional Court has described the right as being of cardinal importance and ‘foundational to the stability of an orderly society’ as it ‘ensures the peaceful, regulated and institutionalized mechanisms to resolve disputes without resorting to self-help’. There are factual disputes in the matter in relation to what transpired giving rise to the orders. As trite, the **Plascon- Evans** rule finds application.[8]

(a) Clear Right:

[7]See *Liberty Group Ltd and Others v Mall Space Management CC 2020 (1) SA 30 (SCA*) para [22].

[8] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623(A*) at 634E to 635C which principle provides that an applicant who seeks final relief using motion proceedings must ,in the event of a dispute, accept the version set out by the opponent unless the opponent’s allegations in the opinion of the Court are not bona fide disputes of facts or are far-fetched or untenable to the extent that the Court is justified in rejecting the allegations on the papers. In motion proceedings, a real dispute of fact only exists where the Court is satisfied that the party who purports to raise it has in the affidavit seriously and unambiguously addressed the fact so disputed. See *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)* para13. See *Malan v City of Cape Town 2014 (6) SA 315 (CC)* para 73.

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[27] Mr Mohlala in his founding affidavit in the original application made the averment based on the surveyor's report that '*The six-room house in question also falls on the portion 244 which according to the Title Deed provided belongs to Government.'* The first applicant does not specifically deal with this averment, save to state in her founding affidavit '*The house was never mean to be the School Head Master's house and the family had an undisturbed occupation for almost 35 years and this even happened after our retirement.'* The first applicant has also not dealt with the averment made by Mr Mohlala that the applicants constructed a steel cage around the water pump for the borehole from which the respondent also get water. Having assessed the facts holistically, I am satisfied that the respondents have proved on a balance of probabilities that they have a clear right in terms of a substantive law.

[28] The applicants failed to deal with the averments made by Mr Mohlala who alleges that the applicants continuously violated the rights of the staff, educators, and learners at Ennis Thabong Primary School. The applicants have failed to demonstrate that the respondents have no clear rights. It is clear from the averments made by the first applicant that the respondents in the main approach the applicants in order to address a specific issue that would have arisen which affected the respondents. For example, she states *'**31 January 2020**- Mr Joel (the gardener) came through to the house instructing Mrs M.V. Moagi to open the water pump. **29 February 2020-** . .. He approached Mrs M.V. Moagi enquiring as to why there is still no water on site. . . **29 March 2020**- on this date the Moagi Family had a knock on their front door and it was Joel (the gardener) who explained, as being sent by Brian Ncube, to check if there is water. . **26 May 2020** (Tuesday)- during the morning Ms Tiny Nkadimeng and Mr Brian Ncube came to knock at the residence of the Moagi Family to request water to be pumped. .* " The first applicant's founding affidavit is filled with many examples of the engagements she and her family have had with the respondents or people acting for the respondents which on a balance of probabilities show the attempts made by the respondents to seek address on their rights.

[29] In addition, there are numerous innuendoes in the first applicant's founding affidavit in an attempt to put the blame on the respondents. For example she states '*Ms M.I & N.M. Moagi quickly went outside to check what was happening and immediately observed a Quantum Kombie next to the electricity meter box after which we walked towards that direction and saw Mr Brian Ncube accessing the Qunatum Kombie and drove off at a high speed… There was an incident where the Moagi's copper cable was chopped by the gentlemen wo were redirecting the original borehole pumping system*..' Yet in all of these, other than a letter written on the

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applicants' behalf, no criminal actions were taken against the alleged perpetrators. I am not convinced by the allegations levelled against the respondents. It follows that the respondent has proved this requirement on a balance of probabilities.

(b) An Injury actually committed or reasonably apprehended

[30] In the founding affidavit by Mr Mohlala in the original application, he avers that '*The Principal approached the First Respondent to request them to switch on the water pump, the Second Respondent informed the principal that she has no right to come and make demands, does she expect her mother to leave her laundry chores to go switch on water for them. They will go switch on water for the school at their will'.* The veracity of this averment is weighed against the version of the applicants. In her founding affidavit, the first applicant avers *'Also, the Respondents, being the applicants in this application, incurred large bills in respect of the property by maintaining the bore hole at their expense which bore hole was also supplying the school with water. The School has never and have failed to service the bore hole.'* In addition to this averment, the first applicant agreed with the averment that the principal approached her to open the water pump. Her version is that the principal was instructive and arrogant. She avers *'She left and returned a few hours later, insisting with an arrogant instructive tone for the water to be pumped, in pursuance whereof Miss M.I. Moagi responded by saying that she need not be instructive and that she must refrain from commanding Mrs M. V. Moagi to go open the water pump.'* I am persuaded that the version by the respondents is probable in that the applicants interfered with their access to water. What is clear is that the both the applicants and the respondents accessed water from the same borehole. The version by the respondents that they suffered injury is more probable than the applicants.

[31] The applicants' averments that they are the ones allegedly suffering is not persuasive. The first applicant avers '*It actually the other way round, the tenants are the ones who harass, intermediate and stalk the Moagi Family. The gardener, Joel, is a 'mandated spy' and who is always on the look-out of anything and everything about the Moagi Family and their daily moves and activities within the yard.'* This averment points towards allegation of harassment yet surprisingly, it is the respondents who seek and obtain legal recourse in a form of an order. It follows that the respondents have proved this requirement on a balance of probabilities.

(c) The Absence of other available remedies:

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[32] An applicant for a final interdict is required to allege and prove on a balance of probabilities that there is no alternative remedy. On the facts, Mr Mohlala avers in the founding affidavit in the original application *'The Applicants has engaged with the Respondent on several occasions to refrain from such unlawful conduct. The Applicants have approached the Brits Magistrate Court wherein the First to Fourth Respondents were advised to cooperate with the school as they are residing in a house that is within school premises, The Applicants have on numerous occasions sought the assistance of the SAPS Hartebeespoort to no avail.*' It is clear that the respondents were left without legal remedies and I am satisfied that the respondents have proved this requirement on a balance of probabilities.

[33] In the second application lodged by the respondents which gave rise to the order dated 18 March 2021, once more Mr Mohlala deposed to a founding affidavit and avers that after the order dated 23 November 2020, the applicants breached the following orders-

(a) Tampering with and /or interfering with the water pump and connections for water to the Ennis Thabong Primary School;

(b) Blocking access in any manner whatsoever into or out of and /or locking gates to the Ennis Thabong Primary School.

Mr Mohlala substantiated the allegation of the contravention of the court order dated 23 November 2020 as follows 'the Respondents disconnected

The applicants may not have been at court when the order dated 23 November 2020 was granted, however I accept that the said order was duly served upon them by the Sheriff. The first applicant fails to deal substantially with the allegations that there was a breach of the court order which resulted in the order dated 18 March 2021 to be issued. The applicants do not address the averment that they (i.e. applicants) poured concrete on the T-connection which prevented the constructor from connecting water to the school amounts to interfering with the water pump. I accept that this averment is not challenged thus admitted. The only inference I can draw is that such action was deliberate and fell within the ambit of conduct which the Court order was interdicting.

[34] The first applicant makes the following averment *'Instead later in the day some staff members Patrick Morathi, Tumi Marivhati and Constable Mahlaule used their cars to blockage the drive way for the 4th respondent to pass to drive to her house within the yard (plot 485 JQ/252) residence it's when the car was confiscated after Officer Mulondo denied the 4th respondent to get into her car saying that he is doing his job, then the 4th respondents car*

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confiscated unlawfully so without any apparent reason as to why'. This is in response to the allegation that the fourth applicant blocked the entrance to the school with the motor vehicle which caused the respondent to get a tow truck amounts to blocking the gate to the school. The applicants' version on the allegations of contempt which gave rise to the order dated 18 March 2021 is highly improbable. The only inference is that the act of blocking the entrance to the school was done deliberately. This behaviour fell within the ambit of conduct that was interdicted. I am persuaded that the breach of the court order dated 18 March 2021 was deliberate and mala fide. It follows that all of the elements for contempt of court have been proved beyond reasonable doubt.

CONCLUSION:

[35] It is recognised that a final interdict is a drastic measure. I am not persuaded by the contention that the application lodged in terms of Rule 6 (12) (c) constitutes an abuse of process and therefore prejudicial to the respondents. The Courts awarded costs in favour of the respondents in all the applications as can be seen from the history of the matter. I am however persuaded that the respondents have demonstrated that they do not have other legal remedies to obtain redress. The averments made by the applicants why the orders stand to be reconsidered are not persuasive. On the contrary, the applicants' version strengthens the respondents' version. It follows that the phrase ' in the absence of a party' does not only denote ex parte applications rather every application in which an order is made in an urgent application in the absence of the other party. It follows that the orders dated 23 November 2020 and 18 March 2021 were properly granted. The applicants have failed to prove on the balance of probabilities that the said orders must be reconsidered.

(ii) Counter- application:

ISSUE FOR DETERMINATION:

[36] The issue is whether the main application constitutes an irregular step.

SUMMARY OF THE EVIDENCE:

[37] The respondents are relying on an affidavit deposed to by Mzwandile Matthews to substantiate the counter application. Mr Matthews avers that the order by Justice De Vos of 23 November 2020 and order by Justice Davis of 18 March 2021 were not granted ex parte as alleged. He states that the application in terms of Rule 6(12) (c) constitute an irregular step for

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non- compliance. The averment is that on 16 November 2020 the applicants were personally served with the papers relating to an urgent interdict and afforded time to file their opposing papers but failed to so despite due notice. On 23 November 2020 an order was granted by Justice De Vos which was served on the applicants on 24 November 2020.

[38] Mr Matthews further avers that the conduct giving rise to the interdict continued causing the contempt of Court proceedings to be instituted and notice was served to the applicants that the proceedings will be on 18 March 2021. The averment is that the applicants failed to file opposing papers before 18 March 2021 and elected not to appear in court. On 18 March 2021 Justice Davis granted an order which was personally served on the applicants. He avers that on 15 April 2021 under case 19026/21 the applicants served an application for rescission of the order which application was on the roll on 28 April 2021. The respondent filed opposing papers and Heads of arguments. The applicants failed to appear in court and Madam Justice Van Der Schyff struck the matter off roll with costs. The averment is that Rule 6 (12) (c) contemplates a reconsideration of applications brought ex parte and it is not designed to aid in instances where notice was given and there was no opposition to the order. He avers that the applicants were personally served with the order and the application for reconsideration constitutes an irregular step.

APPLICABLE LEGAL PRINCIPLES:

[39] Rule 30 (1) of the Uniform Rules provides-

'A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.' Rule 30(1) must be read in conjunction with Rule 30(2).

[40] Rule 30(2) provides-

'An application in terms of sub-rule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if-

(a) *The applicant has not himself taken a further step in the cause with knowledge of the irregularity;*

(b) *The applicant has, within ten days of becoming aware of the step; by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;*

(c) *The application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) of sub-rule (2).'*

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[41] The Rule does not define 'irregularity'. A notice must precede an application in terms of Rule 30(1). The proper procedure envisaged by this Rule is that the party against whom the complaint is directed must be given notice to remove the cause of complaint before approaching the court for an order setting aside the irregularity. Rule 30(1) applies to irregularities of form during the course of litigation and not of substance. See ***Odendaal v De Jager 1961 (4) SA 307 (O) at 310 F-G.*** The court has discretion to overlook in proper cases on the consideration of the circumstances on what is fair to both parties any irregularity which is not prejudicial to the other party. Proof of prejudice is an essential prerequisite to a Rule 30 application.

[42] In ***Soundprops 1160 CC v Karlshavn Farm Partnership 1996(3) SA 1026 (N)*** at1033 it was held 'It is trite law that the Court has discretion and is entitled in a proper case to overlook an irregularity in procedure that does not cause substantial prejudice to the party complaining of it.' In that same matter at 1034, it was further held 'On the other hand, the irregularity which taints the main claim is one of substance and that claim cannot be allowed to stand.'

SUBMISSIONS:

[43] The contention by Counsel for the applicants is that the Rule 30 (1) application is fatally flawed and should not be granted by this Court. The submission by Counsel is that the Rule 30 (1) application is brought on notice not as an application and refers among others to ***Scott and Another v Ninza 1999 (4) SA 820 (E).*** Counsel for the applicants is critical of the respondents' heads of arguments.

[44] Counsel for the respondents reiterate that this Court has a discretion whether to grant or refuse an application under Rule 30 of the Uniform Rules and refers among others to the matter of ***Northern Assurance Co Ltd v Somdaka 1998 (3) SA 34 (SCA)*** at 40 I -41 E. The contention is that if the Rule 30 application is refused, this will be casting shade to the applicants' violation of the rights of the learners and educators at Ennis Thabong Primary School

EVALUATION:

[45] In the Notice in terms of Rule 30, the respondents' main complaints against the applicants are that –

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1) They are bringing this application for reconsideration after proper notice was given to them and therefore the orders dated 23 November 2020 and 18 March 2021 were not granted ex parte;
2) The application for reconsideration is brought after a lapse of at least twelve months from the date the order dated 23 November 2020 was granted.

[46] Rule 30 is intended to deal with matters of form not of substance. The reliance on Rule 30 (1) by the respondents is in my view misplaced for the following reasons-

[46.1] The applicants are within their rights to lodge the application within the ambit of Rule 6 (12) (c) on the basis that the orders were granted against them in their absence.

[46.2] The respondents have failed to show prejudice they have suffered or will suffer as envisaged by Rule 30(1). See ***Trans- African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) at 278F-G***[9]***.***

[46.3] It is correct that Rule 30 is intended to deal with matters where the irregularity emanates from the inappropriate use of the Rules of Court, however, the respondents are under the misconception that the reliance on Rule 6 (12) (c) by the applicants constitutes an irregularity on the basis that the objection to the use of Rule 6 (12) (c) goes to the substance rather than form. See D. Harms *Civil Procedure in the Superior Courts S1-69 at B30.3.*

[47] In the founding affidavit, Mr Matthews avers that there is an irregular step on the basis that the applicants lodged Rule 6 (12) (c) application when the orders dated 23 November 2020 and 18 March 2021 were granted after the applicants received notices and failed to appear in court. The application for reconsideration that is lodged by the applicants in my view falls within the ambit of Rule 6 (12) (c) and based on this finding, it cannot be said that the application constitutes irregular a step. In the event that my finding above is incorrect, in the exercise of discretion by applying the ***Soundprops*** to the facts, I am overlooking the irregularity in procedure in the interest of justice and for the full ventilation of the dispute.

CONCLUSION:

[48] In conclusion, having considered all the facts in this matter, I am satisfied that the counter application is flawed as it attempts to deal with substance and the respondents have failed to demonstrate prejudice and stands to fail.

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[9] It was held 'Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice to interfere with the expeditions and, if possible, inexpensive decision of cases on their real merits.'

COSTS:

[49] The last aspect to be addressed is the issue of costs. Awarding of costs is at the discretion of the court which must be exercised judicially[10]. The applicants lodged an application in terms of Rule 6 (12) (c) and the respondents operated under the misguidance that such an application is irregular. The counter application albeit misguided was triggered by the main application. In the exercise of my discretion I am of the view that a just and equitable cost order is that in respect of the main application, the applicants must pay costs on a party and party scale. No order as to costs in respect of the counter application.

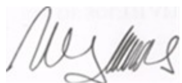
ORDER:

[50] In the circumstances the following order is made:

[50.1] In respect of the main application, it is dismissed with costs.

[50.2] In respect of the counter application, it is dismissed.

[50.3] Applicants are ordered to pay costs on party and party scale in the main application, one paying the others absolved.



MNCUBE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the Applicants : Adv. M.H. Masilo
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[10] See *Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC)* it was held 'The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant consideration.'

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On behalf of the Respondents	: Adv. R. Arcangeli
Instructed by	: ME Tlou and Associates
	: c/o De Swardt Myambo Attorneys
	: 941 Jan Shoba Street
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Date of Judgment	: 19 April 2023