



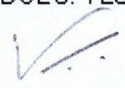
**IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG**

CASE NO: LCC 36/2020B

Before: The Honourable Acting Judge President Meer

Heard on: 15 February 2022

Delivered on: 4 March 2022

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED: YES / NO	
4/3/2022	
DATE	SIGNATURE

In the matter between:

FIHLI JOHANNES LUKHELE

First Applicant

**ALL OTHERS WHO OCCUPY THE HOMESTEAD
OF THE LATE MR ABRAHAM LUKHELE ON
PORTION 15, FARM RIETFONTEIN
395 BASHEWA DISTRICT,
TSHWANE, GAUTENG PROVINCE**

Second Applicant

and

JUDGMENT

MEER AJP

Introduction

[1] This is an application for the rescission of a judgment in which the Applicants seek the following order:

“PART A (EX PARTE AND INTERIM RELIEF)

2. That pending the final determination of the relief sought in 2.1 to 2.5 below, a rule *nisi* be issued calling upon Respondent to show cause, if any, before this Court on a date, time and venue to be determined by this Honourable Court in terms of Rule 34(3)(b), why an order in the following terms should not be made final:
 - 2.1 That the judgment as was granted in the abovementioned matter against the Applicant on the 29th day of November 2021 be wholly rescinded;
 - 2.2 That the order that the First and Second Respondent are sentenced to (60) sixty days’ imprisonment wholly suspended for thirty days, be rescinded;
 - 2.3 Rescission of the order incorporated therein instructing the Respondents to demolish the construction already erected; pending the determination of the rights of the parties by the Honourable Court and/or finalisation of the main case;
 - 2.4 Order for costs if this application is opposed;
 - 2.5 Further and/or alternative relief as the Court may deem fit.

PART B (FINAL RELIEF WITH NOTICE AS PER THE RULES OF THE ABOVE HONOURABLE COURT)

3. That the order granted on the 29th November 2021 be wholly rescinded and the Applicant be permitted to erect a dwelling Respondents are hereby ordered to demolish and remove all or any structure suitable for human habitation as already under construction on the farm, depicted in ANNEXURE “E”.

4. Further or alternative relief.”

[2] The order referred to in the notice of motion above, granted by this Court on 29 November 2021 (“Contempt Order”), as varied, states:

- “3.1. The conduct of the first applicant/first respondent in the main application is declared unlawful and the first respondent is found to be in contempt of court;
- 3.2. The first respondent is sentenced to sixty (60) days imprisonment wholly suspended for forty (40) days from the date on which the order was granted so as to afford the first respondent an opportunity to purge his contempt, failing which the sentence becomes operational;
- 3.3. The applicant is granted leave to approach the Court on the same papers duly supplemented, should the first respondent persist with the contempt of Court.”

[3] The order in respect of which the Contempt Order was granted, the “Demolition Order”, was given on 15 July 2020 and states as follows:

“It is ordered:

1. That the rule *nisi* dated 9 June 2020 be and is hereby confirmed.
2. That the first and second respondents are hereby interdicted and restrained from continuing with the encroachment and/or the construction of the dwelling and/or building and/or structure on the applicant’s property described as Portion 15 of the Farm Rietfontein 395, Bashewa in the District of Tshwane;
3. That the first and second respondents are hereby ordered to demolish and remove all or any structures already constructed on the farm, as mentioned in paragraph 2 above and to render the said area back to the applicant in the undisturbed state it was in, before the construction commenced within seven (7) days from the service of this order on the respondents;
4. That in the event of the first and second respondents’ failure to comply with the order mentioned in paragraph 3 above, the sheriff or his deputy with the assistance of the South African Police Services and/or any private security company of the applicant’s choice and at his/her cost, are granted leave to immediately demolish all or any structure mentioned in paragraph 2 and 3 above and return possession of the said portion of the farm to the applicant;
5. That there is no order as to costs.”

[4] The first and second respondents referred to in the Demolition Order of 15 July 2020 are the First and Second Applicants in this matter. For ease of reference I shall refer to them interchangeably as the “Lukheles” and the Applicants. In the application for the Demolition Order, Sean Mitchell (“Mitchell”), the Respondent in this application, as the applicant obtained an order in terms of which the Lukheles were ordered to demolish and remove structures encroaching on the Mitchell’s property.

[5] Both the Demolition and Contempt Orders were granted in the absence of the Applicants. Although the Applicants had received service of both applications, they filed no pleadings by the time the matters were heard and did not appear in Court. It was in fact only after the Demolition Order of 15 July 2020 was granted that the Lukheles as respondents in that application filed an answering affidavit on 4 August 2020. They however neither applied to rescind or nor appeal that judgment and order.

[6] A contempt application was thereafter brought by Mitchell on 4 June 2021. That application as aforementioned gave rise to the Contempt Order on 29 November 2021, which order was served on the Applicants on 20 December 2021.

[7] On 24 December 2021 this application for the rescission of the Contempt Order and judgment was brought on an urgent basis. The matter was initially set down for hearing on 31 January 2022 but on that date the matter was struck from the roll due to the Applicants’ non-compliance with the Court’s directions for filing a replying

affidavit and heads of argument. By agreement between the parties it was ordered that the First Applicant would bear the wasted costs occasioned by the matter being struck from the roll. At a conference held on 31 January 2022 it was ordered that in terms of Rule 65(3), the Contempt Order of 29 November 2021 was suspended pending the determination of the rescission application or the resolution of this matter. The parties were also directed to meet on 1 February 2022 in an attempt to resolve the matter. They were unable to reach a resolution; whereafter the rescission application was heard on 15 February 2022.

Legal Context

[8] Rule 64 of the Land Claims Court Rules which provides for rescission states as follows:

“64 Variation and rescission of Orders

- (1) Subject to section 35 (11) of the Restitution of Land Rights Act, the Court may suspend, rescind or vary, of its own accord or upon the application of any party, any order, ruling or minutes of a conference which contains an ambiguity or a patent error or omission, in order to clarify the ambiguity or to rectify the patent error or omission.
- (2) Any party seeking the rescission or variation of an order in terms of section 35 (11) or (12) of the Restitution of Land Rights Act or in terms of subrule (1) may do so only upon –
 - (a) application delivered within ten days from the date upon which he or she became aware of the order; and
 - (b) good cause shown for the rescission or variation.”
- (3) Any party applying under this rule must deliver notice of his or her application to all parties whose interests may be affected by the rescission or variation sought.”

[9] Section 35(11) of the Restitution of Land Rights Act, 22 of 1994 (“the Act”) in relevant part states:

“The Court may, upon application by any person affected thereby and subject to the rules made under section 32, rescind or vary any order or judgment granted by it –

- (a) in the absence of the person against whom that order or judgment was granted;
- (b) which was void from its inception or was obtained by fraud or mistake common to the parties;
- (c) in respect of which no appeal lies; or
- (d) in the circumstances contemplated in section 11(5):

Provided that where an appeal is pending in respect of such order, or where such order was made on appeal, the application shall be made to the Constitutional Court or the Appellate Division of the Supreme Court, as the case may be.”

[10] Section 32 of the Act deals with the rules governing procedure and authorises the President of the Court to make rules to govern procedure of the Court.

[11] There is no appeal against either the Contempt or the Demolition Orders.

[12] It is trite that in order to satisfy the “good cause” requirement for rescission referred to in Rule 64(2)(b), an applicant must establish (i) a reasonable and acceptable explanation for their default and (ii) on the merits, a *bona fide* defence which, *prima facie*, carries some prospects of success.¹ Applicants are not required to deal extensively with the facts and the evidence, provided that they disclose their defence and the material facts relied upon with sufficient particularity to enable the Court to find out that they have a *bona fide* defence. It will be sufficient if an applicant

¹ *Chetty v Law Society, Transvaal* 1985 (2) 756 (A) at 765A-D; *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22 at para 85 and *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28 at para 71.

swears to a defence, valid in law, in a matter which is not inherently or seriously unconvincing.².

[13] The First Applicant provides the following explanation for the failure to oppose the application and for the order being granted in his absence.

13.1 On 20 November 2021 a notice that the matter was set down for hearing on the unopposed roll was served upon the First Applicant at his residence by the Sheriff. He contacted the attorney appointed for him by the Department, (presumably of Agriculture, Rural Development and Land Reform), a Mr Welile Cebekhulu of Thabethe Cebekhulu Attorneys, who stated he was aware of the notice and assured the First Applicant that he would attend to the matter on the date in question.

13.2 A week later the First Applicant attempted to contact the said attorney to no avail and as at the date of the launch of this application in December 2021 he had still not heard from that attorney. The Applicant then contacted the “Department” but was told to submit a new application for legal assistance. He thereafter approached the nearest local legal practitioner for assistance but could not afford the fees. After many failed attempts to find an attorney, a locally based community organisation called the “WOTDS Forum” came to his assistance and his current legal representative, Adv Nkosi was appointed for the purpose of this application. Through the efforts of Adv Nkosi, the First

² See *Breytenbach v Fiat (SA) Pty Ltd* 1976 (2) SA 226 (T) and *Gap Merchant Recycling CC v Goal Reach Trading* 55 CC 2016 (1) SA 261 (WCC)

Applicant was able to view a copy of the order granted, the contents thereof were explained to him and it became apparent that the matter has proceeded unopposed.

[14] Regard being had to the above, I am satisfied that an explanation has been given for the Applicants' failure to attend the hearing and obtain legal representation once the notice of set down was served upon them. However, there is insufficient explanation as to what steps they took between the time the contempt application was served on them on 1 September 2021 and the date the order was granted on 29 November 2021. There is no explanation about what they did to ensure that their attorneys were opposing the application, or whether indeed they instructed their attorneys to oppose.

Bona fide defence

[15] As it is the Contempt Order which the Applicants seek to rescind, they are required to show a *bona fide* defence to that application. In the heads of argument filed by Mr Nkosi on behalf of the Applicants, it is conceded that the Applicants failed to comply with the Demolition Order of 15 July 2020. It is moreover not disputed that they failed to comply with Contempt Order. However, the Applicants deny that their conduct amounts to contempt. He submitted that it is impossible to address the aspect of contempt without referring to the main case, the demolition application. The only reason for building the brick walls which Mitchell applied to have demolished, he submitted, was because "the old mud wall was so dilapidated to the extent that it could

collapse at any time and was hazardous.” The Respondent, he submitted, does not dispute the terrible state of the Applicants’ dwelling. Failure to comply with the Demolition Order, submitted Mr Nkosi, was not due to contempt, but due to impossibility. It is both impossible and unreasonable to expect any reasonable person to pick up a sledgehammer and demolish the building which is their only home and primary residence. An order to render any person homeless is against public policy. The lack of contempt, submitted Mr Nkosi, arises out of the importance of protecting their basic human right to housing as protected in section 26(3) of the Constitution of the Republic of South Africa, 1996. Mr Nkosi however intimated that the Applicants had not demolished the dwelling they occupied before the impugned structure had been built. He submitted moreover that the Applicants do not in any way obstruct the Respondent’s convenience in that he does not reside at the farm. The main homestead is occupied by a tenant. Based on impossibility and constitutionality, the Applicants, he submitted, have shown good cause why the Contempt Order must be rescinded.

Finding

[16] It is clear that the Applicants are aware that their contempt lies in their refusal to demolish the impugned structure and they still refuse to do so. As is contended by the Respondent, they are deliberately refusing to purge themselves of their contempt.

[17] In *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 SCA at 344G – 345A, the principle was stated that the respondent in a contempt application “bears an evidential burden in relation to wilfulness and *mala fides* and should the respondent

fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, the contempt will have been established beyond reasonable doubt.” The Applicants in this rescission application, as the respondents in the contempt application, have not advanced evidence establishing a reasonable doubt on these aspects.

[18] The averments that the Contempt Order is a patent error; that it is impossible and unreasonable for the contempt to be purged; those concerning constitutionality and impossibility; and that the Contempt Order cannot be seen in isolation from the demolition application and order, fall short of evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*. These are defences which ought to have been raised in the demolition application, which it would seem the Applicants ignored. That application has been heard and cannot be reconsidered in this rescission application. The Respondent correctly submits that the Applicants are impermissibly attempting to lure the Court into a reconsideration of the demolition application in respect of which an order stands and is *res judicata*. It ill behoves the Applicants in this rescission application, some 20 months later, to belatedly engage with the merits of that application and proffer same as a *bona fide* defence in this application. It is to be noted also that the Applicants had from July 2020 to challenge the demolition order and failed to do so.

[19] Insofar as the Applicants seek to rescind the Demolition Order in paragraph 3 of the notice of motion in this matter, such rescission application of the Demolition

Order is not properly before me. Good cause for the rescission of that order has not even been canvassed, and the Applicants have certainly failed to comply with Rule 64(2) by not delivering any purported application within ten days or applying for condonation.

[20] As the Applicants have not properly applied for the rescission of the Demolition Order, the declaratory relief they seek in paragraph 3 of their notice of motion cannot be granted.

[21] Mr Kruger for the Applicant stated that the Applicant did not “necessarily want the jailing of somebody” as provided for in the Contempt Order. In response to a question from the Court, he submitted that his client was inclined to apply for the eviction of the Applicants and would not take umbrage if the Contempt Order were suspended pending the resolution of eviction proceedings. Cognisance of this is taken in my order below.

Costs

[22] The Respondent seeks an order for costs *de bonis propriis* against Mr Nkosi, the First Applicants’ legal representative and also that his fees be disallowed on the basis that this application was an abuse of the court process. I am of the view that such punitive costs are not justified. This matter is not without its complexities and attention thereto was drawn to the parties in a conference where they were urged to

attempt to settle. In keeping with this Court's practice not to award costs except in exceptional circumstances, of which I find none in this application, I intend making no order as to costs.

[23] I grant the following order:

1. The application is dismissed with costs.
2. The order granted by this Court on 29 November 2021 ("Contempt Order") is suspended pending the resolution of eviction proceedings to be instituted by the Respondent.



Y S MEER
Acting Judge President
Land Claims Court

APPEARANCES

For the Applicants: Adv. R. Nkosi

For the Respondent: Adv. J. E. Kruger

Instructed by: Moolman & Pienaar Inc.