IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***17th MARCH 2017*** Signature: _____

CASE NO: 2017/07857

In the matter between:

SITHOLE: MAVIS NOMSA	First Applicant
MKHONTO: CHARLENE NYELETI	Second Applicant
SITHOLE: PRINCESS YVONNE	Third Applicant
MTSHWENI: MAMIKIE EMILY	Fourth Applicant
MORWAGAASWE: MANTO	Fifth Applicant
BROTTON: ROBERT JOHN	Sixth Applicant
FOURIE: MARION DOROTHY	Seventh Applicant
LAMPRECHT: FREDERICK DARREL	Eighth Applicant
VAN DEN BERGH: CARMEL	Ninth Applicant
VAN DEN BERGH: DIRKIE	Tenth Applicant
MATHONSI: EDMUND BONGANI	Eleventh Applicant

and

MEYER: PETRUS HENDRIK (MARKON REALTY)	Respondent

JUDGMENT

ADAMS J:

[1]. This is an urgent application by the respondent in terms of the provisions of Uniform Rule 6(12)(c) for reconsideration of an order granted by this Court (Ismail J) on an urgent basis on the 3rd March 2017.

[2]. In the original application the applicants, then simply cited as the 1st Applicant (Mavis Nomsa Sithole), the 2nd Applicant (Charlene Nyeleti Mkhonto) and the 3rd Applicant *('the Occupiers')* approached the court for an order reinstating their occupation of premises situate at number: 17 Cloverfield Road, DERSLEY PARK. Springs, Gauteng Province *('the premises')*. The first applicant deposed to the Founding Affidavit in support of the said application, which was based on the *mandament van spolie.* Although there were no confirmatory affidavits by any of the other *'occupiers'* cited as the third applicant, the first applicant purported to have deposed to the founding affidavit on behalf of such unnamed occupiers, allegedly totalling 30 in numbers according to the founding affidavit, who had allegedly authorised her to launch the application on their behalf.

[3]. Having heard the application in the absence of the respondent, the court (Ismail J) granted the following order:

> *'1. The respondent is to reinstate the applicants into the property situated at no 17 Cloverfield Road, Dersley Park, Springs, Gauteng Province, after the applicants were illegally evicted by the respondent's employee without a Court Order.*
>
> *2. The Sheriff of the High Court is to serve the Order on the respondent'.*

[4]. When the matter first came before me on the 14th March 2017, the first applicant had not filed a reply to the respondent's answering affidavit, which also doubled as the founding affidavit in support of the application for reconsideration of the previous Court Order. The first applicant's founding affidavit lacked sufficient particularity regarding her cause of action. I therefore stood the matter down to the 16th March 2017, to enable the parties to exchange further affidavits to assist the court in its assessment of the facts in the matter. Subsequently, the applicants filed a supplementary affidavit, supported by confirmatory affidavits by persons, including the second respondent, to whom I shall refer to as the 2nd to 11th applicants. This affidavit was intended to supplement the founding affidavit of the applicants. The applicants also filed a replying affidavit which they styled *'Applicants' Response to the Respondent's Answering Affidavit'.* The respondent in turn filed a supplementary answering affidavit. This added substantial meat to the bone and provided much more detail and particulars than the scant specifics which were before Ismail J when he heard the matter initially. There are however a number of factual disputes between the parties which came out of the further affidavits delivered. I shall return to the facts of the matter momentarily.

[5]. Uniform Rule 6(12)(c)provides as follows:

> *'A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.'*

[6]. In relation to Rule 6(12)(c) the Court (Farber AJ) in *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others*, 1996 (4) SA 484 (W) at 487B, had this to say:

'The framers of Rule 6(12)(c) have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered. What is plain is that a wide discretion is intended. Factors relating to the reasons for the absence of the aggrieved party, the nature of the order granted and the period during which it has remained operative will invariably fall to be considered in determining whether a discretion should be exercised in favour of the aggrieved party. So, too, will questions relating to whether an imbalance, oppression or injustice has resulted and, if so, the nature and extent thereof, and whether redress can be attained by virtue of the existence of other or alternative remedies. The convenience of the protagonists must inevitably enter the equation. These factors are by no means exhaustive. Each case will turn on its facts and the peculiarities inherent therein."

[7]. I am in full agreement with this enunciation by Farber AJ of the principles relating to the application of the said rule.

THE FACTS

[8]. In my assessment of the facts in this matter I have had regard to all of the affidavits filed by all of the parties involved in this matter, especially the supplementary affidavits files by the first applicant and the respondent. In that regard, I am guided by the dictum by Joffe J in the decision of *Rhino Hotel & Resort (Pty) Ltd v Forbes and Others*, 2000 (1) SA 1180 (W) at 1182B – E where he stated as follows:

'In terms of Rule 6(12)(c) of the Uniform Rules of Court, a party against whom an order was granted in his absence in an urgent application may, by notice, set the matter down for reconsideration of the order. The Rule envisages a redetermination of the matter. The Court that entertains the application in the absence of the respondent does not have the benefit and advantage of argument from the respondent. Accordingly, when the

application is re-enrolled by the respondent for consideration, it is a redetermination with the benefit of argument from the respondent. . . . Where Rule 6(12)(c) is utilised, the original application is reconsidered on its own without reference to anything else.'

[9]. However, in *Oosthuizen v Mijs* 2009 (6) SA 266 (W) Wepener J adopted a different view and, after expressly dealing with Joffe's views, held (at 267E) that *'(t)o hold that the court is confined only to the original application without reference to anything else is in conflict with various decisions on this point'*. See in this regard *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others*, 1996 (4) SA 484 (W) ([1996] 4 All SA 58) at 486H – 487D); see also *National Director of Public Prosecutions v Braun and Another,* 2007 (1) SA 189 (C) (2007 (1) SACR 326; [2007] 1 All SA 211). Wepener J went on to state in the Oosthuizen case at 269I – J, that:

'I am of the view that a court that reconsiders any order should do so with the benefit not only of argument on behalf of the party absent during the granting of the original order but also with the benefit of the facts contained in affidavits filed in the matter.'

[10]. In *The Reclamation Group (Pty) Ltd v Smit and Others*, 2004 (1) SA 215 (SE) full sets of affidavits were delivered dealing with the facts upon which the reconsideration of the matter was done. Froneman J stated at 218D – F as follows:

'The result of all of this is that the reconsideration of the matter needs to be done on the basis of a set of circumstances quite different to that under which the original ex parte order was obtained. Reconsideration need not always take this form but Rule 6(12)(c) is widely formulated and in my view permits a reconsideration in this manner. . . .'

[11]. I am in agreement with the views expressed by Wepener J and I interpret his comments as authority for the proposition that the applicants are entitled to place additional facts and matter before the Court in the reconsideration application, which ought properly to have been placed before the court when the matter was originally presented. The Oosthuizen case *supra*, with which I agree, expressly supports the function and the purpose of rule 6(12)(c), which is the fundamental principle of natural justice — *'audi alteram partem'*. I place reliance on the Oosthuizen case as authority especially in view of the fact that the respondent, who was absent when an urgent order was granted, placed relevant factual matter on affidavit before the court reconsidering the previous order.

[12]. Also, when dealing with factual allegations which are not common cause between the parties I will follow the well-known approach to be taken in opposed motion proceedings where factual disputes arise as set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd,* 1984 (3) SA 623 (A) at 634. The question in that context is whether the facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify the order sought. In other words, the court is bound by the facts in the applicant's affidavits that the respondent admits, and the facts deposed to by respondent, unless they are so far-fetched or clearly untenable that the court is justified in rejecting them on the papers.

[13]. The first applicant alleges that on or about the 1st of March 2017, when the respondent started evicting the occupiers of the premises, she was one such occupant. I do not accept this claim by the first applicant. Her allegation that she resided on the premises is an afterthought and should be seen in the context of her original founding affidavit deposed to on the 2nd March 2017, in which she unequivocally states that: *'I am an adult*

female of 52 years residing at number 158 Geldenhuys Street, Putfontein, Benoni'. This address is not the address at which the premises are situated. The first applicant was therefore not entitled in her personal capacity to the relief granted by Ismail J.

[14]. What is clear however is that the first applicant, who is the driver of the litigation herein, is a Lessor of sorts to a number of the occupiers of the premises, and she collects or attempts to collect rental from these individuals on a monthly basis. There is an arrangement in place between the respondent, who is the lawful owner of the property in question, and the first applicant, which entitles her to occupy the premises at a monthly rental of R10,000.00 per month. The first applicant then sub – lets to the other occupiers of the premises rooms on the property. This is the vested interest the first applicant has in this matter and explains the perceived discrepancies and improbabilities, as alluded to by Counsel for the applicants when he was making submission during the hearing of the matter before me.

[15]. I am persuaded that, whilst he did not physically evict persons from the premises in a violent and brutal manner as alleged by the first applicant, the respondent's agents *'urged'* occupiers to vacate the property, which they interpreted as them being evicted. This means that any person who left the premises would be entitled to be reinstated in their occupancy of the premises.

[16]. In that regard, I am of the view that second respondent, the daughter of the first applicant, also was not in occupation of the premises at the relevant time, and she likewise was not entitled to a reinstatement order.

[17]. The persons who I believe have made out a case on the papers before me, applying the principles in the *Plascon Evans* matter *(supra),* and who were entitled to be reinstated in terms of the Court Order of the 3rd March 2017 are:- Princess Yvonne Sithole, Mamikie Emily Mtshweni, Manto Morwagaaswe, Dirkie and Carmel Van den Bergh, Robert John Brotton and Marion Dorothy Fourie, Frederick Darrel Lamprecht, and Edmund Bongani Mathonsi.

[18]. Having considered all of the aforegoing, I am of the view that the urgent interim order granted by Ismail J on the 3rd March 2017 must be reconsidered and replaced with an order which makes reference to the aforementioned individuals. The order should be set aside.

COSTS

[19]. The first applicant launched the original urgent application on behalf of the other applicants, who are now properly before the court. Some of these applicants have been successful with their *mandamant van spolie* application in that I intend ordering that their occupation of the premises be reinstated. This means that because of their success, which means *'substantial success',* these applicants would in the normal course of events be entitled to a cost order in their favour.

[20]. The flip side of the coin is that the respondent was justified in his opposition to the original application. He also had every right and was justified in launching the application for reconsideration of the previous order. The previous order lacked details and particulars relating to the persons entitled to be reinstated. That has now been accomplished, which also means that, because respondent had a measure of success, he is probably entitled to a cost order.

[21]. The one cost order may very well cancel out the other, and I am therefore of the view that an order that each party should bear his / her own cost would be fair, just and equitable. Therefore, in the exercise of my discretion, I do not intend awarding costs in favour of any one of the parties.

ORDER

In the result, I make the following order:-

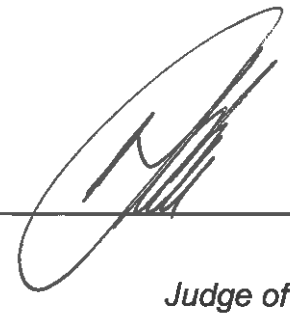
1. The Order of this Court of the 3rd March 2017 by Ismail J be and is hereby reconsidered in terms of Uniform Rule of Court 6(12)(c), set aside and replaced with the following order:-

    1. *'The third to eleventh respondents, together with their children (where applicable and specifically mentioned in the affidavits) are allowed to return to and retake occupation of the premises situate at number: 17 Cloverfield Road, DERSLEY PARK, Springs, Gauteng Province ('the premises').*

    2. *The respondent shall reinstate the third to eleventh applicants, together with their children (where applicable) in their occupation of the premises situated at number: 17 Cloverfield Road, DERSLEY PARK, Springs, Gauteng Province.*

    3. *In the event that the respondent not allowing reoccupation of the premises by the 3rd to 11th applicants on or before 24th March 2017, the sheriff of this court or his lawfully appointed deputy is authorised and directed to reinstate these applicants in their occupation of the premises.*

2. Each party shall bear his / her own cost.



L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	14th & 16th March 2017
JUDGMENT DATE:	17th March 2017
FOR THE APPLICANTS:	Adv
INSTRUCTED BY:	J S Mathibela Attorneys
FOR THE RESPONDENT:	Adv
INSTRUCTED BY:	Matsimela, Krauses & Ngubeni Incorporated