NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 2773/2015

In the matter between:

BONGANI J MPUNGOSE **ID NO: […]**	**FIRST APPLICANT**
MBONGENI STEVEN KHOZA **ID NO: […]**	**SECOND APPLICANT**
JOHN KHIPHA ZWANE **ID NO: […]**	**THIRD APPLICANT**
ELPHAS BUTHELEZI	**FOURTH APPLICANT**
DUMISANI P MBHELE **ID NO: […]**	**FIFTH APPLICANT**
HENRY MSIBI	**SIXTH APPLICANT**
and	
GAGI KENNETH SHABALALA **ID NO: […]**	**FIRST RESPONDENT**
MEISIE ANNASTASIA SHABALALA **ID NO: […]**	**SECOND RESPONDENT**
GREENDDINE AMPERBAAS SHABALALA	**THIRD RESPONDENT**
TRUSTEES FOR THE TIME BEING OF THE AMANTUNGWA DEVELOPMENT TRUST NO. IT (2122/92)	**FOURTH RESPONDENT**

J U D G M E N T
Delivered on: FRIDAY, 24 AUGUST 2018

OLSEN J

[1] This judgment concerns an application for the rescission of an order made by this court on 12 March 2015. Judgment was reserved when the matter served before me as an opposed application, not because of any doubt about the fate of the application itself, but because of a concern I had that the implementation of the judgment granted on 12 March 2015 (which has not yet been executed upon) may now, in 2018, not be in accordance with justice. The issue as to what order ought to be made is the real subject of this judgment.

[2] On 28 February 2015 the respondents in the present application obtained a rule nisi from this court on an urgent basis for restoration of possession of certain immovable property to them which, according to the founding papers, had been "invaded" by the persons who are the applicants before me. Although the principal relief was a spoliatory remedy, certain other relief was also set out in the rule nisi, consistent with the spoliatory remedy and a claim that the applicants in this matter had employed intimidatory tactics. I will continue to refer to the parties as they are cited in the present rescission application.

[3] The rule nisi called upon the applicants to show cause why a final order should not be granted on 5 March 2015. On that day the applicants appeared in person and an adjournment of the matter to 12 March 2015 was allowed on the basis that they required legal representation, and to allow them to deliver their answering affidavit by 9 March 2015. It appears that an attorney was instructed on 10 March 2015, but, nevertheless, there was no appearance on 12 March 2015 when the rule nisi was confirmed. That meant that an order had been granted directing the respondents to vacate the land in question, which is largely agricultural land. It is that aspect of the order which now, three years later, causes me some concern.

[4] On 30 March 2015 the applicants launched an application for the rescission of the final order made on 12 March 2015, coupled with a prayer for an interim order that execution of the eviction order of 12 March 2015 be stayed. That application (in its entirety) was dismissed on 30 March 2015.

(There is a dispute over whether the order made by the learned Judge who presided on that day was generated solely by a finding that urgency had not been established, with the result that, despite the fact that he dismissed the entire application, those proceedings should not be regarded as a dismissal of the application for rescission of the judgment. I do not take the view that anything turns on that dispute, but merely make the observation that if the learned Judge was concerned only with urgency, the order which ought to have been issued was one striking the matter from the roll. There is no reason to doubt that the learned Judge concerned was unaware of that fact.)

[5] That order refusing rescission stands unchallenged. By their own confession the applicants decided to accept it. The founding affidavit in the present application explains the position adopted by the applicants.

> 'After re-assessing the situation we decided that appealing the [spoliation] order was a better option and would have the desired effect of staying the order concerned.'

An application for leave to appeal against the original spoliation order was accordingly delivered in April 2015. It got delayed because the applicants had overlooked the need to obtain reasons for the final judgment granted by this court in the spoliation application. Reasons were subsequently provided, but the application for leave to appeal was not set down for hearing. In fact, as will be seen, it has never been heard.

[6] Undeterred by the dismissal of the first application to rescind the spoliation order, and by the fact that the spoliation order had become the subject of an application for leave to appeal, in March 2016 (a year, more or less, after the spoliation order had been granted) the applicants launched a second application for rescission of the judgment. That is the application which serves before me. It was opposed, affidavits delivered, and the proceedings brought before the court for argument only on 15 June 2018.

[7] During the course of argument it was put to counsel for the applicants that the appeal proceedings were inconsistent with the relief presently sought, as the launch of the application for leave to appeal against the original

spoliation order implied that it had become final, and not susceptible to alteration by this court. Responding to that, the application for leave to appeal was withdrawn and an appropriate order made on that day. If the proposition put to counsel had merit, I do not think that a decision at that late stage to withdraw the application made any difference. If the decision to apply for leave to appeal had consequences, they appear to me to be of the immutable type, and were certainly operative at the time when the present application for rescission of the spoliation order was launched.

[8] Be that as it may, whether the decision of this court to refuse the first application for rescission of judgment was susceptible to attack because it was the wrong form of order for the occasion, or because the application indeed had merit (i.e. it was wrongly judged to be without merit), the position remains that the order was made and was appealable. No appeal against it was launched. In the result this court has finally ruled on the question as to whether the spoliation order should stand or be rescinded. It did so in the first rescission application.

[9] Counsel for the applicants attempted to argue before me that there was some distinction to be drawn between the grounds upon which rescission is sought in the present application, and those which were relied upon in the first, and that this justified a right of access to court in the second application for rescission of the spoliation order. However I cannot agree with the premise. The applications are in all material respects the same. The application before me must be dismissed.

[10] What the papers reveal is that the real dispute between the parties concerns disputed rights of access to the properties which were the subject matter of the spoliation application. I was informed from the bar that no proceedings have yet been instituted in order to resolve those disputes. The disputes appear to me to be real (i.e. there is a genuine adherence on each side to the contentions made by them in support of claimed rights of access to, and claimed rights to exclude others from, the land). It is clear on the papers before me that these disputes must be resolved if peace is to reign.

[11] The difficulty is that on the papers before me one must accept that both sides to this dispute are in occupation of some portions of the land in question. Insofar as the applicants are concerned that occupation has endured from early 2015 until now. Whether or not such occupation by the applicants is lawful, in the intervening period *de facto* residence on the land has been established. The benefits of such residence are presumably enjoyed not only by the applicants, but also by those obtaining occupation through them. A settled state of affairs has arisen, whether lawful or otherwise.

[12] During the course of argument before me this state of affairs was drawn to my attention by counsel for the applicants who spent rather more time dealing with the dispute over rights, rather than with the more narrow issue of dispossession which was the true ground for the grant of spoliatory relief in the first case. Counsel for the respondents recognised that a comparison of the state of affairs which obtains on the land now, with that which formed the foundation of the claim for spoliatory relief three years ago, is problematic. After taking instructions, counsel for the respondents made an open offer in court that if the applicants should concede the present application (with costs), the respondents would undertake not to execute upon the ejectment order it obtained in 2015 pending the determination of an action by the applicants to determine the merits of their claim to rights in the land. It came as something of a surprise to me that this offer was not accepted by the applicants.

[13] The offer made by the respondents must be taken to be withdrawn, the applicants having failed to accede to the conditions upon which it was made. The question which has concerned me is whether I am able *mero motu* to make an order along the lines proposed by the respondents.

[14] At least some relevant considerations militate against my stepping in *mero motu*. The one is the intransigent attitude adopted by the applicants. Another is that the delays which have brought matters to this sorry impasse

must be laid at the door of the applicants who have manipulated proceedings and court process somewhat cynically.

[15] On the other hand, the execution of the spoliation order at this time will address a state of affairs which was not the one which this court could have had in mind when the spoliatory remedy was first granted. That does not on its own mean that the order cannot now be executed upon, given that the delays which have given rise to the problem must be laid at the door of the applicants.

[16] However, agricultural activities aside, we have now reached the stage where the provisions of s 26 of the Constitution, and perhaps also s 25, are engaged by the facts on the ground. At the very least the applicants and those who occupy through them appear to me, on the respondents' case, to have now become unlawful occupiers of the land who, but for an existing order of ejectment, would be entitled to the legislative protection given to persons of that status. On the papers as a whole there is presently a dispute which cannot be resolved on paper, and which certainly does not fall to be resolved in the current proceedings, concerning rights of access to the land. If the respondents were not armed with the spoliation order they would have to launch proceedings which would involve the resolution of those claims of right in order to establish their right to have the applicants ejected. Given that the respondents do have the spoliation order, it seems to me that if an order has to be made which allows for the resolution of the dispute over rights to the land to be resolved before anyone is ejected, then it is for the applicants to bear the onus of establishing their rights.

[17] Given all the circumstances I have reached the conclusion that it is proper and in accordance with justice, and the rights of the parties under s 34 of the Constitution (of access to court for the resolution of their disputes), to make an order suspending the execution of the spoliatory remedy granted to the respondents pending an action or actions to resolve the disputes between the parties.

[18] I have no doubt that this is an appropriate case in which to accede to the respondents' request that the costs of the present application should be paid by the applicants on the scale as between attorney and client.

I make the following order.

1. **The application to rescind the final order made on 12 March 2015 is dismissed with costs on the scale as between attorney and client, the applicants being jointly and severally liable for the payment of such costs.**

2. **The execution of paragraphs (a) and (b) of the final order made on 12 March 2015 (the ejectment provisions) is suspended pending the determination of an action or actions to be instituted by the applicants against the respondents (and any other party the applicants may choose to join) by service of the summons or summonses commencing such action or actions upon the respondents not later than thirty (30) days after the date of this order.**

3. **Without limiting the relief which might be claimed by the applicants, in the said action or actions each applicant shall plead and claim a declaratory order as to his right to occupation of any of the land which is the subject matter of the order of 12 March 2015.**

4. **The suspension of the ejectment orders set out in paragraph 2 of this order shall lapse in respect of any of the applicants in the event of non-compliance by such applicant or applicants with paragraphs 2 and 3 of this order.**

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OLSEN J

Date of Hearing:	FRIDAY, 15 JUNE 2018
Date of Judgment:	FRIDAY, 24 AUGUST 2018
For the Applicants:	MR ND MYENI
Instructed by:	PHUMULANI NGUBANE & ASSOC. APPLICANTS ATTORNEYS SUITE 201a, DOONE HOUSE 379 ANTON LEMBEDE STREET DURBAN (Ref.: PM1471/PA Ngubane) (Tel.: 031 – 829 1988) **c/o KWELA ATTORNEYS** 4 George Street PIETERMARITZBURG KWAZULU-NATAL
For the Respondents:	MR V MOODLEY
Instructed by:	BOTHA & OLIVIER INC. RESPONDENTS ATTORNEYS 239 PETER KERCHHOFF STREET PIETERMARITZBURG KWAZULU-NATAL (Ref.: Miss S Hariparsad/jd/S.92) (Tel.: 033 – 342 7190)