IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 89196 / 2016

In the matter between:

ECONOMIC FREEDOM FIGHTERS	First Applicant
JULIUS SELLO MALEMA	Second Applicant

and

AFRIFORUM NPC	First Respondent
AFRISAKE NPC	Second Respondent

FIRST AND SECOND RESPONDENTS'
PRACTICE NOTE

DATE ON ROLL:	Unknown
ESTIMATED DURATION:	2 hours
COUNSEL FOR APPLICANTS:	Unknown
COUNSEL FOR RESPONDENTS:	Adv CFJ Brand SC – 012 303 7688
	Adv JGC Hamman – 012 303 7691
TYPE OF APPLICATION:	Opposed application for rescission of order interdicting incitement of land invasions
ISSUES TO BE DECIDED:	If condonation should be granted. If wilful

	default and lack of appearance exist/can be condoned. If *bona fide* defences exist and good cause is shown. If applicants are in contempt of court
CONTENTIONS TO BE ADVANCED:	Condonation ought not to be granted because of untruthful explanation and/or wilful default and/or lack of merits. No *bona fide* defence exists. *Rule nisi* should be issued calling on Applicants to show cause why they should not be held in contempt of court
READ THE PAPERS:	Yes, both the original bundle and rescission bundle
URGENCY:	None
GENERAL REMARKS:	No replying affidavit or heads of argument were filed by Applicants. Delaying tactics and attempts to seek postponement might surface. Same will be opposed and punitive cost orders will be sought

ADV CFJ BRAND SC

Counsel for Respondents

ADV JGC HAMMAN

Counsel for Respondents

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 89196/16



In the matter between

ECONOMIC FREEDOM FIGHTERS — **FIRST APPLICANT**

JULIUS SELLO MALEMA — **SECOND APPLICANT**

and

AFRIFORUM NPC — **FIRST RESPONDENT**

AFRISAKE NPC — **SECOND RESPONDENT**

FILING NOTICE

DOCUMENT: **RESPONDENTS' HEADS OF ARGUMENT**

DATE ON ROLL: **NOT ALLOCATED YET**

FILED BY: **HURTER SPIES INC**

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AND TO: **KWINANA & PARTNERS INCORPORATED**
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Date: 24/07/17
Name: 12:41
Signature:

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 89196 / 2016

In the matter between:

ECONOMIC FREEDOM FIGHTERS	First Applicant
JULIUS SELLO MALEMA	Second Applicant

and

AFRIFORUM NPC	First Respondent
AFRISAKE NPC	Second Respondent

FIRST AND SECOND RESPONDENTS'
CONCISE HEADS OF ARGUMENT

INTRODUCTION:

1.

This is an application for rescission of judgment of an order granted by the Honourable Mr. Justice Mabuse on 7 March 2017.

2.

The Applicants have not filed Heads of Argument and hence the Respondents are filing Heads of Argument to procure a hearing date on the Motion Roll.

3.

The Respondents have provided indexes for both the initial bundle that served before this Honourable Court when the relevant order was granted and the bundle in the rescission application. For ease of reference in these Heads the initial bundle that served before Court will be referred to as "the initial bundle" and the bundle in the application for rescission of the default judgment will be referred to as "the rescission bundle".

4.

The order that is the subject matter of the rescission application appears on **paginated pages 17 and 18 of the rescission bundle**. In terms of the order the Applicants (Respondents at the time) are interdicted from inciting unlawful land invasions. The relevant prayer of the order reads as follows:

> *"The First and Second Respondents are interdicted from inciting and/or instigating and/or commanding and/or procuring any*

individual/s to commit the crime of trespassing as described in the Trespass Act, 6 of 1959, and/or to enter any land belonging to or in control of any individual/s or entity/entities without the required permission of the landowner or lawful occupants of land, or a lawful entitlement to do so."

5.

A punitive cost order was also granted against both of the current Applicants.

6.

It appears that the application for rescission of judgment is brought in terms of Rule 31(2)(b) as the Applicants accept that they have to show good cause (**paginated page 5, paragraph 4 of rescission bundle**) and it is also accepted that the application had to be brought within twenty days and condonation is sought for the launching of the application outside the twenty day period. The Respondents are opposing the granting of condonation sought on the basis of the weak merits in the Applicants' case and especially on the basis that the explanation for the lateness provided is not truthful.

THE APPLICABLE LEGAL PRINCIPLES:

7.

In order for an Applicant to possibly succeed with a rescission application in terms of Rule 32(1)(b), the Applicant must show the following:

7.1 An absence of wilfulness;

7.2 A reasonable explanation for the default;

7.3 That the application is *bona fide* and not made with the intention to delay the Applicants' claim;

7.4 That the Applicants have a *bona fide* defence to the Respondents' claim.

See: ***Joffe et al, High Court Motion Court Practice,*** *page 1-78.*

8.

The Applicants attempt to explain the absence of wilfulness and default of appearance by averring that Ms. Mtembu, on whom the application was served in the offices of the First Applicant on 16 November 2016, allegedly never made the Applicants aware of the application..

See: **paginated page 5, paragraph 5 to paginated page 8, paragraph**

14 of the rescission bundle

9.

In short, the Applicants aver that Ms. Mtembu did not bring the application to the attention of the relevant officials, including the central command team of the First Applicant, and that the reason therefor might be that she was negligent or obstructive in this regard. It is also averred that Ms. Mtembu has since left the employment of the First Applicant in terms of a settlement agreement that resulted from disciplinary action. The response of the Respondents is that the Applicants became aware of the application when it was served as proper service took place and that the Respondents cannot be blamed if the Applicants' house is not in order.

10.

It is also pointed out that the Second Applicant, who is employed as the president of the First Applicant, is part of the central command team of the First Applicant and thus would have been one of the individuals to whom the application ought to have been forwarded if the channel had been properly functioning.

11.

It is also pointed out that when as letter of demand annexed to the initial application was transmitted to the exact same address for both Respondents, a response was forthcoming.

See: **paginated page 58, paragraph 12 to paginated page 61, paragraph 14 of the rescission bundle**

12.

The letter of demand and response and relevant returns of service referred to appear from **paginated pages 77 to 83 of the initial bundle.**

13.

It is submitted that the explanation tendered for the alleged absence of wilfulness and default is insufficient and that rescission of judgment ought not to be granted. The Applicants also do not cross the hurdle that the application should be *bona fide* and not made with the intention to delay the Respondents' claim.

14.

Already in the response to the letter of demand **(paginated page 82 and 83 of the original bundle)** Applicants indicated that they had no intention of desisting from their unlawful and illegal conduct. The Honourable Court is specifically referred to paragraph 8 and 10 of said letter.

15.

The Respondents also filed an additional Answering Affidavit still within the timeframe for the filing of the answering affidavit after it became evident that the Second Applicant (acting as president of the First Applicant) was openly and actively acting in contempt of the order. This additional affidavit appears from **paginated page 90 to paginated page 106 of the rescission bundle.** The Respondents will, once again, deal with these aspects later on when the Honourable Court is requested to also grant appropriate relief for the contempt of Court.

16.

It is thus clear that the purpose of the application is to set aside the order simply so that the unlawful and illegal conduct can continue without the threat of contempt of Court proceedings. It is thus respectfully submitted that also on this basis rescission of judgment ought not to be granted.

17.

It also appears, with respect, that there are no merits in the Applicants' "defences" and that these "defences" are also not *bona fide.*

18.

Firstly, the Applicants aver that the order makes it difficult for them to pronounce on their object/s and thus has a chilling effect - **paginated page 8, paragraph 15 to paginated page 9, paragraph 18 of the rescission bundle.** The Respondents point out that, in fact, the Applicants have once again pronounced on issues of land after the order was granted - **paginated page 63, paragraph 18.4 of the rescission bundle**.

19.

The fact that an order is prejudicial to a party is no cause to have the order rescinded.

See: ***Swart v. Absa Bank,* 2009 (5) SA 219 (C)**

20.

It should also be added that the conduct complained of in the main application is criminal if regard is had to Section 2(1) of the *Trespass Act*, 6 of 1959, read with Section 18(2) of the *Riotous Assemblies Act*, 17 of 1956.

21.

In terms of the doctrine of legality this Honourable Court, as a Court of law, cannot condone illegal conduct.

See: ***Lester v. Ndlambe Municipality & Another,* 2015 (6) SA 283 (SCA) at par. 21 to 27**

22.

The Applicants also averred that the order is vague and that difficulties may arise in possible contempt proceedings since there is uncertainty as to whom exactly the order applies and because the Applicants claim to have no control over the numerous members and/or supporters of the First Applicant.

See: **paginated page 9, paragraph 19 and paginated page 13, paragraph 25 of the rescission bundle.**

23.

The wording of the order is most definitely not vague and substantially accords with the wording of Section 18(2)(b) of the *Riotous Assemblies Act*, 17 of 1956.

24.

The Constitutional Court held in ***Pheko & Others v. Ekurhuleni City, 2015 (5) SA 600 (CC) at par. 47*** that not only persons named in an order, but all those who have knowledge of the order aid and abet disobedience or are wilfully part to disobedience to the Court Order can be held in contempt of the Court. This is, however, not something that the Honourable Court needs to concern itself with currently as this aspect will be dealt with in each and every application for contempt of Court if and when same emerges.

25.

In ***AfriForum & Another v. Malema & Another, 2011 (6) SA 240 (EqC),*** in previous litigation between the current Second Applicant and First Respondent in the Equality Court, a similar question arose. In that case an order was, *inter alia*, granted prohibiting the singing of a certain song that was ruled to amount to hate speech. At *paragraphs 110 and 111* Lamont J held as follows:

"It was submitted that the law might be unable to enforce its order in the form of an interdict, as people are passionate about the right to sing the song and will ignore the order. They will sing the song in private or in circumstances where it is difficult or impossible to prevent its singing (e.g. where people unexpectedly and spontaneously burst into song). The answer is that such people must pursue new ideals and find a new morality. They must develop new customs and rejoice in a developing society by giving up all practices which are hurtful to members who live in that society with them. The Equality Act does not only seek to prohibit conduct. It seeks the very prohibition to open avenues of conciliation, to confer dignity upon all members of society by assisting them to find the building blocks necessary to shape their ability to make the judgments which will regulate their future conduct. The Equality Act seeks to drive the process forward by setting the moral standard to which members of society must adhere. The wide powers the Equality Act provides enable a Court to craft its order so as to meet this difficulty. Court orders must be strictly enforced and obeyed. There is a criminal sanction for breach in the form of contempt. ....

.... Parties to the proceedings can be directed to comply with the provisions of the Equality Act. Such parties can be dealt with by

27.

The Respondents averred that they were acting not only in their members' interest, but also in the public interest. The constitutional right to property as enshrined in Section 25 of the *Constitution of the Republic of South Africa*, 1996, is under attack because of the conduct complained of. The Second Respondent is also concerned with the economic climate.

28.

Section 38 of the *Constitution of the Republic of South Africa*, 1996, makes it possible for anyone to litigate in the interest of their members or of a group or class of persons or in the public interest when constitutional rights are involved.

29.

In addition thereto, the Respondents also aver that the vast majority of their members are taxpaying citizens and thus have a further interest if State land is invaded and, even more so, if this can hamper service delivery.

30.

Rabie J held in ***Groengras Eiendomme (Pty) Ltd & Others v. Elandsfontein Unlawful Occupants & Others,* 2002 (1) SA 125 (T) at par. 30** that unlawful land invasions are matters of public interest and an attack on the rule of law.

31.

There does also not appear to be merits in this "defence".

32.

The Second Applicant in his Founding Affidavit in the rescission application states that there is no causal link between his utterances and the conduct complained of and actual land invasions occurring. It is also averred that the utterances which led to criminal charges against the Second Applicant should be ignored because "the charges" are subject to an alleged Constitutional challenge.

33.

The Respondents merely had to prove a reasonable apprehension of harm to secure the interdict that was granted by the Honourable Mr. Justice Mabuse.

It in any event appears that at least some land invasions did have a nexus to utterances that were made. As for the alleged Constitutional challenge, there is no adherence to the *best evidence*-rule and no documentary proof of the alleged challenge is places before this Honourable Court. There is also no detail in relation to which constitutional right is allegedly being infringed upon. In any event a defence must already be in existence at the time when judgment is granted.

See: ***Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A) at 939**

34.

Although it is not the test, it is worth mentioning that individuals can be convicted of the offence created in Section 18(2)(b) of the *Riotous Assemblies Act*, 17 of 1959 even if the crime that someone else was instigated to commit was not committed;

See: ***S. v. Basson,* 2007 (3) SA 582 (CC), par. 207 to 209**

35.

The Applicants furthermore aver that the order granted by the Honourable Mr. Justice Mabuse appears to be enforceable throughout the Republic of South

way of contempt proceedings for non-compliance. Persons who are not parties to the proceedings must be dealt with by way of structuring the order that society knows what conduct is acceptable. Persons who are aware of the line which has been drawn by the Court are as a matter of both law and ubuntu obliged to obey it. There may be no immediate criminal sanction. Their breach of the standard set by this Court will, however, surely result in the appropriate proceedings under the Equality Act being taken against them. Non-participants are bound by orders setting such standards. The Equality Act contemplates that they will be so bound. The order of the Court which set the law, are no different from any order of any Court which determines what the law is. The course open to a non-participant who is aggrieved is to try to persuade the Court hearing his particular matter that the order of the other Court is clearly wrong."

26.

As an additional "defence" the Applicants aver that the Respondents have no entitlement or standing to act in relation to land not belonging to the Respondents' members, such as State land. The Respondents (Applicants at the time) set out their standing in great detail. This appears on **paginated page 8, paragraph 7 to paginated page 10, paragraph 10 of the initial bundle.**

Africa whilst he was sitting in the Gauteng Division of the High Court in Pretoria.

36.

This argument holds no merit as Section 42(2) of the *Superior Courts Act*, 10 of 2013, dictates that any order of any division of the High Court can be enforced throughout the Republic of South Africa.

37.

The last purported "defence" raised by the Applicants is that there is an alternative remedy in the form of criminal sanction.

38.

It is clear that this avenue has already been attempted by, *inter alia*, the Second Respondent. This approach has been unsuccessful as the Applicants and specifically the Second Applicant, are continuing with the unlawful conduct and even did so at his appearances at the criminal court when appearing for the offences.

39.

The fact that the conduct complained of can give rise to a criminal complaint is very seldom, if ever, regarded as an alternative legal remedy to an interdict.

See: ***Hotz & Another v. University of Cape Town,* 2017 (2) SA 485 (SCA) par. 36**

40.

Lastly, the Applicants aver that punitive costs ought not to have been granted against them by the Honourable Mr. Justice Mabuse. The case for seeking punitive costs is made out in the Founding Affidavit in the initial application. It is also repeated on **paginated page 71, paragraph 29.1 to paginated page 72, paragraph 29.3 of the rescission application.**

41.

The granting of crossed orders is a matter of judicial discretion and it is accordingly submitted that the discretion was correctly exercised in the light of the conduct being reprehensible, constituting a crime and various other factors.

CONDONATION:

42.

It is admitted that the application was served one day out of time. The explanation provided is that the driver's vehicle allegedly broke down and he only arrived at the Respondent's attorneys at about 17h15 and the office was already closed for the day.

43.

The explanation is refuted and proven to be false by the Respondents. The building where the attorneys are situated has strict access control and the security records show that the driver did not even attempt to gain access as he falsely avers. There is thus no good explanation for the lateness. The explanation should also be seen in the light of the weak merits in the case.

44.

It is accordingly submitted that condonation should not be granted.

COSTS:

45.

In rescission applications, the Applicant/s are the parties seeking an indulgence and are normally ordered to pay the costs of the application, even if successful.

46.

It is submitted that the factors considered by Mabuse J when he granted the initial punitive cost order should again be considered.

47.

The false explanation tendered for the late serving of the application and the contemptuous conduct also weigh in favour of a punitive cost order.

CONTEMPT OF COURT:

48.

There can be no doubt that the Applicants were aware of the order and that they knowingly defied it. The return of personal service on the Second Applicant has been filed and he also quotes the relevant portion of the order *verbatim* in his founding affidavit. The contempt aspect is fully dealt with in

the supplementary answering affidavit.

49.

In ***Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC) par 2 and 25 – 30** it was held that contempt proceedings can be instituted by a Court *mero motu*. The importance of securing compliance with court orders is also stressed.

50.

The Applicants clearly have no respect for the order that was granted and have not filed a replying affidavit in which the open and active defiance of the order could have been explained.

51.

It is submitted that the Applicants should be called upon to show cause why they should not be held in contempt of court and why an appropriate sanction should not be imposed.

CONCLUSION:

52.

The Respondents respectfully submit that the following order should ensue:-

1) Condonation is not granted/the application is dismissed
2) The Applicants are ordered to pay the Respondent's cost of the application on an Attorney and Client scale, which shall include the cost of two counsel where so employed
3) The Applicants are called upon to show cause within 15 court days from date of this order, by way of affidavit, why they should not be held in Contempt of Court and an appropriate sanction be imposed.
4) The Respondents may reply to the explanation tendered by affidavit within 10 court days of receipt thereof.
5) The normal rules and directives in relation to heads of argument and set down of applications applies thereafter
6) Costs in relation to the contempt aspect are reserved



C.F.J. BRAND S.C.



J.G.C. HAMMAN

COUNSEL FOR RESPONDENTS