

SOUTH AFRICA / JUDGMENT

# Wijnen and Another v Mohamed and Others (16043/13) [2014]

## ZAWCHC 138 (1 September 2014)

[2014] ZAWCHC 138

## COURT

Western Cape High Court, Cape Town

## BEFORE

Masuku

## CASE / FILE NUMBER

16043/13

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IN THE HIGH COURT  
OF SOUTH AFRICA  
(WESTERN CAPE  
DIVISION, CAPE TOWN)  
CASE  
NO. 16043/13

## DATE:

01 SEPTEMBER 2014

REPORTABLE

In the matter

## between:

OLAF RODERICK

WIJNEN.....First

Applicant

MILKO PETER

KOCK.....Second

Applicant

And

ABDURAGMAN

MOHAMED.....First

Respondent

NADIERA

MOHAMED.....Second

Respondent

CITY OF CAPE TOWN

CAPE TOWN

MUNICIPALITY.....Third

Respondent

FURTHER OCCUPANTS

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OF THE PROPERTY.....Fourth  
Respondent

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## JUDGMENT

DELIVERED ON MONDAY, 01 SEPTEMBER 2014

MASUKU, AJ

1. This is an application for an order in terms of Rule 6 (12) (c) of Uniform Rules of Court setting aside the order of Bremridge AJ of 6 August 2014. That order authorized the service of a notice issued in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 “the PIE Act”. The order was granted pursuant an ex parte application by the Respondents in this application, (the Applicants in the main eviction application) on 6 August 2014. Rule 6(12)
- (c) of the Court provides that 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.” This procedure affords an aggrieved party a simple mechanism in terms of which an order granted ex parte, may be reconsidered by a Court. Reconsideration of an order may involve the deletion of the order, in part or in whole, an amendment of an order or even addition to the order. The Applicants in this application seek an order setting aside the entire order of Bremridge AJ on a number of grounds which I deal with below.
2. The nub of the Applicants’ complaint regarding the order of Bremridge AJ is two-fold. First, it is that the order was granted in circumstances where the application was defective in terms of Rule 6(4) of the Rules of Court, because it was not “filed with the registrar and set down, before noon on the court day but proceeding the day upon which it is to be heard”. Secondly, it is that the application was set down for hearing as an urgent application before Bremridge AJ who was sitting on urgent motions, without complying with Rule 6(12). In so far as the application was brought as one of urgency, the Applicants contend that there was no prayer for condoning the non-compliance with the Rules and no grounds of urgency set out in the founding affidavit.
3. The Respondents’ response to this application is that no legal basis exists for the reconsideration and setting aside of the order of Bremridge AJ. They contended that an ex parte application is the regular manner of complying with the statutory requirements in section 4(2) of the PIE Act, and had been sanctioned by the practice notes, the High Court and the Supreme Court of Appeal. In this regard I was referred to the case of Cape Killarney Property Investments (Pty) Ltd v Mahamba 2001

- (4) SA 1222 (SCA) at para 15 and 16. Practice Note 37(11) regulating Chamber Book applications in this Division also provides that applications may be brought through the Chamber Book for directions for service in applications involving the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
4. It was submitted further that no practical effect would result from setting aside the order of Bremridge AJ. I understood that to mean that if the order is set aside, that would not dispose of the matter for the eviction of the Applicants in the main application. The Respondents would simply re-launch their application to have the Applicants evicted from their land. Furthermore, so the argument went, the notice, which was given effect to by the order of Bremridge AJ, completed the procedural steps necessary to ensure that the hearing on the eviction of the Applicants was not hampered by procedural or technical objections.

#### EX PARTE APPLICATIONS

5. An ex parte judicial proceeding is conducted for the benefit of only one party. A bedrock feature of due process is fair notice to parties who may be affected by legal proceedings. An ex parte judicial proceeding, conducted without notice to, and outside the presence of, affected parties, would appear to violate the provisions of the Constitution of the Republic of South Africa. The basic procedural safeguard, ensuring an impartial court, is a hearing held in public in which all the parties with an interest in the order of the Court are allowed to participate. Section 34 of the Constitution guarantees the right of everyone to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.
6. An ex parte procedure could violate the procedural right in section 34 of the Constitution. Unguarded, an ex parte application may also violate the rights guaranteed in section 9(1) of the Constitution, which provides that everyone is equal before the law and has a right to equal protection and benefit of the law. Courts do not likely hear ex parte applications without being satisfied that parties not before them will not suffer constitutional prejudice. A Court must give effect to the constitutional principles and requirements of equality, impartiality and fairness. In appropriate circumstances a Court will require that an ex parte application be served or published, alternatively a court will issue such directions as are necessary to safeguard the fairness of its processes, if it is of the view that a party not before it may suffer prejudice.
7. However, adequate notice of judicial proceedings to concerned parties may at times work irreparable harm to one or more of those parties. In such a case the threatened party or parties may approach a Court on an ex parte basis for temporary judicial relief without notice to, and outside the presence of, other persons affected by the hearing. The circumstances that may justify a party's reliance on or resort to an ex parte application have been set out in numerous cases and received its fair share of commentary from legal scholars. (*Schlesinger v Schlesinger* 1979 (4) SA 342 (WLD) at page 347 H – 348 (A); *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) at 428; Erasmus at B1-41)

8. I will not repeat them here save to add that the principles of ex parte applications are trite.
9. Whether or not the Respondents in this application were entitled to bring an urgent ex parte application must be seen from the facts and circumstances of the case before the Court. The ex parte application was filed in the context of an opposed eviction application under the provisions of the PIE Act. It was hastily prepared, served and filed and set down for hearing on the same day of 6 August 2014. It was therefore not set down as per Rule 6(4) “before noon on the day but one preceding the day upon which it is to be heard.” The application was not placed on the unopposed roll in the Third Division of the High Court, as would be the case for unopposed matters but was placed before an urgent judge as an urgent matter. It was clear to the Respondents that if the matter was not treated as one of urgency, there were two risks to their application for the eviction of the Applicants.
10. The first was that the application for eviction set down for hearing on 21 August 2014 would be heard and possibly dismissed by the presiding judge for lack of compliance with the mandatory requirement of section 4(2) of the PIE Act. The second risk was that the Applicants in the eviction application would seek a postponement in order for them to comply with section 4(2) notice. Both these prospects loomed large over the Respondents who decided to launch an urgent ex parte application to cure a material defect in the application for the eviction of the Applicants. It appears to me permissible, in appropriate circumstances, to launch an ex parte application on an urgent basis if the timeframe for the setting down of such application in Rule 6(4) of the Rules of Court is insufficient to meet the urgency of the situation. In other words, it appears to me that the Respondents resorted to setting down the ex parte application as one of urgency because they needed to serve the Applicants with the section 4(2) notice within fourteen days prior to the hearing of the application on 21 August 2014. If the Respondents had failed to serve the Applicants with the statutory notice the main application for their eviction could not proceed on 21 August 2014; alternatively it could be dismissed if pursued in the absence of that notice. It was this necessity that triggered the urgency in setting down the ex parte

application on 6 August 2014. The urgency was aimed at preventing the application on 21 August 2014 from either being postponed or dismissed for lack of compliance with the notice requirement.

11. With pragmatic haste, and realizing their procedural quagmire, the Respondents had to prepare the ex parte application and place it before Bremridge AJ to be heard as an urgent ex parte application. That approach, in my view, was reasonable and necessary under the circumstances. It prevented the application on 21 August 2014 from being aborted on a technicality. As a consequence of Bremridge AJ’s intervention, the application for the eviction of the Applicants was ripe for hearing on the merits, because there was compliance with the fourteen-day notice in section 4(2) of PIE Act. The Applicants were entitled, under the compulsion of necessity, to set down the ex parte application for hearing on an urgent basis. The question that arises on this finding is whether the Applicants’ application as one of urgency complied with the rules of urgency in Rule 6(12). In my view, they did not,

although that is not where the matter must end, since a Court has a wide discretion to condone any non-compliance with its Rules. It appears to me that this is the judicial discretion that Bremridge AJ was entitled to rely on to grant the order of 6 August 2014. I cannot, on that, set aside the impugned order of Bremridge AJ. The extent of the non-compliance with the

Rules of urgency is significant on the approach I take to the issue of costs.

12. The Notice of Motion filed in the ex parte application lacked two significant prayers common and necessary for urgent applications. The first is that the Applicants in that ex parte application did not seek an order condoning their non-compliance with the rules by bringing the application as one of urgency. As appears from the affidavit filed in support of that ex parte application, there are no grounds of urgency that were set out and the only reason given in support of the application is that the application for the eviction of the Applicants had been postponed to 21 August 2014 “as the matter had become opposed and it seems that no amicable resolution could be found to this matter.” The Applicants did not set out, in the founding affidavit, the significance of the hearing date to support their argument of urgency. The connection between the urgent application and the date of the hearing of 21 August 2014 is the fourteen-day notice of the section 4(2) notice. That connection must have been discovered in the pile of papers by the learned judge through a diligent reading and careful consideration of the application. It is clear from the papers taken as a whole that the real urgency was the necessity to comply with the fourteen-day notice requirement in section 4(2) of the PIE Act and the necessity to comply with the court order of Mantame J, which postponed the eviction application for hearing on 21 August 2014.
13. What the order of Bremridge AJ did was to prevent the application of 21 August 2014 from being unnecessarily postponed, or dismissed on a technicality. I am in no way suggesting that the order deprived the Applicants of a valid defence to their eviction, because they had indeed taken the technical argument in their defence to the main application. The technical defence could wade off the eviction application for a moment but since it could be cured, such victory is temporary and would decay with time. The real dispute, which is whether the Applicants should be evicted from the property of the Respondents, will live beyond this procedural objection. I am accordingly content that the ex parte application was appropriate and furthermore, given the intervening factors, it was necessary for the ex parte application to be heard as one of urgency. Bremridge AJ, in his wide discretionary powers and having considered all the papers and in particular the order of Mantame J and the requirement of the section 4(2) notice, was entitled to treat the matter as such and to grant the order as prayed for. The wide discretion to condone non-compliance with its Rules includes where there has been no specific prayer for such condonation. Bremridge AJ was pragmatic and took a decision that ensured that the application was made ripe for hearing on the merits on 21 August 2014. Having regard to the application and taking into account all the facts, which were before him, what the learned judge did was no more than act in a manner that protected the integrity and proper functioning of our Courts to ensure that the real disputes

between the parties are heard and determined without undue delays. I am accordingly not at large to interfere with an eminently reasonable order of Bremridge AJ in the circumstances and accordingly dismiss the application to have his order set aside.

#### COSTS

14. Even though I have dismissed the application I take a different view on the issue of costs. First the conduct of the Respondents in the main application is less than satisfactory and the less said about it the better. Second, the ex parte application lacked clarity and essentially forced the judge to plough through the papers to get to understand the issue of urgency. The conduct was languorous, lacking in the affidavits material allegations that were necessary to disclose for the judge to appreciate the urgency immediately. Their failure to set out succinct grounds of urgency in the ex parte application was an irresponsible attitude that takes for granted the rigorous requirements of ex parte applications to pertinently point out essential detail. In the founding affidavit, the judge could have been pointed out to the order of Mantame J, which postponed the matter to 21 August 2014 and thereafter indicate the necessity of complying with the section 4(2) notice on the date of 6 August 2014. That was not done, leaving it to the judge to dig through the papers for an answer on urgency. Eviction proceedings require a rigorous compliance with the relevant statutory provisions. It is a process that must be approached with reverence and not a cavalier and boastful attitude.
15. What the Respondents did in the eviction application was to lapse into a state of reckless inertia for a period of time; waking up on the eve of the last day of the fourteen-days required to issue notice to the Applicants - to the reality that their application was vulnerable if a section 4(2) notice was absent. In my view, there would have been no need to resort to an urgent ex parte application if the Respondents had paid adequate attention to their duty to ensure that the mandatory statutory requirements of section 4(2) were complied with on time. In adopting this rather last minute robust procedure, they placed the Court under unnecessary pressure in the result creating the impression that they considered the ex parte application to be there for the mere asking. At the time that this ex parte application was heard on an urgent basis, the Applicants in the meantime had, amongst others, mounted a spirited defence against the eviction on the basis of the lack of compliance with a mandatory procedural requirement.
16. For example, having obtained the order of Bremridge AJ on 6 August 2014, they did not advise the Applicants until 19 August 2014, five days after the Applicants had filed their heads of argument relying on their non-compliance with the notice as a defence. Had the Applicants been made aware of the Bremridge AJ in time before written submissions had been filed for the eviction application, they would not have spent any time on that defence. In addition, at the hearing of the application, and on raising the Rule 6(12)(c) application, the Respondents threw another curve ball to the Applicants by withdrawing the relief sought against the further respondents. The Applicants correctly lamented this step as having a destabilizing effect on their defence, in particular the prospect that these proceedings would be treated in a piecemeal fashion. I share the Applicants' response and I am satisfied on the

conspectus of all the facts that the Respondents pursued their eviction application in a manner that warrants an order of costs against them.

17. In the circumstances I make the following order;
  - a. The application to set aside the order of Bremridge AJ is dismissed;
  - b. The Respondents in this application are ordered to pay the costs of the application, including the costs of the hearing on 21 August 2014.
  - c. The Applicants, in this application are permitted to file such further affidavits, as may be necessary, five days from the date of this order.
  - d. The main application is postponed sine die.

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Prepared on 12 October 2026 · Esheria