

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED
DATE: 15/11/2017 SIGNATURE: [Signature]	

CASE NO: 6672 / 2017

In the matter between:

142 ON SOUTH MANAGEMENT COMPANY (PTY) LTD

APPLICANT

and

CORNELIS BRITZ t/a NELIS BRITZ ATTORNEYS &
CONVEYENCERS

1ST RESPONDENT

THE REGISTRAR OF DEEDS

2ND RESPONDENT

POLOKWANE KOPANO PROPERTIES (PTY) LTD

REG NO: 2005/024409/07

3RD RESPONDENT

AFRICAN OUTDOORSMAN (PTY) LTD

Formerly known as ARROW CREEK 82 (PTY) LTD

REG NO: 2007/00357/07

1ST INTERVENING PARTY

MAVAVA TRADING 262 (PTY) LTD

REG NO: 2006/039049/07

2ND INTERVENING PARTY

JUDGMENT

SIKHWARI AJ

[1] This matter came for the first time by way of an *ex parte* application on 27 September 2017 without prior service of launching papers to the respondents. Justice MG Phatudi J made the following order:

1. *The forms and service provided for in terms of the Rules is dispensed with and that the matter may be dealt with as one of urgency in accordance with the provisions of Rule 6(12) of the Uniform Rules of Court.*
2. *A Rule nisi is granted with immediate effect in the following terms:*
 - 2.1. *Interdicting and restraining the first respondent from proceeding with the opening of the township register and*

registration of the General Plan on Portion 435 of the Farm Sterkloop 688 Registration Division LS.

- 2.2. Interdicting and restraining the second respondent from opening of the township register and registration of the General Plan on Portion 435 of the Farm Sterkloop 688 Registration Division LS.*
- 2.3. Directing the first and second respondents to proceed with the registration of the subdivision of the property situated at remainder of Portion 383 (a Portion of Portion 42) of the Farm Sterkloop 688 Registration Division LS.*
- 2.4. Directing the first and second respondents to proceed with the simultaneous transfer of the property situated at Portion 434 (a Portion of Portion 383 of the Farm Sterkloop 688 Registration Division LS) from the third respondent to the applicant.*
- 2.5. Directing the first and second respondents to proceed with the registration of the consolidation of Portions 432, 433 and*

434 into the one farm collectively known as Portion 435 of the Farm Sterkloop 688 Registration LS.

3. *The order stipulated in paragraph 2 shall act as a Rule nisi, calling upon the respondents to show cause, if any, on 23 November 2017 at 10h00, or as soon thereafter as the matter may be heard, why the said orders should not be made final.*
4. *The first respondent is ordered to pay the costs hereof on an attorney and client scale de bonis propriis.*
5. *The second and third respondents are only ordered to pay the costs in the event of opposition.*

[2] On the anticipated return date, the first and second intervening parties ("intervening parties") brought an application for leave to intervene in the main application. The application was opposed by the applicant. I granted the application without stating my reasons for doing so. I reserved the issue of costs. I now hand down my reasons and the decision on costs.

[3] Intervention is regulated in terms of rule 12 of the uniform rules of this court. The said rule provides that *“any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet”*.

[4] Rule 12 was imported to apply in application proceedings by the provisions of rule 6(14) which state that *“the provisions of rules 10, 11, 12, 13 and 14 apply to all applications”*.

[5] It is clear that the applicable test is similar to the test for joinder of parties in terms of rule 10 of the uniform rules. The said test is that the party must have ‘direct and substantial interest in the subject-matter’.

[5] The first and second intervening parties have separate contracts with the applicant. The said contracts are fairly similar. The said respective contracts provide that each intervening party shall retain certain two residential Erven as indicated on respective General Plan and the applicant is compelled to transfer the said Erven to the intervening party after opening of the Township

Register and as soon as the intervening party has complied with its obligations in terms of the provisions of clause 15 of the said contracts.

[6] The intervening parties submitted that that their interest extends to the immovable properties which form the subject-matter of the main application. The transfer has to be completed by no later than 31 December 2017, before the lapse of the development rights. In a letter from applicant's attorneys dated 27 September 2017 to intervening parties' attorneys, it was conceded by the applicant that the value of the property will be reduced to R6 000 000.00 if the development rights may lapse.

[7] This will constitute a loss on the part of the intervening parties. The interdict and rule *nisi* which was granted herein will make it impossible for the process to be completed by no later than the 31 December 2017. The financial and logistical expenses for re-doing the process will be huge on the part of the intervening parties.

[8] The applicant's contention is that the intervening parties have no 'direct and substantial interest in the subject-matter' on the basis that the rule *nisi* was intended to interdict the first respondent, on his capacity as a

conveyancer, "from proceeding with the opening of the township register and registration of General Plan Portion 435 of the Farm Sterklop 688".

[9] The applicant submitted further that the intervening parties are not parties to the agreement between the applicant and the first respondent. The applicant submitted that it is only the owner of the land who can transfer the land. It is common cause that the applicant is the owner of the said land. The applicant conceded that the interdict and / or rule *nisi* herein may have some impact on the intervening parties but such an impact will not constitute a legal interest.

[10] The court has discretion to grant intervention application. The said discretion has to be exercised judicially. In the case of *Ex Parte Moosa: In re Hassim v Harrop-Allin* 1974 (4) SA 412 (T) at page 416F-G, Bliss AJ said that "... at this juncture, the Court must not be overconcerned with the intrinsic merits of the dispute which can be fully canvassed and fought out in the main proceedings.

"In my opinion, at the leave to intervene stage, it is sufficient for the party seeking leave to intervene to rely on allegations which, if they can be proved in the main action, would entitle him to succeed..."

[11] It is trite law that the intervening parties will not be refused leave to intervene in order to defend their interests merely because the court considers that the legal grounds upon which those interests are assailed are bad, for there is always the possibility of an appeal against the court's judgment (see *Hersch v Esterhuizen* 1946 OPD 370).

[12] In my view, if the opening of the township register does not go ahead; or rather is interdicted, the intervening parties may approach the court to compel same to be effected on an application or action based on determination of the same question of law and fact which is substantially the same as herein. The trite test is that the said question of law and fact must 'in the main' or in their 'principal essentials' be 'essentially' the same (see *Dreyer v Tuckers Land and Development Corporation (Pty) Ltd* 1981 (1) SA 1219 (T) at page 1224F-1225B).

[13] The intervening parties have succeeded to prove that they are entitled to intervene in the main application. Costs should follow the event. In this case the applicant must pay the costs of the intervening parties, which costs should include costs of senior counsel resulting from the employment of two counsel.

[14] As stated above, the applicant approached the court in terms of rule 6(4)(a) of the uniform rules of this court which regulate every application brought *ex parte*. An *ex parte* application is an application which is brought without service of launching documents to the respondents or affected parties.

[15] Rule 6(4) of the uniform rules of this court states that"

6(4)(a) Every application brought ex parte (whether by way of petition or upon notice to the registrar supported by an affidavit as aforesaid) must be filed with the registrar and set down, before noon on the court day but one preceding the day upon which it is to be heard. If brought upon notice to the registrar, such notice must set forth the form of the order sought, specify the affidavit filed in support thereof, request the registrar to place the matter on the roll for hearing, and be as near as may be in accordance with Form 2 of the First Schedule.

(b) Any person having an interest which may be affected by a decision on an application being brought ex parte, may deliver notice of an application for leave to oppose, supported by an affidavit setting forth the nature of such interest and the ground upon which such

person desires to be heard, whereupon the registrar must set such application down for hearing at the same time as the initial application.

(c) At the hearing the court may grant or dismiss either or both such applications as the case may require, or may adjourn the same upon such terms as to the filing of further affidavits by either applicant or otherwise as it deems fit.

[16] Upon being served with the court order of the 27 September 2017, the first respondent reacted in terms of rule 6(8) of the uniform rules of this court which states that “*any person against whom an order is granted **ex parte** may anticipate the return day upon delivery of no less than twenty-four hours’ notice*”.

[17] In anticipating the return day as aforesaid, the first respondent filed a notice of motion dated and served on the applicant’s attorney on the 31 October 2017; and setting down the matter for hearing in terms of rule 6(8) on the 7 November 2017.

[18] Rule 6(8) only apply where an order has been granted against a person *ex parte* and where a return day has been fixed. This subrule comes to the aid of a party who has been taken by surprise by an order granted *ex parte*. It does not apply where the return day of an *ex parte* rule *nisi* was extended in the presence of the affected party.

[19] Rule 6(8) differs materially with rule 6(12(c)) in that the latter allows a party against whom an order was granted in his absence in an urgent application to set the matter down for reconsideration. This must be a party who was served with launching papers but for some reason or another failed to attend court on the date for the hearing of the urgent relief. The former applies to a party who was never served with launching papers (see *Erasmus, "Superior Court Practice", 2nd Ed, Service 2, 2016, at page D1-81*).

[20] It is trite law that *ex parte* application as envisaged in rule 6(4) is invoked in limited type of cases such as cases where:

1. the applicant is the only person who is interested in the relief which is being claimed;

2. the relief sought is a preliminary step in the proceedings, such as applications to sue by edictal citation, for substituted service, to attach to found or confirm jurisdiction;
3. the nature of the relief sought is such that the giving of notice may defeat the purpose of the application, such as in the Anton Pillar-type of an order;
4. immediate relief, even though it may be temporary in nature, is essential because harm is imminent.
5. Certain kinds of applications are customarily brought *ex parte*. In this ground the local practice of various divisions of the high court differ. Generally, sequestration and winding up applications are brought *ex parte* in Kwazulu-Natal and Free State divisions of the high court whereas they are brought on notice in Gauteng Division unless based on *nulla bona* return.

(see Erasmus, "Superior Court Practice", 2nd Ed, Service 2, 2016, at page D1-60).

[21] Applicant has failed to state the category in which the matter herein belongs. In my view, the present application does not fall within any of the above-stated categories of cases which can be brought *ex parte* on such extreme urgency that prior service of papers is dispensed with. On this ground alone, the rule *nisi* and / or court order granted *ex parte* in favour of the applicant on 27 September 2017 has to be rescinded and / or dismissed and / or set aside and /or discharged.

[22] Good faith is a *sine qua non* in *ex parte* applications. In the case of *Cometal-Mometal SARL v Corlana Enterprise (Pty) Ltd 1981 (2) SA 412 (W)* at page 414E, Margo J formulated three cardinal rules of *ex parte* applications as follows:

- “(1) in *ex parte* applications all material facts must be disclosed which might influence the Court in coming to a decision.
- (2) the non-disclosure or suppression of facts need not be willful or *mala fide* to incur the penalty of rescission (*ie* of the order obtained *ex parte*); and
- (3) the Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.”

[23] In the case of *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at page 350B, Le Roux J stated that "it appears to me that, unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained *ex parte* on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant".

[24] When approaching the court on *ex parte* basis on 27 September 2017, the applicant did not disclose certain material facts such as the letter of first respondent dated 21 September 2017, resolutions that were signed by Andile Ramaphosa on behalf of the applicant, applications that were for finance with Investec by applicant, services agreement signed by Andile Ramaphosa, the date of commencement of Andile Ramaphosa, the meeting with attorney of the applicant on 28 August 2017, the knowledge of applicant's board of directors brought to it by Mr Carstens as appearing in annexure "NB10" to the answering affidavit of the first respondent, applicant's letter to the intervening parties dated 27 September 2017 (the date of the *ex parte* court order).

[25] Notwithstanding applicant's subjective views on the right of the intervening parties regarding the subject-matter in this application, the applicant was fully aware of the intervening parties' intention to oppose the urgent application prior to approaching the court on *ex parte* basis on 27

September 2017 but decided not to join them and / or not to disclose same to the court. On this ground alone, the rule *nisi* obtained *ex parte* has to be rescinded. The disclosure of the aforesaid information was material prior to the granting of the *ex parte* order. It would have influenced the court otherwise.

[26] The applicant has further written a letter to the intervening parties dated 13 September 2017 where the applicant indicated its threat to take them to court. What is boggling one's mind is that when the applicant ultimately decides to go to court, applicant does not join the intervening parties nor serve the papers to the cited respondents. There was no justification whatsoever for the applicant to approach the court on *ex parte* basis whilst applicant was aware of the attitude of the first respondent and intervening parties towards the intended application. The applicant has also failed to provide any sound justification.

[25] In the unreported judgment of the case of *Somnium Holdings (Pty) Ltd v Vodacom Service Provider (Pty) Ltd & 2 Others*, Case No 33399 / 2010, North Gauteng High Court (delivered on 17 September 2010), Tuchten J stated in paragraphs 55, 51 and 52 that:

"50. I would add this: in this division, a most pernicious practice has become prevalent. Counsel frequently moves for rules *nisi*, without service, which contain far reaching provisions for interim relief, operative immediately. The grounds on which the applicant asks the Court to dispense with service are often flimsy at best and buttressed with the assertion from the bar that what is being sought is 'only a rule *nisi*', as if what was being sought was some trivial, formal relief which, if found to have been incorrectly granted, could easily be remedied at a hearing in due course. That is in many cases not so. The present is a case in point.

"51. The harm which was caused to Vodacom may, if Gogga is unable pay what it owes, be irreversible. This is bad enough but at least Vodacom, with its financial power, was able to stay the course and right the wrong that was done to it or at least limit the damage done to it. In many cases, respondents with slender means are faced with a choice of failing to comply with a Court order or fighting a long, uphill battle to reverse the order already made against them. We do not see the cases that such respondents have to settle or concede because of the injustice that denied them a fair hearing at the onset. In my view, the Courts should take condign action not only against applicants who violate this most fundamental of the rules of fair litigation but against the legal representatives who put them up to it as well. Lay litigants may not understand the finer points of the application of the principle of *audi alteram partem* to motion proceedings. Their representatives however do or, if they do not, they are not fit to practice in our Courts.

“52. In my judgment, therefore, the urgent application was indeed brought *ex parte* because no notice had been given to the Vodacom respondents before the urgent application was heard. It then follows firstly that no relief should have been granted at all because Somnium did not make out a case for coming to Court without notice and secondly, that Somnium was guilty of material non-disclosure in relation to its failure to disclose the December 2007 agreement and the true inwardness of Hartzenberg’s interaction with Conradie. The application for reconsideration under Rule 6(8) must succeed.”

[26] I share the above views expressed by Tuchten J. Same is true to the application before me and substantial number of other *ex parte* applications brought in this division on some obscure bases for urgency. In my view, the applicant’s case must fail. The court order of the 27 September 2017 should not have been granted on *ex parte* basis at all. Consequently, the rule *nisi* must be discharged. The applicant herein has abused the court process. The interdict has to be dismissed and the rule *nisi* be discharged.

[27] In the circumstances, I am not persuaded that the applicant has made a case for the confirmation of the rule *nisi* and / or interim order of the 27 September 2017. The said *ex parte* order stands to be discharged with costs,

including costs resulting from the employment of two counsel and / or costs of senior counsel.

[28] In my view, the costs order in paragraph 4 of the *ex parte* order of Phatudi J is not an independent or a standalone order. It is an order which is dependent on the outcome of paragraph 2 of the said *ex parte* order. This is more so in view of the fact that the said costs order was granted on *ex parte* basis without prior service of papers to the first respondent and also without hearing his version. The said costs order will fall with the rule *nisi* and / or interim order of the 27 September 2017.

[29] Furthermore, the whole order of the 27 September 2017 was granted on *ex parte* basis. The provisions of rule 6(8) are clear that “*any person against whom an order is granted **ex parte** may anticipate the return day upon delivery of no less than twenty-four hours’ notice*”.

[30] The first respondent’s notice of motion referred to above dated 31 October 2017 constitute compliance with subrule 6(8). Consequently, under rule 6(8), this court can interfere with costs order in the *ex parte* court order of the 27 September 2017. I intend to do so.

[31] My above findings bring the matter to finality. I therefore find it unnecessary to decide the question of applicant's authority to institute the application and merits of the application.

[32] I accordingly make the following order:

1. That the first and second intervening parties are granted leave to intervene in the application.
2. That the applicant is ordered to pay the costs of the first and second intervening parties in the intervention application, such costs to include costs occasioned by the employment of two counsel where one is a senior counsel.
3. That the court order and rule *nisi* granted on the 27 September 2017 is discharged.
4. The application for interdict is dismissed.
5. That the applicant is ordered to pay costs of the first respondent as well as of the first and second intervening parties in the main

application, such costs to include costs for the employment of two counsel where one is a senior counsel.



MS SIKHWARI AJ
ACTING JUDGE OF THE HIGH
COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

For Applicant	:	Adv MM Oosthuizen SC
	:	Adv Y Rust
Instructed by	:	Espag Magwai Attorneys
For 1 st Respondent	:	Adv R Du Plessis SC
Instructed by	:	Du Toit, Swanepoel, Steyn & Spruyt Att
For Intervening Parties	:	Adv F Botes SC
Instructed by	:	AJ Stone Attorneys
		c/o De Bruin Oberrholzer Inc
Date of Hearing	:	7 November 2017
Date of Judgment	:	15 November 2017