

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO.: 1511/2006

DATE HEARD:

DATE DELIVERED:30-11-2007

In the matter between:

A A NIEUWOUDT AND OTHERS

Applicants

and

**THE MINISTER OF PUBLIC
WORKS**

Respondents

(leave to appeal)

and

In the matter between:

THE MINISTER OF PUBLIC WORKS

Applicant

and

A A NIEUWOUDT AND OTHERS

Respondents

(application for leave to cross appeal)

CORAM: C.C WILLIAMS J:

J U D G M E N T

WILLIAMS J:

1. This is an application for leave to appeal as well as an application for leave to cross-appeal against my judgment in the main application dated 17 August 2007 in which the following order was made:

“a) With respect to respondents W.H. Mostert and J.A. McDonald paragraphs 1.1, 1.2, 1.3 and 1.6 of the rule nisi issued on 8 December 2006 are discharged.

b) Applicant is to pay the costs of the two above-mentioned respondents.

c) Paragraphs 1.1, 1.2, 1.3 and 1.6 of the rule nisi of 8 December 2006 are confirmed and made final as against the remainder of the individual respondents as per the amended annexure “A” to the Notice of Motion.”

2. The applicants in the application for leave to appeal are the individual respondents in the main application with the exception of Mr. W.H. Mostert and Mr. J.A. McDonald. The application is directed against paragraph c) of the order.

The application for leave to cross-appeal by the applicant in the main application relates to the position of Messrs. Mostert and McDonald, i.e. paragraphs a) and b) of the order. For the sake of convenience the parties are referred to as in the main application except for W.A. Mostert and J.A. McDonald who will be referred to by name.

3. The essence of the application for leave to appeal is that I erred in finding that the provisions of the Prevention of the Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, ("*PIE*") does not apply to the individual respondents who used the structures they had erected on the land in question as holiday homes.

In the light of the recent judgment of the Supreme Court of Appeal in *Barnett and Others v Minister of Land Affairs and Others* 2007(11) BCLR 1214 (SCA), and specifically paragraphs 37 to 40 thereof, where the SCA found on very similar facts that PIE found no application, this argument consequently is without merit.

4. In argument before me, Mr. Reinders, who appeared for the individual respondents, valiantly persisted that I should have found PIE to apply on the basis that the applicant's founding affidavit and the manner in which the application was dealt with by the applicant, were based on the provisions of PIE. That if I had found in these circumstances that PIE has application, the individual respondents would have been in the same position as W.H. Mostert and J.A. McDonald since I had also found that section 4(2) of PIE had not been complied with. Alternatively, that if I had found that PIE had application, a probe into whether it was just and equitable to evict the individual respondents would have been warranted.

5. This argument is untenable. Whether or not PIE applied to the individual respondents was a legal issue to be determined by the Court. The mere fact that the applicant chose to cover all the bases by dealing with the application in terms of the provisions of PIE does not and cannot render PIE applicable in the circumstances *in casu*.
6. The further grounds of appeal contained in the notice of application for leave to appeal were not argued before me and in any event in the light of the Barnett case *supra* are of no merit at all.
7. It follows then that the application for leave to appeal should be dismissed with costs. I do not regard it as unreasonable that the costs include the costs of two counsel.
8. The grounds raised by the applicant in the application for leave to cross-appeal can conveniently be dealt with as follows:
 - 8.1 That I erred in finding that W.H. Mostert and J.A. McDonald occupy their structures on a permanent basis and that PIE therefore has application.
 - 8.1.1 This argument with regard to W.H. Mostert is somewhat puzzling. Mr. Arendse SC, who appeared for the applicant in the main application (and in these applications for leave to appeal),

conceded that W.H. Mostert is an exception to the rest of the individual respondents in that he and his wife occupy their structure permanently. The argument now, in the application for leave to cross-appeal, is that W.H. Mostert has not provided the court with sufficient particularity regarding the circumstances surrounding his occupation of the property, how long he has occupied the property, etc on which the court could find that he resided permanently.

8.1.2 This is just not correct. The letter written by W.H. Mostert to the applicant's attorney, and from which I quoted an extract on page 15 of the main judgment, states clearly that W.H. Mostert and his wife had occupied the property for longer than six months and that he is 68 years old and has no alternative accommodation. Mr. A.A. Nieuwoudt, the deponent to the answering affidavit, also makes the allegation that W.H. Mostert resides permanently on the property. During argument in the main application Mr. Arendse argued in the alternative that orders be granted as prayed for against all the individual respondents save for W.H. Mostert and his wife, with an instruction that the 8th respondent (Kamiesberg Municipality) facilitate alternative accommodation for them.

No mention was made, as alluded to in the notice of application for leave to cross-appeal and the heads of argument herein, that the applicant had withdrawn its application against W.H. Mostert, much less J.A. McDonald for that matter.

8.1.3 The position with regard to J.A. McDonald is somewhat different. Although J.A. McDonald states

that he resides permanently, which is confirmed by both A.A. Nieuwoudt and W.H. Mostert, he has not proved to be entirely truthful. In his affidavit he claims to have been appointed as lighthousekeeper at Groenriviermond. This state of affairs has been proven not to be true and Mr. Van Niekerk SC, who appeared for the individual respondents in the main application, readily conceded this. The applicant had served a rule 35(12) notice on him requesting particularity regarding his appointment as lighthousekeeper, which he ignored. J.A. McDonald also occupies two structures, no 33 and 34. He resides in one and rents the other out as holiday accommodation. Although I had found, that McDonald resided permanently and was therefore protected by PIE, a Court of appeal may reasonably, on these facts, make an adverse finding or order that the structure used as holiday accommodation be demolished.

8.2 The further ground of appeal is that I erred in finding that section 4(2) of PIE had not been complied with.

8.2.1 The applicant seems to be laboring under the misconception that I found that W.H. Mostert and J.A. McDonald did not receive proper notice of the

proceedings in terms of section 4(2) of PIE. A proper reading of the main judgment and particularly paragraphs 22 and 23 thereof, will prove the opposite. What I did find is that the seventh and eighth respondents, the Namaqua District Municipality and the Kamiesberg Municipality, did not receive proper notice in terms of section 4(2) before the hearing. The proceedings on 8 December 2006 were not merely a ruling on the procedure to be adopted or the manner of service to be effected. The order of 8 December included a *rule nisi* calling upon the respondents to show cause, *inter alia* why the individual respondents should not be evicted. As such the *rule nisi* constituted substantive relief. See *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001(4) SA 1222 at 1228 F-H.

8.2.3 The proceedings of 8 December 2006 were therefore “*proceedings*” contemplated in section 4(1) of PIE and as such the municipalities having jurisdiction (seventh and eight respondents), should have received notice thereof, at least 14 days before the hearing of the proceedings. The municipalities were only served the papers in the

main application after 8 December 2006. No notice in terms of section 4(2) was served on the seventh and eight respondents.

The applicant is incorrect in the contention that the “*proceedings*” only commenced on 21 June 2007, and there is therefor no merit in this ground of appeal.

9. As far as the application for leave to cross-appeal is concerned, Mr. Reinders, who appeared for W.M. Mostert and J.A. McDonald, indicated that these respondents would abide the decision of the court.

The following orders are made.

- a) **The application for leave to appeal is dismissed with costs, which include the costs of two counsel.**
- b) **Application for leave to cross-appeal to the Full Bench of this Division against paragraphs a) and b) of the order in the main application is granted only in respect of the respondent J.A. McDonald.**

C.C WILLIAMS
JUDGE

Counsel for Applicant: Adv N Arendse SC (State Attorney, Cape Town) With
Adv. J. Krige
Counsel for the Individual Respondents: Adv. Reinders