

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 3001/2005

In the case between:

PIETER BADENHORST SCOTT

Applicant

and

MARIA CATHARINA HOUGH

Respondent

HEARD ON: 15 JULY 2005

JUDGEMENT: RAMPAI J

DELIVERED ON: 18 AUGUST 2005

- [1] The matter came to me by way of an application in terms of rule 6(12)(c) of the Uniform Rules of Court. For the purposes of this judgement I shall refer to the parties as in

the main application. In this judgement the word applicant refers to the gentleman, Mr. Scott and the word respondent to the lady, Ms Hough.

[2] Before I deal with the issue, it is expedient to give a brief historical background of the matter. The parties were previously husband and wife. Three dependent minor children were born of the martial relationship, namely: P., a boy born on the [day/month] 1990, now 14 years old, H., a boy born on the [day/month] 1992, now 12 years old, M., a girl born on the [day/month] 1997, now 8 years old. The family previously lived in Bloemfontein.

[3] The respondent file for a divorce early last year. On the 26 February 2004 their marriage was dissolved. By agreement between the parties, which was reduced to writing and embodied in a deed of settlement, custody of the three minor children was awarded to the respondent. The deed of settlement was made an order of the court.

[4] After the divorce the respondent moved to Stellenbosch in the Western Cape. The applicant remained in Bloemfontein in the Free State. In his founding affidavit the applicant averred that since their divorce he had remarried someone else as did the respondent. By mutual agreement P. alias R. had been in the *de facto* custody of his father, the applicant since September 2004, notwithstanding the provisions of the court order. His two siblings had been in the custody of their mother, the

respondent, at all material times. On the 28th June 2005 H., alias H. with his sister M. travelled from Stellenbosch to Bloemfontein to spend the winter school holidays with their farther. The two children were supposed to return to their mother together on the 10th July 2004. H. never did.

[5] On Thursday the 14th July 2005 the applicant launched an urgent application for the provisional custody of H. pending the finalization of the application for the variation order. Advocate C. Reinders appeared for the applicant. For the respondent there was no appearance. Counsel for the applicant informed me that a copy of the application had been faxed to the respondent's attorneys at Stellenbosch early on the same day. I heard the matter in haste, in camera and in the absence of the respondent.

[6] I granted the following order on Thursday the 14th July 2004 after hearing a unilateral argument by the applicant's counsel. The order reads as follows:

1. Hierdie aansoek as 'n dringende aansoek aangehoor word en dat afstand gedoen word van die reëls met betrekking tot tye en betekenings soos voorgeskryf en soos bedoel in Hofreël 6(12).

2. 'n *Bevel nisi* uitgereik word waarin die respondent opgeroep word om redes, indien enige aan te voer op

Donderdag, 11 Augustus 2005 om 09h30 voormiddag
 waarom die volgende bevel nie finaal gemaak sal
 word nie:

2.1 waarom, hangende die afhandeling van hierdie
 aansoek die bewaring van die minderjarige
 kinders R. en H. nie aan applikant toegeken sal
 word nie.

2.2 waarom die bewaringsbevel in terme van die skikkingsakte
 aangegaan tussen die partye (en hierby aangeheg as aanhangsel "A") nie
 opgeskort sal word wat betref R. en H. ten einde gevolg te gee aan
 smeekbede 2.1 hierbo nie.

2.3 waarom die respondent nie gelas sal word om die koste van hierdie
 aansoek te betaal nie (ingeval van opposisie).

3. Smeekbedes 2.1 en 2.2 hierbo sal dien as 'n tussentydse
 interdik hangende die afhandeling van hierdie aansoek en
 dat alle bevel hierin verleen sal verval indien applikant nie
 binne tien (10) dae na verlening van 'n finale bevel hierin,
 sal aansoek doen om wysiging van die Akte van Dading
 (aanghangsel "A") waarin applicant sal aansoek doen dat
 die bewaring van die minderjarige kinders R., H. en M. aan
 applikant toegeken word.

4. Hierdie aansoek tesame met die *bevel nisi* op die
 respondente persoonlik beteken moet word."

[7] The very next day on Friday the 15th July 2005 the
 respondent launched an application in terms of rule 6(12)
 (c) whereby I was called upon to reconsider the order I
 granted in favour of the applicant the previous day.

According to rule 6(12)(c) notice the respondent's sought an order whereby the rule *nisi* I previously issued should be reconsidered and set aside seeing that the applicant had caused a defective notice of the application to be given to the respondent.

[8] Charl August Janse van Rensburg, an attorney of Bloemfontein, deposed to a sworn statement on behalf of the respondent in support of the rule 6(12)(c) application. According to his view the *diés induciae* applicable to the facts of this case was governed not by rule 6(5)(b) or 6(12) (a) or any other rule but by section 27 of the Supreme Court Act No. 59/1959.

[9] The contents of rule 6(12)(c) is couched in the following terms:

“(c) 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 rule must be distinguishable from rule 6(8) which stipulates that any person against whom an order is granted *ex parte* may anticipate the return day by giving at least a twenty four hour notice to the person in favour of whom the order was given.

[10] An *exposé* of the vital considerations which underlie a rule

6(12)(c) application is to be found in the case of **ISDN SOLUTIONS (PTY) LTD v CSDN SOLUTIONS CC & OTHERS** 1996(4) SA 484 WLD at 486H-487B where Faber AJ commented as follows:

“The Rule has been widely formulated. It permits an aggrieved person against whom an order was granted in an urgent application to have that order reconsidered, provided only that it was granted in his absence. The underlying pivot to which the exercise of the power is coupled is the absence of the aggrieved party at the time of the grant of the order. Given this, the dominant purpose of the Rule seems relatively plain. It affords to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his absence. In circumstances of urgency where an affected party is not present, factors which might conceivably impact on the content and form of an order may not be known to either the applicant for urgent relief or the Judge required to determine it. The order in question may be either interim or final in its operation. Reconsideration may involve a deletion of the order, either in whole or in part, or the engraftment of additions thereto.

The framers of the Rule have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered. What is plain is that a wide discretion is intended.”

[11] The passage was quoted with approval in **LOURENCO AND OTHERS v FERELA (PTY) LTD AND OTHERS** 1998(3) SA 281 TPD at 290 E-H per Southwood J and in

CAPE KILLARNEY PROPERTY INVESTMENTS (PTY)

LTD v MATAMBA & OTHERS 2000 (2) SA 67 (CPD) at paragraph 6 per Hlophe DJP, as he then was. In the instant case I also associate myself with the views expressed in the foregoing passage.

[12] The service of court papers upon an interested party is premised on the fundamental principle of *audi alterem partem*. This basic tenet of our law requires a court approached by the one party for a certain relief to hear the other party as well before granting the relief sought. In general a court will decline to grant a relief sought unless the party against whom such relief is sought has been fully and timeously apprised that relief in a particular form would be sought and that he has had the maximum benefit of the *diés induciae* in other words the fullest opportunity permissible in law of considering his defensive options and practically dealing with the claim for the relief being pressed.

[13] In the ordinary course of court proceedings, that is to say, in matters where the relief sought is not urgent, the service of court papers, in other words, ordinary non-urgent applications – there are two scenarios. Where the respondent's resides inside the province he is entitled to a maximum of five court days after the service of the court papers before he can be called upon to appear in court for the hearing – vide rule 6(5)(b). Where the respondent

resides outside the jurisdictional boundaries of the provincial division out of which the ordinary application was initiated the respondent is entitled to at least 14 calendar days if he resides inside a radius of 160km from the seat of the court or 21 calendar days if he resides outside such radius – vide section 27 Supreme Court Act No. 59/1959.

[14] In the extra-ordinary course of court proceedings, that is to say, in matters where the relief sought is urgent, the service of court papers, in other words, urgent applications – there are again two scenarios. The first scenario applies in a case where the respondent resides within the jurisdiction of the court. This scenario is governed by rule 6(12)(a) which provides that the court may dispense with the formal periods of service as prescribed in the rules. However, where the respondent resides outside the jurisdiction of the court there is no similar provision in the aforesaid principal legislation or statute which empowers the court in urgent matters to relax formal periods of service as prescribed in the principal statute. The mere absence of such a statutory provision *per se* does not mean that an applicant who resides within the jurisdiction of one court cannot launch an urgent application out of such court against a respondent who resides outside the jurisdiction of such court. Here rule 6(4) applies together with rule 6(12)(a). This is the second scenario. This uniform rule applies throughout the country irrespective of

the respondent's residence provided the matter is urgent and there is one or other jurisdictional factor which connects the respondent to the applicant's court of residence.

- [15] The respondent's argument boils down to this: It is permissible in such an urgent application for the applicant to seek and to obtain a rule *nisi* in secrete, in haste, and in camera against the respondent who is an outsider. But it is impermissible in such an urgent application for the applicant to seek and to be granted a rule *nisi* in haste in camera but in the absence of the respondent who had been given notice which in terms of section 27 was short or irregular service. Since a high court is empowered, in urgent matters, to relax the rules of service in respect of a respondent who resides within its area of jurisdiction I cannot see any reason in principle or logic as to why, in urgent matters, involving respondents who reside outside its area of jurisdiction, a high court should be precluded from doing so. If this is what the legislature had indeed intended, the legislature would simply have enacted a provision in the principal statute to the effect that in all urgent matters the applicant must follow the respondent's court, in other words, the applicant must initiate an urgent application for a rule *nisi* out of the high court where the respondent resides.

[16] A similar situation as in the instant case arose in **TURQUOISE RIVER INCORPORATED v McMENAMIN & OTHERS** 1992(3) SA 653 NPD per Levinsohn J where the respondent who contented that when an urgent application was initiated it was erroneously sought and erroneously granted because the respondent resided outside the jurisdiction of the court which granted the order; that section 2 Supreme Court Act No. 59/1959 read with the definition of a “civil summons” in section 1 thereof required that an outsider be afforded a minimum period of 21 days from the service of the application if he resided more than 160km from the court in question; that the statutory provisions of section 27 were mandatory and that the court had no power to dispense with the formal *diés induciae* provided therein – vide paragraph 656 E-G.

[17] As regards the applicant it was contented on behalf of the respondent that by faxing the application to the respondent a few hours before the application was launched on Thursday the 14th July 2005, the applicant committed a fatal procedural blunder. The effect of such a telefax was that the matter thereby ceased to be an urgent application brought *ex parte* and became an ordinary application brought on notice to the respondent. Mr. Snellenburg, counsel for the respondent, heavily relied on the decision of this division in **CLAASSENS v ZENECA SA (EDMS)**

BEPERK 1996(1) SA 627 OPD per Hattingh J and Wessels AJ. At 630 C the court held that the term *ex parte* referred to court proceedings against a person who has not been given notice thereof. At 630 H-I the court further held that as the respondent had received notice of the application beforehand, the matter was not *ex parte* and that short service of the relevant notice could be condoned in terms of rule 60 of the Magistrate's Court Rules.

[19] The decision in **CLAASSENS v ZENECA** *supra* is not really helpful towards the resolution of the problem at hand for various reasons. For instance in that case both parties were residents within the jurisdiction of the same court, namely the Bloemfontein District Court. Here the applicant resides in the Free State Province but the respondent resides in the Western Province outside the jurisdiction of this court. The provisions of section 27 which are the core of the dispute in this case, did not feature at all in that case.

[20] An argument similar to the respondent's was raised in **DAVY v DOUGLAS & ANOTHER** 1999(1) SA 1043 NPD at page 1060 A –E Meskin J observed:

;°Mr Daley's next submission was that there had been irregular service of the application and that for this reason I should not entertain it.

The application was not served at all on either of the respondents. It was served on the respondents' attorneys

who, of course, are located outside the jurisdiction of this Court and in relation to such service there was no compliance with the provisions of s 27(a) of the Supreme Court Act 59 of 1959.

Mr Bezuidenhout's answer to this submission was that the applicant never intended to present this application on the basis of formal service thereof on the respondents, ie as distinct from informal notification thereof.

Under Rule 6(12)(a) of the Rules of this Court I have power, in matters of urgency, inter alia, to dispense with service in terms of the Rules. In my opinion the application was properly before me as one of urgency and was inherently sufficiently urgent for such power to be exercised in favour of dispensing with formal service in terms of the Rules upon the respondents..... Accordingly, I rejected this submission by Mr Daley.”

The court did not dispense with services in terms of section 27(a) Supreme Court Act No. 59/1959. The court correctly found that the application was inherently and sufficiently urgent; that the informed service of the notice on the respondent's attorneys outside the jurisdiction of the court was never intended to alter the inherent and true character of the matter as an urgent *ex parte* application and that as a result of such inherent and sufficient urgency the mandatory statutory provisions of section 27 did not apply. This is my understanding of the judgment. Contrary to the submission by the respondent's counsel, I am of the view that the case was correctly decided.

[21] As regards the court, the respondent contented that I erroneously relaxed the mandatory statutory provisions of

sec 27 and granted a rule *nisi* which I should not have done in view of the absolutely inadequate notice of hardly one day notice the applicant had given to the respondent instead of a 21 day notice. It was contented on behalf of the respondent that since the phrase “a rule nisi” bears the same definition as a civil summons in terms of section 1 of the Supreme Court Act 59/1959 the service thereof on a respondent who resided more than 160km outside the jurisdiction of the court was 21 days. In support of this submission the respondent’s counsel relied on a decision in **SHIELD INSURANCE CO. LTD v VAN WYK** 1976(1) SA 770 NCD.

- [22] The facts in **SHIELD INSURANCE CO. LTD v VAN WYK** *supra* were summarised from 656 H – to 657 B in **TURQUOISE RIVER INCORPORATED v McMENAMIN & OTHERS** *supra* after giving the summary of those facts Levinsohn J concluded as follows at 657 C:

“In my view the Shield Insurance Co Ltd case is distinguishable. In that case the applicant instituted an application claiming final and definitive relief from a respondent.”

In the next paragraph 657 D Levinsohn J continued in the following manner:

“In the present case, as I have mentioned, the applicant sought a rule nisi. In my view this application was in the nature of an *ex parte* application in terms of Rule 6(4). It was launched as a matter of urgency and it seems to me that this course was justified as circumstances of urgency did exist.”

I am in respectful agreement with those quotations.

- [23] In the instant case, like in the cases of **TURQUOISE RIVER INCORPORATED v McMENAMIN AND OTHERS** *supra* and **DAVY v DOUGLAS & ANOTHER** *supra* the appellant sought a rule *nisi* in other words an interim relief was sought and not a final relief as was the case in **SHIELD INSURANCE CO LTD v VAN WYK**. In all the three matters the respondents were resident outside the jurisdiction of the courts concerned. In all three matters the respondents were given short and informal notices which were not in accordance with the statutory provisions of section 27. In all three matters the applicants averred and the courts accepted that there was a measure of urgency in each. Therefore the three matters were urgent applications. Now what really sets **SHIELD INSURANCE CO LTD v VAN WYK** apart from the rest was that in that decision the applicant sought and obtained a final relief. The type of relief, in addition to the urgency factor, is a fundamental consideration which distinguishes the flexible external rules of service pertaining to exceptionally urgent applications from the rigid external rules of service

pertaining to ordinary non-urgent application. By external rules of service I mean the rules of *diés induciae* which apply to the respondents who reside outside the jurisdiction of the court concerned.

- [24] This application was launched as a matter of urgency. I cannot accept the proposition that its urgency simply evaporated into thin air the moment the applicant faxed it through to the respondent. The matter was in the nature of an *ex parte* application in terms of rule 6(4). The author Claassen: Dictionary of Legal Words & Phrases, volume 2, Issue 2004 on page E-46 assigns the following meaning to the phrase *ex parte*:

°On behalf of; from one side. An application to the court *ex parte* is made by the applicant only in the absence of the respondent. Such application would not be *ex parte* if the respondent **had due notice** and failed to appear at the time appointed for its hearing. Good faith is necessary. See *Lucernvallei (Edms) Bpk v Turner* 1964 4 SA 107 (O). ”
(my own emphasis)

See also **CLAASSENS v ZENECA** 1996(1) SA 627 OPD at 630 C:

°Die term 'ex parte' verwys na hofverrigtinge teen 'n persoon wat nie daarvan in kennis gestel is nie...”

Vide **COLLECTIVE INVESTMENTS (PTY) LTD v BRINK**

& ANOTHER 1978(2) SA 252 NPD at 255 G per Kriek J.

[25] Erasmus *et ali* Supreme Court Practice page B1-41:

“An *ex parte* application is used: (iv) **where immediate relief** even though it may be temporary in nature, **is essential because harm is imminent**. In such cases the applicant will often seek a rule *nisi*, the application then being in the nature of an *ex parte* application in terms of this subrule;”
(my own emphasis)

In **TURQUOISE RIVER INCORPORATED v McMENAMIN & ANOTHER** *supra* at 657 D the court held that the provisions regarding *diés induciae* contained in section 27 and rule 6(5)(b) do not apply to an application for a rule *nisi* since such an application, **even if brought on notice** to the respondent, is in the nature of an *ex parte* application in terms of rule 6(4). I agree with this submission. The connective tissue between rule 6(5)(b) in section 27 is that both procedures are not underpinned by an element of urgency as rule 6(4). (the emphasis is mine)

[26] I understand Levinsohn J to be saying that once an applicant sets in motion urgent application court proceedings in terms of rule 6(4) then the atomic heart and soul of such court proceedings remains the same unless the court decides otherwise after hearing argument – often in chambers and in the absence of the respondent. The rule allows the applicant who seeks an interim relief where

the circumstances show that his interest or right is in eminent danger of being infringed to hasten to court alone in the absence of the respondent. An applicant in terms of rule 6(4) is ordinarily exempted from giving the customary notice to the respondent provided he makes out a proper case. The exemption is not there for the taking. The procedure in terms of rule 6(4) is somehow *sui generis*. Its rigid foundation is a degree of urgency. Such a quick procedure designed to provide immediate but interim relief in emergency situations does not lose its intrinsic and genuine character as a fast vehicle on a fast track to access justice merely because the applicant gave an unnecessary notice to the respondent.

- [27] Our civil justice system would certainly be defective if such a fast train can easily be derailed or brought to a standstill or slowed down because an applicant, who is under no legal obligation, for that matter, had informally notified or alerted the respondent beforehand of his intention to approach the court urgently for an interim relief. In my view such an informal notice as was given in the instant case was undue and unnecessary. It had virtually no adverse impact on the true character of an *ex parte* application. By alerting the respondent as he did, the applicant did not thereby extinguish or erase the urgency of his *ex parte* application. It could not have been his intention to slow down. By faxing the application, he did not change from

the fast lane, in other words, rule 6(4) procedures into the slow lane, in other words, section 27 procedure. Harms: Civil Procedure in the Supreme Court, service issue 29 at paragraph B6-31 on page B-150 says the following:

“Failure to allow for the days prescribed by the rules may be condoned, but not if the period is prescribed by statute, as is the case for service outside the jurisdiction of the court. **These statutory provisions do not apply to applications for a rule *nisi* (even on notice) since such an application remains by its very nature an *ex parte* application.**” (my own emphasis)

I agree with this view.

- [28] Only the court hearing and application brought in terms of rule 6(4) may direct the applicant to give notice to the respondent first. The court is empowered to do so where it considers that an application brought in terms of rule 6(4) lacked sufficient measure of urgency to justify the grant of even a rule *nisi* in the absence of the respondent. Where *diés induciae* are prescribed, as in terms of rule 6(5)(b) only the court can relax such prescribed formal time limits – vide rule 6(12)(a). The converse is also true and it is implicit in rule 6(12)(a) where no *diés induciae* are prescribed as in the case of rule 6(4) application. The court and only the court and not a party has the power to direct the applicant to serve the urgent application on the respondent and to give the respondent a specified period of time to react to the application prior to the hearing of

argument for or against the rule *nisi*. A litigant cannot usurp such power from the court in advance.

[29] There are degrees of urgency. Of course each case must be determined on its own merits. In *casu* I was satisfied that in his founding affidavit the applicant had set forth explicitly the circumstance which rendered the matter urgent. Dr. E.M. Luttig, the clinical psychologist, who interviewed H. in Bloemfontein on 13th July 2005 was of the preliminary opinion:

“Die manier waarop H. die sinne voltooi het, dui op die volgende:

- Dat Henri depressief, angstig en ongelukkig is.
- Dat hy werklik vreesbevange vir moeder en Mnr Hough is.
- Dat hy ideale het wat hy eendag wil verwesenlik
- Dat hy graag by sy pa wil wees.”

My *prima facie* view as an upper guardian of the children was that it was in the interest of the child then that the interim relief sought by the applicant should be immediately granted in the circumstances. The alleged violation of the child was, in my opinion, such that he should not be expected to return to the respondent to endure the anxiety further ill-treatment or further abuse as he claimed. The alleged fear of the child's continued violation created a degree of urgency which in my view justifies the hearing of

the application not in the ordinary course by way of notice to the respondent in terms of section 27 – vide **PRINSLOO v RAPPORT** 2003(4) SA 450 TPD at 462B-F.

- [30] There has been no compliance with section 27. However, no such compliance was required by law since the matter originated from rule 6(4) which by its very nature requires no mandatory notice to be served on the respondent before a rule *nisi* can be issued unless the court otherwise directed. I hold the firm view that it was competent for the applicant to have launched an urgent application in terms of rule 6(4) for a rule *nisi*. Moreover, I also hold the firm view that the court was not precluded from granting the interim relief by the notice which was uncalled for and unnecessary the applicant had chosen to give to the respondent prior to the grant of the provisional order. Despite such an informal and undue notice, the urgency of the matter remained. The respondent's contention that the applicant by alerting the respondent voluntarily abandoned the benefit of a speedy rule 6(4) procedure and instead voluntarily opted for a slow section 27 procedure is flawed. It is a shallow argument. It is not borne out by the facts. The definitions of phrases such as *ex parte*, civil summons and rule *nisi* did very little to fortify such an argument.
- [31] Right from the onset the respondent argued *in limine* that the application instituted in these proceedings was a nullity

and that the entire proceedings fell to be set aside. As we have seen the grounds of this argument was that the applicant had given the respondent's inadequate notice. In my view, which I have already motivated, there is no merit in the submission that the rule *nisi* issued should be set aside on the alleged ground that it was a fatally abortive relief which germinated from improper proceedings. Having reconsidered the respondent's rule 6(12)(c) application I have come to the conclusion: that the interim relief was correctly sought by way of a proper rule 6(4) procedure; that the rule *nisi* was correctly granted and also that section 27 did not feature anywhere in the equation for a speedy interim relief. I would therefore decline to set aside the order I made on the 14th July 2005 in favour of the applicant.

[32] Accordingly I made the following order:

- 32.1 The respondent's application in terms of rule 6(12)(c) is dismissed.
- 32.2 The respondent is directed to pay the costs thereof.

M.H. RAMPAL, J

On behalf of the applicant:

Adv. C.A. Human

Instructed by:

Oelofse & Kriel Attorneys

BLOEMFONTEIN

On behalf of the respondent:

Adv. N. Snellenburg

Instructed by:

Rosendorff & Reitz Barry

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