REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 1775/2025

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO THE JUDGES: YES/~~NO~~
(3) REVISED.

.....
.....

DATE **9 June 2025** SIGNATURE.....

In the matter between:

POLOKWANE LOCAL MUNICIPALITY	**APPLICANT**
-and-	
SAND HAWKS (PTY) LTD	**1ST RESPONDENT**
NETWORTH PROPERTIES (PTY) LTD	**2ND RESPONDENT**
65 TWIN PROPERTIES (PTY) LTD	**3RD RESPONDENT**
MINISTER OF POLICE	**4TH RESPONDENT**

Delivered	:	**9 June 2025** This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **9 June 2025**.
Date heard	:	**3 June 2025**
Coram	:	**Bresler AJ**

JUDGMENT

BRESLER AJ:

Introduction:

[1] This matter came before court on the 3rd of June 2025 on the urgent roll. The First Respondent anticipated the return date of the eviction order granted against the First Respondent on an *ex parte* basis on the 19th of February 2025.

[2] There is little dispute as to what transpired in the matter to date hereof:

2.1 On the 18th of February 2025, a spoliation order was granted in favour of the 1st Respondent by the Honourable Acting Justice Makoti in terms whereof the 1st Respondent's possession and occupation of the immovable

property, known as the Undivided Portion of the Remainder of Farm Krugersburg 933 LS (the 'Property').

2.2 On the 19th of February 2025, the Applicant approached this Court and obtained an eviction order on an *ex parte* basis.

2.3 The 1st Respondent, upon being served with the *ex parte* order, brought an urgent reconsideration application to be heard within 48 hours. This application was set down in the urgent court before the Honourable Acting Judge Diamond, who removed the matter from the roll with a directive to approach the Office of the Judge President to obtain a preferential date.

2.4 The reconsideration application was eventually heard on the ... before the Honourable Acting Judge Mashifane, who found that the application was not launched on an urgent basis and therefore the 1st Respondent could not avail itself of the procedure contemplated in Rule 6(12)(c) (reconsideration). It was pertinently stated that the 1st Respondent ought to have made use of the procedure contemplated in Rule 6(8) (anticipation). Judgment in this regard was delivered on the 25th of April 2025.

2.4 The 1st Respondent thus opposed the relief as prayed for by the Applicant. The 1st Respondent's representative attended court on the initial return date, being the 13th of May 2025. The matter was then postponed, and the *rule nisi* extended, to the 7th of October 2026. The Applicant submitted that

the postponement was by consent. The 1st Respondent indicated that they had no choice having regard to the fact that the court does not entertain opposed matters on the unopposed roll. As will be evidenced from what has been stated herein after, the reason for the postponement is irrelevant.

2.5 The current *de facto* position is that the eviction order was duly executed. The Property is fenced off and has an access gate to which the 1st Respondent has no access.

[3] It stands to be noted that during the course of argument in Court, this Court took the view that the proverbial 'elephant in the room' is the evident lack of explanation for launching the initial proceedings on an *ex parte* basis in the Founding affidavit of the Applicant. This Court furthermore stated that, if it is found that there was no case made out for the relief on an *ex parte* basis and / or there was a serious non-disclosure of material facts, then the order must be set aside irrespective if the Applicant might be entitled to the relief in due course.

[4] The parties were invited to deliver supplementary heads on or before 6 June 2025 addressing this particular issue. This Court is indebted to all the counsels for their prompt response in this regard and the contents of the supplementary heads were consequently considered and taken into account in the rendering of this judgment.

Issues that require determination:

[5] In this Court's view, what lies at the heart of the matter are the following issues:

5.1 If the 1st Respondent was entitled to anticipate the *rule nisi* having regard to the postponement thereof on the 13th of May 2025.

5.2 If the granting of the eviction order on an *ex parte* basis was warranted on the papers then before court.

Legal Framework

Anticipation of order:

[6] The Applicant, 2nd and 3rd Respondent argued that, once the *rule nisi* was extended, the 1st Respondent no longer had the right to anticipate the proceedings. It is common cause that Rule 6(8) does not contain a specific prohibition against the anticipation of a *rule nisi* once same has been extended. Specific reference was made to the Transkei decision of ***Peacock Television Co (Pty) Ltd v Transkei Development Corporation.***[1]

[7] In this regard, one has to be careful to rely on selected passages from a case without having a holistic picture of the background justifying the selective remarks. First and foremost, the ***Peacock*** case did not address the issue of a potentially fatally flawed *ex parte* application where the Respondent has, in fact, persistently opposed the matter and endeavoured to have the matter anticipated. The ***Peacock*** case

[1] 1998 (2) SA 259 (Tk)

deals with a situation where the parties repeatedly (three times) extended the rule *nisi* whereafter the Respondent anticipated the rule *nisi* to have same discharged as the Applicant failed to comply with prayer 2 of the said rule *nisi.* In the Court's view, the order was anticipated on the merits and it was not shown that the anticipation was reasonable in the given circumstances.

[8] Against this backdrop, the well-known, and often repeated, reasoning saw the light[2]:

> '*If respondents, in circumstances like the present, were to be allowed to anticipate a return date as they please, the orderly practice of this Court and the purpose thereof would be defeated.'*

[9] In this Court's view, the facts of the current matter is clearly distinguishable from the facts presenting itself in the ***Peacock*** case. Even if I am wrong, in accordance with the doctrine of precedent I am not bound to a decision delivered in a Court of equal standing. The circumstances of the current case before this Court is unique. An eviction order was granted on an *ex parte* basis. This warrants urgent intervention by the Court to ensure that no constitutional rights were violated.

[10] The starting point must thus be the intention of the legislature when enacting the Uniform Rules of Court. The role and purpose of the rules of court was aptly

[2] Page 262

described, and again summarised, in the unreported case of ***Ngassam v MTN Group Management Services (Pty) Ltd***[3] as thus:

> *This necessitates a consideration of the object of the Uniform Rules of Court and how they should be applied.*
>
> *[20] The starting point of this enquiry is section 34 of the Constitution. It confers upon everyone the right of access to the courts. That includes the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court.*
>
> *[21] In Mukaddam v Pioneer Foods (Pty) Ltd and Others, the Constitutional Court observed:*
> *"Access to courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution itself may be achieved. It also facilitates an orderly resolution of disputes so as to do justice between individuals and between private parties and the State."*
>
> *[22] The Mukkadam court went on to draw upon the reasoning of the Constitutional Court in Chief Lesapo v North West Agricultural Bank and Another:*

[3] 2024 JDR 1115 (GJ)

"The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable."

[23] To realise this right of access to the courts, empowered by section 173 of the Constitution, the High Court uses the Uniform Rules of Court to regulate its process and to determine how disputes that it hears are both to be readied for hearing and to be heard.

[24] In Mukaddam, after the above statements about the fundamental principle of access to the courts, the Constitutional Court said this:

"However, a litigant who wishes to exercise the right of access to courts is required to follow certain defined procedures to enable the court to adjudicate a dispute. In the main these procedures are contained in the rules of each court. The Uniform Rules regulate form and process of the High Courts. The Supreme Court of Appeal and this Court have their own rules. These rules confer procedural rights on litigants and also help in creating certainty in procedures to be followed if relief of a particular kind is sought. It is important that the rules of courts are used as tools to facilitate access to courts rather

than hindering it. Hence rules are made for courts and not that the courts are established for rules. Therefore, the primary function of the rules of courts is the attainment of justice. But sometimes circumstances arise which are not provided for in the rules. The proper course in those circumstances is to approach the court itself for guidance. After all, in terms of section 173 each superior court is the master of its process."

[25] The Uniform Rules regulate the practice and procedure of the courts. Their object is to ensure the inexpensive and expeditious completion of litigation before the courts, without their being an end in and of themselves.'

[footnotes excluded]

[11] The learned Judge also refers to the matter of ***Arendsnes Sweefspoor CC v Botha***[4] where the following was stated:

'It is trite that the rules exist for the courts, and not the courts for the rules (see Republikeinse Publikasie (Edms) Beperk v Afrikaanse Pers Publikasie (Edms) Bpk 1972 (1) SA 773 (A) 783 A-B; Mynhardt v Mynhardt [1986] 3 All SA 197; 1986 (1) 456 (T) also Ncoweni v Bezuidenhout, 1927 CPD 130), where it was pertinently observed that:

"the rules of procedure of this court are devised for the purpose of administering justice and not of hampering it, and where the Rules are

[4] 2013 (5) SA 409 (CC)

deficient I shall go as far as I can in granting orders which would help to further the administration of justice. Of course if one is absolutely prohibited by the Rule one is bound to follow this Rule, but if there is a construction which can assist the administration of justice I shall be disposed to adopt that construction."

Courts should not be bound inflexibly by rules of procedure unless the language clearly necessitates this – see Simons v Gibert Harner & Co Ltd 1963 (1) SA 897 (N) at 906. Courts have a discretion, which must be exercised judicially on a consideration of the facts of each case, in essence it is a matter of fairness to both parties (see Federated Employers Fire & General Insurance Co Ltd v Mckenzie [1969] 3 ALL SA 424; 1969 (3) SA 360 (A) at 363 G–H).

With the advent of the constitutional dispensation, it has become a constitutional imperative to view the object of the rules as ensuring a fair trial or hearing. Rules of court are delegated legislation, having statutory force, and are binding on the court, subject to the court's power to prevent abuse of its process. And rules are provided to secure the inexpensive and expeditious completion of litigation and are devised to further the administration of justice (see LAWSA, third Edition Volume 4 – paragraph 8–10 page 10 et sec) (see also Kgobane & another v Minister of Justice & another [1969] 3 ALL SA 379 or 1969 (3) SA 365 (A) at 369 F–H). Considerations of justice and fairness are of prime importance in the interpretation of procedural rules (see Highfield Milling Co (Pty) Ltd v A E Wormald & Sons [1966] 3 ALL SA 27; 1966 (2) SA 463 (E) at 465 F–G)."

[12] In this Court's view the violation of the 1st Respondent's right to access to court in such an extreme and unprecedented manner justifies an interpretation of the Rule 6(8) that would bring about justice and fairness. Section 173 of the **Constitution**, 1996 expressly provides that:

> *'The Constitutional Court, the Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'*

[13] Justice demands that the matter be heard. As such, the objection against the anticipation of the order is dismissed.

Ex parte procedure warranted:

[14] During the hearing of the matter, the Court essentially raised two concerns:

14.1 The Founding affidavit to the *Ex parte* application does not disclose a basis for condoning non-service of the application; and

14.2 The Applicant failed to disclose the order granted the previous day.

[15] The Court made specific reference to the matter of ***Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs***[5] where the following was stated:

> *'[50] In regard to the court's discretion as to whether to set aside an ex parte order because of non-disclosure, Le Roux J said in Schlesinger v Schlesinger: '(U)nless 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.'*
>
> *[51] This is consistent with the approach in English law, that if material non-disclosure is established a court will be 'astute to ensure that a plaintiff who obtains [an ex parte order] without full disclosure, is deprived of any advantage he may have derived by that breach of duty'.*

[16] And further:

> *[80] It is a fundamental principle of the administration of justice that relief should not be granted against a person without allowing such person to be heard. Very rarely is a case so urgent that there is no time to give notice. In other cases, there may be a reasonable and substantiated apprehension that giving notice would defeat the applicant's legitimate purpose in seeking relief, for example, because the respondent would dispose of property or evidence*

[5] 2019 (3) SA 251 (SCA)

that the applicant wishes to claim or have preserved. In cases of this kind a court may be willing to dispense with the need to give notice but this power should be exercised with great caution and only in exceptional circumstances.

...

[84] In my view the submission is unsound. Given the centrality of the audi principle, which now gains added force from s 34 of the Constitution, it would be most unsatisfactory if, after hearing the respondent, a judge could not discharge a provisional order obtained through the impermissible use of ex parte proceedings. Often an inappropriate recourse to ex parte proceedings is accompanied by inadequate disclosure. However, even where the applicant's disclosure cannot be faulted, her inappropriate use of ex parte proceedings should attract the same disciplinary jurisdiction. The ex parte litigant's duty of utmost good faith requires not only complete and fair disclosure; it imposes a more fundamental obligation to give notice to the other side unless, objectively, the absence of notice is justified.

[17] The case therefore addresses the exact elephant in the room raised by the Court. The reasoning in the case is clear: there may, or may not be a full disclosure of all material facts but the Applicant still retains the fundamental obligation to give notice to the other side unless the absence of notice is justified.

[18] There was no evidence at all in the Founding affidavit that would justify the absence of notice to the Respondent. It follows that the *ex parte* process was abused. But

the Court also takes the view that there was indeed a material non-disclosure insofar as the spoliation order was concerned, as well a proper and full disclosure with regards to the lien. The information with regards to the lien was exceptionally vague and selective and do not pass muster having regard to the trite requirements set out in the authorities stated herein.

[19] In ***National Director of Public Prosecutions v Basson***[6] the Supreme Court of Appeal said:

> *'[21] Where an order is sought ex parte it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or mala fide I (Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 348E - 349B)*

[20] In ***Wijnen v Mohamed***[7] the nature of *ex parte* proceedings was recorded as thus:

> *'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*

[6] 2002 (1) SA 419 (SCA)
[7] 2014 JDR 1767 (WCC) at par 6 and 7

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.'

[21] In the case of ***National Director of Public Prosecutions and Another v Mohamed NO and Others***[8] the Constitutional Court remarked as follows on the *audi* rule:

'[28] Our common law has recognised both the great importance of the audi rule as well as the need for flexibility, in circumstances where a rigid application of the rule would defeat the very rights sought to be enforced or protected. In such circumstances, the court issues a rule nisi calling on the

[8] 2003 (4) SA 1 (CC)

interested parties to appear in court on a certain fixed date to advance reasons why the rule should not be made final, and at the same time orders that the rule nisi should act immediately as a temporary order, pending the return day.'

[22] From the aforesaid, it is clear that to succeed with an application without notice to the affected party, a substantial case must be made out why the *audi* rule must be relaxed. Once the Court finds that the process has been abused, the order must be set aside.

[23] Having regard to the facts of the matter as it appears from the papers before Court, as well as the persistent argument specifically on behalf of the Applicant that the procedure was warranted and substantiated in the Founding affidavit, this Court is of the view that the Applicant, deliberately and with malicious intent, elected to make use of the *ex parte* procedure under circumstances where they knew there was a material non-disclosure with specific reference to the spoliation order and without presenting any special circumstances why the proceedings should continue without consideration of the 1st Respondent's right to a fair trial.

[24] The *ex parte* process was clearly abused, and the order therefore stands to be set aside.

Costs

[25] The continued opposition of the matter on frivolous and technical grounds again shows the extent to which the Applicant, and their legal representatives, will go in this matter to frustrate the 1st Respondent's constitutional rights. This cannot and should not be allowed. The Courts have repeatedly warned in the past against practitioners abusing the process to the detriment of third parties. This is one such example.

[26] As a consequence, the application stands to be dismissed with costs on a punitive scale as between attorney and client which includes the costs of two counsel.

Referral of the matter to the Legal Practice Council:

[27] This Court is dissatisfied with the approach taken by the legal representatives of the Applicant. This Court is however not willing to refer the matter to the Legal Practice Council at this stage. It remains the prerogative of the First Respondent to report pursue the matter through the appropriate channels should he so wish.

Order:

[28] **In the result the following order is made:**

28.1 The *ex parte* order dated 19 February 2025 and the *rule nisi* contained therein is discharged in its entirety;

28.2 The Application is dismissed;

28.3 The Applicant, Second and Third Respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the 1st Respondent's costs on attorney and client scale including the costs occasioned by the appointment of two counsel.

M BRESLER AJ

ACTING JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION, POLOKWANE

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