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REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**



APPEAL CASE NO: A85/18

Magistrates' Court Case No 1966/17

In the matter between:

MARIET MCNEIL

First Appellant

JEAN-MARI MCNEIL

Second Appellant

and

ANTHONY ASPELING

First Respondent

MORNE DENNIS ASPELING

Second Respondent

**ALL THOSE RESIDING WITH OR UNDER
THE FIRST AND SECOND APPELLANTS**

Third Respondent

STELLENBOSCH MUNICIPALITY

Fourth Respondent

JUDGMENT DELIVERED ON 28 JUNE 2018

DAVIS, AJ

1. This appeal concerns the procedure to be followed in the Magistrates' Court in applications for eviction in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ('PIE').
2. On 17 August 2017 the Paarl Magistrate granted a default judgment against the appellants ('the McNeils') in terms whereof he ordered that they be evicted from the property situated at Erf [...], Maasdorp, La Motte, Franschhoek ('the eviction order'). The McNeils then brought an application for the rescission of the eviction order, which was dismissed. This appeal lies against the dismissal of the rescission application.
3. The main issue is whether or not the first and second respondents, who were the applicants in the eviction application ('the Aspelings'), complied with the Magistrates' Courts Rules of Court ('the Rules') and with the peremptory procedures laid down in section 4 of PIE. A further issue is whether the McNeils have disclosed a *bona fide* defence to the eviction application.
4. The rescission application is founded on Rule 49(1) of the Rules, which empowers a court to rescind a default judgment "*upon good cause shown, or if it is satisfied that there is good reason to do so*", read with s 36(1) of the Magistrates' Court Act 32 of 1944 ('the Act'), which reads as follows in relevant part:

'The court may, upon the application of any person affected thereby, ... , –

- (a) *rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;*
- (b) *rescind or vary any judgment granted by it which was void ab origine or was obtained by fraud or by mistake common to the parties;...'*

5. For purposes of this judgment it is necessary to quote the relevant parts of the notice of motion in the eviction application:

'PART A

PLEASE TAKE NOTICE THAT the afore stated Applicants intend to make application to the above Honourable Court on 04 July 2017¹ at 09h00, or as soon thereafter as the matter may be heard for an order in the following terms:

1. *That the Applicants be authorized and directed in terms of section 4(2) of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998: to serve this notice of motion, the founding affidavit, this order, any further affidavits or documents, as well as any further order which this Court may make in terms of Part A and Part B to this notice of motion (the process) on the First and Second Respondent, all persons living with or under them (hereafter "Respondents"), in the following manner:*

- 1.1. *The Sheriff of this Honourable Court or his deputy is authorized and directed to serve this process in terms of this application personally on First to Third Respondents, and on any and all persons whom he may find on the property, described as Erf [...], Maasdorp, La Motte, Stellenbosch District, Western Cape (hereafter "the property") and who appear to be over the age of 16 years; and*
- 1.2. *If no such persons are present on the property by affixing such documents on the front gate / entrance to the property; and*
- 1.3. *That the cost of this application shall be cost[s] in the main application (Part B) hereof;*
- 1.4. *That such further and/or alternative relief that this Honourable Court may deem just be granted to the Applicants.*

2. ...

...

PART B

¹ The Notice of Motion contained a blank space in which the date of 4 July 2017 was inserted by hand.

THIS DOCUMENT GIVES YOU NOTICE THAT the above named Applicants, the persons in charge of the property ERF [...], MAASDORP, LA MOTTE, STELLENBOSCH DISTRICT, WESTERN CAPE, the property, hereby applies [sic] to the Magistrates' Court of Paarl for an Order as follows:

- 1. An order that the First Respondent and Second Respondent, all who live with or under them ("the Third Respondent"), be evicted in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998;*
- 2. Determining a just and equitable date on which the Respondents must vacate the property;*
- 3. Determining a date on which the Sheriff of this court may evict the Respondents if the Respondents have not vacated the property before such date;*
- 4. In the event of the Respondents failing or refusing to vacate the property within the time as ordered by this Honourable Court in terms of prayers 2 and 3 above, the Sheriff of this Honourable Court or his appointed deputy be authorized and directed to remove from the property all persons occupying the property and their property, and to take such steps as may be necessary to prevent the re-occupation of the property;*
- 5. The First and Second Respondent be liable for the costs of this application;*
- 6. In the event of the Sheriff of this Honourable Court or his deputy being required to carry out the order contained in prayer 4, such Respondent shall be liable for the costs of such removal;*
- 7. That the South African Police Services is instructed and authorized to assist the Sheriff of this Honourable Court, or his Deputy, to carry out the order as per prayer 4 herein above;*
- 8. That such further and/or alternative relief as this Honourable Court may deem just be granted to the Applicants.*

TAKE FURTHER NOTICE that this application is brought in terms of the Prevention of Illegal Eviction and Occupation of Land Act 19 of 1998. The grounds for the proposed eviction are set out in the various affidavits attached to this Application.

...

TAKE FURTHER NOTICE THAT the First Respondent and Second Respondent, all those living with or under them, have the right to oppose this application and have a right to legal representation or to apply for legal aid, is Respondents so qualify.

...

TAKE NOTICE THAT if you intend opposing this application, you are required:

- a) *To notify the Applicant's attorneys at the address as specified herein above and below the Clerk of the Civil Court, Paarl, in writing of your intention to oppose part B on or before 17 August 2017;² and*
- b) *Within 10 days after you have so given notice of your intention to oppose the application, to serve and file your answering affidavit, if any; and*
- c) *To appoint in such notification an address as provided in the Rules of the Magistrates' Court, at which you will accept notice and service of all documents and process in these proceedings.*

TAKE FURTHER NOTICE THAT if no such notice of intention to oppose is given, the application will be made on 17 August,³ 2017 at 09h00, and you will not receive any further notice.

Dated at ...Paarl... on this ...30th... day of ...June... 2017.'

6. It is immediately apparent that the notice of motion was contradictory in that it conveyed that a notice of intention to oppose could be filed at any time on 17 August 2017, while simultaneously stating that if no notice of intention to oppose was delivered, the application for eviction would be made at 09h00 on 17 August 2017.
7. It is common cause that as at 09h00 on 17 August 2017 the McNeils had not yet served and filed a notice of intention to oppose the eviction application. At 12h58 on 17 August 2017 the McNeils' attorney emailed a notice of

² The Notice of Motion contained a blank space in which the date of 17 August 2017 was inserted by hand.

³ The Notice of Motion contained a blank space in which the date of 17 August was inserted by hand.

opposition to the Aspelings' attorney under cover of a letter stating that the notice would be filed at court shortly. However, by that time the eviction order had already been granted earlier that morning at 09h32. ⁴

8. In his reasons for dismissing the rescission application, the Magistrate stated that because the eviction application had been properly served but there was no notice of opposition on the court file, and the Aspelings' attorney had also received nothing from the appellants, he was satisfied that this was an unopposed matter and he proceeded to give judgment by default.
9. The Magistrate was of the view that there could be '*no confusion as to the procedure to be followed if the application for eviction was to be opposed*'. He accordingly found the appellants to be in wilful default on 17 August 2017.
10. The Magistrate was further of the view that the McNeils do not have a defence to the eviction application because he discounted the challenges raised by the McNeils' based on the Aspelings' lack of *locus standi* and their non-compliance with the provisions of PIE.
11. For reasons which will become clear, I consider that the Magistrate misdirected himself in failing to appreciate:

11.1. first, that the Aspelings' notice of motion in the eviction application was irregular;

⁴ The time appears from the Magistrates' reasons for the dismissal of the rescission application.

- 11.2. second, that the correct procedure in terms PIE, as interpreted in the decision of *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA) (“*Cape Killarney*”), had not been followed; and
- 11.3. third, that the McNeils’ challenge to the *locus standi* of the Aspelings to seek eviction in terms of section 4(1) of PIE raised a triable issue and constituted a *bona fide* defence to the eviction application.

12. I deal below with each of these issues.

Irregular Notice of Motion

13. The notice of motion in the eviction application was a hybrid combining the short form notice of motion for the relief sought in Part A and the long form notice of motion in respect of the relief sought in Part B.
14. Rule 55(1)(f) regulates the situation where a respondent fails to deliver notice of intention to oppose an application. It states that:
- “If the respondent does not, on or before the day mentioned for that purpose in a notice of motion, notify the applicant of his intention to oppose, the applicant may place the matter on the roll for hearing by giving the registrar or clerk of the court notice of set down 5 days before the day upon which the application is to be heard.”*
- [Emphasis added]
15. Part B of the notice of motion deviates materially from the provisions of Rule 55(1)(f) in that it stipulates that notice of intention to oppose must be given in

writing on or before 17 August 2017,⁵ but then goes on to say that if no notice of opposition is given, the application will be made at 09h00 on 17 August 2017.

16. It was irregular for Part B of the notice of motion to stipulate that the application would be made to court on an unopposed basis at 09h00 on 17 August 2017 when the McNeils were rightfully entitled, in terms of Rule 55(1)(f) as well as the wording paragraph a) of the notice of motion, to deliver their notice of opposition at any time until the court closed on 17 August 2017.
17. It was also irregular to stipulate in the notice of motion that an application for default judgment would be made on the same day as the date on which the time for delivering a notice of opposition expired. Rule 55(1)(f) clearly envisages that if no notice of opposition is timeously delivered, the applicant may place the matter on the roll for hearing by giving the registrar or clerk of the court 5 days' notice of set down before the day upon which the application is to be heard.
18. The reason for the requirement in Rule 55(1)(f) that the applicant give the court five days' notice of set down of an application for default judgment is not difficult to fathom. It caters for the practical reality that notices of opposition may be delivered a few days late for reasons beyond a litigant's or his attorney's control. Rule 55(1)(f) allows a sensible five-day margin for error and ensures that an application for default judgment can only be made at a

⁵ No particular time is specified by which the notice of intention to oppose must be filed.

time when it is reasonable to infer that the litigant is actually in default, as opposed to being the victim of some or other unforeseen logistical difficulty.

19. By virtue of the provisions of Rule 55(1)(f) the Magistrate was not entitled to grant default judgment on the same day as the period for delivery of a notice of opposition expired. In the circumstances he acted irregularly when he granted default judgment against the McNeils on 17 August 2017.
20. In my view the eviction order was not legally competent because it was granted on the strength of an irregular notice of motion and contrary to the requirements of Rule 55(1)(f). It is therefore void *ab origine* as contemplated in section 36 (1)(b) of the Act, and is consequently liable to be rescinded on this ground alone.
21. Furthermore, I consider that the Magistrate erred in concluding that the McNeils were in wilful default of appearance on 17 August 2017. Part B of the notice of motion was not at all clear as to exactly when the notice of opposition had to be filed. To my mind the McNeils' explanation that they thought they had done what was expected of them by serving a notice of intention to oppose on 17 August 2017, and that they would then have a further 10 days within which to deliver answering papers, makes perfect sense. Part B of the notice of motion was ambiguous and confusing and in the circumstances the inference of wilful default was unwarranted.

Non-compliance with PIE

22. Sections 4(1) to (5) of PIE lay down peremptory procedural requirements for the obtaining of an eviction order. Sections 4(1) to (5) read as follows:

- '(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.*
- (2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.*
- (3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.*
- (4) Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.*
- (5) The notice of proceedings contemplated in subsection (2) must –*
 - (a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;*
 - (b) indicate on what date and at what time the court will hear the proceedings;*
 - (c) set out the grounds for the proposed eviction; and*
 - (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.'*

23. In *Cape Killarney (supra)* the Supreme Court of Appeal interpreted s 4 of PIE and set out the correct procedure to be followed in eviction applications in the High Court. Two aspects of that judgment are important for present purposes.

23.1. First, it was held that the notice of eviction proceedings contemplated in s 4(2) of PIE, which must be authorised and directed by an order of court, is in addition to the notice of proceedings in terms of the rules of court as contemplated in section 4(3) of PIE, i.e., the notice of motion.

23.2. Second, it was held that since the date of hearing of an application in the High Court is usually only determined after all the papers have been served, and since the section 4(2) notice must indicate the date on which the application will be heard, that has the consequence that an application for authorisation to serve a section 4(2) notice can only be made after all papers have been filed, i.e., after the notice of motion and affidavits have been served in accordance with the rules of court as contemplated in section 4(3).

24. *Cape Killarney* dealt with eviction proceedings in the High Court and was based on the provisions of Rule 6 of the Uniform Rules of Court ('the Uniform Rules'). The fundamental principle laid down in *Cape Killarney* was that the notice in terms of s 4(2) of PIE must inform the recipient of the date on which the eviction proceedings will be heard. The hearing date is determined with reference to the provisions of the Uniform Rules and also the particular practice of the division.

25. Prior to the amendment of Rule 55 of the Magistrates' Court Rules the procedure for applications differed from that in the High Court. In its pre-amended form, Rule 55(1) allowed for a notice of motion in the Magistrates' Court to stipulate the date on which the application would be made. On account of that crucial difference it was held in *Theart and Another v Minnaar NO; Senekal v Winskor 174 (Pty) Ltd* 2010 (3) SA 327 (SCA) that the procedural requirements laid down in *Cape Killarney* did not apply in the Magistrates' Court. More particularly, it was held that two separate notices contained in two separate documents were not required to comply with ss 4(2) and (3) of PIE, and it was permissible to use a single notice / document provided that the contents of the document and the manner of service were approved by the Magistrate in a prior *ex parte* application, and provided also that the contents of the document complied with section 4(5) of PIE (see *Theart (supra)* para [15]).
26. Following the amendment of Rule 55 of the Magistrates' Court Rules, the application procedure in the Magistrates' Court is in all material respects identical to that in the High Court. Rule 55(1) now provides that every application shall be brought on notice of motion supported by an affidavit and addressed to the party or parties against whom relief is claimed, and to the registrar or clerk of the court. The notice of motion must be in a form similar to form 1A, which is the equivalent of the long form notice of motion used in the High Court. The notice of motion must set a day, not less than five days after service on the respondent, by which notice of opposition is required to be given, and must stipulate a day on which the application will be heard in the absence of any notice of opposition.

27. Given that application procedure in the Magistrates' Court is now the same as that in the High Court, the basis for the decision in *Theart* has fallen away, and the case can no longer be regarded as good law. The court in *Theart* was at pains to point out that nothing said in that judgment detracted from the exposition of the law in *Cape Killarney*. It must therefore be accepted that the procedure laid down in *Cape Killarney* also governs eviction applications in terms of PIE brought in the Magistrates' Court (see *Occupiers of Ompad Farm v Green Horizon Farm (Pty) Ltd and Others* [Unreported appeal judgment in case no AR468/2013 KZD]).
28. Therefore, save in the case for urgent applications where a different procedure may be adopted on proper motivation, service of the (long form) notice of motion and founding affidavit in terms of s 4(3) of PIE should ordinarily precede the *ex parte* application to court for authorisation and directions in regard to service of a s 4(2) notice, which will then be served subsequently at a stage when the hearing date has been determined. Thus service will be effected twice; initially when the notice of motion and affidavits are served in accordance with the Rules, and subsequently when the s 4(2) notice is served, which contains the hearing date.
29. In this case the procedure adopted by the Aspelings did not accord with the provisions of PIE as interpreted in *Cape Killarney* because:
- 29.1. First, the appellants were not notified of the date on which the eviction application would be heard if the matter was opposed. The *ex parte* application in regard to service of a s 4(2) notice was brought before

all the papers in the application had been delivered and therefore could not, and did not, state a date when the eviction application would be heard in the event of opposition thereto. As a result the notice served on the appellants did not comply with the requirements of section 4(5)(b) of PIE which stipulates that the section 4(2) notice must indicate on what date and time the eviction proceedings will be heard.

- 29.2. Second, the appellants only received one notification of the eviction proceedings instead of two.
30. Furthermore, the grounds for the proposed eviction are not set out in Part B of the notice of motion. Instead it is merely stated that, '*The grounds for the proposed eviction are set out in the affidavits attached to this application.*' This does not constitute proper compliance with s 4(5)(c) of PIE, which requires that the grounds for the proposed eviction be set out in the s 4(2) notice. The grounds for the proposed eviction need to be expressly stated in the s 4(2) if the notice is to be effective. The recipient should not be left to trawl through an affidavit in order to try and ascertain what grounds are relied on for eviction.
31. For these reasons I consider that the procedure followed by the Aspelings did not comply with the peremptory requirements of s 4 of PIE. As a result the eviction order was legally incompetent and, as such, void *ab origine* and liable to be rescinded on this ground.

A bona fide defence

32. It follows from what I have said in the preceding section that there is merit in the McNeils' challenge to the procedure adopted by the Aspelings in the eviction application. This issue alone constitutes a *bona fide* defence to the eviction application.
33. Furthermore, the Mc Neils have raised a triable issue in regard to the *locus standi* of the Aspelings to seek their eviction from the property. It is by no means clear from the papers that the Aspelings are '*persons in charge*' of the property for purposes of section 4(1) of PIE. This is an issue which requires proper ventilation, very likely by way of oral evidence or trial.
34. Therefore the Magistrate erred, in my view, in holding that the McNeils do not have a defence to the eviction application.

Conclusion

35. The McNeils have furnished a satisfactory explanation for their default of appearance in the light of the irregularity and ambiguity of the notice of motion regarding the time for delivery of a notice of intention to oppose. Because of the defects in the notice of motion, they were deprived of an opportunity to present their case. That is unfair, and manifestly contrary to the spirit and intention of PIE. The McNeils have shown that they have a genuine, *bona fide* defence to the eviction application which they wish to prosecute. Justice demands that they be heard.

36. In these circumstances I consider that good cause or reason has been shown for the rescission of the eviction order.
37. It follows that in my view the appeal must succeed.
38. I would therefore make the following order:
1. The appeal is upheld, with costs.
 2. The judgment and order handed down by the Magistrate on 11 December 2017 under case number 1966/2017 dismissing the application for the rescission of the default judgment granted under the same case number on 17 August 2017, is set aside and replaced with the following order:
 - i. **The default judgment and eviction order granted on 17 August 2017 under case number 1966/2017 is rescinded.**
 - ii. **The first and second respondents (i.e. the applicants in the eviction application) are ordered to pay the costs of the rescission application.**

D M DAVIS

Acting Judge of the High Court

I agree and it is so ordered.

R C A HENNEY

Judge of the High Court

Counsel for Appellants : Adv. Mirshaenne W Muller

Counsel for Respondents : Adv. Marais van der Merwe