CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 108/16

In the matter between:

OCCUPIERS OF ERVEN 87 & 88 BEREA Applicants

and

CHRISTIAAN FREDERICK DE WET N.O. First Respondent

ROYNATH PARBHOO N.O. Second Respondent

And

THE POOR FLAT DWELLERS ASSOCIATION Amicus Curiae

Neutral citation:	*Occupiers of erven 87 & 88 Berea v Christiaan Frederick De Wet N.O.* [2017] ZACC 18
Coram:	Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J
Judgments:	Mojapelo AJ (unanimous)
Heard on:	14 February 2017
Decided on:	8 June 2017

Summary: eviction by consent — duties of a court — section 26(3) of the Constitution — section 4 of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998

informed consent—rule 42(1)(a) of the Uniform Rules of Court— common law rescission — *iustus error*

ORDER

On appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of Adams AJ dated 12 November 2015 is set aside and substituted with the following:

   "The eviction order granted by Khumalo J on 10 September 2013 is rescinded."
4. The matter is remitted to the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court) with the direction that the matter be case-managed and dealt with on an expedited basis.
5. The City of Johannesburg is joined as a further respondent to the proceedings in the High Court.
6. The applicants are directed to serve on the City of Johannesburg, within five days of this order, a copy of the record filed in this Court and a copy of this judgment and order.
7. The City of Johannesburg is directed to file a report with the High Court, confirmed on affidavit within 30 days of receiving the documents from the applicants in terms of paragraph 6, on what steps it has taken and what steps it intends or is able to take in order to provide alternative land or emergency accommodation to the applicants in the

event of their being evicted and when the alternative land or accommodation can be provided.

8. The applicants and the respondents may, within 15 days of delivery of the City of Johannesburg's report, file affidavits in response to the report.

9. No order is made as to costs.

JUDGMENT

MOJAPELO AJ (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Pretorius AJ and Zondo J concurring):

Introduction

[1] The central question that arises in this case is whether in eviction proceedings, where an unlawful occupier has purportedly consented to his or her eviction, the Court is absolved from the obligation to consider all relevant circumstances before ordering an eviction. A closely related question is whether an eviction order may be rescinded at the instance of occupiers who had purportedly consented to it.

[2] On 10 September 2013, the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court), granted an order for the eviction of the occupiers from a block of flats, Kiribilly, situated on erven 87 and 88, at the corner of Soper and Fife Roads, Berea, Johannesburg (property). The order was granted purportedly by agreement between the parties in circumstances that are more fully set out later in this judgment.

Parties

[3] The applicants are 184 residents of the property and consist of 47 women, 114 men and 23 children. They are cited simply as "the Occupiers" as their particulars were not known at the time of the institution of the proceedings and until the rescission application referred to below was filed. Some of the applicants have resided at the property for periods of up to 26 years. Most of them are low income earners or unemployed.

[4] The applicants are occupiers of the property which was owned by M L Rocchi Investments CC (M L Rocchi) since 1985. The first and second respondents are the joint liquidators of M L Rocchi appointed with effect from 27 September 2011. Mr Calvin Maseko (Mr Maseko), who is involved in the business of property development, purchased the property from the liquidators of M L Rocchi and intended to spend more than R3 million on its upgrade. It appears that it was his intention that, once he had refurbished the property, he would offer the residential apartments for rent. This offer would be extended to the applicants should they apply, and qualify, for leases in the property. While the liquidators remain the nominal respondents, who are obliged to give *vacua possessio* (vacant possession), Mr Maseko is the *de facto* (in fact) beneficial respondent who invested the proceeds of his pension in the property and financed the litigation as the liquidators were, and are still, unable to do so.

[5] The *amicus curiae* (friend of the court), the Poor Flat Dwellers Association, is a non-profit civic association which was formed in 2009 to resist the exploitation of flat dwellers. It represents the plight of many sectional title flat owners and tenants living in former municipality owned flats that are rented out as residential accommodation.

Factual Background

[6] On 31 January 2013, and pursuant to the sale, the respondents' attorneys served a letter on the applicants notifying them of the termination of their right of occupation

or lease in respect of the property. According to the Sheriff's return of service, the letter was affixed on the principal doors of the property. In July 2013, the preliminary notices in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act[1] (PIE) were served and an order was obtained authorising the service of the eviction application on the applicants. On 23 August 2013, the Sheriff filed his return indicating that a copy of the notice of eviction had been served on the applicants at the property, as required in terms of section 4(2) of PIE.[2] Earlier, on the same date, the Sheriff also served a section 4(2) notice on the City of Johannesburg (City).

[7] After receiving the section 4(2) notice, the applicants approached Mr Skhulu Ngubane (Mr Ngubane), a ward committee member, for assistance.[3] From the facts, it appears that an initial meeting was held with Mr Ngubane and some of the applicants between July and August 2013, at which meeting Mr Ngubane informed the applicants who were present that he would look further into the matter. At a second meeting held on 6 September 2013, Mr Ngubane visited the property and had a meeting with some of the applicants. At this meeting, it appears as if four of the applicants (appearer applicants) were mandated to attend court and seek a postponement in order to enable the applicants to obtain legal representation. Mr Ngubane would also attend with the appearer applicants and speak on their behalf. Neither the applicants nor the City entered an appearance to defend before the hearing of 10 September 2013.

Litigation history

[8] The application came before Khumalo J in the High Court, on 10 September 2013. The appearer applicants, Mr Ngubane and the respondents' legal

[1] 19 of 1998.

[2] Section 4(2) provides: "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] Section 73 of the Local Government: Municipal Structures Act 117 of 1998 creates ward committees.

representatives were present in Court when the matter was called for the first time. The applicants were not legally represented. The matter was stood down for the parties to confer. When it was called for the second time, counsel for the respondents informed the Court that the matter had been settled and presented a draft order to the Court. It was submitted that the order had been agreed to by the parties. When asked by the Court, Mr Ngubane confirmed this and the draft order was accordingly made an order of court by Khumalo J on 10 September 2013. The order provided for the following changes (in favour of the applicants) to the draft order: (a) the date of eviction was changed from 31 October 2013 to 15 November 2013; and (b) a first option to enter into the tenancy was provided for in favour of the applicants who qualified in respect of the property once refurbished. Significantly, there was no request for postponement.

[9] Upon realising that a postponement was not secured and that the eviction had been made an order of court "by agreement", the applicants approached their present legal representatives, the Socio-Economic Rights Institute of South Africa (SERI), in September 2013.

[10] Shortly after engaging the services of SERI, the applicants launched multiple challenges against the eviction order on the grounds set out below. They started with an application for the rescission of the eviction order, followed by a separate application for leave to appeal against the eviction order. Khumalo J dismissed the application for leave to appeal on the basis that the order was not appealable. A petition to the Supreme Court of Appeal failed for the same reason.

[11] The application for rescission of the eviction order was also dismissed by Adams AJ. The applicants launched an application for leave to appeal against the refusal to grant rescission. Pending leave, they brought a separate application to stay their eviction, which was granted by Mphahlele J. That success was however short-lived because shortly thereafter Adams AJ heard and dismissed the application

for leave to appeal against the refusal of rescission. A further petition to the Supreme Court of Appeal against refusal of rescission was dismissed for lack of prospects.

[12] It is against the backdrop of these successive failures in both the High Court and the Supreme Court of Appeal that the applicants approached this Court. They seek leave to appeal, in terms of rule 19 of this Court's Rules, against the whole judgment and order granted by Adams AJ in the matter of *Occupiers of Erven 87 and 88 Berea Township*.[4]

In this Court

Applicants' submissions

[13] The applicants contended, firstly, that there was no actual consent between the parties when the order was granted purportedly by agreement. Secondly, the applicants contended that, even if consent could be found, such consent was not legally valid. Thirdly, the applicants submitted that, even if the consent was legally valid, the Court was under constitutional and statutory duties to satisfy itself that the eviction would, nevertheless, be just and equitable after considering all the relevant circumstances. The High Court, they contended, failed to perform these duties. Lastly, the applicants submitted that the eviction order falls to be rescinded in terms of rule 42 of the Uniform Rules of Court[5] or the common law.

Respondents' submissions

[14] The respondents contended that the applicants were unlawfully occupying the property given that an eviction order by agreement was granted and leave to appeal against it was refused. They argued that it was not common cause that the eviction of the applicants from the property would leave them homeless. They submitted that there was no evidence before the Court that any of the applicants had made any

[4] *Occupiers of Erven 87 and 88 Berea Township v Frederick N.O* [2015] ZAGPJHC 271 (Adams AJ judgment).

[5] Quoted below in n 13.

attempts to find affordable alternative accommodation. Accordingly, the respondents submitted that it is not in the interests of justice for leave to appeal to be granted against the rescission judgment of the High Court because of the time period that has elapsed and the failure by the applicants to take steps in an attempt to secure alternative accommodation themselves.

[15] The respondents indicated that the new purchaser's investment in the building is being sterilised to the detriment of the purchaser, particularly in light of the fact that the cost to refurbish the building has escalated substantially. Furthermore, the respondents submitted that the applicants had not articulated a defence that would entitle them to remain in occupation of the property and thus that an eviction order is just and equitable under the first enquiry mandated in *Changing Tides*.[6]

[16] Finally, the respondents submitted that the applicants had not brought themselves within the ambit of a procedural defect as contemplated in rule 42 of the Uniform Rules of Court insofar as rescission is concerned; and that the applicants' right to access the courts has not been infringed as the applicants still have the opportunity to enforce their right directly against the City.

Amicus curiae's submissions

[17] The *amicus curiae* submitted that in the event that there was actual consent, it was still impermissible for the High Court to have granted the eviction order without employing its judicial oversight function as required by PIE and as guaranteed in section 34 of the Constitution.[7] It argued that the absence of judicial oversight in eviction orders taken "by consent" does not give effect to the right of access to courts in terms of section 34 of the Constitution. This is so, the *amicus curiae* submitted,

[6] *City of Johannesburg v Changing Tides 74 (Pty) Ltd* [2012] ZASCA 116; 2012 (6) SA 294 (SCA); 2012 (11) BCLR 1206 (SCA) (*Changing Tides*) at para 12.

[7] The section provides that: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

because people may be evicted by purported consent without a full understanding of: (a) their rights or (b) what they are consenting to and (c) without judicial interrogation as to the effect of the eviction.

Issues

[18] The issues that this Court is called upon to decide are the following:

(a) Condonation;
(b) Leave to appeal;
(c) Consent, waiver, and mandate;
(d) The duties of a court in eviction proceedings generally, and in the face of a purported consent;
(e) How the High Court approached its duties;
(f) Joinder of the local authority;
(g) Valid defence under PIE;
(h) Rescission;
(i) Remedy; and
(j) Costs.

Condonation

[19] Firstly, the respondents' written submissions were late by almost three months. They applied for condonation citing financial constraints as the reason for the delay. It is from the condonation affidavit of Mr Maseko that it is revealed that he funded the litigation from the onset as part of his investment in the property or the protection of such investment, as the liquidators from whom he purchased the property were not able to do so. Mr Maseko recorded that the delay in filing submissions was due to the fact that he ran out of funds and could not afford legal representation any more. The respondents and Mr Maseko indicated that they were only able to continue with the litigation and to appear at the hearing of the application in this Court as their attorneys have agreed to pursue the matter *pro bono* (free of charge). The financial constraints

are an undeniable reality. Although the delay is lengthy, it is in the interests of justice to condone the late filing in order for the matter to be fully ventilated. This will in turn enable this Court to balance the interests of the parties as it is enjoined to do.[8]

[20] Secondly, the *amicus curiae's* application for admission was due on 21 October 2016 but was only filed on 13 January 2017 together with a condonation application. It appears that the *amicus curiae* only became aware of this matter in December 2016 after which it closed for the festive break. Besides, the period of 16 December 2016 to 13 January 2017 fell within the *dies non* at the Court.[9] The explanation is acceptable and the parties are not prejudiced. Accordingly, it is in the interests of justice to condone the delay.

Leave to appeal

[21] The application raises a constitutional matter as it directly concerns section 26(3) of the Constitution and the interpretation of the provisions of PIE. This legislation was enacted to give effect to section 26(3) of the Constitution. It is a well-established principle that an eviction from one's home always raises a constitutional issue.[10] The right in terms of section 25 of the Constitution is also implicated. The applicants have reasonable prospects of success.[11] Accordingly, it is in the interests of justice to grant leave to appeal.

Merits

[8] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 23.

[9] *Dies non* means "non (court) days". This Court issued directions on 18 November 2016 specifying *dies non* over the Christmas period.

[10] *Machele v Mailula* [2009] ZACC 7; 2010 (2) SA 257 (CC); 2009 (8) BCLR 767 (CC) at para 26.

[11] See *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras 29-30.

Consent, waiver and mandate

[22] The examination of consent, waiver and mandate is relevant for purposes of determining whether the order may be rescinded and set aside. The order may be set aside either in terms of rule 42[12] of the Uniform Rules of Court or in terms of the common law. In terms of rule 42(1)(a) an order may be rescinded where it was erroneously sought or erroneously granted in the absence of the affected party.[13] An order is erroneously granted where there was no procedural entitlement to it.[14] In *Ntlabezo,*[15] the Transkei High Court considered the issue concerning common law rescission of a judgment which was consented to by a legal representative without the authority of the client. It was held that where legal representatives consent to judgments without the requisite authority, the judgment may be set aside.[16]

[23] As already stated, the applicants disputed that they, as a fact, consented to the eviction order and, alternatively, they dispute that such consent is legally valid. Did the applicants consent to the eviction? The question must be considered against the events that preceded the granting of the eviction order.

[24] The applicants were notified for the first time in January 2013 by letter delivered by the Sheriff that they were to be evicted from the property. A notice of motion was then served in July 2013. Then in August 2013 a section 4(2) notice was served giving notice of the court date, 10 September 2013, on which the application for eviction was to be moved at court.

---

[12] Rule 42 of the Uniform Rules must be read together with rule 29 of the Constitutional Court Rules.

[13] Rule 42(1)(a) provides as follows:

> "The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
>
> > (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."

[14] *Lodhi 2 Properties Investment CC v Bondev Developments* [2007] ZASCA 85; 2007 (6) SA 87 (SCA) at paras 24-5.

[15] *Ntlabezo v MEC for Education, Culture and Sport, Eastern Cape* 2001 (2) SA 1073 (TkH).

[16] Id at1080-1.

[25] The notices would have informed the applicants of their procedural rights to give notice of their intention to oppose and to appear at court on the date of the hearing to oppose the application for their eviction. Given that a period of almost nine months had elapsed since they were first informed of the intended eviction proceedings, they had an opportunity to reflect on the implications of the intended eviction on their lives and, in particular, on their continued occupation of the property. The move to evict them from the premises would have been discussed generally throughout the property. However it is unlikely, given that they had no legal representation at the time, that they would have been aware of the full extent of their rights under PIE and the Constitution. That, they would only have known if they consulted a legal representative.

[26] The facts demonstrate that groups of them did meet on the property to discuss the matter. Mr Maseko, the purchaser, visited the property to try to negotiate or speak directly with some of the applicants before the hearing date. As mentioned above, some of the applicants met with Mr Ngubane to discuss the eviction application on two occasions.

[27] The applicants knew that they had no right against the owner to occupy the property. Their very continued occupancy of the property was threatened. It must have been the concern of all the applicants. Only those who decided to be indifferent to the development would have turned a blind eye to what was unfolding before them. It is unlikely that they would not have known what was coming on 10 September 2013. The conclusion of the High Court in this regard cannot be faulted.

[28] It appears from the facts that the appearer applicants had a very specific mandate: to seek a postponement to enable the applicants to get legal representation. There is nothing to suggest that it ever occurred to the applicants, who did not go to Court, that something other than a postponement could happen there. Although the

appearer applicants were mandated to ask for a postponement, they did not do so. What they precisely did at Court is not all that clear, on their version. The events which took place at court, and which culminated in the eviction order being granted, have been discussed above.[17]

[29] Whether they appreciated the full extent of their rights is also questionable. But viewed from the perspective of the respondents and the Court: (a) there was a delegation from the applicants at the Court, namely the appearer applicants; (b) proper service had been effected as authorised by the Court; (c) the appearer applicants engaged with the respondents' legal representatives; (d) the identity of the other applicants was unknown to the Court; and (e) it appeared that the applicants had no defence to the merits of the application other than a right to alternative accommodation for those who qualified.

[30] The applicants argue that the onus that rests on the respondents to prove consent was not discharged as the only positive affirmation made before Khumalo J was made by the respondents' counsel and Mr Ngubane. They argue that the latter had no authority to make such a statement or to bind the applicants. They argue further that the inference that they must have agreed to the order, as the draft order was amended in their favour, was not sound. The applicants intended to oppose the eviction and, in the interim, to obtain a postponement to enable them to get legal representation. It is clear that the applicants were aware of the inadequacy of their own ability, without legal representation, to handle the application for eviction. That is why they decided to get legal assistance. They had no legal representation when the order was obtained against them.

[31] The appearer applicants contend that they remained silent when presented with a draft order and did not speak in Court. They did not ask for a postponement, which they say they meant to do. However, it is improbable that their role was wholly

[17] See [8].

passive. It is not improbable that they were involved in some discussions and factually consented to the order. The finding of the High Court in this regard can, once again, not be faulted.[18]

[32] The next question that arises is whether factual consent by the appearer applicants was legally effective. For consent to be legally effective, it must have been given by the applicants freely and voluntarily with the full awareness of the rights being waived.[19] It must be an informed consent in order to be valid.[20] This requires a consideration of the potential waiver of rights.

[33] An agreement to an eviction order in the circumstances would entail the waiver of, at a minimum, the constitutional and statutory rights: (a) to an eviction only after a court has considered all the relevant circumstances;[21] (b) to the joinder of the local authority and production by it of a report on the need and availability of alternative accommodation;[22] (c) to a just and equitable order in terms of PIE;[23] and (d) to temporary alternative accommodation in the event that eviction would result in homelessness.[24] The applicants and the *amicus curiae* contended, with some force, that the rights are therefore incapable of being waived because they are for the benefit of the public at large. Even if they were capable of waiver, such waiver would need to be free, voluntary and informed.[25] It has not been disputed that the applicants were not informed of any of these rights. It must therefore be accepted that they were not

[18] *The Unlawful Occupiers of Erven 87 and 88 Berea v De Wet N.O. Christiaan Frederick* (unreported) judgment of the High Court of South Africa, Gauteng Local Division, Johannesburg, Case No 2013/24254 (Khumalo J judgment) at para 38 where the Court finds that the appearer applicants stood before the Court and themselves confirmed that the order, as per its terms, was agreed upon.

[19] See *Laws v Rutherford* 1924 AD 261 at 263 and *Mohamed v President of the Republic of South Africa* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at para 62.

[20] Id.

[21] Section 26(3) of the Constitution.

[22] *Changing Tides* above n 6 at para 38.

[23] See sections 4(6)-(7) and 6(1) of PIE.

[24] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) (*Blue Moonlight*) at para 96.

[25] See *Laws* and *Mohamed* above n 19.

aware of any such rights. Given that the applicants were not aware of their rights, the factual consent that they gave was not informed. Their consent is therefore not legally valid. It is not binding on them. It is therefore not necessary in these circumstances to decide whether these rights are capable of waiver.

[34] This conclusion is applicable not only to the appearer applicants but to *all* of the applicants for the reasons below.

[35] The respondents failed to establish a connection between what was "consented" to by the appearer applicants and those 180 applicants who did not attend in the High Court. In this regard, the respondents did not even establish, at the very least, that the appearer applicants had an implied mandate from the other applicants to take any further steps that might have been required, in the event that a postponement was not secured. Although the appearer applicants factually consented to the order, as alluded to by Khumalo J,[26] this consent was, firstly, without mandate and secondly, it was not an informed consent.

[36] It is most probable that the High Court assumed that Mr Ngubane's intimation was representative of the position of all the applicants, which is incorrect. Any assumption that he was a resident himself was also incorrect. The applicants contend that Mr Ngubane offered to speak for the applicants and was mandated to obtain a postponement. On his own version, Mr Ngubane had no mandate to bind the applicants. It must be accepted that Mr Ngubane had no authority to represent the applicants. He was neither their legal representative, nor an occupier. His statements to the Judge were legally inconsequential.

[37] Neither the appearer applicants nor Mr Ngubane could bind the absent 180 applicants to an effective position regarding the eviction order. On all accounts, none of them had the requisite mandate to do so.

[26] Khumalo J judgment above n 18 at para 38.

[38] Accordingly, there was no legally effective and informed consent by the applicants when the eviction order was granted against them.

Duties of the Court

[39] It is necessary to examine the duties of a court when dealing with proceedings for eviction from residences generally, and when faced with actual or purported consent to eviction. The duties arise from the protection of the rights of residents. They are, in the circumstances, inextricably intertwined with the issue of informed consent and waiver[27] which entails an examination into what rights the parties had and the nature of those rights.

[40] The starting point is section 26(3) of the Constitution which provides that "[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances". Accordingly, courts seized with eviction matters are enjoined by the Constitution to consider all relevant circumstances.

[41] The prohibition in section 26(3) is given effect to through the enactment of PIE. This Act goes further and enjoins the courts to order an eviction only "if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances" as contemplated in section 4(6) and (7)[28] and section 6(1).[29]

---

[27] Dealt with in [22] to [38].

[28] These sub-sections provide that:

> "(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.
>
> (7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution

[42] This Court in *Port Elizabeth Municipality*[30] emphasised the new approach that courts must adopt in eviction matters. A court must take an active role in adjudicating such matters. As this Court stated:

> "The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make. The Constitution and PIE require that, in addition to considering the lawfulness of the occupation the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result."[31]

[43] The role played by a court in such matters was elucidated further in other cases. As a starting point, this Court in *Machele* held that "[t]he application of PIE is not discretionary. Courts must consider PIE in eviction cases."[32] Furthermore, this Court

---

> pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."

[29] This sub-section provides:

> "(1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—
>
> (a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or
>
> (b) it is in the public interest to grant such an order."

[30] *Port Elizabeth Municipality* above n 8 at para 36.

[31] Id.

[32] *Machele* above n 10 at para 15.

in *Pitje* held that courts are not allowed to passively apply PIE and must "probe and investigate the surrounding circumstances".[33]

[44] The nature of the enquiry under section 4 of PIE was examined in the case of *Changing Tides.*[34] In summary, it was held that there are two separate enquires that must be undertaken by a court:

> "First, it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under section 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under section 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant that order."[35]

[45] The second enquiry, which the court must undertake before granting an eviction order, is to consider—

> "what justice and equity demand in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly, it cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity."[36]

---

[33] *Pitje v Shibambo* [2016] ZACC 5; 2016 JDR 0326 (CC); 2016 (4) BCLR 460 (CC) at para 19.

[34] *Changing Tides* above n 6 at paras 11–25.

[35] Id at para 25.

[36] Id.

[46] As is apparent from the nature of the enquiry, the court will need to be informed of all the relevant circumstances in each case in order to satisfy itself that it is just and equitable to evict and, if so, when and under what conditions. However, where that information is not before the court, it has been held that this enquiry cannot be conducted and no order may be granted.[37]

[47] It deserves to be emphasised that the duty that rests on the court under section 26(3) of the Constitution and section 4 of PIE goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in which the court is required and expected to take an active role. In order to perform its duty properly the court needs to have all the necessary information. The obligation to provide the relevant information is first and foremost on the parties to the proceedings. As officers of the court, attorneys and advocates must furnish the court with all relevant information that is in their possession in order for the court to properly interrogate the justice and equity of ordering an eviction. This may be difficult, as in the present matter, where the unlawful occupiers do not have legal representation at the eviction proceedings. In this regard, emphasis must be placed on the notice provisions of PIE, which require that notice of the eviction proceedings must be served on the unlawful occupiers and "must state that the unlawful occupier . . . has the right to apply for legal aid".[38]

[48] The court will grant an eviction order only where: (a) it has all the information about the occupiers to enable it to decide whether the eviction is just and equitable; and (b) the court is satisfied that the eviction is just and equitable having regard to the information in (a). The two requirements are inextricable, interlinked and essential. An eviction order granted in the absence of either one of these two requirements will

[37] *Port Elizabeth Municipality* above n 8 at paras 32 and 58-60; and *Changing Tides* above n 6 at paras 26-7.

[38] Section 4(5) read with section 4(2).

be arbitrary. I reiterate that the enquiry has nothing to do with the unlawfulness of occupation. It assumes and is only due when the occupation is unlawful.[39]

[49] Where occupiers are not represented, the Supreme Court of Appeal in *Changing Tides* has provided some additional guidance:

> "Where [unlawful occupiers] are not represented, courts may consider issuing a rule nisi and causing it to be served on the occupiers (and if it is not present, the local authority), together with a suitably worded notice explaining the right to temporary emergency accommodation, how they can access such accommodation, and inviting them to come to court to express their views on that issue at least."[40]

[50] To this I would add that the court should explain to the unlawful occupiers their right to apply for legal aid and where appropriate direct them to approach a named legal aid clinic with a given address.[41]

[51] In brief, where no information is available, or where only inadequate information is available, the court must decline to make an eviction order. The absence of information is an irrefutable confirmation of the fact that the court is not in a position to exercise this important jurisdiction.

How the High Court approached its duties

[52] Was the High Court entitled to accept, in the light of the circumstances that prevailed then, that there was effective consent and waiver? Not if the Court appreciated the extent of the obligation on it to consider all the relevant factors in order to determine whether it was just and equitable to grant the eviction. The just

---

[39] *Port Elizabeth Municiplaity* above n 8 at para 32 where Sachs J stated: "The court is not resolving a civil dispute as to who has rights under land law; the existence of unlawfulness is the foundation for the enquiry, not its subject-matter."

[40] *Changing Tides* above n 6 at para 48.

[41] See generally *Nkuzi Development Association v Government of the Republic of South Africa* [2001] ZALCC 31; 2002 (2) SA 733 (LCC).

and equitable enquiry is an innovation under the Constitution and PIE, which requires the Court to be proactive to establish the relevant facts. At the very least, if the Court was aware of its constitutional duties, it would have realised that it did not have all the relevant facts before it and would not have granted the eviction.

[53] The High Court that granted the eviction order held that, once the parties had reached agreement, the mandate of the Court to determine the issues was terminated (*functus officio*).[42] In this regard, the Court did not apply PIE as it was enjoined to do. It took a passive approach to the eviction proceedings and assumed, incorrectly, that where there is consent to eviction the Court is relieved of its duties under PIE.

[54] Although the Court was faced with a purported agreement this did not absolve it of its duties under PIE. The application of PIE is mandatory,[43] and courts are enjoined to be "of the opinion that it is just and equitable" to order an eviction.[44] It is clear that the opinion to be formed is that of the courts, not the respective parties. Accordingly, a court is not absolved from actively engaging with the relevant circumstances where the parties purport to consent. PIE enjoins courts to balance the interests of the parties before it and to ensure that if it is to order an eviction, it would be just and equitable to do so. Without having regard to all relevant circumstances including, but not limited to, a purported agreement, the court will not have satisfied the duties placed upon it by PIE.[45] These duties arise even in circumstances where parties on both sides are represented and a comprehensive agreement is placed before the court. In that event, it may well be that the court is able to form the requisite opinion from perusing the agreement and the affidavits before it and, where necessary, engaging the legal representatives to clarify any remaining issues.

[42] Khumalo J judgment above n 18 at para 36.

[43] *Machele* above n 10 at para 15.

[44] Section 4(6) and (7) of PIE.

[45] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28; 2010 (9) BCLR 911 (SCA) (*Shulana Court*) at paras 11-5; and *Changing Tides* above n 6 at para 26.

[55] It is evident that the High Court that granted the eviction erred in assessing what it saw as the applicants' consent. It accepted the factual consent without conducting an enquiry to establish its validity and legal effectiveness. Furthermore, it failed to appreciate that the duty to conduct the enquiry is that of the court, which is obliged to be proactive in gathering information about all the relevant circumstances, considering that information and arriving at a just and equitable order in the circumstances of each case. The High Court thus failed to probe the matters that it was statutorily enjoined to do.

[56] In dismissing the application to rescind, Adams AJ found that the difficulty in this case was that the applicants were represented at court when the eviction order was granted.[46] In these circumstances, it was held that "they were fully entitled to canvas all the relevant circumstances and to bring same to the attention of the Court".[47] In other words, the High Court regarded the presence of the appearer applicants and Mr Ngubane as excusing it from making the necessary enquiry. The High Court erred as the applicants were, as a matter of fact, not legally represented in the eviction proceedings. In addition, Mr Ngubane, who confirmed that the applicants had agreed to the eviction order, did not have a mandate to do so, nor was he one of the applicants. The High Court equally failed to appreciate the proactive role that a court considering an eviction application is called upon to play as set out above.

[57] Furthermore, Adams AJ accepted that the Court that had granted the eviction order did not conduct an enquiry as enjoined by the Constitution and PIE. That should have been the end of the enquiry and a sufficient factor to justify rescission. In reasoning further that, even if the eviction court had conducted the requisite enquiry, it would still have been satisfied that the eviction was just and equitable, the Court committed a further error. This is because on the facts before it homelessness was an undisputed risk. An order that will give rise to homelessness could not be said to be

[46] Adams AJ judgment above n 4 at para 39.

[47] Id.

just and equitable, unless provision had been made to provide for alternative or temporary accommodation. That risk triggered the duty to join the City as the authority that would have to take reasonable measures within its available resources to alleviate homelessness.

Joinder of the local authority

[58] On the issue of joinder of the local authority, the High Court in the eviction proceedings held that this was not always necessary and that, in this case, the non-joinder made no difference as the eviction order was agreed upon between the parties.[48]

[59] It is necessary at this point to discuss the effect of this Court's judgment in *Blue Moonlight.*[49] The Court was called upon to decide whether it was reasonable for the local authority to provide temporary emergency accommodation only to those occupants who were evicted from properties owned by the local authorities and not to occupants evicted from private property. This Court held that it was unreasonable to differentiate between these two groups.[50] The effect is that the local authority has a duty to provide temporary emergency accommodation to all persons being evicted who have no alternative accommodation.[51]

[60] This duty must be read together with section 4(7) of PIE, which provides that one of the circumstances which may be relevant to the just and equitable enquiry is "whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier".

[48] Khumalo J judgment above n 18 at para 39.

[49] *Blue Moonlight* above n 24.

[50] Id at para 95.

[51] Id at para 96-7.

[61] It follows that where there is a risk that homelessness may result, the availability of alternative accommodation becomes a relevant circumstance that must be taken into account.[52] A court will not be able to decide the justice and equity of an eviction without hearing from the local authority upon which a duty to provide temporary emergency accommodation may rest. In such an instance the local authority is a necessary party to the proceedings. Accordingly, where there is a risk of homelessness, the local authority must be joined.[53]

[62] On the facts, it is apparent that there is a risk of homelessness resulting from the granting of the eviction order. The risk of homelessness triggered the City's duty to provide temporary emergency accommodation. This accordingly necessitated the joinder of the City.[54] Had the High Court probed and investigated the surrounding circumstances this would have become apparent, even in the face of a purported consent.

"Valid defence"

[63] There was some debate about the meaning of a "valid defence" in terms of PIE during the hearing with reference to *Changing Tides* wherein Wallis JA stated:

> "Under section 4(8) [the court] is obliged to order an eviction 'if the . . . requirements of the section have been complied with' and no valid defence is advanced to an eviction order. The provision that no valid defence has been raised refers to a defence that would entitle the occupier to remain in occupation as against the owner of the property, such as the existence of a valid lease."[55]

[52] See *Shulana Court* above n 45 at para 13 and *Changing Tides* above n 6 at para 38.

[53] See *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd* [2009] ZASCA 80; 2010 (4) BCLR 354 (SCA) (*Shorts Retreat*) at paras 11-4; *Shulana Court* above n 45 at paras 13-6; and *Changing Tides* above n 6 at para 38.

[54] See *Blue Moonlight* above n 24 at para 96; *Changing Tides* id at paras 37–8.

[55] *Changing Tides* id at para 12.

[64] It is apparent that the discussion of "valid defence" is in reference to section 4(8)[56] and not section 4(6) or (7). Furthermore, read in context, the Supreme Court of Appeal does not exclude other possible defences and does not move away from the settled position that the court must come to a decision that is just and equitable to all parties to evict.

[65] It follows that where it is unjust or inequitable to evict, the unlawful occupiers have a defence, and no eviction can be ordered. This is so because in terms of PIE, a court may order an eviction only if it is just and equitable. Accordingly, a defence directly concerning the justice and equity of an eviction, not necessarily the lawfulness of occupation, must be taken into account when considering all relevant circumstances. To limit the enquiry under section 4(6) and (7) to the lawfulness of occupation would undermine the purpose of PIE and be a reversion to past unjust practices under the Prevention of Illegal Squatting Act.[57] The enquiry is whether it is just and equitable to evict. This is a more expansive enquiry than simply determining rights of occupation.[58]

---

[56] The sub-section reads as follows:

> "If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine -
>
> (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
>
> (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a)."

[57] 52 of 1951. See the discussion of this Act in *Port Elizabeth Municipality* above n 8 at paras 8-13.

[58] See *Port Elizabeth Municipality* id at para 37 where Sachs J stated that:

> "Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."

[66] It is clear that even purported consent by the parties does not absolve a judicial officer from her or his duties in terms of PIE. This does not mean that a court is precluded from making a settlement agreement an order of court where that order will result in eviction. As discussed above, PIE enjoins courts to only make an eviction order after having considered all the relevant circumstances and satisfying itself that it is just and equitable to do so. When faced with a settlement agreement, a court may take this into account as one of the relevant circumstances in its just and equitable interrogation. In this instance, the court must as a first step be satisfied that the parties freely, voluntarily and in full knowledge of their rights agree to the eviction. However, the enquiry does not end there. Courts must be alive to the risk of homelessness and the issue of joining the local authority to discharge any duties it may have.

[67] All of this may appear unduly burdensome but it is necessary if one has regard to the fundamental importance that a person's home has to the realisation of almost all human rights.[59] More importantly, the procedure is constitutionally enshrined and legislatively enacted.

Should the eviction order be rescinded?

[68] For the purposes of rule 42(1)(a), one must distinguish the position of the four appearer applicants from that of the 180 absent applicants. As for the 180 absent applicants, as mentioned above, neither Mr Ngubane nor the appearer applicants[60] had a mandate to consent to an eviction on their behalf. Therefore, they were absent for purposes of rule 42. Whether the order was granted in error will be considered below.

[69] As mentioned above, the High Court did not discharge its duty to enquire into all of the relevant circumstances. This resulted in the Court being unaware of

[59] Id at para 17.

[60] [37].

essential issues of fact when granting the order.[61] The Court was for instance not aware that there were 180 occupants who were absent when it granted the eviction order. The Court was further not aware that those who purported to confirm the agreement on the side of the applicants had no mandate to bind the absent 180 applicants. The basis for granting the eviction order was that all the parties had consented thereto. The 180 absent applicants had however not consented thereto and were not bound by anybody present in Court. The eviction order was thus erroneously granted in the absence of the 180 applicants.

[70] Rule 42 therefore provides an adequate basis to set aside the eviction order, in so far as it relates to the 180 absent applicants.

[71] As for the appearer applicants, who were not absent for the purposes of rule 42, *iustus* error (just mistake) is a ground at common law in terms of which they may seek rescission of the order. The discretion of the Court in granting rescission at common law is fairly wide.[62]

[72] In *Gollach & Gomperts*, the Court stated:

> "It appears to me that a *transactio* is most closely equivalent to a consent judgment. . . . Such a judgment could be successfully attacked on the very grounds which would justify rescission of the agreement to consent to judgment. I am not aware of any reason why *iustus error* should not be a good ground for setting aside such a consent judgment, and therefore also an agreement of compromise, provided that such error vitiated true consent and did not merely relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise."[63]

---

[61] See *Nyingwa v Moolman* 1993 (2) SA 508 (TK) at 510D-G; *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 153B-C; and *Rossiter v Nedbank Ltd* [2015] ZASCA 196 at para 16.

[62] *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042F-H; *Hafejee v Bytes Technology Group South Africa (Pty) Ltd* [2016] ZAWCHC 61; 2016 JDR 0928 (WCC) at para 5; *Vilvanthan v Louw N.O.* [2010] ZAWCHC 49; 2010 (5) SA 17 (WCC); [2011] 2 All SA 331 (WCC) at 20F-I; and *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 300.

[63] *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) (*Gollach & Gomperts*) at 922H-923A.

[73] Although the appearer applicants factually signified consent to the eviction order, their consent was not informed. It was thus not valid. The basis of granting the order against them was that they had validly consented thereto. In the absence of valid consent, there was no procedural entitlement to the eviction order. The eviction order was thus granted against them in error. The appearer applicants' lack of knowledge of their rights vitiated true consent.[64]

[74] Once *iustus* error is established a judgment by consent may be set aside.[65] It will be established where there is "good and sufficient cause", which entails the consideration of (a) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent was entered; (b) the *bona fides* of the application; and (c) the *bona fides* of the defence on the merits of the case which *prima facie* carries some prospect of success.[66]

[75] The respondents contended that the applicants failed to establish "sufficient cause" for rescission of the consent order at common law; and as a result, the High Court's finding to this extent is correct.[67] Was there "good and sufficient cause"? Firstly, regarding the reasonableness of the explanation proffered by the applicants, the circumstances under which the consent order was granted have been discussed in detail above. The crux is that the applicants were unrepresented and uninformed when they consented to the eviction order. In the circumstances, their explanation is reasonable.

---

[64] Id.

[65] *Georgias v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 (ZS) confirmed in *Ntlabezo* above n 15 at 1081A-E.

[66] *Georgias* id at 132G-I.

[67] *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) at paras 85-6 and 89; and *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765C-D.

[76] Secondly, the application was *bona fide* for the following reason: an eviction was granted against the applicants which, if unchallenged, would have been executed rendering them homeless. In these circumstances, it was not unreasonable for them to bring the rescission application and this appeal before us. Thirdly, all of the applicants have valid defences to the eviction, namely, (a) the non-joinder of the City in circumstances where the eviction would result in homelessness and (b) the violation of their rights under section 26(3) of the Constitution, and PIE. The applicants have thus presented a coherent case which satisfies the requirement of good and sufficient cause for *iustus* error. As there was no legally valid consent, the consent order was granted in error.

[77] On the facts, there is therefore a good case for rescission based on *iustus* error. There is therefore a basis for granting rescission of the eviction order in respect of the appearer applicants at common law.

[78] Accordingly, on the basis of rule 42(1)(a) and the common law, the eviction order made purportedly by agreement between the parties falls to be rescinded.

Remedy

[79] The applicants have appealed against the judgment and order of Adams AJ, in which rescission of the Khumalo J order was refused. When considering remedy this Court seeks to balance the interests of the land owner with those of the occupiers. The rights on both sides of the scale enjoy protection under sections 25 and 26 of the Constitution respectively.

[80] The submission of the respondents that the investment of the owner in the property should not be sterilised is a valid and weighty consideration. Mr Maseko has invested proceeds of his pension in the property to revitalise urban residential premises. He runs the risk of losing his investment and had to be assisted on a *pro bono* basis to present his case before this Court. The effect of PIE is not and should not be to effectively expropriate the rights of the landowner in favour of

unlawful occupiers.[68] The landowner retains the protection against arbitrary deprivation of property. Properly applied, PIE should serve merely to delay or suspend the exercise of the landowner's full property rights until a determination has been made whether it is just and equitable to evict the unlawful occupiers and under what conditions.[69]

[81] The availability of alternative land or accommodation is a relevant consideration to both enquiries into what is just and equitable.[70] These are considerations which should, as far as possible, be resolved without undue delay to avoid the seeping in of unintended consequences that may cause irreversible prejudice. In order to balance the interests of the respondents, particularly those of Mr Maseko, it would have been ideal for this Court to grant a remedy that would bring finality to the matter. Regrettably, without the City before us, it is not possible to grant a just and equitable remedy that will bring finality to the matter.

[82] Accordingly, it is necessary to remit the matter to the High Court with an express provision that the matter be dealt with on an expedited basis. For this purpose it is necessary for this Court to join the City to the proceedings, *mero motu* (of one's own accord), in order to ensure that all the relevant parties are before the High Court.[71] On the information before this Court, it would appear that the main and possibly only outstanding consideration for a just and equitable order is the resolution of the problem of potential homelessness that would result from the eviction. The City has a duty to respond appropriately and expeditiously. The order below is along the lines of that which was made in *Shorts Retreat*.[72]

[68] *Ndlovu v Ngcobo; Bekker v Jika* [2002] ZASCA 87; 2003 (1) SA 113 (SCA) at para 17.

[69] Id.

[70] *Changing Tides* above n 6 at para 21.

[71] *Shorts Retreat* above n 53 at para 12.

[72] Id at para 1.

Costs

[83] The applicants initially sought costs but stated in Court that they would no longer be seeking a costs order. The respondents similarly do not seek costs against the applicants and ask that they not be mulcted with an adverse costs order. These submissions are reasonable. In light of this, I would make no order as to costs.

Order

[84] In the result, I make the following order:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of Adams AJ dated 12 November 2015 is set aside and substituted with the following:

   "The eviction order granted by Khumalo J on 10 September 2013 is rescinded."
4. The matter is remitted to the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court) with the direction that the matter be case-managed and dealt with on an expedited basis.
5. The City of Johannesburg is joined as a further respondent to the proceedings in the High Court.
6. The applicants are directed to serve on the City of Johannesburg, within five days of this order, a copy of the record filed in this Court and a copy of this judgment and order.
7. The City of Johannesburg is directed to file a report with the High Court, confirmed on affidavit within 30 days of receiving the documents from the applicants in terms of paragraph 6, on what steps it has taken and what steps it intends or is able to take in order to provide alternative land or emergency accommodation to the applicants in the event of their being evicted and when the alternative land or accommodation can be provided.

8. The applicants and the respondents may, within 15 days of delivery of the City of Johannesburg's report, file affidavits in response to the report.
9. No order is made as to costs.

For the Applicants:	S Wilson and F Hobden instructed by SERI Law Clinic
For the First and Second Respondents:	A W Pullinger instructed by Vermaak & Partners Inc Attorneys L Nkosi-Thomas SC and L Nyangiwe at the request of the Court
For the *Amicus Curiae*:	S Pudifin-Jones and I Veerasamy instructed by Legal Resources Centre