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

APPEAL CASE NO: A511/15

WCHC CASE NO: 9201/2014

In the matter between:

ZANELE LUSITHI

First Appellant

VELISWA MBEKI

Second Appellant

**THE OTHER PERSONS UNLAWFULLY OCCUPYING
PORTION 9 OF THE FARM GROENE RIVIER, NO 821**

Third Appellant

And

CAPE LIFESTYLE INVESTMENT LTD

First Respondent

THE SWARTLAND MUNICIPALITY

Second Respondent

Coram: Erasmus, Gamble et Boqwana JJ

Date of Judgment: 13 October 2017

JUDGMENT

ERASMUS, J (BOQWANA, J CONCURRING) :

[1] This is an appeal before the full bench of this division by the appellants, with leave from the Supreme Court of Appeal, against an eviction order that was granted in favour of the first respondent by the court *a quo* on 3 December 2014. The court *a quo* granted an order in terms of which the appellants were directed to vacate the property on which they lived and to remove any structures or possessions from the property on or before 31 January 2015, failing which the sheriff was authorised and directed to evict the occupiers and to remove, by demolition, or other reasonable means, the structures and possessions from the property on 2 February 2015.¹

[2] The second respondent (the municipality) was directed to provide an alternative site for the relocation of persons who were at that date in occupation of 51 structures (the evidence suggests however that there were 53) which were erected on or before 22 May 2014 (when an interim interdict was granted). Save for the 51 households, no alternative sites, or accommodation was to be provided to the appellants.

[3] On 16 January 2015, the appellants launched an application for leave to appeal to the court *a quo*, which application was dismissed on 1 July 2015. On 27 July 2015, the appellants sought leave to appeal the order of the court to the Supreme Court of Appeal of which leave was granted on 8 September 2015 to a full bench.

[4] The appeal was set down for hearing on 29 July 2016, but postponed to 14 October 2016, for the following reasons:

¹ See reasons for the order given on 3rd December 2014. Para 18 pp 11-14.

[4.1.] Although leave to appeal from the Supreme Court of Appeal was granted on 8 September 2015, the appellants and/or the attorneys failed to file heads of argument timeously and to attend to a number of procedural aspects including, inter alia, a failure to file the notice of appeal and to prepare the record. It seems the respondents, keen to resolve the issue, assisted in the preparation of the record and placing the matter on the appeal roll. The appellants appeared without their legal representatives. The appellants were at some stage represented by an attorney by the name of Mr Barclay Mate, who seems to have disappeared and could not be contacted in any way. On 6 July 2016, during the court recess and after the receipt of the appeal records, the senior judge, through his registrar, made enquiries with the Law Society about the whereabouts of the appellants' attorney of record, Mr Mate. She was advised that the Mr Mate was no longer practising. The first respondent's attorneys, Laäs and Scholtz attorneys, were contacted to ensure that the matter be heard. Over and above the efforts of the respondent's attorney, the presiding judge intervened and requested them to take positive steps in order for the matter to be expedited. The presiding judge further contacted the Cape Law Society after it was revealed that Mr Mate was barred from practice. The Law Society was also requested to be present on the day of hearing to inform the court as to what steps could be taken in order to assist the appellants herein. The court is grateful to Mr Jearey of Laäs and Scholtz attorneys for the assistance provided in the matter.

[4.2.] It needs to be noted that at the proceedings in the court *a quo*, an advocate represented the appellants, purportedly, on the instructions of attorney Mr Mate.

Enquiries from the first respondent's attorneys revealed that he had also disappeared. Fortunately, the first respondent's attorneys acted responsibly by ensuring that the appellants be given proper and required information in order to prepare thoroughly for the appearance in court on the day of the appeal hearing. It is instructive to note that the attorney who represented the group in the past on the information provided by Mrs Lusithi (first appellant) was also the person that was involved in the application for leave to appeal to the Supreme Court of Appeal.

[4.3.] At the hearing on 29 July 2016, the first appellant, Mrs Lusithi, a number of members of the community as well as individuals who would form part of the appellants' group were present in court. It was apparent then, that the appellants were not English speaking and would need an interpreter to understand the process. After informing them of the disappearance of Mr Mate, the then attorney of record, the court enquired whether they would need legal assistance, which offer they accepted. Mr Koen who thereafter on 14 October 2016, represented the group at the request of the Law Society, then took the necessary steps to ensure that the appellants were afforded proper and effective legal representation. This court is indebted to *Mr Koen* and the Law Society. In my view the efforts expended by *Mr Koen* and the Law Society is admirable. After conclusion of the hearing the parties were given a further opportunity to file supplementary heads.

[5] I now turn to the issue that we are confronted with and called upon to determine.

BACKGROUND

[6] The factual background to the dispute between the parties was summarised by the court *a quo* in the reasons for the order handed down. I do not propose to deal with same in this judgment for reasons that shall become evident in the order I propose.

[7] The background of the litigation, however, is important.

[8] The eviction application was launched on 23 May 2014 by the first respondent in which it sought an order for the eviction of the appellants from Portion 9 of the Farm, Groene Rivier, No.821 Western Cape ('the property'). The appellants gave notice of their intention to oppose the eviction application. The notice filed on behalf of the third appellant (described as the class of persons unlawfully occupying the property) was signed by the first appellant. At the first hearing of the eviction application on 1 July 2014, the then respondents, who had not filed any answering affidavits, were directed by the court to do so before 10 July 2014.

[9] All the appellants were represented at the hearing of the eviction application by Mate attorneys who were directed by the court to identify the then respondents they represented. An interim order in an ancillary application brought before the eviction application, to prevent occupation of the property by respondents cited in that application as South African Homeless People's Federation NPC (first respondent) and The Persons Attempting or Threatening to Occupy Portion 9 of the Farm, Groene Rivier, No. 821 (second respondent), had been granted on 22 May 2014 and extended with a

similar direction by the court to the appellants' legal representatives. It appears that at the time of service of the interim order there were 53 structures on the property.

[10] Despite the direction to the legal representatives of the then respondents in both the eviction and the interdict applications as well as the attempts by the sheriff to identify the individuals in occupation of the property at the time, the first time the individual persons within the class of respondents cited as the third respondent in the eviction application and the second respondent in the interdict application were identified was in the leave to appeal to the Supreme Court of Appeal. It follows that at the hearing in the court *a quo* it must have been unclear whether the attorneys were properly representing this class of individuals.²

[11] At the second hearing of the eviction and interdict application on 22 July 2014, the matter was again postponed to 27 August 2014. The presiding judge was at pains to ensure that the respondents therein had been given adequate opportunity to prepare the matter. He further suggested (although no direction was made in this regard) that the municipality (the second respondent) file a report setting out its position.³

² The other persons unlawfully occupying portion 9 of the farm Groene Rivier, herein referred to as the Third Appellant.

³ The third general principle is that evictions which might lead to homelessness are never just private disputes. They always involve the state, whose duties to provide emergency housing may be triggered by an eviction. When there is a possibility of people being left homeless, relevant organs of state (usually municipalities) must be joined as necessary parties to the legal processes for eviction. The purposes of this is so that the municipality must investigate and present the court with a report dealing with: the potential impact of the eviction on vulnerable groups such as the elderly, children, disabled persons and households headed by women; efforts to facilitate mediation or meaningful engagement between all concerned; and the steps taken to secure alternative accommodation for those who face homelessness as a result of the eviction. All of these are factors under PIE which must guide the court in deciding whether an eviction would be "just and equitable", and what safeguards must be put in place to protect vulnerable groups.

[12] The appearance of 27 August 2014 and what followed in the order of the court *a quo* is the subject matter of this appeal.

[13] The court *a quo* in paragraph [5] of its reasons for its order states as follows:

"[5] On Wednesday, 27 August 2014, and shortly before the proceedings would have commenced, I called counsel to my chambers and informed them of the view I held with regards to those persons who assert their right to occupation of the property on the basis of shares purchased by House Holding Investments. That view was based on the evidence on record. The view I conveyed to counsel was that, based on the evidence on record, the occupation of the property which is the subject of these proceedings by the respondents is unlawful despite the conclusion of the agreement of sale of shares between Van der Merwe and House Holding Investments. I further indicated to counsel that this was a firm view on my part and that no amount of argument, particularly in the light of the evidence on record, was likely to persuade me otherwise. I then suggested to counsel to convey my view to their respective clients and revert to me as soon as they would have consulted, specifically with regards to my view of the matter.

[6] Once counsel had consulted with their clients, counsel did revert to me and the consequence thereof was the Order I issued on 27 August 2014 in terms of which I declared, in paragraph 1 of that order, that the respondents' occupation on Portion 9 of the farm Groene Rivier, No 821, Western Cape is unlawful. I accordingly directed that the respondents be evicted from the property in point, but suspended the operation of that order until 15 October 2014 subject to certain directions I gave based on that Order." (My underlining)

[14] It is apparent from the reasons for the order that once counsel had consulted with their clients they reverted to the presiding judge who made an eviction order, but suspended the operation of that order to a later date with certain directions. The directions included that the municipality (the fourth respondent in the court *a quo*) attend to the property and conduct a census of the persons in occupation of the property and obtain certain information. I presume that by doing this, the identities of the third appellant (the second respondents in the court *a quo*) would be determined. The court specifically ordered that the report to be compiled by the municipality must comply insofar as possible with the requirements set out in paragraph 40 of *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others* 2012 (6) SA 294 (SCA).⁴

⁴ Paragraph 40 states: “The general approach of local authorities, so far as it can be discerned from the reported cases, has been to file with the court a general report detailing its current housing policy without addressing the facts of that particular case. That is inadequate. In addition to such a report it must deal directly with the facts of the particular case. That report must specify:

- (a) the information available to the local authority in regard to the building or property in respect of which an eviction order is sought, for example, whether it is known to be a ‘bad building’, or is derelict, or has been the subject of inspection by municipal officials and, if so, the result of their inspections. (It appears from some of the reported cases, like the present one, that the local authority has known of the condition of the building and precipitated the application for eviction by demanding that owners evict people or upgrade buildings for residential purposes.) The municipality should indicate whether the continued occupation of the building gives rise to health or safety concerns and express an opinion on whether it is desirable in the interests of the health and safety of the occupiers that they should be living in such circumstances;
- (b) such information as the municipality has in regard to the occupiers of the building or property, their approximate number and personal circumstances (even if described in general terms, as, for example, by saying that the majority appear to be unemployed or make a living in informal trades), whether there are children, elderly or disabled people living there and whether there appear to be households headed by women;
- (c) whether in the considered view of the local authority an eviction order is likely to result in all or any of the occupiers becoming homeless;
- (d) if so what steps the local authority proposes to put in place to address and alleviate such homelessness by way of the provision of alternative land or emergency accommodation;
- (e) the implications for the owners of delay in evicting the occupiers;
- (f) details of all engagement it has had with the occupiers in regard to their continued occupation of or removal from the property or building;
- (g) whether it believes there is scope for a mediated process, whether under s 7 of PIE or otherwise, to secure the departure of the occupiers from the building and their relocation elsewhere and if so on what terms and, if not, why not.”

[15] The municipality conducted a survey which depicted the state of affairs on the property as at 24 August 2014, the results of which indicated the following:

There were 206 households in existence with a total of 542 persons, resident within those households;

- (1) a total number of 250 children were reported, 51 children were seen on the site;
- (2) there were no disabled occupants;
- (3) there were 87 households headed by women;

The municipality further indicated that there was no land available in its area of jurisdiction to make provision for emergency housing. Although the report was made available to all parties concerned, no comment was forthcoming from the appellants and it is instructive to note that in the court *a quo*'s reasons the court observed the following:

"However, that the reason the respondents had not commented on the report was occasioned by one of the respondents being in the Eastern Cape at the time."

[16] Having regard to the number of persons and households as stated above, it is alarming that the absence of one person could have the effect that the rest of the respondents would/could not comment.

[17] In the recent matter of *Berea*⁵ the Constitutional Court was confronted with the question as to whether in eviction proceedings, where an unlawful occupier had purportedly consented to his or her eviction, the court is absolved from the obligation to

⁵ *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* 2017 (8) BCLR 1015 (CC) handed down on 8 June 2017.

consider all relevant circumstances before ordering an eviction. The *Berea* matter is of particular importance to the development of eviction jurisprudence in this country and the facts in that matter are very similar to the instant one.

[18] In *Berea* on the day of appearance before the High Court for the hearing of the application, the matter had stood down. The parties thereafter informed the court that the matter was settled and presented it with a draft order. That order provided that the occupiers agreed that the occupation was unlawful and an eviction order could follow. As in this matter the eviction process itself and the dates thereof were regulated. The applicants contended that, firstly, there was no actual consent between the parties when the order was granted by agreement. Secondly, they argued that even if consent could be found such consent was not legally valid as the court was still under a constitutional and statutory obligation to satisfy itself that the eviction would nevertheless be just and equitable after considering all the relevant circumstances. It was further argued before the Constitutional Court that the absence of judicial oversight in the eviction orders by consent does not give effect to the right of access to courts in terms of section 34 of the Constitution⁶ as the lack of judicial oversight may result in people being evicted by purported consent without them fully understanding their rights and what they have consented to. The absence of judicial oversight would lead to a lack of judicial interrogation upon the effect of the eviction.⁷

⁶ Act 108 of 1996. The relevant section reads as follows “Everyone has the right to have any dispute that can be resolved by application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.

⁷ See also *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC).

[19] The Constitutional Court found [per para 32], that for consent to be legally effective, it must have been given by the applicants freely and voluntarily with a full awareness of the rights being waived. It must be an informed consent to be valid. This requires a consideration of the potential waiver of rights.⁸

“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; (b) to the joinder of the local authority and production by it of a report on the need and availability of alternative accommodation;⁹ (c) to a just and equitable order in terms of PIE;¹⁰ and (d) to temporary alternative accommodation in the event that eviction would result in homelessness.”¹¹

In that matter the court found that the applicants were not aware of their rights, and that the factual consent that they gave was not informed and therefore, was not legally valid. The court went further and dealt with the rest of the applicants that were not represented specifically at the trial.

[20] As is the case in the instant matter where there are a number of people styled as the third appellants that were unknown at the time of the hearing, in the *Berea* matter there were a hundred and eighty (180) applicants who did not attend the High Court. The purported consent in respect of that 180 was therefore invalid.

⁸ Also see *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.

⁹ *Changing Tides* above n 6 at para 38.

¹⁰ See sections 4(6)-(7) and 6(1) of PIE.

¹¹ *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.

DUTIES OF THE COURT

[21] Section 26(3) provides that no one may be evicted from their home or have their home demolished without a court order authorising such eviction after having due regard to “all the relevant circumstances”. This was affirmed in *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2016 (10) BCLR 1308 (CC) where the court stated that section 26(3) does not permit legislation authorising eviction without a court order. The PIE Act amplifies this by providing that a court may not grant an eviction order unless the eviction sought would be “just and equitable” in the circumstances. The court thus has to have regard to a number of factors including but not limited to: whether the occupiers include vulnerable categories of persons (the elderly, children and female-headed households), the duration of occupation and the availability of alternative accommodation or the state provision of alternative accommodation in instances where occupiers are unable to obtain alternatives on their own.

[22] Courts dealing with eviction matters have a specific duty to ensure that the order made is fair and just. All relevant circumstances must be considered and the order so made must be made with reference to section 26 (3) of the Constitution that gave rise to the enactment of the Prevention of Illegal Eviction Act (PIE). An eviction order can only be granted by a court if “it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances”.

[23] The matter of *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) emphasized the requirement of justice and equity under the PIE Act, and the

constitutional requirement of reasonableness set out in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46. According to *PE Municipality*, whether it is just and equitable to order an eviction under the PIE Act will normally depend, amongst others, on whether an occupier can find alternative accommodation and, if not, whether the state has taken reasonable measures to make accommodation available to occupiers who are unable to provide it for themselves.

[24] As pointed out by the Constitutional Court in *Berea* at paragraph [42] and [43]:

“[42] This Court in *Port Elizabeth Municipality* 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.’¹²

¹² In that case, the Court considered an application for leave to appeal against a decision of the Supreme Court of Appeal (SCA). The SCA set aside an eviction order on the basis that it would not be “just and equitable” within the meaning of section 4 (7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act) to relocate a community of 68 informal settlers to a place where they would not enjoy a measure of tenure security. In an expansive decision which provided a sensitive, generous and pro-poor interpretation of the duties of local authorities in eviction cases, the Court held that it would not be just and equitable to evict a community without prior consultation with them and without at least considering the possibility that they could be

[43] The role played by a court in such matters was elucidated further in other cases. As a starting point, this Court in *Machele*¹³ held that '[t]he application of PIE is not discretionary. Courts must consider PIE in eviction cases.' Furthermore, this Court in *Pitje*¹⁴ held that courts are not allowed to passively apply PIE and must "probe and investigate the surrounding circumstances."¹⁵

[25] It is important to note that the Constitutional Court remarked as follows:

"[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.¹⁶ In order to perform its duty properly, the court needs to have all the necessary information. The obligation to provide the

provided with tenure security on any relocation site (para. 55). While it is true that the Court in *Port Elizabeth Municipality* was not directly considering the content of section 26 of the Constitution, the decision is clearly an attempt to interpret the PIE Act through the prism of section 26 of the Constitution and the *Grootboom* decision. The Court's concern for the need to provide the occupiers with some measure of tenure security is clear throughout the judgment (paras 17 and 18). *Port Elizabeth Municipality* accordingly reinforces the view that security of tenure is a constituent of the right of access to adequate housing. The limitation of tenure security will always have to be justified.

¹³ *Machele and Others v Mailula and Others* 2010 (2) SA 257 (CC)

¹⁴ See *Pitje v Shibambo* 2016 JDR 0326 (CC)

¹⁵ Another principle that has crystallised in our law is the law of joinder, viz. municipalities must be joined where eviction is likely to result in homelessness, is now part of our law. Wallis JA amplified on this in *Changing Tides*: Whenever the circumstances alleged by an applicant for an eviction order raise the possibility that the grant of that order may trigger constitutional obligations on the part of a local authority to provide emergency accommodation, the local authority will be a necessary party to the litigation and must be joined. This is because section 26 of the Constitution's positive obligations in respect of the provision of alternative accommodation to evictees who would otherwise be rendered homeless lie primarily with the state rather than private parties.

¹⁶ The PIE Act was intended to protect the millions of South Africans in urban areas who had no common law entitlement to the land that they lived on, at least until housing could be rolled out at scale. In this sense, the PIE Act sought to invert the legal order in relation to evictions from a legal framework that targeted unlawful occupation and "land invasion", to one that sought to prevent illegal evictions. The PIE Act thus had the potential to alter the legal system from one that disproportionately favoured property owners by providing for speedy and effortless evictions in instances where they alleged that residents were in unlawful occupation, to one that provided substantial protection for unlawful occupiers by requiring that no eviction order could be granted unless the eviction would be "just and equitable". However, for the first few years of its application, the PIE Act seemed to have limited impact on the courts, and particularly the lower courts. See, for example, *Betta Eiendomme (Pty) Ltd v Ekple – Epoh* 2000 (4) SA 468 (W) and *Groengrass Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants and Others* 2002 (1) SA 125 (T).

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 they may have 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 did 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'." ¹⁷

[26] An agreement by the parties as to the unlawfulness of the occupation does not absolve a court of its constitutional duties to approach eviction proceedings in a manner that ensures that the protection granted in section 26 of the constitution is fully complied.

THE ISSUES

[27] I now turn to the issues on appeal. The issues on appeal before us were:

- a) whether there was a dispute of fact that was not resolved;
- b) the lawfulness of the occupation;
- c) whether any eviction was just and equitable,;
- d) whether the appellant's had a fair trial.

¹⁷ Berea supra

[28] For the reasons set out below, I do not intend to deal with the first three issues as it would be apparent that another court will have to deal with these at a later stage, should the appeal succeed. This court being a full bench should not be seen to dictate, nor influence the decision of that later court.

[29] I propose to deal with a fair trial issue first, as if we are of the view that the appellants' fair trial rights were infringed, the appeal must succeed. It is further convenient to deal with this matter first because if this court is to conclude that there has been a failure of justice and that the parties were denied their constitutionally guaranteed right to have the dispute resolved in a fair public hearing by court, it may uphold the appeal on this ground alone.

THE FAIR TRIAL ISSUE

[30] On 29 July 2016, this court made an order that "The parties are requested to, in their heads of argument, deal with the fair trial issues as raised by the court and are further granted leave to deal with any matter relating to the adjudication of this matter that might arise from the record."

[31] This matter was not raised by any of the parties in the initial stages and was mooted by this court as a result of the reading of the record and the first appellant's letter to the Supreme Court of Appeal where she stated "The judge said he is not going to listen to our lawyers and no matter how much they can try to convince him he will not change his mind". The parties indeed made submissions to this court, including this point.

[32] I have quoted the background and the eventual order as well as the reasons for that order from the court *a quo*. The order itself indicates as follows: "Having read the papers filed of record and having heard counsel for the applicant and the first to third respondents..." It must be accepted that the "heard" referred to in the order does not include the parties having an opportunity to make the submissions in open court about their respective cases, neither was there any indication that there was substantial debate or argument on the issues before the judge in chambers, with the view to persuade the judge before the granting of the eviction order.

[33] In my view it is clear from the papers that the appellants raised a dispute relating to the question as to whether or not they occupied the property with the respondent's consent. The court *a quo* did not enquire nor did it deal with this issue fully as appears from its reasons, it seems that the court *a quo*'s starting point was that the zoning of the land was not for residential purposes. It seems to me the issue of consent should have been interrogated a lot wider prior to the eviction order granted in a proper hearing.

[34] In the matter of *Transvaal Industrial Foods Ltd v BMM Process (Pty) Ltd* 1973 (1) SA 627 (A) the court held that generally arguments for the litigants in a trial should be delivered only in open court. Neither the court nor the litigants should normally be deprived of the benefit of oral argument in which counsel can fully indulge the forensic ability and persuasive skill in the interests of justice and clients. Trollip JA stated the following at 628E-F:

"I pause here to say that generally arguments for the litigants in the trial should be delivered only in open court and not in writing to the trial judge in his chambers. For sec 16 of the Supreme Court Act, 59 of 1959, requires that 'all proceedings' in a court (i.e., including the final addresses of counsel) must be carried out in open court, 'except in so far as any such court may in special cases otherwise direct.'"

[35] By saying at 628G-H: "Moreover, for reasons that are too trite to be listed here, oral argument is far more effective than the written substitute. ... A trial court should, therefore, not direct that the arguments be delivered in writing except in special circumstances and then only after discussion with counsel." *Tshangela v Tshangela & others* [2001] JOL 9127 (Dk); *Brian Kahn Inc v Samsudin* 2012 (3) SA 310 (GSJ); *S v Bresler* 1967 (2) SA 451 (A)

[36] Section 34 of the Constitution of the Republic of South Africa, 1996, provides that "Everyone has the right throughout the 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". One of the benefits of having a matter ventilated in open court is that in proceedings such as these, litigants have an opportunity of listening to the argument made by their legal representative. If he or she presents argument which is contrary to his or her instructions or make concessions on their behalf on matters they did not discuss, they have an opportunity to correct what is being conveyed to the court. Therefore if a representative had no authority to agree to a particular issue, they can correct it or at least they have an opportunity to do so at that stage. Therefore, even though the appellants were represented by counsel in the court *a quo*, it does not dispense with their right to a public hearing to persuade the court in oral argument and

to hear if their case is properly conveyed to the court. This view is fortified by the findings of the Constitutional Court in *Berea* which require the court to interrogate whether consent was informed. The court there said, when faced with a settlement agreement, “the court must as a first step be satisfied that parties freely, voluntarily and in full knowledge of their rights agree to the eviction.”¹⁸ It is worth stressing that “these duties arise even in circumstances where parties on both sides are represented and a comprehensive agreement is placed before the court.”¹⁹ It may well be that the judge might be persuaded differently in oral argument, even if he or she held a firm *prima facie* view from the reading of the record. The interaction with counsel in chambers may not be sufficient, in matters such the one instant.

[37] In the instance of this matter the third respondent in the court *a quo* remained unidentified at the time of the hearing.

[38] Mrs Lusithi, in her application for leave to appeal to the Supreme Court of Appeal, stated as follows: “The judge said he is not going to listen to our lawyers and no matter how much they can try to convince him he will not change his mind. We came to court to be listened to and we want to be listened to.” This sentiment of the first appellant is an echo of the reasons.

[39] In *Chief Lesapo v North West Agricultural Bank & another* 2000 (1) SA 409 (CC) at para [22] Mokgoro J stated:

¹⁸ *Berea* supra at para 66

¹⁹ *Berea* supra at para 54

"The right of access to court is indeed foundational to the stability of 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."

[40] In *Twee Jonge Gezellen (Pty) Ltd & another v Land & Agricultural Development Bank of South Africa t/a the Land Bank, & another* 2011 (3) SA 1 CC at 19F-G Brand AJ states the following:

"There can be no doubt the importance of the fundamental right which is guaranteed by s 34. As stated by this court in *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)*:

'This section 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order.' "

[41] In my view, on the basis of these authorities and the *Berea* matter, the appellants before the court *a quo* and specifically third appellants were deprived of the constitutionally guaranteed right to a hearing in public before the court. It is worth pointing out that even if it were to be found that the appellants were in unlawful occupation, as was reiterated in *Berea* the enquiry to be undertaken by the court goes beyond considerations of the lawfulness of the occupation. It goes to fairness and

equity. Relevant information must be placed before the court making the inquiry in order to come to a decision of whether an eviction order should be granted.²⁰ In view of the fact that the matter was not properly dealt with by the court *a quo* in respects I have already outlined, this court as an appeal court, is not at large, in these circumstances to decide on the justness and equitable nature of the eviction order, on the basis suggested by the first respondent's counsel, which is to the effect that, this court has all the relevant information required to make that decision. Besides, a lot would have changed from the time the order was granted by the court *a quo* in relation to the occupation of the property and circumstances of the occupiers, which may necessitate fresh information to be provided before a court of first instance.

[42] First respondent argues that the parties were legally represented and consented to the order and process. In my view, the fact that the parties accepted that the occupation was unlawful appears to have been merely acquiescence and does not comply with the test as articulated in *Berea* and the Court's duty as set out above. It is common cause that the number of occupiers has grown substantially from the time of the interdict to the hearing of the matter.

[43] The further occupiers' identity remained unclear until the application for leave to appeal. A question that arises in respect of the third respondents in the court *a quo*, is that they were purportedly legally represented but remained unidentified. It is unfathomable how an attorney could represent people whose identities are unknown

²⁰ *Berea* supra at paras 46 and 47-

and in terms of whom specific facts needed to be placed before the court, in an eviction matter. In my view, not only did the attorney fail in his duty but ultimately it was the court's duty to ensure that the information was fully placed before it before an eviction order was issued. The unidentified respondents in this matter must be treated the same as the 180 persons in the *Berea* matter referred to in para [18] above.

Conclusion

[44] In my view, taken cumulatively, the appellants did not have a fair hearing in court and that the matter must be heard afresh.

[45] I note the views expressed by my colleague in the dissenting judgment regarding the judge *a quo*'s impeccable values as a human rights lawyer and a judge, with which I agree. I however wish to place on record that this judgment is neither reflective of the judge *a quo*'s values nor does it question his diligence in the handling of the matter. It simply deals with the law.

[46] It is further regrettable that this judgment took so long to be delivered. Mindful of the rights of the parties and particularly those of the first respondent, it is important that the matter be placed before a new judge on an expedited basis.

[47] The parties should be granted leave to supplement their papers for a hearing *de novo*.

[48] It must further be fair and just that the trial court deal with the issues of costs as it may arise. The appellants were represented on a *pro bono* basis by the Law Society; therefore, there shall be no order as to costs.

[49] I will thus order as follows:

- (1) The appeal is upheld and the order of the court *a quo* is set aside.
- (2) The matter must be heard afresh before a different judge to the court *a quo*.
- (3) The parties are granted leave to supplement the papers to the extent necessary for a fair and just adjudication of the issues.
- (4) The costs to be determined by the trial court, excluding the costs of the appeal in respect of which no order as to costs is made.

N C Erasmus
Judge of the High Court

I agree

N P Boqwana
Judge of the High Court

GAMBLE, J (DISSENTING)**INTRODUCTION**

[50] I regret that I am unable to concur in the judgment of my colleague (“the main judgment”) for the reasons that follow. I prefer to preface those reasons with reference to certain facts which I consider material to the determination of this appeal and which do not appear from the main judgment.

[51] The first respondent (for convenience hereinafter referred to as “the respondent”) is the registered owner of certain undeveloped agricultural land measuring some 140 hectares in extent²¹ which borders on the eastern edge of the village of Chatsworth, which owes its creation to the Group Areas Act of 1950, and which lies a short distance away from the town of Malmesbury. The property falls within the jurisdiction of the Swartland Municipality (hereinafter “the Municipality”), the second respondent herein.

[52] The respondent purchased the property for R2,28m in March 2005 and took transfer thereof in April 2006. It is said that the respondent intended developing the property for residential purposes and to that end it made application to the local and provincial authorities for the necessary planning approvals to permit it to develop a so-called lifestyle estate (which it euphemistically wished to call “Fynbosch Estate”) consisting of some 36 luxury dwelling units and other infrastructural and recreational buildings. The necessary applications made to, inter alia, the Municipality were ultimately refused in September 2009 primarily because the authorities were reluctant to

²¹ The property is registered in the Deeds Office as “*Portion 9 of Farm 821, Groene Rivier, Malmesbury Road.*”

extend the urban edge of Chatsworth so as to include the property. The property was (and still is) zoned as Agriculture 1, did not have any infrastructural services such as sanitation, electricity or water and was accordingly unsuitable for residential accommodation.

[53] At all material times prior to April 2009 the shareholding of the respondent was held by 4 people - Messers Antonie van der Merwe (21,4%), Sean McCarthy (25%), Charl Visser (33.6%) and Martin Fourie (20%). It is said that there had been on-going disputes between the shareholders arising from the problems relating to the refusal of the development, so much so that van der Merwe decided to dispose of his interest in the respondent.²² He first offered them to McCarthy and Visser but they declined. Accordingly, on 11 April 2009 van der Merwe sold his 15 shares in the respondent to a group of persons identified as “House Holding Investments (PHP)”, represented by Mr Ntsikelelo Mbambo (aka Jeffrey) of Khayelitsha, for R650 000 payable in 2 tranches of R100 000 and R550 000 on 11 and 30 April 2009, respectively. The sale was subject to various suspensive conditions.

[54] In about May/June 2011 it came to the attention of McCarthy that a company known as Great Force Investments 154 (Pty) Ltd, which traded as “*Stokvel Homes*”, was offering plots for sale at “Fynbosch Estate” for R3500 each. A rudimentary advertising brochure informed unsuspecting purchasers that the South African Homeless People’s Federation (“SAHPF”) had come to their rescue to address the

²² It appears as if McCarthy and Visser, the directors of the respondent, were in alliance and took advantage of their majority stake in the company to form a united front.

acute housing shortage in the Western Cape and had acquired 10 000 sites at Chatsworth of which the first 1600 sites of “phase 1” were selling out fast. Interested parties were encouraged to act swiftly – *“First come...First served...This is yo (sic) chance to grab yo (sic) piece of land and get your RDP HOUSE you’ve been waiting for (sic) many years”*

[55] In August 2011 the respondent’s attorneys wrote to Great Force at its registered address in Khayelitsha cautioning it against the unlawfulness of its advertising campaign in relation to Fynbosch Estate. It was cautioned that if it did not desist with its activities an urgent interdict would be sought against it. In that letter it was alleged that Van der Merwe was a director of Great Force. The respondent says that it seems as if Van der Merwe, Stokvel Homes and the SAHPF took the advice seriously and complied with its demands.

[56] Thereafter, says the respondent, its officials attempted to engage with Mbambo and others regarding the purported sale of plots at the estate but it encountered difficulties in pinning down the authorized representatives of Stokvel Homes, which became something of a “moving target”. In the process, says the respondent, it gained the impression that van der Merwe had misled the representatives of Stokvel Homes into believing that they were buying plots of land rather than shares in

the respondent. It established that the stokvel²³ consisted of about 3000 members who had clubbed together to put up the sum of R650 000 to buy van der Merwe's shares.

[57] As of April 2014 the property was leased by the respondent to Mr Antonio Ormonde, a small-scale livestock farmer from Chatsworth, who utilised the property as pasturage for his herd. He also farmed vegetables on the land which was enclosed with a fence and a gate which was secured with a padlock.

ATTEMPTS TO OCCUPY THE PROPERTY – MARCH 2014

[58] On 19 and 21 March 2014 there were two attempts by people, some of whom claimed to be members of the SAHPF, to occupy the property. The groups acted swiftly and were well prepared, having brought along the necessary equipment to break the locks and gain access to the property. Mr Ormonde responded equally quickly and through the intervention of the local police, the attempts to occupy the property and erect residential structures thereon were nipped in the bud.

[59] The respondent then sought to engage with the intended occupiers and attended a meeting facilitated by the Municipal Manager, Mr Joggie Scholtz, on 9 April 2014. The respondent was represented by McCarthy and Mr Rashay Magan (a property development manager), while Ms Patricia Matolengwe (who called herself the managing director of the SAHPF) represented the aspirant occupiers. During that meeting (says Magan in the founding affidavit herein) Matolengwe confirmed that she and her

²³ According to Wikipaedia On-line Encyclopaedia, “Stokvels are invitation only clubs of 12 or more people serving as rotating credit unions or saving schemes in South Africa where members contribute fixed sums of money to a central fund on a weekly, fortnightly or monthly basis.”

organization understood that they were not shareholders in the respondent, and that they knew that they had neither rights of ownership or occupation in the property. She is alleged to have told Scholtz that the SAHPF's members wanted access to land for residential purposes and called upon the Municipality to make such land available to its members.

OCCUPATION OF THE PROPERTY – MAY 2014

[60] On Sunday 4 May 2014 a group of persons again broke the locks on the gate to the property and attempted to occupy it. Once again the local police were contacted for assistance which was declined on the basis that the matter had now become a "*civil dispute*". Scholtz was also contacted and he attempted to convince the group to vacate the property but his plea fell on deaf ears.

[61] The following day, Monday 5 May 2014, the respondent received a letter from the Municipality's attorneys in which it was recorded that 4 structures had been erected on the property, that the property was outside the urban edge of Chatsworth and that there were accordingly no infrastructural services available for residential housing. The respondent was urged to take immediate steps to address the situation and, if necessary, to procure an interdict preventing anyone from squatting on the farm. The respondent's attorneys immediately contacted Matolengwe via email informing the SAHPF that occupation of the property without the consent of the owner was unlawful. An undertaking was sought that the existing structures would be removed by the end of the week. There was no response from Matolengwe or the SAHPF to this letter.

[62] The respondent set up a further emergency meeting at the offices of the Municipality on Friday 9 May 2014 to discuss the issue with the occupiers. That meeting was attended by McCarthy, Magan, Mr Willie van Rooy (a local representative of the African National Congress) and 11 persons associated with the SAHPF, including the first and second appellants herein and Matolengwe. Scholtz declined to attend saying that the Municipality had made its position clear: the land could not be lawfully occupied due to zoning restrictions.

[63] The respondent says that at that meeting the first appellant adopted a strident attitude and said that she and fellow occupiers would do whatever they needed to do to acquire land for purposes of erecting residential structures. The first respondent denies these allegations. In any event, the meeting ended in deadlock and Scholtz was asked to intercede. He did so reluctantly and reiterated his earlier position. When the meeting adjourned those present refused to accept that they were required to vacate the property.

[64] Over the weekend that followed that meeting (10 and 11 May 2014) a large number of persons (the respondent says more than 50 individuals) invaded the property and began marking out plots and erecting dwellings thereon. In the week that followed further lawyers' letters were written, no responses thereto were forthcoming and occupation of the property continued apace. By the next weekend (17 and 18 May 2014) the occupants numbered around 100 individuals.

THE ORDERS OF VELDHUIZEN J AND GRIESEL J

[65] On 23 May 2014 the respondent launched urgent proceedings under case no. 9202/2014 for relief in terms of PIE²⁴ aimed at securing the eviction of the unlawful occupiers from the property. That application made provision for a hearing on 1 July 2014 (during the court's mid-year recess) with the requisite notice in terms of PIE having been given. The first, second and third appellants and the Municipality were cited as the first to fourth respondents respectively in the matter.

[66] Prior to launching the PIE application the respondent evidently approached this court for urgent interdictory relief under case no. 8820/2014²⁵ aimed at restraining unauthorized persons from further entering on the property. In any event, on Thursday 22 May 2014 Veldhuizen J granted a rule *nisi* under that case also returnable on 1 July 2014 (which order was to operate as a temporary interdict pending the return day) interdicting the two respondents named therein²⁶ from entering on the property without prior written consent and, further, from erecting any structures on the property.

[67] The order also incorporated extensive provisions for service by the sheriff through the fixing of the order at 2 prominent points on the property and on all existing structures, as well as service on all occupants of all such structures. The sheriff was also directed to draw up a detailed list of all people then in unlawful occupation of

²⁴ The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998

²⁵ I say 'evidently' because the papers in the interdict application are not part of the appeal record and therefore neither the notice of motion nor the founding affidavit is before us.

²⁶ Cited as the SAHPF and "*The Persons Attempting or Threatening to Occupy Portion 9 of the Farm Groene Rivier, No 821*" respectively.

structures on the property and to monitor the premises on a daily basis for a week in order to ensure that copies of the order remained in place.

[68] The sheriff duly served the order of Veldhuizen J shortly before 5pm on 22 May 2014 and recorded, *inter alia*, that there were then 53 structures on the property. All of these were individually numbered by the sheriff with a can of spray paint and photographed while the details of the occupants were also recorded. In addition, the respondent's attorneys emailed copies of the Veldhuizen order to, *inter alia*, the SAHPF and the first appellant.

[69] The first to third appellants each entered an appearance to defend the PIE application on Monday 28 May 2014. The notices were properly drawn in the customary format, suggesting that there may have been some assistance given to the appellants in that regard by an attorney or para-legal. The first appellant personally signed her notice of intention to oppose and gave her service address as “[...], *Groene Rivier (sic) No 821, Chatsworth, Malmesbury*”. The second appellant did likewise and furnished her service address as “*Site Office, [...], Groene Rivier (sic) No 821, Chatsworth, Malmesbury*”. The second appellant also filed a notice of intention to oppose on behalf of the third appellant with the service address given as “*Office Administration, Site Office, [...], Groene Rivier (sic), Chatsworth, Malmesbury.*”

[70] On 5 June 2014 the sheriff oversaw the removal of 42 structures from the property – being additional structures erected after the interim interdict of 22 May 2014,

while the original 53 structures remained in place. On 9 June 2014 the respondent sought the requisite statutory *ex parte* notice in terms of s4(2) of PIE and on 12 June 2014 Griesel J granted an order to that effect which was served by the sheriff just after 10 am the following day. At that stage there were 86 structures on the property – 33 more than the original 53 structures.

OPPOSITION TO THE APPLICATION AND FURTHER POSTPONEMENTS

[71] When the matter was called in the Motion Court on Tuesday 1 July 2014 the appellants were represented by counsel and an attorney and sought a postponement to file opposing papers, this notwithstanding the fact that 5 weeks had passed since they had entered an appearance to oppose the matter. A postponement was granted on the basis that the interim interdict was extended until the further hearing of the matter on 24 July 2014.

[72] On 10 July 2014 the first appellant deposed to an answering affidavit on behalf of herself and the other appellants, which affidavit was confirmed by the second respondent. On that day the appellants' opposing affidavits were duly filed by Mate Attorneys of Cape Town, acting on their behalf. The thrust of the affidavit is that the occupiers were duped by van der Merwe to buy his and McCarthy's respective interests in the respondent and that they had effected part payment of the purchase price to van der Merwe who in turn had only paid McCarthy a portion of what was due to the latter. The occupiers maintained that the acquisition of an interest in the respondent

automatically gave them the right to occupy the property. The first appellant also claimed that the occupiers were given permission by McCarthy to move onto the land:

“21. Indeed Mr McCarthy advised us that we can occupy the property because he does not have a problem with us occupying same.

22. On 19 March 2014 we indeed went and occupied the property and only the portion in (sic) the property which was shown to us. While in (sic) the property people were then approached by members of the SAPS and 42 of the people were arrested on the basis that they had occupied the land illegally and without consent and thus committing what is formally known as “a land grab”. The members of the SAPS indicated that they were acting on request from the Land Lord (sic), in this case Mr McCarthy.

23. On 09 April 2014 we again met Mr McCarthy and some members of the municipality who indicated that we cannot occupy the land because it is not for dwelling purposes. Mr McCarthy however indicated that he does not have a problem with us occupying the land and it is the municipality that are (sic) making things difficult.

24. In light of this we again informed McCarthy that we would re occupy the land and indeed on 04 May 2014 we went and occupied the land.”

[73] But, the first appellant then almost immediately put up a different reason for occupation of the property:

“28. We do not have any alternative accommodation and we have invested all our money in buying the plots and building material used to build the shacks

which we live in. What triggered the need to take occupation is (sic) the lengthy periods (sic) the whole entire process was taking and need (sic) to ensure that our money already spent comes back to us if the land cannot be obtained. As it stands our only security in (sic) the land.”

[74] On 24 July 2014 the matter served before Traverso DJP in the Motion Court again when, by agreement, it was postponed for hearing on the Semi-Urgent Roll on 27 August 2014, with provision made for the filing of heads of argument. In para 4 of that order the parties further agreed that the Municipality was –

“...directed to file a report on or before Thursday 7 August 2014 dealing with the provision of alternative accommodation.”

The Municipality duly complied with this order when Scholtz made an affidavit on 6 August 2014 stating that the Municipality had no alternative accommodation available in its area of jurisdiction.

THE HEARING BEFORE YEKISO J ON 27 AUGUST 2014

[75] The facts relevant to the hearing of the matter on the Semi Urgent Roll before Yekiso J on Wednesday 27 August 2014 are, save as set out hereunder, recited in the main judgment. In his reasons ultimately delivered in relation to the eviction order granted on 3 December 2014, Yekiso J explained what occurred at the August hearing. In my considered view, there are various factors which fall to be considered in relation to this hearing, and which obviously influenced the reasoning of the Judge *a quo*.

[76] Firstly, the occupiers of the property before Yekiso J were represented by counsel and attorneys of their choice: they accordingly had access to legal advice and representation. Secondly, as demonstrated above, in the affidavit filed on behalf of the occupiers, the first appellant (who throughout had adopted a leading role on behalf of the other appellants and continued to do so on appeal when the matter initially came before this court) effectively conceded that the occupation was unlawful and was a stratagem designed to enhance their attempts to secure contractual rights in the land. In any event, whatever those rights may have been, the land was incapable of lawful occupation in light of its zoning. Further, the local authority had entered the fray and demanded of the owner that it ensure that the zoning rights were observed by it. It had also filed a report with the court in relation to the non-availability of alternative accommodation. Finally, there was already a court order in place (per Veldhuizen J) which precluded the occupiers of all but the original 53 structures on the land, from entering upon the property. At the time that Yekiso J heard the matter there were then already 206 structures on the land.

[77] In para [5] of his reasons, Yekiso J said that he came to the conclusion, on the evidence before him, that the land had been occupied unlawfully and gave his reasons therefor. He stressed, correctly in my view, that rights of ownership in the shareholding of the respondent did not equate to rights of occupation of its only asset – the property in question. In my view, this conclusion is unassailable in respect of the 153 new structures erected after the order of Veldhuizen J. And, in my view, it is equally

unassailable in respect of the occupiers of the 53 original structures whose occupation was not only contrary to the relevant zoning scheme, but who had participated in “*what is formally known as a ‘land grab’* “ expediently and for strategic purposes to bolster their alleged contractual claims.

[78] Moreover, to the extent that the first appellant had alleged in the answering affidavit that the occupation was with the consent of one of the shareholders of the owner (and assuming for the moment that that allegation was capable of surviving the application of the rule in Plascon-Evans²⁷), any such purported consent had clearly been revoked when the founding affidavit in the eviction application was deposed to and the removal of the occupiers from the land was sought. At best for the occupants of the original 53 structures then, their right to occupy was on the basis of a *precarium tenens*, a common law right of occupation which is revocable at the will of the owner.²⁸ On any basis then the land was illegally occupied when the matter served before the court *a quo* and Yekiso J’s finding in that regard cannot be faulted.

FAIR TRIAL RIGHT INFRINGED?

[79] As Yekiso J’s later reasons reflect, he informed the parties’ legal representatives in chambers before the hearing on 27 August 2014 that he had come to a firm view on the question of the illegality of the occupation and suggested that the parties engage with each other in the light of this view. What Yekiso J did not say to the parties at the time was that he would not allow the matter to be heard in open court. It

²⁷ Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

²⁸ Malan v Nabygelegen Estates 1946 AD 562 at 573.

was therefore open to the appellants' counsel, for instance, to have asked that the matter proceed in open court or that Yekiso J recuse himself on the basis of having exhibited bias against the appellants. Counsel did neither but consulted with his clients and thereafter did not oppose the granting of the order made by Yekiso J later that day. This stance is consonant with the alleged concession made by the first appellant at the meeting on 9 April 2014 that the occupiers appreciated that their alleged shareholding did not entitle them to occupy the land.

[80] It is important to bear in mind at this juncture the general principle that, when parties are represented in litigation by an advocate, they repose their trust in their counsel and, as in this case, the advocate makes the tactical and strategic decisions based on instructions and conveys them to the court.²⁹ There is no suggestion here in any of the affidavits filed on behalf of the occupiers that the appellants did not instruct their counsel on the day to act otherwise than in the manner in which he did. Indeed, in the affidavit deposed to by the first appellant in support of the application to the Supreme Court of Appeal for leave to appeal, the attack was only against the merits of the decision of Yekiso J. There was no allegation that the appellants' fair trial rights protected under s34 of the Constitution were infringed at the hearing on 27 August 2014.

[81] The question as to whether the appellants' rights under s34 were infringed was raised for the first time on appeal by this court *meru motu*. It was in response to an invitation by the Presiding Judge, when postponing the matter on 29 July 2016, that Mr

²⁹ R v Matonsi 1958 (2) SA 450 (A) at 456 A-C

Koen addressed us in this regard on behalf of the appellants in argument on 14 October 2016. While it is open to a court to raise such an issue of its own accord, in fairness to all parties, it should only do so when the question of law emerges fully from the evidence, when it is necessary for a just decision in the decision of the case and, importantly, as long as the consideration thereof on appeal does not lead to prejudice to the opposing party.³⁰ The approach was usefully summarized thus in Maphango:

“[109] The rule in terms of which a court permits a party to raise a point of law is subject to well-known conditions. These conditions ensure fairness to all parties. First, the point sought to be raised must be a point of law in the true sense of the word. Second, if not foreshadowed in the pleadings, it must be supported by the established facts in the record. Further, the entertainment of the point must not prejudice the other parties. Consistent with these requirements, in Barkhuizen this court made it clear that the party will not be permitted to raise a point not covered in the pleadings if its consideration will result in unfairness to the other party. The purpose of this rule is to give a fair hearing to all parties. Therefore, the rule promotes the right to a fair hearing which is entrenched in s 34 of the Constitution.”

[82] Having heard argument on behalf of the respondent I am not persuaded that the alleged infringement of the appellants’ rights appears with sufficient clarity from the record before us to enable this court to consider the issue without doing an injustice to the respondent. In his heads of argument filed on behalf of the respondent, Mr Cooper

³⁰ Barkhuizen v Napier 2007 (5) SA 323 (CC) at [39]; CUSA v Tao Ying Metal Industries and Others 2009 (2) SA 204 (CC) at [68]; Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd 2012 (3) SA 531 (CC) at [109] – [114]; Molusi and Others v Voges NO and Others 2016 (3) SA 370 (CC) at [28].

alluded to discussions in the Judge's Chambers prior to the order being granted on 27 August 2014 and suggested that oral submissions were made by the parties' counsel. That may have been so but because we do not have any admissible evidence from either of the parties as to precisely what transpired on the day, we can only have regard to what the Judge *a quo* says in his reasons. This is of limited assistance in assessing whether the constitutional right in question has been infringed and I am loathe to make such a finding in the absence of clear evidence establishing a breach of such a right.

[83] Furthermore it is not necessarily a fatal irregularity to dispose of a matter without hearing evidence.³¹ At the end of the day each alleged transgression will have to be considered on its merits. The important fact in this matter is that the appellants were legally represented, had filed written argument and their counsel did not thereafter assert the right to be heard in open court.

[84] I am constrained to remark in passing that Yekiso J (recently retired) had a long and distinguished record in the field of human rights before he came to this Bench and he continued to uphold those values diligently in the matters over which he presided in this court. Indeed, his nuanced reasons here demonstrate how alive he was to the impact to both parties of the issues before him. In the circumstances, and in the absence of the issue having been fully ventilated in the papers, I am of the respectful view that it is not appropriate for this court to speculate about the possible unfairness of the proceedings in the court *a quo*.

³¹ Brian Kahn Inc v Samsudin 2012 (3) SA 310 (GSJ) at [6]

[85] I am satisfied, having considered the matter in its entirety, that the appellants were not dealt with in an arbitrary fashion. They were legally represented and filed opposing papers and heads of argument. On the strength thereof the presiding judge formed a strong *prima facie* view. It seems that this view probably accorded with their own understanding of their position, and the appellants accordingly appear to have accepted their lot – that an eviction was inevitable. Thereafter, as I shall demonstrate shortly, Yekiso J’s management of the matter was impeccable, affording the appellants all of the procedural rights to which they were entitled under the PIE jurisprudence.

STATUTORY COMPLIANCE?

[86] As persons likely to be evicted from a property that they were unlawfully occupying, the appellants were afforded the protection of s26 (3) of the Constitution³². Further, they enjoyed the procedural rights afforded to them under PIE. The correct interpretation of these statutory instruments has been the subject of numerous decisions of both the Supreme Court of Appeal and the Constitutional Court.³³ The principles which emerge from those cases are by now clear.

[87] Firstly, all such evictions raise a constitutional issue and are therefore subject to judicial oversight. Secondly, where the unlawfulness of the occupation has been

³² The subsection provides that –

“(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

³³ See for example Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC); Machele v Mailula 2010 (2) SA 257 (CC); The Occupiers, Shulana Court, 11 Hendon Road Yeoville, Johannesburg v Steele 2010 (9) BCLR 911 (SCA); City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd 2012 (2) SA 104 (CC); City of Johannesburg v Changing Tides 74 (Pty) Ltd 2012 (6) SA 294 (SCA); Occupiers of erven 87 & 88 Berea v Christiaan Frederick de Wet N.O., [2017] ZACC 18.

established an eviction must follow provided that it is just and equitable to grant such an order after consideration by the court of all the relevant circumstances. Where the spectre of homelessness might ensue after such an eviction the relevant local authority must be joined in the proceedings and it must report to the court regarding the availability of alternate or emergency housing. Finally, consideration must also be given to the fact that the unlawful occupation of land does not have the effect of expropriating the owner of its rights in the property protected under s25 of the Constitution.

[88] The main judgment seeks to rely heavily on the recent judgment of the Constitutional Court in Berea as providing the complete answer in this case. While the case does restate all of the relevant principles in mass eviction cases, it is distinguishable from the present matter in a number of fundamental respects and is accordingly not the panacea to the appellants' problems in this matter. Firstly, the occupiers in that case were not legally represented before the court of first instance and in fact sought a postponement to remedy that situation. That is not the case here where the occupiers were represented before this court with effect from at least 1 July 2014, and possibly earlier if regard be had to the content and format of the entry of appearance to defend.

[89] Next, the local authority was not initially joined as a party in Berea whereas in this matter the Municipality was not only joined from the outset but had itself been instrumental in the run-up to the litigation in raising its objection to the incremental occupation of the property which infringed upon the local zoning provisions and, most

importantly, had reported to the court hearing the matter on 27 August 2014 on the non-availability of alternative accommodation. Thirdly, the occupiers in Berea were not only unrepresented but had concluded an agreement with the owner to quit the premises while so unrepresented.

[90] In this matter, the evidence suggests that the appellants' legal representatives may have participated in negotiating the terms of the draft order made by Yekiso J on 27 August 2014. But, even if the occupiers' legal representatives did not negotiate its terms with the respondent, they certainly acquiesced (through counsel and their attorney) in the terms of that order being made by Yekiso J. Importantly, there is no complaint in the affidavit filed in the application for leave to appeal that counsel was not authorized to negotiate those terms or to acquiesce therein, nor was it argued on appeal before this court that there was anything improper or legally assailable in the fact that they may have so acquiesced

[90A] The reliance therefore in the main judgment on the approach enunciated in Berea as a basis for finding that Yekiso J should have interrogated the integrity of the appellants' purported consent to the order of 27 August 2014 before he made it, is not based on any facts before the court *a quo* or argument advanced in this court. The appellants' stance in the lower court was clear – they did not agree to the order and indeed the preamble to the order confirmed this, there being no recordal that the draft order was presented to the court by agreement between the parties. And, importantly, in

his reasons Yekiso J did not record any finding that the appellants had consented to the order. Consent was therefore not the basis for the order of Yekiso J.

[91] But perhaps the most fundamental difference between the two cases is that when Yekiso J made the decision to evict on 27 August 2014, he was already in possession of a report from the Municipality regarding the non-availability of alternative accommodation. To the extent that any eviction from the property might accordingly lead to homelessness, Yekiso J had done what was required of a court in terms of the directives given in para 25 of Changing Tides.

[92] Berea confirms the earlier *dicta* of our apex courts³⁴ that the court hearing an application for eviction under PIE is required to adopt an interventionist role in the proceedings. In this matter that is precisely what Yekiso J did. In the first place the operation of the order of 27 August 2014 was suspended until 15 October 2014 pending a further report from the Municipality in relation to alternative and/or temporary emergency accommodation. Further, the Municipality was directed to immediately enter upon the property and conduct a detailed census of the occupants thereon. Thereafter, the Municipality was directed to comply with its obligations as set out in para 40 of Changing Tides. Importantly, the order of 27 August 2014 made it clear that the date of eviction would only be established once the court had considered this report.

[93] In pursuance of his obligation to manage the process, Yekiso J met with the parties' legal representatives in Chambers on 15 October 2014 and a detailed minute of

³⁴ See for example Shulana Court at [11] – [15] and Changing Tides at [26]

that meeting is filed on record. That minute recorded the concerns of both the owner and the Municipality that, notwithstanding the extension of the interim interdict, there had been a steady flow of people onto the property: from 53 structures on 22 May 2014, to 206 on 27 August 2014 and 300 on 14 October 2014. The Judge directed that the matter would serve before him again in Chambers on 6 November 2014. It is not apparent from the record what transpired on that day but eventually on 3 December 2014 Yekiso J made an order for the eviction of the occupiers from the property at the end of January 2015. At that stage he knew all that he needed to know in exercising his discretion to make such an order. Importantly, in making that order the Judge *a quo* required the Municipality to make alternate emergency housing available to the original 53 occupiers who were on the property at the time of the order of Veldhuizen J.

[94] In his reasons for that order filed later, the Judge *a quo* noted, inter alia, the report of the Municipality of 14 October 2014 regarding the availability of emergency accommodation at a place known as “Sibanye” in the neighbouring Municipality of Moorreesburg (about 60 km to the north along the N7 highway). This availability was reconfirmed by Ms Pillay on behalf of the Municipality at the hearing on 14 October 2016.

[95] Insofar the appellants may complain that this is not a suitable alternative, consideration must be given to the fact that the first appellant pointed out in the answering affidavit that many of the original occupiers had relocated to Chatsworth from the township of Du Noon which is some 40 kms to the south along the N7. At that stage,

the appreciable distance of their relocation did not seem to be a serious consideration to the occupiers. And, as the Constitutional Court recently observed in Baron³⁵, (in a matter where the City of Cape Town offered evicted farm-workers outside Stellenbosch the option of moving to its temporary relocation area at Wolwerivier near Mamre, some 50 km away), “(t) he applicants cannot delay their eviction each time by stating that they find the alternative accommodation offered by the City unsuitable.”

[96] Having regard to all of these considerations I am satisfied that Yekiso J complied properly with all the statutory injunctions inherent in a matter such as this and that there is no basis to interfere with his order of 3 December 2014.

CONCLUDING REMARKS

[97] In the event that I am wrong in this conclusion, and if it is found that the main judgment is correct in relation to the fair trial issue, I consider that the remittal of the case for a hearing *de novo* is not warranted in the circumstances. All of the considerations required for a court to determine whether an eviction order should be granted, and if so upon what terms, are before this court, which is in as good a position as any other to make an order that is just and equitable³⁶. No purpose will be served by remitting the matter at this stage.

[98] Moreover, to refer the matter back for such a hearing will be prejudicial to the respondent which has had to put up with the unlawful occupation of its land for more

³⁵ Baron and Others v Claytile (Pty) Ltd and Another [2017] ZACC 24 (13 July 2017) at [50]

³⁶ Take and Save Trading CC and Others v Standard Bank of SA Ltd 2004 (4) SA 1 (SCA) at [4]

than 3 years now. To order a hearing *de novo* will place the owner in the untenable position that it may have to endure an even longer period of deprivation of its rights of ownership as the matter goes through a full hearing and further possible appeals.

[99] Upon the adjournment of the matter before this court a year ago the respondent was assured a speedy resolution to this appeal, something which has not eventuated. All the while the appellants have had the use of the land, the vast majority of them in blatant contempt of the order of Veldhuizen J. In Baron the Constitutional Court described the owner's predicament thus –

'[49] The applicants have enjoyed free accommodation since 8 December 2012, when their right of occupation was terminated, until 2017, almost 5 years. The first respondent has had a temporary restriction on its property rights for that period and it cannot, in fairness, be expected to continue granting free accommodation to the applicants where its current employees are disadvantaged. Therefore, the applicants must be evicted to enable the first respondent to accommodate its current employees.'

In the context of the facts at hand, I consider that the respondent is now entitled to have free and unfettered access to its land to do with it what it is legally permitted to.

[100] In the circumstances, I am of the respectful view that the appeal should succeed with costs. However, to afford the occupants presently on the property

sufficient time to make alternate accommodation arrangements, I would vary the dates in the order of Yekiso J of 3 December 2014 as follows:

- In para 1.1, the date 31 January 2015 is to read 15 December 2017;
- In para 1.3, the date 2 February 2015 is to read 19 December 2017;and
- In para 2, the date 31 January 2015 is to read 15 December 2017.

P A L GAMBLE

Judge of the High Court

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