

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A3057/2020

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

DATE: 9 June 2021

In the matter between:

JOHN MOHOLENG

Appellant

and

BEKANA MOSELE LYDIA

First Respondent

EMFULENI LOCAL MUNICIPALITY

Second Respondent

JUDGMENT

SIWENDU J (NICHOLS AJ CONCURRING)

Introduction

[1] This appeal is against the judgment and order of the Sebokeng Magistrate's Court dated 5 May 2020. The appellant, then a 70-year old man, approached the court a quo for a rescission of a judgment authorising his eviction from a property described as Erf [...], Evaton North, 1984 (the property). The court a quo had

granted the eviction order on 13 December 2016. Almost three years had lapsed from the date of the granting of the eviction order and the date of the launch of the rescission application in December 2019.

[2] The appellant had brought the rescission application in terms of s 36(1)(b) of the Magistrates Court Act 32 of 1944 read together with Rule 49(7) and (8) of the Rules of that Court, alternatively, based on common law.

[3] The primary contention in the court a quo, and now, before this appeal court, is that the eviction order was void *ab origine*. The appellant contended that the application initiating the eviction and the eviction order was defective because it breached the peremptory requirements of the Prevention of the Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE'). The appellant argues that the court a quo misdirected itself on various grounds and failed to apply the requirements prescribed by PIE.

[4] In dismissing the application for rescission, the Magistrate held that:

- (a) There had been an effective notice of the eviction in terms of s 4(2) of PIE;
- (b) The case involved the property rights of the applicant (now respondent), and is a dispute between private parties. The respondent was the owner of the property;
- (c) The appellant was present in court, albeit that he was unrepresented. His attempt to obtain legal aid were unsuccessful. He had consented to the eviction.

[5] In so far as the application for rescission, the Magistrate reasoned, based on various authorities, that the court had a discretion whether to grant or refuse the rescission. Premised on Rule 49(1) of the Magistrates' Court Rules,¹ the court a quo noted that Rule 49(1) requires a party seeking a rescission to do so within 20 days after obtaining knowledge of the judgment. According to the court a quo, the hurdle for the appellant was to satisfy the court a quo that there was a good reason to grant

¹ Rule 49(1) provides as follows: 'A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the court may, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit: Provided that the 20 days' period shall not be applicable to a request for rescission or variation of judgment brought in terms of sub-rule (5) or (5A).'

the rescission on two grounds, namely: (1) upon good cause shown where there is a reasonable explanation for the default and; (2) by demonstrating a bona fide defence. The court a quo found that the appellant had failed to do so. It dismissed the rescission application and awarded costs against the appellant.

Background and the eviction application

[6] A background of the eviction process and application is necessary. It was not disputed that the appellant and his family occupied the property since 1990. It appears from the record that, at some stage, he was eligible for a housing subsidy. He had approached his ward councillor for assistance.

[7] In March 2016, Ms Lydia Mosele Bekana (the respondent in this appeal), sent a letter to the appellant through her attorneys demanding that the appellant vacate the property, failing which, she would institute proceedings for his eviction. The letter of demand was served by the Sheriff in May 2016 by affixing it on the outer door of the property.

[8] On 1 September 2016, the respondent initiated eviction proceedings in the Magistrate's Court. The Notice of Motion reads:

‘TAKE NOTICE THAT BEKANA MOSELE LYDIA (herein after referred to as “the applicant”) intends to make application to this court for an order.

(a) Eviction

(b) Costs

And that the accompanying affidavit of BEKANA MOSELE LYDIA be used in support hereof.

TAKE NOTICE FURTHER that the applicant has appointed Malebogo Maeyane Attorneys at which Applicant will accept notice a-d service of all process in these proceedings. (sic)

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

(a) To notify the applicant's attorney in writing on or before the 09 September 2016

(b) And within ten (10) days after you have so given notice of intention to oppose the application to file your answering affidavits, if any and further that you are required to appoint in such notification and address referred to in rule 55 (1)(g) at which you will accept notice and service of all documents in these proceedings.

If no such notice of intention to oppose is given the application will be made on the 20 September of 2016 at Sebokeng.'

[9] The above Notice of Motion was supported by an affidavit deposed to by the respondent on 30 August 2016. It purports to be an *ex parte* application. The averments were that: the respondent purchased the property by means of an auction in 2013 from the Vanderbijlpark Sheriff; the property was not occupied; she took lawful ownership of the property in 9 January 2014 in terms of Deed of Transfer No. T743/2014.

[10] The respondent acknowledged that at least one of the occupants is elderly, lives with his wife (who is employed) and resides with a younger grandson. She stated that despite the appellant's elderly age, he seemed to be an able person. There were no disabled people living on the property. She asserted that the appellant could be accommodated in care facilities for the elderly, or the immediate family (with whom he resides) could easily find suitable accommodation for the entire family. The respondent had attempted lawful occupation but the appellant refused to vacate the property.

[11] The above notice of motion and affidavit were served personally on the appellant on 9 September 2016. The appellant was called on to indicate his intention to defend on the same day of the service thereof.

[12] The respondent's attorneys followed with a second *ex parte* application in terms of s 4(2) of PIE. The notice of motion informs the appellant of the pending application hearing scheduled for 6 December 2016. The affidavit attached to the initial application referred to in paragraph [8] above formed the basis for the *ex parte* application. The Magistrate Court authorised the service of the above notice of application and s 4(2) notice (the 'Notice') on 16 November 2016.

[13] Based on the second Notice of Application, the court granted the following order on 16 November 2016:

‘1. That the Sheriff Vanderbijlpark District be authorised to serve the said notice and annexures thereto, on the Respondent in the following manner:

1.1 That the Sheriff for Vanderbijlpark District hand over, the copy of the Notice and Annexures thereto, the Respondents immediately after having read the content thereof to them in the Respondents presence, alternatively serve same by means of affixing on the Respondents.

2. The Respondents are hereby given written notice of these proceedings against him/her as stipulated in Section 4(5) read with Section 4(2) of the prevention of illegal eviction from unlawful occupation of land Act 19 of 1998, hereafter referred as "the Act. (sic)

3. The Local Municipality Emfuleni is hereby given written notice of these proceedings against the Respondents as stipulated in Section 4(5) read with Section 4(2) of the prevention of illegal eviction from unlawful occupation of land Act 19 of 1998, hereafter referred as "the Act

4. The Respondents must appear before the honourable Court on the 6 December 2016 at 09h00 and electing from their constitutional right to conduct their own case, alternatively to get their own attorneys of choice whom they will pay and if they cannot afford to pay an attorney, that they have the right to apply for legal aid.

5. That the manner of service aforesaid be deemed to be effective service of the Notice as envisaged in Section 4(4) of the Act.

6. Service on the Respondents and Local Municipality must be effected on or before the 18 November 2016.’ (sic)

[14] The above s 4(2) Notice was duly served on the appellant on 18 November 2016. The application for the eviction of the appellant was first heard on 6 December 2016. The appellant was present at court when the application for eviction was first called. The case was postponed to 13 December 2016 to allow him time to seek legal aid.

[15] On resumption of the hearing on 13 December 2016, the record reveals that the appellant reported to the court that he was not able to procure legal aid. The reasons are not apparent. An annotation on the file shows that even though the final eviction order was granted, the appellant was given time to vacate the property on or before 1 March 2017. There is no record of the involvement or participation by the municipality in the eviction proceedings. The inscription from the record of the proceedings records reads:

‘L/A application was unsuccessful. We just ask for time as we need to move out. We do not oppose the application’.

[16] It is common cause that the appellant did not vacate the property. The court a quo issued a warrant for his ejectment on 30 October 2017, authorising the Sheriff to put the respondent in possession of the property by removing the appellant. On 7 November 2019, the appellant and his wife were summonsed to appear in the Sebokeng Magistrate’s Court on 13 December 2019 in a criminal case (case number: 265/08/2018). They were charged with contempt of court, housebreaking with the intent to trespass, and trespassing in connection with their continued occupation of the property. It was submitted to this Court that the appellant and his family had remained in occupation of the property despite the eviction order, and were still in occupation at the time of the hearing of the appeal.

[17] As stated above, the appellant launched the application for the rescission of the judgment after consulting with his current attorneys who represent him *pro bono*. Almost three years had lapsed from the date of the granting of the eviction order on 13 December 2016 to the date of the launch of the rescission application on 12 December 2019.

[18] In support of the rescission application, the appellant stated that he first had knowledge that the eviction order was void *ab origine* on 5 December 2019, when his attorneys advised him of this. According to him, he had brought the application within the time period provided for by the Magistrates’ Court Rules.

[19] The respondent did not oppose the application for rescission in the court a quo. She did not oppose the appeal in this Court either.

The appeal

[20] The appeal pivots on three areas: (1) the grounds for the rescission of the judgment in the circumstances of the application and facts before the court a quo; (2) the requirements for a valid eviction notice and application; and (3) the grounds for a final eviction envisaged in PIE.

[21] The first question is whether the Magistrate was correct in dismissing the rescission application on the basis that: (a) there was a proper service of the eviction application and; (b) the eviction application complied with PIE. The second question concerns the Magistrate's premise for refusing the rescission application. The court a quo refused to depart from the premise that the appellant was required to meet the requirements in Rule 49(1), namely, that he was required to explain his wilful delay and show a bona fide defence to the eviction. The question is whether the Magistrate misdirected himself and erred in this regard.

[22] The last question involves multiple substantive concerns about the final eviction, the court a quo's legal premise, the finding and concluding that the eviction was sound, just and equitable, and consequently, that the rescission application should fail. I commence with the issues surrounding the rescission application.

Rescission application

[23] The court a quo premised its decision in the rescission application on Rule 49(1) read with s 36(1)(a) of the Magistrates' Court Act 32 of 1944 ('the Act').² Rule 49(1) empowers a court to rescind a default judgment '*upon good cause shown*', or if it is satisfied that '*there is good reason to do so*'. Section 36(1) of the Act which reads as follows in the relevant part:

'The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), *suo motu*—

(a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;

² The judgment a quo (at page 15 thereof) refers to s 36(1)(b) of the Magistrates' Court Act 32 of 1944, but did not apply the subsection. Subsection 36(1)(a) and (b) are mutually exclusive (see para [27] below).

- (b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties;
- (c) ...;
- (d) ...'

[24] In contrast, the appellant's founding affidavit based the application for rescission on s 36(1)(b) of the Act read with Rule 49(7) and (8) of the Rules of the Magistrates' Court.

[25] Rule 49(7) provides:

'All applications for rescission or variation of judgment other than a default judgment must be brought on notice to all parties, supported by an affidavit setting out the grounds on which the applicant seeks the rescission or variation, and the court may rescind or vary such judgment if it is satisfied that there is good reason to do so.'

[26] Rule 49(8) sets out that—

'Where the rescission or variation of a judgment is sought on the ground that it is void from the beginning, or was obtained by fraud or mistake, the *application must be served and filed within one year after the applicant first had knowledge of such voidness*, fraud or mistake.' [Emphasis added.]

[27] I observe that the requirements of s 36(1)(a) and (b) differ materially. Section 36(1)(a) is intended to cover instances where a judgment is granted by default. Section 36(1)(b) is intended to cover a scenario where a judgment is erroneously taken. I am of the view that the two subsections fall to be read disjunctively to cater for a variety of reasons for seeking a rescission. On the pleaded case and facts, they could not be applied at the same time.

[28] When read together with the Rules, the two provisions require different time frames within which to launch the application for rescission. An application for the rescission of a default judgment must be launched within 20 days of obtaining the knowledge of the judgment; while the application in this instance had to be launched within a year after acquiring knowledge of the *voidness* of the judgment, which need not have been granted by default.

[29] The order dismissing the rescission application on the basis of s 36(1)(a) of the Act could not be validly granted and was incorrect. The subsection relied on by the court a quo was not the basis of the relief sought. Furthermore, the final order of eviction could not have been granted by default. The appellant was present in court on 13 December 2016 and is recorded to have made certain representations about the eviction, albeit that they were not on oath. For reasons not apparent, the court a quo simultaneously took the view that the date for the reckoning of the *dies* within which to launch the application for the rescission was from November 2019, presumably the day that the appellant and his wife were summonsed to appear for contempt of court.

[30] I agree that the court a quo misdirected itself and erred on this score. The consequence of the misdirection permeated the court a quo's approach to the requirements the appellant had to meet to succeed in the rescission application. The question of whether the appellant was in 'wilful default' and/or had shown 'good cause' for the rescission did not arise from the grounds for rescission relied on by the appellant. The invitation, and correct inquiry for the court a quo, was to consider when the appellant knew, or ought to have reasonably known, that the eviction order was void *ab origine*.

[31] Given that the application for rescission was not opposed in the court a quo, it would have been hard pressed to dispute the appellant's assertions of when he became aware of the voidness of the order. I find that the Magistrate erred and applied an incorrect approach in refusing the rescission of the eviction order. I now turn to the Magistrate's approach to the underlying eviction application.

The eviction application

[32] The court a quo's conclusion that there had been compliance with the requirements of s 4(2) of PIE is at issue. I observe that s 4 of PIE refers to both the procedural and substantive requirements which must be met before an eviction order can be validly granted. Section 4 sets out the formalities, the contents, and the time period for the service of the notice of eviction.³ It also sets out what a court must

³ See subsections 4(2), (3) and (4) of PIE.

consider before it concludes that an eviction order would be just and equitable under subsections 4(6) – 4(9).

[33] The accepted and correct procedure under PIE, was for the respondent to launch an *ex parte* application (in the form of the rule *nisi*) authorising the service of the Notice of Eviction in terms of s 4(2) of PIE. Section 4(2) of PIE 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.’

[34] Section 4(2) must be read with subsection (3), which provides that—

‘Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.’

[35] The import of the Notice under s 4(2) was dealt by the Court in *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others*.⁴ The requirements in s 4 are peremptory. Dealing with the procedure before the High Court, the court in *Cape Killarney Property Investments* held that the 14-day notice period referred to in s 4(2) was *in addition* to the normal Notice in terms of Rule 6 of the Uniform Rules of Court.⁵ The aim is to afford a respondent a better opportunity than they would otherwise have had under the Rules of the Court concerned to put all the circumstances they allege to be relevant before the Court.⁶ In this case, the Magistrate was required to apply the time period in PIE, over and above the period provided for in Rule 55 of the Magistrates’ Court Rules.⁷

⁴ *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA).

⁵ *Ibid* paras 12-13.

⁶ *Ibid* para 20.

⁷ Rule 55(e), at the time, provided as follows:

‘(e) In a notice of motion the applicant shall — (iii) set forth a day, not less than 5 days after service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether he or she intends to oppose such application, and state that if no such notification is given the application will be set down for hearing on a stated day, not being less than 10 days after service on the respondent of the notice.’

It should be noted that the paragraph (e) was substituted by GN R842 of 31 May 2019 with effect from 1 July 2019. However, for purposes of this matter, the essence of the Rule remains the same, simply changing the word ‘shall’ to ‘must’.

[36] I observe further that the contents of the Notice in s 4(2) are prescribed in s 4(5).⁸ Material to the Notice issued in this matter, is that it must, amongst others, inform the appellant of the:

- (a) summary of the grounds upon which the eviction order will be sought;
- (b) respondent(s) right to defend the application together with the legal resources available to assist the applicant.
- (c) mode and manner of service authorised by the court.

[37] The appellant contends that the Magistrate erred because the respondent did not bring the eviction application properly, and the s 4(2) application should have been preceded by the main application for eviction in terms of s 4(3). The appellant also submitted that the s 4(2) Notice did not sufficiently set out the grounds for eviction. The appellant argued that this constituted valid and *bona fide* grounds for rescission in terms of s 36(1)(b) of the Act.

[38] It is now trite that a court must only grant an eviction order under s 4 if it is satisfied that the requirements of the section are met. There were defects in the contents of the s 4(2) Notice issued on 1 September 2016, its prosecution, and the respondent's compliance with prescribed time periods. Firstly, the notice of motion in respect of the *ex parte* application was issued under case number 2016/2133. It was served on the appellant on 9 September 2016, yet it required the appellant to indicate his intention to defend the application on the day of the service thereof. Significantly, the s 4(2) Notice sanctioned by the court a quo did not explicitly set out the requirements in s 4(5), in particular, the grounds for the eviction referred to in paragraph [36] above. Despite the court a quo's purported reference to *Cape Killarney*, which deals with the 14-day notice period in PIE, it disregarded this decision in so far as the reckoning of the *dies* in the September notice.

⁸ Section 4(5) of PIE provides as follows:

'The notice of proceedings contemplated in subsection (2) must—

- (a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;
- (b) indicate on what date and at what time the court will hear the proceedings;
- (c) set out the grounds for the proposed eviction; and
- (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.'

[39] Curiously, as stated previously, the respondent's attorneys issued another Notice of Motion on 16 November under case number 2016/4231. Even though the same affidavit that was deposed to on 30 August is attached, the nexus between the two applications is not clear. It conflated the Notice in terms of s 4(2) of PIE with the substantive main application in breach of PIE. This had the potential to confuse a litigant. The upshot is that Notice of Eviction was irregular and the procedure followed is not one sanctioned by PIE. The defects were in breach of PIE and the Magistrate was not authorised to grant the eviction order in those circumstances.

[40] In sum, the correct procedure envisaged for evictions in terms of PIE is that:

- (a) The notice of eviction in terms of s 4(2), is brought by way of an *ex parte* application;
- (b) The applicant must seek the leave of the court to authorise the service of the s 4(2) Notice;
- (c) A respondent must be granted at least 14 days to indicate an intention to defend.

[41] The s 4(2) Notice must:

- (a) Describe the property from which the applicant is seeking to have the respondent evicted;
- (b) Provide a summary of the grounds for eviction;
- (c) Direct the respondent to legal resources available should they wish to defend the application;
- (d) State the return date of when the main application will be heard.

[42] The main application must be:

- (a) Comprised of a Notice of Motion and Founding Affidavit, which must fully set out the cause of action and the grounds for the eviction sought;
- (b) Attached to the *ex parte* application authorising the service of the s 4(2) Notice;

(c) Served on the respondent simultaneously with the s 4(2) Notice.

[43] I now turn to the foundation of the court a quo's decision for confirming the final eviction order and, in turn, refusing the rescission application. I observe ahead that the entire premise of the decision of the court a quo is erroneous, stands against the purpose of PIE, and the jurisprudence developed over the years since its enactment. The court misconstrued and sanctioned a negation of its role. Accordingly, it is necessary to restate the applicable principles, commencing with the role of the court in eviction proceedings.

[44] A court seized with the application for eviction under PIE cannot be supine or 'passive', as counsel for the appellant puts it. It must have regard to the requirements in s 4(7).⁹ Furthermore, it cannot apply the requirements in a perfunctory or mechanical manner. The inquisitorial role of the court is entrenched. Even though stated in the context of s 4(6) of PIE, the SCA in *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* stated that —

'There is nothing to suggest that in an enquiry in terms of section 4(6), a court is restricted to the circumstances listed in that section. The court must have regard to all relevant circumstances. The circumstances identified are peremptory but not exhaustive.'¹⁰

[45] I agree that the court erred in finding that it had no obligation on its shoulders to consider the requirements in s 4(7) in this instance.

[46] It is common cause that the appellant, although present in court, was an unrepresented litigant. He attempted to obtain legal aid without success. He could not have been reasonably expected to have filed papers. The role of the court was amplified in those circumstances.

⁹ Section 4(7) of PIE provides: '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 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.'

¹⁰ *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28; [2010] 4 All SA 54 (SCA) para 13. This similarly applies to s 4(7) of PIE. The distinguishing factor between s 4(6) and s 4(7) is the length of the period of the unlawful occupation.

[47] When invoking s 26(3) of the Constitution, the Magistrate departed from the view that the case involved private property law rights between private citizens. As I understand it, the court a quo reasoned that based on the vertical application of the rights in s 26(3), the state was not a party to the proceedings. In my view, the court a quo misconstrued the issue and the applicable law as a direct assertion of the right by the appellant against the respondent.

[48] On the contrary, the purpose for requiring that the s 4(2) Notice is served on the Municipality is to ensure the participation of the Municipality as envisaged in s 4(7) of PIE. The respondent had served the applications on the Municipality on 7 September 2016 and 18 November 2016 respectively, and correctly joined the Municipality as the second respondent. The court a quo failed to appreciate that the participation by the Municipality, which has the duty to provide alternative accommodation, is integral to a number of relevant considerations a court must take account of if it is to grant or confirm an eviction. The critical role of the Municipality is stated in the *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*,¹¹ where the Constitutional Court observed that:

‘.... All relevant circumstances must be taken into account though to determine whether, under which conditions and by which date, eviction would be just and equitable. The availability of alternative housing for the Occupiers is one of the circumstances. The eviction would create an emergency situation in terms of Chapter 12. The City’s interpretation of Chapter 12 as neither permitting nor obliging them to take measures to provide emergency accommodation, after having been refused financial assistance by the province, is incorrect. The City is obliged to provide temporary accommodation. The finding of the Supreme Court of Appeal that the City had not persuaded the Court that it lacks resources to do so has not been shown to be incorrect and must stand.

The City’s housing policy is unconstitutional in that it excludes people evicted by a private landowner from its temporary housing programme, as opposed to those relocated by the City. Blue Moonlight cannot be expected indefinitely to provide free housing to the Occupiers, but its rights as property owner must be interpreted within

¹¹ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) [2011] ZACC 33; 2012 (2) SA 104 (CC) paras 96-97.

the context of the requirement that eviction must be just and equitable. Eviction of the Occupiers would be just and equitable under the circumstances, if linked to the provision of temporary accommodation by the City.'

[49] Disregarding this role was a misdirection by the court a quo.

[50] Another premise by the court a quo was that appellant had not disputed the proof of ownership of the property. It noted that the appellant had not established the right to remain on the property (for three years).¹² According to the judgment, proof of ownership would have triggered the operation of s 26(3) of the Constitution and an inquiry envisaged in s 4(7) of PIE.

[51] When viewed cumulatively with the court a quo's finding about its role, already referred to above, the finding negates the purpose and protections afforded in PIE. Contrary to the court a quo's view, proof of ownership is not a prerequisite for determining the rights of an occupier. It is now well established that the protective purpose of PIE alters common law rights and subjects all evictions to the requirements of due process and substantive fairness. As held by the court in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*,¹³ PIE does not usurp or expropriate the rights of the owner, but delays or suspends the rights of the owner for a period until the court has determined whether an eviction order is just and equitable, and on the conditions for the eviction. In this regard, Wallis JA had this to say:

'The issue of the availability of alternative accommodation is more difficult in the context of an eviction at the instance of an owner of property that is not an organ of state. There another constitutionally protected right, the right to property, comes into play. As pointed out in this court in *Ndlovu v Ngcobo: Bekker & another v Jika* the effect of PIE is not to expropriate private property. What it does is delay or suspend the exercise of the owner's rights until a determination has been made whether an eviction would be just and equitable and under what conditions. The Constitutional Court endorsed that approach in *Blue Moonlight*.'

¹² I surmise that the court a quo meant the three years for the date of the eviction order.

¹³ *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* (SCA) [2012] ZASCA 116; 2012 (6) SA 294 (SCA) para 16.

[52] Another material consideration and cause for complaint in this appeal is the court a quo's approach to the requirement in s 4(7) of PIE. In terms of s 4(7) of PIE, an eviction order may only be granted if it is just and equitable to do so.¹⁴ While an applicant bares the onus to satisfy the court that it is just and equitable to evict an occupant, a court is enjoined to engage in a two pronged inquiry¹⁵ and only grant an eviction after (1) considering *all relevant information* to arrive at a decision whether it is just and equitable to evict;¹⁶ and (2) only thereafter can it consider a just and equitable date for the eviction, including the consideration of any conditions it wishes to attach to the eviction. Notwithstanding the purported consent of the appellant to the eviction, a matter which I return to later, the court a quo was not fully informed when granting the order for eviction.

[53] The appellant occupied the property since 1990. Whether his occupation was once lawful is not known. He had attempted to seek assistance from a ward councillor to obtain a housing subsidy. The circumstances of the sale to the respondent were not disclosed. The appellant is an elderly person. Despite the assertion in the respondent's affidavit that the appellant would not be rendered homeless by an eviction, the risk of homelessness and the availability of alternative accommodation was not investigated.

[54] Lastly, I turn to the court a quo's view that the appellant was present at court on the day the judgment was granted, consented to the eviction, and that s 4(8) of PIE did not apply.¹⁷ In the Constitutional Court's decision in *Occupiers of Erven 87*

¹⁴ In *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC) paras 35-36, the Constitutional Court stressed that the phrase 'just and equitable' entails a more elaborate enquiry than 'purely of the technical kind that flow[s] ordinarily from the provisions of land law'. And it emphasized that in conducting such an enquiry, '... 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.'

¹⁵ *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA).

¹⁶ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC)

¹⁷ Section 4(8) of PIE provides:

'(8) 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).'

and 88 Berea v De Wet N.O. and Another,¹⁸ the court held that:

‘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. It must be an informed consent in order to be valid. This requires a consideration of the potential waiver of rights.

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; (c) to a just and equitable order in terms of PIE; and (d) to temporary alternative accommodation in the event that eviction would result in homelessness. 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. 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 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.’

[55] Given that the appellant was not represented, and the court had not investigated all the relevant information, the conclusion that the appellant consented to the eviction was not validly reached. The court erred in this respect too.

[56] The whole of the judgment and order of the dated 5 May 2020 falls to be set aside.

Therefore, the following order is made:

1. The appeal is upheld.

¹⁸ *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* [2017] ZACC 18; 2017 (5) SA 346 (CC) paras 32-33.

2. The whole of judgment and order, which includes the cost order granted against the appellant by the learned Magistrate A. W Morton dated 5 May 2020 is set aside and replaced with the following order:

'1. The eviction order granted against the appellant on 13 December 2016 under Case Number 4231/2016 is rescinded and set aside.

2. There is no order as to costs.'

3. There is no order as to costs.

T SIWENDU

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

NICHOLS AJ

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 9 June 2021.

Date of hearing: 13 April 2021

Date of judgment: 9 June 2021

Appearances:

Counsel for the appellant: JG Rautenbach SC

Attorney for the appellant: Cheadle, Thompson & Haysom Inc

Counsel for the respondents: No appearance

Attorney for the respondents:

No appearance