CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 228/22

In the matter between:

CITY OF EKURHULENI METROPOLITAN MUNICIPALITY	Applicant

In re:

UNLAWFUL OCCUPIERS: 1 ARGYL STREET	First Applicants
UNLAWFUL OCCUPIERS: 193 PRESIDENT STREET	Second Applicants
UNLAWFUL OCCUPIERS: 214 MEYER DRIVE	Third Applicants
UNLAWFUL OCCUPIERS: 146 MEYER DRIVE	Fourth Applicants
UNLAWFUL OCCUPIERS: 117 JOUBERT STREET	Fifth Applicants
UNLAWFUL OCCUPIERS: 180 MEYER STREET	Sixth Applicants
UNLAWFUL OCCUPIERS: 12 KNOX STREET	Seventh Applicants
UNLAWFUL OCCUPIERS: 70 PRESIDENT STREET	Eighth Applicants
UNLAWFUL OCCUPIERS: 103 KNOX STREET	Ninth Applicants
UNLAWFUL OCCUPIERS: 1 GRAVETT STREET	Tenth Applicants
UNLAWFUL OCCUPIERS: 43 SPILBURY STREET	Eleventh Applicants
UNLAWFUL OCCUPIERS: 53 END STREET	Twelfth Applicants
UNLAWFUL OCCUPIERS: STIRLING COURT	Thirteenth Applicant

UNLAWFUL OCCUPIERS: 27 POWER STREET	Fourteenth Applicants
UNLAWFUL OCCUPIERS: UNITED BUILDING	Fifteenth Applicants
UNLAWFUL OCCUPIERS: FRIMIDA COURT	Sixteenth Applicants
and	
ROHLANDT HOLDINGS CC	First Respondent
42 POWER STREET PROPERTIES CC	Second Respondent
LANRON PROPERTIES	Third Respondent
RICHMOND INVESTMENTS CC	Fourth Respondent
GERMISTON CENTRAL REAL ESTATE CC	Fifth Respondent
LIMA JOSE MANUEL MONTEIRO	Sixth Respondent
EKURHULENI METROPOLITAN MUNICIPALITY	Seventh Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR DEPARTMENT OF HUMAN SETTLEMENTS, GAUTENG PROVINCE	Eighth Respondent
SHERIFF OF THE HIGH COURT: GERMISTON SOUTH	Ninth Respondent
WAVERLEY COURT CC	Tenth Respondent

Neutral citation:	*City of Ekurhuleni Metropolitan Municipality In re: Unlawful Occupiers 1 Argyl Street and Others v Rohlandt Holdings CC and Others* [2024] ZACC 10
Coram:	Zondo CJ, Chaskalson AJ, Dodson AJ, Kollapen J, Mathopo J, Rogers J, Schippers AJ and Tshiqi J
Judgments:	Dodson AJ (unanimous)
Heard on:	23 November 2023
Decided on:	31 May 2024

Summary: Condonation — late filing of application for leave to appeal, record and written submissions — lengthy delay in filing of record criticised — importance of issues raised and public interest justifying airing of dispute and granting of condonation

Consent order — order recording settlement reached between parties — requirements for grant of such order — order related to *lis* between parties — consistent with Constitution, law and public policy – holding some practical or legitimate advantage for parties

Consent order — non-compliance with requirements for grant of such order — consent order unrelated to *lis*, inconsistent with Constitution, Local Government: Municipal Structures Act 117 of 1998 and Local Government Ordinance 17 of 1939 and holding no practical or legitimate advantage — attorney lacking authority to consent to order

Rescission of consent order — delay in seeking — requirements for grant of rescission at common law — residual discretion to refuse

Costs — unsatisfactorily explained delays — costs not following suit

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ORDER

On appeal from the High Court of South Africa, Gauteng Division, Johannesburg (Van Der Merwe AJ):

1. Condonation is granted for the late filing of the application for leave to appeal, the record and the applicant's written submissions.
2. The application for leave to appeal is granted.
3. The appeal is upheld.
4. The order of the High Court of South Africa, Gauteng Division, Johannesburg dated 19 August 2021 is set aside and substituted with the following order:

"(a) The application for rescission of the order of Lamont J dated 12 February 2020 is granted.

(b) Each party must bear its own costs."

5. The matter is remitted to the High Court of South Africa, Gauteng Division, Johannesburg for the further conduct of the proceedings under case numbers 40089/2017, 43010/2017 and 7583/2019.

6. Each party must bear its own costs in this Court and in the Supreme Court of Appeal.

JUDGMENT

DODSON AJ (Zondo CJ, Chaskalson AJ, Kollapen J, Mathopo J, Rogers J, Schippers AJ and Tshiqi J concurring):

Introduction

[1] This is an application for leave to appeal against a decision of the High Court of South Africa, Gauteng Division, Johannesburg (High Court), refusing the rescission of an order granted by consent on 12 February 2020 (consent order). The effect of the consent order was, amongst other things, to compel the applicant, the City of Ekurhuleni Metropolitan Municipality (City), to purchase a number of properties on which there are residential buildings that are occupied unlawfully (the properties). The City contends that rescission of the consent order ought to have been granted because, amongst other things, its attorney lacked the authority to consent to the order and the requirements laid down by this Court in *Eke*[1] for a court to make a settlement agreement an order of court were not fulfilled. The owners of the properties oppose the application and seek to defend the High Court judgment refusing rescission.

[1] *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) (*Eke*).

[2] The participating parties in the present application are the City, as applicant, and the owners of the properties, as the first to sixth and tenth respondents (owners). The persons unlawfully occupying the residential buildings (occupiers) were the first to sixteenth applicants in the application to stay two eviction orders, which are discussed more fully below. The occupiers did not participate in the application before this Court. Nor did the eighth and ninth respondents, the Member of the Executive Council for Human Settlements, Gauteng Province (MEC) and the Sheriff for Germiston South.

Background

[3] During October and November 2017, 16 buildings privately owned by the owners were unlawfully occupied. The circumstances under which this took place are unclear, but it does not seem disputed that occupation was taken with physical violence against person and property. The current situation in the properties is similarly unclear. A letter from the occupiers' attorney to the MEC on 7 February 2019 refers to there being more than a thousand families in occupation.

[4] The properties are within the City's area of jurisdiction. In two separate applications, the owners applied to the High Court for the urgent eviction of the occupiers in terms of section 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[2] (PIE). Rules *nisi*[3] were issued in each of the applications directing the occupiers to show cause why final eviction orders should not be granted. The applications were consolidated.

[5] The rules *nisi* were extended while, in terms of further orders by the High Court, the MEC and the executive mayor were joined, certain officials were required to appear before the Court, a report was provided on the availability of alternative accommodation and, in terms of an order made on 10 July 2018, the parties were directed to "engage

[2] 19 of 1998.

[3] A rule *nisi* is an order that calls on a party subject to it to come to court and explain why a particular order should not be made against them. See also *National Director of Public Prosecutions v Mohamed N.O.* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at paras 28-9.

meaningfully . . . in regard to the purchase of the properties and or [alternative] housing" (engagement order). The precise circumstances in which the engagement order was made are not explained. But the presiding Judge must have envisaged the possibility that the buildings might be purchased by the City to fulfil its duty to provide the occupiers with emergency accommodation. This would have averted the need to evict them, while at the same time compensating the owners for the loss of occupation of their properties.

[6] On 20 July 2018, the owners' counsel called the City's attorney, Mr Maluleke, to complain about the City's failure to comply with the court orders, particularly, the engagement order. On 24 July 2018, Mr Maluleke addressed a letter to the owners' attorneys saying that he had met with his client the previous day and his client's instructions were that any purchase of the properties by the City would require a report to, and resolution of, the council, along with permission from the "Provincial office",[4] "in line with the relevant legislation". According to the owners, the "stumbling block" in negotiations over the acquisition of the properties at that time was the price.

[7] On 2 October 2018, after these developments had been brought to the attention of the Judge presiding in the matters, Victor J, she granted eviction orders against the occupiers in both matters. The orders required vacation of the properties on 22 February 2019. The orders did not require the City or the MEC to provide alternative accommodation.

[8] On 21 February 2019, the attorney for the occupiers addressed a letter to the other parties indicating that his letter to the MEC regarding alternative housing had met with no response. The letter pointed out that execution of the eviction orders would render "thousands of occupiers homeless and destitute". The letter conveyed their instructions urgently to seek a stay of the execution of the eviction orders.

[4] What this referred to is discussed in [69] below.

[9] On 28 February 2019, the occupiers launched an urgent application for a stay of the eviction orders pending the provision of alternative accommodation by the City and the MEC. The launch of the stay application appears to have stalled the execution of the eviction orders. On 23 May 2019, the owners "counter-applied" for relief against the City and the MEC, conditional upon the stay order being granted. The relief included constitutional damages and a declarator that the City and the MEC's failure to provide alternative accommodation resulted in breaches of the owners' rights under sections 7(2), 9(1) and (2) and 25(1) of the Constitution.

[10] The subsequent delay from 23 May 2019 is not explained by either side. It appears that the stay application was then set down for hearing on 12 February 2020. At court on that day, the parties negotiated with each other. Mr Maluleke purported to represent the City. He was, say the respondents, accompanied by a female official of the City from whom he took instructions. The parties were able to settle the matter on the basis of an agreement "encapsulated into an appropriate draft order". The draft order was not signed by any of the parties. On the same day, Lamont J made the draft an order of court. The consent order provides—

(a) that the City "is ordered to purchase" the properties;

(b) for the determination of the value of the properties in terms of section 12(1) of the Expropriation Act[5] by agreement or, failing that, by the Court;

(c) for the write off of arrear rates and service charges in respect of the properties with effect from October 2017, when the buildings were first unlawfully occupied;

(d) for the disputed rates and service charges from before October 2017 to be determined either by agreement or "by court", and then to be "taken into account in the determination of the purchase price";

(e) that the owners' claims for loss of income will be determined by agreement or, failing that, by the court;

[5] 63 of 1975.

(f) that the MEC is required to make the funds available to the City for the purchase of the properties within three months, failing which the owners may issue a warrant against the MEC for the amounts determined;

(g) that the Sheriff is authorised to sign the documentation required to effect transfer in the event of the City failing to do so; and

(h) directing the City to bear the costs of the transfer of the properties.

[11] The City avers that it was not "fully aware" of this order at the time that it was granted. Soon after, it says, the Covid-19 lockdown came into force. This precluded consultation with the City's attorney. It was only in August 2020, after it had consulted with Mr Maluleke, and requested and received a memorandum from him on 18 August 2020, that it became fully aware of the consent order. Mr Maluleke was instructed to obtain an opinion from counsel regarding the implications of the consent order, the manner in which it had been obtained and whether it was competent for the Court to have granted it. The opinion was received in the second week of September 2020. Based on the opinion, the City now fully understood the implications of the order. The City insisted that Mr Maluleke had no mandate to consent to the order on the terms that he did. It therefore terminated Mr Maluleke's mandate at the end of September 2020 and appointed new attorneys in the first week of October 2020.

[12] The City launched its rescission application on 2 November 2020. In the founding affidavit, the City averred that Mr Maluleke had no authority to bind the City to the consent order; that the order purported to dispose of disputes about rates and service charges in respect of the properties when those disputes were not before the Court; that it introduced the Expropriation Act when it was not relevant; and that it failed to settle the dispute that was before the Court, namely the stay application. The consent order therefore stood to be rescinded in terms of the common law.[6]

[6] The City pleaded in its founding affidavit that rescission should be granted "on the common law principle in that the parties . . . were in a common *justus error* and . . . there are sufficient grounds for the Court Order to be rescinded under the *justa causa* [justifiable mistake]."

Litigation history

[13] The application for rescission failed before the High Court. On the question of the attorney's alleged lack of a mandate, the High Court applied *Kruizenga*.[7] There, the Supreme Court of Appeal said, with reference to an attorney's *actual* authority, that—

> "Attorneys generally do not have implied authority to settle or compromise a claim without the consent of the client. However, the instruction to an attorney to sue or defend a claim may include the implied authority to do so provided the attorney acts in good faith".

[14] On this basis, the High Court considered that Mr Maluleke had the requisite authority to settle the matter and had acted in good faith and in the best interests of the City. The Court held further that the City was estopped from denying Mr Maluleke's authority.

[15] As to the competency of the consent order, the High Court went on to consider whether the three requirements in *Eke* were satisfied. It held that they were. The consent order related directly and indirectly to the underlying dispute. As to consistency with the Constitution, the law and public policy, there was no objection to an order compelling the purchase of property because the Supreme Court of Appeal had endorsed such an order in *Coppermoon*.[8] Furthermore, the consent order held some practical and legitimate advantage as there was no need for the execution of the eviction orders, the City was absolved from having to secure alternative accommodation for the occupiers, and it brought the litigation between the parties to an end.

[7] *MEC for Economic Affairs, Environment and Tourism v Kruizenga* [2010] ZASCA 58; 2010 (4) SA 122 (SCA) at para 11.

[8] *Coppermoon Trading 203 (Pty) Ltd v The persons whose identities are to the Applicant unknown and who unlawfully occupy remainder Erf 149, Phillippi, Cape Town* 2020 JDR 0553 (SCA) (*Coppermoon*).

[16] The High Court and the Supreme Court of Appeal refused leave to appeal. The President of the Supreme Court of Appeal also refused a request for reconsideration in terms of section 17(2)(f) of the Superior Courts Act.[9]

In this Court

Jurisdiction

[17] The matter raises at least the following constitutional issues:

(a) A consent order embodying a settlement agreement brings the legal dispute between the parties to a close. None of the parties may further litigate an issue resolved by the consent order. The result is that no party may exercise any further their right under section 34 of the Constitution to have such issues adjudicated in a fair public hearing before a court. Where a party complains that the consent order was wrongly granted, it asserts in effect that it has wrongly been deprived of the right to pursue the litigation further in terms of section 34.[10]

(b) The City alleges that the obligation imposed on it by the consent order to purchase the owners' properties bypasses—

(i) the requirements for fair, equitable, transparent, competitive and cost-effective procurement in section 217 of the Constitution; and

(ii) the requirement of a prior resolution by a municipal council before the acquisition of immovable property that is compliant with section 160(3)(a) and (c) of the Constitution.

(c) The City raises the issue of whether or not the consent order is compliant with the legislation regulating the City's acquisition of immovable property, which raises questions pertaining to the rule of law, a founding value in terms of section 1(c) of the Constitution.

(d) The matter also raises the question of the remedies available to the owners, in circumstances where they were allegedly deprived of their

[9] 10 of 2013.

[10] *Eke* above n 1 at paras 43-8.

> property rights under section 25(1) of the Constitution as a result of the City's failure to fulfil the housing rights of the occupiers in terms of section 26 of the Constitution.

[18] This Court accordingly has jurisdiction in terms of section 167(3)(b)(i) of the Constitution. It is unnecessary to consider whether it also has jurisdiction under section 167(3)(b)(ii) of the Constitution.

Condonation

[19] The City filed every document required to be filed in its application for leave to appeal late.

[20] The City was required to file its application for leave to appeal in this Court on or before 5 August 2022. The application was filed on 11 August 2022. Having regard to the intervening weekend and public holiday, the application was filed three court days late. An explanation is provided by the City. The lateness arose primarily out of the security staff at the offices of the MEC having been unwilling to accept service on the basis that there was no one present with the authority to accept service. The attempt at serving on the MEC was made within the required period for filing. An attempt to serve on the MEC by email before the expiry of this period also failed, in the sense that a delivery confirmation was generated, but a read receipt was not received from the offices of the MEC. All other parties were timeously served with the application. Condonation of the late launch of the application is not opposed.

[21] In terms of directions of this Court, the record was to be filed by 16 June 2023, and the City's written submissions by 23 June 2023. A reasonable explanation is provided for the delay in the preparation of the record, which was ultimately finalised on 17 July 2023. However, the record could not be filed without an accompanying condonation application for its late filing. The record along with the required condonation application was ultimately only filed on or about 6 October 2023 and the written submissions on 16 October 2023. The only explanation given for the delay after

17 July 2023 is that there were "issues between the applicant's representatives and the applicant, which issues were only settled in the first week of October 2023." No explanation is provided in the relevant condonation application as to what the issues were.

[22] In a subsequent condonation application pertaining to the City's supplementary written submissions, reading between the lines, there is a partial explanation for the "issues" between the applicant and its attorneys. The head of the department responsible for decision-making on the City's litigation took a decision to appoint new attorneys, presumably because of dissatisfaction with the sequence of decisions that went against the City in the High Court and the Supreme Court of Appeal. However, before this decision could be implemented the head of department's contract expired. After that, the decision to appoint new attorneys was withdrawn and the existing attorneys were instructed to resume their mandate.

[23] The owners oppose the City's applications to condone the late filing of the record and the written submissions. However, they only signalled their opposition in their written submissions. The owners did nothing about formally opposing the application. Their excuse for not doing so is that the notice of motion in the City's condonation application did not provide for the filing of an answering affidavit. This is no excuse. It is trite that a party is entitled to file an answering affidavit in an interlocutory application within a reasonable time, regardless of what the notice of motion might or might not say. Having elected not to oppose properly, the owners' opportunity to articulate any prejudice they might suffer if condonation is granted, is forfeited.

[24] The City's third condonation application relates to its late filing of supplementary written submissions. Senior counsel declined the City's brief for the initial filing of written submissions. Subsequent to the filing of the record and written submissions, and when the "issues" between the City and its attorneys had been resolved, it seems that he was persuaded to accept the brief. Senior counsel was not satisfied that the written submissions filed fully addressed the issues. Hence, the

supplementary written submissions and the application to condone their filing. This application is not opposed, although the owners objected to the slew of new legal points raised. This is dealt with later in the judgment. The owners filed supplementary submissions in response.

[25] The factors that a court will consider in deciding whether the grant of condonation is in the interests of justice include—

> "the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer*[11] and *Van Wyk*[12] emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant."[13]

[26] A party seeking condonation must make out a proper case for the court's indulgence with reference to these criteria. The explanation for the delay must be full and "reasonable enough to excuse the default".[14]

[27] Applying these criteria, the late filing of the City's application for leave to appeal is explained satisfactorily. It was not due to neglect on the part of the City. The extent of the delay was three court days, which is a short period. It is rightly not opposed and should be condoned.

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[11] *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

[12] *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC) ;2008 (4) BCLR 442 (CC) at para 20.

[13] *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) at para 22.

[14] Id at para 23.

[28] The filing of the supplementary written submissions was something that should not have happened if the City was managing its litigation properly, something it bears an enhanced duty to ensure as an organ of state.[15] This Court will not lightly entertain such conduct, particularly from an organ of state. This Court bears a massive caseload. Taking two attempts at written submissions to get it right adds to the Court's burden. Ultimately however, in this matter the Court is better off with the supplementary written submissions given the clarity they provided. Subject to what is said below about new legal points on appeal, any prejudice was addressed by the owners' filing of supplementary written submissions in reply. Condonation is therefore appropriate in this respect.

[29] The remaining aspect is the City's late filing of the record and the written submissions. This is satisfactorily explained until 17 July 2023, which is a month after the due date for the record and approximately three weeks after the written submissions were due. Then follows a three-month delay during which all that needed to be done to enable the filing of the record was for a condonation application to be prepared. The explanation for this delay is wholly inadequate and opaque. The late filing of the City's initial written submissions was seemingly a casualty of the late filing of the record, because the former could not precede the latter. They were filed shortly after the record.

[30] Considering the condonation criteria of the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, and the reasonableness of the explanation for the delay, the City fares poorly. The delay in filing the record was long, some four months in all. The cause is not properly explained, but it appears to have been official dithering over replacing the City's attorneys, presumably for poor performance. The impact on the administration of justice caused by such a delay is invariably negative. Justice delayed is justice denied.

[15] Id at para 30. See also *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) at para 82.

[31] On the other hand, as regards the nature of the relief sought, the importance of the issues raised and the public interest, there is much to be said for the airing of the dispute in this Court. The remedy fashioned in the consent order was novel. It will provide helpful guidance to the courts more broadly if this Court goes some way towards deciding whether the parties and the High Court went about it in the right way. The situation in the owners' residential buildings remains unresolved. There is a need for certainty about the positions of the occupiers of these buildings. They should not be prevented from attaining greater certainty by the City's delays in prosecuting the application before this Court. Similarly, the interests of ratepayers are affected. It is their rates that will ultimately pay for the substantial amount of immovable property that the City must acquire in terms of the consent order. If the purchase required by the consent order is unlawful, this Court should be slow to turn a blind eye to it on the basis that the record was filed late. For reasons that will become apparent, the City's prospects of success are strong.

[32] For these reasons and weighing the competing considerations, the late filing of the record and the City's initial written submissions should also be condoned. Nevertheless, it bears emphasis that the repeated failures to comply with the time limits laid down in the Rules of this Court and in the directions issued by the Chief Justice manifest disrespect towards this Court, its processes and the Chief Justice. The City has apologised for this. Whether its apology is sincere is open to question. Sincerity will be demonstrated by future strict compliance. The City's conduct is also relevant to the issue of costs, which is dealt with at the end of the judgment.

Leave to appeal

[33] As pointed out by Zondo J (as he then was) in *Dengetenge*[16]—

[16] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd* [2013] ZACC 48; 2014 (5) SA 138 (CC); 2014 (3) BCLR 265 (CC).

> "[t]his court grants leave to appeal if it is in the interests of justice to do so. The factors that it normally takes into account include the importance of the issues raised by the matter, the prospects of success and the public interest."[17]

[34] The matter undoubtedly raises important issues. Similar questions to those raised in this case have arisen in earlier cases in the High Court and the Supreme Court of Appeal.[18] On a daily basis, the various divisions of the High Court are confronted with cases raising difficult issues pertaining to the fates of both unlawful occupiers faced with eviction and owners prevented by such occupation from exercising their ownership rights. These are the consequences of the acute housing crisis faced in South Africa. Any guidance that can be derived from the adjudication of this case will be of assistance to them.

[35] The City has reasonable prospects of success.[19] As pointed out earlier, the consent order was novel. It is in the public interest that it be decided whether the solution it attempted was compliant with the Constitution and the law.

[36] In the circumstances, it is in the interests of justice that leave to appeal be granted.

Submissions in this Court

The applicant

[37] The City submitted initial and supplementary written submissions. In its initial submissions, the City contends that the High Court erred in refusing rescission of the consent order. In doing so, the City focuses on the alleged absence of authority on the

[17] Id at para 52.

[18] See *Coppermoon* above n 8; *Ekurhuleni Metropolitan Municipality v Dada NO* [2009] ZASCA 21; 2009 (4) SA 463 (SCA); *Dada NNO v Unlawful Occupiers of Portion 41 of the Farm Rooikop* 2009 (2) SA 492 (W); and *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC) (*Fischer*).

[19] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) (*Paulsen*) at para 29, quoting *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) SACR 1; 2001 (1) BCLR 36 (CC) at paras 11-12.

part of Mr Maluleke to settle the matter, particularly the absence of compliance by the City with the statutory requirements imposed on it by section 79(24) of the (Transvaal) Local Government Ordinance[20] (LGO) for the acquisition by a municipality of immovable property. The City also points out that there was no compliance with the requirements of section 217 of the Constitution for fair, equitable, transparent, competitive and cost-effective procurement of goods, in this case, the properties.

[38] The City asserts that the consent order failed to bring finality to the main dispute between the occupiers and the owners over the eviction orders and the undecided application to stay them. It would, in fact, lead to further protracted litigation. It was also void for vagueness.

[39] These were matters that the Judge granting the consent order ought to have considered, but failed to. In these initial submissions, the City seeks the overturning of the High Court's order refusing rescission, its replacement with an order granting rescission and remittal of the stay application to the High Court for adjudication. Apart from the setting aside of the High Court's costs orders against it, no award of costs is sought.

[40] In the City's supplementary written submissions it elaborates upon the grounds in the initial submissions and raises, in addition, the supposed invalidity of the consent order under the Alienation of Land Act,[21] the Local Government: Municipal Property Rates Act[22] (Rates Act) and the State Liability Act.[23] As regards relief, there is a new tack. A declaration of constitutional invalidity of the consent order is sought. This is despite the fact that no such relief was sought in the original notice of motion or in the notice of application to this Court for leave to appeal. This declaration is now put forward as the basis for rescission. Remittal is no longer sought. However, having no

[20] 17 of 1939.

[21] 68 of 1981.

[22] 6 of 2004.

[23] 20 of 1957.

foundation in the pleadings, the new tack cannot receive any further consideration.[24] Costs are now sought by the City against "the respondents" in all of the litigation.

The respondents

[41] The owners raise preliminary points. They contend that the application before this Court is stillborn because the City has not separately appealed, or sought leave to appeal, the refusals by the High Court and the Supreme Court of Appeal to grant leave to appeal. There is no such requirement, so this ground needs no further attention.

[42] The owners say that the High Court's refusal of condonation of the late application for rescission lay unchallenged – that too precludes the application to this Court for leave. But the application in this Court seeks leave to appeal against the whole of the judgment and order of the High Court, so there is no merit in that submission.

[43] On the merits, the owners assert that the reasoning and findings of the High Court in refusing rescission are unassailable. The question of Mr Maluleke's authority is a factual, not a legal one, and the City had not adduced the facts to show any constraint on his authority. As regards non-compliance with the statutory requirements for the purchase of immovable property, the mechanisms in the consent order ensure that fair value is paid. This caters for the concerns pertaining to section 217 and the LGO.

[44] The owners submit that the requirements for rescission were not established and the Court granting the consent order was *functus officio* (meaning it had finally and irreversibly adjudicated the matter). The rescission application was an impermissible, disguised appeal against the consent order.

[24] Having regard to the authorities referred to in n 25 below, it is open to question whether a direct constitutional challenge to a court order of this nature is permissible at all.

[45] This Court's judgment in *Modderklip*[25] was cited as authority for the grant of the consent order. As to the lack of alignment between the consent order and the underlying litigation, *Eke* recognises that issues that are not strictly at issue in the litigation may be included in a settlement agreement that is made an order of court. The consent order was not vague.

[46] In their supplementary written submissions, the owners complain that a new case is now advanced impermissibly by the City. The City does so, according to the owners, on new facts that were not pleaded in the original rescission application. This notwithstanding, the owners deal with the merits of the new points raised, none of which they consider sustainable. They persist in asking that the application for leave to appeal be dismissed with costs.

Legal framework

[47] The City in its notice of motion in the High Court sought the rescission of the consent order. It pleaded its case in the founding affidavit on the basis of the common law grounds for rescission. The High Court in its judgment dealt with the application accordingly. In considering whether or not the consent order had correctly been granted by Lamont J, the High Court applied this Court's judgment in *Eke*. It also evaluated whether the common law grounds for rescission had been established.[26] Its approach was true to the case pleaded. In my view, it is within that framework that the High Court's judgment must be assessed on appeal. I will consider first whether the High Court was correct in holding that the consent order complied with *Eke*, including the question whether Mr Maluleke had the requisite authority, and then whether a case was made out for rescission.

[25] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) (*Modderklip*).

[26] It also applied rule 42 of the Uniform Rules of Court, although the case pleaded in the founding affidavit is based solely on the common law.

[48] As appears from the summary of the High Court's judgment, *Eke* requires that, before a court makes a settlement reached between the parties an order of court, it must be "competent and proper". This requires that—

(a) the consent order must relate directly or indirectly to a *lis* (lawsuit) or issue between the parties;

(b) the terms of the consent order must be consistent with the Constitution, law and public policy; and

(c) the consent order must hold some practical or legitimate advantage.[27]

[49] Were these requirements satisfied?

Compliance with Eke

Related to the lis between the parties

[50] *Eke* encourages a generous approach to this requirement, so as not to burden parties unduly, or deter them from settling their litigation.[28] Thus ancillary or related matters, not strictly central to the litigation, might form part of an approved settlement. Absent such an approach, two settlement agreements might be required to cover those issues relevant to a dispute and those not, or a settlement might fail because clauses important to one or both of the parties could not receive the benefit of the court's sanction. On the other hand, a legal agreement reached entirely outside the context of litigation cannot be made an order of court.[29]

[51] In relation to this requirement, the City complains that the consent order was made in the context of proceedings where the occupiers sought relief, namely the stay application, against the owners. The *lis* was between them. The City was only cited as an interested party. There was no *lis* between the City and the owners justifying a counter-application by the owners against it. This, says the City, is impermissible in

[27] *Eke* above n 1 at paras 25-6.

[28] Id at paras 19-20.

[29] Id at para 25.

terms of rule 24 read with rule 6(7)(a) of the Uniform Rules of Court without the leave of the court granted under rule 24(2).[30]

[52] Rule 24 deals with claims in reconvention. Rule 6(7)(a) places a respondent bringing a counter-application in the same position as a defendant bringing a claim in reconvention. Rule 24(2) requires the leave of the court before a defendant may bring a claim in reconvention against both the plaintiff *and* "any other person". This is not what the owners' counter-application sought to achieve. Their counter-application was not directed against the occupiers, who were the applicants in the main case, but against the City and the MEC, who were co-respondents with the owners in the main application brought by the occupiers.

[53] What was in fact required was the issuing of a third party notice by the owners against the City and the MEC under rule 13(8),[31] which applies to applications in terms

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[30] Rule 24(2) reads as follows:

> "(2) If the defendant is entitled to take action against any other person and the plaintiff, whether jointly, jointly and severally, separately or in the alternative, he may with the leave of the court proceed in such action by way of a claim in reconvention against the plaintiff and such other persons, in such manner and on such terms as the court may direct."

[31] Rule 13 reads, in relevant part, as follows:

> "(1) Where a party in any action claims—
>
> (a) as against any other person not a party to the action (in this rule called a 'third party') that such party is entitled, in respect of any relief claimed against him, to a contribution or indemnification from such third party, or
>
> (b) any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between such party and the third party, and should properly be determined not only as between any parties to the action but also as between such parties and the third party or between any of them,
>
> such party may issue a notice, hereinafter referred to as a third party notice, as near as may be in accordance with Form 7 of the First Schedule, which notice shall be served by the sheriff.
>
> . . .
>
> (8) Where a party to an action has against any other party (whether either such party became a party by virtue of any counter-claim by any person or by virtue of a third party notice or by any other means) a claim referred to in subrule (1), he may issue and serve on such other party a third party notice in accordance with the provisions of this rule. Save that no further notice of intention to defend shall be necessary, the same procedure shall apply as between the parties to such notice and they shall be subject to the same rights and duties as if such other party had been served with a third party notice in terms of subrule (1)."

of rule 6(14). No such third party notice was issued, so the counter-application by the owners was not compliant with the Uniform Rules of Court. A settlement between the owners, the City and the MEC against the backdrop of such a rule 13 notice would clearly have been one related to an issue or issues in dispute. But technical non-compliance of this nature is not a sufficient basis to fall foul of the first *Eke* requirement. There is still an indirect relationship with the issues in dispute.

[54] The City also complains that the consent order incorporates the settlement of disputed outstanding municipal rates and service charges as between the owners and the City. This does not seem to me to be decisive on the first *Eke* requirement. If the purchase by the City of the properties is a permissible basis for settling the owners' counter-application, it would be an understandable consequence that extant disputes over rates and service charges pertaining specifically to those properties be settled. It would however, be necessary that the settlement of rates and service charges was permissible under all relevant legislation and was properly effected in each of the courts in which the disputes were pending. This is not the case here. This difficulty is discussed in relation to the third *Eke* requirement below.

[55] What is more problematic in this context is that the consent order does not address the unenforced eviction orders or the application to stay them. These were the main issues before the High Court. Instead, the effect of the consent order is that the City is simply replaced as the party entitled to enforce, and responsible for enforcing, the eviction orders, which remain extant. The consent order does not require the City to allow the occupiers to continue in occupation of the properties. The stay application also remains pending, now against the City as the new owner of the properties.

[56] Viewed holistically, the settlement does not relate to the primary *lis* between the parties. Notwithstanding a generous approach to the ancillary and related issues, they cannot form the main substance of the consent order. That is what happened here. The first *Eke* requirement is therefore not satisfied. The High Court erred in finding that it was.

Constitutional, statutory and public policy compliance

[57] Is the consent order consistent with the Constitution, the relevant legislation and public policy?

[58] The City complains that the consent order is in conflict with section 217 of the Constitution and related statutes insofar as no competitive public procurement process was followed in the acquisition of the properties. It also asserts that the consent order was in conflict with section 2 of the Alienation of Land Act – it was not "a deed of alienation signed by the parties thereto or by their agents acting on their written authority". Insofar as the consent order provided for the write-off of arrear rates, it was said by the City to offend section 15(2) of the Rates Act, which regulates rebates of, and exemptions from, rates.

[59] The order's provisions for execution against the MEC were argued to be in conflict with section 3(1) of the State Liability Act, insofar as it provides for execution by the owners against the MEC in circumstances where they are not the judgment creditors of the MEC. The City contends further that its purchase of immovable property is regulated by section 79(24) of the LGO, which requires a prior resolution by the council, informed by an independent valuation in respect of the property, prepared by a qualified valuer or associated valuer.[32]

[60] The difficulty is that, save for the last point pertaining to the LGO, these points of law were not raised in either the City's founding or replying affidavits in the rescission application. They do not seem to have been argued before the High Court. Unless they were canvassed in the unsuccessful application to the Supreme Court of Appeal for leave to appeal and the request for reconsideration,[33] they

[32] Section 19(1)(a) and (b) of the Property Valuers Profession Act 47 of 2000 provides for these property valuation professionals.

[33] The papers from this application and the request for reconsideration are not available to this Court.

are being raised for the first time in the application for leave to appeal to this Court. Should we have any regard to them?

[61] The question of when this Court will allow a point of law to be raised for the first time on appeal was considered recently in *Fujitsu*.[34] The general approach may be summarised as follows:

(a) The mere fact that a point of law is raised for the first time on appeal is not sufficient reason to refuse to consider it.[35]

(b) This Court must have jurisdiction to consider the point. If the point does not raise a constitutional issue, it must comply with section 167(3)(b)(ii) of the Constitution. That, in turn, necessitates that the point of law is (i) arguable; (ii) of general public importance and transcends the interests of the immediate parties to the dispute;[36] and (iii) ought to be considered, in the sense that the interests of justice require that leave to appeal be granted in order to do so.[37]

(c) The fact-base for adjudication of the new point must be sufficiently set out in the pleadings and evidence in the record of the first instance court[38] – the point must not raise any new facts.

(d) Consideration of the point must not give rise to any unfairness to a party.

(e) The disadvantage of the absence of decisions on the point from the High Court and the Supreme Court of Appeal must be considered.

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[34] *Fujitsu Services Core (Pty) Ltd v Schenker South Africa (Pty) Ltd* [2023] ZACC 20; 2023 (6) SA 327 (CC); 2023 (9) BCLR 1054 (CC). Both the majority and minority judgments discussed the approach to new points of law on appeal at paras 34-41 and 91-5. The judgments align in this regard. The following judgments were considered in the majority and minority judgments: *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (*Barkhuizen*) at paras 37-43; *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14; 2019 (7) BCLR 850 (CC) (*Tiekiedraai*); *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18; 2003 (12) BCLR 1301 (CC); 2004 (5) SA 460 (CC) at paras 44-6 and *Tuta v The State* [2022] ZACC 19; 2023 (2) BCLR 179 (CC); 2024 (1) SACR 242 (CC) at paras 52-3.

[35] *Barkhuizen* id at para 39.

[36] *Tiekiedraai* above n 34 at para 14.

[37] Id at paras 17-8.

[38] The court from which the appeal emanates.

(f) That counsel did not think of the point earlier is not on its own a good enough reason to entertain it, particularly if there have been full and fair opportunities to argue the case in the High Court and the Supreme Court of Appeal.[39]

(g) Even if there is compliance with the foregoing, this Court has an ultimate discretion to decide whether or not to entertain the point.

[62] Turning to the new points here, save for the point relating to the State Liability Act, they satisfy the jurisdictional requirements. It is open to question, though, whether the City's founding and replying affidavits in the High Court plead an adequate factual or legal basis for their adjudication. The question of compliance with section 217 of the Constitution raises difficult issues pertaining to whether the process is governed, and the public interest protected, by the regulatory framework for procurement, or the regulatory framework for the acquisition of immovable property, or both. This raises legal and policy considerations, in respect of which this Court would have benefitted from a fuller pleading.

[63] Similarly, in relation to the Alienation of Land Act, the City's practice may be that the preparation and signature of a written agreement of sale is a formality that follows automatically upon a compliant decision-making process under the LGO. If that is so, the non-compliance of the consent order with the Alienation of Land Act might not vitiate the consent order, if the LGO was complied with. However, the facts regarding the City's practice in this regard would need to be pleaded for the Court to make this assessment.

[64] Insofar as the Rates Act is concerned, section 15(2) is not the only relevant provision. The starting point is section 15(1). It provides that a municipality may "in terms of the criteria set out *in its rates policy*" exempt from rates, or grant rebates or reductions in rates to, categories of owners or to the owners of categories of properties.

[39] *Tiekiedraai* above n 34 at paras 21-3.

A rates policy must in terms of section 3 of the Rates Act be adopted by every municipality. Having the City's rates policy before us seems to be indispensable for an adjudication of this point. The policy is not before us.

[65] There may be an adequate factual basis for deciding the point based on the State Liability Act, but its prospects of success are questionable and it would therefore not be in the interests of justice to consider it.[40]

[66] Another obstacle to the consideration of the City's new points is the absence of decisions on them from either the High Court or the Supreme Court of Appeal. These would have been helpful. Further, whilst not serving as a bar to their consideration, this also appears to be a case where the City's lawyers failed to think of the points earlier. On a conspectus, a fair exercise of the discretion enjoyed by this Court must go against considering these new points on appeal.

[67] The LGO point is on a different footing. It was the owners who in their answering affidavit drew attention to its factual basis. They quoted directly from, and attached, the letter from Mr Maluleke dated 24 July 2018 pointing out that "in order to purchase any immovable properties unlawful[ly] occupied, a report will have to be prepared and submitted to the Council for a resolution; furthermore, the Provincial office must also provide permission in line with the relevant legislation". Although not directly referred to in the founding affidavit, this is plainly a reference to section 79(24) of the LGO which reads in relevant part as follows:

> "79. General powers
> The council may do all or any of the following things, namely—
> . . .
> (24)
> (a) Subject to the succeeding paragraphs—

[40] *Paulsen* above n 19 at paras 29-30.

> (i) hire, purchase, expropriate or in any other manner acquire any movable or immovable property, including a servitude on or a right in immovable property, for the performance or discharge of any function or duty which the council is in terms of any law authorised or required to perform or discharge;
>
> . . .
>
> (b) A council wishing to exercise any of the powers conferred by paragraph (a)(i) . . . shall cause a valuer or an associated valuer registered in terms of the provisions of the Valuers' Act, 1962, to—
>
> . . .
>
> (ii) evaluate the immovable property it wishes to purchase, to expropriate or to acquire in any other manner . . .
>
> . . .
>
> (c) A council, . . . shall not acquire—
>
> (i) any immovable property . . . by purchasing, expropriating or acquiring it in any other manner, excluding by hiring it, for an amount exceeding the amount for which it was evaluated in terms of paragraph (b)(ii), by more than five per cent;
>
> . . .
>
> unless the Administrator has, subject to such terms and conditions as he may determine, granted his approval thereto beforehand."

[68] The introductory paragraph of section 79 of the LGO provides for conferral of the various powers listed in its subsections on "the council". It contemplates that, for the power in subsection (24) to purchase immovable property to be engaged, there must be in place a valid decision of the municipal council. This requires, under section 160(3)(a) of the Constitution, a majority of the members of the council to be present at a meeting and, under section 160(3)(c), a majority of the votes at that meeting being cast in favour of the decision. These constitutional requirements are echoed in subsections 30(1) and (3) of the Local Government: Municipal Structures Act[41] (Structures Act).

[41] 117 of 1998.

[69] Section 79(24)(b) requires that a council "wishing to exercise" its power to purchase property under section 79(24)(a)(i) must obtain a valuation by an appropriately qualified valuer. A property valuation is typically provided in the form of a valuation report. This is no doubt the report referred to in Mr Maluleke's letter. The words "wishing to exercise" convey that the valuation report is something that must be in place before the council takes its decision to purchase. If the contemplated purchase price exceeds the valuation in the valuer's report by more than 5%, permission of the "Administrator" is required. This is in all likelihood the requirement alluded to in Mr Maluleke's letter as the permission of the "Provincial office".[42]

[70] Yet neither the owners nor the City put up any evidence whatsoever to suggest that these constitutional and statutory requirements were complied with before the settlement recorded in the consent order was concluded. Indeed, it was common cause in the hearing before this Court that they had not. Absent compliance with these requirements of the LGO, the Constitution and the Structures Act, the City failed to comply with the constitutional and statutory preconditions for the exercise of its power to "purchase . . . or in any other manner acquire" immovable property, as the consent order required it to do.

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[42] In this regard, Item 3(2)(b) of Schedule 6 to the Constitution, which forms part of an item dealing with the interpretation of legislation existing when the Constitution took effect, provides as follows:

> "(2) Unless inconsistent with the context or clearly inappropriate, a reference in any remaining old order legislation—
>
> . . .
>
> (b) to a State President, Chief Minister, *Administrator* or other chief executive, Cabinet, Ministers' Council or executive council of the Republic or of a homeland, must be construed as a reference to—
>
> (i) the President under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to the national executive; or
>
> (ii) *the Premier of a province under the new Constitution*, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to a provincial executive." (Emphasis added.)

In terms of Proclamation R114 GG 15813 of 17 June 1994, the administration of the Local Government Ordinance 17 of 1939 was assigned to what is now the Gauteng Provincial Government.

[71] The owners argue that section 79(24) of the LGO was substantially complied with. This was because the purpose behind the section, namely that the City receives fair value for money, was supposedly accomplished by the terms of the consent order. This is a reference to the mechanism in the consent order for determining the purchase price of the properties. This was to be done with reference to section 12(1) of the Expropriation Act. In the event that agreement could not be reached on the purchase price, it was to be determined by the High Court.

[72] This argument does not withstand scrutiny. A statute is not complied with through compliance with a different statute that seeks to achieve similar ends. In any event, the non-compliance with section 79(24) of the LGO is not confined to the absence of a valuation report. There is no council resolution in place. For the reasons given in paragraph [68] above, such a resolution is required by section 79(24)(a)(i) of the LGO, read with the Constitution and the Structures Act.

[73] The owners argue, further, on the authority of *Gijima*[43] and *Buffalo City*,[44] that the City ought to have "instituted review proceedings to attack their agent's authority to act as such". There is no merit in this argument. If the City has a valid basis in law to seek rescission, it is entitled to do so. This much is confirmed by the Supreme Court of Appeal judgments discussed later.[45]

[74] The owners' reliance on *Modderklip*[46] is also misplaced. In that case, the Court was concerned with a situation where thousands of persons had unlawfully occupied a farm, and the State authorities responsible for ensuring the enforcement of eviction orders had failed in their constitutional duties to do so. This was a breach of

[43] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC).

[44] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2016 (6) BCLR 661 (CC).

[45] *Valor IT v Premier, North West Province* [2020] ZASCA 62; 2021 (1) SA 42 (SCA) (*Valor IT*); *Oppressed ACSA Minority 1 (Pty) Ltd v Government of the Republic of South Africa* [2022] ZASCA 50; 2022 JDR 0767 (SCA) (*Oppressed ACSA Minority*).

[46] *Modderklip* above n 25.

Modderklip's rights in terms of section 34 of the Constitution, for which it was entitled to constitutional damages. Those are not the facts here. Nor does the consent order provide for such a remedy.

[75] The High Court placed reliance on the order of the Supreme Court of Appeal in *Coppermoon*.[47] The order in that case was made in an appeal against a decision of the Western Cape Division of the High Court where the City of Cape Town had been ordered to enter into good faith negotiations for the purchase of unlawfully occupied properties.[48] The order of the Supreme Court of Appeal was granted by consent and without reasons. Significantly, it set aside all the provisions of the High Court's order for the acquisition of the properties. It did however provide afresh for the acquisition of the properties at a price to be determined by way of arbitration, referenced to section 12 of the Expropriation Act and section 25(3) of the Constitution.

[76] There are important differences between the consent order in *Coppermoon* and the present one. In *Coppermoon* the dismissal of the eviction applications by the High Court was left in place. There is nothing to suggest that the attorneys for the municipality in that case were unauthorised or that any prior legislative requirements had not been satisfied. There is no indication that any components of the High Court litigation were left unresolved. In the absence of reasons from the Supreme Court of Appeal, the order does not establish any helpful precedent.

[77] Accordingly, none of the authorities relied on by the owners provide a basis for finding that the consent order was constitutionally and statutorily compliant.

[78] *Eke* also requires an assessment of the consent order from the perspective of public policy. Had the consent order been concluded on the basis of full prior compliance with the Constitution and the relevant statutes, the conferral of a lawful

[47] *Coppermoon* above n 8.

[48] *Fischer* above n 18.

mandate on Mr Maluleke, and compliance with the three *Eke* requirements in all other respects, it does not seem that there could have been any public policy objection to it.[49]

[79] It is appropriate at this point to consider the question of Mr Maluleke's authority. As the City's attorney, he could only agree to the consent order if he enjoyed authority to bind the City to it. An agent may not bind a municipality as principal to an act that requires, but lacks, prior compliance by the municipality with a statute.[50] Put differently, if a municipality may not perform a particular act without first complying with a statute, still less may it mandate an agent to perform that act on its behalf. The agent's conduct in these circumstances is invalid, notwithstanding that the municipality may have purported to confer authority on the agent expressly or tacitly, or is said to have done so ostensibly. Similarly, a principal may not be estopped from denying an agent's purported authority where to do so would give rise to an illegality.[51]

[80] The City's failure to comply with section 79(24) of the LGO meant that neither it, nor any agent purportedly mandated by it, could purchase immovable property. In consenting to an order committing the City to the purchase of immovable property in these circumstances, Mr Maluleke acted without authority. To hold the City estopped from denying its agent's authority, as the High Court did, would give rise to an illegality. Estoppel cannot therefore apply here.

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[49] Although this Court in *Modderklip* (above n 25) left open the question whether it could order the State to expropriate unlawfully occupied property (at paras 62-5), it recognised purchase of the properties as a potential solution, saying "[n]o reasons have been given why Modderklip's offer for the State to purchase a portion of Modderklip's farm was not taken up" (at para 50). This Court also pointed out that the State could have considered expropriation (at para 51).

[50] Insofar as the position in English law is concerned, Woolf et al *De Smith's Judicial Review* 8 ed (Sweet and Maxwell 2018) say at 703: "In the law of agency, an agent . . . cannot bind his principal to do what is *ultra vires*", referencing Ganz "Estoppel and Res Judicata in Administrative Law" (1965) 1 *PL* 321; Craig "Representations by Public Bodies" (1977) 73 *LQR* 398.

[51] Hoexter, Penfold *Administrative Law in South Africa* 3 ed (Juta & Co Ltd, Cape Town 2021) at pages 50-5 and the authorities discussed there. See also the judgment of Corbett AJ in a Full Court judgment in *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) where he said the following at 57E-F:

> "[I]t is also a good affirmative answer to a case of estoppel by representation that the allowance of the estoppel must result in illegality and thus a statutory body cannot be estopped from denying an act which is *ultra vires*. (*Spencer Bower*, p. 182; *Halsbury*, p. 226; F Donges and van Winsen, *Municipal Law*, 2nd ed. pp. 38-40)."

[81] In the circumstances, the second *Eke* requirement was not complied with on account of the City's failure to comply with the Constitution, the LGO and the Structures Act. Its attorney also lacked authority to consent to the order. The High Court accordingly erred in finding that this requirement was satisfied.

Practical or legitimate advantage

[82] Does the consent order "hold some practical and legitimate advantage"? The consent order does not resolve the position of the occupiers. They remain subject to the eviction orders. Their stay application remains undecided. Their housing rights under section 26 of the Constitution have therefore not been addressed. Their eviction orders stand unenforced. So the breach of the rule of law continues.

[83] The consent order does not resolve the "counterclaim" of the owners. They have expressly preserved the right in the consent order to pursue an as-yet unquantified claim for loss of income.

[84] Paragraph 3.1 of the consent order requires that the disputed quantum of arrear rates and service charges in respect of the period pre-dating the unlawful occupation of the properties "must be determined either by agreement or by court". Read with paragraph 5 of the consent order, it is clear that the court referred to here is the High Court. However, disputes in relation to those arrears are already pending in the Germiston Regional and Magistrates' courts. The upshot is that disputes regarding the arrear rates and service charges remain pending in three different courts. No practical or legitimate advantage can be gained by that.

[85] Generally speaking, the courts favour a settlement.[52] One of the primary reasons that they do so is that it reduces demands on the courts and allows them to reallocate

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

their limited resources to other cases.[53] Unfortunately, the consent order in question does not achieve this. If anything, it has birthed more litigation than it purported to settle. Accordingly, the High Court erred in finding that the third *Eke* requirement was satisfied.

Rescission

Introductory

[86] Absent compliance with the three *Eke* requirements, the consent order ought never to have been granted. That is not, however, the end of the enquiry. If the High Court had come to the correct conclusion on the *Eke* requirements, it would still have had to consider whether a case was made out for rescission of the consent order. Apart from the formal requirements for rescission, this includes the questions: (a) whether the rescission application was brought timeously; and (b) whether the court should exercise the ultimate discretion it enjoys to refuse rescission, even where the formal requirements are established.

[87] In assessing whether a case has been made out for rescission, it is important to bear in mind that a consent order "brings finality to the *lis* between the parties; the *lis* becomes *res judicata* (literally, a 'matter judged')".[54] The fact that an order may be incorrect or in conflict with the Constitution is not, on its own, a reason for its rescission.[55] Indeed, this Court has made it clear that it will not, in a constitutional dispensation where court orders are sacrosanct, readily allow a widening of the grounds for rescission.[56] The City must be able to demonstrate a sound and recognised legal basis for rescission. It is that question to which I now turn.

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[53] *Ex Parte Le Grange and Another In re: Le Grange v Le Grange* [2013] ECGHC 75 (*Le Grange*) at para 22. In the South African Law Reports, this is reported as *PL v YL* 2013 (6) SA 28 (ECG) at paras 36-8.

[54] *Eke* above n 1 at para 31.

[55] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (*Zuma*) at paras 71-85; *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) at paras 177-183.

[56] Id.

Delay

[88] An application for rescission under the common law must be brought within a reasonable time. What is reasonable will depend on the circumstances of the particular case. A starting point in determining what is reasonable is the 20-day time period referred to in rule 31(2)(b) of the Uniform Rules of Court. Where there has been delay, the applicant must show that there is a reasonable explanation for the delay.[57]

[89] The City acknowledges that it delayed in bringing the rescission application. It contends that it has a reasonable explanation. The consent order was granted on 12 February 2020. As explained earlier, the City asserts that it was "not fully aware, nor did it appreciate or [understand] the terms of the Court Order" at the time. It only came to appreciate the content and implications of the consent order once it had consulted with Mr Maluleke, received a memorandum from him and obtained an opinion from counsel. The delay in consulting with Mr Maluleke was brought about primarily by the Covid-19 lockdown.

[90] In their answering affidavit, the owners contest the City's version of events. They point out that the owners' attorneys sent an email to Mr Maluleke on 12 March 2020 attaching a draft deed of sale and requesting a meeting with Mr Frank, the deponent to the City's founding affidavit. Mr Maluleke responded on 17 March 2020 confirming that a meeting had been arranged for 20 March 2020. However, on 19 March 2020, Mr Maluleke emailed cancelling the meeting on account of Mr Frank's having fallen ill.

[91] On the basis of this correspondence the owners contended that the City was aware of the consent order much earlier than it claimed. However, the owners conceded in their answering affidavit that the Covid-19 lockdown, which commenced on

[57] *Roopnarain v Kamalapathy* 1971 (3) SA 387 (D) at 390F-391D; *Nkata v Firstrand Bank Ltd* 2014 (2) SA 412 (WCC) at paras 26-9 and *NW Civil Contractors CC v Anton Romaano Inc* [2019] ZASCA 143; 2020 (3) SA 241 (SCA) at para 21.

26 March 2020,[58] affected the parties' ability to implement the order. This is borne out by the fact that their attorneys' next letter attempting to convene the envisaged meeting was only sent on 5 August 2020. If the months from April to July 2020 are left out of account, the City's delay beyond the 20-court day period envisaged in rule 31(2)(b) is of the order of three-and-a-half months.

[92] In *Valor IT*[59] a settlement agreement that gave effect to a breach of section 217 of the Constitution had been made an order of court. The Supreme Court of Appeal was willing to uphold the rescission of the order on the basis of the unlawfulness of the underlying settlement agreement, despite the Premier having delayed for some 20 months in applying for rescission and having failed to provide a satisfactory explanation for the delay.[60] Regard was had to the strong prospects of success on the merits of the rescission and the judicial review of the settlement agreement.

[93] In *Oppressed ACSA Minority*,[61] the rescission application was launched a year after the granting of the consent order at a point when substantial steps had already been undertaken in its implementation. The Supreme Court of Appeal nevertheless upheld the rescission of the consent order granted by the High Court.

[94] In this case it is so that the City's explanation of the delay is at the weak end of the spectrum. It is lacking in detail and couched in what appears to be deliberately vague language. However, the disruptive effect of the Covid-19 lockdown on both public and private institutions, even after 1 June 2020 when employees were allowed to

[58] On 23 March 2020, President Cyril Ramaphosa announced that South Africa would enter a nationwide lockdown with effect from midnight on 26 March 2020. The initial regulations giving effect to the lockdown were promulgated in terms of section 27(2) of the Disaster Management Act 57 of 2002 in GN R318 *GG* 43107, 18 March 2020, as amended by GN R398 *GG* 43148, 25 March 2020 and by GN R419 *GG* 43168, 26 March 2020 and by GN 608, *GG* 43364, 28 May 2020.

[59] *Valor IT* above n 45.

[60] Id at paras 31-9.

[61] *Oppressed ACSA Minority* above n 45 at para 9.

return to work wearing masks,[62] cannot be denied. Given that a serious breach of the rule of law forms the basis of the rescission application, and that the degree of non-compliance of the consent order with the *Eke* requirements is substantial, I am disinclined to refuse rescission on account of delay. This should not, however, be taken as a departure from this Court's stance that it will only consider the grant of rescission in exceptional circumstances. The likelihood of an exception being made will be in inverse proportion to the passage of time since the order was made and the laxity of the explanation for the delay.

Merits of the rescission

[95] As a starting point on the merits, it is well to remind ourselves of what was pointed out by Khampepe J in *Zuma*:

> "There is a reason that rule 42, in consolidating what the common law has long permitted, operates only in specific and limited circumstances. Lest chaos be invited into the process of administering justice, the interests of justice require the grounds available for rescission to remain carefully defined. In *Colyn*, the Supreme Court of Appeal emphasised that 'the guiding principle of the common law is certainty of judgments'. Indeed, a court must be guided by prudence when exercising its discretionary powers in terms of the law of rescission, which discretion, . . . should be exercised only in exceptional cases, having 'regard to the principle that it is desirable for there to be finality in judgments.'"[63]

[96] This Court in *Berea*[64] overturned the High Court's refusal to rescind an eviction order granted by consent on the basis of the common law ground of *justus error*. The occupiers appeared in the court of first instance unrepresented, planning to seek a postponement to secure legal representation. However, they were persuaded at court to

[62] Determination of Alert Levels and Hotspots R608, *GG* 43364, 28 May 2020. The determination was made in terms of regulation 3(2) of the regulations issued under section 27(2) of the Disaster Management Act 57 of 2002 in GN R480, *GG* 43258, 29 April 2020, as amended.

[63] *Zuma* above n 55 at para 98.

[64] *Occupiers of Erven 87 and 88 Berea v De Wet N.O.* [2017] ZACC 18; 2017 (5) SA 346 (CC); 2017 (8) BCLR 1015 (CC) (*Berea*).

consent to an eviction order. They gave their consent without knowledge of their rights under PIE or their rights to temporary alternative accommodation. The court of first instance granted the order under the erroneous belief that the applicants consented to it. In truth the consent was invalid because it was not informed consent. This Court held that an error is "*justus*" where there is "good and sufficient cause", which, in turn, requires: (a) a reasonable explanation of the circumstances in which the consent order was granted; (b) that the application must be made *bona fide* (in good faith); and (c) that the applicant must have a *bona fide* defence on the merits which carries prospects of success.[65]

[97] The facts and issues in this matter and the terms of the consent order do not lend themselves comfortably to analysis with reference to the three *Berea* requirements for rescission. In *Moraitis*,[66] the Supreme Court of Appeal held that rescission may be granted in circumstances where a legal representative consented to an order without the authority to do so.[67] The effect of this would be that the court granting the consent order had been misled into thinking that the parties bound by the order had agreed to it, when in fact they had not.[68] In *Moraitis*, had it been proven, the absence of authority alone might have been sufficient to grant rescission, although the court acknowledged that—

> "A gloss has subsequently been placed upon this proposition that, while lack of authority is the preponderant factor, on its own it may not suffice unless there is a reasonable explanation for the circumstances in which the consent judgment came to be entered."[69]

[65] Id at paras 68-78.

[66] *Moraitis Investments (Pty) Ltd v Montic Dairy (Pty) Ltd* [2017] ZASCA 54; 2017 (5) SA 508 (SCA) (*Moraitis*).

[67] Id at paras 17-9.

[68] Id at para 17.

[69] Id at para 20, referring to *Georgias v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 (ZS) at 132B-D and *Ntlabezo v MEC for Education, Culture and Sport, Eastern Cape* 2001 (2) SA 1073 (TkH) at 1081B-E. See also *Valor IT* above n 45, where a settlement agreement that was in breach of section 217 of the Constitution and other procurement-related "prescripts" was rescinded on the basis of the breach alone.

[98] In *Oppressed ACSA Minority*,[70] the Supreme Court of Appeal was faced with an appeal concerning the rescission of a consent order because ACSA's legal representatives and executives agreed to it without the authority to do so. There the Supreme Court of Appeal applied the three requirements referred to in *Berea*, but treated the third requirement as "a *bona fide* defence justifying rescission of the judgment",[71] (in the sense of there being good reason to conclude that the agreement underlying the consent order was invalid) rather than a *bona fide* defence in the legal proceedings that would revive on rescission of the consent order. Whilst this articulation of the third requirement may not be consistent with the authorities on rescission of a consent order at common law, it represents a sensible application of them in this context.

[99] It is not necessary here to resolve which approach is correct. Whether one applies the approach in *Moraitis* or that in *Oppressed ACSA Minority*, the City in this matter has demonstrated that—

(a) there is a reasonable explanation of the circumstances in which the consent order came to be granted, including the High Court's failure correctly to apply the *Eke* requirements and the attorney's lack of authority;

(b) the application is made in good faith; and

(c) there is a *bona fide* and sound legal basis, both for the rescission and for the City to defend the "counter-application" that it will face in the stay proceedings.

Residual discretion

[100] The City has made out a case for compliance with the formal requirements for rescission. A court considering an application for rescission under the common law

[70] *Oppressed ACSA Minority* above n 45 at paras 27 and 33.

[71] Id at para 27.

nevertheless enjoys a wide discretion.[72] It may refuse rescission if justice and equity demand it, notwithstanding that an applicant had shown formal compliance with the requirements for granting rescission.

[101] The owners, in effect, ask that this discretion be exercised in their favour. They contend, on the basis of *Steenkamp*[73] and *All Pay*,[74] that this Court could grant declaratory relief in respect of the non-compliance with the Constitution and the relevant statutes under section 172(1)(a) of the Constitution, but leave the consent order intact in the exercise of its discretion under section 172(1)(b) of the Constitution. In the present context, the argument must be considered with reference to the Court's residual discretion.

[102] In my view this is not an occasion for the exercise of the Court's residual discretion in favour of the owners by refusing rescission. The constitutional and statutory non-compliance that gave rise both to non-compliance with *Eke* and the attorney's lack of authority is fundamental. The fact that the eviction orders stand unenforced and the stay application remains pending and unresolved is a significant problem. It is so that the owners are prejudiced by the rescission of the consent order, in that the uncertainty of their position is revived. But withholding rescission prejudices the unlawful occupiers, whose situation was left unresolved by the consent order. It also prejudices the ratepayers, who must bear any consequences of non-compliance with the statute regulating the acquisition of immovable property and the introduction by the consent order of an open-ended loss of income claim against the City.

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[72] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* [2003] ZASCA 36; 2003 (6) SA 1 (SCA) at para 11; *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1039H-1043A (the focus is on rescission at common law of a judgment granted by default, but the discussion of the relevant Roman-Dutch law and other authorities goes wider than this).

[73] *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 29.

[74] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) at para 56.

Conclusion

[103] Having regard to all the circumstances, the High Court erred in not granting rescission. The appeal should accordingly be upheld, the High Court's order set aside and replaced with one granting rescission, and the matter remitted to the High Court for adjudication of the stay application.

[104] On costs, the City has not conducted the litigation in the manner expected of an organ of State. I refer in this regard to what is said above in relation to condonation and the City's lateness in filing every document that it was required to file in this Court. In the circumstances giving rise to the grant of the consent order, all the parties took their eyes off the ball on compliance with *Eke* and the LGO. In those circumstances, although the City has been successful, no award of costs should be made in its favour. Each party should bear its own costs.

Order

[105] The following order is accordingly made:

1. Condonation is granted for the late filing of the application for leave to appeal, the record and the applicant's written submissions.
2. The application for leave to appeal is granted.
3. The appeal is upheld.
4. The order of the High Court of South Africa, Gauteng Division, Johannesburg dated 19 August 2021 is set aside and substituted with the following order:
   "(a) The application for rescission of the order of Lamont J dated 12 February 2020 is granted.
   (b) Each party must bear its own costs."
5. The matter is remitted to the High Court of South Africa, Gauteng Division, Johannesburg for the further conduct of the proceedings under case numbers 40089/2017, 43010/2017 and 7583/2019.

6. Each party must bear its own costs in this Court and in the Supreme Court of Appeal.

For the Applicant:	J Peter SC and E Sithole instructed by Ncube Incorporated Attorneys and Ezenwa Attorneys
For the First to Sixth and Tenth Respondents:	K Prehmid, K Kabinde and P Vabaza instructed by JHS Attorneys