REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes /No
(2) OF INTEREST TO OTHER JUDGES: Yes / No

13/10/2021
DATE

SIGNATURE

Case No.: 42396/2020

In the matter between:

EDITH SEHUBE — First Applicant

THE RESIDENCE OF 72 UNITS
AT FLEURHOF EXT 30, GAUTENG — Second to Seventy Second Applicants

and

CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY — First Respondent

FLEURHOF EXTENSION 2 (PTY) LIMITED — Second Respondent

THE REMAINING 47 OCCUPIERS OF THE UNITS
AT FLEURHOF EXT 30, GAUTENG AFFECTED BY
THE EVICTION ORDER GRANTED BY THE
HONOURABLE JUSTICE MAKUME ON 29 JULY 2021 — Third Respondent

JUDGMENT

This judgment is written by Acting Judge Gilbert. It is handed down electronically by circulation to the parties' or their legal representatives, as the case may be, by email and uploading it to the electronic file of this matter on CaseLines.

Gilbert AJ:

1. On 29 July 2021 the first and second respondents, as applicants, obtained an eviction order with ancillary relief before Makume J under this case number in the absence of the respondents in those proceedings ["the main eviction proceedings"].

2. To avoid confusion I will refer to the first and second respondents in these proceedings, who are the applicants in the main eviction proceedings, as "the City" and "Fleurhof" respectively.

3. The order was granted at the instance of the City and Fleurhof in the absence of the respondents in those main eviction proceedings, who are described in those proceedings as "[t]he unlawful occupiers of 146 units at Fleurhof situated at Erf 2566, Ext 30, Gauteng, previously known as Portion 17 of the Farm Vogelstruisfontein No. 231, Registration Division IQ, Province of Gauteng and the Remaining Extent of Portion 18 of the Farm Vogelstruisfontein No. 231, Registration Division IQ, Province of Gauteng and the identity of the respondents as identified in annexure "A" annexed to the founding affidavit".

4. The City and Fleurhof describe how the respondents in the main eviction proceedings "*jumped the queue*" by unlawfully occupying 146 residential units in the Fleurhof Housing Project being developed by the City and Fleurhof on the properties belonging to Fleurhof. The City further explains that it had identified qualifying individuals for social housing in the project and had allocated housing units to these correctly identified beneficiaries and their families in fulfilment of its constitutional mandate to provide housing. The City explains that the unlawful occupation of the units by the respondents in the main eviction proceedings, who are not persons identified as beneficiaries and who had not been allocated units, seriously undermines the Fleurhof Housing Project and more particularly:

4.1 violates the City's and Fleurhof's rights as the property owner and developer to deal with the property as they see fit;

4.2 is at variance with the City's housing plans and policies and thwarts the City's fulfilment of its constitutional obligations;

4.3 the property invasion offends the rights of the community to a fair and transparent housing allocation process;

4.4 their conduct is in a direct violation of the constitutional rights and expectations of the identified beneficiaries, and those beneficiaries' rights to enjoy and benefit from the social housing project, which are being unjustifiably and indefinitely suspended by the actions of the respondents in the main eviction proceedings.

5. In the present urgent proceedings, approximately 312 occupiers of 72 of the affected units, represented by the SERI Law Clinic, seek to urgently rescind the order granted in their absence. I will refer to these occupiers of the 72 units who were among the respondents in the main eviction proceedings as "the applicants" as they are the applicants for rescission in these urgent rescission proceedings.

6. What the position is of the remaining respondents in the main eviction proceedings is of some consequence, and will feature later in this judgment.

7. The applicants seek to rescind and set aside the eviction order both in terms of Uniform Rule 42(1)(a) and under the common law. Rule 42(1)(a) provides that the court may, in addition to any other powers it may have, *mero motu* or upon an application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. The common law basis relied upon by the applicants is that the order was taken against them in default of their appearance and where they have good or sufficient cause for the rescission of the order.

8. The applicants assert that the rescission is to be granted on an urgent basis because the eviction order provides for a sixty-day period for them to vacate the units, failing which the City may proceed to evict them. That sixty-day period has passed and so the applicants fear that they will be evicted from their homes. I find that the proceedings are sufficient urgent for the matter to have been enrolled for hearing by the urgent court and that the truncation of the usual

periods for the exchange of affidavits is commensurate with the urgency of the matter.

9. Dealing first with whether the eviction order is to be rescinded in terms of rule 42(1)(a), the applicants set out several procedural deficiencies which they contend constitute procedural errors that fall within the ambit of rule 42(1)(a) in that had the court been alive to those errors, it would not have granted the order. These errors include:

11.1 the City and Fleurhof in the main eviction proceedings sought and obtained from the court the obligatory notice in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 ("PIE") before they had launched, and served, the main eviction application. This was contrary to the Practice Manual in various respects, such as paragraph 10.9(2);

11.2 the City and Fleurhof as applicants in the main application proceeded on 28 April 2021 to obtain a date for the main eviction application to be heard on the unopposed roll for 29 July 2021 before they had attended to serve the main application on the applicants, which only took place on 6 May 2021. Apart from this being contrary to the Practice Manual[1] and directives, there is no way that the City and Fleurhof could have known on 28 April 2021 when applying for an unopposed date whether

[1] Paragraphs 9.9.2(11) and 10.9(2) of the Practice Manual.

the matter would be unopposed and so be enrolled on the opposed roll as they had not attended yet to serve the main application, which would only take place on 6 May 2021. The City and Fleurhof effectively *"jumped the queue"* by seeking, and obtaining, a date on the unopposed roll, to the prejudice of litigants who were waiting their turn;

11.3 the section 4(2) notice that had been authorised by the court by way of an *ex parte* application at the instance of the City and Fleurhof on 2 March 2021 provided for a hearing date of 5 May 2021. By the time the section 4(2) notice was served on 6 May 2021 upon the respondents in the main eviction proceedings (which included the present applicants), the specified hearing date in the authorised section 4(2) notice had passed. The City and Fleurhof seek to explain themselves that simultaneously with serving the section 4(2) notice together with the main application on 6 May 2021, a notice of set down was also served which reflected the revised date for the hearing of the main eviction application on the unopposed roll, namely 29 July 2021. While this may be so, the fact remained that the court-authorised section 4(2) notice as served contained an outdated date. Section 4(5)(b) of PIE requires that the section 4(2) notice *"indicate on what date and at what time the court will hear the proceedings"*. The service of a section 4(2) notice with a date that had already passed does not fulfil the purpose of the notice, which is to *"afford the respondents in eviction proceedings a better opportunity than they would have under the rules to put all the*

circumstances that they allege to be relevant before the court."[2] As it would turn out, this turn of events is the reason advanced by the applicants as to why their legal representatives did not appear in court on the revised unopposed date of 29 July 2021. I deal with later in the context of whether the applicants have made out a case for rescission under the common law.

10. These procedural deficiencies in my view cannot be seriously disputed. They are evident from a close reading of the court file. Although the City and Fleurhof sought to downplay these deficiencies, they nonetheless remain. In my view the applicants justifiably describe in their founding affidavit that the process followed by the City and Fleurhof to obtain the eviction order effectively failed to comply with the every rule of procedure specifically intended to inform potential evictees of the date on which the eviction hearing would be held. This is apart from the disregard by the City and Fleurhof of the requirements of the Practice Manual and Directives.[3]

11. During argument, Mr Mokhare SC for the City and Fleurhof focused on the requirement that the error must not have been known to Makume J when he granted the eviction order on 29 July 2021.

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[2] *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA), para 20 at 1229E/F.

[3] As to the importance of complying with the Practice Manual and Directives, see *Chongqing Qingxing Industry SA (Pty) Ltd v Ye and Others* 2021 (3) SA 189 (GJ).

12. In *Nyingwa v Moolman* 1993 (2) SA 508 (TK) the court held that:

> "*a judgment has been erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of that judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment.*"[4]

13. To similar effect in *Stander and another v ABSA Bank* 1997 (4) SA 873 (E) the court accepted[5] that an order would be erroneously granted where there existed at the time the order was made facts of which the court was unaware and which, if the court had been aware thereof, would have induced the court not to grant the order sought.

14. The state of the court's knowledge of the error, and what it would have done with knowledge of the overlooked facts, is fundamental. If the court would have granted the order even if it had knowledge of the overlooked facts, then to rescind that order would transgress on what is the domain of an appeal and not of a rescission.[6]

15. In the present instance, the applicants must establish that the errors upon which they rely were not known to the court when the court granted the eviction order on 29 July 2021. If the court had known of the facts and granted the order, then

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[4] At 510G.

[5] At 880H.

[6] See *Selota Attorneys and another v Ramolotja and others* [2020] All SA 569 (GJ) at para 31, and generally for a discussion on the requirements for rescission under Uniform Rule 42(1)(a).

whatever error is committed would be for an appeal and not for a rescission under rule 42(1)(a).

16. Mr Mokhare SC for the applicants submitted that the applicants had not satisfied in their founding affidavit this requirement that the facts relied upon by the applicants were unknown to the Makume J when he granted the eviction order on 29 July 2021 and therefore these rescission proceedings based on rule 42(1)(a) must fail.

17. Although the applicants set out in length in their founding affidavit the multiple procedural errors, they do not squarely set out in their founding affidavit why they contend that Makume J was unaware of the procedural errors now identified. Nonetheless the applicants rely upon the transcript of the proceedings that took place on 29 July 2021 before Makume J, which they attended to transcribe urgently (which explains their brief delay in initiating this proceedings on an urgent basis), attach and refer to in the founding affidavit. When regard is had to that transcript, there is no mention of any of the procedural deficiencies, whether by counsel or by the court. So, the applicants argue, it must be accepted that the court was unaware thereof. Mr Mokhare SC on the other hand submits that it was unnecessary for specific reference to be made to any procedural deficiencies during the address to the unopposed court on 29 July 2021 as it was the duty of the unopposed court to diligently read the court file, and therefore the matter must be approached on the basis that the court did so, and was therefore alive to the procedural errors as they are

apparent from a close reading of the court file, and then proceeded to nevertheless grant the order.

18. I have considerable reservations whether it can have been expected of a busy unopposed court in our Division hearing dozens of matters enrolled for the day to read the court file as closely as would be required to pick up the now identified procedural deficiencies. Although the procedural deficiencies may appear from the record that served before Makume J, this is with the benefit of hindsight and having been precognised of these deficiencies after reading the applicants' detailed founding affidavit in these rescission proceedings.[7]

19. The procedural deficiencies are numerous but are not so self-evident that it must be inferred that Makume J must have from his reading of the court file noticed those deficiencies and then proceeded with that knowledge to grant the eviction order. It is unfathomable that Makume J would have noticed all these procedural deficiencies yet still have proceeded to grant the order on 29 July 2021, without demur and without making any mention of any of these deficiencies during the course of the hearing of the application on the unopposed roll.

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[7] There is some judicial support for the argument that a court must have been taken to have read the documents before it and so is to be taken to be aware of the deficiencies and nonetheless granted the order. See the unreported judgment of *First Rand Bank v Winter*, case number 6150/2011, 24 May 2012 where Lamont J found that although there was no direct evidence of what the court had before it and what its state of knowledge was, that "*these facts must have been known and present to the mind of the judge at the time the judge made the order she did*". But unlike the position in *First Rand Bank v Winter*, in the present instance a transcript is available of the proceedings that had taken place before the unopposed court

20. I am persuaded that that the facts relied upon by the applicants were unknown to Makume J when he granted the eviction order on 29 July 2021 on an unopposed basis and also that had he known of those facts, he would not have granted the eviction order. The applicants have therefore established that the eviction order was erroneously granted in their absence as envisaged in rule 42(1)(a), and is to be rescinded and set aside.

21. Nonetheless, to the extent that I may have erred in this respect, I proceed to consider whether the applicants are entitled to a rescission under the common law.

22. To succeed under the common law, the applicants must show good cause, which entails that they must:

24.1 give a reasonable explanation for their default in failing to appear on 29 July 2021;

24.2 show that their application is made *bona fide*; and

24.3 show that on the merits they have a *bona fide* defence which *prima facie* carries some prospect of success.[8]

23. The applicants explain that although the notice of set down for 29 July 2021 was served upon them on 6 May 2021 amongst the bundle of documents that also contained the notice of motion in the main eviction proceedings and section

[8] *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476-7, and as approved in numerous subsequent decisions including by the Supreme Court of Appeal in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9E/F and the Constitutional Court in *Gundwana v Steko Development and others* 2011 (3) SA 608 (CC) at 628B, fn 54.

4(2) notice, when briefing their attorneys the particular bundle that was provided to the attorneys did not contain the notice of set down for 29 July 2021. The applicants explain that only one copy of the bundles of documents that had been served upon them was provided to the attorneys. The applicants' attorneys therefore did not receive a copy of the notice of set down for 29 July 2021 and therefore were unaware that the matter was to proceed that day. It should also be remembered that the authorised section 4(2) notice referred to an earlier date of 5 May 2021, which is where the applicants and their attorneys would naturally look for the hearing date as that is the purpose of the notice. The applicants and their attorney could reasonably expect, as they assert, that a further notice would again be authorised and served in terms of section 4(2) calling upon the applicants to appear in court. A respondent, or their attorney, does not ordinarily expect when he or she is first served process that a notice of set down will be simultaneously served as he or she has not yet decided whether to oppose the proceedings or not.

24. The applicants have given a reasonable explanation for failing to appear in court on 29 July 2021.

25. The applicants are *bona fide* in bringing these rescission proceedings. Not only had the applicants given notice of intention to oppose the main proceedings on 3 June 2021 through their present attorneys, when the attorneys' authority to represent the applicants was challenged by the City and Fleurhof in the main eviction proceedings, the applicants' attorneys went to considerable effort to obtain and file a special power of attorney by their multiple clients. It is also

plain from the papers that there is a long history of litigation between the parties and in which the parties' respective attorneys featured. It is therefore hardly likely that the applicants would have willingly permitted an order to be granted in their absence that resulted in their being evicted from their homes. A simple enquiry by the City's and Fleurhof's attorneys to the applicant's attorneys before proceeding on 29 July 2021 to obtain evictions orders against 312 people living in 72 households would have revealed that the applicants' intended filing answering affidavits.

26. Insofar as a *bona fide* defence that carries some prospects of success is concerned, section 4(7) of PIE provides that 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. Section 4(9) of PIE provides that in determining a just and equitable date on which an unlawful occupier must vacate the land, the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question. This requirement is repeated in section 6(1) of PIE, which again provides that a court may grant an eviction order if it is just and equitable to do so, after considering all the relevant circumstances, amongst other things.

27. Apart from the procedural requirements of PIE, it is now settled that a court must make two enquiries before granting an eviction order. The first enquiry is whether there is a defence to the eviction claim, and whether it is just and equitable to grant an eviction order having regard to all relevant factors. If the court decides there is no defence to the eviction claim and that it is just and

equitable[9] to all the parties grant the order, it must grant the order.[10] But before granting the order, the court must move to the second enquiry, which is what justice and equity demand, if an eviction order is to be granted, in relation to the date of implementation of that order and what conditions must be attached to that order. Although an eviction order is a result of two discrete enquiries, it is a single order and therefore cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can such an enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity.[11]

28. The applicants make it plain in their founding affidavit that they intend placing their personal circumstances before the court to enable the court to engage in the necessary enquiry which includes determining whether it is just and equitable to grant an eviction order, and if so, the date of implementation of that order and what conditions must be attached to that order.

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[9] It follows that the unlawfulness alone of the occupation will not suffice to enable an eviction order to be granted, because, unlike under the common law, it must also be just and equitable to grant the eviction order i.e. justice and equity may require an eviction order to be refused even if the occupation is unlawful. It is not difficult to conceive of instances where this may happen, such as whether a lessor cancels the lease agreement in accordance with breach and cancellation provisions because payment was made one day late.

[10] It is unclear to me how a court could in any event decide not to grant an eviction order once it determines that there is no defence and that it is just and equitable to grant the order.

[11] Para 12 and 25 of *City of Johannesburg v Changing Tides 74 (Pty) Limited and others* 2012 (6) SA 294 (SCA), referred to with approval in *Occupiers, Berea v De Wet N.O. and another* 2017 (5) SA 346 (CC) in paras 44-46..

29. Particularly apposite are the following paragraphs from *Occupiers, Berea v De Wet N.O. and another* 2017 (5) SA 346 (CC):

> *"[46] As is apparent from the nature of the enquiry, the court will need to be informed of all the relevant circumstances in each case in order to satisfy itself that it is just and equitable to evict and, if so, when and under what conditions. However, where that information is not before the court, it has been held that this enquiry cannot be conducted and no order may be granted.*
>
> *[47] It deserves to be emphasised that the duty that rests on the court under s 26(3) of the Constitution and s 4 of PIE goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in which the court is required and expected to take an active role. In order to perform its duty properly the court needs to have all the necessary information. The obligation to provide the relevant information is first and foremost on the parties to the proceedings. As officers of the court, attorneys and advocates must furnish the court with all relevant information that is in their possession in order for the court to properly interrogate the justice and equity of ordering an eviction. This may be difficult, as in the present matter, where the unlawful occupiers do not have legal representation at the eviction proceedings. In this regard, emphasis must be placed on the notice provisions of PIE, which require that notice of the eviction proceedings must be served on the unlawful occupiers and 'must state that the unlawful occupier . . . has the right to apply for legal aid'.*
>
> *…*
>
> *[51] In brief, where no information is available, or where only inadequate information is available, the court must decline to make an eviction order. The absence of information is an irrefutable confirmation*

> *of the fact that the court is not in a position to exercise this important jurisdiction."* [12]

30. The applicants' undisputed evidence is that these personal circumstances had already been made available to the City previously and so were known to the City and that the City did not place those personal circumstances before the court on 29 July 2021 before the order was made. The applicants contend that it was incumbent upon the City to do so and that in any event if the order is rescinded, they will place those personal circumstances before the court.

31. The applicants are entitled to place those personal circumstances before the court and it is incumbent upon the court to consider those personal circumstances. The placing of those personal circumstances before the court impacts upon whether it is just and equitable to grant an eviction order, and if so, the date of implementation of the order and the conditions attached thereto. That the applicants have not advanced any basis as to why they are entitled to legally occupy the housing units, or even that they have no legal entitlement to occupy the units, is beside the point.[13]

32. I am persuaded that the applicants are so entitled to a rescission of the eviction order of 29 July 2021 under the common law.

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[12] My emphasis.

[13] *Occupiers, Berea* at 361H, citing *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 32.

33. As explained earlier, it is approximately 312 occupiers of 72 of the housing units that seek to rescind the judgment, with the balance of the respondents in the main eviction proceedings having not participated in these proceedings and having not applied for rescission of the eviction order. I will refer to these respondents who have not sought the rescission of the eviction order as "the remaining occupiers".

34. The remaining occupiers are cited by the applicants in these rescission proceedings collectively as the third respondent, and are described as "[t]he remaining 47 occupiers of the units at Fleurhof Extension 30, Gauteng affected by the eviction order granted by the Honourable Justice Makume on 29 July 2021". Although the City and Fleurhof initially in the *ex parte* section 4(2) proceedings cited the occupiers of 146 units, the eviction order granted on 29 July 2021 relates to the occupiers of 119 units. The applicants in the present rescission proceedings occupy 72 units, and the remaining occupiers occupy 47 units, making up the occupiers of the 119 units.

35. During the course of argument, I raised with the respective counsel whether the eviction order is to be rescinded as against all the respondents in the main eviction proceedings or only those respondents who are now applicants in these proceedings.

36. Mr Mokhare SC for the City and Fleurhof submitted that should the court be inclined to grant a rescission, it should be confined only to the present applicants. Mr Mokhare SC submitted that as a matter of legal principle there did not appear to be a difficulty with a rescission being granted in favour of

some, but not all, of the respondents in the main eviction proceedings. Mr Thobakgale for the applicants submitted that given the nature of the eviction order and that it impugned upon all the occupiers' constitutional rights, including those of the remaining occupiers, the order should be rescinded in its entirety, including in respect of the remaining occupiers who do not seek rescission. I invited the parties to make written submissions, should they so wish, on this issue. The applicants did so.

37. The point made by the City and Fleurhof is that some of the remaining occupiers are conducting themselves in accordance with the eviction order that the applicants now seek to rescind. The eviction order, apart from providing for ejectment, also provides for the respondents who qualify and are in need of emergency shelter temporary emergency accommodation upon their eviction to identify themselves and provide their personal circumstances for the provision of the emergency shelter by the City and Fleurhof. It appears that some of the remaining respondents have taken this up.

38. In my view, all the respondents in the main eviction proceedings need to be aware of the rescission proceedings before a court rescinds entirely this particular eviction order that goes further than ejectment. At least some of the remaining respondents may not wish the eviction order to be rescinded as they are in the process of taking up temporary emergency accommodation. This is affirmed to some extent by a "statement" by the attorney representing some of the remaining occupiers that was uploaded to the electronic court file on 12 October 2021, after I reserved judgment. That "statement" records that at least

some of the respondents in the main eviction proceedings are neither represented by the applicant's attorneys nor the attorneys that filed the statement, and so would appear to be unrepresented in these proceedings. The general tenor of the statement appears to be that at least some of the remaining occupiers are not supportive of the rescission of the eviction order.

39. The applicants in these rescission proceedings do not limit the rescission that they seek to be only in relation to the eviction order insofar as it relates to them. The applicants seek the rescission and setting aside of the eviction order in its entirety. Although none of the remaining occupiers have sought to formally participate in these rescission proceedings and so to potentially oppose (or support) the rescission of the eviction order, and although they have been collectively cited by the applicants as the third respondent in these proceedings, I have considerable doubt whether they have had effective notice of these rescission proceedings. Although there appears to have been service of the rescission application per email upon the attorneys who represent some of the remaining occupiers, it appears that is those attorneys do not represent all the remaining occupiers in the main eviction proceedings.

40. In the circumstances, I am unable to rescind and set aside the eviction order against all the respondents in the main eviction proceedings as the remaining occupiers would be affected by such relief but where at least some of them may not have had notice of these rescission proceedings.

41. Nonetheless, I do find that the order can be rescinded in relation to those respondents in the main eviction proceedings who are now the applicants in

these rescission proceedings. In the limited time available to prepare this judgment and after having requested counsel for the respective parties to furnish written submissions after I had reserved judgment, I can find no authority squarely in point dealing with whether an order can be rescinded against some but not all the affected parties. Although there are authorities that deal with a partial rescission in the form of rescinding part of a judgment, those authorities do not deal with rescinding an order in respect of some parties only.

42. In *Occupiers Berea*,[14] the Constitutional Court rescinded an eviction order against some of the occupiers on the basis of rule 42(1)(a), and against the remaining occupiers under the common law. The court did not consider what would have been the position if rescission had not been sought by some of the respondents.

43. Whatever the position made by under the common law (the urgency of the proceedings precludes me from considering the position more closely), section 172(1) of the Constitution provides that when deciding a constitutional matter within its power, a court:

> *"(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistencies;*
>
> *(b) may make any order that is just and equitable…."*

[14] At para 68 to 78.

44. The matter before me is a constitutional matter, directly affecting the applicants' right to housing under section 26(3) of the Constitution and under PIE.[15] An order can be made that is just and equitable without first necessarily declaring any law or conduct invalid as being inconsistent with the Constitution.[16]

45. I accordingly find that it is just and equitable to make an order rescinding and setting aside the eviction order insofar as it relates to the applicants, and leaving extant the eviction order extant in relation to the remaining occupiers.

46. The issue of costs remains.

47. The applicants have sought costs of the rescission proceedings on the ordinary scale. It is difficult not to come to the conclusion that the City and Fleurhof acted opportunistically in obtaining the eviction order in the manner that they did. I should mention though that Mr Mokhare SC to his credit without demur recorded that the City and Fleurhof would not proceed to execute on the eviction order and evict the applicants while this judgment was being prepared. This, to some extent, mitigates the manner in which the City and Fleurhof went about obtaining the eviction order in the absence of the applicants on 29 July 2021. In my discretion, it is appropriate the costs should follow the result of these rescission proceedings.

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[15] *Occupiers, Berea* at 368D.

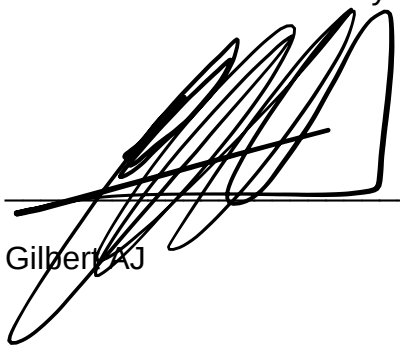
[16] *Head of Department, Mpumalanga Department of Education and another v Hoerskool Ermelo and another* 2010 (2) SA 415 (CC) at para 97; *Minister of Safety and Security v Van der Merwe and others* 2011 (5) SA 61 (CC) at para 59.

48. The following order is made:

44.1 The order granted by this court per Makume J on 29 July 2021 in the main eviction proceedings under this case number as against the applicants in these rescission proceedings (who are identified in annexure “ES2” to the founding affidavit in these rescission proceedings) is rescinded and set aside.

44.2 The first and second respondents (who are the applicants in the main eviction proceedings under this case number), are to pay the costs of the applicants in these rescission proceedings, jointly and severally.

44.3 The order granted by this court per Makume J on 29 July 2021 in the main eviction proceedings under this case number in relation to the remaining respondents in those main eviction proceedings remains unaffected by this order.



Gilbert AJ

Date of hearing:	5 October 2021
Date of judgment:	13 October 2021
Counsel for the applicants:	KAR Thobakgale N Mpya (pupil advocate)
Instructed by:	Seri Law Clinic
Counsel for the first and second respondents:	W R Mokhare SC T Mosikili
Instructed by:	Padi Incorporated Attorneys
Counsel for the third respondent:	No appearance