REPUBLIC OF SOUTH AFRICA

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

Case No: A295/2014

In the matter between:

MR J WILDEBEEST	First Appellant
MS K WILDEBEEST	Second Appellant
And all the other occupiers	

And

COMMUNICARE, A NON PROFIT COMPANY	First Respondent
(REG NO. 05/001590/08)	
THE MUNICIPAL MANAGER	Second Respondent
(Goodwood Administration)	

JUDGMENT DELIVERED ON 06 MAY 2015

RILEY, AJ

[1] This is an appeal against the whole of the judgment of the magistrate sitting at Goodwood, handed down on 21 November 2013, in terms of which he refused to grant the appellants condonation and dismissed the appellant's application for the rescission of the eviction order granted on 7 February 2013 with costs. At the hearing of this appeal both the appellants and the first respondent applied for condonation for the late filing of their heads of arguments which condonation was granted.

[2] The background to this appeal can be summarized as follows: On 13 April 2006 the first respondent, Communicare, a Non Profit Company, an incorporated association not for gain entered into a written lease agreement with the first and second appellant in respect of certain residential premises at Ruyterwacht. The appellants have three minor children. It is common cause that the first appellant is a minister employed by the Rapha International Ministries, a church in the Elsies River area. Second appellant is not employed. Although first appellant's monthly salary to assist the chief minister is approximately R3500-00 per month, he has not received a salary regularly as the church depends primarily on income from its congregation and occasional donations from outside sources. As a result of the irregular payments of his salary, the first appellant has not been able to pay his personal expenses, particularly his rent regularly or timeously.

[3] In the founding affidavit of the first appellant (in the application for condonation and rescission of the eviction order in the court a *quo*), which was confirmed by the second appellant, first appellant at the outset makes it clear that when he received the eviction application, he contacted his attorney of record, Mr Khan, ("Khan") with the intention of opposing the relief sought by Communicare. Even though they did not have sufficient funds to pay Khan, Khan nevertheless undertook to assist them and allowed them to make the necessary payment arrangements when they were able to do so. First appellant understood that Khan had filed a notice of intention to oppose the application. Khan subsequently advised him that they would have to consult in order to prepare first and second appellants affidavits in support of the opposition to the relief sought by the first respondent.

[4] The first appellant further averred that when he and his family moved into the rental premises, the floors were beginning to collapse and there were no outside gates and walls. The floors in the lounge and bedroom had collapsed. In addition the ceilings were also damp.

[5] When the first respondent refused to attend to the defects after first appellant pointed them out to it, the first appellant reported the matter to the Rental Tribunal who requested that first respondent and first appellant settle the matter. On 26 May

2011 a representative of the first respondent attended at the appellant's home with the view to investigate 'settlement terms'. Second appellant was advised that their case was before the Rental Tribunal regarding inter alia increased rental and that first respondent had been advised to enter into a settlement agreement with tenants whose cases were before the Tribunal.

[6] It is common cause that the parties entered into an agreement signed on 26 May 2011 the terms which can be summarised as follows:

1. First respondent would replace and erect a fence on the left and in front of the property and erect a gate for a vehicle entrance.

2. First respondent would fix (temp) floor panels in the bedroom. House floors to be fixed in the summer 2011/2012.

3. First respondent would clean the mouldy ceilings.

4. The appellants would arrange a payment plan with Communicare relating to the matter.

5. The appellants will investigate and resolve lawyer's fees.

6. That the rent would not be increased until the work referred to in paragraphs 1 and 2 of the agreement had been attended to.

[7] It is further common cause that this settlement agreement was entered into before the eviction application was launched.

[8] According to the first appellant he had also informed the first respondent that his rental had increased on 26 May 2011. Despite the terms of the agreement, first appellant avers that first respondent had not complied with the terms of the aforesaid settlement agreement and that the floors on the lounge and bedrooms are in the same condition and the appellant and his family were unable to use the lounge and one of the bedrooms. Appellants presented photographic evidence and specifically averred that the repairs were not effected. According to appellants', first respondent has also acted in breach of paragraph 6 of the settlement agreement in that it has

increased the rental contrary to the terms of the agreement.

[9] First appellant was of the view that their rental should not have been increased and that the rental should have been reduced as they did not have the use and enjoyment of the entire house and he accordingly disputed the amount owing.

[10] Consequently the appellants deny that they were in arrears with the rental to the extent as averred by the first respondent. First appellant in particular avers that the first respondent is not entitled in law to charge them the full rental as first respondent has not substantially complied with the settlement agreement in terms of a directive of the Housing Tribunal.

[11] On or about 30 July 2012 the first respondent brought an *ex parte* eviction application against the appellants before the magistrate at Goodwood, in terms of section 4(5) and 4(2) of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ("PIE ACT").

[12] In terms of the notice served on them, the appellants were notified that they should appear before court on 23 August 2012 to defend the action, and to bring to the attention of the court all relevant circumstances which would establish that the granting of an eviction order is unfair and unjust. Appellants were further given notice that if they intended to oppose the application, that they should do so before 14 August 2012 and to file their answering affidavits within ten days of such notice of opposition.

[13] On 22 August 2012 the appellant's gave notice of their intention to oppose the eviction application. According to the first Notice of Set Down, the eviction application was set down for hearing on 17 February 2013. It was served on the correspondents of the appellant's attorney of record on 12 December 2012.

[14] On 19/12/2012 a further Notice of Set Down, with a date of hearing for 7 February 2013, was served on the correspondent of the appellant's attorney of record. It is not clear why a second notice of the set down was served and filed and particularly during a period when it was common knowledge that most attorneys

would close their offices for the Christmas holidays.

[15] It is common cause that on 7 February 2013, a magistrate other than the magistrate who made the orders which are the subject matter of this appeal, granted an order for the eviction of the appellants and their minor children.

[16] After Khan had filed the notice of opposition, and around the end of December 2012, he informed first appellant that the hearing of the eviction matter had been set down for hearing on 17 February 2013. Khan also informed him that he would contact first appellant as soon as he was ready to start preparing the answering affidavit, but that Khan would be closing his office for the holidays in December 2012 and re-open in mid-January 2013. According to first appellant, Khan then informed him towards the end of January or early February 2013, that the matter would be postponed to a date in April 2013 in terms of a directive by the magistrate that all opposed matters of Communicare be postponed to that period.

[17] The first appellant avers that he was shocked when in and about February the sheriff of the court served an eviction order on him which was granted on 7 February 2013. He contacted Khan immediately and they met to discuss this turn of events. According to first appellant, Khan appeared to be equally shocked and advised him that there was clearly a mistake as according to him the matter had been set down for hearing on 17 February 2013 and that when he (Khan) appeared in court in January 2012 he had understood the magistrate to mention that all opposed matters of the first respondent should be set down for April 2013. Khan then undertook to speak to first respondent's attorney and advised that he would try to apply to set aside the warrant of eviction.

[18] A week or two after this meeting, first appellant was informed by Khan that he had spoken to first respondent's attorney who had advised him that appellants would have to apply for the rescission of the judgment and that the first respondent's attorney did not recall the magistrate directing that the eviction application be set down in April 2013.

[19] What is clear is that Khan must have misunderstood or misinterpreted the

proceedings in court in January 2013 and that confusion arose in regard to the set down dates for the eviction application and it appears that Khan had belatedly found the second notice of set down for 7 February 2013 at his office, which notice had been misplaced.

[20] It is further clear that notwithstanding the severe financial strain the appellant was subjected to, he was doing his utmost best to borrow money from friends and his employer to pay towards his arrear rent.

[21] What is abundantly clear, is that as, a lay person, first appellant was not aware that the application to have the judgment and order rescinded had to be brought within a specified time limit in terms of the rules of court, nor did Khan inform him of this requirement. On 28 April 2013 Khan advised him for the first time that since the application ought to have been brought within twenty days of the date on which appellants received the court order, they would have to apply for condonation.

[22] In his *ex tempore* judgment, the magistrate found that there was no reason whatsoever that would justify him granting condonation and further dismissed the rescission application.

[23] It is trite law that an applicant for the rescission of a default judgment must show good cause and prove that at no time did he renounce his defence and that he had a serious intention of proceeding with the case. See Herbstein and Van Winsen – Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa 5th ed p715 – 716. According to the learned authors, in order to show good cause, an applicant must give a reasonable explanation for the default, the application must be made *bona fide* and must show that a defence exists to the plaintiffs claim.

[24] I turn briefly to deal with the defences raised by the appellants which relate *inter alia* to the state of the rented property, their obligation to pay rent and the settlement agreement entered into by the parties, as in my view these issues are all relevant to the ultimate determination of the eviction application.

[25] To the extent that the appellants claim that the amount of rent paid did not

accord with the value of the services provided, in that the tenant did not obtain complete and proper beneficial occupation of the property, it appears that there is support for the view that in such circumstances, such a lessee is entitled to a reduction in the rent, has a claim for damages and that this would constitute a *bona fide* defence. See *Mpange and Others v Sithole 2007(6) SA 578(w).* In *Thompson v Scholtz 1999(1) SA 232 (SCA) at 247A* – Nienaber JA stated that:

> "*Where a lessee is deprived or disturbed in the use or enjoyment of leased property to which he is entitled in terms of the lease, either in whole or in part, he can in appropriate circumstances be relieved of the obligation to pay rental, either in whole or in part; the Court may abate the rental due by him pro rata to his own enjoyment of the merx. This is true not only where the interference with the lessee's enjoyment of B the leased property is the result of vis major or casus fortuitus but also where it is due to the lessor's breach of contract, e.g. because the leased property is not fit for the purpose for which it was leased for, as in this case, because the performance rendered by the lessor is incomplete or partial. (See the cases cited by Piek and Klein (supra at 380 footnote 112).) The lessee would be entirely absolved from the obligation to pay rental if he were C deprived of or did not receive any usage whatsoever. That would simply be a manifestation of the exceptio, more particularly of the first proposition in BK Tooling (cf Fourie NO en 'n Ander v Potgietersrussse Stadsraad 1987(2) SA 921(A).*' See also Cooper Landlord and Tenant 2 ed at 102-7 and 164 and the authorities quoted in Mpange and Others v Sithole *supra* at paragraphs [67] – [70]. On a consideration of the appellant's version, it seems to me that the appellants' would not have been required to pay the amounts over and above the amount of rent as it stood at the date of the settlement agreement. I pause to mention that nowhere in the affidavit deposed to by Vuyani Joel Mkunqwana in support of the eviction applications, is any mention made whatsoever of the complaint to the Rental Tribunal and the subsequent settlement agreement entered into between the parties. In my view this information was most relevant and important, and should have been placed before the magistrate who heard the original eviction application. It is clear that the magistrate who heard the condonation and rescission application in any event did not give proper consideration to

the issues raised by appellant's when considering the totality of the application.

[26] In considering the reasons advanced by the magistrate for his ruling, it is necessary to consider the appellants conduct, i.e. whether they are wilful, or negligent or blameless as one of the various considerations which courts will take into account in the exercise of their discretion to determine whether or not good cause is shown. (See *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd 1994(4) SA 705E*). In determining whether or not good cause has been shown whether an applicant has given a reasonable explanation, the court is given a wide discretion. It is accepted law that the courts discretion must be exercised after a proper consideration of all the relevant circumstances. In *Grant v Plumbers (Pty) Ltd 1949(2) SA 470(O)*, Brink J was of the view that a court should not come to the assistance of a defendant whose default was wilful or due to gross negligence. Our courts have however also held that whilst a court may well decline to grant relief where the default has been wilful or due to gross negligence it cannot be accepted that the absence of gross negligence in relation to the default is an essential criterion or an absolute pre-requisite, for the granting of relief under Rule 31(2)(b). See *Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd 1975(1) SA 612(D) at 615*. I agree with the sentiments expressed by Jones J where he states in De Witts Auto Body Repairs (Pty) Ltd *supra* that it is but a factor to be considered in the overall determination of whether good cause has been shown although it will obviously weigh heavily against the applicant for relief. More importantly, Jones J emphasized that a magistrate is bound to exercise his discretion judicially in the light of the consideration referred to above, and any other considerations which might be relevant.

[27] On a consideration of the magistrates reasons it is clear that the magistrate had failed and neglected to properly consider whether or not appellants had raised a *bona fide* defence.

[28] In addition, the magistrate failed to give proper consideration to the fact that the first respondent's main business is the facilitation of the provision of affordably accommodation for the benefit of economically disadvantaged citizens of the

Western Cape. In terms of Clause 12.2.1 of the lease agreement, the landlord shall have the right and be entitled to require the tenant to transfer from the leased premises to another premise of the landlord's housing estates if and when the landlord considers the circumstances render such transfer necessary or desirable. It is clear that the appellants fall into the category of financially disadvantaged persons and that they were granted accommodation on this basis. It is further clear that appellants were not in wilful default and that they were making every effort possible to pay their rent to the extent that they were making loans from all and sundry. Considering its mandate and the fact that it worked with the Western Cape Department of Housing to provide economical housing/accommodation to the financial disadvantaged in the Western Cape, there is no evidence that the landlord made any attempt whatsoever to transfer the appellants to another of its premises, albeit on the basis that they would be required to pay a lesser rental, and considering that, in my view, the circumstances rendered such a transfer necessary or desirable.

[29] Even though the magistrate correctly placed emphasis on the negligence of the defendants' attorneys, which appears to be the paramount reason which resulted in the Eviction Order being granted against the appellants, it appears that he did so out of context. As correctly held by Jones J in De Witts Auto Body Repairs (Pty) Ltd *supra* at p711, '*the correct approach is not to look at the adequacy or otherwise of the reasons for the failure to file a plea in isolation. Instead, the explanation, be it good, bad, or indifferent, must be considered in the light of the nature of the defence, which is an all-important consideration, and in the light of all the facts and circumstances of the case as a whole … An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the rules and procedure laid down for civil procedure in our courts. The questions is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence, and hence that the application for rescission is not bona fide. The magistrate's discretion to rescind the judgments of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interest of the parties, bearing in mind the considerations referred to in Grant v Plumbers (Pty) Ltd (supra) and HDS Construction (Pty) Ltd v Wait (supra) and also any prejudice which might be*

occasioned by the outcome of the application. He should also do his best to advance the good administration of justice. In the present context this involves weighing the need, on the one hand, to uphold the judgments of the courts which are properly taken in accordance with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment being executed where it should never have been taken in the first place, particularly where it is taken in a party's absence without evidence and without his defence, having been raised and heard'. It is clear that the magistrate did not give any consideration to the aforesaid principles.

[30] In the present matter, it is clear that the appellants had done everything reasonably necessary to instruct their attorney of record. There is no evidence that the appellants were responsible for the delays and problems that occurred.

[31] It is accepted law that where the delay was due entirely to the negligence of the applicant's attorney, the attorney's neglect should not in the circumstances of the case debar the applicant who was himself in no way to blame, from relief. See *Regal v African Superslate (Pty) Ltd 1962(3) SA 18(A) at 23*.

[32] I agree of course that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. I am however satisfied that it cannot be said, that the appellants' , when they found out, that the prescribed period to apply for rescission of the judgment had lapsed, and that a condonation application is necessary, had sat back passively and done nothing to rectify the situation.

[33] A consideration of the magistrates reasons for refusing the condonation application and dismissing the application for rescission setting aside the order, points to the inescapable conclusion that he was impatient and extremely irritated with the conduct of the appellants attorney and that in his view the appellant could not hide behind the negligence of his attorney. Of further concern is that he appeared upset that his roll had become clogged up with rescission applications in respect of Communicare matters where applicants were out of time, opposing affidavits were not filed timeously, thus resulting in condonation applications, and

further resulting in a situation where according to him a court is sort of held hostage so to say to grant the condonations '*so that we can just at least get to the hearing and finalise the matter*'. It is apparent from his remarks that in his view, applications of this nature '*drag on for ever and ever*' and that should the court grant the application (in *casu*) then, to use his words '*… when on earth are we going to get to the actual hearing of the matter and when is there ever going (sic) to come finality?*'.

[34] The approach adopted by the magistrate is clearly not in accordance with the general principles as laid down in the authorities hereinbefore referred to and in my view amount to a misdirection.

[35] It is further clear that the magistrate had erred and misdirected himself on the facts by considering the question of the explanation by the appellants in a vacuum and in doing so, he failed to make a proper assessment of the explanation given by appellants considering the nature of the defence on the merits together with the appellants *bona fides* and the desire to raise the defence at the hearing of the eviction application. The magistrate accordingly erred by not looking at the total picture presented by all the facts and by considering the explanation and the defence in a piecemeal manner. On a conspectus of the evidence it is clear that the appellants have given a reasonable explanation for the default, that the application was made in good faith and that a *bona fide* defence exists to the plaintiffs claim in respect of the arrear rental. The action relating to the arrear rental is however not the subject matter of this appeal and it appears as if the appellants have to date not brought any applications for the rescission of that judgment. In my view the magistrate's judgment had regrettably become clouded by his pre-occupation with the conduct of attorney Khan which resulted in him not giving proper consideration to the total picture as hereinbefore referred to.

<u>The just and equitable issue</u>

[36] On the papers it is clear that the appellants are indigent and thus rely on economical housing and accommodation of the kind provided for by respondent. They occupy the property with their three minor children and they have no alternative

accommodation.

[37] Mr Khan contended on behalf of the appellants that they are entitled to legal protection under the PIE Act read with the provisions of Section 26 of the Constitution of the Republic of South Africa 1996. Ms Steyn who appeared for the first respondent contended strongly that the appellants do not qualify for protection under the PIE Act, that the court a *quo* had decided the matter correctly in not granting condonation for the late bringing of the rescission application and that it in any event since the appellants were in arrears with their rent, whatever the amount, that they had not made an effort to find alternative accommodation and that there was no obligation or duty on the court a *quo* or the respondent to come to their assistance.

[38] Section 4(6) of the PIE Act provides that:

> "*4(6) If an unlawful occupier has occupied the land in question for less than six (6) months at a time when the proceedings are initiated, the court my grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women*".

[39] Section 4(7) provides that where an unlawful occupier has occupied land in question for more than six months at the time when the proceedings are initiated, the court is enjoined, in addition to the above-mentioned circumstances, also to consider whether land has been made available or can reasonably be made available by a municipality (or other organ of State or another landowner) for the relocation of the unlawful occupier.

[40] It is now generally accepted law that the PIE Act was enacted for the sole purpose of giving effect to the rights afforded under Section 26 of the Constitution of the Republic of South Africa, 1996 ('the Constitution'). Section 26 of the Constitution which entrenches the right to housing provides that:

1. Everyone has the right to have access to adequate housing;

2. The State must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of this right.

3. No one may be evicted from their house or have their home demolished without an order of Court made after considering all the relevant circumstances.

[41] There can now be no doubt that the PIE Act demonstrates how serious the legislature is in its protection of the rights contemplated in Section 26 of the Constitution. See *Ark City of Refuge v Bailing and Others* [2011] 2 All SA 195 (WEC). The appellants and their children have occupied the premises since 2006. The contention that they are not entitled to the protection of the PIE Act and the provisions of Section 26 of the Constitution, is ill conceived and misguided and falls to be dismissed. On the facts of this particular case, I am satisfied that according to their personal circumstances the appellants fall within the purview of the PIE Act and are therefore entitled to the protection afforded by the Act. It is clear from the approach by the SCA and Constitutional Court that a court seized with an eviction application is obliged to consider the availability of alternative land for the relocation of the occupier. Accordingly where information relating to these matters is not placed before the court, the court will not be in a position to consider these circumstances in determining whether the eviction was just and equitable. See *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others [*2009] All SA 410 (SCA); [2009] ZASCA 80 paras 5 – 6, The *Occupiers, Shulana Court, ll Hendon Road, Yeoville, Johannesburg v Steele* 2010 JDR 0300 (SCA) JDR 0300 p1 at p10. In *Port Elizabeth Municipality v Various Occupiers 2005(1) SA 217 (CC)* at para 32 Sacks J sets out the obligation of the court as follows: 'The obligation on the court is '*to have a regard' to the circumstances, that is, to give them due weight in making its judgment as to what is just and equitable. The court cannot fulfil its responsibilities in this respect if it does not have the requisite information at its disposal. It needs to be fully apprised of the circumstances before it can have regard to them. It follows that although it is incumbent on the interested parties to make all relevant*

information available, technical questions relating to the onus of proof should not play an unduly significant role in its inquiry….. Both the language of the section and the purpose of the statute require the court to ensure that it is fully informed before undertaking the onerous and delicate task entrusted to it. In securing the necessary information, the court would therefore be entitled to go beyond the facts established in papers before it. Indeed, when the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain, the court might be obliged to procure ways of establishing the true state of affairs, so as to enable it properly to 'have regard' to relevant circumstances'. In the Occupiers, Shulana Court, ll Hendon Road, Yeoville, Johannesburg v Steele (*supra*) Theron AJA held at para 12, that '*PIE imposed a new role on the courts in that they are required to hold the balance between illegal eviction and unlawful occupation and ensure that justice and equity prevail in relation to all concerned'*. Sacks J, in Port Elizabeth Municipality (*supra*), described this new role as '*complex and constitutionally ordained*' and one which required a court '*to go beyond its normal functions, and to engage in active judicial management*'. A number of courts, have in relation to the provisions of Section 4 of PIE, recognized the duty of the court to act proactively, as well as its powers to investigate, call for further evidence or make special protective orders. In Shorts Retreat, (*supra*) Jafta JA stated that Section 4 obliged the court to be '*innovative*' and in some instances, '*to depart from the conventional approach*'.

[42] Even though the magistrate refers to the constitutional court case of *Government of the Republic of South Africa and Others v Grootboom and Others 2001(1) SA 46 CC* he clearly did not have proper regard to the principles laid down in that matter and in particular the finding of the court '*that a housing programme could only be reasonable if it provided emergency shelter to people in desperate need who, for whatever reason, faced the prospect of homelessness*'. See paras 52, 63 and 49.

[43] In dealing with matters of this nature, there can be no doubt that a special sense of constitutionalism is required on the part of the presiding officer in the sense that his / her primary function is to give effect to the constitutional rights of the affected individuals as embodied in the Constitution and the principles as hereinbefore set out. To illustrate the magistrates inability to appreciate his role, I

refer to the following remarks made by him with reference to the application by the appellants where he says that the '*only thing that he is trying to place before this court is to play the emotion card to say: I will be out in the street if the court do not grant me the opportunity to come to the court to give you all this information, yet again and another might come and say it is not just and equitable to evict you in these circumstances…*' *All the documents or the photos attached here (sic) to how absolutely shocking state the property is in. I think it was raised in the opposing affidavit. If not, I might have thought about it. If it was in such a sorry state, I cannot see how the applicant can stay in the property and why he even want to stay in the property, because what he tried to portray here in, court is that it is not liveable*."

[44] The approach adopted by the magistrate is clearly incorrect and amounts to a misdirection. The magistrate's remarks were, in the context of this matter, completely insensitive and are a further illustration that the magistrate had lost sight of the fact that the appellants and their family had nowhere else to go and that they were accordingly forced to live in the property irrespective of the condition in which it was. He further failed to have regard to the words of Van der Westhuizen J in *City of Johannesburg M M v Blue Moonlight Properties 2012(2) SA 104 CC,* where the learned judge stated at p118 with reference to the Port Elizabeth Municipality case (*supra*), that courts have recognized the concept of '*ubuntu*' as underlying the Constitution and PIE and that it is relevant to their interpretation. Accordingly the magistrate in dealing with the matter was required to apply the concept of '*ubuntu*' which '*infuse elements of grace and compassion into the formal structures of the law*'. As was stated in the Port Elizabeth Municipality case, a court is called upon to balance competing interest in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The spirit of '*ubuntu*' which is part of the deep culture heritage of the majority of the population suffuses the whole constitutional order and combines individual rights with a communitarian philosophy and espouses the need of human interdependence, respect and concern.

[45] Even though criticism has been levelled about the detail provided by the appellants as to why it would not be just and equitable to evict them, I am on the whole satisfied that based on the information that was placed before the court about

their personal circumstances that they entitled to the protection afforded to them in terms of the law and the Constitution.

[46] In any event the unreasonable approach adopted by the magistrate in refusing to hear the evidence of the municipal manager regarding alternative accommodation, and or to call for any other relevant evidence, as he was required to do in terms of the law to assist him in the '*just and equitable*' enquiry, in my view amounts to a further misdirection.

[47] I am accordingly satisfied that the magistrate erred and misdirected himself when he refused to grant the appellants condonation and when he dismissed the application for rescission of the order made on 7 February 2013 with costs.

[48] Since the effect of the magistrate's refusal to grant the appellant's condonation resulted in the eviction application not being considered, it is necessary that the matter be remitted back to the magistrate to consider the application for rescission afresh. Considering that the magistrate who dealt with the matter on 21 November 2013 will not be able to hear such an application objectively, the *de novo* hearing of the application for the rescission on the merits of the eviction application should be heard by a different magistrate.

Costs

[49] In the normal course costs are not granted in appeals of this nature. However, since it is clear that the appellants are indigent and that they literally had to go from pillar to post to get funds to instruct their attorney to bring the application in the court a *quo* and thereafter had to find money to fund the prosecution of this appeal, I am of the view that this is an appropriate matter where I should deviate from the normal approach followed in matters of this nature, and make a cost order in favour of the successful party.

[50] In the result I make the following order:

1. The appeal is upheld with costs.

2. The order by the magistrate to refuse to grant the applicants condonation and dismissing the rescission application in respect of the order made on 7 February 2013, is set aside.

3. The order of the magistrate is replaced with the following:

    a) The applicants are granted condonation for the late bringing of the application for the rescission of the order made by the magistrate at Goodwood on 7 February 2013.

    b) The matter is remitted back to the magistrate at Goodwood for hearing afresh on the merits of the rescission application before a magistrate other than the magistrate who refused to grant the applicants condonation on such date to be determined by the Clerk of the Court.

    c) The parties are hereby granted leave to supplement their papers.

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RILEY, AJ

SAMELA, J: I agree and it is so ordered.

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SAMELA, J