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

[REPORTABLE]

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

Case No. 4375/2017

In the matter between:

JOHNNY ANDREW ISAACS	First Applicant
MAGDALENE ELIZABETH WILLIAMS	Second Applicant
JANÉ WILLIAMS	Third Applicant
JUANITA WILLIAMS	Fourth Applicant
JODENE WILLIAMS	Fifth Applicant
ELFRED GEORGE	Sixth Applicant
FRANK WAGNER	Seventh Applicant

and

THE CITY OF CAPE TOWN	First Respondent
THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Second Respondent

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JUDGMENT DELIVERED ON 22 SEPTEMBER 2017

MASUKU AJ

INTRODUCTION

1. This is an application in terms of Rule 42 of the Uniform Rules of Court alternatively the common law, for an order that the eviction and demolition orders granted by Weinkove AJ dated on 22 March 2017 be rescinded. The orders are as follows:

> "1. The First to Eighth Respondents and all those holding title under them shall vacate the premises situated at the Blaauwberg Nature Reserve ("the reserve") at Eerste Steen Resort, Otto Du Plessis Drive, Cape Town, ("the property") comprising the erven listed on "A" hereto, on or before 31 March 2017.
>
> 2. Failing the aforesaid, the Sheriff of the Honourable Court is authorised and directed, with the assistance of the South African Police Service if necessary, to evict the First to Fifth Respondents and all those holding title under them from the Property within 2 (two) calendar days of the aforesaid date;
>
> 3. The Applicant is authorised to demolish the building structures on the Property within 2 (two) calendar days, or so soon thereafter as Applicant is able to do so, after the First to Eighth Respondents and all those holding title under them have vacated or been evicted from the Property (whichever is the case)"

2. The applicants were the respondents in the application for their eviction from the reserve brought on an urgent basis by the City in terms of the section 5 of the

Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act"). Faced with the terrifying reality of their eviction, the applicants launched this application, also on an urgent basis, to suspend the execution of the eviction and demolition orders. The relief sought in this application is in two parts. In terms of Part A, the applicants sought an order suspending the operation and execution of the orders granted by Weinkove AJ pending the finalisation of this application for the rescission of those orders in terms of Part B. Goliath DJP granted an order by agreement between the parties on 29 March 2017 suspending the execution of the eviction and demolition orders. This is an application for relief in Part B of the Notice of Motion.

3. At the hearing of this matter, Mr Papier together with Ms Adriaanse appeared for the applicants and Ms Titus appeared for the first respondent, (hereinafter the "City"). There was no appearance for the second respondent ("the Department"). That said, an affidavit by Nina Navarro Brito, an acting director responsible for the land tenure branch at the Department of Rural Development and Land Reform was filed on behalf of the Department. The significance of this affidavit will become clear later in this judgment, save to point out that the allegations made therein demonstrate a profound difference of opinion between the City and the Department on the legislation that should be relied on for the removal of the applicants. The difference of opinion over the applicable legislation for the removal of the applicants arose from consultative meetings that took place between the City and the Department and as a consequence of the Department's strongly held view that the removal of the applicants was more appropriately a matter to be dealt with in terms of the Extension of Security of Tenure Act 62 of 1997 ("ESTA"). I revert back to the significance of these consultative meetings.

4. In my view, prior to the City pursuing the eviction and demolition application as vigorously as it did, a concerted effort should have been made, within the parameters of the principle of cooperative government between the City and the Department, to resolve the matter in favour of a removal process that affirms the dignity of the applicants. This means that the City and the Department had an opportunity to address the removal of the applicants in a manner consonant with the underlying values of the Constitution. That failed when the City launched, under PIE, an application for the removal of the applicants on an urgent basis.

5. This rescission application therefore became necessary because the City, on an urgent basis in terms of section 5 of PIE, had obtained an eviction and demolition order in the absence of the applicants and with it, could evict the applicants and demolish their premises.

BACKGROUND TO THE RESCISSION APPLICATION

6. The applicants, on justified urgency and fearing the prospect of their imminent removal from the property, brought this application in terms of Rule 42(1)(b) of the Uniform Rules of Court, alternatively, the common law for an order rescinding the eviction orders granted by the court. Rule 42(1)(a) provides that the Court may, 'in addition to any other power it may have, *mero moto* or upon 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 arguments before me centred on whether the facts upon which the applicants rely give rise to the type of error envisaged in the

rules, and if so, whether the order was erroneously sought or erroneously granted on the basis of the error.

7. The applicants contend that they are occupiers in terms the Extension of Security of Tenure Act 62 of 1997 ("ESTA") and their removal is unlawful because it was sought and granted in terms of PIE. In the alternative, and in the event that PIE is held to be applicable, the applicants contend that the eviction and demolition orders were granted in error on the basis that the court, granting the eviction and demolition order, was not appraised of the facts necessary for the court to determine whether an eviction order is a just and equitable order.

THE EVICTION APPLICATION UNDER PIE

8. On 8 March 2017, the City launched eviction proceedings in terms of section 5 of PIE for the eviction of the applicants from the reserve they occupied. Section 5 of PIE regulates the launching of eviction proceedings on an urgent basis for a final order of eviction. It provides that such final order may be granted if the Court is satisfied that (i) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land; (ii) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted and (iii) there is no other effective remedy available. Even where all these facts are established, the court remains with a discretionary power to refuse an order of eviction. Before granting the urgent order of eviction, the court must give written and effective notice of the intention of the owner

or person in charge to obtain an order evicting an unlawful occupier and the municipality in whose area of jurisdiction the land is situated.[1]

9. Contemplating the urgent eviction and demolition proceedings, the City approached the court on an *ex parte* basis for the aforementioned notice in terms of section 5(3) of PIE on Monday, 13 March 2017. The notice complied with the requirements in section 5(3) and the grounds of urgency set out therein are the following:

9.1. The applicants and all those holding title under them are unlawful occupants of the Property;

9.2. The building structures on the Property have been declared unfit for human habitation and present a real and imminent danger of substantial injury and damage to them, as well as other persons and adjacent property, should they not vacate the Property urgently;

9.3. The continued unlawful occupation of the Property by them poses a significant risk to the staff, visitors and wildlife at the reserve, as well as to the internationally recognised conservation and archaeological projects at the reserve. There is accordingly a further real and imminent danger of substantial injury and damage;

[1] Section 5(3) of PIE provides that a notice of proceedings contemplated in subsection (2) must
(a) State that proceedings will be instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;
(b) Indicate on what date and at what time the court will hear the proceedings;
(c) Set out the grounds on for the proposed eviction; and
(d) State that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.

10. The prescribed notice and the application for the urgent eviction of the applicants would be affixed to the entrance to the Property and at the 'homestead' on the reserve, by the Sheriff of this Honourable Court, with the assistance of the South African Police Service if necessary at the Property on or before 14 March 2017.

11. Meer J granted the required service order on 13 March 2017 in terms of section 5(3) of PIE. In terms of that order, the applicants would deliver to the City a notice to oppose, if they so wished, on Monday, 20 March 2017 and thereafter file an answering affidavit on or before Monday, 3 April 2017. The matter, if opposed, would be heard on Wednesday, 19 April 2017; if unopposed, on 22 March 2017.

12. The applicants did not file any notice to oppose the application. They also failed to file any answering affidavit to the application. The application was accordingly unopposed when it served before Weinkove AJ on 22 March 2017 who granted the order evicting the applicants and demolishing the house occupied by them. In terms of that order, the applicants had seven days to move from the Property failing which the eviction order would be implemented. Before the expiry of the seven days, on 30 March 2017, the applicants filed this application on an urgent basis for an order suspending the operation of the eviction and demolition pending an application to rescind the said orders.

APPLICATION FOR RESCISSION

13. The main deponent to the founding affidavit filed in support of the application for the rescission of the eviction and demolition orders is John Andrew Isaacs, ("Mr Isaacs") a resident on the property for a long period of time - according to him – for a period of more than 30 years. The founding affidavit is supported by the confirmatory affidavits of only the second, third and fourth applicants. The applicants contend that they are "Afrikaans speaking indigent litigants' who have resided on the property for more than 30 years. Their knowledge of English is limited. Ms Brito on behalf of the Department confirms this language aspect and states in paragraph 5 of her affidavit as follows:

> "I can thus confirm that I attended the meeting of 1 February 2017, the minutes of which is attached to the founding affidavit as annexure "J13". The minutes of the meeting is in English, but can confirm that the language that was spoken to the Applicants who were present at the meeting (First to the Fourth Applicants) was Afrikaans as it was clear that their understanding of English was limited. In fact, I can confirm that the officials from the City of Cape Town spoke English, and that I would translate in Afrikaans to the Applicants. Similarly, their (the City's) legal representative, Adv Zeynub Titus would explain to them in Afrikaans what has been discussed in English."

14. In paragraph 21 and 22 of the founding affidavit, Mr Isaacs deals with the prejudice that the applicants suffered as a result of the service order and application being in English only. He states that:

> "The Meer order itself is in English and not in our mother-tongue, Afrikaans. The Sheriff did not explain the contents of the order to us. We have been

advised and verily believe that in terms of the order, notice of opposition should have been filed on the 20th March 2017.

We have been advised, further, and verily believe that the Meer order should have been in the Afrikaans language that we understand and directions should have also been given as to the language of the Meer order in terms of section 5(1) of PIE"

15. Mr Isaacs concludes that on the grounds that the Meer J order was delivered to them only in English and not in Afrikaans, the execution of the Weinkove AJ order should be suspended and the Meer J order rescinded. The order in English should have been accompanied by Afrikaans translation.

16. Once more, the requirements for a rescission of an order must be present before such an order is granted. With respect to the Meer J order, the applicants must show that it was granted in error. The applicants contend it was. They say so because the City failed to provide the court with accurate information relating to the language of the applicants, the result of which the court failed to appreciate the necessity of issuing an order directing that the notice of eviction proceedings in terms of section 5(3) of PIE be issued in Afrikaans. The notice was therefore not effective as required in section 5(2) of PIE. If there was no compliance with section 5(2) of PIE in that the notice sought and authorised by the court was issued in a language that the applicants are not conversant with, then it lacked the material facts necessary for it to exercise its judicial powers in terms of section 5(2) of PIE to issue an effective notice. It would follow that the notice was sought on the basis of incomplete or inaccurate information in that when the City

sought an order in terms of section 5(2) of PIE, it did not inform Meer J that the occupiers were Afrikaans speaking occupiers. Had the City done so, the court would, no doubt, have issued an order directing that the notice in English be issued also in Afrikaans. In my view, the application for rescission must succeed on this basis.

17. A failure to point out the language of the occupiers to the court considering a section 5(2) notice is a fatal omission and strips the eviction process of the attributes of fairness and lawfulness. Such an omission not only undermines the right of the occupiers to access the court as guaranteed in section 22 of the Constitution, but has the real potential of violating the right of the occupiers to access housing in section 26 of the Constitution. When the City seeks directions from the Court on how to serve an eviction notice, it is enjoined to inform the court about the language of the occupiers, so that a court is placed in a position to fashion an appropriate order that is just and equitable having particular regard to the language and cultural context relevant to the applicants. A service order in terms of section 5(2) of PIE is an indispensable requirement for a fair and lawful eviction process.[2] The notice is unfair and unlawful if it is not in a language of the occupiers.

18. Had Meer J been informed that the occupiers for whom the notice was being sought, were largely Afrikaans speaking, she would not have ordered the notice to be issued only in English. In my view, the Meer J order should be rescinded on the basis that it was obtained on incorrect information relating to the language of the occupiers. It was granted erroneously because it was on the basis that the occupiers could read, speak and understand the English language, when that was not the case.

[2] Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others 2000 (2) SA 67 (C) at 16

19. The consequence of the rescission of the Meer J order is that the orders of eviction granted by Weinkove AJ must fall by rescission. A lawful and appropriate notice that complies with the requirements of section 5(2) is a jurisdictional requirement for a lawful eviction. Since a section 5(2) notice that does not comply with the language requirement for lawful eviction, it follows that an eviction order, on the basis of an error, cannot stand.

20. This is however not the only basis on which the eviction and demolition orders should be rescinded. According to the applicants, a rescission order should also be granted because the eviction and demolition orders were obtained by the respondents relying upon incorrect legislation. They contend that they are ESTA occupiers and accordingly may only be removed from the property in accordance with the procedures set out in ESTA. In granting the eviction orders on the basis of PIE against ESTA occupants, it is competent for this court to rescind the orders on the basis that such orders were granted erroneously.

DID THE APPLICANTS HAVE THE CONSENT OF THE OWNERS TO RESIDE ON THE PROPERTY?

21. The applicants contend that they are indigent people who have lived on the property for most of their lives and they do so with the consent of previous owners. The first and second applicants have lived on the Property for more than 30 years and they consider the property to be their permanent place of residence. On the issue of consent, the applicants contend that they moved on the farm in the early 1980s when the farm was

still owned by a Mr Andries Van der Spuy. In the early 1990s Garden Cities bought the Property from Van der Spuy and gave the first and second applicants consent to live on the Property. That consent was specifically given to them by someone they recall his name as being "Gary", who was allegedly the farm manager at the time. These facts had been conveyed to the City during its meetings with the Department and the applicants prior to the eviction application, and yet did not find their way into the founding affidavit filed on behalf of the City.

22. There was some debate about how the Department became involved in these consultations with City and the occupiers for an amicable solution to the occupation of the property. That debate, in my view, is immaterial - for whoever attracted the Department's involvement in this matter showed commendable foresight and wisdom. It is regrettable that the consultations were brought to an unhappy halt with the City resorting to an urgent application for the eviction of the applicants in terms of PIE. Consultations between the relevant officials of the Department and the City to reach an amicable solution that affirms, on the one hand, the constitutional rights of vulnerable occupiers on agricultural land, and, on the other, enables the state to pursue its environmental and land policies in accordance with constitutional obligations imposed on them, should be encouraged. Organs of state should ensure that the eviction of vulnerable and indigent people from land is done with an abiding reverence to the constitutional values of human dignity, equality and freedom. This means that before an eviction application is pursued by an organ of state, there should be consultations, to the extent possible, between the relevant organs of state for an amicable solution. The consultations must be carried out in good faith to avoid any adversarial system of evicting vulnerable people from land or property. This is not an onerous interposition of

a procedural requirement. It is a procedural necessity. If parties commit to a consultation process, in good faith, it widens the prospect of parties reaching an amicable solution to a difficult issue.

23. In this case, as far as the Department is concerned, the eviction process was resorted to with haste and impatience by the City without due regard to the assistance offered by it to ensure that the removal of the applicants was lawfully done. In paragraph 4 of Ms Brito's affidavit filed on behalf of the Department reveals that the route of meaningfully consulting the applicants to find a mutually agreeable solution involving their removal from the property had not reached a point where an urgent application for their eviction was justified. She states:

> "The Department's interest in matters such as the present are to ensure that the rights of vulnerable occupiers such as the Applicants are protected, inasmuch as the ESTA Act provides for the protection of ESTA occupiers. My colleague, Themba Maluleke and I then engaged with the current owner of the farm (the City of Cape Town) in order to secure the rights of the occupiers, in particular their security of tenure which is guaranteed by ESTA.

24. In paragraph 6 of Ms Brito's affidavit, she expresses her surprise that the eviction of the applicants had been brought in terms of the provisions of PIE and not the ESTA. In a very strong tone, she says on behalf of the Department that "*I am quite surprised that the City of Cape Town brought the eviction application in terms of the Prevention of Illegal Eviction from and Occupation of Land Act 19 of 1998 ("PIE") as I made it*

clear to them at the meeting that such an application would be illegal, and in this regards I quote from the minutes hereunder:

> *"NB commented that the legislation requires that the residents be provided with better accommodation than they have at present. She advised that there are currently 8 family members staying on this property, some for more than 30 years and that two of the children of JAI were born on the property. She further indicated that if a person is resident for more than 10 years on the property, you become a tenant. She advised that the Department informed the residents not to move as it infringes on their rights of tenure. NB also indicated that the Departments wants to visit the site of the homestead and to apply for legal support for the residents if they refuse to move to the Wolverivier units as they will regard the eviction to be brought by the City as an illegal eviction. NB reiterated that the family has been on the land for over 30 years and that they will prove this. NB advised that she wants to find a solution and by doing so the Department will consider the following factors:*
> - *Is the City moving the residents to better socio-economic conditions;*
> - *The proximity of schools;*
> - *The use of wood as a socio-economic benefit for the residents;*
> - *The fact that the wild animals have been placed with no protection or fence;*
> - *That the parties could have engaged prior to the introduction of the wild animals.*
>
> *NB advised that the Department will compile a more extensive report on the family and will legally support the family if the litigation proceeds."*

25. It appears that the eviction proceedings were proceeded with before the Department could provide its extensive report on the occupiers, or obtain answers to the important questions set out in the minute. The main basis for the rescission application is that the eviction order was granted erroneously in that it was granted on the basis that PIE was applicable when in fact ESTA was the relevant statute in terms of which the applicants could lawfully be removed from the property. If indeed ESTA is the appropriate legislation, the question is whether this is the kind of error that justifies a rescission order. In other words, if the City was wrong to rely on PIE for the eviction of the

occupiers, is it competent for this court to rescind the eviction on that basis? In my view, it is competent for this court to rescind an order erroneously granted.

26. Whether or not an order of court granted in terms of incorrect legislation may be rescinded on the basis that the order was erroneously granted depends on whether the court granting that order did so on the basis of inaccurate or incomplete facts. Had the court known the true facts relating to the nature of the occupied land and the occupiers' claim to occupation of the land; the Department's strongly held view that ESTA was applicable; it would have considered whether the matter had correctly been brought under the provisions of PIE.

27. In the eviction application brought by the City for the eviction of the occupiers, there is no reference made to the attitude of the Department regarding the application of ESTA to the matter. The City avoided setting the content of its consultations with the Department and the occupiers, with the consequence that the Court was deprived of the opportunity to explore whether the application for the eviction of the applicants had been brought in terms of the correct legislation. The minutes of the consultative meeting with the Department would have given the court a view into the various arguments of the parties on the appropriate legislation for the eviction of the applicants. Had the minutes of the consultative meeting with the Department been attached to the eviction application, the court would have been placed in a position to assess the facts within the context of the appropriate legislation to conclude whether the PIE was appropriate. In the application for the eviction of the applicants, the City did not pertinently point out four critical factors that could have alerted the court to determine whether PIE or ESTA is the applicable legislation.

28. The first is that the occupied land is agricultural land. This is a material fact that should have been disclosed to the court, for ESTA applies to agricultural land. The second material fact is that during consultations with the Department and the occupiers, the City knew that the occupiers contended that they had the consent of previous owners to occupy and live on the agricultural land. Thirdly, the minutes of deliberations and consultations between the City, the Department and the occupiers should have been disclosed to the court so that it could appreciate the nature of engagements undertaken prior to the court application. The fourth material fact is that the City failed to disclose the Department's view that ESTA was the applicable legislation and not PIE. The failure of the City to give the court all the relevant information relating to the land, the language of the occupiers and the claim to occupation of the land, the nature of the consultations that the City had undertaken with the Department resulted in the court granting the eviction and demolition order in terms of PIE.

29. On the facts disclosed by the applicants in this application, together with the firm view of the Department, it is necessary for this court to now determine whether or not ESTA is the appropriate legislation and if indeed it is, whether it is competent for this court to order a rescission of the order on that basis. I must, in doing so, studiously avoid acting as an appeal court disguised as a rescission court.

IS ESTA THE APPROPRIATE LEGISLATION FOR THE REMOVAL OF THE OCCUPIERS?

30. Since the property occupied by applicants is agricultural land, and since the applicants allege that their incomes do not exceed the prescribed amount of R5000.00 per month, the applicability of ESTA, and thus this court's jurisdiction, turned primarily on whether the applicants had the consent of the owners at the relevant time to reside on the land. The applicants contended that they had stated they had the consent of the previous owners. They also stated that their respective income did not exceed the prescribed amount of R5000.00. The City did not seriously controvert this evidence in my view. In essence, the City's main claim was that the applicants had failed to meet the requirements for a rescission order - whether in terms of Rule 42 or the common law. In this regard, the City argued that the applicants had failed to show that, on the facts and evidence presented before Weinkove AJ, the order for their eviction had been erroneously granted under PIE. As far as the City was concerned, Weinkove AJ had everything that was necessary and relevant to grant an order of eviction and demolition.

31. However, the City's approach misconstrues the primary basis on which this rescission application rested. There is no doubt in my view that the City may well have satisfied the requirement of PIE if that were the applicable legislation. The issue is however not whether the court erred in granting the eviction and demolition order under PIE. The issue is a different one. It is whether the court erred, when it granted an order of eviction under PIE, in respect of a matter falling within ESTA. The issue of the applicability of ESTA, in particular, whether the applicants had established the consent of the owners was the main issue for argument.

32. The constitutional importance of ESTA is now well expressed in our law and therefore trite.[3] An eviction – no matter how justified – must be obtained lawfully and not arbitrarily. An ESTA occupier therefore cannot lawfully be evicted in terms of PIE. While both pieces of legislation have their objective to regulate the manner of evicting unlawful occupiers, each has special mandatory features that must be complied with. ESTA provides statutory protection against eviction of occupiers of agricultural land.[4] An occupier as defined in section 1 of ESTA is a "person residing on land that belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so…" Consent is defined as express or tacit consent of the owner or person in charge of the land in question. In terms of section 3(1) of ESTA consent to an occupier to reside on or use land shall only be terminated in accordance with the provisions of section 8. That section refers to the termination of an occupier's 'right of residence' on the land in question. Plainly that is the right to occupy that arises from the express or tacit consent of the owner of the land. In most cases, consent will arise from some agreement between the owner and occupiers, but an agreement, in a contractual sense is not a requirement. The SCA[5] clarified the position in the following terms:

> "The Act (meaning ESTA) does not describe an occupier as a person occupying land in terms of an agreement or contract, but as a person occupying with the consent of the owner. One can readily imagine circumstances in which the rural areas of South Africa people may come to

[3] Molusi and Others v Voges NO and OTHERS 2016 (3) SA 370 (CC) at para 1

[4] Sterklewies (Pty) Ltd t/a Harrismith Feedlot v Msimanga and Others 2012 (5) SA 392 (SCA) ([2012] ZASCA 77

[5] Sterklewies (Pty) Ltd; ibid para 3

reside on the land of another and the owner, for one or other reason, takes no steps to prevent them from doing so or to evict them. That situation will ordinarily mean that they are occupying with the tacit consent of the owner and will be occupiers for the purpose of the Act.

33. The SCA discarded a restrictive approach to determining the issue of consent and conclude that whatever "*its origins it is the right of residence flowing from the consent that must be terminated in terms of section 8 before an eviction order can be obtained."* In the present case, the applicants' consent was not terminated in terms of section 8 of ESTA because the City utilised PIE as a source of authority for the eviction of the applicants from the land. If ESTA is applicable, it follows that the eviction under PIE was unlawful since the City could not comply under PIE with the requirements of section 8 of ESTA. The termination of a right of residence must be lawful and just and equitable having regard to the specific facts of the case.

34. The land from which the applicants were evicted in terms of PIE is agricultural land. It is referred by the City as a farm situated in a nature reserve area. At the hearing of this application, Ms Titus for the City confirmed, under instructions from City officials, that the property is agricultural land. Section 2 of ESTA provides the following:

> "Subject to the provisions of section 4, this Act shall apply to all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships, but including-

(a) any land within such a township which had been designated for agricultural purposes in terms of any law; and

(b) any land within such a township which has been established, approved, proclaimed or otherwise recognised after 4 January 1997, in respect only of a person who was an occupier immediately prior to such establishment, approval, proclamation or recognition.

35. The City does not submit that the land falls within an established township or is encircled by a township or townships. What the City appears to submit though is that an occupier on agricultural land may be evicted by reliance on PIE since PIE applies to all land. The City further contends that in order to fall within the definition of occupier under ESTA, the person must have the consent or another right in law to occupy the property. In other words, the fact that the land concerned is agricultural land is not decisive for the application of ESTA according to the City. What is decisive is that the occupier must occupy the land with the consent of the owner. Absent that consent, so the argument goes, an occupier on agricultural land may be evicted, as an unlawful occupier, by reliance on PIE.

THE CONSENT TO OCCUPY THE PROPERTY

36. According to the rescission application, the applicants claim to have been in occupation of this agricultural land for a period of over 30 years, having occupied the land since 1987. Mr Isaacs specifically claims that, "the previous owner of the Farm knew about our presence here. There can be no dispute about that. My wife and I moved into the

farm in the early 1980's when the farm was still owned by Mr Andries Van der Spuy. In the early 1990's when Garden Cities acquired ownership of the Farm, consent in respect of our occupation was confirmed during 1994 by Gary who was at that stage in charge of the Farm. This fact was communicated to the First Respondent's legal team in a meeting in a meeting on 1 February 2017."

37. The Department appears to confirm the applicants' claim of consent in the affidavit of Brito where she states that:

> "3. I have been involved in the matter of the Applicants since January 2017. The Department of Rural Development and Land Reform ("the Department") got involved in this matter as we believed that the Applicants are occupiers in terms of the Extension of Security of Tenure Act 62 of 1997 ("ESTA"). In this regard, it should be noted that they are in occupation of land that is designated for agricultural purposes for more than 30 years. They do not earn more than R5000 per month and they do appear to have had the consent from the previous owners to reside on the land."

38. In paragraph 4, Brito continues to state that:

> "The Department's interest in matter such as the present are to ensure that the rights of vulnerable occupiers such as the Applicants are protected, inasmuch as the ESTA Act provides for the protection of ESTA occupiers…"

39. The courts have established that it suffices that persons claiming the protection of ESTA show that the owner of the land has consented to their being in occupation, irrespective of whether that occupation flows from any agreement or has its source elsewhere. The Supreme Court of Appeal has held that whatever its origins it is the right of residence flowing from that consent that must be terminated in terms of section 8 before an eviction order can be obtained.

40. Without setting out the precise terms of the consent claimed, the City dealt with the issue of consent. In a supporting affidavit of Francois Renier Smith ("Mr Smith") consent is dealt with in the following manner:

> "4. The 'homestead' on which the First Respondent and his family reside is situated on Portion 10
>
> 5. I have been in the employ of Garden Cities for approximately 21 years. I cannot recall that either Garden Cities, or myself personally, had at any stage prior to the transfer given consent to the First Respondent or any other person to reside on the homestead or to conduct any economic activity on the property, including cutting trees/wood and selling same. The legal representatives for the City of Cape Town have informed me that the First Respondent has said that his surname is "Isaacs" and not "Williams". After diligent search, I could not find that Garden Cities has any record of any formal documentation of the First Respondent, so we cannot comment on the issue of his surname. All the information herein relates to the First Respondent whether he identifies himself by the surname "Isaacs" or "Williams".

6. I must mention that until approximately 2004, Garden Cities had granted permission in writing to small bush cutting operations, typically families, to cut wood on various vacant erven owned by Garden Cities, including Portion 10. I cannot recall that such written permission was at any stage given to the First Respondent or any other occupant on the homestead.

41. The affidavit of Mr Smith, in my view, is not evidence that the occupiers did not have the consent to reside on the property. He cannot recall any formal consent being given but does not unequivocally state they the occupiers were not given any consent. In conclusion, Mr Smith states;

"10. At the time that we entered into negotiations with the City to acquire Portion 10, we informed the City of the unlawful occupation of the First Respondent and his family at the homestead. The City acknowledged that the residents were in occupation of the homestead and took the position that it would continue our attempts to get the occupants to vacate the property amicably and take the necessary steps to deal with the matter."

42. In this application, the City further deals with the issue of consent by relying on the affidavit of Ms Sarah Van der Spuy, ("Ms Van der Spuy") the daughter of Mr Andries Christoffel van der Spuy. The evidence of Ms Van der Spuy deals with the applicants' claim that they obtained the consent of Ms Van der Spuy's father. Her evidence is that the family sold their farm in 1965. They vacated the farm. According to the City, the affidavit of Ms Van der Spuy is evidence that the applicants' version that consent was

obtained from Mr Andries Christoffel Van de Spuy should not be believed. The affidavit of Ms Van der Spuy was not present when the eviction order was sought and obtained by the City against the City. It has been filed in this application to oppose a rescission application.

43. In my view, the evidence relied on by the City to rebut the allegations of consent to occupy the land fails to meet the required standard of proof determinative of that issue. The applicants state that they obtained the consent of someone called "Gary" who they recall to have been an employee of the Garden Cities with the authority to grant such consent. The City further relies on the affidavit deposed to by John Mathews, the CEO of Garden Cities, and the successor-in-title to Mr Van der Spuy. What is significant about the affidavit of Mr Mathews is the following:

> "3. I confirm that from the employee records, no individuals by the name of "Gary" has been employed by Garden Cities in a position of authority or to make decisions on behalf of Garden Cities over any property owned by Garden Cities during 1990 or anytime thereafter. Nor has any individual by the name of "Gary" had control over any property owned by Garden Cities during 1990 or anytime thereafter.
>
> 4. I must mention that prior to the sale of the property in question to the City of Cape Town, Garden Cities had on several occasions engaged with the occupants, in particular "Johnny" as we know him, that is Mr Isaacs the First Respondent. Garden Cities made every attempt to persuade him and his family to vacate the property which they persistently refused to do. Garden Cities did

not take legal steps to evict the occupants from the property only because it had not decided to develop the land yet."

44. In my view, the issue of consent is a matter for the trial court to determine should the matter be proceeded with in terms of ESTA. There is a genuine dispute of fact as to whether the applicants occupied the land with the consent of the landowners that cannot be resolved on the papers as they stand. What is clear in my view is that there is at least a prima facie case of consent to occupy the land having been given to the applicants. Accordingly, the court faced with an application for eviction under ESTA would be in a position to make the right determination taking into account the evidence in totality including oral evidence that I believe is necessary to determine the question of consent. As stated above, prima facie, there was consent given to the applicants to occupy the land taking into account the period of occupation, and the attitude of Garden Cities when it became the landowner and the City's awareness of the applicants' occupation at the time of acquiring the land.

45. The City does not – as the new owner – claim to have withdrawn or taken steps to withdraw any consent allegedly given by the previous owners. It is entitled to do so as the owner of the land under ESTA. In other words, it is open to the City to terminate the consent allegedly granted prior to it being the owner of the land. In my view, ESTA is the applicable legislation on the basis that it is the legislation that was specifically designed to regulate the removal or plight of tenants on agricultural or rural land. The requirement of consent is relevant and important when the owner of that land seeks to evict the occupier of that land.

46. The principle of consent in ESTA is wide enough to include the consent alleged by the applicants in this case, for example even if that consent was orally given. Section 3(3) of ESTA provides the following:

> "For purposes of this Act, consent to a person to reside on land shall be effective regardless of whether the occupier, owner or person in charge has to obtain some other official authority required by law for such residence."

47. For purposes of ESTA it is irrelevant that there is no official authority required by law to claim consent to reside on land. Section 3(4) of ESTA provides that:

> "For the purpose of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved."

48. It is not disputable that the applicants have been resident on the land for more than one year continuously and openly. They say so and there is nothing in the papers of the City to controvert their assertion.

49. Section 3(5) of ESTA provides that:

> "For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of three years shall be deemed to have done so with the knowledge of the owner or person in charge."

50. The evidence is that the applicants have continuously and openly resided on the land for a period of three years even if one were to discard the applicants' claim to have occupied the property from the 1980's. The presumption that the occupation was with the knowledge of the owner or person in charge kicks in.

51. Section 3(4) and 3(5) of ESTA is however not applicable to any land held by or registered in the name of the State or an institution or functionary exercising powers on behalf of the State. There was no evidence that the land is registered in the name of the City and accordingly exempted from the application of ESTA. In any event, the consent alleged arose during the time when the land belonged to either Van de Spuy or Garden City. It would be a subversion of the provisions of ESTA if consent to occupy land obtained during a time when registration of the property was in the name of a private party could be lost as soon as that land is registered in the name of an organ of state. The consent asserted therefore is not from the City but previous owners, none of who fall within section 3(6) of ESTA.

52. In my view, the City was incorrect to approach the eviction of occupiers of this agricultural land on the basis of PIE. The City should have heeded the advice of the Department and sought the eviction of the occupiers under the provisions of ESTA.

THE POWER OF THE COURT TO ORDER RESCISSION OF EVICTION AND DEMOLITION ORDER

53. The eviction of occupiers on agricultural land should be pursued in terms of ESTA particularly having regards to the purpose of that legislation.[6] In my view, had the matter been presented to the court under ESTA, the court considering that application would have been able to resolve the issue of whether ESTA was applicable. The court would have been able to resolve the dispute involving whether the applicants had the consent of previous owners to reside on the property. Evicting ESTA occupiers in terms of PIE deprives the occupants of numerous procedural advantages that are attached to the eviction process under ESTA. Moreover, evicting the applicants from agricultural land by default, makes it impossible for the court to make a just and equitable order in that it cannot perform its special duties as set out in numerous cases of the Constitutional Court, more particularly the recent judgment of Mojapelo AJ.

54. A careful analysis of the ESTA provisions on the eviction process has been done by a number of courts. Having regards to ESTA, the process of eviction would be as follows;

> 'If the respondents are occupiers as defined in ESTA, their eviction would depend on the following:
>
> (i) Was their right of residence lawfully terminated (s 8(1))?
>
> (ii) Was such termination just and equitable, having regard to the factors listed in s8(1) of ESTA, namely the fairness of any agreement or legal provision on which the applicant relies, the conduct of the parties giving rise to the termination, the interests of the parties, including comparative hardship, the existence of reasonable expectation of renewal, and the fairness of the procedure followed by the owner?
>
> (iii) If so, has there been compliance with the procedural prerequisites for eviction contained in s9(2)(d)?

[6] Molusi and Others v Voges NO and OTHERS 2016 (3) SA 370 (CC) para 7 "…The legislation was enacted, amongst other things, to improve the conditions of occupiers of premises on farmland and to afford them substantive protections that the common-law remedies may not afford."

(iv) If so, is eviction just and equitable, having regard to the factors listed in s 11(3), namely the period of occupation, the fairness of the terms of any agreement, whether suitable alternative accommodation is available, the reason for the eviction, and the balance of the interests of the applicant and the respondents?

(v) If eviction is just and equitable, what is the just and equitable date by which the respondents must vacate, having regard to the factors listed in s 12(2), namely the fairness of the terms of any agreement between the parties, the balance of the interests of the applicant and the respondent, and the period of occupation?

If ESTA does not apply, the issue arising under PIE would be the following

(i) Would the granting of an eviction order be just and equitable as contemplated in s 4(7), having regard to all relevant circumstances, including whether other land has been or can reasonably be made available by the City or other organ of state or land owner and including the rights and needs of the elderly, children, disabled persons and household headed by women?

(ii) If so, what is the just and equitable date by the which the respondents must vacate (s4(8)), having regard to all relevant factors, including the period of occupation (s4(9).'

55. Whether or not an eviction order may be rescinded has been answered positively. In a recent unanimous Constitutional Court decision of Mojapelo AJ, with impressive clarity has given guidance on the power of courts to order a rescission of eviction applications erroneously sought and granted. The Constitutional Court addressed the question "*whether an eviction order may be rescinded at the instance of occupiers who had purportedly consented to it*."[7] In that case, an order by agreement had been granted for the eviction of applicants who had not been in court when the said order was granted. An application for leave to appeal that decision was dismissed and so was the

[7] Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another (CCT108/16) [2017] ZACC 18 (8 June 2017)

application for the rescission of the eviction order. Of relevance to this Court is what the Constitutional Court held about the scope of the power of the court to grant an order rescinding the eviction order granted in the absence ("albeit with purported consent") of the applicants.

56. Mojapelo AJ dealt with the duties of the Court in eviction proceedings. The Court held that:

> [39] …The duties arise from the protection of the rights of residents. They are, in the circumstances, inextricably intertwined with the issue of informed consent and waiver which entails an examination into what rights the parties had and the nature of those rights.
>
> [40] The starting point is section 26(3) of the Constitution which provides that "[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances". Accordingly, courts seized with eviction matters are enjoined by the Constitution to consider all relevant circumstances.
>
> [41] The prohibition in section 26(3) is given effect to through the enactment of PIE. This Act goes further and enjoins the courts to order an eviction only "if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances" as contemplated in section 4(6) and (7) and section 6(1)."

57. Quoting from Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)[8], Mojapelo AJ reiterated that the court must take an active role in adjudicating such matters. In paragraph 48 the Court concluded as follows:

> "The court will grant an eviction order only where: (a) it has all the information about the occupiers to enable it to decide whether the eviction is just and equitable; and (b) the court is satisfied that the eviction is just an equitable having regard to the information in (a). The two requirements are inextricable, interlinked and essential. An eviction order granted in the absence of either one of these two requirements will be arbitrary.

58. Where the occupiers, as these, are not legally represented at the time of the order being considered, the Supreme Court of Appeal in Changing Tides[9] provided additional guidance:

> "Where [unlawful occupiers] are not represented, courts may consider issuing a rule nisi and causing it to be served on the occupiers (and if it is not present, the local authority), together with a suitably worded notice explaining the right to temporary emergency accommodation, how they can access such

[8] at para 36: "The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has four major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make. The Constitution and PIE require that, in addition to considering the lawfulness of the occupation the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result.

[9] City of Johannesburg v Changing Tides 74 2012 (6) SA 294 (SCA) at para 48

accommodation, and inviting them to come to court to express their views on that issue at least."

59. In overturning the order of the High Court refusing rescission, Mojapelo AJ in the Constitutional Court held the following:

> [57] Furthermore, Adams AJ accepted that the Court that had granted the eviction order did not conduct an enquiry as enjoined by the Constitution and PIE. That should have been the end of the inquiry and a sufficient factor to justify rescission.

60. The Constitutional Court found that a finding by the court that an eviction order had been granted without the court conducting an enquiry as enjoined by the Constitution and PIE justified a rescission, essentially means that this Court for similar reasons may do so.

61. In more detail, the Constitutional Court committed a significant part of the judgment to determining whether the eviction order could or should be rescinded. It is worth quoting from the judgment:

> [70] Rule 42 therefore provides an adequate basis to set aside the eviction order, in so far as it relates to the 180 absent applicants.
>
> [71] As for the appearer applicants, who were not absent for the purposes of rule 42, iustus error (just mistake) is a ground at common law in terms of which they may seek rescission of the order. The discretion of the Court in granting rescission at common law is fairly wide.
>
> [72] In Gollach & Gomperts, the Court stated:

> "It appears to me that a transactio is most closely equivalent to a consent judgment. . . . Such a judgment could be successfully attacked on the very grounds which would justify rescission of the agreement to consent to judgment. I am not aware of any reason why iustus error should not be a good ground for setting aside such a consent judgment, and therefore also an agreement of compromise, provided that such error vitiated true consent and did not merely relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise."

[73] Although the appearer applicants factually signified consent to the eviction order, their consent was not informed. It was thus not valid. The basis of granting the order against them was that they had validly consented thereto. In the absence of valid consent, there was no procedural entitlement to the eviction order. The eviction order was thus granted against them in error. The appearer applicants' lack of knowledge of their rights vitiated true consent.

[74] Once iustus error is established a judgment by consent may be set aside. It will be established where there is "good and sufficient cause", which entails the consideration of (a) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent was entered; (b) the bona fides of the application; and (c) the bona fides of the defence on the merits of the case which prima facie carries some prospect of success.

[75] The respondents contended that the applicants failed to establish "sufficient cause" for rescission of the consent order at common law; and as a result, the High Court's finding to this extent is correct. Was there "good and sufficient cause"? Firstly, regarding the reasonableness of the explanation proffered by the applicants, the circumstances under which the consent order was granted have been discussed in detail above. The crux is that the applicants were unrepresented and uninformed when they consented to the eviction order. In the circumstances, their explanation is reasonable.

[76] ….

[77] On the facts, there is therefore a good case for rescission based on iustus error. There is therefore a basis for granting rescission of the eviction order in respect of the appearer applicants at common law.

[78] Accordingly, on the basis of rule 42(1)(a) and the common law, the eviction order made purportedly by agreement between the parties falls to be rescinded.

62. It is clear from the judgment of Mojapelo AJ in the Constitutional Court that an eviction order may be rescinded where it is granted in error. It follows that this court may rescind the order of Weinkove AJ on the basis that it applied incorrect legislation by error. The SCA has also found that an order by default is by its nature not final in its effect because it is capable of being revisited.[10]

63. Had Meer J or Weinkove AJ known the facts and the evidence now set out in this rescission application, they would have addressed the issues accordingly and may well have taken the view that ESTA is the applicable legislation and refused to grant an eviction on the basis of PIE. The City simply did not set out the facts which could have enabled the court to determine the appropriate legislation for the eviction of the applicants. The facts and evidence in this rescission application are different to those presented in support of the eviction of the applicants. On the totality of facts in this application, it is clear that the City erroneously sought the eviction of the applicants in terms of PIE when ESTA was the applicable legislation.

[10] Pitelli v Everton Gardens Projects 2010 (5) SA 171 at 31F

64. Moreover, the SCA has held that where "*notice of proceedings to a party is required and judgement is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the Sheriff's return of service wrongly indicates that the relevant document has been served as required by the Rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour then judgment is given is not entitled to judgment because of an error in the proceedings*."[11] The Meer J order suffers from the defects identified by the SCA. The issuance of a notice of eviction proceedings as required by PIE or indeed ESTA, that does not comply with the language requirements of the respondents is no notice at all, for it cannot convey to the respondents the requirements of the notice. It is for this reason that the order granting the notice of eviction proceedings against the applicants should be rescinded. Had the City indicated that the applicants are Afrikaans speaking and that their English was inconsequential, Meer J would have issued an appropriate order incorporating the language requirements of Afrikaans speaking occupiers. That was not done because Meer J was not presented with those facts.

65. As held by the SCA, a court which grants judgment by default does not grant the judgment on the basis that the defendant does not have a defence: "*it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to*

[11] Lodhi 2 Properties Investments CC and Another v Bondev Developments Pty Ltd 2007 (6) SA 87 (SCA) at para 24

defend, is not defending the matter and the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence to the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment."[12]

66. Applying the position above to the present case, the application for the rescission of the orders of eviction and demolition must succeed.

67. In the result, I make the following orders.

1. The order granted on 13 March 2017 by Meer J is hereby rescinded;

2. The order granted on 22 March 2017 by Weinkove AJ is hereby rescinded; and

3. The City is ordered to pay the costs of the application including the costs of two counsel.

Applicants' Attorneys:	*Rahman Inc c/o Robert Charles Attorneys*
Applicants' Counsel:	*Gregory Papier and Keturah Adriaanse*
Respondents' Attorneys:	*Adriaans Attorneys*
First Respondent's Counsel:	*Zeynab Titus*
Day/s in court:	*22 September 2017*
Coram:	*The Hon Mr Acting Justice T Masuku*

[12] ibid. para 27