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

REPORTABLE

CASE NO: 3860/2016

In the matter between:

LUBABALO LINDILE MAYEKISO	First Appellant
NCEDIWE AMELIA MAYEKISO	Second Appellant
and	
MOHAMED ISMAIL PATEL N.O.	First Respondent
HERMAN BESTER N.O.	Second Respondent
TASNEEM SHAIK MOHAMED N.O.	Third Respondent
DUANE COLIN STARKEY N.O.	Fourth Respondent
NANDIPHA VINQI N.O.	Fifth Respondent

Coram: P.A.L.Gamble, P.B.Mantame and M.L.Sher, JJ
Date of Hearing: 3 & 24 August, 13 September 2018
Date of Judgment: 24 October 2018

JUDGMENT DELIVERED ON WEDNESDAY 24 OCTOBER 2018

GAMBLE, J:

INTRODUCTION

[1] This appeal concerns the continued occupancy of the immovable property known as Erf […], Constantia in the City of Cape Town (for convenience hereinafter referred to as "*the property*"). The property is sizeable: it measures 4400 sq. m in extent and accommodates a main dwelling and garages covering some 822 sq. m as well as other buildings measuring 335 sq. m. The street address is […], Constantia, being one of Cape Town's most exclusive and sought-after suburbs.

[2] On 23 September 2016 Dolamo J ordered the eviction of the occupants (the appellants and those holding under them) from the property by 31 December 2016. After an application for leave to appeal was dismissed by Dolamo J, the appellants successfully applied to the Supreme Court of Appeal which, on 1 June 2017, granted them leave to appeal to the Full Bench of this Division. The appeal was set down for hearing on Friday 3 August 2018 before the 2 senior members of this Bench together with Engers AJ. The matter could not proceed on that day as Engers AJ felt obliged to recuse himself, having earlier dealt with an interlocutory application in the matter. Sher J was then appointed to replace Engers AJ and the matter continued, firstly on 24 August 2018 when the appellants sought a last-minute postponement and then on 13 September 2018 when the matter was finally argued.

[3] The respondents were represented in this appeal by Advs. I. Bremridge S.C and L.Wilkin while the appellants have successively been represented by Advs.D.Claasen (3 August 2018), L.Buikman S.C (24 August 2018) and D.Melunsky (13 September 2018).

BACKGROUND TO THE HISTORY OF LITIGATION REGARDING THE PROPERTY

[4] The property was purchased by the appellants (Mr. and Ms. Mayekiso, who are married in community of property) in March 2007 for R19,95m. There is no record of the registration then of any mortgage bond over the property and it must be assumed it was paid for in cash. According to a valuation report placed before the court *a quo*, the dwelling, a 3-level structure said to be designed in the "*Tuscan style*", comprises, inter alia, an entrance hall, a formal lounge, a family room, a dining area, kitchen, scullery, laundry, pantry, study, guest toilet, 6 bedrooms (each with its own *en suite* bathroom), a wine cellar, bar, cinema room, five garages, two servants' (*sic*) quarters (each with its own shower, toilet and basin), a covered outside braai area with large patio and terraces, a pergola with deck, an assortment of balconies, three gas fire-places, alarm system with beams and intercom system, underfloor heating and heated towel rails. In January 2015 the property was said to have a market value of R18m and a "*forced sale*" value of R13m. It is, by all accounts, a home with panoramic views of the Constantia valley and mountains, attesting to a lifestyle of opulence.

[5] From at least November 2011, Mr. Mayekiso, who describes himself as a pastor and entrepreneur, appears to have been in financial difficulty and over the next three years or so he became embroiled in protracted litigation in this Division to

stave off the inevitable: the sale of the property. In January 2012 summary judgment was granted against Mr. Mayekiso for some R800 000 based on a deed of suretyship which he had signed and pursuant thereto the Sheriff attached, first, movable property (including luxury vehicles and furniture). This lead to abortive litigation of its own as Mr. Mayekiso sought unsuccessfully to interdict the Sheriff from doing his job.

[6] After another abortive application (for rescission of the summary judgment order), an initial application for the sequestration of Mr. and Ms. Mayekiso was launched in March 2013 by two creditors, Messers Heinemann and Priday. A provisional order, which was granted on 12 March 2013, was thereafter regularly extended by agreement as the parties tried to reach a settlement. Such a settlement was eventually concluded on 7 August 2013 on the basis that the debt of Heinemann and Priday be settled by Mr. Mayekiso on agreed terms, failing which the creditors would be entitled to sell the property.

[7] Payment in terms of the settlement did not eventuate and on 11 November 2013 the property was attached under a writ, with 17 February 2014 fixed as the date for the sale in execution. On 12 February 2014 Mr. Mayekiso's erstwhile attorneys informed the creditors' attorneys that the property had recently been sold, that he would make payment of an amount of R2,592m and asked that the sale in execution therefore be stopped. This request was refused and the sale went ahead as planned on 17 February 2014 with the property fetching R8m on public auction.

[8] This sale was thwarted by an urgent application lodged on the same day by the family matriarch, Ms. Thembeka Mayekiso, for the sequestration of the parties' joint estate. Ms. Mayekiso senior did not prosecute her application to finality but the

sequestration application was actively pursued thereafter by Heinemann and Priday who were granted leave to intervene on 27 February 2014. The provisional order of sequestration was made final just a month later, on 27 March 2014. And so, what commenced as a friendly sequestration application turned hostile through the intervention application and has remained hostile ever since.

[9] Following upon the final order of sequestration, the first to third respondents were appointed by the Master as the joint trustees in the insolvent estate of the Mayekisos. In November 2016 the first respondent ("*Patel*") was removed from office by the Master (in circumstances which will be described more fully later) and replaced by the fourth and fifth respondents. Except where it is necessary to refer to individuals, I shall collectively refer to the respondents as "*the trustees*".

[10] After their appointment the trustees went about their duties as usual and subsequent to a second meeting of creditors on 20 November 2014, were formally directed and authorised by written resolution of such creditors , *inter alia* –

> "*…to dispose of any movable and immovable property of the estate including any such further assets that may come to light, by public auction, private treaty or public tender upon such terms as he/they in his/their discretion shall determine and to abandon any such assets for which he/they can find no purchaser or abandon them to a secured creditor at the value placed thereon by such creditor if such creditor's claims is/are secured by such assets."*

[11] On 1 December 2014 the second respondent wrote to Mr. Mayekiso on behalf of the trustees with proposals regarding the disposal of certain of the assets in the insolvent estate. He informed Mr. Mayekiso that they were entertaining an offer to purchase certain of the movable assets. At the same time the trustees made a without prejudice offer to Mr. Mayekiso in terms whereof they indicated that they were willing to accommodate him and his family as tenants in the property on certain stipulated conditions namely –

> "*1. that the insolvents enter into a written lease agreement with the trustees within seven days of payment of the arrear rentals referred to hereunder;*
>
> *2. that the trustees shall be entitled to demand vacant occupation of the Constantia property upon one calendar month's written notice;*
>
> *3. that the arrear rentals referred to hereunder are paid within 14 days of the date of this letter; and*
>
> *4. that all future rentals are promptly paid on before the 1st day of each month commencing on 1 January 2015 for so long as the insolvents remain in occupation of the Constantia property.*
>
> *The trustees are of the opinion that rentals (sic) in respect of the Constantia property of R 10 000-00 per month is (sic) fair and market related. Arrear rentals in respect of the 10 months calculated from the*

date of provisional sequestration i.e. 27 February 2014, to 30 December 2014, amounts (sic) to R100 000."

[12] The papers do not reflect what became of this discussion but it is clear in the light of subsequent developments that Mr. Mayekiso was not interested in paying any rental to the trustees to continue occupying the property. Be that as it may, on the strength of the valuation referred to above, the trustees set about offering the property for sale on public auction through a reputable agency (Claremart Auctioneers) who fixed Monday, 28 September 2015 as the date for the sale of the property.

THE URGENT APPLICATION BEFORE DONEN AJ

[13] The auction could not however proceed on the designated day because Mr. Mayekiso launched yet another urgent application (once again on the very morning of the sale) this time seeking to permanently interdict any prospective sale of the property. That application was heard on 22 October 2015 by Donen AJ who subsequently dismissed it on 30 November 2015. It is necessary to briefly deal with certain aspects of that application because they were raised yet again on appeal by Mr. Melunsky.

[14] In resisting the sale of the property by public auction, Mr. Mayekiso told the court that he was attempting to save the family home at all costs contending that the value of the property far exceeded the amount then due to creditors. Notwithstanding the January 2015 valuation, it was said that the property was worth R19,95m (fortuitously the purchase price of the property some seven years earlier)

while the value of creditors' claims was said to be of the order of R9,5m. But, said Mr. Mayekiso, a number of the claims which had been proved against the insolvent estate had been lodged by family and friends and these persons could be prevailed upon to waive their claims amounting to some R5,35m.

[15] Contending that the proven claims would be reduced by such waivers to R4,165m, Mr. Mayekiso then alluded to the intercession of a benefactor - the proverbial knight in shining armour - in the form of one Shamus Fitzhenry. It was said that Mr. Fitzhenry had agreed to assist the family in order to save their home by paying off the creditors on the revised list and registering a bond over the property to secure his debt. This was to be regarded as a sale of the property and Mr. Mayekiso thus sought to intervene in the winding up of the estate by stopping any future attempt to sell the property.

[16] In a detailed and considered judgment, Donen AJ found that the applicants before him had failed to establish that they had the requisite *locus standi* to intervene in the matter because they had not established any act of irregularity or maladministration on the part of the trustees in relation to the insolvent estate.[1] The learned Acting Judge also agreed with the contention advanced on behalf of the trustees that there was no proof of a valid and binding written offer put forward by Mr. Fitzhenry (who was not a party to those proceedings) to purchase the property. Rather, it was said that there was a draft order of sorts with which Mr. Fitzhenry evidently associated himself. In the result, the trustees had contended that there was no valid offer to purchase the property with which they were required to deal.

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[1] Muller v De Wet NO and Others 1999 (2) SA 1024 (W) at 1029 - 1030

[17] In his conclusion the learned Acting Judge held as follows -

> "*[34] In the circumstances the applicants have not established any irregularity or maladministration on the part of the trustees. The applicants have no right to regulate the administration of the insolvent estate in a (sic) way that they seek to do. No injury to their rights has been proved. It would appear that they may have at least one other satisfactory remedy available to them. The property is vested in the trustees and their administration is regulated by the [Insolvency] Act. They may proceed accordingly. In all the circumstances the application is dismissed. Costs will be costs in the sequestration."*

THE APPLICATION FOR EVICTION

[18] After the dismissal of the application before Donen AJ the trustees, no doubt spurred on by the ruling, continued in their statutory obligation to realise the assets in the joint estate. They said that they had been informed by Claremart Auctioneers that the sale of the property was being severely hampered by Mr. and Ms. Mayekiso who refused to allow interested parties (and it was said that there were a large number thereof) access to the property for purposes of viewing same. They were also concerned about the condition of the property and the fact that certain necessary repairs had not been effected thereto by the occupants. In the result the trustees resolved to approach the court for the eviction of the appellants from the property and pursuant thereto on 3 March 2016 launched the application which is the subject of this appeal.

[19] Patel deposed to the founding affidavit in the eviction application which concluded with the following allegations.

> "*[21] It has now become a matter of some urgency that the applicants obtain vacant occupation of the Constantia property. The property is deteriorating on a daily basis, the respondents are neither paying nor tendering any consideration for their occupation of the Constantia property, increasingly prospective buyers are being scared off by the presence of the respondents and every single day that goes by the costs attendant upon the winding up of the estate of the respondents increases. All of this is to the detriment of the creditors of the respondents' estate.*
>
> *[22] The applicants are enjoined to wind up the estate of the respondents for the benefit of the creditors of the respondents, and indeed for the benefit of the respondents themselves. The applicants simply cannot do so while the respondents remain in occupation of the Constantia property. The respondents have no lawful right to be in occupation of the Constantia property and it is according (sic) submitted that the applicants are entitled to the relief prayed (sic) in the notice of motion."*

[20] In their opposition to the eviction application the appellants raised a host of substantive defences as well as procedural points. One of the fundamental challenges to the application was said to be the fact that the appellants remained the registered owners of the property and they accordingly asserted a residual right of interest therein. In the circumstances they challenged the right of the trustees to deprive them of occupation of the property and indignantly objected to being asked to

pay rent for their home: they asserted that their right of ownership (at that stage no more than the bare *dominium* in the property[2]) entitled them to occupy it without offering any *quid pro quo* for their right of habitation. Further, they referred, once again, to the Fitzhenry offer and contended that eviction was not warranted in the circumstances, the suggestion being that the "sale" of the property to him would be the panacea to all of the trustees' problems.

[21] The eviction application was eventually heard by Dolamo J on 2 August 2016 and, as I have said, judgment was delivered on 23 September 2016. It is a detailed and considered judgment of some 21 pages. The learned Judge had regard to various factors and dealt convincingly with the argument that the appellants, as the registered owners, were not in unlawful occupation of the property as contemplated by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("*PIE*"), holding that their occupation was indeed unlawful. Since the challenge to this point was not persisted with on appeal, it is not be necessary to deal with it further: Mr. Melunsky accepted unequivocally that the appellants were illegal occupiers and were to be dealt with as such under PIE.

[22] A further aspect which was challenged before Dolamo J related to the *locus standi* of the trustees to bring the application. This too was not taken further by the appellants on appeal and Mr. Melunsky correctly conceded that the trustees were entitled to approach the court *a quo* for an eviction order. In the result, this issue need not be dealt with either on appeal.

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[2] Hendricks v Hendricks 2016 (1) SA 511 (SCA) at [7]

[23] In light of these concessions the ambit of the appeal was of a fairly narrow compass. Save for an attack on the identity of the first appellant and the potential consequences thereof (a matter to which I shall revert later), the principal attack by Mr. Melunsky related to the application of the established principles arising from a PIE application such as this. In essence, the argument was that the court *a quo* failed to have proper regard for the effect of an eviction order on the parties' minor children and, further, it failed to consider the prospect of the Mayekiso family being left homeless. The attack on the identity of the first appellant was contingent upon the introduction of additional evidence not appearing from the record of appeal.

THE TRUSTEES' APPLICATION TO ADDUCE FURTHER EVIDENCE ON APPEAL

[24] Shortly before the matter was due to be heard on Friday, 3 August 2018 the trustees made application to adduce further evidence on appeal. They did this on the basis of certain developments which had materialised since the order of Dolamo J and they sought to place such facts before this court in an endeavour to demonstrate that the appeal was essentially moot. When the matter was eventually argued on 13 September 2018 Mr. Melunsky indicated that the appellants did not oppose the trustees' application.

[25] In the light of Mr.Melunsky's concession that the trustees' application could be granted there are two further factors for this court to take into account. Firstly, in the affidavit which he lodged in the application for leave to appeal to the SCA, Mr. Mayekiso dealt with the trustees' concerns regarding the consequences of any future sale of the property by assuring that court that whilst he accepted that the property would have to be sold in order to settle the creditors, there would be no risk

that he and his wife would refuse to vacate the property once it had been sold. In this regard he said the following.

> "*[49] In addition, we also agree to vacate the property if and when it is sold and registered into the name of a third party. We are also willing to agree to a Court order for this purpose. Thus, there can be no fears by any purchasers that we shall fail to vacate the immovable property, if they were to purchase it."*

And, in the replying affidavit, after the trustees had expressed certain misgivings about the insolvents' intentions, Mr. Mayekiso made it clear that he accepted that the property had to be disposed of by the trustees.

> "*[45] Applicants are* ***not objecting*** *to the sale of the property. We accept that the property has to be sold in order for creditors to be paid and for Applicants to be paid the balance of the equity, which will remain due to us….*"

[26] The trustees point out that the property was sold on 18 September 2017 for an amount of R13,2m and that transfer thereof was passed to a certain Dirk Shamil on 4 December 2017. In the circumstances they submitted that this fact, together with Mr. Mayekisos unequivocal undertaking to vacate the premises in such circumstances, rendered the appeal moot.

[27] Initially, in an affidavit pertaining to the earlier postponement of the appeal, Mr. Mayekiso sought to suggest that his undertaking to the SCA to vacate was conditional upon the property being sold for a reasonable price, the implication

being that R13,2m was not reasonable although no express allegation was made as to what was reasonable in the circumstances. The condition, which was not contained in the affidavit presented to the SCA, was really just an opportunistic after-thought which was untenable in the circumstances and Mr. Melunsky did not seek to rely thereon when he argued the appeal.

THE APPELLANTS' APPLICATION TO LEAD FURTHER EVIDENCE ON APPEAL

[28] At about 15h30 on Wednesday 12 September 2018 (just some 18 hours before the appeal was finally to be heard) Mr. Mayekiso lodged yet another late application. This time he sought to introduce further evidence on appeal relating to the conduct and *persona* of the first respondent. As will be seen shortly, it was argued by Mr. Melunsky that at all material times Patel was *"an impostor*" masquerading under a false name. This, said counsel, rendered the founding affidavit in the eviction application fundamentally flawed. Further, it was argued that, had Dolamo J known of the true facts regarding the identity of Patel, he would undoubtedly have refused to entertain the application until he knew what the real identity of the first respondent was.

[29] This application was opposed by the trustees. Mr. Bremridge SC noted that the late filing of the application (which he complained was a tactic regularly employed by Mr. Mayekiso to the prejudice of his opponents) precluded the trustees from dealing with the substance thereof. That notwithstanding, a short answering affidavit was put up by way of provisional opposition with the right reserved to deal more fully with the substance of the allegations in due course, should the necessity arise.

[30] S19(b) of the Superior Courts Act,10 of 2013 expressly sanctions the receipt of further evidence on appeal but this is a power which will be sparingly exercised and only in special circumstances, bearing in mind the overriding public interest in the finality of litigation.[3] First principles in relation to an application to adduce further evidence on appeal require Mr. Mayekiso to show -

- that the application has been made timeously;
- why the evidence was not placed before the court *a quo;*
- that the failure to adduce the evidence earlier was not attributable to any remissness or negligence on his part;
- that there is a *prima facie* likelihood in the truth thereof;
- that the evidence is materially relevant to the outcome of the matter; and
- that the application is *bona fide.*

[31] In the affidavit of 12 September 2018, Mr. Mayekiso offers no explanation as to why the application was filed so late. He notes that the facts deposed to therein had been known to him for quite some time but offers no explanation why the application was not filed sooner, at least sufficiently early to

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[3] Erasmus, Superior Court Practice, (2nd ed) Vol 2 at A2-69; Rail Commuters Action Group and others v Transnet Ltd t/a Metrorail and others 2005 (2) SA 359 (CC) at [41] – [43]; Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency 2014 (1) SA 604 (CC) at [94]

enable the court and the trustees to have proper regard thereto. In fact, he has the gumption to castigate the trustees (who, he says, knew about the facts and the importance thereof) for failing to bring such facts to the attention of the court in circumstances where they were duty bound to do so.

[32] Mr. Melunsky informed the court that he could make no submissions in regard to the failure by Mr. Mayekiso to take timeous action nor could he offer any reasonable explanation suggesting why it was left until the proverbial 11th hour. In my view, the application therefore falls down at the first hurdle and it must be assumed that at the very least Mr. Mayekiso was remiss in failing to act timeously. But that is not the end of the matter.

[33] It is significant to note that not all of the facts which Mr. Mayekiso sought to introduce through the s19(b) application existed at the time that Dolamo J was seized with the matter. The substance of the affidavit refers to a rather intriguing situation which has found its way around this Division in a number of cases[4] in which allegations of fraud and theft on the part of the first respondent abound. It is said by Mr. Mayekiso that the first respondent is not "*Mohamed Ismail Patel*" but in fact "*Patel Muhamed*" – allegedly 2 different persons with differing identity numbers. Whatever his correct names may be, the person who fulfilled the function of the first respondent was formerly an admitted attorney of this court who was struck off the roll by Rogers J

[4] Reference is made, for instance, to case nos 21851/2016 and 9318/17.

(Dolamo J fortuitously concurring) on 24 March 2017. The citation in that matter is Cape Law Society v Patel Muhamed[5].

[34] The use by the first respondent of different names is explained by Rogers J as follows.

> "*[2] If the respondent is to be believed, he has over the years, gone variously under the names Patel Muhamed (the one used in the above citation), Mohamed Ismail and Muhamed Ismail Patel. He says the third of these is his real name. Due to the racial distinctions then applicable, his father chose to register his family as Malay rather than Indian. This was achieved inter alia by dropping the name Patel when the children were registered. The respondent's first registered name was Mohammed Ismail with ID number 44[…] [6]. Years later he applied to correct his registration so as to read Muhamed Ismail Patel but, through an administrative bungle, he was issued with an ID document in the name of Patel Muhamed and ID number 49 […]. During March 2013 he ascertained to his astonishment that according to the records of the Department of Home Affairs he was deceased. He is still battling to regularise his registration.*
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> *[3] It was under the first of these names that the respondent applied for admission as an attorney. He has, however, used the third name (the one he says is his true name) in proceedings in Gauteng."*

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[5] Case no 4568/2016, reported in SAFLII as [2017] ZAWCHC 29 (24 March 2017)

[6] In accordance with the SAFLII confidentiality policy the full identity numbers have been redacted.

[35] Rogers J further alluded to the fact that the first respondent had, on 1 August 2016, been removed by the Master as co-liquidator of a company known as Crimson Moon Investment 32 CC on account of alleged misappropriation of monies in the course of its winding-up. Finally, His Lordship referred to the insolvency of an entity known as The Coe Family Trust in which similar allegations of the misappropriation of funds were also levelled against the first respondent.

[36] In concluding that the striking off of the first respondent was warranted, Rogers J held as follows.

> "*[27]…It is irrelevant that the greater part of these misappropriations were committed by him as an insolvency practitioner rather than a legal practitioner. The courts expect attorneys to be scrupulously honest. A person who steals money and behaves fraudulently in whatever capacity is not a person who can be allowed to remain on the roll of attorneys."*

[37] Earlier in the judgment Rogers J noted that the first respondent had practiced as an attorney in Cape Town while also taking appointments as an insolvency practitioner from time to time and pointed out that the Cape Law Society had interdicted him from practicing as an attorney on 19 February 2016. Immediately thereafter (and on 16 March 2016) the Society launched an application to remove Patel from the roll of attorneys on account of his alleged dishonesty. Hence, when the present matter served before Dolamo J in August 2016, those facts were in the public domain and it was open to Mr. Mayekiso to place the file in the interdict application before Dolamo J, and/or to draw to His Lordship's attention that the Master had

concerns about the first respondent's suitability as a trustee in other insolvency proceedings.

[38] In any event, in the affidavit of 12 September 2018 Mr. Mayekiso says that his knowledge about Patel Muhamed is limited but that the Master would be better informed in that regard. He goes on to suggest, on the basis of media reports and court judgments –

> *"[27]…of which I have been made aware that Patel Muhamed had been engaging in an elaborate scheme in respect of many estates over many years by representing himself as Mohamel (sic) Ismail Patel, while at the same time engaging in fraudulent activities involving the misappropriation of millions of rands from those estates."*

[39] In an apparent leap in logic based on hearsay, Mr. Mayekiso alleges that –

> "*[29] There is no reason to believe that Patel's conduct in respect of the appellant's (sic) insolvent estate was not part of the same grand scheme. Indeed, the facts and circumstances indicate that it was. The proceeds of the sale of moveables (sic) (furniture) is unaccounted for in our estate."*

[40] After pointing out that Patel had deposed to various affidavits in cases before this court in which he had perjured himself in regard to his identity, Mr. Mayekiso goes on to assert that-

"*[31] All of the foregoing information, I respectfully submit, would have been highly relevant to the Honourable Mr. Justice Dolamo when he was required to consider the eviction application."*

And then he suggests that the Learned Judge would have been entitled to know that one of the trustees seeking to evict the appellants from property, which they had been duly authorized to dispose of by the insolvents' creditors, and which they controlled in terms of their statutory duties under the Insolvency Act[7] was allegedly –

- a person who "*apparently did not exist"*;
- a person who masqueraded as the deponent to the founding affidavit and was in fact "*an impostor"*;
- *a "perjurer"*;
- "*not fit to be a trustee"*;
- one who had "*been misappropriating funds from estates under his control*";
- "*a person…engaged in an elaborate scheme to steal money from estates under his control*; and
- "*abusing the court and insolvency machinery for his own ends"*.

[7] Act 24 of 1936 (*"the Act"*)

[41] It goes without saying that if the hearsay allegations made by Mr. Mayekiso are true and correct, the matter certainly warrants an investigation by the police but in my view that *per se* is not a reason for invalidating decisions taken by the first respondent and the remaining two trustees in the execution of their statutory functions. This is particularly so in circumstances where (i) it is no longer in issue that the property has to be sold to cover the liabilities in the insolvent estate, and (ii), that the trustees have the power (and duty) to do so.

[42] It will be seen that s76[8] of the Act expressly provides for the continuation of pending legal proceedings in a situation such as the present. As a public official statutorily appointed by the Master a trustee such as Patel was required to discharge his duties subject to the control of the Master. Those functions may in appropriate cases be subject to judicial review and, importantly, where the Master considers that a person is no longer suitable to be a trustee in the estate concerned she may remove him.[9] That is exactly what happened in this matter in November 2016.

[43] The logical conclusion flowing from the application of s76 is that the removal from office of a trustee by the Master, does not automatically invalidate

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[8] *"76(1) Whenever a trustee of an insolvent estate has vacated his office or has been removed from office or has resigned or died, no legal proceedings previously instituted, in which the estate is involved, shall lapse merely by reason of the vacating, removal, resignation or death.*

(2) The court in which any such proceedings are pending may, upon receiving notice of the vacating, removal, resignation or death, allow the name of the surviving or new trustee to be substituted for the name of the former, and the proceedings shall thereupon continue as if the surviving or new trustee had originally represented the estate in those proceedings."

[9] S60(e) of the Act.

decisions taken by a duly appointed trustee when he was still in office. In my view, this accords with the so-called *de facto* doctrine, where steps taken pursuant to a valid appointment as trustee will continue to be legally binding on the basis of the trustee's so-called '*colourable authority'*[10]*,* provided of course that such decisions were otherwise duly taken in accordance with the provisions of the Act.

[44] Mr. Melunsky's complaint that Patel was an "*impostor"* might, at first blush, to be said to resonate with the facts which applied in *Mkise*[11]*.* In that matter a certain Sebastian Hendrik de Jager stole the identity document of his housemate, Jacobus Willem Pienaar, in Keetmanshoop (where both were employed as prosecutors) and applied for admission in the erstwhile Orange Free State as an advocate under the name of the said Pienaar. He thereafter practiced at the Bar in Bloemfontein under that name, representing several hapless accused in criminal matters in the process. He did the same in Pretoria.

[45] When the subterfuge was discovered it became the subject of an official commission of enquiry before which de Jager confessed his misconduct. The commissioner, who was directed to establish whether any miscarriage of justice had occurred, subsequently recommended that the matter be referred to court and *pro deo* counsel were appointed to represent certain of the accused who de Jager had represented earlier, in an appeal directly to the Appellate Division. In that court various special entries were noted on behalf of the accused.

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[10] Mgoqi v City of Cape Town and another 2006 (4) SA 355 (C) at [124] – [125]

[11] S v Mkise; S v Mosia; S v Jones; S v Le Roux 1988 (2) SA 868 (A)

[46] In delivering the unanimous judgment of the court of appeal, Kumleben AJA approached the matter on the basis of assessing whether any irregularity had occurred in any of the matters and further considered whether any such irregularity was of "*so fundamental and serious a nature that the proper administration of justice and the dictates of public policy [required] it to be regarded as fatal to the proceedings in which it occurred."* The court found that to do so it was necessary to "*examine any statutory requirements for the admission of an advocate to practice, the underlying reasons for such provisions and the role an advocate is called upon to fulfil in the administration of justice."*

[47] After a thorough consideration of the provisions of the Admission of Advocates Act[12] and the relevant case law applicable thereto, the learned Acting Judge of Appeal found that de Jager did not possess the requisite authority to practice in terms of that Act and concluded that "*it is in the public interest that the defence in a criminal trial be undertaken by a person who has been admitted to practice as an advocate in terms of the Act and the lack of such authorisation must be regarded as so fundamental an irregularity as to nullify the entire trial proceedings."* The various appeals were therefore upheld.

[48] The facts in the present matter differ in a number of material respects. These are civil proceedings and there is therefore no room for a fundamental irregularity or miscarriage of justice such as that considered by the Appellate Division. Then, there is the fact that the first respondent was removed from office by the

[12] 74 of 1964

Master[13] ostensibly on the basis that he was no longer (and not *ab initio*) a suitable person to hold that office as a trustee. Thirdly, the continuation of proceedings commenced by a dismissed trustee is expressly sanctioned and validated by the Act.

[49] In para [125] of *Mgoqi* reference is made to a *dictum* in an Australian judgment [14] which is to the following effect.

> "*The acts of a de facto public officer done in apparent execution of his office cannot be challenged on the ground that he has no title to the office. It matters not that his appointment to the office was defective or has expired or in some cases even that he is a* ***usurper****."* (Emphasis added)

I accordingly conclude that there is no merit in the argument that the use by the first respondent of different names in other proceedings is something which would have warranted the dismissal of the application to evict.

[50] There is, moreover, an equally compelling reason not to interfere in the order of Dolamo J on the basis of potential lack of authority on the part of the first respondent: the fact that he did not act alone but was then assisted by two other trustees whose competencies and authority are not challenged. In the short answering affidavit deposed to by the second respondent on 13 September 2018, Mr. Bester points out that when the application for eviction was instituted Patel was still a functioning trustee together with the second and third respondents. He notes too that while Patel did most of the day-to-day work in administering the insolvent estate of the

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[13] In terms of s60(e) of the Act

[14] GJ Coles & Co Ltd v Retail Trade Industrial Tribunal (1987) 7 NSWLR 503 at 525

Mayekisos, at all material times his fellow trustees were consulted and decisions were made jointly. This fact, too, distinguishes the situation from ***Mkise.***

[51] In any event, the court *a quo* was alerted to the possibility that Patel's conduct was suspect and not in accordance with acceptable standards. In the answering affidavit deposed to by Mr. Mayekiso in opposition to the eviction application he complained about the conduct of the trustees, in particular Patel, accusing them of incompetence, questionable practices, dereliction of duty and advancement of self-interest.

> "*6….. I understand that he* [Patel] *has either been struck from the roll of attorneys, alternatively such an application is pending against him…*
>
> *7. The removal of first applicant from the roll of attorneys should also disqualify him from acting as a liquidator and/or from bringing an application of the nature which this matter is, against myself and second respondent….*
>
> *10. I deny that Applicants were duly appointed. At the time of deposing to this affidavit, there is an application pending before this Honourable Court to have First and Second Applicants removed from office, due to the improper appointment.…*
>
> *17. Second Respondent and I have long held the view that it is Applicants and their legal representative's intent to extract as much value from our insolvent estate as possible. This is unlawful. Our*

insolvent estate has a large equity contained therein. This application is nothing but another attempt to waste out that equity with unnecessary litigation, to the benefit of Applicants. Clearly, Applicants intend, whether they succeed with this application or not, to extract the costs associated with this application, from our joint estate….

30.2. The current problems have been brought about by Applicants refusing to administer the insolvent estate for the benefit of creditors and ourselves as debtors, who are entitled to the balance of the equity.

30.3 In fact, their purpose is to waste out the assets of the insolvent estate and to enrich themselves in the process as far as possible. They wish to leave as little as possible for the creditors and ourselves as the ones entitled to the equity."

[52] And yet, despite serious allegations of impropriety having been made by the insolvents against the trustees, and the court having been alerted thereto, Dolamo J was not persuaded to refuse the application to evict. The reason therefor was obvious: the liabilities in the estate could only be settled through the sale of the property and to achieve this speedily and efficiently (due regard being had to Mr. Mayekiso's dilatory tactics in the past) it was necessary to effect the eviction of the occupants from the property so that the sale could proceed without further ado.

[53] In the result, I am not persuaded that Mr. Mayekiso has established the admissibility of the facts he now wishes to place before the court on appeal. The

allegations amount, in the main, to inadmissible hearsay and are in any event sorely lacking in materiality as to the decision to evict the occupants from the property more than 2 years ago. In any event, it appears that the allegations of dishonesty, deceit and possible fraud on the part of Patel were already before the court *a quo* at the time given the contents of the affidavit of Mr.Mayekiso referred to above.

[54] Finally, I am not persuaded that the application to adduce further evidence has been made *bona fide.* It is clear that Mr. Mayekiso has known about allegations underpinning the hearsay evidence for quite some time. Indeed, brief mention thereof was made by Ms. Buikman SC when she argued for a postponement of the appeal on 24 August 2018. And yet, the application was held back until the very last moment, no doubt in the hope that its production would occasion yet another postponement of the inevitable. It bears mention that the record of this case shows a persistent pattern of behavior in this regard - one might even term it "*a hallmark*" of the litigation strategy employed by Mr. Mayekiso.

[55] In the result, I am of the view that the application by Mr. Mayekiso to adduce further evidence on appeal falls to be refused and that the appeal must be decided on the record as it stands together with the common cause facts that-

- the property was sold in September 2017 for R13,2m;
- it has been transferred and registered in the name of the purchaser; and

- Mr. Mayekiso undertook in the application for leave to appeal to the SCA to vacate the property upon the sale thereof.

WAS THE DECISION OF THE COURT *A QUO* JUST AND EQUITABLE?

[56] After all is said and done the submissions on appeal on behalf of the appellants, although designed to create an atmosphere of subterfuge, mystery and deceit, were of a relatively narrow focus. Firstly, it was argued that there were certain critical issues relating to the status of Patel which were not fully known to Dolamo J and which would have materially affected his view of the matter had he known thereof. This argument does not get off the ground in light of the refusal to admit further evidence by the appellants. Secondly, it was argued by Mr. Melunsky that Dolamo J failed to properly consider all the material factors before him and that his decision to evict the appellants was not just and equitable in the circumstances.

[57] Counsel for the Mayekisos relied heavily in his argument on *PE Municipality*[15] and *Berea*[16] for his submissions that Dolamo J had failed to discharge his constitutional duty in ordering the eviction. But these are not the only authorities to be considered. The application of PIE and the removal of unlawful occupiers of land has generated a considerable body of law in the last 15 years or so with leading appellate cases such as *Ndlovu*[17], *Blue Moonlight*[18] and *Changing Tides*[19] also featuring prominently in the debates before our courts.

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[15] Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)

[16] Occupiers, Berea v De Wet N.O. and Another 2017 (5) SA 346 (CC)

[17] Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA)

[58] What those cases demonstrate first and foremost is that the facts of each instance of alleged illegal occupation is the point of departure. This is so because there are competing constitutionally entrenched rights at play *viz.* s26(3) of the Constitution, 1996, which provides that people may not be evicted from their homes without an order of court granted after considering all the relevant circumstances, and s25(1) which protects the rights of owners of private property against arbitrary expropriation.

[59] And so, when applying the established jurisprudence, a court being asked to apply s4(6) or (7) of PIE[20] (which is the statutory instrument which underpins the s26(3) right) would need to know, *inter alia* –

- whether the land in question is privately owned or whether it belongs to the State (or an arm of government);
- how long the land has been illegally occupied;
- how many people/families/households are likely to be effected by the proposed eviction;
- how many of those households are headed by women;

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

[19] City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2102 (6) SA 294 (SCA)

[20] S4(6) applies to land which has been unlawfully occupied for less than 6 months and s4(7) applies in respect of a period longer than 6 months. It is common cause that the present application was brought in terms of s4(7)

- how many children are likely to be affected, what their ages are, whether they attend school and if so where;

- whether there are sick or disabled occupiers who might be dependent on public health care;

- whether homelessness is likely to ensue; and

- what alternative options, particularly in respect of emergency housing, can be made available by the local authority concerned?

[60] In his argument, Mr. Melunsky stressed the importance of the presence of at least 2 minor children on the property pointing out that the rights of children were considered to be paramount under the Constitution, the clear imputation being that the presence of children on a property might be relied upon to trump the right of the owner to seek eviction of their parents. In my view that submission does not, in and of itself, hold water. A court considering eviction would always want to know whether there are children likely to be effected by such an order primarily because the court would want to avoid the possibility of children being subjected to the hardship of homelessness or the possibility of the displacement of members of a family.

[61] Mr. Melunsky went on to complain that Dolamo J had not discharged his function in accordance with the approach advocated in ***Berea*** where the Constitutional Court stressed the following.

> "*[46] As it is apparent from the nature of the enquiry, the court will need to be informed of all the relevant circumstances in each case in order to satisfy itself*

> *that it is just and equitable to evict and, if so, when and under what conditions. However, where that information is not before the court, it has been held that this enquiry cannot be conducted and no order may be granted."*[21]

Counsel argued that the court *a quo* did not have sufficient information before it regarding the effect of an eviction on the parties' children and took the judge to task for not directing further enquiry. It was suggested, for example, that the court should have called for a report from a social worker regarding the interests of the children.

[62] Besides the fact that it is well known that Government appointed social workers are hopelessly overworked and that their reports to the courts in both criminal and civil matters take many months to be completed, the argument does not heed the directions given by the Constitutional Court in the very next paragraph in *Berea.*

> "*[47]….. In order to perform its duty properly the court needs to have all the necessary information.* ***The obligation to provide the relevant information is first and foremost on the parties to the proceedings****. As officers of the court, attorneys and advocates must furnish the court with all relevant information that is in their possession in order for the court to properly interrogate the justice and equity of ordering an eviction. This may be difficult, as in the present matter, where the unlawful occupiers do not have legal representation at the eviction proceedings."* (Emphasis added)

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[21] The authorities referred to were *PE Municipality* at [32] and [58] - [60] and *Changing Tides* at [26] – [27].

[63] In this case, however, the occupiers of the property have throughout enjoyed legal representation. The opposing papers were clearly drafted by lawyers who, in the process of discharging their professional and constitutional obligations, sought to place all relevant factors before the court. For example, in the founding papers, Patel had stated the following.

> "*[16] The personal circumstances of the respondents, little is known as the respondents have chosen not to divulge much, if anything, by way of personal information to the applicants.*
>
> *16.1 It should however be noted that both the respondents are in good health and free of any mental or physical disability.*
>
> *16.2 The respondents are the parents of four children, a daughter Cassandra aged 20, a son Jonathan aged 17, a daughter Shalom aged 11 and a son Immanuel aged four.*
>
> *16.2.1 These details are gleaned from the affidavits deposed to by the first respondent in the Western Cape High Court case number 18583/15 on 26 December 2015. It might well be that Jonathan is now an adult.*
>
> *16.3 I am not aware that any of these children suffers from any mental or physical disability and same has not been disclosed to applicants."*

[64] The reply to those allegations by Mr. Mayekiso in the answering affidavit is fairly terse.

> "*31. The personal circumstances cited in these paragraphs are correct.*
>
> *32. However, I wish to point out that second respondent and I have nowhere to go, if we are evicted from our home. We shall be left homeless, with our children. We have no family to go to and Applicants had failed to finalise the winding up of the insolvent estate, as they should have done. That means, our equity in the estate, which should have accrued to Second Respondent and myself, remains under the control of Applicants, to the detriment of ourselves."*

[65] In *Ndlovu* the court dealt with the question of adducing relevant evidence in PIE applications and said the following.

> "*[19]… Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent's unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties."*

[66] Yet in answering the case put up by the trustees, Mr. Mayekiso did not seek to draw to the court's attention any further factors relating to his children which he considered material to the exercise of the court's discretion as to whether to grant an eviction order or not. The reason for that is obvious: there was nothing more that he could say in that regard. Further, while he was quick to seek to file an affidavit on appeal relating to intervening circumstances concerning Patel, Mr. Mayekiso had nothing further which he wished to say about the 2 children who are still minors, In my view then, the court *a quo* cannot now be blamed for not doing its job when there was clearly nothing further that could be said about the children. I should point out too that when the court enquired from Mr. Melunsky whether there were any further facts pertaining to the children or the Mayekisos personal circumstances which he might wish to place before the court, counsel informed us that he had no instructions to put any further information before the court.

[67] What the answering affidavit does stress however is the issue of homelessness ensuing as a result of an eviction, and the effect that this might have on the minor children. In my view, that is indeed the only context in which the children's' interests fell to be considered in this case. Dolamo J gave full consideration to the allegation of homelessness in paras 26 to 39 of his judgment. I do not think it is necessary now to recite the full extent thereof; the following will suffice.

> "*[33] The Mayekisos relied on the judgment of Meer J in Arendse v Arendse and Others*[22] *to allege that an eviction will not be just and equitable if it will result in homelessness. But the Mayekisos have not attempted to show how*

[22] 2013 (3) SA 347 (WCC)

their eviction would render them homeless save to say that all their assets were tied up in the insolvent estate. This is not sufficient. What they had to show was how they have tried and failed to find alternative accommodation within their available resources.

[34] Lubabalo Mayekiso described himself as an entrepreneur. One can assume that he had been a successful entrepreneur who was so successful as to be able to afford a home in the affluent suburb of Constantia."

[68] Dolamo J went on to refer to the litigation in which the Mayekisos had immersed his family while not taking the court into his confidence regarding their personal circumstances. The inference which therefore can fairly be drawn is that it was not convenient to set out personal circumstances such as income and expenditure because these would not have sustained the bald allegation of homelessness. Similarly, a list of failed attempts to secure alternate accommodation might have assisted the court. Once again, the absence thereof in the papers speaks volumes.

[69] Further, in relation to the claim of imminent homelessness, one cannot ignore the fact that Mr. Mayekiso has over a number of years continued to litigate in numerous matters in this court persistently and with impunity, at all times with the assistance of attorneys and counsel. It goes without saying that lawyers (let alone senior counsel) do not come cheaply these days and the availability of litigation funding, whether from Mr. Mayekiso's second estate or from a benefactor well-disposed to the family, suggests unequivocally that homelessness is not at all a likely consequence of an eviction in this matter. The very fact that Mr. Mayekiso was, for

instance, in a position to brief out of town counsel to initially argue the appeal (and the court was shown proof of payment of relatively large sums of money in this regard in the postponement application moved by Ms. Buikman SC) and then also tender payment of the costs associated with the postponement, are clear proof of the availability of money which could be put towards the payment of rental, thereby avoiding homelessness.

[70] I should further point out that despite having been sequestrated more than four years ago, the Mayekisos have, by all accounts, continued to enjoy the same lifestyle and standard of living as they always did. Considering the location of the property, and the extent of the expenses which would ordinarily come with living at such address, even though they have not been paying any rent for a number of years, in my view the allegation that they would be rendered "homeless" were they to be evicted is nothing more than empty assertion made with the cynical view of preventing an eviction order from being granted.

[71] But the clearest proof that homelessness is not a likely consequence in this matter comes from the mouth of Mr. Mayekiso himself. It is he who assured the SCA that he accepted that the property had to be sold and it is he who promised under oath that the family would move out when the property had been sold and transferred to its new owner. In neither instance was the word homelessness mentioned as a factor to be considered when this undertaking was given.

[72] Finally, it was argued on behalf of the appellants that an order should have been made by Dolamo J which accommodated a Fitzhenry-type proposal. It was said that the family should not have had to move out until an opportunity had been

given for a benefactor to come to their assistance and help them out of their predicament. That submission ignores the structure of the order which was made in the court *a quo.*

[73] In the course of his judgment Dolamo J considered the prospect that a private sale of the property might still eventuate. In the result, applying the provisions of s4(7) of PIE, the learned Judge considered what was "*just and equitable*" in the circumstances and held as follows.

> "*[31] The only issue is when should the Mayekisos vacate the property or be evicted if the property is sold before they can rescue their home through any lawful scheme they may come up with. The solution in my view is to afford them a reasonable period within which to pay the debts of the estate and other costs, which will entitle them to apply for their rehabilitation. A period of thirty (30) days should be adequate as they claim to have a benefactor[23] willing to do so….*
>
> *[38] I am of the view, however, that it will not be necessary to immediately order the eviction of the Mayekisos, if they were to adhere to their undertaking to afford the applicants access to the property for purposes of effecting repairs and any potential purchaser to view the property. The Mayekisos cannot also continue to live in the property without paying rates and taxes.*
>
> *[39] I deem it just and fair to give an order which will delay the eviction of the Mayekisos for a reasonable period of time to put in place their plans to save*

[23] This was evidently a reference to Mr Fitzhenry.

their important asset, being their home. In my view, thirty days will be sufficient for this purpose. In the meantime the Mayekisos can continue to occupy the property, provided they allow the applicants and potential buyers reasonable access to the property for purpose of effecting repairs and viewing, respectively. They must also pay all rates and taxes levied on the property. If after a period of thirty days from the date of this order they fail to come with an offer to purchase the property, backed by guarantees, the applicants can sell the property to any buyer. The sale will be subject to the buyer affording the Mayekisos a reasonable time to vacate the property."

The learned Judge then made an order on 23 September 2016 that the Mayekisos should have to move out on 31 December 2016. In making that order Dolamo J expressly forbade the trustees from selling the property for a period of 30 days unless authorized in writing by Mr. and Ms. Mayekiso.

CONCLUSIONS

[74] I am accordingly of the view that the court *a quo* did not misdirect itself in any way and that it gave due consideration to all the relevant factors. In the circumstances it was just and equitable, firstly, to grant an order of eviction in this matter, and secondly, to fix the date of eviction while simultaneously affording the insolvents an opportunity to make financial arrangements to secure the settling of their debts through an external source. In both respects the judgment of Dolamo J is a model of clarity and reasonableness: it very fairly addressed the issues to hand and was undoubtedly just and equitable in the circumstances. In the result the appeal must fail.

[75] The date fixed for eviction has come and gone and it is now up to this court to fix a new date. In so doing the court must have regard to the jurisprudence which requires us to consider what justice and equity demands.[24] We invited Mr. Melunsky to address us on this point and to make positive suggestions as to what would be fair in the circumstances. Counsel was regrettably most obdurate in this regard and despite some considerable pressing from the court simply refused to be drawn into any debate or to make any meaningful submissions. On that score, while he may have been following instructions (and it was not made clear to us that he was), Mr. Melunsky failed in the duty, which the Constitutional Court in ***Berea*** has held, he owed to the court.

[76] Mr. Bremridge SC suggested that, having regard to the fact that the 2 minor children are still of a school-going age, an order should made for an eviction during the school holidays so as to cause as little disruption to their schooling as possible. Realizing that the spring holidays were around the corner and that a judgment was only likely to issue thereafter (as it has), counsel suggested that a date be fixed during the December 2018 school holidays. In my view that proposal is reasonable and an appropriate order shall be made. Fortuitously, our order largely accords with the time periods fixed by Dolamo J save that a further 2 years have intervened.

COSTS

[24] Changing Tides at [25]

[77] While ordinarily the losing party in an appeal will be ordered to bear its opponent's costs of suit, it is customary in matters such as this to order that those costs be borne by the insolvent estate. In that way the insolvent is effectively penalized personally particularly where there is likely to be a free residue repayable to him/her upon conclusion of the winding up of the estate. However, in a post-hearing note Mr. Bremridge SC referred us to the recent decision of the SCA in ***Mulaudzi*** [25] and asked that the Mayekisos should be ordered to bear the costs of appeal personally (effectively from their personal/second estate) because the appeal was devoid of any merit and he submitted that their conduct should be considered to be unreasonable and unjustified. In that case the learned Judge of Appeal noted that there were a number of instances where orders for costs have been made against insolvent litigants.[26] No response to this note was filed on behalf of the Mayekisos.

[78] I agree with counsel for the trustees that such an order be made. In light of the undertaking furnished to the SCA in the application for leave to appeal almost a year ago, I consider the conduct of the Mayekisos in the further prosecution of this appeal to be unreasonable. Similarly, they have behaved disrespectfully towards the court and their opponents by lodging dilatory applications at the last minute. It is apparent that there will be a residue payable to the insolvents once their estate is finally wound up and it is appropriate in the circumstances that they be ordered to bear the costs personally.

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[25] Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and Others 2017 (6) SA 90 (SCA) at [73]

[26] De Beer v Olivier en 'n Ander 1966 (1) SA 684 (O); Nieuwoudt v The Master and Others NNO 1988 (4) SA 513 (A) and De Polo and Another v Dreyer and Others 1991 (2) SA 164 (W)

[79] In relation to the costs of the postponement which was sought on 24 August 2018, Mr. Bremridge SC asked the court to hold Mr. Mayekiso to his tender and to order that such costs be awarded to the trustees separately. In my view such an order is fair despite the fact that Mr. Mayekiso is an unrehabilitated insolvent – in making the tender he clearly warranted that he had the means with which to bear those costs.

[80] The wasted costs of the postponement on 3 August 2018 were caused by the fact that Engers AJ recused himself and that the court was thereafter not quorate. In the circumstances those costs should be costs in the insolvent estate.

IN THE RESULT THE FOLLOWING ORDER IS MADE

A. The appeal is dismissed with costs, such costs to include -

1. the wasted costs attendant upon the hearing of the matter on 3 August 2018;

2. the application made on 14 September 2018 by the first appellant to lead further evidence on appeal; and

3. the costs of two counsel where so employed by the respondents.

B. All costs orders are to be paid by the appellants jointly and severally, the one paying the other to be absolved, save for the

wasted costs of the postponement of the appeal on 3 August 2018, which will be costs in the sequestration.

C. It is ordered that the first and second appellants and all persons holding title under them are to vacate Erf […] Constantia, situate at […], Constantia, Cape Town, Western Cape by not later than 18 December 2018.

D. In the event that the first and second appellants and all persons holding title under them fail to vacate the property as aforesaid on or before 18 December 2018, the Sheriff of this court is authorized and directed to evict them on 31 December 2018.

_____

GAMBLE, J

I AGREE:

_____

SHER, J

MINORITY JUDGMENT

MANTAME J

[1] Diverse issues are present in this matter, which have a bearing on the outcome of this appeal. I have read the judgment of Gamble J and agree with the history and the facts of the matter, it would not be necessary to regurgitate them. However, I am unable to agree with my learned brother's reasoning leading to the conclusion.

[2] I have once more read Gamble J's revisited judgment and overwhelmingly surprised that this final judgment is nothing other than a reply to my minority judgment.

[3] To the extent that a judgment in its nature is a final decision and not a pleading, I do not intend to fall in the same trap of turning a judgment into a pleading of which I imagine is not permissible. I accept that the judgment I disagreed with its reasoning has been queried and unfortunately the reader has not had an opportunity to have sight of it. For what it is worth, I stand by my judgment.

[4] The hearing of this appeal was postponed twice, before it ultimately sat on 13 September 2018. On 3 August 2018, on the initial hearing, there was an application by the appellant for the recusal of Engers AJ as the judge previously presided in one of the interlocutory applications which involved the parties and his objectivity was somehow questionable to the appellants. After the Court granted the order in appellant's favour, the Court did no quorate. The matter was therefore postponed to 24 August 2018 for another judge to replace Engers AJ. Sher J was therefore appointed to be the third judge.

[5] On 24 August 2018, when the matter sat for the second occasion, appellants brought an application for postponement in order to consider the heads of argument that were prepared by their counsel from Pretoria, Advocate Conraad Swanepoel, who did not appear in court and whom it later transpired that he was not a member of the Pretoria bar. Although it was said that this advocate was briefed and paid by the appellants, it further came to light that he could not deliver according to the mandate given. Appellants, therefore, needed to brief new Counsel in order to properly prepare for this appeal. This Court granted this application, with a further order that

heads of argument be filed by appellants by no later than 10 September 2018. The matter was postponed to 13 September 2018.

Applications by both parties to lead further evidence

[6] When the matter ultimately came before this Court on 13 September 2018, two (2) applications to lead further evidence were brought before this Court for consideration from both appellants and respondents respectively. Respondents filed their application to lead evidence on 20 July 2018, by way of an affidavit of Mr Schalk Marais ("*Mr Marais*") an attorney for the respondent to the following: that appellants agreed to vacate the immovable property if and when it is sold and registered into the name of a third party; that appellants were also willing to agree to a Court order for that purpose and that there can be no fears by any purchasers that they shall fail to vacate the immovable property, if they were to purchase it.

[7] On 18 September 2017, the property previously owned and registered in the name of the appellants, 18 Belair Drive Constantia, Western Cape ("*the property")* was sold to one Dirk Shamil pursuant to an auction by Claremart Auctioneers at a purchase price of R13.2 million. On 4 December 2017, this property was transferred to the said purchaser. In the light of the undertaking given in their affidavit to the Supreme Court of Appeal, it was said that the appellants are obliged and can have no objection to vacating the property. In the result, it was Mr Marais' assertion that it is necessary that Dolamo J's order be given effect to and put into execution.

[8] Appellants did not oppose this application on the strength that they have filed the same or similar application. It was their contention that similar principles should apply. However, respondents remained steadfast in opposing appellants' similar application.

[9] On 12 September 2018, appellants filed their application to adduce further evidence. According to them, this information is relevant and should have been put

before this Court at the hearing of the eviction application before Dolamo J, of which appellants were unaware. It mostly affected the approach that Dolamo J was enjoined to apply in deciding the eviction application. It pertained to the *locus standi* of one trustee of the joint insolvent estate and the manner in which the trustee was appointed and subsequently removed from office, and all of which happened during and after the eviction order.

[10] It was submitted on behalf of the appellants that first respondent is no longer the trustee in these proceedings. In his stead two (2) other trustees have been appointed, and they are Duane Colin Starkey and Nandipha Vinqi. As it appears from the Certificate of Appointment of Trustee issued by the Master of the High Court on 13 October 2014, the first trustee is 'Mohamed Ismail Patel'. The said '*Mohamed Ismail Patel*' does not exist and did not exist at any time relevant thereto. The person who went by this name was an imposter, a perjurer, not fit to be a trustee and or did not exist at all. It was understood by the appellants that the true name of the person who purported to be '*Mohamed Ismail Patel*' was in fact *'Patel Muhamed'*. These are two (2) different persons with two (2) different identity numbers. Whoever this individual was, he was not fit or proper person to be a trustee of the appellant's insolvent estate. The person the Master thought she was appointing appears to have been non-existent or died. Patel Muhamed assumed this person's identity for purposes of obtaining appointments as a liquidator and for purposes of being admitted as a practicing attorney. For his fraudulent ways, this Court struck him off the roll of attorneys of this Court on 24 March 2017.

[11] As a consequent thereto appellants have filed an application to set aside the sequestration of their joint estate as the inquiry by the Master and the Court is warranted on the person referred to as first respondent masquerading as *'Mohamed Ismail Patel*'. This questionable character was said to have been involved in fraudulent activities and thereby misappropriating millions of rands from the estates of the unsuspecting persons. Appellants have a reason to believe that the winding up of their insolvent estate was part of the same grand scheme. For instance, the proceeds of the sale of their movable assets remain unaccounted for in the insolvent estate. Further, this questionable *Mohamed Ismail Patel* deposed to several affidavits in this

Court in which the facts were not true. Such is evident in Case No: 21851/16 that he perjured himself in several affidavits.

[12] It was appellants' submission that Dolamo J's attention should have been drawn to these facts in order to consider the eviction proceedings and exercise his discretion properly. The second and third trustees in the appellants' insolvent estate admitted in a meeting before the Master that about R5 million worth of creditors whom first respondent alleged that supported his appointment did not exist. First respondent fabricated these creditors to gain an appointment from the Master as a trustee to their joint estate. These are the same creditors that inflated the amount which the trustees claimed that it was owed by the insolvent joint estate at the time of the eviction application. The amount claimed by the creditors was considerably reduced, which begs the question of whether the sale of the appellants' immovable property was necessary in the circumstances where appellants purchased it for R19,95 million and the trustees sold it at an auction for R13.2 million.

[13] As appellants put it, it is imperative that this information be considered by this Court as it relates to the proper administration of justice, the integrity of the Court and the insolvency processes.

[14] Further, it was appellants' submission that not all relevant circumstances were put before Dolamo J, for example, whether an alternative accommodation has been made available to the appellants as it was their contention that should they be evicted they will be rendered homeless. Also, it was put in question whether the rights and needs of appellants children were taken into account, more especially the two (2) minor children aged thirteen (13) and six (6) years respectively.

[15] It was appellants' assertion that if all this information and relevant considerations were taken into account, the court a *quo* would have exercised its discretion just and equitably before granting the eviction order.

[16] This application to lead further evidence was opposed by the respondents on the basis that the test for the admission of further evidence on appeal is succinctly stated in *The City of Johannesburg v Changing Tides 74 (Pty) Ltd 2012 (6) SA 294 SCA* at para [61] that:

> "*The applicant must give a reasonable explanation for the failure to tender the evidence at first instance; the evidence must be credible and materially relevant to or decisive of the outcome of the proceedings.*"

It was argued that the application to lead further evidence must not cause prejudice to any of the parties. First respondent was removed as a trustee over a year ago i.e. 7 November 2016. This fact was known to the legal representatives that preceded those who are currently acting for the appellants. While the allegations against first respondent might not have been known by the appellants, it appears that applicant seeks to present at best, allegations that might be hearsay, but are more in the realm of idle speculation. Not a single objective fact for the removal of first respondent has been presented before this Court.

[17] It was, however, respondents' contention that the allegations relating to the first respondent have no bearing on the instant matter as it is common cause between the parties and was conceded that the property has indeed been sold and transferred.

[18] First respondent had the necessary *locus standi* to bring the eviction proceedings as a trustee. The attempt by the appellant to adduce further evidence should be rejected by this Court as respondents did not have time to deal with it. It later turned out that an answering affidavit had been prepared by the respondents dealing with this new evidence.

[19] A notice in terms of Section 76 (1) and (2) of the Insolvency Act 24 of 1936 for the substitution of trustees was handed up in court by respondents' Counsel. According to this notice, first respondent was replaced by Duane Colin Starkey and Nandipha Vinqi as co-trustees of the insolvent estate with second and third respondents. Appellants did not oppose the handing up of this notice in court, as it was common cause that indeed first respondent has been substituted by these trustees. The Court granted an order that the two (2) trustees should be added as fourth and fifth respondents respectively. For purposes of the record, it should continue to reflect *Mohamed Ismail Patel* as the first respondent.

[20] Section 19(b) of the Superior Courts Act 10 of 2013 confers a wide competence on the court exercising appeal jurisdiction. While holding that it is

undesirable to lay down definite rules as to when the court ought to accede to the application of a litigant desirous of leading further evidence upon appeal, the Appellate Division (as well as the Supreme Court of Appeal and the Constitutional Court) has in a series of decisions laid down certain basic requirements as follows:

> "(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to be lead was not led at the trial;
>
> (b) There should be a *prima facie* likelihood of the truth of the evidence;
>
> (c) The evidence should be materially relevant to the outcome of the trial – See *Simpson v Selfmed Medical Scheme And Another 1995 (3) SA 816 (A) at 825 C – 826; Rail Commuters Action Group And Others v Transnet Ltd t/a Metrorail And Others 2005 (2) SA 359 (C).*"

[21] To the extent that appellants have not opposed respondents' application to adduce further evidence and respondents opposed appellants' application to adduce further evidence, it is of paramount importance that I should deal with this application. First, it is unconscionable as to how respondents take issue with the late filing of appellants' application, whereas they themselves handed up in Court notice of substitution of trustees and further moved their own application to adduce evidence ten (10) days before the initial hearing date. The fact that appellants are sophisticated individuals who live in one of the most expensive suburbs and occupying a R19.95 million house does not make them automatically knowledgeable with the Court procedure. It may well be that appellants and their erstwhile legal representatives knew about the questionable conduct of the first respondent but did nothing about it. Again I am not aware exactly which legal representatives respondents referred to in this regard as appellants have been represented by a couple of them and did hold their brief that long. Now, could a conduct of the previous legal representatives, in general, be a ground of prejudice in prosecuting appellants' appeal? Does that mean if appellants had their chance to present their case previously, but for whatever reason missed it they are now precluded from presenting it in future, regardless of

how materially relevant is the information? The Constitutional Court in *De Lange v Smuts NO And Others 1998 (3) SA 785 (CC)* at para [131] said the following:

> "*Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance.*"

[22] If it is appellants' contention that the omission of this information before Dolamo J affected the outcome of their case, in my view, appellant cannot be penalised in bringing their application on the eve of the hearing. It cannot be disputed that appellants got a raw deal from their previous legal team/s. They failed to deliver according to appellants' mandate which culminated into this appeal being postponed. Now that they ultimately found Counsel who was able and willing to deliver in accordance with their instructions, this Court cannot be seen to be shutting the door on the appellants' face. It has to consider their application in the same way it considered respondents' application. Fairness dictates that there should be parity of arms in presenting the case and that extends to the adjudication of the same matter.

[23] As stated by appellants Counsel, due to the amount of time they had in preparation of this appeal, it was not possible to present evidence before this court on the shady character of the first respondent as same had been requested from the Master of the High Court and not yet available. But judging from the judgments of this court, there is enough information and or explanation given to cast aspersions on the *locus standi* of the first respondent. For instance, upon investigation on the first respondents' conduct by the Cape Law Society, it found that numerous transgressions have been committed by the first respondent and filed a striking off application. This Court in *Cape Law Society v Muhamed (4568/2016 [2017] ZA WCHC 29 (24 March 2017)* *at para [27] found that:*

> "*The respondent has not answered any of these serious supplementary allegations. There is unanswered evidence of a misappropriation of trust funds*

> *as an attorney in relation to the single file made available to the curator and of further substantial misappropriations and dishonesty as an insolvency practitioner.*"[my underline]

[24] The test in these types of applications is that applicant should furnish a reasonably sufficient explanation based on allegations that may be true, there should be a *prima facie* likelihood of truth in the evidence and such evidence should be relevant to the outcome of the matter. The allegations of first respondent as an imposter are of a serious nature. The court needed to have investigated the fact that the person initiating the eviction proceedings is the person he claims to be. If first respondent deposed to the founding affidavit that he is an insolvency practitioner, the Court should be satisfied that he is indeed the person he swears to be. In terms of Justices of the Peace and Commissioners of Oaths Act 16 of 1963, as amended, Section 9 states that:

> "***Penalties for false statements in affidavits and certain other declarations –***
>
> *Any person who, in an affidavit, affirmation or solemn or attested declaration made before a person competent to administer an oath or affirmation or take the declaration in question, has made a false statement knowing it to be false, shall be guilty of an offence and liable upon conviction to penalties prescribed by law for the offence of perjury.*"

[25] If it is found that the founding affidavit in the eviction proceedings before Dolamo J, for instance, was deposed to by a perjurer – such proceedings in my view cannot be legitimised by the fact that there were two (2) other trustees who confirmed that the facts are true and correct. If aspersions are cast on the very existence or non-existence of the deponent, such proceedings might end up being rendered a nullity. The well-established principle that no Court will lend its aid to a party who finds his cause of action upon an illegal act should have equally applied in this matter.

[26] It might have been argued that no evidence was put before this Court in order for the respondents to counter the appellants' allegations. I am convinced that this Court as a Court of appeal should not occupy itself with the question of whether there

is enough evidence put before it for the said allegations. The test is that "*there should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence led was not led at trial*." Such an inquiry should have been made at the hearing by the court of first instance.

[27] For these reasons, I would grant the application to lead further evidence to appellants. Given that there was no opposition to respondents' similar application; I would similarly grant the application.

Just and Equitable

[28] It was appellants argument further that the court a *quo* committed a misdirection by granting an eviction order without conducting an inquiry in terms of Section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("*PIE*")

> "*4(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.*"[my underline]

[29] It is common cause that Dolamo J granted an eviction order based on the fact that the appellants are unlawful occupiers within the meaning of Section 1 of PIE. In fact, it cannot escape one that the reasoning and conclusion in Dolamo J's judgment is premised on PIE. Now, did the court a *quo* satisfy the requirements in terms of Section 4(7) *supra* in arriving at its order? It is appellants' contention that their relevant circumstances were not properly investigated in order for the court to grant the eviction order, more especially the interests of the minor children and that should

they be evicted, they will be rendered homeless.

[30] Much was said about the appellants' family lifestyle, that this case involved a sophisticated property worth millions with magnificent views and that appellants are people sitting with fancy cars and so on. These are somehow not candidates to be relocated to "*Wolwerivier" or "Bokmakierie"*, the integrated human settlement option for the displaced. Unfortunately, that is pure speculation as that was not appellant's case. On the reading of PIE, its aim and purpose is to provide for procedures for eviction of unlawful occupiers, as no one may be evicted from their home, without an order of court made after considering all the relevant circumstances. PIE is not only applicable to certain sectors of community or category of people. In as much as the South African community is not categorised according to classes in the democratic dispensation, I find nowhere in PIE where certain considerations are reserved for a certain sector of the community. In any event, the question of whether the operation of PIE is restricted to poor, homeless persons who out of necessity arising from pass laws, have occupied the land of others without consent, is the question that divided the SCA in *Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA).* It would be an unfortunate situation if such were to be repeated in this matter.

[31] If indeed appellants' sophisticated lifestyle was a consideration or not a consideration when Dolamo J granted an eviction order, in my opinion, that needed to have reflected in his judgment. The fact that appellants stated that, should they be evicted, they have nowhere to go – that should have triggered an investigation as the consequence of the eviction order would have rendered them homeless. The level of sophistication of appellants' lifestyle is not a reason for the determination of the stipulated requirement. The eviction order should have been granted after relevant considerations have been taken into account in my view. The appellants' circumstances are not at all excluded from those that appear in Section 4 (7). So, there would be no justification in classifying them in a category that is not catered for in our constitutional dispensation. Section 9 of The Constitution in the Bill of Rights guarantees that everyone is equal before the law and has the right to equal protection and benefit of the law. Discrimination in whatever form is regarded as unfair, and therefore unwarranted.

Consideration of all relevant circumstances

(i) Report by Municipality

[32] It is common cause therefore that despite the City of Cape Town being the third respondent in the eviction proceedings and fourth respondents in the appeal proceedings, no report was furnished by them. It is a well-established principle that eviction from one's home always raises a constitutional issue – See *Occupiers, Berea v De Wet 2017 (5) SA 346 (CC)* at para [21]; *Machele and Others v Mailula and Others 2010 (2) SA 257 (CC).*

[33] The local authority has obligations to respond to the notice if served in terms of Section 4(2) of PIE. It has a duty to consider whether there is a dispute in terms of Section 7 of PIE, and if so, whether to appoint person/s to mediate the dispute. This duty has been one of necessity in so many cases and courts have repeatedly emphasised its importance – See *Sailing Queen Investments v The Occupants La Colleen Court 2008 (6) BLCR 666 (W); Cashbuild (South Africa) (Pty) Ltd v Scott and Others 2007 (1) SA 332 (TPD); Lingwood and Another v Unlawful Occupiers of Erf 9 Highlands 2008 (3) BCLR 325 (W).*

[34] It has been repeatedly stated that each eviction has its own intractable elements. For instance, in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC)* – the issue was the constitutionality of the differentiation made by the appellant in its housing policy, between persons it evicted from 'bad buildings', and persons that private landowners evicted. The Constitutional Court held that it was unreasonable to differentiate between these two (2) groups. The local authority has a duty to provide temporary emergency accommodation to all persons being evicted who have no alternative accommodation (paras 50 – 51). It should not be assumed that simply because the alleged unlawful occupiers occupied a R19.95 million worth of a property, they cannot be rendered homeless. Due process requires that an inquiry be made.

[35] It then follows that whether the unlawful occupier has a sophisticated or unsophisticated lifestyle, the fact that it is alleged that eviction would render such unlawful occupier homeless has to be investigated by the court and without a doubt,

the local authority has to furnish a report. The court cannot assume that an unlawful occupier's circumstances do not need investigation based on the lifestyle of that person.

[36] This is a matter where appellants alleged that they have nowhere to go, so should they be evicted from their home, they shall be left homeless with their children. In *Occupiers, Berea (supra) at para [61] the Court held:*

> *"It follows that where there is a risk that homelessness may result, the availability of alternative accommodation becomes a relevant circumstance that must be taken into account. A court will not be able to decide the justice and equity of an eviction without hearing from the local authority upon which a duty to provide temporary emergency accommodation may rest. In such an instance the local authority is a necessary party to the proceedings. Accordingly, where there is a risk of homelessness, the local authority must be joined*."

It is, therefore my view, that in the face of the allegation that appellants agreed to vacate the immovable property if and when it is sold and registered into the name of the third party, the court a *quo* should have made inquiries on their arrangements for an alternative accommodation should they be evicted. In *Occupiers Berea (supra)*, the unlawful occupiers consented to an order evicting them, but the Constitutional Court held that the Court is not absolved from the obligation to consider all relevant circumstances before ordering an eviction.

[37] There is no indication from the judgment of Dolamo J that the report by the local authority was ever called for and considered. The only reason for the delay of the eviction was to afford the appellants a reasonable period of time in order to put in place their plans to save their important asset, being their home. In my view, this was a misdirection on the part of the court *a quo*.

(ii) Interest of the minor children

[38] As stated above, and to be exact in para [39] of the judgment of Dolamo J, this is a matter where the court a *quo* only stated that the personal circumstances of the appellant were not placed before Court. In the same paragraph the Court states that the appellant divulged that they have nowhere to go and if they are evicted from their home, they shall be left homeless with their children. If the Court considered these allegations to be serious, it should have investigated them further, other than making a comment in passing. To simply state that appellants enjoyed good health without any facts supporting such a conclusion is rather misguided and or irresponsible. Further, stating that appellants resided or were parents of four (4) children aged 20, 17, 11 and 4 years respectively (at that time) was not enough.

[39] The Courts have long prioritised the interests of children more especially when it came to the alleged homelessness. Section 4(7) specifically states that a court may grant an eviction order after circumstances have been considered … including the rights and needs of the children. In addition, the rights of children are guaranteed in Section 28 of Chapter 2 of the Bill of Rights; and in Section 7 of the Children's Act 38 of 2005. It is only when those requirements have been met and the court is satisfied as such that the court can proceed with an eviction order. The Court need not take a passive approach and assume the unlawful occupiers' circumstances rather incorrectly.

In *Occupiers, Berea (supra)* para [47] the Court stated:

> "*It deserves to be emphasised that the duty that rests on the court under section 26(3) of the Constitution and section 4 of PIE goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in which the court is required and expected to take an active role. In order to perform its duty properly the court needs to have all the necessary information. The obligation to provide the relevant information is first and foremost on the parties to the proceedings. As officers of the court, attorneys and advocates must furnish the court with all relevant information that is in their possession in order for the court to properly interrogate the justice and equity of ordering an eviction*".

[40] It might be that appellants themselves failed to provide relevant information before Court. In my opinion, the Court as a final arbiter of a just and equitable order should have called for that information if parties fell short. In *Occupiers, Berea (supra) at [52] it was stated:*

> *"The just and equitable enquiry is an innovation under the Constitution and PIE, which requires the Court to be proactive to establish the relevant facts. At the very least, if the Court was aware of its constitutional duties, it would have realised that it did not have all the relevant facts before it and would not have granted the eviction*."

[41] In addition, Sachs J in *Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)* para [36] stated:

> "*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 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 interest 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.*"

Other than the ages of the children of the appellants, it is clear that the court *a quo* did not have any information about their health, welfare including care, education, social and cultural and religious practices that could be considered relevant to the eviction. For those reasons, the court a *quo* erred in granting an eviction order without probing any of the children's' rights and needs.

(iii) Any other relevant circumstances

[42] Sachs J in *Port Elizabeth Municipality (supra) at para [30] and [31] suggests that:*

'[30] There is nothing in s6 to suggest that the three specifically identified circumstances are intended to be the only ones to which the court may refer in deciding what is just and equitable. They are peremptory and not exhaustive. It is clear both from the open-ended way in which they are framed and from the width of decision-making involved in the concept of just and equitable, that the court has a very wide mandate and must give due consideration to all circumstances that might be relevant. Thus the particular vulnerability of occupiers referred to in s4 (the elderly, children, disabled persons and households headed by women) could constitute a relevant circumstance under s6. Similarly, justice and equity would take account of the extent to which serious negotiations had taken place with equality of voice for all concerned. What is just and equitable could be affected by the reasonableness of offers made in connection with suitable alternative accommodation or land, the time scales proposed relative to the degree of disruption involved, and the willingness of the occupiers to respond to reasonable alternatives put before them.

[31] *The combination of circumstances may be extremely intricate, requiring a nuanced appreciation of the specific situation in each case. Thus, though there might be a sad uniformity in the conditions of homelessness and desperation which lead to unlawful occupations, on the one hand, and the frustration of landowners at being blocked by intruders from enjoyment of their property, on the other, the actual details of the relationships involved are capable of infinitive variation. It is not easy to classify the multitude of places and relationships involved. This is precisely why, even though unlawfulness is established, the eviction process is not automatic and why the courts are called upon to exercise a broad judicial discretion on a case by case basis. Each case, accordingly, has to be decided not on generalities but in the light of its own particular circumstances. Every situation has its own history, its own dynamics its own intractable elements that have to be lived with (at least, for the time being), and its own creative possibilities that have to be explored as far as reasonably possible. The proper application of PIE will therefore depend on the facts of each case, and each case may present different facts that call*

for the adoption of different approaches."

Similarly in this matter, it might be argued that first respondent was authorised to bring the proceedings as a trustee for eviction of appellants before this Court in terms of Section 73(1) of the Insolvency Act 24 of 1936. But, if the circumstances leading to his appointment as such are questionable, in my opinion, the performance of his duties as a trustee cannot be legitimate. This court cannot be seen to be embracing and or enforcing the consequences arising from an illegal appointment of the first respondent. The allegations of first respondent's masquerading as somebody that he is not, in my view, taint the entire proceedings in the court *a quo*. This is something relevant to the proceedings that should have been put before the court a *quo*, more especially that there are allegations that the proceeds of movable assets were not accounted for by the first respondent. The fact that the first respondent was ultimately removed by the Master in the appellants' insolvent estate, in my opinion, raises a red flag that something might be amiss about his character. It might have been that this is a matter for investigation by the police, but in my view, the first inquiry should have started with the court hearing the eviction application.

[43] The issues in this appeal are not moot and cannot be rendered moot by the appellants' undertaking to vacate the property. Even if that was so, the Courts are enjoined to balance the interests of the parties before they issue eviction orders. The court a *quo* was similarly enjoined to balance the statutory duties of the respondents (and enquire on their questionable personalities) with the constitutional rights of the appellants and their children.

[44] To the extent that the court a *quo* found appellants to be unlawful occupiers, they should be treated as such to the conclusion of the eviction proceedings.

[45] In conclusion, for the reasons stated above, I am of the view that both appellant and respondents should be granted leave to adduce further evidence and the appeal be upheld with costs of 3 August 2018 and 13 September 2018. Appellants should remain liable for the costs of 24 August 2018.

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MANTAME J

WESTERN CAPE HIGH COURT