

Case No: 87/2023

In the application between:

**THE TRUSTEES FOR THE TIME BEING OF THE
P G W[...] FAMILY TRUST**

First Applicant

ABDUL KHABEER JARDIEN

Second Applicant

SAAJIDAH FELTON

Third Applicant

and

N[...] W[...]

First Respondent

(Together with all other occupiers holding under
First Respondent)

G[...] W[...]

Second Respondent

(Together with all other occupiers holding under
Second Respondent)

**ALL OTHER UNLAWFUL OCCUPIERS OF
ERF 1[...] CAPE TOWN**

Third Respondent

(Together with all other occupiers holding under
Third Respondent)

THE CITY OF CAPE TOWN

Fourth Respondent

Date of Hearing:	22 November 2023
Further affidavits filed:	1 and 4 December 2023
Date of Judgment:	31 January 2024
Coram:	Holderness AJ

JUDGMENT

HOLDERNESS AJ

Introduction

[1] The applicants seek an order in terms of section 4(8) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE') for the eviction of the first, second and third respondents ('the respondents') from the immovable property formally known as Erf 1[...] Cape Town, in the City of Cape Town, Cape Division, Western Cape Province, more commonly known as 2[...] T[...] R[...], B[...], Athlone, Cape Town, Western Cape ('the property').

[2] The section 4(2) notice was duly served on the first, second and third respondents.

[3] The issues which arise for determination are:

3.1 Do the respondents have a legal right to occupy the property or are they in unlawful occupation thereof?

3.2 If their occupation of the property is unlawful, is it just and equitable that they be evicted?

3.3 If it is just and equitable that the respondents be evicted, the terms and conditions and what would be a just and equitable period within which eviction is to be effected?

Factual matrix

The parties

[4] The property is owned by and registered in the name of the PG W[...] Family Trust ('the Trust').

[5] The sole trustee of the first applicant is A[...] C[...] W[...] ('A[...]a'). The other trustee, the late P[...] G[...] W[...] ('P[...]'), who was also a beneficiary of the Trust, was the husband of the first applicant, the son of the second respondent and the brother of the first respondent. P[...] passed away on 15 March 2017.

[6] The surviving beneficiaries of the Trust are the first applicant and her children, K[...] J[...] W[...] ('K[...]'), M[...] J[...] W[...] ('M[...]') and N[...] W[...] ('N[...]').

[7] In terms of the joint last will and testament of the first applicant and the late Mr W[...], the first applicant is the sole beneficiary of his estate.

Personal circumstances of A[...] and the second and third applicants

[8] A[...]’s evidence regarding her and her children’s personal circumstances, placed before the Court at its request in a supplementary affidavit filed on about 1 December 2023, is as follows:

- 8.1 She had to secure employment after P[...] passed away, in order to support herself and her children;
- 8.2 She only managed to secure employment in 2019, and during the two years of unemployment she incurred various debts, in a total amount of approximately R857,674, which is one of the reasons she decided to sell the property;
- 8.3 She is currently employed as a payroll administrator and earns a monthly net salary of R13 991.25;
- 8.4 She has suffered several health setbacks since the passing of P[...], including anxiety and chronic hypertension, and is on chronic medication;

- 8.5 She is unable to afford medical aid and is not able to pay for any major medical procedures for herself or her children, should same become necessary;
- 8.6 P[...] owned three properties at the time of his death. The first applicant resides in one of the properties with her two youngest children. She had to sell one of the other properties in 2019 to settle the debts referred to above, to pay for her son's tuition and to pay the balance owing on her motor vehicle;
- 8.7 The third property is tenanted, however the tenants have not paid rental since September 2023, and she is accordingly in arrears with the monthly bond instalments and municipal charges in respect of the property;
- 8.8 K[...] is studying in the USA. His scholarship was withdrawn, and she has therefore had to fund his medical expenses, agent fees of R40,000, accommodation and life insurance. He owes students fees of approximately R200,000 to Illinois State University;
- 8.9 M[...] attends UCT where he is majoring in Film and Media Studies. The first applicant pays for all his expenses; and
- 8.10 N[...] is in Grade 9. The first applicant pays for all her educational and other expenses.

[9] The second and third applicants are the co-purchasers of the property in terms of a written agreement of sale concluded with the first applicant on 20 September 2022 ('the agreement of sale'), in terms of which they purchased the property for R900,000.

[10] The second and third applicants are both employed and have two minor children, aged two and six years old.

Personal circumstances of the respondents

[11] The first respondent is Mr. N[...] W[...]:

11.1 He is 60 years old;

11.2 He is unemployed;

11.3 He is the son of the second respondent and the brother of P[...];

11.4 According to the first applicant, he continuously abuses alcohol and / or other unknown substances; and

11.5 He requires psychological and emotional support, and has been reliant on the first respondent and V[...] for the past nine years.

[12] The second respondent is Mrs. G[...] W[...]:

12.1 She is 87 years old;

12.2 She is the mother of P[...] and the first respondent;

12.2 She receives a SASSA pension;

12.3 She is frail and in need of fulltime care for her personal hygiene needs, meals, and transportation.

12.4 Her medical condition requires that she visit the local Health facility on a monthly basis and she receives treatment at Groote Schuur Hospital.

12.5 She is on chronic medication. She uses both a walking stick and a wheelchair to move around;

12.6 She is assisted by her daughter, V[...] W[...] ('V[...]'), who helps her to move around and who dispenses the various prescription medications to her on a daily basis; and

12.7 She acknowledges that she may need frail care soon.

[13] The second respondent has lived at the property since 12 April 2014. On her version the first time she became aware of the fact that the first applicant wanted her to vacate was on 8 August 2022.

[14] The first and second respondents (hereafter collectively referred to as 'the respondents') receive support from various family members and friends:

14.1 Mr D[...] W [...], the son of the second respondent and brother of the first respondent ('D[...]'), is employed at Transnet and resides with his wife and three children in a three-bedroom house in D[...] Street, Parow, Cape Town. D[...] pays for the respondents' electricity, telephone bills, groceries and transport;

14.2 Mrs V[...] B[...] ('V[...]') resides in the immovable property next door to the respondents, together with her husband, Mr C[...] B [...]. V[...] attends to the second respondent's daily needs and manages her monthly pension and disability grant;

14.3 Mr M[...] M [...], the second respondent's nephew, who is gainfully employed;

14.4 Ms Aloma Jennifer Matthews, a friend of the second respondent.

Ms Matthews describes herself as a community activist residing in Hanover Park, Cape Town;

14.5 Ms B[...] W[...], the granddaughter of the second respondent; and

14.6 Gatto (who would not provide his full names), who informed the Court that he is a ‘customary legal advisor’ and wished to represent the second respondent at the first hearing on 9 October 2023. As he did not have right of appearance, he was not permitted to do so.

[15] It appears that the respondents are the sole occupiers of the property.

The property

[16] The Trust is the registered owner of the property.

[17] In terms of the joint last will and testament of P[...] and the first applicant, A[...] is the sole beneficiary of his estate.

The sale of the property to the second and third applicants

[18] The property was registered in the name of the first applicant on 29 November 2013.

[19] A[...], in her capacity as a trustee of the first applicant, decided to sell the property to the second and third applicants to ensure that there are sufficient funds in place to pay for her and her children’s needs, and in particular for her children’s education requirements.

[20] In terms of clause 16 of the agreement of sale, vacant occupation is to be given to the purchasers against registration of transfer.

[21] The first and second respondents (hereafter collectively referred to as ‘the respondents’) moved into the property in 2014 and remain in occupation thereof.

[22] Prior to 2014, the second respondent held secure tenancy in a house in Kewtown, Athlone for more than 40 years with the City of Cape Town.

[23] The nature of the respondents’ occupation of the property is contested. The first applicant avers that there is no valid lease or other agreement in terms of which the respondents are entitled to remain in occupation of the property. The second respondent contends that P[...] offered her and the first respondent an unregistered right of life-long tenancy or *habitatio* in respect of the property. This is denied by the first applicant.

[24] In the supplementary replying affidavit filed on behalf of the Trust, A[...] claims for what appears to be the first time, that the respondents’ right to occupy, prior to such right being terminated, was that of *precarium*, and that the second respondent in particular was afforded the right to occupy the property until such time as she would need additional or frail care.

Notice to vacate

[25] A[...]’s evidence is that on 8 August 2022, she engaged with the respondents regarding a date on which they would vacate the property. The respondents however refused to commit to vacating the property on any future date.

[26] The applicants contend that to the extent that the respondents had any rights to reside at the immovable property (which they deny), those were terminated on a number of occasions, but at least on the following dates:

26.1 8 August 2022 (verbally);

26.2 29 August 2022 (first written notice);

26.3 30 September 2022 (second written notice); and

26.4 15 December 2022 (third written notice).

[27] The respondents have never paid any rental, nor contributed towards payment of rates or municipal charges in respect of the property. The first applicant bears the cost of all maintenance and repairs in respect of the property.

[28] The applicants contend that any right to occupy the property which the respondents may previously have enjoyed has been terminated in writing, alternatively was again expressly terminated by the first applicant on behalf of the Trust in the founding papers in this application, and that the respondents are therefore in unlawful occupation of the property.

The first defence – Lifelong right of occupation

[29] The eviction application was postponed on 9 October 2023 for the respondents to obtain legal representation. Adv Rudolph du Toit of the Cape Bar came on brief on a *pro bono* basis in November 2023. He filed lengthy heads of argument and argued the matter on behalf of the respondents. I am grateful to both Adv du Toit and Mr van Rensburg for their comprehensive submissions, which were of great assistance to the Court.

[30] During argument, it was conceded on behalf of the respondents that their right to occupy was a personal, and not a real right, and could be cancelled by the applicants.

[31] The respondents accordingly rely not on a real right of *habitatio*, but rather on an unregistered personal right of occupation or *precarium*.

[32] The respondents assert that P[...] granted them an unregistered lifetime right of occupation in respect of the property. This is disputed by the first applicant.

[33] In her supplementary replying affidavit A[...] states that the respondents were granted right of occupation by way of *precarium* which would terminate when the second respondent was in need of care.

[34] Whilst it is clear that the principal reason for the eviction sought is that the property has been sold to the second and third respondents, and the Trust wishes to distribute the proceeds as benefits to the beneficiaries, it also appears from the second respondent's evidence that she requires full time care on a daily basis.

[35] Even if the right of occupation was a lifetime right, as asserted by the respondents, it is not in dispute that such a right may be terminated.

[36] On the evidence before me, it appears on the probabilities that such right has been terminated on reasonable notice on a number of occasions.

[37] The respondents contend that these notices constituted notice to vacate the property, and not notice to terminate the right to occupy the property. This strikes me as being a legalistic argument which does not assist the respondents. In my view a notice to vacate by implication includes the termination of the right to occupy.

[38] What appears to be an insurmountable obstacle with regard to the right asserted by the respondents to remain in occupation of the property for their lifetime is the provisions of the trust deed of the Trust, which governs the Trust, and limits the actions of the trustees.

[39] The Trust was established with the express purpose, in terms of clause 3.3 thereof, of providing for the welfare and maintenance of the beneficiaries of the Trust.

[40] It is trite that the trustees of a trust are duty bound to act jointly, and to act in the interests of the beneficiaries of the trust, and not to do anything which undermines the purpose of the trust.

[41] The trustees of the Trust could not validly conclude an agreement in terms of which the respondents, who are not beneficiaries of the Trust, would have lifelong rights or benefits over the property, a major asset of the Trust.

[42] Such an agreement would prevent the Trust from freely dealing with or realising such asset for the benefit of the beneficiaries, which conflicts with the stated purpose of the Trust.

[43] I am persuaded by the argument on behalf of the Trust, namely that P[...], as an experienced attorney, if he intended to create a lifelong right of occupation in favour of the respondents, he would in all probability not have:

43.1 caused the property to be registered in the name of the Trust, of which the respondents are not beneficiaries; or

43.2 concluded an oral agreement for the creation of a personal servitude in favour of the respondents, which he would have known is prohibited by section 2 of the Alienation of Land Act, 68 of 1981¹, and section 5 of the General Law Amendment Act, 50 of 1956.²

[44] On the second respondent's version, the alleged personal servitude entitling her to occupy the property was in terms of an oral agreement, without any form of payment. This is not legally competent in terms of the relevant statutory provisions cited above.

[45] I am therefore not satisfied that the respondents have proven that they have an unregistered lifetime right to remain in occupation of the property. They are accordingly in unlawful occupation of the property.

The respondents' second defence – Knowledge of the right of occupation

[46] The second respondent alleges that because the second and third applicants, as purchasers of the property, were at all material times aware of the respondents' occupation of the property, they must have been aware of the right of *habitatio* granted to the respondents, prior to offering to purchase the property.

¹ Which provides that an alienation of land shall not be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.

² Which requires that a donation, which this could only have been, of future entitlement, which includes an interest in land, must be in writing and signed by the parties.

[47] The second respondent further contends that an unregistered right of *habitatio* is still binding on the second and third applicants as purchasers.

[48] To the extent that the trustees are required to act jointly, the second respondent avers that as A[...] was at all material times aware of the respondents' being granted the right to occupy, and never countermanded the granting of these rights, she impliedly authorised P[...] to act on her behalf in this regard.

[49] The second and third applicants however contend that all they knew at the time of purchasing the property was that the respondents were in unlawful occupation thereof. In terms of the sale agreement, they required the Trust to give them vacant occupation against registration of transfer.

[50] To my mind the second and third applicants' knowledge of the respondents' occupation of the property does not equate to knowledge of the alleged personal servitude of *habitatio*. There is no record of the alleged servitude, and there is no factual basis set forth to support the respondents' contention that they had actual or effective notice thereof.

[51] According to the second and third applicants, the only knowledge which they had about the respondents' occupation is what they were told by the first applicant, who denies being aware of any lifetime right to occupy the property.

[52] In all the circumstances I am satisfied that any right which the respondents had has been lawfully terminated on proper notice by the first applicant on behalf of the Trust. The respondents have been aware of the Trust's intention to evict them for almost eighteen

months, and it cannot be argued that they have not had adequate notice of the termination of any right which they may have had to occupy the property.

Applicable law

[53] In any eviction of an unlawful occupier from residential property the starting point is section 26(3) of the Constitution which provides that '(n)o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances'. Accordingly, courts seized with eviction matters are enjoined by the Constitution to consider all relevant circumstances.³

[54] The prohibition in s 26(3) was effected through the enactment of PIE, which goes further and enjoins the courts to order an eviction only 'if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances' as contemplated in ss 4(6) and (7)⁴ and s 6(1).

[55] In *Port Elizabeth Municipality*⁵ the Constitutional court emphasised that a court must take an active role in adjudicating such matters, stating as follows:

³ *Occupiers, Berea v De Wet NO and Another* 2017 (5) SA 346 (CC) at para [40].

⁴ These subsections provide that:

'(6) If an unlawful occupier has occupied the land in question for less 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 the rights and needs of the elderly, children, disabled persons and households headed by women.'

(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.'

⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para [36].

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

[56] Furthermore, the apex court in *Pitje v Shibambo*⁶ held that courts are not allowed to passively apply PIE and must *'probe and investigate the surrounding circumstances'*.

[57] In *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*⁷ the Supreme Court of Appeal held that there are two separate enquires that must be undertaken by a court:

'First, it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under s 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under s 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant that order.'

[58] The second enquiry, which the court must undertake before granting an eviction order, is to consider —

'what justice and equity demand in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered

⁶ 2016 (4) BCLR 460 (CC) ([2016] ZACC 5) para [19].

⁷ 2012 (6) SA 294 (SCA) at paras [11] to [25].

*homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly, it cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity.'*⁸

[59] In *Occupiers, Berea v De Wet NO and Another*⁹ the Constitutional Court held that:

*'The court will grant an eviction order only where: (a) it has all the information about the occupiers to enable it to decide whether the eviction is just and equitable; and (b) the court is satisfied that the eviction is just and equitable, having regard to the information in (a). The two requirements are inextricable, interlinked and essential. An eviction order granted in the absence of either one of these two requirements will be arbitrary. I reiterate that the enquiry has nothing to do with the unlawfulness of occupation. It assumes and is only due when the occupation is unlawful.'*¹⁰

[60] Should section 4(7) of PIE apply, and where there is a risk that homelessness may result if an eviction order is granted, the availability of alternative accommodation becomes a relevant circumstance that must be taken into account.¹¹

[61] 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.¹²

⁸ Id

⁹ 2017 (5) SA 346 (CC) at para [48].

¹⁰ Id at para [48].

¹¹ *Occupiers, Berea supra* at para [61], and the authorities as cited at footnote 52.

¹² Id.

[62] Of particular relevance to the present matter is the position as stated by the Constitutional Court, namely that ‘private entities are not obliged to provide free housing for other members of the community indefinitely, but their rights of occupation may be restricted, and they can be expected to submit to some delay in exercising, or some suspension of, their right to possession of their property in order to accommodate the immediate needs of the occupiers.’¹³

[63] As observed by Wallis J in *Changing Tides*, where the party seeking the eviction is a private entity, as in the present matter, the availability of alternative land bears not on the question of whether an eviction order *should* be granted, but rather on the date of eviction and the conditions attaching to such an order. Should alternative accommodation be available, the date of eviction may justifiably be sooner than were the converse to apply.¹⁴

[64] The Court further stated that:

*‘This does not mean that courts may disregard the question of the availability of alternative land or accommodation — that would ignore the express requirements of s 4(7) — but the weight this factor will carry in making the initial decision whether an eviction order is just and equitable may not be great.’*¹⁵

[65] Accordingly the availability of alternative land or accommodation is relevant to both enquiries into what is just and equitable. That link between the first and second stages of the enquiry underpins the numerous decisions in which our courts have held that, before

¹³ *Changing Tides supra* at para [18].

¹⁴ *Id.*

¹⁵ *Id.*

determining whether an eviction order should be granted, the relevant authorities must be engaged in order to ensure that they will discharge their obligations to the evictees.¹⁶

[66] The recent decision of the Constitutional Court in *Grobler v Phillips & Others*¹⁷ involved similar facts to the present matter, and the findings of the apex Court are both apposite and instructive.

[67] In the *Grobler* matter, the issue which arose for determination was whether an 84-year-old widow and her disabled son ought to be evicted from a home in which she had lived she was 11 years old, and whether the appellant's rights of ownership of the property in question ought to be vindicated by such an eviction order.

[68] One of the issues underpinning the eviction application was the effect, if any, of reliance upon an oral right of *habitatio* or *usus* upon the entitlement of an owner to an order of eviction in terms of the Act. In that matter it was undisputed that the occupiers had been granted a lifelong right of occupation by the previous owners.

[69] The third issue related to the exercise of the high court's discretion not to order the eviction of the first respondent on the basis that such an order was not just and equitable. At issue in this regard was the nature of the discretion, the Constitutional Court's entitlement to interfere with the exercise of that discretion and, to the extent it may, whether grounds for interference had been established.

¹⁶ Id at para [21].

¹⁷ 2023 (1) SA 321 (CC).

[70] The Constitutional Court, after referring to its judgment in *Snyders*,¹⁸ affirmed its stance that ESTA was not enacted to provide security of tenure to an occupier in the house of his or her choice and held that as PIE was also enacted to prevent unfair evictions, this principle is equally applicable to PIE matters.¹⁹

[71] Based on the aforementioned, it is now settled law whilst the question whether the constitutional rights of the unlawful occupier are affected by the eviction is one of the relevant considerations, the wishes or personal preferences of the unlawful occupier are not relevant.

[72] An unlawful occupier therefore does not have the right to refuse to be evicted on the basis that she prefers or wishes to remain in the property that she is occupying unlawfully. An unlawful occupier's right to adequate housing in terms of section 26 of the Constitution does not give her the right to choose exactly where she wants to live.²⁰

[73] Referring to the principles set out by the Supreme Court of Appeal in *Ndlovu*²¹ the Court in *Grobler* emphasised that PIE was not designed for the expropriation of land from a private landowner from whose property the eviction is being sought.

[74] In *Ndlovu* the Court emphasised that the landowner retains the protection of section 25 of the Bill of Rights.²²

¹⁸ *Snyders v De Jager* 2017 (3) 545 (CC).

¹⁹ *Grobler supra* at paras [35] and [35].

²⁰ *Id* at para [36].

²¹ *Ndlovu v Ngcobo, Bekker v Jika* 2003 (1) SA 113 (SCA).

²² *Grobler* at para [37].

[75] As held by the Constitutional Court in *Blue Moonlight*,²³ the right to adequate housing guaranteed under section 26(2) of the Constitution places a positive obligation on the State, and not on private landowners, to realise such right.

[76] In determining whether it is just and equitable to grant an eviction order, the capacity of the landowner to provide alternative accommodation and the peculiar circumstances of the occupier are relevant considerations, but do not impose an obligation on the property owner to provide such accommodation.²⁴

[77] As held by the Constitutional Court in *Hattingh*²⁵, and referred to in *Grobler*²⁶ court in determining whether it is just and equitable that an eviction order should be granted, must determine the competing interests of both the property owner and the unlawful occupier to ‘infuse justice and equity in the inquiry.’

The litigation history and the availability of alternative accommodation

[78] The application for eviction first presented before me on 9 October 2023. The respondents were represented at the time by Ms C Makua of the Legal Aid Board, however when the matter was to be heard the second respondent informed the Court that she wished to terminate the services of Ms Makua, and wanted to be represented by a Mr Gatto, who purported to appear on her behalf. Ms Makua was also present in Court.

²³ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) at para [31].

²⁴ *Grobler* at para [38].

²⁵ *Hattingh v Juta* 2013 (3) SA 275 (CC) at para [32].

²⁶ At para [39].

[79] Mr Gatto described himself as a 'customary law adviser.' It became clear after further questioning that he did not have right of appearance. I then explained to the second respondent that the matter should be postponed for her to obtain alternative legal representation. The first respondent was not present in Court.

[80] An order was granted postponing the matter for hearing on 22 November 2023. Provision was made in the order for the respondent to approach the Women's Legal Centre on or before 13 October 2023, and should they not be willing or able to assist the respondents, directing that a member of the Cape Bar be appointed on a *pro bono* basis to represent the respondents ('the October order'). The respondents were further granted leave to deliver further or supplementary answering affidavits by 13 November 2023, to which the applicants could reply by 20 November 2023. A copy of the order was to be served on the fourth respondent by no later than 10 October 2023.

[81] In terms of paragraphs 7 and 8 of the order, the fourth respondent, in consultation with the Department of Social Development (should such consultation be deemed by the fourth respondent to be necessary), was directed by no later than November 2023 to deliver a report to the court, confirmed on affidavit by an appropriate official of the fourth respondent, detailing the accommodation that it would make available to the first to third respondents, in a location as close as feasibly possible to the property currently occupied by them, should an eviction order be granted.

[82] The fourth respondent was further directed to set out in such report when the accommodation would be available, and to undertake to make same available. The report was further required to deal with the issue of proximity and explain why the location and form of

accommodation had been selected. Further provision was made for the report to set out the steps taken from the date of service of the October order until the filing of the report to engage with the respondents through their legal representatives, in person, or through family members or by any other means that may appear appropriate.

[83] The respondents were granted leave to deliver affidavits dealing with the contents of the fourth respondent's report, and specifying any objections thereto by 13 November 2023, to which the respondent was entitled to respond any further affidavit to be delivered by no later than 21 November 2023.

[84] On 12 October 2023 and after receiving an affidavit deposed to by Ms Makua on 11 October 2023, I issued a written directive in which she stated that certain members of the public appeared to have interfered with her representation of the second respondent.

[85] In terms of the directive, the family members of the second respondent were directed not to interfere with the second respondent obtaining legal representation and furnishing her legal representatives with proper instructions. The applicant's attorney, Mr van Rensburg, was requested to take the necessary steps to ensure that the directive was brought to the attention of the daughters of the second respondent, V[...] and E [...], who are not parties to these proceedings.

[86] The Court is indebted to Mr van Rensburg who complied fully with all requests, was at pains to ensure that the relevant parties received service of the Court order and directive, addressed correspondence to the fourth respondent with details of the respondents' family members and completed the relevant questionnaires for the fourth respondent. Mr van

Rensburg sought out attorneys who were willing to act for the respondents on a pro bono basis and to brief counsel *pro bono*.

[87] The second respondent completed a personal circumstances questionnaire for the fourth respondent. She stated that she would be rendered homeless if evicted and when asked what steps she had taken to obtain alternative accommodation she answered as follows:

'It has been difficult for me to even talk about alternative accommodation. Because I've been taken out of my home of 40 years by my son and daughter-in-law with promise of me they allowed to move out by coffin. Now I am care dependent on my daughter and cannot entertain the idea of another person touching my body. My daughter's house is full and it's not her property. The property belongs to my husband's family and the property is shared by more than one household and too many children and won't be able to move with walker or wheelchair and won't be able to have a private room or space to be washed. If the council can give my own flat back I will stay in the flat if you carry me up and stay up until I die. Having to answer this question makes my head spin, my chest tight and give me palpitations. My daughter had refused many job opportunities because she had promised her brother and myself that she will take care of me and all she gave me my final wish before I close my eyes. So if I'm evicted then I need to make sure my daughter gets a job at an old age home to make sure she is the only one to touch my body. But I pray that the judge will see A[...] is lying and not evict me. The only arrangement I made that I can depend on is the arrangement with my God to allow to die before the eviction date if the judge cannot see through A[...].'

[88] This response illustrates just how difficult and heart wrenching this matter has been.

[89] On 7 November 2023, the fourth respondent filed a report in terms of which it undertook to provide the respondents with an emergency housing kit and requested a period of 18 months to make a structure available at an emergency accommodation site.

[90] On 13 November 2023 Ms Ebrahim of M.B Ebrahim Attorneys came on record as the attorney for the first and second respondents. On the same day a supplementary affidavit deposed to by the second respondent was filed.

[91] The respondents' personal circumstances are repeated in such affidavit, and it is alleged by the second respondent that the first respondent, who has never been diagnosed with a mental disorder, does not have the requisite capacity to participate in the current proceedings or provide Ms Ebrahim with instructions. The second respondent avers that she also deposes to the affidavit on behalf of the first respondent and as his 'de facto curator.'

[92] In a supplementary replying affidavit the first applicant tendered, if an agreement could be reached without the matter being determined by the Court, to make some of the proceeds of the sale of the property available to assist the respondents with accommodation in a care facility and for the payment of a carer.

[93] In the founding affidavit, A[...] alleges that the respondents have sufficient resources to find alternative accommodation, and that she has furthermore offered for the second respondent to move in with her, and to employ a carer to assist her.

[94] A[...] denies that the first respondent lacks mental capacity and further denies that the second respondent has authority to depose to an affidavit on the first respondent's behalf.

[95] The first respondent has not deposed to any affidavits in this matter, including any confirmatory affidavits. There is no independent medical evidence confirming his lack of mental capacity.

[96] In the supplementary affidavit deposed to by A[...] on 15 November 2023, she states that P[...] never gave the first respondent consent to move into the property with the second respondent. She avers that the second respondent moved into the property on the basis of a *precarium* and at the request of V[...], who wanted the second respondent to live next door to her to help take care of her children.

[97] Lastly, it is pertinent that in her supplementary answering affidavit the second respondent admits that the first respondent abuses alcohol. A[...]’s evidence is that the family members of the first and second respondents would be willing to care for her if she did not insist on the first respondent, who apparently becomes violent and aggressive when under the influence, moving with her.

[98] When the matter was argued on 22 November 2023, Mr Exford of the Human Settlements Directorate – Informal Settlements appeared in person on behalf of the fourth respondent (‘the City’), and informed the Court as follows:

98.1 The fourth respondent usually offers as alternative accommodation for unlawful occupiers facing homelessness an emergency shelter with communal facilities at a TRA (temporary relocation area). The City will erect an 18 m² structure using metal sheeting and a wooden door and window, with one toilet per five families, and one water standpipe per 25 families;

98.2 The other scenario is what he described as the ‘Rolls Royce’, the best that the City can offer, namely a 26-30 m² unit with individual toilet, washbasin, and

electrification in an IDA (integrated development area). This unit was described by Mr Exford as a ‘very high standard home with everything that one needs for daily life’;

98.3 The City had identified a small pocket of land off the M5 to establish a settlement after being placed under significant pressure by our Court to provide accommodation;

98.4 The project has commenced, and the IDA has ‘formal development services in the ground; and

98.5 If all goes according to plan and there is no political interference, at the end of May 2024 one of the units would be made available to the first and second respondents.

Is it just and equitable to grant an order evicting the first and second respondents?

[99] The respondents aver that should the Court find that their rights of occupation were validly cancelled, an order of eviction would not be just and equitable considering the following facts and circumstances:

99.1 The only income which the respondents receive is their SASSA grant and pension, and they are accordingly not able to procure accommodation like the property;

- 99.2 The second respondent is 88 years old, has failing eyesight and is wheelchair bound. The first respondent is 60 years old and unemployed. He suffers from alcoholism and according to the second respondent he is mentally challenged.
- 99.3 They are therefore vulnerable persons, as contemplated by the provisions of section 7 of the Act, as they are elderly, disabled and live in a woman-headed household;
- 99.4 They need to remain in the property as it is next door to V[...], who acts as the second respondent's caregiver. The second respondent is not able to care for the first respondent on her own; and
- 99.5 They are not cause of their occupation becoming unlawful. The termination of their right to occupy is solely because of the Trust selling the property and being required to give vacant occupation to the purchaser.

[100] The counter argument on behalf of the Trust is that:

- 100.1 despite the first applicant making several offers to the respondents, which should not be construed as imposing an obligation on her to provide accommodation, none of the offers were properly considered by the second respondent or by her attorney/s;

- 100.2 The second and third applicants, who have acquired rights to occupy the property and who have two minor children, are required to vacate their rental accommodation, and yet cannot occupy the property which they paid for;
- 100.3 A just and equitable order should not be translated to mean that only the rights of the unlawful occupier are given consideration and that those of the property owner should be ignored;
- 100.4 An unlawful occupier does not have a right to remain in the property that he or she is unlawfully occupying, and his or her personal preference in this regard is irrelevant;
- 100.5 In terms of section 4(7) of the Act, the obligation to provide alternative accommodation lies with the *'municipality, or organ of state or another landowner.'* Section 26(2) of the Constitution guarantees the right to access to adequate housing and places a positive obligation on the State to realise such right; and
- 100.6 The Act was not enacted to allow for expropriation of land from a private landowner, who has no obligation to provide free housing.

[101] I am satisfied that the applicants have shown a clear need for possession of the property and the Trust, as the registered owner, also has a right to constitutional protection.

[102] The respondents do not have a legal right to remain in the property. Any right which they may have had has been clearly and unequivocally terminated and they are therefore unlawful occupiers as envisaged in PIE.

[103] In any event, as was the case in *Grobler*²⁷, the right to occupy, if indeed granted to the second respondent for the rest of her life by P[...], was never reduced to writing, nor registered against the title deed and is therefore not binding or enforceable against successive owners.

[104] Accordingly the second respondent's belief that this confers on her a right to remain in occupation of the property indefinitely is mistaken.

[105] Our jurisprudence is now settled that where the owner of private property demonstrates a need for possession and that there is no valid defence to that claim, it will be just and equitable to grant an eviction order. In *Ndlovu v Ngcobo*²⁸ Harms JA made the point that ownership and the lack of any lawful reason to be in occupation are important factors in the exercise of the court's discretion.

[106] Based on the facts and circumstances placed before me, I am of the view that it is just and equitable that the first and second respondents be evicted from the property.

[107] It is however clear that both the first and second respondents have the status of vulnerable persons, as envisaged in PIE. This much was fairly conceded by Mr van Rensburg in argument.

²⁷ At para [17].

²⁸ Above at note 22.

[108] A disquieting feature of this matter, which was also of significant relevance in *Grobler*, is that the first applicant through A[...] has attempted to engage with the second respondent and has made reasonable offers to accommodate her in her home, with the assistance of a carer, or in an appropriate care facility, and that these offers have been rejected out of hand. This is highly relevant and an important factor to be taken into consideration in determining the justice and equity of granting an eviction order.

[109] I am enjoined by precedent and our constitutional prescripts to balance the rights of both the Trust (and specifically the beneficiaries thereof) as the owner of the property and the respondents as occupiers.

[110] In determining a just and equitable date for eviction, and what conditions, if any should apply to such eviction, I have had due regard to the possibility of other family members potentially being able to accommodate the respondents, or at the very least the second respondent, and the undertaking by the City to accommodate the first and second respondents in a suitable and high standard unit in the newly developed IDA off the M5, from the end of May 2024.

[111] I am mindful of the significant emotional hardship that the respondents will suffer as a result of being moved from their family, community and support structure, and the devastating impact that this eviction will have on an 88 year old woman. No evidence was led of the distance from the property to the new settlement.

[112] However as set forth in *Baron and others v Claytile (Pty) Limited and Another*,²⁹ which involved an eviction in terms of the Extension of Security of Tenure Act 62 Of 1997, it is incumbent on the City to provide suitable housing to the respondents. It must however be within the City's available resources in terms of section 26(2) of the Constitution.

[113] The applicants in *Baron* urged the Court to make a value judgment as to what is just and equitable, which includes consideration of the distance from the applicants' places of employment and the distance from social amenities, such as schools, clinics and shopping centres.

[114] As stated by the Constitutional Court in *Baron*:

'Cognisant that the duty is one of progressive realisation, I accept that the housing units at Wolwerivier qualify as suitable alternative accommodation which is provided by the City within "its available resources".'

[115] I am cognisant that the accommodation offered by the City is far from ideal, however based on the submissions made at the hearing by Mr Exford, it would appear that this is the best accommodation which the City is in a position to offer at this time.

[116] After considering the resource dynamics of the parties and their peculiar personal circumstances, I have endeavoured to craft the order in such a manner as to mitigate, as far as possible, the adverse consequences of the eviction, by including the provision of a carer for the second respondent at the cost of the Trust, and by directing that the Trust shall bear the transport costs of V[...], who has acted as the second respondent's carer, visiting the

²⁹ 2017 (5) SA 329 (CC) at para [38].

respondents at their new home twice a week, and by bearing the costs of the second respondent visiting her regular clinic once a month.

[117] The issue of costs was not canvassed at the hearing. Needless to say, in the emotionally fraught and peculiar circumstances of this case, I am not inclined to grant any costs order against these vulnerable occupiers, whose lives will already be devastated by the order I intend to make, whatever mitigatory steps may be put in place.

Order

[118] In the circumstances, the following order shall issue:

- (a) The first and second respondents and all those occupying through them (“the occupiers”) are ordered to vacate the immovable property situated at 2[...] T[...] R[...], B[...], Athlone, Cape Town, Western Cape (‘the property’) by no later than 30 May 2024, in order to take occupation of a suitable unit at the fourth respondent’s IDA referred to above;
- (b) The fourth respondent shall ensure that the unit made available for occupation by the first and second respondent’s has wheelchair access and is suitable for a disabled individual;
- (c) Should the first occupiers fail to vacate the property by the date set out in paragraph (a), the Sheriff of this Court or the Sheriff of the Magistrate’s Court or their deputies are authorised and directed to evict the occupiers by 15 June 2024;

- (d) The first applicant shall employ a duly qualified and experienced carer to assist the second respondent at her home for eight hours a day;
- (e) The first applicant shall bear the costs of transport for the second respondent's daughter, V[...], to visit her at her new home twice a week, if required by the second respondent;
- (f) The first applicant shall bear the costs of transport for the second respondent to visit her regular clinic once a month, if required by the second respondent; and
- (g) There shall be no order as to costs.

HOLDERNESS, AJ

APPEARANCES

For the First, Second and

Third Applicants:

Mr van Rensburg

Van Rensburg & Co Attorneys

For the Respondent:

Adv Rudolph du Toit

Instructed by:

Ms M Ebrahim of MB Ebrahim Attorneys