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**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable Yes/No
Case No: 2372/2024

In the matter between:

M[...] Z[...] O[...] N.O.

First Applicant

CHRISTIAAN WAGENAAR N.O.

Second Applicant

(In their capacities as the trustees for the time-being
of the **Shisha Trust, T70[...]**)

and

S[...] M[...]

First Respondent

**ANY UNKNOWN UNLAWFUL OCCUPIERS RESIDING
AT 1[...] B[...] STREET, DISTRICT LADYBRAND,
FREE STATE PROVINCE**

Second Respondent

MATSOPA LOCAL MUNICIPALITY

Third Respondent

Case No: 5234/2024

In the matter between:

S[...] K[...] M[...]

First Applicant.

N[...] N[...] M[...]

Second Applicant

and

N[...] M[...] M[...]

First Respondent

M[...] Z[...] O[...] N.O.

Second Respondent

CHRISTIAAN WAGENAAR N.O.

Third Respondent

(In their capacity as trustees for the time-being of the
Shisha Trust, T70[...])

DANIEL JOHANNES RUDOLPH SCHUTTE N.O.

Fourth Respondent

(In his capacity as trustee of the **K[...] T[...]**
M[...] Testamentary Trust, MT1[...])

MASTER OF THE HIGH COURT, FREE STATE

Fifth Respondent

REGISTRAR OF DEEDS, BLOEMFONTEIN

Sixth Respondent

CORAM: Hefer AJ

Heard: 21 November 2024

Delivered: 13 February 2025

ORDER

1. Application number 2372/2024 is dismissed with costs.
2. Application number 5234/2024 is dismissed with costs.

JUDGMENT

Hefer AJ

- [1] In terms of an order of Court, dated 24 October 2024, the two applications under the above case numbers, had been consolidated.

Background:

- [2] K[...] T[...] M[...] (the deceased) passed away on 22 May 2000.
- [3] On 14 May 1997, a will was passed by the deceased. This will was accepted by the Master of the High Court.
- [4] Subsequent to this will, the deceased has passed a further not less than thirteen codicils to his original will. It appears that the Master has accepted nine of these codicils. Four of them had been rejected for not complying with the provisions of the Wills Act 7 of 1953.
- [5] The relevance of some of these codicils (both accepted as well as rejected), will be dealt with herein.
- [6] In his will the deceased bequeathed Erf 5[...], Ladybrand as follows:

8.1 I bequeath to the Memorial Trust –

8.1.1 My residential property situate (sic) at Erf Nr 5[...] Ladybrand, RSA, which property is to be transferred in full ownership to my granddaughter N[...] M[...] M[...] when she turns 21 (TWENTY ONE) years.

8.2 The bequest in clause 8.1 is subject to the following conditions –

8.2.1 The usufruct of my wife M[...] G[...] M[...] as provided for in clause 4.5;

8.2.2 The property contemplated in clause 8.1.1 is to be leased, preferably to any suitable male offspring of the M[...] FAMILY.'

- [7] In the will of the deceased he further recorded as follows:

'I record that I have decided to treat my granddaughter N[...] M[...] M[...] more favourably than my other grandchildren since she, unlike my other grandchildren, had the misfortune of losing her father at a very young age.'

[8] The property referred to is also known as 1[...] B[...] Street, Ladybrand and Ms M[...] referred to is the first respondent in case number 5234/2024 (**"the second application"**).

[9] In terms of a separate clause of the deceased's will, the deceased's late wife M[...] G[...] M[...] was awarded usufruct over *inter alia* 'my residential property situate (sic) at Erf Nr 5[...] Ladybrand, RSA'.

[10] In his codicil dated 15 October 1998 the deceased provided as follows:

'1[...] B[...] Street, Ladybrand FS

I the undersigned do hereby amend that part of my will that specifically refers to the property I own and is situated at Plot Nr 1[...] B[...] Street, Ladybrand.

At 21 years my granddaughter M[...] N[...] M[...] born of late son N[...] L[...] M[...] be assisted by 'the Trust Committee, its successors, established to conduct the affairs of the Trust Fund to full ownership of the said property and is further charged to initiate to fully appreciate the norms and values such property i.e. to exercise parental control as we all called upon to do ...'

[11] This codicil was however rejected by the Master due to not complying with the provisions of the Wills Act.

[12] In a further Codicil dated 8 March 2000, which was accepted by the Master, with reference to his original will as well as all the other codicils preceding such codicil, the deceased further stipulated as follows:

'1. I hereby confirm, notwithstanding any previous bequeaths, that my house situated at 1[...] B[...] Street, Ladybrand, is hereby bequeathed to my daughter(sic) , M[...] N[...] M[...], to be held in Trust as contemplated in my

Codicil dated 15 October 1998, subject to the lifelong usufruct of my wife, M[...] G[...] M[...].

2. ...
3. Notwithstanding any contrary stipulation in my abovementioned will and codicils, all fixed properties bequeathed to beneficiaries of Trust in terms of my abovementioned will and codicils, shall not be transferred in full ownership to the said beneficiaries, but shall, on the death of such beneficiaries, revert back to the Trust in terms of a fideicommissum in favour of the said Trust, and my trustees are hereby instructed to administer the said property in favour of the remaining beneficiaries, or in their discretion, my descendants.

Except where explicitly or by implication amended, all remaining provisions of my abovementioned Will and Codicils remain unchanged.'

[13] I now turn to the relief sought in the two applications serving before me.

First application – case number 2372/2024:

[14] After leave had been granted to have a notice in terms of s 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation Act, 19 of 1998 (“**PIE**”) issued out of the office of the Registrar of this division, the application now serves before Court for the eviction of the First and Second Respondents from 1[...] B[...] Street, Ladybrand (“**the property**”).

[15] To make the facts pertaining to this application more lucid, I shall refer to the First and Second Applicants collectively as “**the trustees**”.

[16] According to the trustees, the Shisha Trust is the registered owner of Portion 2 of Erf 5[...], Ladybrand.

[17] It is common cause that the Shisha Trust duly purchased the property from the First Respondent in the second application, being Ms M[...] during October 2023. The property was duly registered in the name of the Shisha Trust during February 2024.

- [18] This was subsequent to the property being transferred to Ms M[...] during 2008 in terms of a resolution of the trustees of the K[...] T[...] M[...] Testamentary Trust (“**the M[...] Trust**”), which resolution was collectively taken during 2007/2008.
- [19] The illegal occupants, according to the trustees are related to Ms M[...] in that they are her uncle and aunt. The first respondent is one of the surviving children of the deceased. It is unclear , if the identity of the second respondent is known to the trustees, why the aunt of Ms M[...] was not identified as such in the citation of the unlawful occupiers by the trustees .
- [20] According to the applicant, the first and second respondents have been occupying the property since the passing of the deceased. The year of the occupation by the respondents are not provided by the trustees. I must therefore assume that the respondents had been occupying the property more or less for the past 24 years.
- [21] The trustees further allege that after the passing of the deceased's late wife , Ms M[...] had several family meetings between 2018 and 2021 during which the first respondent was informed that Ms M[...] was of the intention to serve formal termination of lease due to the fact that Ms M[...] was struggling financially with her expenses regarding her minor child. It is alleged that Ms M[...] gave the first and second respondents notice to vacate the property by way of service of termination of lease letter on the 14th of February 2022 which was met with no response. No particulars are however provided in regards to the terms of the lease agreement and more in particular with whom such lease agreement was concluded. The alleged letter of termination dated 14 February 2022 was also not put before me.
- [22] It is then further alleged as follows:

‘Ms M[...], who was in an extremely difficult position, having to evict family members from her property, managed to secure the Applicant Trust as a willing and able purchaser for the Property. The Applicant Trust was further willing to purchase the property along with the responsibility of initiating the eviction process against the illegal occupants.’

- [23] The trustees then initiated the eviction process on the 8th of February 2024 by way of service of a letter of termination duly served by the sheriff. The relevant portions of this letter by Ms K Bosman of Coertzen Incorporated attorneys acting on behalf of the trustees, read as follows:

‘We confirm that you obtained the right to occupy the aforesaid premises by virtue of a verbal lease agreement concluded by yourself and the previous owner, **Ms NM M[...], during June 2018.**

As it is our instruction that no fixed term was agreed upon in the aforesaid agreement alternatively that any fixed term already expired, it submitted that the agreement is presently continuing on a month to month basis. In the preamble you are hereby given sufficient notice of our client’s formal termination of the relevant agreement and you are requested to vacate the premises no later than **31 March 2024.**’

- [24] In support of the application the trustees rely on the fact that the Shisha Trust is the registered owner of the property and as such, it is fully entitled to all rights of a registered landowner, which includes the right to free and undisturbed possession of its property.

- [25] The trustees further allege that as the registered owner of the property is responsible for payment of imposts charged by the relevant local authority in respect of electricity usage at the property, the applicant is being prejudiced by the fact that the first and second respondents made use of electricity, but refuse to make payments for such usage.

- [26] In respect of the requirement of the eviction to be just and equitable, it is the contention by the trustees that the first and second respondents appear to be in good health and are in a gainful financial position in that they receive

pension monies. The first respondent is also, according to the trustees, an income trust beneficiary and receives money from the testamentary trust of the deceased twice annually. The first and second respondents are therefore in a financial position to rent alternative accommodation.

[26] In opposition to the application for eviction, the first and second respondents rely primarily on the fact that the transfer of the property to Ms M[...] was unlawful and therefore stands to be invalidated for the reasons as stated in the second application which will be dealt with herein later.

[27] In addition, the first respondent further alleges that the second respondent consists of his wife who is a pensioner, his son M[...] M[...] as well as his minor granddaughter.

[28] According to the first respondent, the property was not and could not fully be inherited by Ms M[...] because clause 3 of the Codicil dated 8 March 2000 provides that the property in question shall upon the death of N[...] revert to the testamentary trust. According to the first respondent, N[...] could never have had full ownership of the property. The first respondent maintains that the transfer and registration of the property has taken place against the provisions of the will and codicils referred to . He further maintains that first and second respondents have the right to occupy the property. First respondent however does not elaborate on what this alleged right to occupy consists of.

[29] In the replying affidavit, now deposed to by Ms Bosman, the attorney acting on behalf of the trustees, attention is drawn to the fact that the usufruct on the property was only in respect of the deceased's late wife who passed away prior to the transfer of the property into the name of Ms M[...]. The remainder of the reply will also be dealt with in respect of the second application.

Second application – case number 5234/2024:

[30] The first and second applicants (“**the M[...]s**”), mainly rely on the provisions of the codicil to the will of the deceased dated 8 March 2000, the wording which has already been referred to above. According to the M[...], from this codicil it follows that the deceased bequeathed to Ms M[...] only a lifelong usufruct during her lifetime.

[31] The M[...], then further refer to the fact that the deed of transfer in terms of which the property was transferred from the M[...] Trust to Ms M[...] referred to the following condition as set out in the Last Will of the deceased which reads as follows:

‘I direct that all benefits accruing under this my Will to female beneficiaries shall devolve upon such female beneficiaries as their sole and exclusive property, excluded from any community of property arising from an existing or future marriage of such beneficiary, and shall not be subject to the marital control of any husband to whom such beneficiary is then married or whom she may thereafter marry.’

[32] The M[...], further contend that it is evident from the power of attorney under the signature of Mr Rudolph Schutte, the fourth respondent in the second application, that the transfer to Ms M[...] disregarded the codicil passed on 8 March 2000. In view thereof, it follows, according to the M[...], that both the transfer to Ms M[...] as well as that to the Shisha Trust are unlawful whereas they conferred full ownership rights to the pair, which was contrary to the wishes of the deceased. First applicant stated as follows in this regard in his founding affidavit:

‘His wish was that the ownership of the property vests in a Trust, for the benefit of all his descendants. Put differently, it is blatant that the transfer to N[...] M[...] is null and void, consequently, the transfer to the Shisha Trust suffers the same fate.’

[33] Mr M[...] then continues as follows:

'We submit that it would be in the best interest that the transfer be declared null and void, particularly considering the historic land tenure challenges in developing this country.

Our late father worked tirelessly to acquire land for his descendants. His wish was for all the land he acquired to remain in trust for our benefit and the benefit of our children's children. Setting aside the transfer, is a just and equitable remedy.'

- [34] In opposition to the second application, Ms M[...] in the first instance relies on two points *in limine*. The first being the misjoinder of Mr Schutte whereas Mr Schutte is presently a retired attorney and no longer holds office as a trustee of the erstwhile Trust and therefore is unable to give effect to any order which this Court may make with regard to the transfer of the property back into the name of the Trust. Furthermore, it is alleged that Mr Schutte has been replaced by N[...] M[...] as executor in the estate of the deceased in terms of letters of executorship dated 14 April 2023. In this regard it appears strange that the estate of the deceased had not been finalised after 23 years. Be that as it may, in view of my finding herein, I do not deem further consideration of this point necessary.
- [35] As far as the second point *in limine* is concerned, Ms M[...] pleads that in view of the M[...]s' failure to join the trustees of the M[...] Trust, also constitutes non-joinder. In this regard, Ms M[...] relies on the fact that in the event of the Court finding that the transfer of the property into her name was done unlawfully and ordering that such transfer should be cancelled, then the property will again vests in the Trust. Therefore, according to Ms M[...] the Trust, through its trustees, have an interest in the outcome in this application.
- [36] Whereas the interests of the Trust and in particular the trustees of such Trust cannot be adversely affected should such transfer be set aside and to that extent such trustees is not to be regarded as an interested party to the application, such point *in limine* should also fail.

[37] In any event I find it misplaced that Ms M[...] asks that the application should fail and be dismissed with costs on an attorney and own client scale. Upholding such points *in limine* would not have resulted in dismissal of the application .

[38] Ms M[...], in her opposing affidavit, further raises the nonsensical point that:

‘It is of concern that the first, second, third, fifth and sixth respondents’ residential and/or registered addresses have not been inserted.

The applicant is required to provide proof of service of this application on all the respondents’.

Obviously, Ms M[...] and her legal representative loose sight of the fact that first respondent, being Ms M[...] indeed deposed to an opposing affidavit. The application therefore must have been served on the respondents and in particular on the first respondent.

[39] The first respondent, Ms M[...] then further contends that the M[...]s failed to state that the cancellation of the transfer can only be granted if it is found that the transfer is tainted by fraud.

[40] Ms M[...] then further refers to clause 1 of the relevant Codicil dated 8 March 2000, which also has been set out above and which will be dealt with herein later.

[41] Significantly so, Ms M[...] now in opposition to the second application states that since the property was transferred into her name during 2008 the M[...]s were liable to pay rent to her as owner of the property in terms of the will.

[42] Ms M[...] further alleges that with the exception of a few properties, it was her grandfather wish that the land remains in a Trust for the benefit of the deceased’s grandchildren. However, the property which is at the centre of this

application, was not one of the properties to be held in trust but was bequeathed to her directly.

- [43] In reply, the M[...]s relied upon the fact that it would be in the best interest of all beneficiaries and descendants of the deceased that the relevant transfers be cancelled.

Discussion:

- [44] 'The point of departure when interpreting wills is to 'ascertain the wishes of the testator from the language used in the Will'.¹

- [45] In **Cohen NO v Roetz NO and Others**² the Appellate Division reiterated the golden rule for the interpretation of wills is to ascertain the wishes of the testator from the language used. It was further emphasized that in endeavouring to ascertain the wishes of the testator, the will must in general be read in the light of the circumstances prevailing at the time of the execution.

- [46] In **Versepput and Another v De Gruschyno and Another**³, Franklin J stated:

'In construing a will the cardinal principle is to ascertain from the language used therein the true wishes of the testator. In construing wills, the Court has in the course of time evolved a number of presumptions, such as the presumption against intestacy and the presumption that, if the language used in the will is ambiguous or doubtful, that meaning ought to be given to the will which is in accord with the general wishes of the testator to be gathered from the terms of the will read as a whole, and so as to make a bequeath effective, rather than which makes it null and void. But these presumptions may only be resorted to if the language of the will is of doubtful import.'⁴

¹ King and Others NNO v De Jager and Others 2021 (4) SA 1 (CC) at par. [34], p. 18;
Robertson v Robertson's Executors 1914 AD 503 at 507.

² 1992 (1) SA 629 (A)

³ 1977 (4) SA 440 (W)

⁴ p. 443 C – E.

[47] In **Parker v Fletcher Est**⁵, Watermeyer AJP (as he then was) stated:

‘Undoubtedly the first rule of construction is that the Court must endeavour to ascertain the intention of the testator from the terms of the will taken as a whole ...’

[48] An important aspect upon a consideration of the will of the deceased, which has not been mentioned before, is that it appears that the deceased was deeply emotionally affected by the death of his son N[...] L[...] M[...]. The following words of the deceased as contained in his Will give insight into his emotions:

‘I herewith record with posterity that, since the tragic death of my beloved son, N[...] L[...] M[...], it has always been presently ease, and will for the rest of my mortal days be the consuming interest and longing that throbs in my bosom to raise efficient funds in order to fittingly and adequately immortalise with sweet fragrance the tender and the pleasant memory of my said son.”

[49] Although the codicil to the will by the deceased dated 15 October 1998 had been rejected by the Master, it can be gathered from this codicil that Ms M[...] is the daughter of the late N[...] L[...] M[...]. This then gives perspective to the provision in the will of the deceased to the effect that he has decided to treat Ms M[...] more favourably than his other grandchildren since she, unlike the other grandchildren, had the misfortune of losing her father at a very young age.

[50] It is the interpretation of clause 1 and clause 3 of the Codicil dated 8 March 2000, that forms the nucleus of this matter, in particular in respect of the second application .

[51] It is clear that in his I will the deceased initially in no uncertain terms expressed his wishes Ms M[...] to acquire full ownership of the property concerned when she turns 21.

⁵ 1932 CPD 202 at 205.

- [52] If one then considers clauses 1 and 3 of the 2000 Codicil, it immediately becomes clear that the deceased wished to differentiate the bequest in regards to the 1[...] B[...] Street property from other fixed properties which was dealt with in paragraph 3.
- [53] Even if one disregard the contents of the codicil dated 15 October 1998 which was rejected by the Master, taking into account the contents of the deceased's will as a whole as amplified by the relevant Codicils and in particular the 2000 Codicil, it is clear that the intention of the deceased was that Ms M[...] was to attain full ownership of Erf 4[...] Ladybrand when she turns 21.
- [54] For those reasons the second application must therefore fail and that this part of the M[...]s' defence in respect of the first application can also not be upheld.
- [55] The next question is whether the trustees should be successful in its application to have the respondents evicted from the property.
- [56] The trustees first seek an order to the effect that the respondents be declared to be unlawful occupiers of the property concerned. A court's discretion to issue a declaration arises when a Court is satisfied that the claimant is an interested person and there is an existing, future or contingent right or obligation.⁶
- [57] In considering whether to exercise this discretion, the Court may have regard to amongst others whether the claimant is entitled to claim consequential relief.⁷

⁶ *Reyneke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A);
South African Mutual Life Assurance Society v Anglo Transvaal Collieries Ltd 1977 (3) SA 642 (A).

⁷ *Ex Parte Nell* 1963 (1) SA 754 (A);
Mohammed v Mohammed 1976 (3) SA 151 (T).

[58] It must therefore be considered not only whether the respondents are to be declared unlawful occupiers, but also whether the trustees is entitled to claim consequential relief and in particular the eviction of the respondents.

[59] In **Port Elizabeth Municipality v Various Occupiers**⁸ Sachs J stated as follows:

‘Simply put, the ordinary prerequisites for the municipality to be in a position to apply for an eviction order at that the occupation is unlawful and the structures are either unauthorised, or unhealthy or unsafe. Contrary to the pre-constitutional position, however, the mere establishment of these facts does not require the court to make an eviction order. In terms of s 6, they merely trigger the court’s discretion. If they are proved, the court then may (not must) grant an eviction order if it is just and equitable to do so. In making its decision it must take into account of all relevant circumstances, including the manner in which occupation was effected, its duration and the availability of suitable alternative accommodation or land.’⁹

‘Different considerations could arise depending on whether the land occupied is public or privately owned. In the case of public land, the State generally has further land to meet its obligations in terms of s 26 of the Constitution ...’¹⁰

‘The municipality launched motion proceedings to seek the eviction of the occupiers. Many of the facts it alleged in its founding affidavit were disputed by the occupiers in response. Accordingly, we must accept those facts asserted by the applicant that remain undenied by the respondent, together with the facts as alleged by the respondents.’¹¹

‘Furthermore, persons occupying land with at least a plausible belief that they have permission to be there can be looked at with far greater sympathy than those who deliberately invade land with the view to disrupting the organised housing program and placing themselves at the front of the que.’¹²

‘The court cannot fulfil its responsibilities in this respect if it does not have the requisite information at its disposal. It needs to be fully appraised of the

⁸ 2005 (1) SA 217 (CC)

⁹ p. 232 B – D.

¹⁰ p. 232 F – G.

¹¹ p. 242, par. [48]

¹² p. 232, par. [26].

circumstances before it can have regard to them. It follows that, although it is incumbent on the interested parties to make all relevant information available, technical questions relating to onus of proof should not play an unduly significant role in its enquiry. The court is not resolving a civil dispute as to who has rights under law land; the existence of unlawfulness is the foundation for the enquiry, not its subject matter. What the court is called upon to do is to decide whether, bearing in mind the values of the Constitution, in upholding and enforcing land rights, it is appropriate to issue an order which has the effect of depriving people of their home.

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.¹³

‘It is clear from what has been said above that the occupiers moved into the land with what they considered to be the permission of the owner and that they have been there for a long period of time.’¹⁴

[60] In **Occupiers of Erven 87 & 88 Berea v Christian Frederick de Wet NO¹⁵** the Constitutional Court in a unanimous judgment held *inter alia* that:

‘It deserves to be emphasized that the duty that rests on the court under s 26(3) of the Constitution and s 4 of PIE goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in which the court is required and expected to take an active role.’¹⁶

‘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.’

¹³ p. 237, par. [36]

¹⁴ p. 244, par. [53].

¹⁵ 2017 (5) SA 346 (CC)

¹⁶ p. 361 D – E.

In *Port Elizabeth Municipality v Various Occupiers supra*, Sachs J stated:

‘The Court is not resolving a civil dispute as to who has rights under land law. The existence of unlawfulness is the foundation for the enquiry, not its subject matter.’¹⁷

- [61] The trustees rely upon the termination of a lease agreement. As mentioned already, no details are provided about the terms of such lease agreement. For purposes of the existence of such lease agreement, I do however take into consideration the allegations by Ms M[...] to the effect that since 2008 when the property was registered in her name, the respondents had been liable to paying her rent. This was not denied by the M[...]s in their reply in the second application .
- [62] It further appears that the alleged lease agreement had been terminated as per the letter by Coertzen Incorporated dated 8 February 2024. What is however confusing is that this letter states that the respondents had obtained the right to occupy the premises during June 2018. This contradicts the allegation by Ms M[...] that the respondents had been liable for paying rent since 2008.
- [63] More importantly, the trustees rely on the fact that the Shisha Trust as the registered owner of the property is responsible for payment of imposts charged by the relevant authority in respect of electricity usage at the property and is being prejudiced by the fact that the first and second respondents make use of electricity, but refuse to make payment for such usage. Although they were not obliged to do so, no reasons were provided for the termination of the alleged lease agreement in the letter by Coertzen Inc.
- [64] Although it may be held that the respondents are indeed in unlawful occupation of the property, it does not follow that I am obliged to declare them as such if the trustees are not entitled to consequential relief. I am not

¹⁷ Par. [32].

convinced that the trustees are indeed entitled to such consequential relief, for the reasons that follow.

- [65] As far as prejudice is concerned, I do take into account that the Shisha Trust is the registered owner of the property. This indeed includes the right to free and undisturbed possession of its property.
- [66] The trustees do however not provide any information in regards to the proposed use of the property. The only prejudice evident from the founding affidavit is the failure by the first and second respondents to pay for the electricity which they use. The trustees have other remedies to their disposal in this regard. In the absence of any facts and reasons, I can come to no other conclusion that the trustees wish to have the respondents evicted from the property just for the sake of getting rid of them.
- [67] Opposed to the interests and rights of the Shisha Trust, are the rights and the interests of the M[...]s and their family.
- [68] Of importance also in this regard is that upon a consideration of the will of the deceased as a whole, it is patently clear that it was his wishes that all the properties concerned was to be conserved for the deceased's descendants. It is unfortunate that Ms M[...] has effectively ignored the wishes of the deceased in this regard and also the provision in the deceased's estate to the effect that Erf 5 [...], Ladybrand is to be leased, preferably to any suitable male offspring of the M[...] family. This is even more so considering the historic land tenure challenges also relied upon by the M[...]s but which does not provide a basis for the transfer of the property to the Shisha trust to be invalidated.
- [69] The property had indeed been leased accordingly to the respondents of whom Mr S[...] M[...] is the son of the deceased. These respondents have been occupying the property for the past approximately 24 years. This has been their home for the past 24 years from which the trustees now wish to have

them evicted. Even if it be accepted that other alternative accommodation may be available to the M[...]s and that they may have the means to afford such accommodation , with due regard to the broader consideration of fairness and other constitutional values, it cannot be just and equitable to have the respondents evicted from the property. The discretion I have , referred to the Port Elizabeth – matter, is to be excercised in favour of the M[...]s. It is open to the trustees to negotiate a new lease agreement with the M[...]s.

[70] The effect of the above is that the first application must also fail.

[71] As far as cost is concerned, there is no reason why the unsuccessful applicants in each of the two applications not be liable for the costs.

Order

Therefore, I make the following order:

3. Application number 2372/2024 is dismissed with costs.

4. Application number 5234/2024 is dismissed with costs.

J J F HEFER, AJ

Appearances:

On behalf of Shisha Trust and Ms M[...]:

Instructed by:

Adv N van der Sandt

Coertzen Incorporated

Bloemfontein

On behalf of SM and NN M[...]:

Adv TM Ngubeni

Instructed by: Zwelibanzi Ngququ Inc.
Bloemfontein