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**IN THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 2024-117154

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO

(3) REVISED.

DATE: 22/9/2025

SIGNATURE:

In the matter between:

VARIFLAT RESIDENTIAL PROPERTY (PTY) LTD
[REG NO.: 2001/000274/07]

APPLICANT

and

MITANA TRAINING CONSULTANTS (PTY) LTD
[REG NO.: 2014/269709/07]

1ST RESPONDENT

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

2ND RESPONDENT

JUDGMENT

CORAM: LOURENS AJ

INTRODUCTION

1 This is an unopposed application in terms of which Variflat Residential Property (Pty) Ltd ("*Variflat*") applies for two main categories of substantive relief. The specific orders sought by Variflat have been formulated as follows in Variflat's notice of motion:

"1. CONFIRMATION OF CANCELLATION of the Lease Agreement entered into between the Applicant and the First Respondent on 28 October 2022;

2. EJECTING the First Respondent and those living with through or under the First Respondent including but not limited to all Directors and / or employees of the First Respondent from the premises situated at FLAT 1[...] MUCKLENEUK LANTERNS (V), 1[...] B[...] STREET, MUCKLENEUK, PRETORIA ("the premises") together with any movable property that is on or in the premises in terms of Section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998."

2 In this judgment, the relief sought in prayer 1 of the notice of motion will be referred to as "*the Cancellation Relief*" whereas the relief sought in prayer 2 will be referred to as "*the Eviction Relief*". The Eviction Relief is premised on the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998 ("*the PIE Act*").

3 The first respondent in this application, is Mitana Training Consultants (Pty) Ltd ("*Mitana*"), who appears to be a duly registered private for-profit company with limited liability as intended by the Companies Act, 71 of 2008. Mitana is the contractual counterpart to Variflat in terms of a written lease agreement in respect of the residential premises at the centre of this application. The City of Tshwane Metropolitan Municipality ("*the Municipality*") is the second respondent in this application. Like Mitana, the Municipality did not participate in this application.

4 The application first served in the unopposed motion court of this Division on Tuesday 24 June 2025, and then, for a second time, on Thursday 26 June 2025, upon which date this court reserved judgment in respect of the application.

VARIFLAT'S FORMULATED PURSUIT:

(i) The deponent's personal knowledge:

5 With the view to substantiate its pursuit of the relief sought in terms of its application, Variflat relies on a founding affidavit deposed to by a legal advisor in the employ of City Property Administration (Pty) Ltd, situated at CPA House, 1[...] D[...] T[...] Street, Pretoria ("CPA"). According to the deponent, CPA is Variflat's duly authorised agent and "*handles and facilitates*" *inter alia* Variflat's properties.

6 In her founding affidavit, the deponent states that (i) "*the file*" pertaining to Mitana as well as the leased premises, which is the subject matter of the application, falls under her direct control; (ii) she has read and acquainted herself with "*the contents of the file*" and (iii) the facts of the matter "[C]onsequently" fall within her personal knowledge.

(ii) The Premises and the Lease:

7 Variflat is the owner of Flat 1[...] Muckleneuk Lanterns (V), 1[...] B[...] Street, Muckleneuk, Pretoria ("*the Premises*"). It is Variflat's case that on or about 28 October 2022, Variflat and Mitana (both duly represented at the time) concluded a written lease agreement, a copy of which is attached to the founding affidavit as annexure AM2 ("*the Lease*"), in terms of which Variflat leased the Premises to Mitana on the written terms and conditions contained in the Lease.

8 The Lease commenced on 24 October 2022 and would originally terminate on 31 October 2023. The parties however agreed that the Lease would be deemed to have been renewed in the event that neither party advised the other, by not later than 2 (two) months prior to the expiry of the Lease, that they were not desirous of renewing the Lease, with such *double negative* resulting in a consequential, and accepting for present purposes a consensual, extension of the Lease.

9 The monthly rental due to Variflat by Mitana in terms of the Lease was R3,800.00 and had to be paid monthly in advance, by no later than the 1st day of

each and every month, free of exchange and without deduction, together with the applicable rates, property taxes and/or CID levies.

(iii) The allegations made in the founding affidavit that pertain to the Cancellation Relief:

10 Prior to the termination of the Lease on 31 October 2023, and on 15 August 2023, CPA issued Mitana with a *Notice of Expiry and Renewal* of the Lease, pursuant to which CPA notified Mitana that the Lease would endure beyond the expiry date and henceforth continue on a month-to-month basis.

11 In summary, it is Variflat's case further that:

11.1 Mitana materially breached the Lease in that Mitana, up to and including October 2024, had fallen in arrears with regard to the payment obligations that it owed to Variflat in terms of the Lease. In this respect, the deponent alleges that by October 2024 the total arrears amounted to R12,434.65, comprised of arrear rental, municipal charges, interest and other related charges;

11.2 on 11 September 2024, due to Mitana having repeatedly materially breached the payment obligations that it owed to Variflat in terms of the Lease, and despite numerous demands to rectify such breach which Mitana failed to adhere to, Variflat (through CPA) issued Mitana with a notice of termination of the Lease, in terms of which Variflat inter alia called upon "*the Tenant*" (Mitana) to vacate the Premises immediately ("*the Cancellation Notice*").

(iv) The allegations made in the founding affidavit that pertain to the Eviction Relief:

12 The allegations made in the founding affidavit in support of Variflat's pursuit of the Eviction Relief require careful consideration.

13 In paragraph 9.6 of the founding affidavit, the deponent states as follows:

"The First Respondent and/or all occupants and all those holding/occupying through or under the First Respondent including but not limited to all Directors and/or employees of the First Respondent however refuse to vacate the premises and remain in occupation of the property. As a result of the termination of the agreement, the First Respondent and/or all occupants and those holding / occupying through or under the First Respondent including but not limited to Directors and / or employees of the First Respondent became unlawful occupiers in terms of Section 1 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998." [emphasis added]

14 A first observation to be made is that the founding affidavit does not contain the necessary primary facts to support the factual proposition that any employee or director of Mitana is currently in occupation of the Premises, that any such person has refused to vacate the Premises and is, as we speak, an unlawful occupier of the Premises as envisaged by the PIE Act.

15 Furthermore, in paragraph 11 of the founding affidavit the deponent alleges that *"... the First Respondent [Mitana] and/or all occupants and all those holding/occupying through or under the First Respondent [Mitana] including but not limited to all Directors and/or employees of the First Respondent [Mitana] are doing so unlawfully due to the Lease ... having been terminated ... and no right to continue occupying the premises unlawfully"*.

16 The following allegations then nevertheless appear in paragraphs 12 to 15 of the founding affidavit, appropriately emphasised:

"12.

AD RELIEF SOUGHT:

In light of the above, the First Respondent [Mitana] and/or all occupants and all those holding/occupying through or under the First Respondent [Mitana] including but not limited to all Directors and/or employees of the First Respondent are occupying the Property [the Premises] without the Applicant's consent and I submit that the First Respondent and/or all occupants and all those holding/occupying through or under the First Respondent including but

not limited to all Directors and/or employees of the First Respondent have no right to do so. Therefore, I submit further that the First Respondent and/or all occupants and all those holding/occupying through or under the First Respondent including but not limited to all Directors and I or employees of the First Respondent are frustrating the Applicant's clear right of vacant occupation of its property, as well as making it impossible for the Applicant to lease the property to a willing and able tenant. I submit that the First Respondent and/or all occupants and all those holding / occupying through or under the First Respondent including but not limited to all Directors and I or employees of the First Respondent are "Unlawful Occupiers" as defined in terms of the Prevention of the Illegal Eviction from an [sic] Unlawful Occupation of Land Act, 19 of 1998. The First respondent and/or all occupants and all those holding/occupying through or under the First Respondent including but not limited to all Directors and / or employees of the First Respondent are currently in occupation of the property.

13.

Despite the First Respondent and/or all occupants and all those holding/occupying through or under the First Respondent including but not limited to all Directors and/or employees of the First Respondent having occupied the property for a period exceeding 6 (six) months, I submit that the Honourable Court should grant an order for eviction against the First Respondent and/or all occupants and all those holding/occupying through or under the First Respondent, as the Second Respondent can reasonably make land available for the relocation of the First Respondent and/or all occupants and all those holding/occupying through or under the First Respondent including but not limited to all Directors and/or employees of the First Respondent.

14.

14.1 I submit that there are no minor children residing in the property, as stipulated in Section 4 of Act 19 of 1998.

14.2 I confirm that [the Premises] is a one bedroom flat. The occupants in the premises are Rendani ... , Tijharuka ... and Tumelo. A copy of the Residential Lease Schedule is annexed hereto marked Annexure "AM12".

14.3 As far as the Applicant's knowledge, through all its representatives are concerned, there are no other occupants in the premises. The First Respondent and/or all occupants and all those holding/occupying through or under the First Respondent including but not limited to all Directors and/or employees of the First Respondent have also not informed the Applicant of anything to the contrary.

15.

I submit that, the Applicant being the registered owner of the Property, is severely prejudiced by the continued unlawful occupation of the First Respondent and/or all occupants and all those holding/ccupying through or under the First Respondent including but not limited to all Directors and/ or employees of the First Respondent and further submit that it would be just and equitable that an order for eviction be granted as prayed for in the Notice of Motion."

17 The Residential Lease Schedule attached to the founding affidavit as annexure "AM12" is dated 24 October 2022 ("*the Lease Schedule*"). In terms of the Lease Schedule, the director of Mitana, who appears to have represented Mitana in concluding the Lease, is not Rendani, Tjiharuka or Tumelo but Ms Dibakwane. Ms Dibakwane's contact details appear from the Lease Schedule too. The Lease Schedule then furthermore specifies the number of occupants of the Premises as only 3 (three). In this regard, there are some perceived inconsistencies, or at least material uncertainties, in the version of Variflat that require to be highlighted:

17.1 There is no evidence of who the other directors of Mitana may be, who its employees are and if Mitana and/or its employees and/or its directors occupied the Premises, what the purpose of such occupation would be.

17.2 Variflat in the one respect contends that only Rendani, Tjiharuka or Tumelo thar are in occupation of the Premises, and then in the second respect that the Premises is occupied by Mitana "and/or all occupants and all those holding/occupying through or under" Mitana "including but not limited to all Directors and/or employees of Mitana.

THE FIRST HEARING:

18 The application first served before this court on Tuesday 24 June 2025 ("*the first hearing*"). During the first hearing, the court engaged Variflat on the question as to whether the founding affidavit was not perhaps in want of the necessary *evidence* to sustain an entitlement on the part of Variflat to the relief sought in pursuance of the application. In this regard, it was this court's *prima facie* view, at the first hearing, that the founding affidavit was indeed insufficient and wanting in material respects.

19 A material factual issue neither properly nor adequately addressed in the founding affidavit, at the very core of the concerns raised by the court at the first hearing, is a basic, but nonetheless pivotal, consideration central to an eviction application under the PIE Act. This is simply, on a factual level, whether anyone indeed occupies the property/premises concerned as his/her/their home and, if so, who are they and what are their personal circumstances?

20 That a person is in unlawful occupation of the Premises, and occupy same as their home, is indeed a jurisdictional requirement that an applicant in an eviction application under the PIE Act needs to satisfy to sustain an entitlement to eviction relief under the PIE Act. If the Premises is, on a factual level, not occupied by anyone, or perhaps not as their home in the sense intended or required by the PIE Act, then an order for eviction cannot competently issue under the PIE Act and the application would be moot.¹ If the Premises is occupied as a home, and the PIE Act indeed applies, then a different enquiry is triggered.

21 The deponent to Variflat's founding affidavit, who on her version acquired knowledge of the facts of the matter by (it appears only) reading and acquainting herself with "*the contents of the file*" in her possession, relied on (i) the Lease between Variflat and Mitana and (ii) the information recorded in the Lease Schedule in support of Variflat's assertions that it is Rendani, Tjiharuka and Tumelo who are in occupation of the Premises.

¹ Stay At South Point Properties (Pty) Ltd v Mqulwana and Others 2024 (2) SA 640 (SCA) at par [5].

22 The Lease was, furthermore, concluded on 24 October 2022 and the Lease Schedule is dated 24 October 2022 as well. According to the Tenant/Debtor Transactions report relied upon in the founding affidavit, which relates to the financial period February 2018 to November 2024 and which on the face of it appears to have been printed on 8 October 2024, the last payment received by Variflat from *the Tenants* during this period appears to have been on 13 September 2024.

23 At the first hearing, this court's view was that the evidence in the founding affidavit was insufficient and that the founding affidavit, without more, did not sustain a proper evidential basis upon which the Eviction Relief sought by Variflat could competently be granted. In response to the court engaging Variflat in relation to these concerns, this court understood Variflat to, in summary, adopt the following position:

23.1 Rendani, Tjiharuka and Tumelo were in occupation of the Premises because they are the listed occupants in terms of the Lease Schedule;

23.2 The application was not opposed by Mitana;

23.3 If Mitana intended to contest the application, then Mitana had the onus/duty to engage this issue and deal with it in opposition to this application, in Mitana's answering affidavit;

23.4 It was only Variflat's version (i.e. the founding affidavit) that was before this court and the court was, consequently, bound by Variflat's version and compelled to accept that version without more; and

23.5 Variflat, by virtue of its ownership in respect of the Premises, was entitled to the Eviction Relief.

24 Having regard to the nature and import of evictions proceedings, particularly eviction proceedings under the auspices of the PIE Act, and the role that a court is required to fulfil in PIE Act related eviction proceedings, the position adopted on behalf of Variflat was, in the view of this court, untenable.

25 The Supreme Court of Appeal ("the SCA") in any event made it clear in **McDonald** that uncontradicted evidence is not necessarily acceptable or sufficient to discharge an onus.²

26 This court was however (and remains) alive to Variflat's rights as owner of the Premises and the fact that the application had not been opposed by Mitana. Accordingly, and with the view to afford Variflat an indulgence, the court granted Variflat an opportunity to supplement the evidence in its founding affidavit so as to address the court's concerns regarding the shortcomings thereof.

27 Pursuant to what, on the face of it at least, appeared to have been reluctance on the part of Variflat to make use of this opportunity, the court requested Variflat to file a supplementary affidavit pertinently dealing with the factual issue as to whether anyone was at the time indeed in occupation of the Premises and, if so, who they were and what their personal circumstances entailed.

28 The application was in the circumstances stood down for hearing to Thursday 26 June 2025.

THE SUPPLEMENTARY AFFIDAVIT AND THE SECOND HEARING:

29 Variflat subsequently delivered a supplementary affidavit on 25 June 2025 (*"the Supplementary Affidavit"*). The supplementary affidavit is deposed to by the same legal advisor who deposed to the founding affidavit on behalf of Variflat.

30 The deponent again stated that (i) *"the file pertaining to the First Respondent as well as the leased premises which is the subject of the present application"* falls under her control, (ii) that she had *"read the contents of the file and acquainted*

² McDonald v Young (292/10) [2011] ZASCA 31; 2012 (3) SA 1 (SCA) (24 March 2011) - "[6] It is settled that uncontradicted evidence is not necessarily acceptable or sufficient to discharge an onus. In Kentz (Pty) Ltd v Power,¹ Cloete J undertook a careful review of relevant cases where this principle was endorsed and applied. The learned judge pointed out that the most succinct statement of the law in this regard is to be found in Siffman v Kriel,² where Innes CJ said:

'It does not follow, because evidence is uncontradicted, that therefore it is true ... The story told by the person on whom the onus rests may be so improbable as not to discharge it.'

[herself] with the contents thereof' and (iii) that "consequently the facts of the matter [fell] within [her] personal knowledge".

31 Then, the remaining allegations made in the supplementary affidavit that assume significance for purposes of this application, read as follows, duly emphasised where relevant:

"2.

2.1 I submit that there are no minor children residing in the property, as stipulated in Section 4 of Act 19 of 1998.

2.2 I confirm that [the Premises] is a one bedroom flat. The current occupants in the premises are still Rendani ... , Tjiharuka ... and Tumelo. A copy of the [Lease Schedule] is annexed hereto marked Annexure "SA1":

2.3 I confirm that to the best of my knowledge neither the First Respondent nor any of the occupants residing in the premises are elderly or disabled.

2.4 As far as the Applicant's knowledge, through all its representatives are concerned, there are no other occupants in the premises. The First Respondent and/or all occupants and all those holding/occupying through or under the First Respondent including but no limited to all Directors and/or employees of the First Respondent have also not informed the Applicant of anything to the contrary.

3.

I therefor humbly pray that the Court Order is granted as per the Notice of Motion."

32 This court remained discontent with the evidence placed before it by Variflat and at the Second Hearing confronted Variflat with its concerns. Variflat nonetheless adopted the stance that its papers were in order, that a proper case was made out for the relief sought in terms of the application and, as it did at the First Hearing, was steadfast in its pursuit and sought an order in the following material substantive terms:

"1. That the Lease Agreement entered into between the Applicant and the First Respondent on 28 October 2022 is cancelled.

2. That the First Respondent and all those living with, through or under the First Respondent, including but not limited to all Directors and/or employees of the First Respondent, be evicted from [the Premises], together with any movable property that is on or in the premises in terms of Section 4(1) of [the PIE Act] within 15 (FIFTEEN) calendar days from the date of this order;
3. Should the First Respondent and all those living with, through or under the First Respondent, including but not limited to all Directors and/or employees of the First Respondent, fail to vacate the premises ... within [15 (FIFTEEN) calendar days], the Sheriff of the area where the premises is situated, is authorised to assist the Applicant in evicting the First Respondent and all those living with, through or under the First Respondent, including but not limited to all Directors and/or employees of the First Respondent, from the premises;"

33 Judgment was, in the circumstances, reserved.

THE CANCELLATION RELIEF:

34 The Cancellation Relief is essentially declaratory relief that this court is empowered to grant under section 21(1)(c) of the Superior Courts Act, 10 of 2013. This court is satisfied that the Lease was validly cancelled by Variflat on 11 September 2024 and that an order in respect of the Cancellation Relief could competently, and indeed should, in the circumstances of this case, issue.

35 That said, the Cancellation Relief {which is essentially declaratory relief}, although Variflat is entitled to pursue such relief, is not a necessary precursor to the Eviction Relief. Variflat could have pursued the eviction of Mitana from the Premises without first obtaining the Cancellation Relief. As will appear later, it is fortunate that Variflat decided to do so.

36 However, it is, for different reasons, and in a different context, necessary that this court grants the Cancellation Relief at this point in time, albeit in somewhat different terms. This judgment deals more comprehensively with this aspect of the matter, later.

MOST MATERIAL LEGAL PRINCIPLES APPLICABLE TO THE EVICTION RELIEF UNDER THE PIE ACT:

(i) Evidence and affidavits:

37 Primary facts are those capable of being used as a basis for the drawing of inferences as to the existence or non-existence of other *further facts*. Such *further facts* are known as secondary facts. Secondary facts, in the absence of primary facts, are nothing more than a deponent's own conclusions and do not constitute evidential material capable of supporting a cause of action.³

38 Moreover, inference is to be distinguished from speculation, and needs to be based on proven facts that support the inference sought to be drawn. An inference sought to be drawn must, furthermore, be consistent with all proven facts.⁴

39 The necessary allegations upon which an applicant relies in order to pursue the relief which it seeks in its notice of motion, being those that make out its cause of action, must appear in its founding affidavit and that an applicant stands and falls thereby.⁵ In motion proceedings, an applicant's notice of motion and founding affidavit serves - in the analogy with an action - as the pleadings as well as the essential evidence of the applicant [*qua* plaintiff] which would be led at a trial and required to sustain an entitlement to relief.⁶

³ See *Willcox v Commissioner for Inland Revenue* 1960 (4) SA 599 (A) par 602 A; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324 D - F; *Die Dros (Pty) Ltd v Telefon Beverages CC* 2003 (4) SA 207 (C) at 271 B - D; *Reese v Harris* 2012 (1) SA 583 (GSJ) 595 H - 596 A.

⁴ *Skilyia Property Investments (Pty) Ltd v Lloyds of London Underwriting* 2002 (3) 765 (T) at 780G-781B.

⁵ See *Betlane v Shelley Court CC* 2011 (1) SA 388 (CC) at 396 C; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at 349 A- B; *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A); *Genesis Medical Scheme v Registrar of Medical Schemes and Another* (CCT139/16) [2017] ZACC 16; 2017 (9) BCLR 1164 (CC); 2017 (6) SA 1 (CC) (6 June 2017) at par 132; Full bench decision in *Shepherd v Mitchell Gotts Seafreight SA (Pty) Ltd* 1984 (3) SA 202 (T) at 205; *Titty's Bar & Bottlestore (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T).

⁶ *Hano Trading CC v J R 209 Investments (Pty) Ltd* (650/11) [2012] ZASCA 127 (21 September 2012) at par 10.

(ii) Evictions under the PIE Act, the Constitutional imperatives and the role of a court in eviction proceedings under the PIE Act:

40 The PIE Act is intended to *"To provide for the prohibition of unlawful eviction; to provide for procedures for the eviction of unlawful occupiers; and to repeal the Prevention of Illegal Squatting Act, 1951, and other obsolete laws; and to provide for matters incidental thereto."* Its preamble reads as follows:

"WHEREAS no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property;
AND WHEREAS no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances;

AND WHEREAS it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances;

AND WHEREAS special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and that it should be recognised that the needs of those groups should be considered; ... "

41 The following provisions of the PIE Act assume particular significance in this application:

41.1 First, section 4(7) of the PIE Act provides that *"[I]f 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."

41.2 Then, in terms of section 4(8) of the PIE Act, it is only when a Court is satisfied that all the requirements of section 4 have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).

41.3 Section 4(9) of the PIE Act then provides that "*In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question*".

41.4 Lastly, in terms of section 4(12), it is provided that "*[A]ny order for the eviction of an unlawful occupier or for the demolition or removal of buildings or structures in terms of this section is subject to the conditions deemed reasonable by the court, and the court may, on good cause shown, vary any condition for an eviction order.*"

42 In the decision of Harms JA (as he then was) in **Ngcobo**,⁷ the Supreme Court of Appeal considered applications for eviction under PIE and therein held that:

"[3] PIE has its roots, inter alia, in s 26(3) of the Bill of Rights, which provides that 'no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances'. ... It invests in the courts the right and duty to make the order, which, in the circumstances of the case, would be just and equitable and it prescribes some circumstances that have to be taken into account in determining the terms of the eviction.

[18] The court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated (s 4(8)), has to exercise a discretion based upon what is just and equitable. The discretion is

⁷ Ndlovu v Ngcobo, Bekker and Another v Jika (1) (240/2001, 136/2002) [2002] ZASCA 87; [2002] 4 All SA 384 (SCA); 2003 (1) SA 113 (SCA) (30 August 2002).

one in the wide and not the narrow sense ... A court of first instance, consequently, does not have a free hand to do whatever it wishes to do and a court of appeal is not hamstrung by the traditional grounds of whether the court exercised its discretion capriciously or upon a wrong principle, or that it did not bring its unbiased judgment to bear on the question, or that it acted without substantial reasons ...

[19] Another material consideration is that of the evidential onus. 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. Whether the ultimate onus will be on the owner or the occupier we need not now decide."

43 In ***Changing Tides***⁸, the Supreme Court of Appeal, after having considered a number of well-known and oft referred to decisions of its own⁹ and of the Constitutional Court¹⁰ summarised the position when a private land owner applies for the eviction of an unlawful occupier as follows:

⁸ City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others (SCA) [2012] ZASCA 116; 2012 (6) SA 294 (SCA); 2012 (11) BCLR 1206 (SCA); [2013] 1 All SA 8 (SCA) (14 September 2012).

⁹ City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another 2011 (4) SA 337 (SCA); Baartman & others v Port Elizabeth Municipality 2004 (1) SA 560 (SCA); City of Johannesburg v Rand Properties (Pty) Ltd & others 2007 (6) SA 417 (SCA); Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa & others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae) 2004 (6) SA 40 (SCA); Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele [2010] 4 All SA 54 (SCA).

¹⁰ City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another 2012 (2) SA 104 (CC); Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7; 2005 (1) SA 217 (CC); Port Elizabeth Municipality v Various Occupiers, supra; Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg & others [2008] ZACC 1; 2008 (3) SA 208 (CC); Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & others (Centre on Housing Rights and Evictions & another, amici curiae) 2010 (3) SA 454 (CC); President of the Republic of South Africa & another v Modderklip Boerdery (Pty) Ltd (Agri SA & others, Amici Curiae) 2005 (5) SA 1 (CC); Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd & others 2012 (4) BCLR 382 (CC); Occupiers of Mooiplaats v Golden Thread Ltd & others 2012 (2) SA 337 (CC).

"[11] In terms of s 4(7) of PIE an eviction order may only be granted if it is just and equitable to do so, after the court has had regard to all the relevant circumstances, including the availability of land for the relocation of the occupiers and the rights and needs of the elderly, children, disabled persons and households headed by women. If the requirements of s 4 are satisfied and no valid defence to an eviction order has been raised the court 'must', in terms of s 4(8), grant an eviction order. When granting such an order the court must, in terms of s 4(8)(a) of PIE, determine a just and equitable date on which the unlawful occupier or occupiers must vacate the premises. The court is empowered in terms of s 4(12) to attach reasonable conditions to an eviction order.

[12] ... The first enquiry is that under s 4(7), the court must determine whether it is just and equitable to order eviction having considered all relevant circumstances. Among those circumstances the availability of alternative land and the rights and needs of people falling in specific vulnerable groups are singled out for consideration. Under s 4(8) it is obliged to order an eviction 'if the ... requirements of the section have been complied with' and no valid defence is advanced to an eviction order. The provision that no valid defence has been raised refers to a defence that would entitle the occupier to remain in occupation as against the owner of the property, such as the existence of a valid lease. Compliance with the requirements of section 4 refers to both the service formalities and the conclusion under s 4(7) that an eviction order would be just and equitable. In considering whether eviction is just and equitable the court must come to a decision that is just and equitable to all parties. Once the conclusion has been reached that eviction would be just and equitable the court enters upon the second enquiry. It must then consider what conditions should attach to the eviction order and what date would be just and equitable upon which the eviction order should take effect. Once again the date that it determines must be one that is just and equitable to all parties.

...

[19] In most instances where the owner of property seeks the eviction of unlawful occupiers, whether from land or the buildings situated on the land, and 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. That is consistent with the jurisprudence that has developed around this topic. In *Ndlovu v Ngcobo*, 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...

...

[25] Reverting then to the relationship between ss 4(7) and (8), the position can be summarised as follows. A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve the gradual realisation of the right of access to housing in terms of s 26(1) of the Constitution, is faced with two separate enquiries. 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. Before doing so, however, it must consider what justice and equity demands 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 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."

44 The Supreme Court of Appeal went further and dealt with the issue of onus within the context of eviction proceedings and the role intended for a court to fulfil in

the eviction enquiry. It is in this context that the Supreme Court of Appeal said the following in ***Changing Tides***:

"[28] The City submitted that it is the duty of the occupiers to place any necessary relevant information before the court. It contended that the common law position that an owner can rely simply on its ownership of the property and the occupation of the occupiers against its will is applicable to applications governed by s 4(7) of PIE. It relied on the cases where it has been held that the landowner may allege only its ownership of the property and the fact of occupation in order to make out a case, to which the occupiers must respond and establish a right of occupation if they wish to prevent an order from being made. It argued that the only effect of PIE was to overlay the common law position with certain procedural requirements.

[29] This is not an issue that has been resolved in the cases and to some extent it has been obscured by cases in which a less conventional approach to the function of the court has been espoused. The enquiry into what is just and equitable requires the court to make a value judgment on the basis of all relevant facts. It can cause further evidence to be submitted where 'the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain'. That may mean that 'technical questions relating to onus of proof should not play an unduly significant role'. However, I do not think that means that the onus of proof can be disregarded. After all what is being sought from the court is an order that can be granted only if the court is satisfied that it is just and equitable that such an order be made. If, at the end of the day, it is left in doubt on that issue it must refuse an order. There is nothing in PIE that warrants the court maintaining litigation on foot until it feels itself able to resolve the conflicting interests of the landowner and the unlawful occupiers in a just and equitable manner.

[30] The implication of this is that, in the first instance, it is for the applicant to secure that the information placed before the court is sufficient, if unchallenged, to satisfy it that it would be just and equitable to grant an eviction order. Both the Constitution and PIE require that the court must take into account all relevant facts before granting an eviction order. Whilst in some cases it may suffice for an applicant to say that it is the owner and the

respondent is in occupation, because those are the only relevant facts, in others it will not. One cannot simply transpose the former rules governing onus to a situation that is no longer governed only by the common law but has statutory expression. In a situation governed by s 4(7) of PIE, the applicant must show that it has complied with the notice requirements under s 4 and that the occupiers of the property are in unlawful occupation. On ordinary principles governing onus it would also have to demonstrate that the circumstances render it just and equitable to grant the order it seeks. I see no reason to depart from this...

[31] The response to this may be to say that the applicant for relief will be unaware of the circumstances of the occupiers and therefore unable to place the relevant facts before the court. As a general proposition that cannot be sustained. Most applicants for eviction orders governed by PIE will have at least some knowledge of the identity of the persons they wish to have evicted and their personal circumstances. They are obviously not required to go beyond what they know or what is reasonably ascertainable..."

...

[34] In my view, therefore, there are no good reasons for saying that an applicant for an eviction order under s 4(7) of PIE does not bear the onus of satisfying the court that it is just and equitable to make such an order. Cases where that onus affects the outcome are likely to be few and far between because the court will ordinarily be able to make the value judgment involved on the material before it. However, the fact that an applicant bears the onus of satisfying the court on this question means that it has a duty to place evidence before the court in its founding affidavits that will be sufficient to discharge that onus in the light of the court's obligation to have regard to all relevant factors. The City's contention, that the common law position continues to prevail and that it is for the occupiers to place the relevant facts before the court, is incorrect. Once that is recognised it should mean that applicants go to greater lengths to place evidence of relevant facts before the court from the outset and this will expedite the process of disposing of these applications, particularly in cases that are unopposed as the need for the court to direct that further information be obtained will diminish."

45 Lastly, as to the duties of a court in eviction proceedings, this court borrows liberally from the decision by the Constitutional Court in **Occupiers Berea**¹¹ wherein the apex court pronounced upon the duties of a court in eviction proceedings, when that court said the following:

"Duties of the Court

[39] ... The duties arise from the protection of the rights of residents. They are, in the circumstances, inextricably intertwined with the issue of informed consent and waiver which entails an examination into what rights the parties had and the nature of those rights.

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

[41] The prohibition in section 26(3) is given effect to through the enactment of PIE. This Act goes further and enjoins the courts to order an eviction only "if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances" as contemplated in section 4(6) and (7) and section 6(1).

[42] This Court in *Port Elizabeth Municipality* emphasised the new approach that courts must adopt in eviction matters. A court must take an active role in adjudicating such matters. As this Court 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 interests and circumstances

¹¹ *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* (CCT108/16) [2017] ZACC 18; 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC) (8 June 2017).

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."

[43] The role played by a court in such matters was elucidated further in other cases. As a starting point, this Court in *Machele* held that "[t]he application of PIE is not discretionary. Courts must consider PIE in eviction cases." Furthermore, this Court in *Pitje* held that courts are not allowed to passively apply PIE and must "probe and investigate the surrounding circumstances".

[44] The nature of the enquiry under section 4 of PIE was examined in the case of *Changing Tides*. In summary, it was 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 section 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 section 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."

[45] 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 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."

[46] As 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.

[47] 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. This may be difficult, as in the present matter, where the unlawful occupiers do not have legal representation at the eviction proceedings. In this regard, emphasis must be placed on the notice provisions of PIE, which require that notice of the eviction proceedings must be served on the unlawful occupiers and "must state that the unlawful occupier ... has the right to apply for legal aid".

[48] 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.

[49] Where occupiers are not represented, the Supreme Court of Appeal in *Changing Tides* has provided some additional guidance:

"Where [unlawful occupiers] are not represented, courts may consider issuing a rule nisi and causing it to be served on the occupiers (and if it is not present, the local authority), together with a suitably worded notice explaining the right to temporary emergency accommodation, how they can access such accommodation, and inviting them to come to court to express their views on that issue at least."

[50] To this I would add that the court should explain to the unlawful occupiers their right to apply for legal aid and where appropriate direct them to approach a named legal aid clinic with a given address.

[51] In brief, where no information is available, or where only inadequate information is available, the court must decline to make an eviction order. The absence of information is an irrefutable confirmation of the fact that the court is not in a position to exercise this important jurisdiction." ¹²

AN ANALYSIS OF VARIFLAT'S CASE IN RESPECT OF THE EVICTION RELIEF:

(i) Reliance on inadmissible hearsay, absence of personal knowledge and the unreliability of the allegations made in the founding affidavit:

46 The supplementary affidavit appears to be no more than a *word-for-word* reproduction of the allegations already contained in the founding affidavit. Substantively, the supplementary affidavit does not contribute anything to the matter.

47 The deponent to Variflat's affidavits is employed by CPA, which is situated at CPA House, 1[...] D[...] T[...] Street, Pretoria. The Premises, on the other hand, is situated at 1[...] B[...] Street, Muckleneuk, Pretoria. From the Lease, this address appears to also be the address of Variflat itself. CPA's address, where the deponent is stationed at, which indeed also appears to be Variflat's address, is approximately 3km from the Premises. In metropolitan terms, CPA (and it appears Variflat too) is proverbially *just around the corner* from the Premises.

48 The allegations made in Variflat's affidavits nonetheless emanate not from the bare minimum that a court would expect from an applicant in circumstances such as the present, but rather from:

48.1 the deponent having "*read the contents of the file and acquainted [herself] with the contents thereof*";

¹² See also *Grobler v Phillips and Others* (CCT 243/21) [2022] ZACC 32; 2023 (1) SA 321 (CC); 2024 (1) BCLR 115 (CC) (20 September 2022) at paras [27] to [40].

48.2 the information recorded in the Lease and the Lease Schedule in support of its case, in circumstances where both the Lease and the Lease Schedule are dated 24 October 2022, being 2 (two) years and 8 (eight) months before the hearing of the application;

48.3 the allegation that “[A]s far as the Applicant’s knowledge, through all its representatives are concerned, there are no other occupants in the premises”, in circumstances where these representatives have not been identified nor have confirmatory affidavits been filed by them.

49 The Variflat affidavits are thus premised on (i) the information recorded, more than two years ago, in the Lease and the Lease Schedule and (ii) what had been communicated to the deponent by Variflat’s unidentified “representatives”: who themselves have not deposed to confirmatory affidavits.

50 Despite Variflat and CPA being in close proximity to the Premises, there is no evidence that the Premises has been attended on prior to or since the institution of this application, or after the first hearing, with the view to (i) ascertain, on a factual level, what circumstances indeed presently prevail upon the Premises and (ii) to furnish this court with such facts in pursuance of seeking an order for eviction under the PIE Act.

51 In the absence of proper evidence on this score, concerns and uncertainty that come to mind in this regard include, by way of example, how does the deponent know that it is for instance indeed true and correct that (i) Mitana “*and/or all occupants and all those holding/occupying through or under [Mitana] including but not limited to all Directors and/or employees of*” Mitana are currently in occupation of the Premises; (ii) Mitana “*and/or all occupants and all those holding/occupying through or under the First Respondent including but not limited to all Directors and/or employees of*” Mitana have occupied the property for a period exceeding 6 (six) months; (iii) that the Municipality is able to make land available for the relocation of those sought to be evicted from the Premise in terms of this application; (iv) The occupants in the Premises are indeed, and only, Rendani, Tjiharuka and Tumelo or (v) that there has been continued unlawful occupation of the Premises by Mitana

"and/or all occupants and all those holding/occupying through or under [Mitana] including but not limited to all Directors and I or employees of" Mitana.

52 Variflat has not offered any proper explanation, nor any justification for that matter, as to why its founding affidavit does not properly deal with or contain up to date, direct and primary factual evidence. Variflat, for instance, did not contend that it is in any manner impeded in its ability to present proper evidence to this court. Variflat's stance, which is in this court's view untenable, is rather that its founding affidavit is sufficient.

53 Even after this court (i) confronted Variflat with the deficiencies in the founding affidavit, (ii) granted an indulgence to Variflat to supplement its founding affidavit and (iii) stood the application down for later hearing so that Variflat could augment the deficiencies in its founding affidavit, Variflat elected not to do so. Variflat rather elected to content itself with what had already been said in its founding affidavit, and in this respect with what objectively appears to be little more than a *desk-top* consideration of the matter premised on little (if anything) more than information recorded in documents that are more than 2 (two) years old and what it was told by other unidentified individuals.

54 On a basic level, the factual correctness of the allegations contained in the founding affidavit depends on the credibility and/or veracity of individuals other than the deponent to Variflat's affidavits, and almost all the material allegations in the founding affidavit constitute inadmissible (oral and documentary) hearsay.

55 This is not necessarily the end of the road for Variflat because section 3 of the Law of Evidence Amendment Act empowers this court to admit hearsay as part of the record of evidence in this application, provided that it is in the interests of justice to do so. The Constitutional Court, for instance, admitted hearsay in an unopposed matter that served before that court, when it was in the interests of justice to do so, and particularly in a matter where the veracity of the evidence admitted by the

Constitutional Court depended on the respondent.¹³ Having considered the facts of this particular matter, there is no compelling reason for this court to admit the hearsay evidence in question in the exercise of its *section 3 discretion*. That said, even if this court was minded to admit the hearsay evidence, in spite of its inherent unreliability, it would still not have made a difference to the outcome of this application.

56 Regardless of the hearsay issue, this court doubts whether the deponent to Variflat's affidavits is indeed possessed of the necessary personal knowledge of that which is stated in the Variflat affidavits. She at least appears to not have personal knowledge of that which is truly material or otherwise relevant to this application, which perhaps explains why the founding affidavit is primarily premised on hearsay and substantively wanting in material respects.

57 In addition, the reliability of the allegations made in the Variflat affidavits is further compromised due to the lapse of more than two years since the conclusion of the Lease and the Lease Schedule, which in and of itself raises an additional level of concern about the reliability of the allegations made in the founding affidavit. This is so because in the absence of up to date direct evidence (even in the supplementary affidavit) dealing pertinently with the present circumstances surrounding occupancy of the Premises, the lapse of time in this matter renders the Lease and Lease Schedule, as sources of primary facts from which Variflat wants this court to infer the current facts surrounding the occupancy and status of the Premises, unreliable.

58 This court is not satisfied that it is able to infer, nor is it convinced that it should infer, without more and only from the facts recorded in the Lease and the Lease Schedule, that anyone is still in occupation of the Premises and, if so, that it is

¹³ Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others (CCT 52/21) [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (29 June 2021) at paras [19] to [23]. See also Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security (749/2010) [2011] ZASCA 220; 2012 (2) SA 137 (SCA); [2012] 2 All SA 56 (SCA) (30 November 2011); Executive Officer: Financial Services Board v Dynamic Wealth Ltd & others (888/10) [2011] ZASCA 193 (15 November 2011) at par 7-19 as regards documentary hearsay. Compare Swifambo Rail Leasing (Pty) Limited v Passenger Rail Agency of South Africa (1030/2017) [2018] ZASCA 167; 2020 (1) SA 76 (SCA) (30 November 2018).

only Rendani, Tjiharuka and/or Tumelo that is in occupation of the Premises, or perhaps only Mitana, if it is in occupation of the Premises at all.

59 Accordingly, even if the allegations made in the founding affidavit constituted *evidence*, and if one ignores the hearsay issue, then this court would, in the circumstances of the matter, still fosters serious concerns about the reliability of such *evidence*.

60 To illustrate the lack of reliability more pertinently, this court, as one example only, deals with one particular feature of the founding affidavit:

60.1 The oft employed practice by eviction applicants of grouping together occupiers as "*all those holding/occupying through or under*" the primary unlawful occupier cannot, in this court's view, be employed as a catch all function or as a band-aid to cover up insufficient evidence of actual occupation.

60.2 Of course, adopting the practice of grouping together unknown unlawful occupiers as a single category of occupiers, in certain appropriate circumstances, may be the only way in which an applicant can go about procuring a proper and complete eviction. By way of example, if the primary unlawful occupier is an adult person with minor children, and they all occupy the premises concerned, then the children will fall into the category of "*all those holding/occupying through or under*" the primary unlawful occupier.

60.3 One could conceive that the practice, when it appears that a premises is occupied by individuals in addition to the primary unlawful occupant and the eviction applicant, after having taken acceptable steps to ascertain the actually relevant facts concerning occupation. An example of such a situation would, for instance, be cases such as the numerous reported land-invasion cases. It is for particular circumstances that, and indeed why, the practice of grouping together unlawful occupiers under the rubric of "*all those holding/occupying through or under*" the primary unlawful occupier exists, and why that practice is, when the facts so require and justify, accepted by our courts. As always, the acceptable use of this practice depends on the specific facts of each case.

60.4 That said, *submissions* do not constitute *evidence*.

60.5 The one position adopted in the founding affidavit is that it is only Rendani, Tjiharuka and Tumelo that are in occupation of the Premises.

60.6 A second position is simultaneously adopted, which is that:

60.6.1 the Premises is - as a matter of fact - currently occupied by Mitana and/or "all occupants and all those holding/occupying through or under [Mitana] including but not limited to all Directors and/or employees of [Mitana]"; and

60.6.2 it is these *persons*, whomever they may be (if they are not Rendani, Tjiharuka and Tumelo) that are, according to Variflat, *unlawful occupiers* as intended by the PIE Act, who *refuse* to vacate the Premises and are *frustrating* Variflat's rights.

60.7 The Lease Schedule, who provides for 3 (three) individuals to occupy the Premises and specifies Rendani, Tjiharuka and Tumelo, also specifies at least one director of Mitana, furnishes her contact details, but does not contemplate that she is indeed also in occupation of the Premises. It also appears from the sheriff's return of services dated 11 November 2024, that on 21 October 2024, the Premises was occupied by one Ms Phihlela which is a cause for even greater concern.

60.8 Ms Dibakwane, for instance, who appears to have been the director of Mitana at the time when the Lease was concluded, is in one sense contemplated by the founding affidavit contended to be occupation of the Premises and in the other sense not. There is a factual conflict on this score, and if not a conflict then at least tension, both of the kind that does not instil confidence in the reliability of the allegations made in the founding affidavit, but doubt.

60.9 What is more, the founding affidavit does not contend that Variflat or CPA are, in spite of any endeavour to establish the actual facts prevalent upon the alleged occupation of the Premises, unable (for whatever reason) to ascertain who are actually in occupation of the Premises etc.

60.10 As far as this court is concerned, Variflat's grouping together of unidentified alleged occupiers of the Premises under the rubric of "*all occupants and all those holding/occupying through or under [Mitana] including but not limited to all Directors and/or employees of [Mitana]*" is not appropriate

in the circumstances of this case, particularly not in circumstances where Variflat has seemingly not taken any proper steps to ascertain the true factual position on this score.

60.11 Off course, ignoring the *gremlins* in the founding affidavit, the common ground could possibly be that Rendani, Tjiharuka and Tumelo are the only individuals that constitute "*all those holding/occupying through or under*" Mitana as the former primary unlawful occupier. However, there is no reason for this court to attempt to try and *solve a puzzle* in circumstances where Variflat was, both prior to the prosecution of this application, throughout its prosecution and after the first hearing, in a position to place proper, accurate and clear evidence before this court.

60.12 If Variflat intended to evict only Rendani, Tjiharuka and Tumelo from the Premises, or perhaps Ms Dibakwane in addition to them, then Variflat should have sought such an order, on clear terms, on proper evidence, and not the broad and generalised order that it seeks in terms of this application based on affidavits that do not warrant such wide orders being granted.

61 Ultimately, this court is not persuaded that Variflat's affidavits reliably demonstrate that the Premises is indeed presently occupied as a home and if it is, that this court, in performing the ***Changing Tides*** analysis in accordance with the duties of this court as set out in ***Occupiers Berea***, can competently and ought to order Mitana and "all those living with, through or under" Mitana "including but not limited to all Directors and/or employees of" Mitana to be evicted from the Premises "*within 15 (FIFTEEN) calendar days*" from the date of such order, without any proper and clear evidence of who would find themselves in the wake of such an order.

62 These deficiencies and the concerns raised by this court in relation to the reliability of the Variflat affidavits could, of course, have been both avoided prior to the prosecution of this application and also subsequently cured after the first hearing, but Variflat elected not to do so.

(ii) Apart from the Municipality, only Mitana is a party to this application:

63 If this court is incorrect in holding that the Variflat affidavits are fatally deficient for the reasons set out in paragraphs 46 to 62 above, then the application must still, nonetheless and for different reasons, suffer the same fate.

64 The PIE Act only applies to eviction of persons from their *homes*. Occupation required for purposes of a PIE Act based eviction requires an element of regular occupation of the premises in question, and a particular degree of permanence, so as to elevate the premises concerned to a *home*.¹⁴ Mitana is a legal person that does not itself occupy a *home* in the sense contemplated by the PIE Act.

65 Variflat's case, however, is *inter alia* that the Premises is occupied by Rendani, Tjiharuka and Tumelo, and that based on the information recorded in the Lease and the Lease Schedule. Having invoked the provisions of the PIE Act with the view to procure *inter alia* their eviction from the Premises, Variflat accordingly mounted the application on the primary supposition that the Premises is, on a factual level, at least occupied by Rendani, Tjiharuka and Tumelo for residential purposes, and that the Premises to that end constitutes their *home*. It is at least Rendani, Tjiharuka and Tumelo who, on Variflat's version, may be rendered homeless if evicted from the Premises.

66 On Variflat's version, if it is to be accepted in spite of the shortcomings already discussed earlier in this judgment, then it is Rendani, Tjiharuka and Tumelo who entitled not to be evicted from their *home* (i.e. the Premises) unless this court so orders, after having considered all the relevant circumstances and having properly undertaken the ***Changing Tides*** analysis in accordance with the duties of this court as set out in ***Occupiers Berea***.

67 It is, as such, Rendani, Tjiharuka and Tumelo, who are sought to be evicted, who are possessed of a direct and substantial interest in the subject matter of this

¹⁴ Compare *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) and *Stay At South Point Properties (Pty) Ltd v Mqulwana and Others* 2024 (2) SA 640 (SCA).

application. In **Matjhabeng**,¹⁵ the Constitutional Court said, albeit in the context of non-joinder and in dealing with a contempt of court dispute, that:

"[92] ... No court can make findings adverse to any person's interests, without that person first being a party to the proceedings before it. The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences - including a penalty of committal - for their non-compliance. All of these entitlements are fundamental to ensuring that potential contemnors' rights to freedom and security of the person are, in the end, not arbitrarily deprived.

[93] The principles which are fundamental to judicial adjudication, in a constitutional order, were reaffirmed by this Court in its recent decision in *Lushaba*, where the Court, per Jafta J, endorsed principles stated by Ackermann J in *De Lange*:

"[F]air procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that ... the other side should be heard [*audi alterem partem*], aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law.... 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. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest, like personal freedom, tugs at the strings of what I feel is just, and points in the direction of a violation."

¹⁵ *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* (CCT 217/15; CCT 99/16) [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) (26 September 2017).

68 Recently, in **Hlatshwayo**,¹⁶ the Supreme Court of Appeal restated the principles laid down by the Constitutional Court in paragraph **Snyders**,¹⁷ wherein the apex court held that:

"A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such person's rights or interest. In that case the person should be joined in the proceedings. If the person is not joined in circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person's rights or interests has been given without affording that person an opportunity to be heard. That goes against one of the most fundamental principles of our legal system. That is that, as a general rule, no court may make an order against anyone without giving that person the opportunity to be heard."

69 There can be no doubt that an order for a person's eviction from that person's home is an order that would directly affect such persons rights or interests.

70 Secondly, as appears from the sheriff's return of services dated 25 May 2025, the sheriff served the *ex parte* court order and notice as envisaged by section 4(2), read with section 4(3) of the PIE Act, by affixing it to the principle door of the Premises as "*after a diligent search and enquiry at the given address no other manner of service was possible*". The Premises constitutes Mitana's chosen *domicilium citandi et exutandi* in terms of the Lease. These documents also appear to have been sent to the first respondent by email, on 29 May 2025. The section 4(2) notice was not served on Rendani, Tjiharuka and Tumelo who, on Variflat's own approach, is contended to occupy the Premises as their *home*.¹⁸

71 What is more, according to Variflat, Rendani, Tjiharuka and Tumelo are *known occupiers* of the Premises. Because their identities are known to Variflat,

¹⁶ Road Accident Fund and Others v Hlatshwayo and Others (724/2023; 724B/2023) [2025] ZASCA 17; [2025] 2 All SA 333 (SCA) (5 March 2025) at par [29].

¹⁷ Snyders and Others v De Jager and Others [2016] ZACC 54; 2017 (5) BCLR 606 (CC).

¹⁸ Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others (495/99) [2001] ZASCA 87; [2001] 4 All SA 479 (A); 2001 (4) SA 1222 (SCA) (10 September 2001).

these individuals cannot, in the view of this court, competently be grouped together by Variflat in the class of those persons described by Variflat as "*all those holding/occupying through or under [Mitana] including but not limited to all Directors and/or employees of [Mitana]*". The nature of the two groupings of persons sought to be evicted from the Premises should neither be confused nor conflated.

72 It is inconceivable that a proper order for the eviction of Rendani, Tjiharuka and Tumelo can be granted, after having properly undertaken the ***Changing Tides*** analysis in accordance with the duties of this court as set out in ***Occupiers Berea***, in the absence of their joinder as a party to this application or at least notice of this application being given to them. After all, section 4(2) provides, duly emphasised, that "*[A]t least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction*". Variflat did not comply with the requirements of section 4(2) of the PIE Act as regards Rendani, Tjiharuka and Tumelo.

73 This court accordingly holds that, on Variflat's own version, it is not entitled, substantively or procedurally, to an order evicting Rendani, Tjiharuka and Tumelo, whom are persons that this court considers to be parties that as of necessity, had to be (i) joined as parties to this application and (ii) at the very least properly notified of this application. This court furthermore holds that Variflat's failure to join Rendani, Tjiharuka and Tumelo as necessary parties to this application, and its failure to properly notify them of this application, renders the application materially, and indeed fatally, defective.

(iii) This court declines to grant the Eviction Relief:

74 Irrespective of the unlawfulness of occupation, this court will only grant eviction relief where (i) all the relevant facts and information required to decide whether an eviction is just and equitable is placed before it; (ii) the court is satisfied that premised on such facts and information, the circumstances render it just and equitable for eviction relief to issue. After all, "*[A]n eviction order granted in the absence of either one of these two requirements will be arbitrary*" and " ... where no

information is available, or where only inadequate information is available, the court must decline to make an eviction order". It has also been authoritatively held, to which this court is bound, that "[T]he absence of information is an irrefutable confirmation of the fact that the court is not in a position to exercise this important jurisdiction."

75 In this court's considered view, the Variflat affidavits do not pass muster when analysed against the principles enunciated by the Constitutional Court and Supreme Court of Appeal in the binding decisions referred to above. In particular, in a consideration of the material issues in this matter beyond the unlawfulness of any occupation of the Premises, this court has not been placed in the position to conduct the first and second enquiries laid down in ***Changing Tides*** in accordance with this court's duties as set out in ***Occupiers Berea***.

76 This court is alive to Variflat's rights as the owner of the Premises and that those rights are protected under section 25 of the Constitution. Provided that Variflat complied with all the applicable procedural requirements incumbent upon it (which it did not), Variflat would ordinarily have been entitled to approach this court for an order evicting unlawful occupiers of its Premises. But this is not an *ordinary* matter, and the approach that Variflat has adopted in this application is somewhat extraordinary. Variflat, who essentially seeks to vindicate its rights as owner of the Premises, has by and large been the cause of its own difficulties.¹⁹

77 As a starting point, this court is unable to find that there has probably been proper procedural and substantive compliance with section 4 of the PIE Act in the circumstances of this case. The facts, on Variflat's own version, demonstrate that necessary parties have neither been joined as parties to this application, nor notified of its prosecution.

¹⁹ Magistrate M Pangarker v Botha (446/13) [2014] ZASCA 78 (29 May 2014), with reference to Momentum Life Assurers Ltd v Thirion [2002] 2 All SA 62 (C), wherein it was held that - "Of course no court would feel the urge to come to the assistance of a litigant who has been the author of his own misfortune and has suffered injustice by his own conduct. Cognisance must, therefore be taken of all the relevant facts and circumstances giving rise to such misfortune and injustice. If he has been careless, dilatory or in bad faith (mala fide), he cannot expect the courts to come to his assistance."

78 What is more, without proper *audi* being afforded to at least those persons suspected by Variflat to be in occupation of the Premises, this court cannot (i) determine whether any person possibly in occupation of the Premises is possessed of a defence to the application or (ii) properly dispense justice on the parties in a manner that is just and equitable. Doing so would, in the view of this court, disregard the duties of a court in eviction applications under the PIE Act.

79 This court has also not been furnished with any proper evidence regarding the actual circumstances prevailing on the Premises and/or the personal circumstances of those alleged to be in occupation of the Premises. It is against this context understandable that, and indeed why, the alleged occupants of the Premises did not participate in this application and why affidavits by them or on their behalf, bringing the facts surrounding their personal circumstances to the attention of this court, have not featured.

80 It is Variflat who bears the onus of satisfying the court that it is just and equitable for this court to grant eviction relief, and it is Variflat who has the duty to place evidence before this court in its founding affidavit sufficient to discharge that onus in the light of this court's obligation to have regard to all relevant factors. It was for Variflat to secure that the information placed before this court is sufficient to satisfy this court, without more, that it would be just and equitable for this court to grant an eviction order. This court is duty-bound to take into account all relevant facts before granting an eviction order and this is not a case where it is sufficient for Variflat to rely only on the fact of its ownership with the view to sustain its entitlement to such an order.

81 To this end, it was for Variflat to show that (i) it has complied with the notice requirements under section 4; (ii) the occupiers of the Premises are in unlawful occupation of the Premises, and (iii) that the circumstances render it just and equitable for this court to grant an eviction order, and to that end the specific eviction order that Variflat seeks. In this court's view, Variflat failed to do so.

82 With the close proximity of the Premises in mind, there is in this court's view of the matter no justification for Variflat's failure to ascertain and verify the up to date

facts and place them before this court. Had it done so, Variflat would at least have been able to present this court with some evidence of the identity of the persons they wish to have evicted and their personal circumstances. What this court expected of Variflat is not to go above and beyond, but only to establish what is reasonably ascertainable.

83 In the absence of an explanation that would otherwise have justified Variflat not adducing this type of evidence, this court cannot find any reason why it should look past the deficiencies in Variflat's case in the circumstances of this matter. Had Variflat gone to acceptable lengths to place evidence of relevant facts before the court from the outset, it would have expedited the process of disposing of this application, and it was in Variflat's its own interest to have done so.

84 In adopting its active role in this application, probing and investigating the surrounding circumstances, this court went beyond its normal functions and, in active judicial management, afforded Variflat an opportunity to augment the deficiencies in its case, which opportunity Variflat itself decided not to utilise. One could only conclude that if an order for the eviction of anyone from the Premises was truly important or at least priority to Variflat, then it would (proverbially) have *jumped* on the opportunity to ensure that its papers were in order prior to the second hearing. It did not.

85 This is a case where this court has, it appears for no good reason and without justification, not been informed of the relevant circumstances and the necessary information upon which this court is expected to exercise its discretion and proper evidence dealing with the actually relevant considerations in the matter has not been placed before it. This court is, accordingly, precluded from granting any eviction order because it has not been placed in a position to undertake the enquiry it is duty-bound to undertake in matters of this nature, having regard to its role in applications such as the present.

86 From a Constitutional point of view:

86.1 Section 25(1) of the Constitution (*the property clause*) provides that "*No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*" The PIE Act is a law of general application that in and of itself does not arbitrarily deprive a property owner of property.

86.2 Section 26(3) of the Constitution on the other hand 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". The PIE Act gives effect to section 26(3), and further enjoins this court to only order an eviction in the event that this court concludes that it is just and equitable to do so, after this court considered all the relevant circumstances of the matter through the applicable gateway provisions of the PIE Act.

86.3 Ultimately, in applications of this nature, a court is called upon to dispense a just and equitable order on the parties without arbitrarily depriving (i) a property owner of its rights under section 25 and an occupier of its rights under section 26, in a *give and take* type of determination.²⁰

86.4 The starting point is that deprivation, within the context of section 25, occurs when there is a substantial interference in the property rights of another, in the sense of the interference being so extensive that "*it has a legally relevant impact on the rights of the affected party.*"²¹ On this topic, the Constitutional Court, in **FNB**,²² stated that:

"[57] The term "deprive" or "deprivation" is, as Van der Walt (1997) points out, somewhat misleading or confusing because it can create the wrong impression that it invariably refers to the taking away of property, whereas in fact

"the term 'deprivation' is distinguished very clearly from the narrower term 'expropriation' in constitutional jurisprudence worldwide."

In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title

²⁰ See Grobler supra at fn 12.

²¹ See South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others (CCT234/16) [2017] ZACC 26; 2017 (10) BCLR 1303 (CC); 2017 (6) SA 331 (CC) (24 July 2017) at par 48.

²² First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002).

or right to or in the property concerned. If section 25 is applied to this wide genus of interference, "deprivation" would encompass all species thereof and "expropriation" would apply only to a narrower species of interference. Chaskalson and Lewis, using a slightly different idiom and dealing with both the interim and 1996 Constitutions, put it equally correctly thus:

"Expropriations are treated as a subset of deprivations. There are certain requirements for the validity of all deprivations."

[58] Viewed from this perspective section 25(1) deals with all "property" and all deprivations (including expropriations). If the deprivation infringes (limits) section 25(1) and cannot be justified under section 36 that is the end of the matter. The provision is unconstitutional."

86.5 The Constitutional Court's decision in **FNB** also addressed this feature of section 25(1) when it said the following:

"[65] In its context "arbitrary", as used in section 25, is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality. At the same time it is a narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of section 36. This is so because the standard set in section 36 is "reasonableness" and "justifiability", whilst the standard set in section 25 is "arbitrariness". This distinction must be kept in mind when interpreting and applying the two sections.

[66] It is important in every case in which section 25(1) is in issue to have regard to the legislative context to which the prohibition against "arbitrary" deprivation has to be applied; and also to the nature and extent of the deprivation. In certain circumstances the legislative deprivation might be such that no more than a rational connection between means and ends would be required, while in others the ends would have to be more compelling to prevent the deprivation from being arbitrary.

...

[100] Having regard to what has gone before, it is concluded that a deprivation of property is "arbitrary" as meant by section 25 when the "law" referred to in section 25(1) does not provide sufficient reason for the particular

deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:

- (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.
- (b) A complexity of relationships has to be considered.
- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
- (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
- (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. This judgment is not concerned at all with incorporeal property.
- (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
- (g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.
- (h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing

in mind that the enquiry is concerned with "arbitrary" in relation to the deprivation of property under section 25."²³

86.6 Refusing eviction relief applied for by a property owner will invariably lead to *deprivation* of the owner's property rights, at least on some level. Granting eviction relief may in certain circumstances (such as when it is incorrectly granted) offend section 26(3) of the Constitution and in and of itself constitute *deprivation* too. With deprivation essentially being unavoidable, whatever the possible outcome, the guiding principle is this court's duty to avoid that deprivation that may ensue upon its decision is *arbitrary* in performing the balancing act required.

86.7 If the Premises is indeed occupied by and constitute the home of any person, the effect of granting the Eviction Relief, in the circumstances of this matter, may very well bring about serious detrimental, and indeed final, consequences for whomever the occupants of the Premises may be, in a manner that in and of itself would appear to be arbitrary.

86.8 This court cannot conscionably issue an order finally evicting someone from their home pursuant a process that this court primarily considers to be a defective eviction application, in the absence of Variflat having secured the joinder of or notice to necessary parties, without proper *audi* being afforded to parties sought to be evicted, in the absence of proper, reliable and sufficient evidence, and without being placed in a position to properly perform its function within the context of these proceedings.

86.9 For it to do so, this court will be required to turn the proverbial blind eye not only to the stated fatal deficiencies in the application, but also to binding authority of the Constitutional Court and the SCA that preclude this court from granting the Eviction Relief. If this court nonetheless proceeds to do so, it would itself offend the Constitution and, in the view of this court, the Rule of Law, in a number of respects.

86.10 On the contrary, should this court decline to grant an order in respect of the Eviction Relief, such an outcome would not entail a final determination of

²³ See also *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others* [2017] ZACC 26 at paras 72-74. See also *Prophet v National Director of Public Prosecutions* (CCT56/05) [2006] ZACC 17; 2007 (2) BCLR 140 (CC); 2006 (2) SACR 525 (CC); 2007 (6) SA 169 (CC) (29 September 2006) in which decision the Constitutional Court deals with deprivation of property by a Court under Chapter 6 of POCA in paragraphs [61] to [62].

Variflat's pursuit of evicting whomever may perhaps be in unlawful occupation of the Premises, nor would it be finally dispositive of Variflat's rights.

86.11 If the Premises is indeed occupied, and Variflat remains devoted to its cause, then the consequences of this court declining to grant an order in respect of the Eviction Relief would simply require of Variflat to mount a fresh application, appropriately premised on proper and relevant admissible evidence, and as against all parties that ought to be before this court.

86.12 Such an outcome would, in the result, not constitute an absolute or final *deprivation* of Variflat's property rights protected under section 25 of the Constitution and it would not result in Variflat being deprived of its ownership in the Premises. Refusing the Eviction Relief would rather result in only a temporary limitation being imposed on Variflat's rights as property owner, and only pending the outcome of a proper eviction application, properly prosecuted.

86.13 On analysis, if this court declines to grant the Eviction Relief, then the deprivation that would result for Variflat is confined to its right and ability, as owner of the Premises, to lease the Premises to alternative tenants until such time as Variflat is able to properly procure a final eviction. The resultant *deprivation* to be occasioned upon Variflat accordingly does not embrace all the incidents of ownership in the Premises, but only one aspect thereof, and such *deprivation* is moreover only temporary.

86.14 In this respect, the monthly loss in rental revenue that Variflat would otherwise perhaps have been able to charge for the Premises, a one bedroom residential unit, is not sufficiently significant so as to warrant the consequences of this court granting the Eviction Relief without more. This is also so when it is kept in mind that Variflat's claim for payment in respect of occupational rental / interest as against the unlawful occupiers would increase commensurate to the period of continued unlawful occupation.

86.15 This court considered whether to issue some form of a *rule nisi*, with the view to impose a structured order upon Variflat and those possibly in occupation of the Premises, and so as not to bring about a complete end to the application. However, having regard to the extent to which the application is considered to be fatally defective, and keeping in mind that no respondent

nor any person sought to be evicted from the Premises have participated in the application, it will in this court's view serve no purpose to *keep it alive*.

86.16 The better view, in this court's consideration, is that it would be best for Variflat to start over and institute appropriate proceedings, properly, afresh.

86.17 Accordingly, and in the view of this court, granting an order for eviction in the circumstances of this case will, in this court's view, result in *deprivation* to whomever is in occupation of the Premises probably (at least possibly) of a final nature that will be *arbitrary* on the facts of this particular case.

86.18 Deprivation will on some level ensue for Variflat if this court declines to issue an order in respect of the Eviction Relief. Any such *deprivation* will, in this court's view, not be permanent nor, in the circumstances of this case, *arbitrary*. After all, Variflat could have avoided this result from ensuing upon it and it chose not to do so.

86.19 Having considered the matter, this court finds that there is sufficient reason to warrant the temporary and limited deprivation to be occasioned upon Variflat's right to lease the Premises to other tenants until such time as it properly procures the eviction of those possibly in unlawful occupation of the Premises.

87 This court furthermore considered whether perhaps to grant the Eviction Relief only as against Mitana, and thus not the other category/ies of individuals sought to be evicted, and whom actually may be faced with homelessness. In this regard, the following:

87.1 On the one hand, the Variflat affidavits contend that it is only Rendani, Tjiharuka and Tumelo who are in occupation of the Premises, and on the other hand Variflat contends that Mitana (and others) are in occupation of the Premises. Variflat's version, on this score, is not a model of clarity.

87.2 This court has already stated that Mitana cannot occupy the Premises as a home within the contemplation of the PIE Act. Thus, an application for the eviction of Mitana from the Premises is not an eviction subject to the PIE Act.

87.3 Mitana is a private for profit company that acts through *flesh*, whom one normally would expect to be its directors. However, apart from the Lease

Schedule, who Mitana's current directors are, and whether they occupy the Premises on behalf of Mitana, remains unclear and is not dealt with in the Variflat affidavits. It is also not clear from the founding affidavit as to whether Rendani, Tjiharuka and Tumelo occupy the Premises on behalf of or as representatives of Mitana.

87.4 The Eviction Relief inter alia has one of its objections the eviction of Mitana from the Premises. Whether Mitana is in occupation of the Premises is a question of fact, which in this court's view has not been clearly established.

87.5 That said, Didcott J, concluded in **Lurlev**²⁴ that the ejectment of a respondent from a premises does not depend on its actual occupation of the premises. The learned Judge, in this regard, held as follows:

"The ordinary sort of judgment or judicial order has at least two functional components. First of all, it is a command to the party at whom it is aimed, coupled in an appropriate case with a warrant to the sheriff to enforce the command. Secondly, it regulates the legal relations between the parties and settles their mutual rights and obligations, to the extent necessary for its grant. That, after all, is what makes its effect *res judicata*. Even the simplest judgments generally contain this second element. A default judgment for the price of goods sold and delivered is, in addition to all else, a judicial declaration that the plaintiff has sold and delivered the goods to the defendant and that the defendant is liable to pay their price to the plaintiff. In essence, most judgments and orders are thus declaratory orders supplemented by positive directions, and this is no less because declaratory orders in a pure form are sometimes claimable on their own.

Such duality is likewise a feature of an ejectment order. Its primary object, and its intended result, is to put the party obtaining it in possession of the premises to which it relates ... So that this may be achieved, the right of the claimant instead of the other party to possess the premises must first be acknowledged and proclaimed. That is accomplished by the judicial declaration implicit in the order. The other party, if he occupies the premises, must then be compelled to vacate them, and the command which the order embodies attends to that. But the order's transcendent and more enduring

²⁴ Lurlev (Pty) Ltd v Unifreight General Services (Pty) Ltd and others 1978 (1) SA 74 (D) 79.

effect, even when such is the case and a fortiori when it is not, is the confirmation of the claimant's better title to their possession which the declaration signifies. These consequences would ensue from the grant of an ejectment order in the present case. In particular, the order would uphold the plaintiff's cause of action in all its essentials, vindicate the plaintiff's cancellation of the tenancy by reason of the first defendant's breach of the lease, and recognize that the plaintiff rather than the first defendant was entitled to occupy the premises. All this would then be *res judicata* ... An order with that import would be no *brutum fulmen*. It would serve a definite and real purpose, even if it is true that the first defendant does not occupy the premises and there is thus no occasion for its physical removal from them."

87.6 **Lurlev** was concerned with an ejectment order sought pursuant to a summary judgment application, without declaratory relief being sought concerning the validity of cancellation of the right to occupy. The decision features in two subsequent reported judgments. The dictum in 79A-D of **Lurlev** was applied in **SA v JHA and Others**²⁵ albeit in a different context and not the portion Didcott J's judgment in relation to evictions or eviction orders. **Lurlev** was also referred to, in the context of *res judicata* and issue estoppel, in **Kommissaris van Binnelandse Inkomste v Absa Bank Beperk**.²⁶

87.7 Recently, in an opposed PIE Act related eviction matter, Mossop J referred to **Lurlev** and granted an order for the eviction of a husband and wife from a premises in circumstances where the wife contended that the husband had not been in occupation of the premises, in the decision of **Venter**.²⁷ **Venter** was concerned with an application by liquidators for the eviction of natural persons from a valuable premises belonging to the liquidated entity and which had been unlawfully occupied for long after the commencement of the liquidation proceedings in respect of the entity. The factual basis upon which the learned Judge referred to **Lurlev** was as follows:

"[20] The applicants have teased out a further potential defence that they speculate may have been raised by the first respondent. It is alleged by the applicants that the apartment is Unit 4 in the building known as 'Pearls of

²⁵ 2021 (1) 541 (WCC) at par [9.1].

²⁶ 1995 (1) 653 (A).

²⁷ **Venter NO and Another v Murimuthu and Others** (D10106/22) [2025] ZAKZDHC 20 (7 May 2025).

Umhlanga'. When he delivered his confirmatory affidavit to the second respondent's answering affidavit, the first respondent stated that his address was Units 1 and 2 in the 'Pearls of Umhlanga'. Thus the applicants concluded that he did not stay at the apartment. I do not take the same view.

[21] There were several allegations made in the founding affidavit that the first and second respondents both resided at the apartment. Those allegations were never denied by either of the respondents. In my estimation, a married couple ordinarily reside together. If that is not the case, and if it is the case here that they reside separately from each other in the same building but in different units, I would expect to be explicitly informed of this. I am not so informed and I take it therefore to be admitted that the respondents reside together in the apartment.

[22] Even should that not be the case, an order for the ejectment of the first respondent would be competent based upon the dicta of Didcott J in *Lurlev*...

87.8 It appears to this court that the true purpose and rationale behind the **Lurlev** principle (which was laid down prior the advent of the Constitution and the PIE Act) as applied in **Venter**, is that the claimant's better title to and in the unlawfully occupied premises be confirmed, and the right of the claimant, instead of the other party, to possess the premises, be proclaimed and acknowledged. The liquidators in **Venter** (a post Constitution and PIE Act case) were obliged to take into their possession the assets of the company in liquidation and to realise the premises in question, which had been occupied unlawfully for almost 5 years, to the best advantage of creditors. What is more, the eviction relief granted by the learned Mossop J would result in complete and vacant occupation of the premises in question. This is not such a case.

87.9 The Cancellation Relief that this court is minded to grant, without more, declares that the Lease has been terminated. The logical and indeed natural consequence of such declaration is that Mitana *qua* lessee or otherwise, is not entitled to be in occupation of Variflat's Premises and Variflat, as owner, is entitled, as against Mitana, to be in possession of the Premises. The Cancellation Relief, once granted, will as such regulate the legal relations between Variflat and Mitana, settling their mutual rights and obligations.

87.10 As between Variflat and Mitana, the Eviction Relief has its objective to mechanise and giving effect to the consequences of the Cancellation Relief,

and essentially procure vacant occupation of the premisses to Variflat. The primary object of the Eviction Relief is to place Variflat in possession of the Premises.

87.11 For reasons already dealt with in this judgment, the Eviction Relief cannot be granted at least as against for instance Rendani, Tjiharuka and Tumelo. In these circumstances, and for reasons unrelated to the *lis* as between only Variflat and Mitana, granting the Eviction Relief only as against Variflat will not result in Variflat being placed in possession of the Premises.

87.12 But the point remains that the Cancellation Relief, once granted, acknowledges the right of Variflat, instead of Mitana, to possess the Premises and proclaims this to be the case. That is the judicial declaration implicit in the Cancellation Relief granted by this court, who in granting the Cancellation Relief does so in confirmation and declaration of Variflat's better title to possess the Premises, in vindication of Variflat's better title and right to possess the Premises.

87.13 The Eviction Relief, in the circumstances of this specific case, is not necessary or required to achieve this result, in circumstances where the Cancellation Relief granted will do so without more and where the Eviction Relief, if only granted as against Mitana, will in any event not result in Variflat obtaining vacant occupation of the Premises. This is a matter where the Cancellation Relief indeed achieves the very purpose that the learned judges Didcott J and Mossop J intended for the ejectment orders granted in **Lurlev** and **Venter**.

87.14 Had the Variflat affidavits demonstrated that only Mitana was in occupation of the Premises, then this court would have granted the Eviction Relief as against Mitana. This court cannot, however, ignore the fact that the Variflat affidavits also contend that Rendani, Tjiharuka and Tumelo are the only persons in occupation of the Premises.

88 This court, in the circumstances and on the particular facts of this specific case, declines to grant any order in respect of the Eviction Relief. In doing so this court does not finally pronounce on Variflat's right or entitlement to evict whomever is in unlawful occupation of the Premises, if anyone. On the contrary, this court

acknowledges that Variflat is entitled to approach a court for eviction relief, but requires of Variflat to do so properly.

THE ORDER:

89 What remains is the issue of costs. It does not appear that Mitana at any stage placed Variflat's ownership rights, rights in terms of the Lease or the validity of Variflat's termination of the Lease in issue. This, and having regard to what has been set out above, and with the limited relief that this court is minded to grant to Variflat in terms of this application, in the exercise of its discretion, this court is of the view that Variflat should pay its own costs of the application.

90 For the reason set out herein above, the following order is granted in respect of this application:

90.1 It is declared that on 11 September 2024, the written Lease Agreement entered into by and between Variflat and Mitana on 28 October 2022, and a copy of which is attached to the founding affidavit as annexure AM2, was terminated by Variflat.

90.2 It is further declared that pursuant to the termination of the Lease, and from 11 September 2024 onward, Mitana had no further right or entitlement to occupy the Premises.

90.3 This court declines to make any order in respect of the relief sought in prayer 2 of the notice of motion.

90.4 Variflat shall pay its own costs of the application.

P LOURENS
Acting Judge of the High Court
Gauteng Division, Pretoria

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Pretoria

Counsel for the Respondents: no appearance

Date of hearing: 24 and 26 June 2025