



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

JUDGMENT

Reportable/~~Not Reportable~~

Case no: A180/2025

In the matter between:

FRANCOIS PETRUS RUITERS

First Appellant

TRUDIE INGRID RUITERS

Second Appellant

and

ELSIE ARENDSE

First Respondent

ALL OTHER UNKNOWN OCCUPIERS, OF 5[...] I[...]

Second Respondent

STREET, BELLVILLE

CITY OF CAPE TOWN METROPOLITAN MUNICIPALITY

Third Respondent

Neutral citation: Ruiters and Another v Arendse and Others (A180/2025) [2026]
ZAWCHC (12 May 2026)

Coram: SALLER AJ (MANTAME J and RALARALA J concurring)

Heard: 30 JANUARY 2026

Delivered: 12 MAY 2026

ORDER

1. The appeal is dismissed.
 2. The appellants to pay the costs of the appeal jointly and severally on scale B.
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JUDGMENT

Saller AJ:

Introduction

- [1] “If the law supposes that, ... the law is an ass”, Charles Dickens had Mr. Bumble famously declare in 1838 in the novel *Oliver Twist*, when the unhappy spouse of a domineering wife is told in court that “...the law supposes that your wife acts under your direction”. What Mr. Bumble bemoaned was the law’s occasional predilection for blinkered rigidity that calls to mind the donkey’s proverbial stubbornness. Happily, in 2026 in South Africa, our legal system proves the poor Mr. Bumble wrong each day.
- [2] Respect for the fundamental human dignity of each and every person who lives within our country’s borders is one of the cornerstones of our constitutional democracy and the legal system which supports it. One of the instruments our legislature has devised to give effect to this and other constitutional protections was to pass the Prevention of

Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ('PIE'). It is a statute that gives effect to the right to access to housing enshrined in section 26 of the Constitution, and was adopted with a view to overcoming the abuses of the past by ensuring that evictions in future took place in a manner consistent with constitutional values and respectful of human dignity, while balancing the rights of occupiers with those of owners.

- [3] PIE has been the subject of extensive consideration by the Constitutional Court, including three decisions to which I will return below at various points: *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) ('*PE Municipality*'); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) ('*Blue Moonlight*'); *Occupiers of Erven 87 and 88 Berea v De Wet N.O.* 2017 (5) SA 346 (CC) ('*Berea*').
- [4] The principles emerging from those decisions are not in doubt, and must guide any matter concerned with the application of PIE. Eviction proceedings are not a mechanical exercise in which proof of ownership and unlawful occupation produces the eviction order as a matter of course. The court must consider all the relevant circumstances which are particular to the case at hand, to arrive at a determination that is in accordance with justice and equity. One can do no better than quote the *dicta* of Sachs J in *PE Municipality* at paras 36 and 37:

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

[37] Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance

competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.”

- [5] This means that even where it can be shown that the occupation is unlawful, the Court has an active duty under section 26(3) of the Constitution and section 4 of PIE to satisfy itself that eviction would be just and equitable. In *Berea* at paras 46 and 47, the Constitutional Court held further that “[t]he 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.”
- [6] The present appeal concerns an application under PIE for the eviction of the respondents from immovable property at 5[...] I[...] Street, Erf 1[...], Bellville (‘the property’). For generations, the property was jointly owned and occupied by members of the Arendse and Florence families. It remains occupied by their descendants, including the first respondent Elsie Arendse, who is a pensioner of 73 years, her two adult children, one of whom is disabled, and two grandchildren who appear to be in their early twenties.
- [7] Late in 2023, the property was purchased by the current appellants, Mr. and Mrs. Ruiters, in unusual circumstances which are elaborated below. Soon after the transfer of the property into their name, the appellants launched the present proceedings for the eviction of the respondents. The court below dismissed the application on the grounds that such an order would not be just and equitable in the unique circumstances of the case. The present appeal is against the whole of the order and judgment of the court below.

Factual background

- [8] Before turning to the legal complexities, it is necessary to set out the factual background in some detail.
- [9] The property was formally owned jointly in undivided shares by four members of the Arendse and Florence families ('the original registered owners'). The joint ownership was registered by way of title deed in 1969.
- [10] The four original registered owners of the property passed away over the period 1980 to 1993 without, it appears, any steps being taken to deal with their respective estates. All died intestate. The property thereafter remained in the hands of Gertrude Florence, the wife of the last-deceased original registered owner with whom she had been married in community of property. Gertrude Florence occupied the property along with one of their four children, Albie Johnny Arendse ('Albie Arendse') and his wife Elsie Arendse with whom he was married in community of property until his death in 2010. Elsie Arendse says her in-laws brought her to live in the property in 1975 and she has been living there ever since.
- [11] In December 2005 Gertrude Florence also passed away. After that, one of the extended family members who it appears is a nephew of the late Gertrude Florence, Mr. Chris Florence ('Chris Florence'), reported four of the five deceased estates to the Master: the deceased estates of three of the four original registered owners, and that of Gertrude Florence. He did so without the knowledge or agreement of any other family members, including Elsie Arendse.
- [12] The Master appointed Chris Florence as Master's representative to four of the five estates in terms of section 18(3) of the Administration of Estates Act 66 of 1965 ('section 18(3)' and 'Administration of Estates Act'), under four consecutive letters of authority: 04522–04525/2006. This was done despite the fact that the estates jointly owned the property, the value of which far exceeds the proclaimed threshold of R250 000 for the application of section 18(3). The letters of authority are not on record.
- [13] In the meantime, Albie Arendse and Elsie Arendse and their children remained living in the property. On 22 November 2010, Albie Arendse passed away, also intestate. His

three siblings predeceased him over the years 2006 to 2010. They leave several descendants.

- [14] In 2021 Chris Florence reported the deceased estate of the fourth original registered owner (who died in 1990), whose estate he had not reported in 2005 for reasons unknown. The Master appointed Chris Florence as Master's representative to this deceased estate as well, under letter of authority 012917/2021. That is also not on record.
- [15] Chris Florence was now the Master's representative in respect of the deceased estates of all four original registered owners of the property, as well as the deceased estate of the last-deceased original registered owner's wife. The immovable property is the only significant asset in all five deceased estates, held through joint undivided ownership.
- [16] The appellants say that on 26 July 2022 Chris Florence appointed attorney Sybrand Smit ('Sybrand Smit'), practising as an attorney under the name and style of Smit & Co Attorneys, as his agent in respect of the deceased estates. The current appellants are supported in their application by affidavits of Sybrand Smit. The appellants say that Sybrand Smit issued invoices to Chris Florence for services rendered in the context of winding up the deceased estates, in an amount of R200 000. They say the invoices remained unpaid. The invoices are not on record, and the services which are said to have been rendered are not particularised.
- [17] The only legal service provided by Sybrand Smit to Chris Florence of which there is a record, is an instruction to the sheriff dated 8 October 2022, for service of an even-dated letter addressed to the respondents demanding that they vacate the property.
- [18] That letter is concerning in several respects: First, it alleged that Chris Florence was the "current registered and lawful owner" of the property – something that has been untrue at any relevant time. Second, it suggested that rental was due in respect of the property, despite there being no indication of a rental agreement. Third, it denied the respondents' right to occupy the property since the death of Albie Arendse on 22 November 2010, on the grounds that their continued alleged unlawful occupation "prevents Mr. Chris Florence from exercising his proprietary rights". Chris Florence has never held any such rights. Nor is it in dispute that Albie and Elsie Arendse's

marriage was in community of property, and that she and her children are, or are among, the intestate heirs to the property.

- [19] The respondents did not vacate the property since they were, and are, of the view that as the intestate heirs they are entitled to remain in the property.
- [20] It appears that on or around 19 July 2023 Sybrand Smit in his personal capacity served a simple summons on Chris Florence, for payment of outstanding legal fees in an amount of R200 000 plus interest thereon from 1 July 2023. The summons neither refers to nor attaches any document on which it relies. There is also no return of service on record.
- [21] On 24 July 2023, Chris Florence and Sybrand Smit entered into a settlement agreement whereby they agreed that Chris Florence would transfer the property to Sybrand Smit in full and final settlement of the claim. The parties further agreed that the conveyancing attorneys would be Sybrand Smit's own firm, Smit & Co Attorneys. The settlement agreement further records the parties' intention to make it an order of court.
- [22] It further appears that around the same time, Sybrand Smit concluded a sale agreement with the appellants in respect of the property, for a purchase price of R500 000. The sale agreement, too, is not on record. Notably, the purchase price of the property reflected on the deed of transfer is significantly higher than Sybrand Smit's alleged claim against Chris Florence.
- [23] On 3 August 2023 the summons was formally issued out of the Bellville Magistrate's Court, and on the same day it was made an order of court by agreement.
- [24] The appellants say that on 5 August 2023 the purchase price of R500 000 was transferred to the trust account of Smit & Co Attorneys. No supporting document is on record.
- [25] On 25 October 2023 Chris Florence caused the transfer of the property to Sybrand Smit. The *causa* for the transfer reflected in the deed of transfer is the settlement agreement that was made an order of the Bellville Regional Magistrate's Court on 3 August 2023. The transfer relies on a power of attorney signed by Chris Florence on 15 August 2023 in his ostensible capacity as Master's representative in the respective

deceased estates of the original registered owners. This is not a power afforded to a Master's representative under section 18(3). There is no indication on the deed of transfer that the Master consented to or approved the transfer of the property.

[26] On the same day, Sybrand Smit caused the on-transfer of the property to the appellants.

[27] On 1 November 2023 Sybrand Smit paid Chris Florence an amount of R300 000 – this proof of payment is on the record. Chris Florence has not distributed the amount to any of the intestate heirs, including the respondents.

[28] On 8 November 2023 the appellants launched the application that is the subject of the appeal, seeking the respondents' eviction from the property. As mentioned, their attorney of record is Sybrand Smit.

In the court below

[29] The appellants' founding papers rely on the letter of 8 October 2022 to make out their case for the unlawfulness of the respondents' occupation. They address the just and equitable requirement with cursory reference to the availability of alternative accommodation, and otherwise place the burden on the respondents to put up relevant facts regarding their personal circumstances which they say lie in the respondents' exclusive knowledge.

[30] The hearing of eviction application was postponed for the respondents to obtain assistance from Legal Aid, subject to a timetable for the filing of papers.

[31] The first opposing affidavit filed on behalf of the respondents is of one Mr. Jacobus Cornelius Welgemoed ('Mr. Welgemoed'), an attorney and conveyancer who is also a family acquaintance. He placed on record information which he obtained from the deeds office relating to the property. Much of the facts set out above relating to the sale and transfer of the property derive from his affidavit, none of which is in dispute – in fact, the appellants' reply relies heavily on Mr. Welgemoed's annexures.

[32] Mr. Welgemoed called into question the significant size of the debt (R200 000) ostensibly incurred in winding up the deceased estates whose only significant asset constitutes the single immovable property which was allegedly sold for R500 000.

That is not something taken up in the reply, despite Sybrand Smit deposing to a confirmatory affidavit in support thereof.

[33] Mr. Welgemoed also pointed out that it does not appear that the Master consented to the transfer of the property, potentially tainting the appellants' title. That is borne out on the face of the deed of transfer. Mr. Welgemoed questioned whether a Master's representative appointed under section 18(3) has the power to enter into a settlement in respect of immovable property, and to cause its transfer, absent the Master's consent. That, too, is not taken up in reply.

[34] Elsie Arendse also filed an opposing affidavit. She says that she is one of the intestate heirs to the property. None of the intestate heirs were aware of, or approved, Chris Florence's appointment as the Master's representative. They "thought that the whole thing was a scam as what [Chris Florence] purported to have done was illegal." (para 26).

[35] Elsie Arendse firmly denies that she and her children are unlawful occupiers, on two grounds: the impropriety of Chris Florence's appointment, and their right to occupation of the property as intestate heirs. In the relevant paragraphs of her opposing affidavit, Elsie Arendse states:

"30. We are of the view that we are not unlawful occupiers in light of the fact that the appointment of [Chris Florence] may have been done fraudulently and therefore the subsequent sale was fraudulent as well.

31. We are of the view that had the Estates been administered correctly, we should have inherited our portion of the deceased estates, at the very least, myself as the surviving spouse married in community of property was and still am a clear heir."

[36] Elsie Arendse placed on record that the respondents had sought access to the Master's files and that they intended filing a supplementary affidavit. She concluded by saying that in her view "the administration of the deceased estate and the subsequent sale or donation of the property should be adjudicated on before this application before court is finalised."

- [37] In reply to para 30 (i.e. the denial of unlawful occupation), the appellants merely persist with the case made out in the founding affidavit, relying on the letter of 8 October 2022.
- [38] In reply to para 31 (i.e. the improper administration of the estate) the appellants put up a more comprehensive reply, supported by an affidavit of Sybrand Smit which, in turn, enclosed an affidavit of Chris Florence.
- [39] The appellants admit the respondents' averments in para 31, but qualify the admission. They refer to Sybrand Smit's alleged demand for payment, the summons, and the settlement agreement that was made an order of court. The appellants say Sybrand Smit was entitled to transfer of the property pursuant to such order, and that Sybrand Smit, in turn sold and transferred the property to the appellants.
- [40] The hearing of the matter was repeatedly postponed, including on 7 November 2024 for the City to file a housing report. At the last hearing of the matter on 24 January 2025, the City's report was on record. The report indicated, in substance, that the respondents could be supplied with two emergency housing kits, but the respondents would have to secure a site and assemble. The court below regarded that report as wholly inadequate.
- [41] In its Judgment dated 10 February 2025, the court below recorded a concession by the respondents' counsel "that they are *de facto* in unlawful occupation, as they have not challenged the sale of the property" because they were unable to obtain the Master's files. In those circumstances, the court below found that the sole issue it was called to determine was whether it would be just and equitable to grant the eviction.
- [42] The court below found not. In its discussion, the court below repeatedly emphasised the unique nature of the present matter, including the fact that the respondents were not parties who refused to vacate the property upon the termination of a lease agreement but had lived there most of their lives. The court below found that the respondents had a real right to inherit the property under the Intestate Succession Act 81 of 1987 ('Intestate Succession Act'). The court refused to follow a "tick box approach" and found there was no presumption in favour of granting an eviction order if ownership and unlawful occupation was shown. The court below held that the appellants additionally bore an onus to show that it would be just and equitable to evict the

respondents. The court concluded that it would not be just and equitable to do so in the circumstances of the present matter, and dismissed the application.

On appeal

- [43] On appeal, the appellants argued that in the case of an eviction application brought by private owners of the property, a court's discretion to refuse an eviction order in circumstances where it finds the occupiers to be in unlawful occupation is extremely constrained. This is because private owners bear no constitutional obligation to provide access to housing – that duty rests with the state.
- [44] The appellants placed considerable weight on the decision in *Blue Moonlight* where the Constitutional Court accepted that a private land-owner cannot be expected to provide housing to unlawful occupiers for an indefinite period. The duty to provide alternative accommodation rests on the State, not private land-owners. The appellants argued that to refuse eviction in the present circumstances would, in effect, amount to an expropriation and deprivation of their property.
- [45] In their notice of appeal, the appellants say that, on the facts of the present matter, the order of the court below ought to be set aside and the eviction granted; alternatively, that the matter be remitted to the court below for the narrow purpose of obtaining further information from the City regarding possible alternative accommodation.
- [46] The respondents, for their part, contended that the court below was correct in finding that the making of an eviction order would not be just and equitable. They emphasised the inadequacy of the City's housing report, the prospect of homelessness, and the unique features of this matter – in particular Elsie Arendse's position as at least one of the intestate heirs to the property and the suspect circumstances in which the property had been alienated and transferred.
- [47] At the hearing of the appeal, we raised with counsel for the appellants the absence of the Master's consent to the settlement agreement and transfer of the property, which appeared from the record. We questioned whether it was shown on the record that the respondents were unlawful occupiers.

[48] On this issue, counsel for the appellants submitted we were not entitled to raise the issue *mero motu*. He sought and was granted the opportunity to submit a supplementary written note dealing with both the procedural question and the issue on the merits. This will be the first issue to be determined, before turning to the elements of eviction under PIE.

Mero motu questions of law

[49] To answer this question, the starting point is *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) (*'Fischer'*). At paras 13 to 15, the Supreme Court of Appeal emphasised the adversarial nature of our civil procedure and held that it is for the parties to define the issues; that the court is to adjudicate on those issues alone; and that it is not for a court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it.

[50] *Fischer* however expressly preserved an exception in para 13: "There may also be instances where the Court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided."

[51] Similarly, in *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC) at para 28 the Constitutional Court affirmed: "Of course there are instances where the court may of its own accord (*mero motu*) raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed."

[52] Counsel for the appellants conceded that Mr. Welgemoed had raised the issue of whether the Master's approval was required under section 18(3) for a valid settlement agreement and transfer of the property to Sybrand Smit, but submitted this was done only speculatively, and was not an issue taken up by the respondents in argument, either in the court below or in the appeal. That understates the issue.

[53] Paragraphs 30 and 31 of Elsie Arendse's opposing affidavit, set out above, expressly assert her right to both inherit and occupy the property by virtue of her position as an

intestate heir, a right she says she has been deprived of due to what she says has been Chris Florence's fraudulent behaviour.

[54] Elsie Arendse's reliance on what she says was Chris Florence's fraud must be considered in context. It is correct that her focus in the affidavit is on his improper appointment. But that would have been of little consequence, had he thereafter properly discharged his duties as Master's representative. The true complaint is directed against the situation which the respondents find themselves in at present – in short, that their right of inheritance and occupation of the property has been frustrated by Chris Florence's improper behaviour, which Elsie Arendse describes as fraudulent and a "scam". Chris Florence's dealing with the property without the Master's consent forms part and parcel of the fraudulent scheme which Elsie Arendse alleges. Mr. Welgemoed's affidavit elaborates on the mechanism whereby the alleged fraudulent scheme may have been perpetrated.

[55] It is correct that the issue is not traversed on the papers in all its details, due to the unavailability of the Master's file which the respondents had sought but were unable to obtain. But it cannot be said that the issue is not raised on the record, nor that the facts on record are insufficient to determine the matter.

[56] Counsel for the appellants emphasised the novating effect of the order made by the Bellville Magistrate's Court. Regardless of the validity of the settlement agreement between Chris Florence and Sybrand Smit, once it was made an order of court it constituted a valid *causa* for the transfer of the property. Relying on section 28(2) of the Alienation of Land Act 68 of 1981, he submitted that upon full performance by both parties, Sybrand Smit obtained good title and was in a position to pass that to the appellants.

[57] That being the case, so the argument goes, the issue is of no further relevance to proceedings under PIE, because the registered owners are under no legal obligation to allow the occupation to continue indefinitely. In other words, the submission is that even if the issue was raised on the record, its determination is nevertheless not necessary for a decision in the present matter.

[58] Here, the appellants may be on a stronger footing, but fail for three reasons.

- [59] First, PIE defines an “owner” with express reference to registration, as “the registered owner of land”. On a first reading, the textual reference to the “registered owner” in PIE might suggest that the inquiry under PIE is purely formal, tied to the deeds register. On this view, it is the person whose name appears on the title deed who is inextricably the owner for the purposes of PIE, and disputes about the validity of the underlying transactions are matters for separate proceedings.
- [60] There is some support for that approach in the case law, including *Msibi v The Occupiers of Unit [...] C[...] and Another* (55038/2021) [2022] ZAGPPHC 880 at paras 25–27, where Nyathi J held that it is the registered owner who must be regarded as the owner for PIE purposes, notwithstanding allegations of fraud impugning the underlying sale on the record. There is no doubt that it would be untenable if every PIE application could be defeated, or indefinitely suspended, through the mere raising of disputes over ownership.
- [61] But that approach must be applied with care. The point is that the textual reference to the “registered owner” in PIE in the first place goes to the standing of an applicant – section 4(1) identifies who may bring the application.
- [62] Who is the registered owner of the property does not definitively resolve the question whether the occupier is in unlawful occupation. That this is so, appears from PIE’s definition of “unlawful occupier” which in presently relevant parts means “a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land”. If lack of consent of the registered owner or person in charge were determinative of the question of unlawful occupation, the legislature would not have included the rider that there may be another right in law rendering such occupation lawful.
- [63] A court cannot close its eyes to substantive disputes about the validity of the registration where those disputes are raised with a view to establishing the lawfulness of the occupation. Where, on the papers properly considered, the lawfulness of the occupation is alleged to have been defeated by an alienation that is itself open to substantive attack, the Court’s enquiry cannot proceed on the bare assumption that it is only the consent of the registered owner, or person in charge, that determines the lawfulness of the occupation. To do so would, in circumstances where the true position

is in dispute, prefer registered ownership to true ownership in a manner that the legislature can scarcely have intended.

- [64] The point can be put more directly. The respondents' case is that they are in lawful occupation of the property as (among) the heirs of the property. That assertion appears prominently in the answering affidavit and in the heads of argument in the appeal. Their right of inheritance is not disputed. Whether they can thereby sustain a right of occupation is a separate matter I consider below. But for present purposes, it cannot be said that the enquiry is extraneous to the decision we are called to make.
- [65] Second, as regards the novating effect of the court order, the proposition that an order of court cures the underlying invalidity of an agreement that the court was not asked to consider, is too strong. The court that made the settlement an order on 3 August 2023 was not invited to, and did not, consider whether Chris Florence had authority to alienate the property in the manner agreed, and what legal consequences flow from this. Nor can the settlement agreement and the order incorporating it, bind persons who are not party to it. The settlement agreement cannot defeat Elsie Arendse's substantive entitlements, to the extent that she has them, even after it was made an order of court.
- [66] Third, section 28(2) of the Alienation of Land Act cures non-compliance with the formal requirements of section 2(1) where there has been full performance and transfer. It cannot cure a substantive incapacity to pass transfer. If the Master's consent was a precondition of Chris Florence's representative authority to dispose of the property in lieu of fees, then section 28(2) cannot supply the missing authority.
- [67] What, then, lastly, of the concession of the respondents' counsel in argument? Where a concession of law is wrongly made, this Court cannot be precluded from raising the issue on the principles of *Fischer*. Whether or not the respondents are unlawful occupiers within the meaning of PIE is such a question of law. Despite the curious wording of conceding "*de facto* unlawful occupation", it does not appear from the record that material facts on which the respondents relied for their claim to lawful occupation were actually conceded. Instead, the respondents' counsel merely accepted on behalf of the respondents that they were not in a position to challenge the appellants' registered ownership of the property without access to the Master's file. But as I have explained above, it does not follow from this that the respondents' occupation is

automatically unlawful. It is an issue we were entitled to raise, and which I now turn to consider.

Is the respondents' occupation unlawful?

[68] The starting point is that the court below was wrong to find (albeit in the context of the just and equitable enquiry) that the respondents have a real right to inherit the property under the Intestate Succession Act.

[69] In *Greenberg v Estate Greenberg* 1955 (3) SA 361 (A) ('*Greenberg*') at 365H-366A, the Appellate Division held that under the modern South African system of administering deceased estates, and in contrast to the principle of universal succession which applied under the earlier Roman Dutch law, *dominium* in the property that constitutes the deceased estate does not vest in the heir immediately upon death. The heir or legatee acquires a personal right to claim the property.

[70] *Greenberg* remains good law. In *De Leef Family Trust and Others v Commissioner for Inland Revenue* 1993 (3) SA 345 (A) at 358D-E the Appellate Division elaborated:

“Besides, according to our modern system of administration of deceased estates, the heir or legatee of an unconditional bequest obtains a vested right (*dies cedit*) to be entitled to the bequest on the death of the testator (*a morte testatoris*). Such a right is transmissible but his claim is enforceable *only at some future time* when the executor's liquidation and distribution account has been confirmed (*dies venit*). He then has an enforceable right to claim payment, delivery or transfer of his bequest (*ius in personam ad rem acquirendam*).”

[71] This position was again recently confirmed in *Wallage v Williams-Ashman NO and Others* 2023 (4) SA 113 (SCA) at para 13.

[72] This well-established legal doctrine is built upon the architecture of the formal winding up procedure under the auspices of an executor whom the Master has issued with letters of executorship. But Chris Florence was not appointed as executor. Chris Florence was appointed under section 18(3) of the Administration of Estates Act, which provides for a simplified regime for the administration of small estates, that is, estates whose

value does not exceed an amount determined by the Minister by notice in the Gazette. That amount is currently R250 000.¹

- [73] In such a case, the Master may dispense with the appointment of an executor and the formal regime which the Administration of Estates Act imposes, and instead appoint a Master's representative by way of letters of authority, giving, in the words of section 18(3), "directions as to the manner in which any such estate shall be liquidated and distributed".
- [74] A Master's representative appointed under section 18(3) enjoys no statutory powers under the Administration of Estates Act. He or she acts wholly under the direction of the Master.
- [75] The simplified regime under section 18(3) carries with it a number of consequences. The most significant for present purposes is that the formal liquidation and distribution machinery contemplated in sections 35 and following of the Administration of Estates Act – the framing of an L&D account, advertisement, lying open for inspection, and confirmation by the Master – does not apply to a section 18(3) administration (see in this regard *Da Silva and Another v Da Silva N.O. and Others* [2008] ZAWCHC 9 paras 19 and 23).
- [76] Precisely because the statutory protections afforded by the statutory accounting machinery do not apply, the power of the Master's representative to deal with estate property must be strictly limited to giving effect to the Master's directions. Typically, letters of authority issued under section 18(3) authorise a Master's representative to take control of the assets of the deceased, to pay debts, and to transfer the residue to identified heirs, but do not extend to a disposition of immovable property without express direction or consent of the Master.
- [77] I must mention that in a recent decision in *Rasmeni v Mbuku and Another* (8232/2023) [2025] ZAWCHC 566 Da Silva Salie J expressed the view at para 17 that the position and rights of a representative appointed under section 18(3) is not any more restricted than that of an executor. She was concerned with the standing of a Master's

¹ GN R920 in GG 38238 of 24 November 2014. Although the value of the property in issue in the present appeal exceeds that amount, the value of each of the five estates to which Chris Florence was appointed Master's representative does not.

representative to seek an occupier's eviction under PIE. Insofar as that observation goes to the bare authority of a Master's representative to take control of and to administer assets in accordance with the Master's directions, I have no quarrel with it. But it cannot be read as authorising a Master's representative to alienate property in the absence of the Master's express consent and directions: under section 13(1) of the Administration of Estates Act, an executor relies on his letters of executorship to liquidate or distribute the property that falls into the deceased estate, but a Master's representative may only do so in pursuance of a direction by a Master.

[78] In a section 18(3) administration, there is no liquidation and distribution account and associated formalities, and the Master's representative does not have any statutory power to deal with the property outside the ambit of the Master's directions. What replaces the formal executorship regime, as I read section 18(3)'s statutory purpose, is a more, not less, direct entitlement of the heir to the property. This includes that where the heir is in occupation of immovable property over which the heir has a vested right, they would ordinarily be entitled to remain in occupation pending the transfer of the property to them, unless the Master has given contrary directions. Such an interpretation gives effect to section 26(1) of the Constitution in affording the heir and occupier access to adequate housing.

[79] That is of course not to say that immovable property which forms part of a section 18(3) estate may never be sold and transferred, and the proceeds distributed, if that is what the Master's directions require – for example, if there are multiple heirs and joint ownership is not feasible. It also does not mean that a Master's representative appointed under section 18(3) may not require an heir to vacate the property, and to apply under PIE for an eviction order, if that is necessary to implement the Master's directions.

[80] But that is not the appellants' case. In their founding papers, they rely wholly on the letter of 8 October 2022, which they say withdrew the consent whereby the respondents occupied the property. The letter, as already noted, contained at least three statements which do not accurately reflect the powers of Chris Florence under section 18(3): the letter described Chris Florence as the "current registered and lawful owner" when he was nothing of the kind; it suggested that rental was due when there was no evidence of a lease; and it denied the respondents' right to occupy on the basis of Chris Florence's

purported “proprietary rights”, which were non-existent. None of the grounds upon which the purported withdrawal of consent relied, are valid grounds upon which to demand that the respondents vacate the property.

[81] In those circumstances, the letter of 8 October 2022 was incapable of overriding the respondents’ *prima facie* legal entitlement to remain in occupation of the property pending the proper winding up of the deceased estates in which they have a vested right.

[82] And although this is not the case made out in the appellants’ papers, to the extent that it can be said that upon their acquiring registered ownership of the property, the appellants’ application evidences their lack of consent for the respondents to remain in the property, that argument fails for the same reason. The question is not whether the appellants are the registered owners of the property – they are. The question is whether their desire for the respondents to vacate the property is capable of extinguishing the respondents’ legal entitlement to remain in occupation pending the proper winding up of the deceased estates as provided by section 18(3).

[83] On the undisputed facts on record, the property has been dealt with and alienated without the Master’s consent and in conflict with section 18(3). What consequences flow from this as regards the sale and transfer of the property did not fall to be determined in the application. But the consequence regarding the lawfulness of the respondents’ occupation is, in my view, clear. It has remained intact.

What is just and equitable in the circumstances

[84] PIE is not engaged where unlawful occupation is not established. But because the appeal was argued on the assumption that the respondents are unlawful occupiers as the court below wrongly held, it is necessary to address the just and equitable inquiry as well.

[85] The inquiry under section 4(7) of PIE is a substantive inquiry where the factors listed in that section are peremptory but not exhaustive (see in this regard *PE Municipality* at para 30; *Blue Moonlight* at para 39). The court is required to consider all relevant circumstances. Even where unlawful occupation is established, the court must not grant an eviction order unless it is satisfied, on adequate information (see in this regard

Berea at paras 47–48) that the eviction is just and equitable. While unlawful occupation results in deprivation of property as envisaged by section 25(1) of the Constitution, such deprivation “might pass constitutional muster by virtue of it being mandated by law of general application [such as PIE] and if not arbitrary” (*Blue Moonlight* para 37).

[86] Of course, where the PIE applicant is a private party, that will carry significant weight in the balancing exercise which the court undertakes. A private party is under no legal obligation, without more, to provide accommodation to any other person (*Blue Moonlight* at para 40). Nevertheless, a private owner “may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted” (para 40); and a party who acquires ownership of a property while being aware of the presence of occupiers may have to bear that knowledge as a relevant factor in the just-and-equitable inquiry (para 39).

[87] Relying on the SCA’s decision in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) (*‘Changing Tides’*), the appellants’ case in heads of argument is that, in the case of a private owner as applicant under PIE, the court’s discretion to refuse eviction on just and equitable grounds is “extremely limited, if it even exists at all”.

[88] The appellant’s proposition somewhat overstates the appellate courts’ jurisprudence. The first point to make is that *Changing Tides* dealt with the consequences to the just and equitable enquiry of alternative accommodation not being available to unlawful occupiers of private land. That is the context in which the SCA found that, in most cases, lack of alternative accommodation would not have a bearing on the question whether to make an eviction order at all. By contrast, a lack of alternative accommodation is not the key consideration in the present matter, although it remains relevant.

[89] Furthermore, in *Changing Tides*, too, the SCA accepted that a private owner of property who seeks eviction of an unlawful occupier may have its rights of occupation restricted, and might have to take into account the delay or even some suspension of, their right to possession of their property to accommodate the immediate needs of the occupiers. At para 19, the SCA also accepted that in rare cases (the example mentioned is a case of

occupiers who are entitled to a long period of notice) a court might be persuaded that the issue of an eviction order, at the stage at which it was brought, might not be appropriate at all.

[90] This case is such a rare instance where it is not appropriate to make an eviction order, on just and equitable grounds. Even if I am wrong in finding that section 18(3) affords the respondents a right in law to remain in occupation of the property pending the proper winding up of the deceased estates, the record nevertheless shows that the respondents had acquired a vested right over the property, that occupation of the property gave effect to their right under section 26(1) of the Constitution, and that title in the property was nevertheless passed by persons without lawful authority to do so.

[91] The respondents are persons whom section 4(7) affords special protection: the elderly, the disabled and households headed by women. Elsie Arendse is currently 73 years old. She has occupied the property for more than 50 years. She lives in the property with her two surviving adult children, one of whom receives a disability grant, and young adult grandchildren. She and her children and grandchildren would have to find alternative accommodation without access to land, nor significant resources beyond, potentially, an *ex gratia* payment of R30 000 which the appellants have offered to make and a rudimentary building kit provided by the municipality. This is despite the fact that they have a vested right in the deceased estates, which have been denuded through the unauthorised alienation of the property which currently affords the respondents access to adequate housing, in conflict with section 18(3).

[92] I have carefully considered the possibility of remitting the matter to the High Court subject to directions regarding the gathering of further information relating to the appointment of Chris Florence, the intestate succession entitlements, the unreasonably large debt said to have been incurred in the administration of the estate, and the settlement and the alienation of the property absent the Master's directions to that effect. But these are issues which are best left to the parties, and which are not ultimately necessary for the determination of this appeal.

[93] Counsel for the appellants submitted that the appellants will be left without a remedy if their application for the respondents' eviction is dismissed. Not so. They are left without a remedy only as against the respondents, and only on the material facts as they

currently stand. That is as it should be. The appellants' remedy lies against the person or persons who can be shown, in due course, to have caused the unauthorised transfer of the property to them. It may be necessary to join the Master to such proceedings. It is for the appellants to frame their case against the parties they hold responsible, including with reference to any damages they may have suffered, not for this Court. Until such time as these matters are determined, it will not be just and equitable to grant an eviction order against the respondents.

[94] Before concluding, I must emphasise that I make no definitive finding of wrongdoing on the part of any person. What I have said above is limited to a determination on the record before us, and binds only the parties to this application.

Costs

[95] The court below found it appropriate to order that each party bears its own costs. The respondents have been represented by Legal Aid throughout. I have no difficulty with that finding.

[96] As regards the appeal, however, there is no reason to depart from the ordinary rule that costs follow the result. The issues raised were somewhat complex. The record was not lengthy. Both parties were represented by one counsel. I find it appropriate that the appellants bear the costs of the appeal on Scale B.

Order

[97] In the result, the following order is made:

1. The appeal is dismissed.
2. The appellants are to pay the costs of the appeal on Scale B.

K SALLER

ACTING JUDGE OF THE HIGH COURT

I agree

N RALARALA

JUDGE OF THE HIGH COURT

I agree, and it is so ordered

B MANTAME

JUDGE OF THE HIGH COURT

Appearances

For appellants: A Walters

Instructed by: Smit & Co. Attorneys

For respondents: T Prinsloo

Legal Aid South Africa