



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

CASE NO: 9919/2022

Date of hearing: 15 November 2023

In the matter between:

GOODFIND PROPERTIES (PTY) LTD

Applicant

and

ROSIE KENNEDY

First Respondent

CHARLENE BOTES

Second Respondent

**ALL OCCUPANTS OF THE PROPERTY SITUATED AT
911 SAKABULA FLATS, SAKABULA CIRCLE,
RUYTERWACHT, WESTERN CAPE PROVINCE**

Third Respondent

CITY OF CAPE TOWN MUNICIPALITY

Fourth Respondent

Judgment handed down on: 30 November 2023

JUDGMENT

JAMIE, AJ

[1] This is an opposed application by the applicant for the eviction of the first, second and third respondents in terms of section 4 of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, No. 19 of 1998 (hereafter “PIE”). The application was issued out of this Court on 13 June 2022.

[2] The applicant describes itself in the founding affidavit as follows:

“3. The Applicant is Goodfind Properties (Pty) Ltd (Registration No.: 2018/037214/07), with its registered address at Block A, Park Lane Office Park, Park Road, Pinelands, Cape Town, Western Cape Province.”

[3] The applicant is referred to interchangeably in this judgment as such or as “Goodfind”.

[4] The applicant goes on to state the following:

“4. On 4 April 2019, the Applicant purchased 911 Sakabula Flats, Sakabula Crescent, Ruyterwacht, Western Cape Province (‘the property’) from Communicare NPC (‘Communicare’). The Applicant is therefore the registered owner of the immovable property.”

“10. On 28 August 2002, the Applicant, duly represented (as landlord) and the First Respondent personally (as lessee),

at Ruyterwacht, entered into a lease agreement ('the lease') in respect of the property. A copy of the lease is annexed hereto marked 'B', the contents of which are to be read as if specifically incorporated herein."

[5] The first, second and third respondents are described as follows:

- "5. The First Respondent is Rosie Kennedy, an adult male (sic), whose further particulars are unknown to me, who is currently in occupation of the property.*
- 6. the Second Respondent is Charlene Botes, an adult female, whose further particulars are unknown to me, who is currently in occupation of the property.*
- 7. The Third Respondent(s) is/are all other persons who may currently occupy the property. The Applicant has no knowledge of who else (if anyone aside from the Respondents mentioned above) currently occupies the property.*
- 8. The Fourth Respondent is the City of Cape Town Municipality, a municipality established in terms of section 12, 14 and 16 of the Municipal Structures Act, No. 117 of 1998, with its offices at Civic Centre, 12 Hertzog Boulevard, Cape Town, Western Cape Province."*

[6] I shall in this judgment refer to the first and second respondents as such or as "Mrs Kennedy" and "Ms Botes" respectively.

[7] As I have said, the applicant seeks the eviction of the first to third respondents from the property by virtue of their alleged unlawful occupation.

[8] The first to third respondents oppose the application. They are represented by Ms Adhikari and Mr Ebrahim, instructed by Mr MC Coetzer of Attorneys Chris Fick & Associates. I was informed by Ms Adhikari that they appear and act for their clients on a pro-bono basis. The court is indebted to them and their attorney for their assistance in this matter.

[9] The City of Cape Town took no active part in the proceedings save to file a brief affidavit to which was attached its standard occupier questionnaire. The relevant portions of the affidavit are to the following effect:

- “6. *In these proceedings, the City has not been provided with sufficient information (i.e. the current financial ability of the Respondents to obtain alternative accommodation) to determine whether the Respondents will be able to secure alternative accommodation if an eviction order is granted by this Honourable Court.*
7. *If the Respondents require the assistance of the City, they are required to deliver the completed questionnaire to the City within 15 days of attesting hereto.*
8. *On receipt of a duly completed questionnaire or affidavit which contains the personal circumstances of the Respondents, the City will be in a position to issue and file a comprehensive housing*

report which takes into account the personal circumstances of the Respondents and details whether the Respondents qualify for emergency shelter, the nature of the emergency shelter and when such shelter may be available for occupation.”

[10] The respondents rely on the following grounds of opposition to the application:

- 10.1. That Goodfind lacks standing to bring the application;
- 10.2. That a tacit term should be imported into the lease agreement to the effect that Goodfind is bound not to increase the rental beyond that which Mrs Kennedy can afford;
- 10.3. On a proper constitutional interpretation, the same conclusion is reached.
- 10.4. An equality challenge to Goodfind’s conduct, based on alleged age discrimination against Mrs Kennedy as also the respondents’ right of access to housing in terms of section 26.
- 10.5. That the requirements of PIE for an eviction have not been met.

[11] I shall deal with each of the grounds in turn.

Locus standi

[12] The relevant averments in this regard are the following:

- 12.1. Goodfind obtained transfer of the property from Communicare on or about 4 April 2019. I point out in this regard that the allegation

in the founding affidavit that, on 28 August 2002, Goodfind concluded a lease agreement with Mrs Kennedy is obviously incorrect. As the lease agreement indicates, it was concluded by Communicare, described as an Incorporated Association not for Gain, with registration no. 1929/01590/08. As appears from its registration number, Goodfind was only incorporated in 2018. The parties however, correctly, approached the matter on the basis that, upon its acquisition of the property from Communicare in 2019, Goodfind would have stepped into the shoes of Communicare as lessor. I shall approach the matter on that basis.

- 12.2. There is a more significant error in paragraph 10 of the founding affidavit. It fails to mention that the lease was concluded not only with Mrs Kennedy, but also with Ms Botes. Her name appears on the cover sheet of the lease above the word "Tenant", and she also signed the lease, with Mrs Kennedy, in such capacity.
- 12.3. On 19 October 2020, Mrs Kennedy received a letter of demand from Toefy Attorneys acting on behalf of Communicare. It alleged that she owed arrear rentals in the amount of R53 316,52 to Communicare. Although not alleged in the founding affidavit, the letter also purported to give notice of cancellation of the lease agreement should the arrears not be settled within twenty days.
- 12.4. In December 2020, Communicare issued summons against first and second respondents out of the Goodwood Magistrate's Court for recovery of the arrear rental claimed.

12.5. The particulars of claim allege, *inter alia*, that Communicare is the owner and person in charge of the property, that the property was transferred from Communicare to Goodfind, thereby ceding all the former's rights in terms of the lease agreement to Goodfind, and that Goodfind had passed a resolution permitting Communicare to initiate and defend legal proceedings and to manage Goodfind's immovable properties.

12.6. The aforementioned resolution is to be found as annexure "H" to the replying affidavit at record page 212. It is dated 20 May 2019 and records the following:

"1. GOODFIND PROPERTIES (PTY) LTD hereby appoints COMMUNICARE NPC (Registration Number: 1929/001590/08)

as its true and lawful Agent and in its name, place and stead to initiate and/or defend any legal proceedings on behalf of GOODFIND PROPERTIES (PTY) LTD and/or its subsidiaries.

2. GOODFIND PROPERTIES (PTY) LTD hereby appoints COMMUNICARE NPC (Registration Number: 1929/001590/08)

as its true and lawful Agent, entitling it to manage all immovable properties registered in the name of GOODFIND PROPERTIES (PTY) LTD and/or its

subsidiaries, but without prejudice to the generality of the foregoing, be entitled to authorize and/or give permission to any person to enter or reside upon any immovable property owned by GOODFIND PROPERTIES (PTY) LTD and/or its subsidiaries.”

12.7. The resolution is signed by one Anthea Houston, in her capacity as a director of Goodfind.

12.8. In their answering affidavit the respondents aver that, to the best of their knowledge, Ms Houston is also a director of Communicare and its Chief Executive Officer.

12.9. Based on the foregoing, the respondents contend that, as far back as May 2019, Goodfind divested itself of the right to litigate on its own behalf, and that it follows that it has no standing to institute these proceedings in its own name, and that same should have been instituted by Communicare. On that basis alone, the respondents contend that the application falls to be dismissed.

[13] It will be apparent from the aforesaid that the respondents have not utilised the provisions of Rule 7(1) to dispute that the institution of the application was properly authorised. In my view, Rule 7 has no application in the present instance. What is being challenged here is the applicant’s *locus standi*, i.e., whether it is entitled to seek the relief in the proceedings instituted. Rule 7 deals with a different point, i.e., whether the institution of

the proceedings themselves is authorised, not the question of whether the applicant is entitled to seek the requested relief.¹

[14] In response to the challenge to its standing, the deponent to the founding affidavit, Ms Lynn Oliver, who, in the founding affidavit stated that she was duly authorised by Goodfind to bring the application on its behalf, states the following in the replying affidavit:

14.1. She is an adult female portfolio manager employed by Goodfind, the applicant in the matter.

14.2. On 20 May 2019 Goodfind resolved to authorise Communicare to institute any legal proceedings on its behalf.

14.3. Communicare has its own internal delegation authority, initially adopted on 26 February 2008, whereby the Board of Communicare adopted a delegation of authority framework, which came into effect on 1 March 2008. The delegation authority is updated from time to time, the latest amendment being made on 16 August 2019. A copy of the delegation authority in force when the present matter was instituted is attached to the replying affidavit marked “1”.

14.4. Ms Oliver then avers the following:

“8. [The] delegation provides for matters such as this to be initiated by the General Manager: Rental Property

¹ See Erasmus, Superior Court Practice, Second Edition, at D1 – 96.

Management, Faieda Jacobs, who in turn on 11 August 2021 authorised me by way of a delegation of authority that I attach hereto marked ‘J’”. Such delegation is pertinently permitted in third principle on annexure A to I. (sic)

9. *In terms of the delegation of authority, I was provided with the necessary authority to commence, institute and defend any legal proceedings on behalf of the applicant, which includes the signing of all affidavits for any legal proceedings specifically related to the immovable properties leased by the applicant. I therefore, as stated, have the necessary authority to initiate these proceedings, and to appoint attorneys for this purpose.”*

- 14.5. Ms Olivier then, puzzlingly, goes on to say the following:

“Communicare, acting through its functionaries, properly institutes (sic) these proceedings in the applicant’s name.”

- 14.6. Ms Olivier also conceded that Goodfind is a wholly-owned subsidiary of Communicare.

- 14.7. The delegation of authority from Ms Jacobs to her, relied upon by Ms Oliver, is on a Goodfind Properties letterhead and states the following:

“This letter serves to confirm that in terms of the clause 6.5.3 of the applicable Delegation of Authority Framework, Faieda Jacobs in her capacity as General Manager: Rental Property Management has with immediate effect, delegated to Lynn Oliver in her capacity as Portfolio Manager of Goodfind Properties the responsibility to commence, institute and defend any legal proceedings on behalf of the aforementioned entity including the signing of affidavits for any legal proceedings pertaining specifically to the immovable properties leased by Goodfind Properties.”

- 14.8. The letter is signed by Faieda Jacobs in her capacity as General Manager and is countersigned by one Elsabe Marx in her capacity as Company Secretary.
- 14.9. Clause 3.4.1 of the delegation authority relied upon by Goodfind in reply states that instructions to institute legal proceedings in matters other than those relating to collections and arrears may be recommended by Communicare’s General Manager: Rental Property Manager but are subject to the final approval of the Chief Executive Officer of Communicare.
- 14.10. Clause 6.5.3 of the delegation authority empowers Communicare’s General Manager: Rental Property Management to grant final approval for the authorisation of legal proceedings and the signing of affidavits in respect of collections.

[15] Accordingly, the respondents contend, as to Goodfind’s standing:

- 15.1. Goodfind clearly, by virtue of the resolution of May 2019, divested itself of the right to litigate on its own behalf and appointed Communicare for this purpose.
- 15.2. Although the respondents accept that Goodfind could, by way of a further resolution, have revested itself with this power, there is no evidence before the court that it in fact did so.
- 15.3. The fact that Goodfind, in its reply, seeks to demonstrate that Communicare, in the person of Ms Jacobs, had delegated the power to institute these proceedings to Ms Oliver, demonstrated that no such resolution had been taken by Goodfind to revest the power to litigate in itself. I agree with this submission.
- 15.4. The matter is further confused by the assertion, referred to above, that the proceedings had been instituted in Goodfind's name by duly authorised functionaries of Communicare. This is at odds with, and destructive of, the assertion by Ms Oliver, both in the founding affidavit and in reply, that she, as an employee of Goodfind, is authorised to bring the present proceedings in Goodfind's name.
- 15.5. I am further in agreement with the respondent's contentions that the provisions of the delegation authority relied upon do not assist Goodfind. In this regard:
- 15.5.1. Clause 3.4.1 clearly only contemplates a recommendation by Communicare's General Manager: Rental Property

Management, but final approval by Communicare's Chief Executive Officer. There is no evidence that Ms Houston, who appears to occupy that office, approved the institution of the present proceedings.

15.5.2. Clause 6.5.3, which purportedly authorises Ms Jacobs to delegate her powers to Ms Oliver, does not assist as it is confined to collections.

15.6. Finally, the actual purported delegation by Ms Jacobs to Ms Oliver does not evidence any act on the part of Communicare. As stated, it is on Goodfind's letterhead and, although signed by Ms Jacobs in the capacity of General Manager, there is no indication that she is acting in such capacity on behalf of Communicare, as opposed to on behalf of Goodfind.

[16] It is settled that a party can divest itself of the right to sue. In *Picardi*, the Supreme Court of Appeal held as follows:

*"An effective and unconditional transfer of rights occurred when the cession in securitatem debit was executed. The consequence is that the respondent was divested of the power to sue the appellant in respect of the unpaid rentals. In order to sue for the recovery of the ceded debts the respondent should have taken recession of them from the bank."*²

² *Picardi Hotels Limited v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA) at [14]

[17] It is further the position that a principal can revoke his or her representative's authority provided that the authorised act has not already been concluded.³

[18] As already indicated above, there is no evidence that Goodfind rescinded the resolution divesting itself of the power to sue in respect of its immovable properties.

[19] For what it is worth, the facts set out in paragraphs 12.3 to 12.5 above support the conclusion that Goodfind ceded the right to manage its immovable properties, including the right to institute legal proceedings in that regard, to Communicare.

[20] In the circumstances, and on the basis of the facts placed before me, I am of the view that Goodfind has not demonstrated that it has or had the power to institute the present proceedings. In summary:

20.1. It divested itself of that power in favour of Communicare in May 2019.

20.2. There is no indication on the papers that it ever retook the power.

20.3. The fact that it had not retaken the power is to be inferred from the efforts made in the replying affidavit to demonstrate that Communicare, via Ms Jacobs, had authorised Ms Oliver, on behalf of Goodfind, to institute proceedings.

20.4. Those efforts are ineffectual as:

³ *Stowe v Royal Insurance Co* (1885) 5 EDC 37; *Bhanjee v Kara Devraj* 1933 NPD 547

- 20.4.1. Ms Jacobs had no power, in terms of clause 3.4.1 of the delegation authority, to institute legal proceedings, whether on behalf of Communicare or Goodfind. Her authority was limited to making a recommendation to Communicare's Chief Executive Officer, who had to approve same.
- 20.4.2. In terms of clause 6.5.3, relied upon in the subsequent alleged delegation by Ms Jacobs to Ms Oliver, Ms Jacobs did have such power but only in respect of collections.
- 20.4.3. In respect of the actual letter of delegation relied upon, there is no indication in same that it emanates from Communicare or that Ms Jacobs was acting as General Manager of Communicare when she signed the letter.

[21] For all of the above reasons, I am of the view that Goodfind has not demonstrated *locus standi* to bring this application, and that same accordingly falls to be dismissed on this ground alone.

[22] That would ordinarily be the end of the matter. However, Ms Adhikari referred me to the judgment of the Constitutional Court in *S v Jordan*⁴. There the Court said that where the constitutionality of a provision is challenged on a number of grounds and the court *a quo* upholds one such ground, it is desirable that it should also express its opinion on the other challenges. This is necessary in the event of the Court declining to confirm on the ground upheld by the court *a quo*. In the absence of a judgment on the other

⁴ 2002 (6) SA 642 (CC)

grounds, the matter may have to be referred back to the court *a quo* which could result in unnecessary delays in the disposal of cases.⁵

[23] Although the dictum in *Jordan* is strictly applicable to constitutional proceedings only, I consider the reasoning to be equally applicable to non-constitutional matters, especially where a point *in limine* is upheld. Should the matter go on appeal, and should it be found that I was wrong in respect of Goodfind's lack of *locus standi*, the matter will have to be referred back to me for judgment on the other issues. This is obviously undesirable. I have heard full argument, and I will accordingly also deal with the further grounds of objection raised on behalf of the respondents.

Tacit term

[24] The tacit term contended for by the respondents is pleaded as follows, with the preceding paragraphs in the answering affidavit provided for the relevant context:

“61. Communicare’s business model is one which makes available affordable rental options for low-income consumers. This is, as I have stated, the express basis on which the lease agreement was concluded in 2002. Further, Communicare was well aware of my financial circumstances and my age when the lease agreement was concluded, which is why I qualified to rent affordable housing from Communicare.

⁵ At para 21

62. *Consequently, when Communicare entered into the lease agreement with me, it was, or ought reasonably to have been aware that when I reached retirement age, the only income which I would have would be a SASSA grant.*
63. *Since the purpose of the lease agreement was to provide me with affordable housing, properly interpreted in light of all the relevant facts and surrounding circumstances, Clause 7.4 only permits Communicare as lessor to increase the rental amount to an amount that remains affordable for me bearing in mind my income.*
64. *In the circumstances, on a proper interpretation of Clause 7.4, once I retired, the lease agreement permitted Communicare to increase my rental to an amount that does not exceed my SASSA grant and allows me to provide for my basic amenities such as food, water, and electricity from my SASSA grant.*

(Emphasis in the original)

65. *In the alternative, and only in the event that the Court does not find that the proper interpretation of Clause 7.4 is as set out above, I submit that the lease agreement contains a tacit term, limiting the permitted rental increase in terms of Clause 7.4 so that the total amount of my rental after retirement does not exceed my SASSA grant and allows me to provide for my basic amenities from my SASSA grant.*

66. *I point out that Clause 7.4 does not require the lessor to increase my rental. It permits the lessor to elect not to increase my rental, or to decrease my rental.*

67. *However, Communicare elected to vary the rental by increasing my rental amount on a yearly basis to an amount that is not affordable for me, in breach of Clause 7.4 properly interpreted, alternatively in breach of the tacit term pleaded above. (Emphasis supplied)”*

[25] Clause 7.4 of the lease agreement provides as follows:

“7.4 The Landlord shall have the right to vary the rental during the lease period by giving the Tenant one clear calendar month’s written notice.”

[26] It is trite that the process of interpretation involves a unitary exercise of considering language, context and purpose. It is an objective exercise where, in the face of ambiguity, a sensible meaning is to be preferred to one which undermines the purpose of the document.⁶

[27] In oral submissions in support of the existence of the contended for tacit term counsel had some difficulty in articulating with precision the terms of same.

⁶ Martrade Shipping and Transport GmbH v United Enterprises Corporation and MV ‘Unity’ [2020] ZASCA 120 (2 October 2020)

[28] Thus, in the heads of argument, the contention was made that it limited the permitted rental increases under the lease agreement to no more than that which is affordable for Mrs Kennedy.⁷

[29] However, in oral argument, counsel was constrained to accept that, given that the second respondent was also reflected as a lessee in the agreement of lease, the tacit term should relate to increases which were affordable to first and second respondents collectively.

[30] A tacit term, or term inferred from the facts, was described by Corbett AJA in *McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*⁸ as “*an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties.*”⁹

[31] There are a number of principles to bear in mind when considering the importation of a tacit term into a contract. The first is that such a term cannot be imported into a contract where the parties have expressly and unambiguously dealt with the matter, and a tacit term may not contradict such an express term.¹⁰

⁷ At para 58

⁸ 1974 (3) SA 506 (A)

⁹ At 531 to 532, footnotes omitted

¹⁰ *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors* 2020 (2) SA 49 (SCA) at [24]

[32] A second is that the tacit term sought to be imported must be capable of clear and exact formulation. The following has been said as to this requirement:

“Once there is difficulty and doubt as to what the term should be or how far it should be taken it is obviously difficult to say that the parties clearly intended anything at all to be implied.”¹¹

[33] I deal with the second principle first. I have already referred to the difficulty that respondents’ counsel had in formulating the precise content of the tacit term, and also the concession that it would have to include affordability in relation to the second respondent as well.

[34] Upon a consideration of the lease agreement there are various indicators that it was not meant to be an ordinary residential lease. I refer to the following:

34.1. Clause 7.5 provides as follows:

“The Tenant agrees to complete and return to the Landlord an income survey form as and when required by the Landlord.”

34.2. In my view, the clear meaning and purpose of clause 7.5 is to enable the landlord, from time to time, to ascertain whether the tenant still qualifies for affordable housing as offered by Communicare (and Goodfind).

¹¹ Desai v Greyridge Investments (Pty) Ltd 1974 (1) SA 509 (A) at 522 to 523

34.3. Various clauses of the lease, for example 7.2 and 10.1, refer to the Rental Housing Act, Act 50 of 1999. Section 2(1)(a) of that Act provides that Government must promote a stable and growing market that progressively meets the latent demand for affordable rental housing among persons historically disadvantaged by unfair discrimination and poor persons, by the introduction of incentives, mechanisms and other measures.

34.4. Once again, this points to the lease being directed at persons as described in the aforementioned section, i.e. who require affordable housing.

34.5. Clause 11.2 provides as follows:

“[The Landlord] [s]hall have the right and be entitled to require the Tenant to transfer from the leased Premises to other Premises of the Landlord on the Landlord’s Housing Estate if and when the Landlord considers circumstances render such transfer necessary or desirable. Failure or refusal by the Tenant to move to such other Premises when instructed by the Landlord to do so, shall constitute a breach of this agreement by the Tenant and entitle the Landlord to cancel this lease.”

34.6. This is a highly unusual provision, and indicative of the fact that one is not dealing here with an ordinary residential lease. In fact, Communicare (and Goodfind) would appear to stand in a different relationship to its tenants from that of an ordinary landlord. This

is clear from the fact that it may allocate different premises to the tenant for a variety of reasons, one of which would, presumably, be affordability of the rental to the tenant concerned.

[35] Accordingly, and had the tacit term contended for been one to the effect that, notwithstanding clause 7.4 of the lease, any increases had to be affordable, whether in the sense of being lower than market-related rentals for a similar property, or in line with affordable housing for purposes of applicable legislation, such as the Rental Housing Act, or the Social Housing Act, 16 of 2008, there may have been some traction in respondents' point.¹²

[36] However, none of the above considerations point to a tacit term of the very specific, and self-serving, sort contended for by the respondents, *viz* that, regardless of circumstances and the needs of others in relation to affordable housing, there is a term that the rental would always be affordable to the first respondent, whether alone or in conjunction with the second respondent, and would in addition be such as to enable her to purchase groceries, utilities and the like.

[37] I consider the suggestion of such a term to be far-fetched and such as to render Communicare's (and Goodfind's) business impractical, if not impossible.

¹² Section 2(1)(f) of the Social Housing Act requires the State and social housing institutions, *inter alia*, to ensure the sustainable and viable growth of affordable social housing as an objective of housing policy. While there is no definition of "affordable housing", the phrase 'affordable social housing' is defined, *inter alia*, as "a rental or co-operative housing option for low to medium income households". Such households are in turn defined as "those households falling within the income categories as determined by the Minister from time to time."

[38] Thus, if the contended for term were to be imported across the board, as it would have to be in respect of other leases containing clause 7.4 or a similar provision, Communicare (and Goodfind) would find themselves having to deal with a myriad of subjective considerations before they could increase rentals at any of their affected units. This, to my mind, does not make sense, even in the context of the provision of affordable housing. Put differently, I can accept the notion of an objective standard of affordability, but not the subjective, personalised one contended for by the respondents.

[39] Such a construction would also not be necessary in the business sense in order to give efficacy to the contract.¹³ In fact, for the reasons aforementioned, it would have the opposite effect.

[40] As to the principle that the term may not contradict an express term, I find this to be the case here. Clause 7.4 is clear and unambiguous. The tacit term sought to be imported would clearly contradict it and in fact render it *pro non scripto*. This is not permissible.

[41] As to Ms Adhikari's suggestion that clause 7.4 was textually and purposively connected to clause 7.5, and that the income form provided for in the latter was so that the landlord could assess what rental the tenant could afford, I disagree. I consider the interpretation suggested by me above, *viz* that the purpose of the form is to assess whether the tenant still qualifies for affordable housing as determined by Communicare or Goodfind, to be more plausible, in light of the business conducted by Communicare and Goodfind.

¹³ *Hamleyn & Co v Wood & Co* [1891] 2 QB 494, cited with approval in *Union Government (Minister of Railways) v Faux Ltd* 1916 AD 105, at 112

[42] Such interpretation is supported by the language used, which suggests an obligation on the tenant, not an entitlement directed at obtaining a lower rental.

[43] In the circumstances, I find that respondents have not established the tacit term contended for.

The constitutional interpretation argument

[44] As I understand the argument, the respondents contend for an interpretation of the contract that would lead to the same conclusion as the tacit term contended for, viz that rental increases had to be commensurate with what Mrs Kennedy could afford, taking into account her requisite living expenses. I intend to approach the matter on that basis.

[45] As a starting point, one should bear in mind what was said by Brand JA in *Potgieter v Potgieter N.O.*¹⁴, viz:

“Reasonableness and fairness are not freestanding requirements for the exercise of a contractual right. That much was pertinently held in Bredenkamp v Standard Bank of South Africa Ltd 2010 (4) SA 468 (SCA) para 53. As to the role of these abstract values in our law of contract this court expressed itself as follows in South African Forestry Co Ltd v York Timbers Ltd 2005 (3) SA 323 (SCA) ([2004] 4 ALL SA 168) para 27:

‘[A]lthough abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relations. These abstract values

¹⁴ 2012 (1) SA 637 (SCA)

*perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty.”*¹⁵

[46] In *Beadica 231 CC and Others v Trustees, Oregon Trust and Others*¹⁶ the Constitutional Court pronounced authoritatively on the proper approach to the role of the Constitution, fairness, reasonableness, justice and ubuntu in relation to the interpretation and enforcement of contracts.¹⁷ The Court referred to the Supreme Court of Appeal judgment in *Pridwin*¹⁸ in which that court set out what it viewed as the most important principles governing the judicial control of contracts through the instrument of public policy. These principles were:

“(i) Public policy demands that contracts freely and consciously entered into must be honoured;

(ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;

(iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;

¹⁵ At para [32]

¹⁶ 2020 (5) SA 247 (CC)

¹⁷ From para [71] onward

¹⁸ AB v Pridwin 2019 (1) SA 327 (SCA)

(iv) *The party who attacks the contract or its enforcement bears the onus to establish the facts;*

(v) *A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;*

(vi) *A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.”¹⁹*

[47] The Constitutional Court went on to say the following:

“These principles are derived from a long line of cases and find support in the decisions of this court. There are, however, two principles listed by the Supreme Court of Appeal in Pridwin which require further elucidation.”²⁰

[48] The first principle identified by the Constitutional Court was that of *pacta sunt servanda*. The Court said that the principle gives effect to the central constitutional values of freedom and dignity and that, in general, public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken.²¹ However, the Court went on to say that, in our new constitutional era the principle was not the only or the most

¹⁹ Pridwin at para [27] quoted in Beadica at para [82]

²⁰ Id

²¹ At para [83]

important one informing the judicial control of contracts. The requirements of public policy are informed by a wide range of constitutional values, and there is no basis for privileging the principle over other constitutional rights and values. Where a number of constitutional rights and values are implicated, a careful balancing exercise is required to determine whether enforcement of the contractual terms would be contrary to public policy in the circumstances.²²

[49] The second of the *Pridwin* principles that the Court qualified was that a contract would only be invalidated or not enforced in the clearest of cases in which harm to the public is substantially incontestable, the so-called 'perceptive restraint' principle.²³

[50] In this regard, the Court noted that it had recognised that the principle was sound and that the power to invalidate, or refuse to enforce, contractual terms should only be exercised in worthy cases.²⁴

[51] The Court went on however to say that the principle should not be used in order for courts to shrink from their constitutional duty to infuse public policy with constitutional values. Moreover, the notion that there must be substantial and incontestable 'harm to the public' before a court may decline to enforce a contract on public policy grounds is alien to our law of contract.²⁵

[52] The respondents' constitutional interpretation argument, is not a model of clarity. As far as I can discern from the papers, it is as follows:

²² At para [87]

²³ At para [88]

²⁴ At para [89]

²⁵ At para [90]

- 52.1. When the lease agreement was concluded in 2002, the monthly rental was R690 per month. In 2021 it was R3 323,96 per month, an increase of 381.5%.
- 52.2. Although the property does not appear to form part of Communicare's accredited social housing program, when the lease was concluded Communicare did so on the basis that it was providing affordable housing to the first respondent as a person who could not afford market-related rentals.
- 52.3. At the time that the lease was concluded, she was 55 years old, and Communicare was aware that, upon retirement, she would only have a pension or grant as income.
- 52.4. The first respondent is a 75-year-old pensioner and her only income is an amount of R1 980 per month, being her SASSA grant.
- 52.5. When she took occupation of the property in 2002 she was employed at a salary of R2 000 per month.
- 52.6. Her daughter, the second respondent, assisted with paying rental until early 2019 when she lost her job.
- 52.7. She began experiencing difficulty in meeting the full rental amount from around October 2018. At that stage the second respondent assisted her so she could continue paying an amount of approximately R2 800 per month, albeit that the rental had increased to R3 049 per month.

- 52.8. She continued paying the rental even after the second respondent lost her job until April 2020, when she (purportedly) realised that the applicant was not acting in good faith by increasing the rental to an unaffordable amount.
- 52.9. Since the purpose of the lease agreement was to provide the first respondent with affordable housing, properly interpreted in light of all the relevant facts and surrounding circumstances, clause 7.4 only permits the applicant to increase the rental amount to an amount that remains affordable for her bearing in mind her income.
- 52.10. The applicant has thus breached the lease agreement by increasing her rental after retirement to an amount that renders the rental unaffordable to her, thus undermining the very purpose of the lease agreement.
- 52.11. The alleged arrear rental claimed by the applicant is a direct result of its aforesaid breach of the lease agreement and is thus not due and payable by the first respondent, and she is not in breach of the lease agreement, and accordingly not in unlawful occupation of the premises.
- 52.12. The first respondent is aware that she cannot simply not pay rental and is prepared to agree to a reasonable rental amount going forward, and the applicant is invited to engage with her in this regard.

52.13. The applicant's conduct is manifestly contrary to the principles of good faith and/or ubuntu.

[53] In my view, the construction of the agreement contended for by the respondents, underpinned as it is with allegations that the applicant has acted in bad faith, and is therefore not entitled to enforce the lease, ignores the extracts that I have referred to above from *Pridwin* and *Beadica*, particularly the need to undertake a careful balancing exercise in order to determine whether enforcement of the contractual term at issue would be contrary to public policy. There is no attempt in the first respondent's papers to undertake such exercise.

[54] I consider there to be force in the argument, advanced by Mr Brink, who appeared for Goodfind, that, upon the construction contended for by the respondents, Goodfind and Communicare would be hampered in their ability to provide affordable housing to other, deserving, persons.

[55] In this regard it must be borne in mind that Goodfind, and Communicare, are not organs of state and are not generally under a positive obligation to provide housing, let alone to do so when a tenant is unable or unwilling to pay the agreed rental.

[56] In *Juma Musjid*²⁶ a Trust had over many years provided premises for a public school, albeit one that provided a Muslim-based curriculum. The MEC for Education refused or failed to conclude a formal agreement with the Trust

²⁶ *Governing Body of the Juma Musjid Primary School and Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC)

however, eventually leading the Trust to seek the eviction of the school from its premises.

[57] Having found that the MEC had failed in his obligations to the learners in question, the Constitutional Court went on to say the following:

“[57] It is clear that there is no primary positive obligation on the Trust to provide basic education to the learners. That primary positive obligation rests on the MEC. There was also no obligation on the Trust to make its property available to the MEC for use as a public school. A private landowner may do so, however, in accordance with section 14(1) of the Act which provides that a public school may be provided on private property only in terms of an agreement between the MEC and the owner of the property.

[58] This Court, in Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, made it clear that socio-economic rights (like the right to a basic education) may be negatively protected from improper invasion. Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measure that diminish that protection. It needs to be stressed however that the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to

require private parties not to interfere with or diminish the enjoyment of a right. Its application also depends on the 'intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State'.

...

[59] The Trust permitted the Department to enlist the school as a public school on its property with a distinctive religious character in accordance with sections 56 and 57 of the Act. It also performed the public function of managing, conducting and transacting all affairs of the Madressas in the most advantageous manner, including the payment of the costs of various items which the SGB and the Department ought to have provided. By making contributions towards expenses associated with the running of a public school, the Trust acted consistently with its duties: to erect, maintain, control and manage the school in terms of the Deed of Trust."

(Footnotes omitted)

[58] I accordingly accept that there is a negative obligation on Communicare and Goodfind not to interfere with or diminish the enjoyment of a constitutionally protected right, in this case the right of access to housing. The actual question is whether that is what has occurred here, on the facts placed before me.

[59] One of the *Pridwin* principles accepted in *Beadica* was that the party who attacks the contract or its enforcement bears the onus to establish the facts. The following are relevant in this regard:

- 59.1. Although the first respondent has placed her personal circumstances before the Court, the details relating to the second respondent are, at best, sparse.
- 59.2. Thus, although I am told that second respondent was employed until 2019, no details are provided as to her educational status, her income, her present employment, if any, or any attempts made by her to obtain employment.
- 59.3. The first respondent's son resides with her and the first respondent in the property. The sole information in the answering affidavit about the son is that he is a major male and that neither he, or the second respondent, is employed 'at present'. Although there is reference to a confirmatory affidavit by the son, none has been filed.
- 59.4. The first respondent, having decided that the rental was unaffordable to her, and that Goodfind and/or Communicare was acting in bad faith, simply stopped paying rent in 2021.
- 59.5. Although there is the aforementioned suggestion in the answering affidavit that she is prepared to pay what is termed a 'reasonable rental', it is clear that no offer has been made in

this regard, nor do the respondents suggest what a reasonable rental would be in the circumstances.

- 59.6. In the answering affidavit the respondents themselves aver that Communicare is a social housing institution, and thus, that at least some of its operations, take place in terms of the Social Housing Act.
- 59.7. As pointed out by the applicant, although Communicare is a non-profit company, that does not mean it can afford to run at a loss. Were it to do so on a sustained basis, it would fall to be wound-up.
- 59.8. Communicare's core mandate is to carry on the business of providing rental for low to medium income households. It does so, *inter alia*, by providing social housing in terms of the Social Housing Act. The property at issue in this matter is however not such a property and has not had the benefit of public funding.
- 59.9. The monthly rental has increased, since 2002 by less than 10% per annum. Had it increased at a rate of 10% per annum it would be at present over R5 000 per month.
- 59.10. While the property can be regarded as 'affordable housing', inasmuch as it is not market-related, the rental charged is not linked to the amount paid in social grants.

[60] Those are the facts against which I must consider the constitutional arguments advanced by the respondents, both as to construction of the term and its enforcement.

[61] In my view, the principal argument of the respondents, *viz* that rental increases must be confined to what the first respondent, can afford, is not sustainable, for the following reasons:

- 61.1. To give the lease such a construction would entirely ignore the rights of Goodfind, and Communicare, to conduct their business, which, while providing housing to low and medium income earners, cannot be conducted at a loss, for obvious reasons.
- 61.2. The respondents have placed little, if any, information before the Court as to the personal circumstances of the second respondent, and none at all as to the personal circumstances of the third respondent, the unnamed son who resides with the first and second respondents in the property.
- 61.3. In the balancing exercise envisaged in *Baedica*, the rights and interests of other persons who wish to obtain affordable housing must also be considered. These persons, who may well themselves be aged, or comprise households headed by women, or include children and disabled persons, are also entitled to seek access to affordable housing, in terms of the housing model provided by Goodfind, and Communicare.

61.4. The respondents point to no constitutional provision which would entitle them to insist that they are entitled to remain in occupation of the property, regardless of whether they can afford it or not, thereby rendering the property unavailable to other disadvantaged and poor persons who can afford it.

61.5. Further, by simply remaining in occupation of the property, in clear violation of Goodfind's rights, and going further and asserting that this conduct was justified inasmuch as Goodfind and Communicare have acted unlawfully, the respondents have clearly ignored what was stated in both *Pridwin* and *Baedica* regarding the importance of the principle that persons who conclude contracts should be held to them.

[62] In my view, and given a conspectus of all of the facts, I am unable to interpret or enforce the contract in the manner contended for by the respondents.

[63] In particular, given Communicare and Goodfind's model for providing affordable housing, the fact that there is no legal obligation on them to do so, the fact that the need for such housing will always outstrip the ability to provide same, and thus, inevitably, some, such as those who cannot afford the accommodation provided, will have to seek assistance from the State, which bears the primary positive obligation to fulfil the section 26 right, I cannot find that the conduct of Communicare and Goodfind has breached the negative constitutional obligations resting upon them, in terms of *Juma Musjid*, viz not

to interfere with or diminish the enjoyment of the right of access to housing on the part of the respondents.

[64] I point out that the obligation resting on the state, and private actors such as Communicare and Goodfind, not to interfere with or diminish the enjoyment of a right (described as a negative right in our jurisprudence) is not unqualified.

[65] In *New Nation Movement NPC and Others v President of the Republic of South Africa and Others*²⁷ the Constitutional Court dealt with the question of whether the section 18 right, viz the right to freedom of association, included a negative right, viz the freedom not to associate.

[66] The Court referred to what it called ‘the *Lavigne* threshold’, derived from the dictum in *Lavigne v Ontario Public Service Employers Union*²⁸, a decision of the Supreme Court of Canada, in which the following was stated:

*“Given the complexity and expansive mandate of modern government, it seems clear that some degree of involuntary association beyond the very basic foundation of the nation state will be constitutionally acceptable, where such association is generated by the workings of society in pursuit of the common interest.”*²⁹

[67] On the question, the Constitutional Court concluded as follows:

²⁷ [2020] ZACC 11

²⁸ [1991] 2 SCR 211

²⁹ *Lavigne* at 321, quoted in *New National Movement* at para [50]

“[54] This must be not be taken to mean the state is entitled to ride roughshod over associational choices that are not sound. Even if not well founded, choices by an individual may well define her or him. Unless the state can justify interference, even such choices are deserving of protection under section 18.”

...

“[55] All this must also apply to arational choices not to associate. Again, that is subject to constitutionally compliant curtailment by the state.”

[68] I consider these dicta to be equally applicable to private actors such as Communicare and Goodfind. It must be noted that the dicta were expressly made by the Constitutional Court subject to the *Lavigne* threshold, quoted above.

[69] In light of the above jurisprudence, and given my discussion above regarding the mandate of, and its execution by, Communicare and Goodfind, I conclude that, in the circumstances of this case, Communicare and Goodfind have not acted in a constitutionally offensive manner, *vis a vis* the respondents, even in the context of the negative protection of the right as outlined in *Juma Masjid* above.

The equality challenge

[70] This ground was pleaded with even less clarity than the constitutional interpretation. In my view, the challenge fails on the basis of first principles.

[71] The argument is focused on the first respondent, who is an elderly person. No regard is had, however, to the fact that the household also consists of the second and third respondents, who are not elderly persons.

[72] If the matter is considered from the point of view of the respondents constituting a household, as I consider it must be, then it is hard to understand how the respondents, collectively, can complain of age discrimination.

[73] I have already referred above to the facts relating to the core mandate of Communicare and Goodfind and how they go about achieving same. I reiterate that such core mandate is to provide affordable housing to lower and medium income earners, who would, *inter alia*, not be the beneficiaries of assistance from the State. This is a commendable objective and comports with the positive obligation to fulfil the rights in the Bill of Rights, also on the part of private persons. I have also referred to the fact that Communicare's and Goodfind's mandate would be frustrated were they to be compelled to operate at a loss because they were obliged to provide housing to persons unable to afford same. This includes aged persons.

[74] I find support for this reasoning in the following passage from *Beadica*:

"[101] The National Empowerment Fund Act established the Fund to facilitate the redress of economic inequality that resulted from unfair discrimination against historically disadvantaged persons. This falls within the scope of the 'measures' envisioned by section 9(2) of the Constitution (as would initiatives funded by the Fund). The applicants have not shown that the failure of their businesses, in these

circumstances, would unjustifiably undermine substantive equality. To hold that the failure of a black economic empowerment initiative financed by the Fund renders the enforcement of the renewal clauses deleterious to the constitutional value of equality would have the undesirable result of defeating the Funds own objects. This is because the effect of this finding would increase the risk of contracting with historically disadvantaged persons who benefit from the Fund. If the applicants were to succeed, it would establish the legal principle that enforcement of a contractual term would be inimical to the constitutional value of equality, and therefore contrary to public policy, where enforcement would result in the failure of a black economic empowerment initiative. This could, in turn, deter other parties from electing to contract with beneficiaries of the Fund, or force beneficiaries to offset the increased risk by making concessions on other contractual aspects during contract negotiations. These outcomes would, in effect, undermine the very objects that the Fund and section 9(2) seek to achieve.

[75] To transpose the above reasoning to the facts here: to hold that Communicare's (and Goodfind's) business model offends substantive equality would be to imperil the achievement of their core objectives as described above, and impair their ability to provide affordable housing to those in need thereof.

[76] For these reasons, I would not uphold the equality challenge.

PIE

[77] The last question to address is whether the applicant has made out a case for an eviction order in terms of the provisions of PIE.

[78] PIE has led to a veritable cottage industry of litigation. This is because of the collision between the requirements of the law, on the one hand, and the overwhelming need of large segments of the population for access to housing when they are able to afford or procure same from their own resources.

[79] In approaching the legal question of whether the applicant has made out a case on the facts of this matter for an eviction order against the respondents, I intend referring to only two authorities, one from the Supreme Court of Appeal and one from the Constitutional Court. These, in my view, cover the relevant aspects that I must consider and are dispositive of the question as to what a just and equitable order, in accordance with the legal requirements, would be on the facts of this case.

[80] First, as to the Supreme Court of Appeal, in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*³⁰, the Court said the following:

“Reverting then to the relationship between ss4(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

³⁰ 2012 (6) SA 294 SCA

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.”³¹

[81] As to the Constitutional Court, in *Occupiers, Berea v de Wet N.O. and Another*³², the Court said the following:

³¹ At para [25]

³² 2017 (5) SA 346 (CC)

“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.”

...

“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.”³³

[82] Based on my conclusions in the portions of the judgment dealing with the respondents’ various defences, I find as follows:

82.1. Upon a proper construction of the lease, the applicant was entitled to cancel same based on the first and second respondents’ failure to pay the agreed rental, and to approach this court for an eviction order.

³³ At paras [48] and [51] respectively

- 82.2. It follows that the respondents are unlawful occupiers in terms of PIE.
- 82.3. The respondents have not prevailed in their attempt to raise legal defences to the eviction proceedings.
- 82.4. The question of the potential homelessness of the respondents has not been adequately addressed in the affidavits by the respondents, and I am accordingly unable to conclude either that it would be just and equitable to grant an eviction order, or what the date of any such eviction should be. I refer to the City's aforementioned affidavit in this regard.
- 82.5. On the authority of *Changing Tides and Occupiers, Berea*, I am precluded from granting an eviction order in the absence of such information.

[83] In the circumstances, it is clear that the respondents have to be afforded a further opportunity to place all relevant facts pertaining to their potential homelessness, should an eviction order be granted, before the court.

[84] In *Occupiers, Berea*, the Constitutional Court referred to the steps that might have to be taken by a court in the event that occupiers are unrepresented, in order to ensure that all the relevant facts are before the court before it exercises its jurisdiction in relation to an eviction in terms of PIE.³⁴

³⁴ At paras [49] and [50]

[85] Here of course the respondents are not unrepresented. In the latter regard, a Full Bench of this court in *Luanga*³⁵ made the following general observations, by which I am bound, and which I in any event consider both correct and applicable³⁶:

“To my mind it is incumbent upon a respondent in eviction proceedings who is legally represented and who avers that an eviction order will render her and her family homeless, to explain to the court why that is so. Where a respondent facing an eviction application has the benefit of legal representation, she and her legal representatives must engage fully on the relevant issues. Facts must be put up to demonstrate that there is indeed a risk of homelessness, and that the assertion is made in good faith. Details regarding the employment status and income of adult members of the household are obviously relevant to substantiate the assertion of a risk of homelessness, and must be provided. And if there is good reason for why the information cannot be furnished, that should be disclosed in the affidavit.

Respondents in eviction proceedings who have the benefit of legal representation cannot be permitted to content themselves with bald, unsubstantiated averments of homelessness. They must be made to understand that if they do, they run the risk that the court may infer that the assertions regarding inability to afford alternative accommodation

³⁵ *Luanga v Perthpark Properties (Limited)* 2019 (3) SA 214 (WCC)

³⁶ I point out that the judgment in *Luanga* was delivered by a full bench of this division.

and the risk of homelessness are not genuine and bona fide, and may be rejected merely on the papers.”³⁷

[86] I need to make two comments here. First, I do not understand the respondents in this matter to assert squarely that they would, as a fact, be rendered homeless, should an eviction be ordered. I accept, however, that it is asserted, at least by Mrs Kennedy that she cannot afford other accommodation.

[87] The second comment that I wish to make is that reference to the dicta in *Luanga* is not to be taken to impute any criticism whatsoever to the manner in which the respondents’ defence has been conducted by their legal representatives.

[88] In the circumstances, and had I been required to rule on the eviction order, I would have granted an order to the following effect:

88.1. The application for an eviction order is postponed *sine die*.

88.2. The first, second and third respondents are directed to file an affidavit with this court within thirty (30) days of the granting of this order in which affidavit they are required to deal with:

88.2.1. Their personal circumstances in full, including their employment status and income and attempts to obtain employment, any attempt(s) made on their behalf, whether collectively or individually, to obtain

³⁷ At paras [44] and [45]

alternative accommodation, and if no such attempts have been made, the reason(s) therefor, and whether they will, as a fact, be rendered homeless should an eviction order be granted.

88.2.2. Whether, in all the circumstances, it would be just and equitable to grant an eviction order.

88.2.3. If so, what the date of such order should be.

88.3. The fourth respondent, the City of Cape Town, is directed, upon the filing of the affidavits contemplated above, to furnish to this court within thirty (30) days of the receipt of such affidavits, a comprehensive report dealing with the matters set forth in paragraph 8 of its affidavit filed in this matter and referred to in paragraph 9 of this judgment.

88.4. The applicant is given leave, should it so elect, to file a response to both such affidavits and report, within fifteen (15) days of receipt of same by it.

88.5. The applicant is given leave to re-enroll this matter following compliance with the above directions.

Order

[89] For all of the aforesaid reasons, I make the following order:

“The application is dismissed with costs.”

I JAMIE

ACTING JUDGE OF THE HIGH COURT

For the Applicant: Adv A Brink

Instructed by: Mr S Thomson
BBM Attorneys

For the First, Second
and Third Respondents: Adv M Adhikari
With: Adv M Ibrahim

Instructed by: Mr MC Coetzer
Chris Fick and Associates

No appearance for the Fourth Respondent