

SOUTH AFRICA / JUDGMENT

Grobler v Phillips and Others (CCT 243/21) [2022] ZACC 32; 2023 (1) SA 321 (CC); 2024 (1) BCLR 115 (CC) (20 September 2022) [2022] ZACC 32

COURT
Constitutional Court

BEFORE
Kollapen, Madlanga, Majiedt, Mathopo, Mhlantla,
Mlambo, Theron, Tshiqi, Unterhalter

CASE / FILE NUMBER
CCT 243/21

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CONSTITUTIONAL

COURT OF SOUTH AFRICA

Case

CCT 243/21

In

the matter between:

WILLEM
GROBLER
Applicant
and
CLARA
PHILLIPS
First Respondent
JOHAN
VENTER
N.O.
Second Respondent
HELDERBERG
MUNICIPALITY
Third Respondent
Neutral

	citation: Grobler v Phillips and Others [2022] ZACC 32
Coram:	Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ
Judgment:	Tshiqi J (unanimous) Heard
on:	10 May 2022 Decided
on:	20 September 2022
Summary:	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 — section 4(7) — factors to be taken into account — eviction not unlawful ORDER On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town)
the following order is made:	1. Leave to appeal is granted. 2. The appeal is upheld. 3. The order of the Supreme Court of Appeal is set aside and substituted
with the following:	“3.1. The applicant, Mr Willem Grobler, is directed to purchase a two bedroom dwelling in a good condition (the dwelling). 3.2.
The dwelling shall comply with the following requirements:	3.2.1. It shall have at least two bedrooms. 3.2.2. It shall have a lounge, kitchen and a bathroom. 3.2.3. The dwelling must be situated within a radius of 5 kilometres from [...] D [...] Street, Somerset West. 3.2.4. Regard being had to the first respondent, Mrs Clara Phillips’ age and Mr Adam Phillips’ disability, the dwelling shall be easily accessible. 3.3. It is declared that once the dwelling is registered in the name of Mr Willem Grobler, Mrs Clara Phillips, and her son, Mr Adam Phillips, shall have the right to reside in the dwelling for the rest of Mrs Clara Phillips’ life, and

Mr Willem Grobler is directed to register the
aforementioned right against the title deed of the dwelling.

3.4. Mr

Willem Grobler is directed to arrange and pay for all the relocation
costs of Mrs Clara Phillips and Mr
Adam Phillips, including the
removal and transportation costs of their furniture, personal goods
and effects to the dwelling.

3.5.

Mrs Clara Phillips and Mr Adam Phillips will be liable for the costs
of municipal services that are rendered
by the municipality to them
in respect of the dwelling and will be liable for the reasonable
maintenance costs of the interior
of the dwelling.

3.6.

Mrs Clara Phillips and Mr Adam Phillips are directed to comply with
all municipal regulations in respect
of the dwelling and if
applicable, the body corporate house rules.

3.7. If

Mrs Clara Phillips and Mr Adam Phillips do not take occupation of the
dwelling within six months from
the date of registration of the
dwelling in the name of Mr Willem Grobler, Mrs Clara Phillips
and Mr Adam Phillips
and all other occupants are directed
to vacate the premises known as [...] D [...] Street, Somerset
West, failing which,
the Sheriff of the Court is directed to evict
them from the premises.

3.8.

There shall be no order as to costs.”

JUDGMENT

TSHIQI J (Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, and Unterhalter AJ concurring):

Introduction

[1] The question that arises in this application is whether it is just and equitable, as envisaged by section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[1] (PIE), to grant an order directing the first respondent, Mrs Clara Phillips and her son, Mr Adam Phillips, who has a physical disability, to vacate their current home.

Background

[2] The applicant is Mr Willem Grobler, a businessman who resides at 21 Aberdeen Street, Somerset West, Western Cape Province. Mrs Clara Phillips, who is currently 85 years old, has been residing at [...] D [...] Street, Somerset West, Western Cape Province (the property), that is the subject of the dispute, since she was 11 years

old. She began living on the property in 1947 when the property had formed part of a larger farm at the time. The property is situated

approximately 500 metres from Mr Grobler's own home in Somerset West, and is thus within walking distance from his home.

Mr Grobler bought the property at a public auction because he wants his elderly parents to reside in it. The property was

registered in Mr Grobler's name on 15 September 2008 and, as is apparent from the facts below, his wishes to accommodate

his parents in it have not yet been realised.

[3] The second respondent is Mr Johan Venter N.O., an adult attorney who acts in his representative capacity as the curator bonis of Mr Adam Phillips. Mr Venter did not oppose any of the proceedings leading up to this application and abides the outcome of this application. For the sake of convenience, and where appropriate, the reference to "Mrs Phillips" should be read to refer to both Mrs Clara Phillips and Mr Adam Phillips.

[4] After Mr Grobler had purchased the property, he met with Mrs Phillips on three separate occasions and informed her that he required her to vacate the property. During the meetings, Mr Grobler advised Mrs Phillips that he was prepared to pay a certain amount towards her relocation, alternatively, he was prepared, at his cost, to provide alternative accommodation for her. Mrs Phillips did not accept any of Mr Grobler's proposals. She stated that she was not prepared to move out of the property.

[5] On 27 November 2008, Mr Grobler's attorneys requested Mrs Phillips, in writing, to vacate the property by 31 January 2009. She refused and alleged that she enjoyed an oral right of life-long habitatio,[2] granted by a previous owner, which was enforceable against Mr Grobler. On 5 May 2009, Mr Grobler's attorneys again made an

offer to Mrs Phillips in writing, that Mr Grobler would make available to her, at his cost, a two-bedroom flat where she could

reside for the rest of her life. That offer was also rejected. On 18 May 2009, the offer was repeated in writing by Mr Grobler's

attorneys but was once again rejected.

Litigation history

Magistrates' Court

[6] After it became apparent that the offers were not acceptable to Mrs Phillips, Mr Grobler commenced proceedings in the Somerset West Magistrates' Court. Relying on the relevant provisions of PIE, he applied for Mrs Phillips' eviction and alleged that she was an unlawful occupier of his property. Both the letters of 5 May 2009 and 18 May 2009 were attached to Mr Grobler's founding affidavit. Mrs Phillips opposed the

application. In her answering affidavit, she relied on the oral right of habitatio which she alleged had been given to her by previous owners. She also alleged that she was a protected occupier in terms of PIE, and that an eviction order should not be granted. The application was referred to trial.

[7] The Magistrates' Court rejected Mrs Phillips' defence based on the alleged right of habitatio and held that Mr Grobler had proved his right of ownership over the property. The Magistrates' Court accepted the undisputed evidence that the alleged right of life-long habitatio was invalid and unenforceable against Mr Grobler as it was not registered against the title deed. The Court held that the only right Mrs Phillips had in respect of the property was the right of occupancy which, according to the Court, could not be equated to a right of habitatio or a usufruct. The Court also held that at the time of the proceedings, Mrs Phillips no longer had Mr Grobler's consent to occupy the property and had no right in law to occupy it. The Court granted an order of eviction against Mrs Phillips. The date of eviction was not immediately considered by the Court and the matter was postponed in order to consider an appropriate eviction date.

[8] Before the matter was postponed, Mr Grobler's counsel informed the Court that although Mrs Phillips' counsel had expressed an intention to apply for leave to appeal against the eviction order, Mr Grobler was willing to assist Mrs Phillips with her relocation costs. He further informed the Court that Mr Grobler was willing to allow Mrs Phillips to continue to reside on the property for another two months and that when she had relocated, he would bear the reasonable costs of accommodation in a retirement centre for a period of 12 months. Mr Grobler's counsel informed the Court further that those costs would be limited to R 4000 per month.

[9] When the matter next came before Court, it became apparent that this offer was also not accepted. On this date, and in order to decide on the suitable eviction date, the Court heard evidence on whether alternative accommodation for Mrs Phillips was available. It also invited counsel to address it on the fact that Mrs Phillips is

residing on the property with her disabled son. It further referred the parties to the offer that was made during the previous Court proceedings. The Court was addressed on Mrs Phillips personal circumstances, including her age and the duration of her residence on the property. It became necessary for the Court to postpone the matter again in order to hear evidence of the local social services department and the local municipality regarding the availability of alternative accommodation. When the proceedings resumed, the Court was presented with two reports from

the local social services department and heard evidence from a social worker who was the author of one of the reports. The reports and the oral evidence dealt with suitable state-funded accommodation in the area. After considering all the relevant factors, the Court ordered that Mrs Phillips should vacate the premises on 30 August 2017. In making the decision on the eviction date, the Court took into account the fact that its eviction order had been granted a year earlier, on 2 August 2016.

High Court

- [10] Mrs Phillips appealed to the Full Court of the Western Cape Division of the High Court, Cape Town (High Court). In that Court, not only did Mrs Phillips invoke the provisions of PIE but also relied on a new and alternative ground of appeal, namely that she was an occupier in terms of the provisions of the Extension of Security of Tenure Act[3] (ESTA).
- [11] The High Court upheld the appeal. The Court held that a change of Mrs Phillips status from that of a “lawful occupier” to an “unlawful occupier” could not be achieved without giving her reasonable notice to terminate the right to occupy the property. The High Court found that the notice of termination that was given on 27 November 2008 for her to vacate the property by 31 January 2009 was too short and, accordingly, unreasonable. It also held that Mr Grobler had no right in law to launch the proceedings before dealing in a meaningful and precise manner with what it considered to be Mrs Phillips rights, and thereby placing her in a position of being an unlawful occupier. The High Court seemed to have in mind proceedings such as an application for a declaratory order.[4] The High Court further held that Mr Grobler had failed to show that Mrs Phillips was an unlawful occupier in terms of PIE. Regarding the reliance on ESTA, the High Court held that the property only ceased to be a farm in 2001 and that, accordingly, ESTA was applicable. It also held that Mrs Phillips was protected under ESTA. The High Court invoked the provisions of ESTA despite the contents of the pre trial agreement in which the parties had agreed that the matter would be determined solely in accordance with the provisions of PIE. The High Court deviated from the terms of the pre-trial agreement on the basis that it was not persuaded on the affidavits filed by the parties that the provisions of ESTA were not applicable to the matter. What also seems to have influenced the High Court’s reasoning was that Mrs Phillips had not been able to assert her rights to the property in terms of ESTA before the area where the property is located became an urban area.

Supreme Court of Appeal

- [12] Mr Grobler appealed to the Supreme Court of Appeal with the special leave of that Court. The Supreme Court of Appeal identified three issues for determination. First, whether it was appropriate for the High Court to allow Mrs Phillips to raise a new defence on appeal that she was also protected by ESTA. Second, whether Mr Grobler had established that Mrs Phillips was an unlawful occupier in terms of the provisions of PIE. According to the Court, this issue turned on the notice of termination of occupation given to Mrs Phillips. It also concerned the broader question of compliance with the requirements for eviction. The third

issue pertained to the exercise of the High Court's discretion not to order the eviction on the basis that such an order would not be just and equitable. The Court said that a related issue was the nature of the discretion, the Supreme Court of Appeal's entitlement to interfere with the exercise of the discretion, the extent to which it may so interfere and whether grounds for interference had been established.

- [13] The Supreme Court of Appeal highlighted that the action before the Magistrates' Court was initiated on the basis that the provisions of PIE were applicable. It was, however, not convinced that there was an express agreement between the parties that the provisions of ESTA did not apply. It reasoned that in any event the principal dispute between the parties was whether Mrs Phillips was an unlawful occupier.
- [14] Regarding the reliance on ESTA, the Supreme Court of Appeal held that the undisputed facts established that the property was incorporated into a township by no later than 1991, when its status as an erf was registered in the land register, thereby converting it from agricultural land. It concluded that section 2(1)(b) of ESTA did not apply and that the High Court erred in finding that Mr Grobler did not discharge the onus of establishing that ESTA did not apply.
- [15] The Supreme Court of Appeal next considered the conclusion by the High Court that Mrs Phillips was not an unlawful occupier. It stated that the High Court's reasoning on this aspect was difficult to follow, because, although the High Court accepted the fact that, before the notice to vacate was given, Mr Grobler engaged Mrs Phillips regarding her continued occupation of the property, it did not take this factor into consideration when deciding whether or not she was an unlawful occupier. According to the Supreme Court of Appeal, the High Court did not consider the lengthy period of these interactions, the fact that a written notice to vacate the premises was given, and the period that elapsed from the end of the notice period to the institution of legal proceedings.
- [16] The Supreme Court of Appeal held that the evidence showed that Mr Grobler had signalled, clearly and unequivocally, his intention to terminate Mrs Phillips right to occupy the property, thereby withdrawing his consent for her continued occupation. It found that it had been proven that she was an unlawful occupier.
- [17] The Supreme Court of Appeal then considered the alleged oral lifetime right of habitation. In this regard it highlighted that Mrs Phillips' counsel did not pursue reliance upon the existence of that right in that Court. It also accepted that the alleged right had not been reduced to writing, had not been registered against the title deed and therefore, it could not be enforceable against successive owners.
- [18] The Court considered whether it was just and equitable to grant an eviction order. It accepted that Mrs Phillips was granted an oral right of occupation of the property for life. It also accepted that it was not in dispute that some, if not all, of the previous owners were aware of this right and were prepared to honour it. The Court observed that Mrs Phillips believed, albeit incorrectly, that the right protected her from eviction and she continued to occupy the property based on this belief. According to the Supreme Court of Appeal, Mrs

Phillips could hardly be expected to know that her right was precarious as a result of the right not having been reduced to writing and registered against the title deed of the property. It reasoned that it was as a result of this ignorance that Mrs Phillips lost absolute protection against eviction.

- [19] The Supreme Court of Appeal also emphasised certain factors which, it held, were taken into account by the High Court in exercising what it regarded as its discretion: (a) the fact that Mrs Phillips has been in occupation of the property since she was 11 years old; (b) the fact that she was, at the time the matter was argued at the Supreme Court of Appeal, 84 years old; and (c) the fact that during the greater part of her occupation of the property, it formed part of a farm and gradually, as a result of circumstances beyond her control, became part of an urban development. According to the Supreme Court

of Appeal, had it not been for the urban development, Mrs Phillips would undoubtedly have enjoyed the protection of ESTA. The Court formed the view that while she may have lost the absolute protection conferred by section 2(1)(b) read with section 8(4) of ESTA as a vulnerable person, her status as a vulnerable person, even in the context of PIE, has essentially remained unchanged.

- [20] It held that all these factors outweighed those that entitled Mr Grobler, as a property owner, to obtain an order of ejectment. It reasoned that PIE recognises that in appropriate circumstances the right to full exercise of ownership must give way, in the interests of justice and equity, to the right of vulnerable persons to a home. The Supreme Court of Appeal then concluded that there was no basis to interfere with the discretion exercised by the High Court and agreed that it was not just and equitable to order an eviction in the matter. It thus dismissed Mr Grobler's appeal.

This Court

Jurisdiction and leave to appeal

- [21] This Court, in Machele,[5] held that eviction from one's home will always raise a constitutional issue. Initially, Mrs Phillips objected to this Court's jurisdiction but later conceded, correctly so, that in light of this Court's findings in Machele, our jurisdiction is engaged as the issues are centred around eviction from one's primary residence.
- [22] Another ground advanced for this Court's jurisdiction is that the Supreme Court of Appeal interpreted the "some time" principle, laid down by this Court in Blue Moonlight[6] to mean an "indefinite period", whereas this Court in Blue Moonlight had stated that a property owner cannot be expected to provide free housing for the homeless for an indefinite period. Reference was also made to Claytile,[7] where the fact that Claytile had accommodated the applicants in that matter for several years, weighed heavily against imposing a further obligation on it. I accept that the "some time" principle concerns the interpretation of the provisions of section 4(7) of PIE. The interpretation of the provisions of PIE engages this Court's jurisdiction because PIE was enacted to ensure that "evictions in future took place in

a manner consistent with the values of the new constitutional dispensation. Its provisions have to be interpreted against this background”.[8]

- [23] The Supreme Court of Appeal also took into account the fact that it was Mrs Phillips “wish” to remain in the property and not to be moved to alternative accommodation. The wish of a party to remain on someone else’s property, unlawfully, and not to be moved to alternative accommodation is not one of the factors that have previously been taken into account in determining what is just and equitable. This raises the question whether the Supreme Court of Appeal, in taking into account Mrs Phillips’ wish or preference to continue to occupy the property unlawfully, misconceived the test to be applied when considering what is just and equitable in eviction proceedings. That question requires the attention of this Court.
- [24] Another important consideration concerns the misapprehension by the Supreme Court of Appeal that it was the High Court and not the Magistrates’ Court, as the court of first instance, that had the discretion to determine whether it was just and equitable to grant an eviction order. This matter commenced in the Magistrates’ Court and it was that Court that had the discretion. When it was heard on appeal by the High Court, that Court had to determine whether the Magistrates’ Court had exercised its discretion properly. The Supreme Court of Appeal dealt with the matter as if the High Court was the court that had the discretion to determine whether it was just and equitable to grant an eviction order and it erred in this regard.
- [25] However, the manner in which the Magistrates’ Court exercised its discretion is not beyond reproach. That Court seems to have missed an important step. As shall be illustrated below, the Magistrates’ Court did not consider whether it was just and equitable to make an order of eviction in the circumstances.
- [26] In the consideration of whether it is in the interests of justice to grant leave to appeal, it needs to be considered that, although these errors may be regarded as a mere misapplication of established legal principles, the fact that the application has reasonable prospects of success is an important consideration. In *University of Johannesburg*, [9] this Court held that where a court departs from settled law, such a departure would establish the arguability of the point of law,

provided that there is merit to the argument and it has prospects of success.[10]

Merits

The exercise of the Magistrates’ Court discretion

- [27] Before I deal with whether the High Court and Supreme Court of Appeal were correct in holding that it was not just and equitable to grant an eviction order, it is helpful to first clarify why I hold the view that the Magistrates’ Court overlooked an important step and therefore did not adopt the proper approach when exercising its discretion to determine whether to grant an eviction order.

- [28] Section 4(7) of PIE provides guidance on what considerations have to be taken into account when a court exercises its discretion to determine whether it is just and equitable to grant an eviction order. It reads:

“If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.”

- [29] Before the Magistrates’ Court listed the relevant factors prescribed in section 4(7) of PIE, it clarified the legal principles pertaining to PIE evictions and reminded itself that, in the event that it found that the occupation was unlawful, the application in terms of PIE could succeed. It did not say that it had to succeed. This shows that the Magistrates’ Court was alive to the fact that a finding that an occupation is unlawful in matters regarding PIE does not necessarily lead to an order of eviction without a consideration of the other relevant factors. Another indication that the Magistrates’ Court was alive to its discretionary powers is the fact that after concluding that Mrs Phillips was in unlawful occupation, the Court emphasised that the use of the word “may” in PIE gave it a discretion on whether the application in terms of PIE should succeed. Then the Court said that the last step in its determination was whether it would be just and equitable to grant an eviction, given the facts of the matter, and if so determine a just and equitable period within which an eviction should take place. However, having outlined the steps that had to be considered in the enquiry, the Magistrates’ Court proceeded to omit what it referred to as the last step of the enquiry. It did not ask whether it was just and equitable to make an order of eviction. After it found that Mrs Phillips was in unlawful occupation, it granted the eviction order. But, as will become apparent below, the fact that the Magistrates’ Court skipped this step is not of such a nature that the eviction order granted by the Magistrates’ Court should have been set aside.
- [30] When the matter went on appeal to the High Court, that Court disagreed that Mrs Phillips was an unlawful occupier, based on its conclusion that she was not given reasonable notice of termination. It took into account considerations relating to equity and justice, against the backdrop of a finding that Mrs Phillips occupation of the property was lawful.
- [31] On further appeal to the Supreme Court of Appeal, that Court dealt with the matter on the basis that it was the High Court that had a discretion to determine whether it was just and equitable to order eviction. It is not clear, as will be illustrated below, on what basis the Supreme Court of Appeal concluded that “the High Court was entitled to exercise its discretion even though the occupation was unlawful”. I say so because, if the occupation was lawful, as the High Court concluded, then there was no basis to order eviction. Then there was no need to exercise any discretion on whether eviction was a just and equitable remedy. In any event, that discretion was that of the trial court, not that of the High Court as a court

of appeal. The High Court would have been entitled to, itself, exercise a discretion if it had justifiably interfered with the exercise of discretion by the Magistrates' Court.

- [32] The specific defences raised by Mrs Phillips that she had a right of habitatio and that she was a lawful occupier were rejected by the Supreme Court of Appeal. The Court however concluded that it was not just and equitable to order the eviction in the circumstances. It is this reasoning by the Supreme Court of Appeal that is at the centre of the application in this Court. I now turn to considerations of justice and equity as envisaged in section 4(7) of PIE.

Was it just and equitable to grant an order of eviction?

- [33] In deciding whether it is just and equitable to grant an order of eviction, a court must consider all relevant circumstances. This includes, except where the land is sold in a sale in execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier. This also entails taking into account the rights and needs of the elderly, children, disabled persons and households headed by women.
- [34] In holding that it was not just and equitable to evict Mrs Phillips, the Supreme Court of Appeal took into account Mrs Phillips' age, the fact that she occupied the property with her disabled son and the fact that she would have been protected by ESTA, had the farm not become absorbed by the growth of urban developments. All of these are relevant factors in terms of section 4(7) of PIE. Apart from these factors, the Supreme Court of Appeal also took into account

Mrs Phillips' wishes, specifically when considering the offers of alternative accommodation and concluded that she was

justified in refusing to accept them. Further, the Supreme Court of Appeal considered the fact that Mrs Phillips was accustomed to life in the house which she presently occupies and the fact that she enjoyed not only the freedom and space, but also the environment around it.

- [35] This Court, in *Snyders*,^[11] dealt with the position of Mr Willem Breda who was employed at Stassen Farm and occupied a house on the farm that was previously occupied by Mr Snyders and his family. This Court held that the right of residence that Mr Breda and his family were enjoying was not necessarily tied to the specific house they occupied.^[12] In *Oranje*^[13] the Supreme Court of Appeal held that ESTA was not enacted to provide security of tenure to an occupier in the house of his or her choice.^[14]

- [36] Although ESTA is aimed at the protection of a different category of occupiers and its provisions are as a result different from those of PIE, to the extent that both statutes were enacted to prevent unfair evictions, there is no basis to find that the principle laid down in *Snyders* is not applicable to PIE matters. The question whether the constitutional rights of the unlawful occupier are affected by the eviction is one of the relevant considerations, but

the wishes or personal preferences of the unlawful occupier are not relevant. An unlawful occupier such as Mrs Phillips does not have a right to refuse to be evicted on the basis that she prefers or wishes to remain in the property that she is occupying unlawfully. In terms of section 26 of the Constitution, everyone has the right to have access

to adequate housing. The Constitution does not give Mrs Phillips the right to choose exactly where in Somerset West she wants to live.

[37] Who then bears the obligation to provide alternative accommodation? Section 4(7) of PIE clearly states that such obligation lies with a “municipality, or other organ of state or another land owner”. PIE was enacted to prevent the arbitrary deprivation of property and is not designed to allow for the expropriation of land from a private landowner from whose property the eviction is being sought. In *Ndlovu*,^[15] the Supreme Court of Appeal held that “[t]he effect of PIE is not to expropriate the landowner and cannot be used to expropriate

someone indirectly and the landowner retains the protection of [section] 25 of the Bill of Rights”.^[16] This Court, in *Blue Moonlight*, held that “a private owner has no obligation to provide free housing”^[17] and that “[u]nlawful occupation results in a deprivation of property under [section] 25(1)”^[18] of the Constitution. Section 26(2) of the Constitution guarantees the right to access to adequate housing and places a positive obligation on the state to realise that right.

[38] Of course when dealing with considerations of justice and equity, the capacity of a landowner to provide alternative accommodation and the peculiar circumstances of an evictee are relevant. But the fact that Mr Grobler has repeatedly made offers of alternative accommodation to Mrs Phillips should not be taken as creating any obligation on him to offer alternative accommodation. In *Port Elizabeth Municipality*^[19] this Court stated that an offer of alternative accommodation is not a pre-condition for the granting of an eviction order but rather one of the factors to be considered by a court.^[20] In *City of Johannesburg*^[21] the Supreme Court of Appeal held that “an eviction order in circumstances where no alternative accommodation is provided is far less likely to be just and equitable than one that makes careful provision for alternative housing”.^[22]

[39] In determining the competing interests of both parties to eviction proceedings, due regard must be had to the considerations of

“justice” and “equity” as required by PIE. In Hattingh^[23] *this Court said:*

“In my view the part of [section] 6(2) that says: ‘balanced with the rights of the owner or person in charge’ calls for the striking of a balance between the rights of the occupier, on the one side, and those of the owner of the land, on the other. This part enjoins that a just and equitable balance be struck between the rights of the occupier and those of the owner. The effect of this is to infuse justice and equity in the inquiry.”^[24]

[40] Claytile, as well, reminds us that there has to be “some give by both parties”. In essence, when balancing the interests, compromises have to be made by both parties, in order to reach a just and equitable outcome. A disturbing feature in this matter is that very little effort was made by Mrs Phillips to seriously consider the several offers of alternative accommodation made by Mr Grobler. She also did not make any counter- offers in response to the generous offers of alternative accommodation made by Mr Grobler.

[41] Mrs Phillips was approached by Mr Grobler, personally and through his attorneys, on several occasions before the commencement of the eviction proceedings and offered alternative accommodation in a bid to reach a compromise. None of these offers were accepted. During the Magistrates’ Court proceedings, after the order of eviction was granted in Mr Grobler’s favour by the Court, he made an offer to bear Mrs Phillips’ reasonable costs of accommodation in a retirement centre for a period of 12 months provided that those costs were limited to R 4000 per month. He also offered to

assist Mrs Phillips with her relocation costs and agreed that she could continue to occupy the property for two months after the date of the order. This offer was also rejected. Her counsel made much of the fact that this offer was made during the section 4(8) stage of the proceedings and was not an offer for alternative accommodation. However, one cannot overlook that Mr Grobler, even

after having been granted an eviction order, attempted to assist Mrs Phillips. All of this is relevant for the purposes of determining

what is just and equitable.

[42] During proceedings in the Supreme Court of Appeal, Mr Grobler was afforded an opportunity to make an additional offer of alternative accommodation to Mrs Phillips. We know that Mr Grobler offered to purchase an upmarket apartment in a secure complex in the Somerset West area, where Mrs Phillips could live for the rest of her life. According to the Supreme Court of Appeal, this offer was rejected because Mrs Phillips was accustomed to life in the house she presently occupies and enjoys not only the freedom and space it affords, but also the environment around it.

[43] Before the Supreme Court of Appeal judgment was handed down, Mr Grobler sent a list of several properties to Mrs Phillips and invited her to view them. It is not in dispute that only three of these properties were viewed by Mrs Phillips and none of them were deemed acceptable to her. Apart from the tenders for alternative accommodation, Mr Grobler consented to a draft order of court that would direct him to purchase a two bedroom dwelling in a good condition in Somerset West within a period of 30 days from the date of order. He further undertook to arrange for the removal and transportation costs of Mrs Phillips’ furniture and personal goods to the new premises. She would have a lifetime right of residence in the property. Mrs Phillips’ counsel argued before us that she has not taken advantage of the offers made to her because of her belief that she has a lifetime right to occupy the property. Whilst she could initially have laboured under this wrong impression,

she subsequently managed to obtain legal representation. The Magistrates' Court had already rejected her reliance on an oral lifetime right of habitation. If her continued rejection of the offers was due to poor legal advice, this should not disadvantage Mr Grobler. The efforts made by Mr Grobler from the time the property was registered in his name until the present application show that Mr Grobler has consistently been at pains to resolve the matter amicably, and no effort was made by Mrs Phillips to meet him halfway.

[44] The Supreme Court of Appeal failed to balance the rights of both parties. Mr Grobler is the owner of the property and has been enforcing his rights of ownership for the past 14 years. He has offered alternative accommodation on numerous occasions. If this offer were to be accepted, Mrs Phillips will continue to enjoy having a decent home. Furthermore, the Supreme Court of Appeal placed too much emphasis on Mrs Phillips' peculiar circumstances. A just and equitable order should not be translated to mean that only the rights of the unlawful occupier are given consideration and that those of the property owner should be ignored. And it does not mean that the wishes or personal preferences of an unlawful occupier are of any relevance in this enquiry.

[45] Mr Grobler argued that the effect of the Supreme Court of Appeal judgment is that he now has to provide free housing indefinitely to Mrs Phillips. The order of the Supreme Court of Appeal effectively sets aside the eviction order of the Magistrates' Court, allowing Mrs Phillips to continue to live in Mr Grobler's property indefinitely. This is in conflict with Blue Moonlight where this Court held:

"It could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation for some time. Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient."[25]

Mr Grobler has had to endure Mrs Phillips' unlawful occupation on his property for 14 years. This cannot be said to conform to the prescripts of what would constitute "some time".

[46] It is an important consideration that an eviction order in these circumstances will not render Mrs Phillips homeless. The offer advanced by Mr Grobler still stands. If it is made an order of court, it will essentially mean that Mrs Phillips will only be required to relocate from one home to another in the same immediate community within Somerset West. In essence, the order will not have the effect of uprooting her from the community she has known for decades. In my view, such an order would be just and equitable.

[47] The dwelling being offered will be similar to the one currently being occupied. Mr Grobler has undertaken to pay for the relocation costs. He is also willing to wait for a period of six months from the date of registration to afford Mrs Phillips an opportunity to vacate the present property and take occupation of the dwelling. This is a reasonable period.

[48] The offer is generous and should not be construed as setting a precedent on what other private landowners are obliged to do in similar circumstances. As already stated, there is no obligation on a private landowner to provide alternative accommodation to an unlawful occupier.

Order

[49] I make the following order:

For the Applicant:

W Vos instructed by Miller Bosman le Roux

Incorporated

For the First to Third Respondents: E Fagan SC and A Morrissey instructed by

Stellenbosch Law Clinic

[1] 19 of 1998.

[2] A right to habitatio, alternatively, habitation is a lifelong right to live in a house owned by another. See *Hendricks v Hendricks* [2015] ZASCA 165; 2016 (1) SA 511 (SCA) at para 6 where it states that “the right to habitation as a servitude is a limited real right which confers on the holder the right to dwell in the house of another, without detriment to the substance of the property”.

[3] 62 of 1997.

[4] When a party applies for a declaratory order, a court is required to declare that a litigant has certain rights. This matter focused on whether Mrs Phillips was an unlawful occupier and, if so, a consideration of whether alternative accommodation was available for her. This is not akin to an application for a declaratory order.

[5] *Machele v Mailula*

[2009] ZACC 7; 2010 (2) SA 257 (CC); 2009 (8) BCLR 767 (CC).

[6] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*

[2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC).

[7] *Baron v Claytile (Pty) Ltd* [2017] ZACC 24; 2017 (5) SA 329 (CC); 2017 (10) BCLR 1225 (CC).

[8] *Port Elizabeth Municipality v Various Occupiers*

[2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 11.

[9] *University of Johannesburg v Auckland Park Theological Seminary*

[2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC).

[10] Id at para 50.

[11] *Snyders v De Jager*

[2016] ZACC 55; 2017 (3) SA 545 (CC); 2017 (5) BCLR 614 (CC).

[12] Id at para 78.

[13] *Oranje v Rouxlandia Investments (Pty) Ltd* [2018] ZASCA 183; 2019 (3) SA 108 (SCA).

[14] Id at para 21.

[15] *Ndlovu v Ngcobo, Bekker v Jika*

[2002] ZASCA 87; 2003 (1) SA 113 (SCA).

[16] Id at para 17.

[17] *Blue Moonlight* above n 6 at para 31.

[18] Id at para 37.

[19] *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001

(4) SA 759 (E).

[20] Id at 769C-E.

[21] *City of Johannesburg v Changing Tides 74 (Pty) Ltd*

[2012] ZASCA 116; 2012 (6) SA 294 (SCA).

[22] Id at para 15.

[23] *Hattingh v Juta*

[2013] ZACC 5; 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC).

[24] Id at para 32.

[25] *Blue Moonlight* above n 6 at para 40.

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