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

Case No. 9643/07

In the matter between:

OMARJEE ESSOP MOHAMED OMAR N.O.
(in his capacity as trustee of the
Essop Mohamed Omar Will Trust) Applicant

and

EBRAHIM ESSOP MOHAMED OMAR	First Respondent
AHMED ESSOP MOHAMED OMAR	Second Respondent
ANWA ESSOP	Third Respondent
LATIEFA EDRIES	Fourth Respondent
JANEY HALIM	Fifth Respondent
SHANAAZ SAMUELS	Sixth Respondent
MAGDALENE GEORGE	Seventh Respondent
REDIWAAN PHILANDERS	Eighth Respondent
MOGAMAT ABRAHAMS	Ninth Respondent
VERONICA BART	Tenth Respondent
NADIA ROSSIE	Eleventh Respondent
ALLIE RHODE	Twelfth Respondent

JUDGMENT DELIVERED ON 11th DAY OF MAY 2010

BINNS-WARD J:

[1] During the 1940's, the late Essop Mohamed Omar acquired certain immovable property in an area of Cape Town best known as District Six. The property is currently designated as Erven 8504, 8505 and 8513, Cape Town. It is on land bordered by Nelson, Pontac and Aspeling Streets. A number of small dwelling houses stand on the property. These have been occupied by various family members of Mr Omar and also by some longstanding tenants. One of the tenants, who passed away after the issue of the papers in this application and before the hearing, had lived on the property since 1916. She had come to the property with her parents as a seven year old child. Her daughter is the tenth respondent. The property is situated in a small section of District Six on the western side of the Eastern Boulevard that was left physically untouched by the mass removals and demolition that affected most of District Six in one of the well known notorious chapters of apartheid history.

[2] The late Mr Omar died in 1969. In terms of the joint Will executed by him and his subsequently deceased wife, the late

Mrs Bibi Suyleman Omar, the property vested in a testamentary trust until the latter's death in 2001. The Will provided that upon the termination of the trust, the residue of the estate was to devolve on four of the children of the late Mr and Mrs Omar. The immovable property in issue in the current case forms part of that residue. The bequest caused discord in the family because it excluded some of children. The family discord was settled in terms of a so-called redistribution agreement, which provided that eight of the Omar children should inherit the residue of the estate upon the death of the late Mrs Bibi Omar.

[3] The applicant in the current matter is the eldest son of the late Mr and Mrs Omar. He sues in his capacity as the sole trustee of the Essop Mohamed Omar Will Trust. He seeks an order that the respondents and all those occupying the property under them be ordered to vacate the property, failing which that they be evicted therefrom. The application was instituted in terms of s 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act'). The applicant requires the property to be vacated so that he can sell the property and pass vacant possession to the purchaser. The applicant's intention is to

distribute the free proceeds of the sale to the residuary heirs and to formally wind up the trust in accordance with the Will.

[4] The current application was launched in July 2007, when the applicant sought and was granted an order that a 'section 4(2) notice', a copy of which was attached to the notice of motion in the preliminary application brought *ex parte*, be 'authorised and issued'. The s 4(2) notice succinctly set out the grounds of the principal application and the nature of the substantive relief that was sought. It informed the respondents of the date upon which the principal application had been set down for hearing and advised them of their entitlement to appear and defend the case, as well as their right to apply for legal aid. All the respondents opposed the application; although by the time of the hearing the fifth, sixth and twelfth respondents had voluntarily vacated the property and no longer had an interest in the proceedings.

[5] The applicant had for some time prior to the institution of the current application been engaged in various endeavours to wind up the trust. These endeavours, which I do not find it necessary to particularise, had entailed engagement with the testamentary heirs and the occupants of the property in order to try to find an agreed

basis for the disposition or transfer of the property. In this regard consideration had been given to the subdivision of the property, but after expert advice had been taken and regard had to the limited means of the trust, this had been discarded as impracticable. The various measures considered by the applicant, including an attempt by him to sell the property on auction, had given rise to heated opposition, during the course of which the occupants of the property enlisted the support of a community trust involved in representing the interests of the District Six land restitution claimants.[1]

[6] Part of this history led to the institution of an application[2] by one of the heirs, one Moosa Essop Mohamed Omar,[3] for an order to the following effect:

> 1. Declaring that the only power granted to the First Respondent [i.e. the applicant in the current case] in terms of the will in relation to the rest and residue[4] of the estate is to transfer the properties into the names of all the beneficiaries jointly, alternatively, to subdivide the rest and residue of the estate and to transfer the subdivided units into the names of the beneficiaries;

[1] The property in issue is not the subject of any land restitution claims.
[2] The application was brought in this court under case no. 479/06.
[3] The second respondent in the current application.
[4] The expression 'rest and residue' derives from the terms of the Will.

> 2. Directing the First Respondent to transfer the rest and residue of the estate into the names of the beneficiaries jointly, alternatively, as subdivided units;
>
> 3. Directing that the costs of this application be costs in the winding up of the Trust….[5]

[7] The application to compel the transfer of the property to the Will beneficiaries in joint ownership, or in subdivided units was dismissed (by Jamie AJ). In the reasons for judgment it was held that the Will did not prescribe how effect was to be given to the bequest and that the first respondent in that case (the applicant in this case) had unrestricted authority to implement the bequest as he saw most practicable, including by alienating the assets in order to render the proceeds susceptible to division in equal shares between the beneficiaries. It follows that there can be no argument at this stage against the applicant's entitlement to sell the property for the purpose aforementioned and, if it should facilitate the execution of that objective, to seek the eviction of any person currently unlawfully occupying the property.

[8] There was some attempt in the answering papers to argue that the respondents have not been given valid notice to vacate the property and that they are not unlawful occupiers. I find it

[5] Quoted from the judgment in case no. 479/06.

unnecessary to examine these arguments in any detail. While not abandoned, they were not pursued with any enthusiasm at the hearing by Mr *Wilkin*, who appeared at hearing as counsel for the first to fourth and seventh to twelfth respondents; rightly so in my opinion.[6] Suffice it to say that I am satisfied that the respondents have all been given sufficient and effective notice to vacate the properties and that in disregard of such notice they have remained there unlawfully.

[9] The effect of the PIE Act is that, if the property in question happens to be the unlawful occupier's home, the owner is not entitled on common law grounds to obtain the eviction of the occupier simply because the occupier's presence on the property is unlawful. An eviction order can be made only after all the relevant circumstances have been considered by the court and the court concludes upon such consideration that it would be just and equitable to make the order. Sub-sections 4(7),(8) and (9) of the PIE Act are applicable in the current case. Those sub-sections provide:

[6] Although the heads of argument submitted by Mr *Wilken* suggest that he represents the twelfth respondent. The evidence is that the twelfth respondent has vacated the property.

(7) 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.

(8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine-

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).

(9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.

[10] Before addressing whether it would be just and equitable to make an order as sought by the applicant, and if so, upon what terms, it is necessary to deal with three issues raised by the respondents *in limine*. These were (i) a procedural objection to the amenability of the application to determination in the absence of a notice of motion; (ii) an objection to the matter being heard before the receipt of an improved report from the local municipality and (iii) an objection to the application being heard before mediation by

the municipality, as contemplated in terms of s 7 of the PIE Act, had been attempted. After hearing argument on these preliminary issues I declined to uphold them and indicated that I would furnish my reasons in the judgment on the merits of the main case.

Absence of notice of motion

[11] As mentioned earlier, the relief sought by the applicant was set out in the notice served on the respondents in terms of s 4(2) of the PIE Act. As required by the Act, the notice in terms of s 4(2) was also served on the municipality (which was later joined as the thirteenth respondent). The notice in terms of s 4(2) was accompanied by the founding affidavit made in support of the relief sought in the principal application. (I distinguish the 'principal application' from the application for permission to serve the s 4(2) notice, which was moved in terms of a notice of motion moved in *ex parte* proceedings.) There was no notice of motion setting out the relief sought in the principal application, as required in terms of rule 6(1) and (2) of the Uniform Rules.

[12] The objection to the absence of a notice of motion is well-taken from a technical point of view. The time at which the

objection should have been taken, however, was before the delivery of any answering papers. As matters transpired, the respondents filed a full set of answering papers traversing the merits of the principal case at length. They do not appear to have been in any way embarrassed by the absence of a notice of motion. They were adequately informed by the notice in terms of s 4(2) of the relief that was being sought by the applicant. The applicant then filed a replying affidavit. In addition, the matter was thereafter postponed by order of court made by agreement between the parties on 31 August 2009; in terms of which, amongst other things, the municipality was joined as a respondent in the application and directed to file a report, to be confirmed on affidavit, dealing with various matters. The order granted the respondents leave to respond on affidavit to such report.

[13] The order made on 31 August 2009 contained (in paragraph 4 thereof) a rather curious provision:

> 4. The matter is postponed until 21st April 2010, for consideration of the matter, including, if appropriate, the possibility of mediation to seek a resolution of the matter and such other interim or final order, as it may be considered appropriate.
>
> 4.1 On the 21st April 2010 Applicant shall ask for the relief as set out in its 'Notice of Motion', a copy whereof is attached hereto marked "A".

> 4.2 Respondents specifically reserve the right to dispute that said document indeed constitutes a valid notice of motion or that this 'application' has been properly initiated or pursued.

Attached to the order, as annexure A, was a document entitled 'notice of motion'. It gave notice of the applicant's intention to apply for the relief set out therein on 21 April 2010 and stated that the affidavits filed of record would be used in support of the application. The order of court and annexed 'notice of motion' were served by the Sheriff on all the respondents, with the exception of the eighth respondent.

[14] It is evident on the record that all the respondents, including the eighth respondent, have notice of these proceedings and that all of them who are opposed to the relief sought are represented by counsel. The opposing respondents have filed answering papers and were party to obtaining an order joining the City of Cape Town as the thirteenth respondent and imposing on the City the obligation of filing a report confirmed on affidavit. It is taking technicality to absurd lengths for the respondents to suggest in the circumstances I have just described that the application should not be heard because the provisions of rule 6 were not complied with at the outset. It has been pointed out on several occasions in the

past that the rules of court are there for the court; and not the court for the rules. The rules are applied to facilitate the administration of justice, not to hinder it. As it is, rule 30 and rule 30A of the Uniform Rules afforded the appropriate means and procedure for a party to take this type of objection. One of the requirements of rule 30 is that the objecting party must raise the objection before itself taking a further step in the proceedings. The rationale for this requirement is highlighted by the unacceptable consequences that would attend upholding an objection of this nature at an advanced stage of the proceedings, when full papers have been exchanged and the matter is ripe for hearing. (To Mr *Wilkin's* credit, he did not press this objection when it was clear that it found no favour with the court.)

The adequacy of the municipality's report

[15] Turning to the second preliminary objection. The municipality filed two reports in the form of affidavits made by Mr Gregory Goodwin, who holds the office of Head: Sub-councils and Area Co-ordination. The first affidavit was 13 pages in length, supported by annexures running to 77 pages. It set out in general terms a description of the enormity of the housing shortage in the

City of Cape Town. This has been caused, in the main, by the ingress of several million people into the city in recent years as part of the large scale urbanisation that has been the most prominent characteristic of South African social development in recent history.[7] According to the report, there are currently approximately 400 000 inadequately housed families in the metropolitan area. This number is currently increasing by between 16 000 to 18 000 households annually.

[16] On consideration of the report I am satisfied that the City of Cape Town is conscientiously striving to address its constitutional obligations in respect of the provision of adequate housing within the applicable financial and logistical constraints. I accept the evidence that there is no way in which the City is able to address the accommodation requirements of any evictee from the property within its current housing programmes. It seems to me in any event that the basic accommodation opportunities that are made available in terms of the programme are directed at providing basic shelter and access to 'basic municipal services', as defined in the Local Government: Municipal Systems Act 32 of 2000; and not at

[7] For an insight into this 'universal social phenomenon', see *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para. [5]; especially footnote 7.

providing alternative accommodation at the level enjoyed by the occupants of formal housing such as that provided to the unlawful occupiers of the property currently in issue. In this regard it is perhaps significant that s 4(7) of the PIE Act requires the consideration of the availability of alternative *land* for unlawful occupiers and not of alternative *housing*.[8]

[17] Mr Goodwin further suggested that the Department of Social Services was a more appropriate agency of government to deal with the problems that might arise if all the current occupants of the property, including those unable independently to obtain alternative accommodation, were to be evicted. He pointed out in his initial report, however, that the papers provided insufficient information about the means and income of the occupiers to permit a proper assessment whether or not they were able to make their own arrangements with regard to alternative accommodation.

[18] In response to the additional information subsequently provided, Mr Goodwin expressed the view of the City that only the eleventh respondent was in need of consideration for the provision of alternative accommodation with the assistance of the State. He

[8] Cf. *Port Elizabeth Municipality*, supra, at para.s [19]-[20] as to the objects of the PIE Act assessed in the context of the Constitution.

articulated the City's submission that if the eleventh respondent (an 80 year old woman) was in need of assistance, the provincial department of Social Development should be able to subsidise board and lodging costs at one of the 'number of State funded homes for the aged in the Western Cape'.

[19] The respondent's counsel criticised the reports submitted by the municipality as having failed to engage sufficiently with the individual circumstances of each of the respondents and as having shown insufficient commitment to determining the availability of alternative accommodation for the respondents. In my view this criticism is unfounded. I do not consider that the provisions of the PIE Act place a responsibility on municipalities to involve themselves in the detail of the possible consequences of every eviction case.[9] The criterion of reasonableness, which is defined with regard to the characteristics of the case judged in the context of the local authority's practical ability to ameliorate the probable effects of an eviction, governs the extent of the municipality's

[9] In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg and others* 2008 (3) SA 208 (CC) at para. [26] the Constitutional Court reiterated the point made earlier in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (2000 (11) BCLR 1169) at para. [82] that 's 26(2) [of the Constitution] mandates that the response of any municipality to potentially homeless people with whom it engages must also be reasonable. It may in some circumstances be reasonable to make permanent housing available and, in others, to provide no housing at all. The possibilities between these extremes are almost endless. It must not be forgotten that the city cannot be expected to make provision for housing beyond the extent to which available resources allow.

obligation under s 26(2) of the Constitution. Similar considerations will determine the extent to which the courts will look to a municipality for detailed input. This much is recognised in the two-judge bench judgment of this court in *Drakenstein Municipality v Hendricks and others* 2010 (3) SA 248 (WCC). (It was also the criterion which decided me against insisting on a report from the municipality in *Absa Bank Ltd v Murray and Another* 2004 (2) SA 15 (C) (2004 (1) BCLR 10), despite being of the view (which I still hold) that a report by the municipality should be filed in all s 4 PIE applications.) I need only say that I am in full agreement with the reasoning set out in para.s [15]-[17] and [26]-[32] of the *Drakenstein Municipality* judgment.

[20] The respondent's counsel however drew attention to the recent judgment of the Supreme Court of Appeal in *The Occupiers of Shorts Retreat v Daisy Dear Investments* [2009] ZASCA 80 (3 July 2009),[10] in which, at the request of the parties, an order was made upholding the appeal against the eviction order granted by the court of first instance and remitting the matter for further consideration, with regard, amongst other things, to a report that

[10] Available online at http://www.supremecourtofappeal.gov.za/judgments/sca_2009/sca09-080.pdf. and http://www.saflii.org.za/za/cases/ZASCA/2009/80.html .

the local authority was directed to file dealing with (I quote from para (c) of the order) –

> (i) What steps it has taken and what steps it intends or is able to take in order to provide alternative land and/or emergency accommodation for the Occupiers of Erven 101, 102, 104 and 112 Shorts Retreat in the event of their being evicted and when such alternative land or accommodation can be provided;
>
> (ii) What the effects would be if the eviction would take place without alternative land or emergency accommodation being made available;
>
> (iii) What steps can be taken to alleviate the effects of the current occupation of the properties referred to above if the occupiers are not immediately evicted and pending alternative land or accommodation being made available.

[21] I was informed by counsel that the judgment in *The Occupiers of Shorts Retreat* and certain judgments of the Gauteng High Courts[11] which suggest that the local municipality should be joined as a respondent in all eviction cases under the PIE Act were the underlying reason for the seeking of the order taken by agreement in this matter on 31 August 2009 joining the municipality as a respondent and directing it to file a report.

[22] In my view the nature of the input that the court will look to from a municipality will depend on the peculiar circumstances of

[11] *CashBuild (South Africa) Pty Ltd* v *Scott and Others* 2007 (1) SA 332 (T); *Sailing Queen Investments v The Occupants of LA Colleen Court* 2008 (6) BCLR 666 (W) and *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* 2009 (1) SA 470 (W).

the case in issue. One of the most material considerations in this regard will be whether the application for eviction is instituted by or at the instance of the municipality itself.

[23] As acknowledged in the *Drakenstein Municipality* judgment,[12] 'there will inevitably be a grey area between' the category of case where the relevance of the availability of alternative land is evident and that in which it is not readily apparent. The court is always in a position to call for further information from a municipality if that should appear necessary.

[24] The role of the local authority in the statutory framework is most obviously relevant where the eviction of communities of landless persons is in issue. The progressive realisation by the State of the right to everyone to adequate housing in terms of s 26(2) of the Constitution is most centrally directed at meeting the needs of this large, mainly recently urbanised, section of our society. The facts in *The Occupiers of Shorts Retreat* afford a recent example of such a case. In that matter the persons subject to eviction belonged to a community of approximately.2000 people, the majority of whom were unemployed, poor and homeless,

[12] At para. [32].

settled in informal dwellings on vacant land. They had been there for about five years. The application for their eviction had been instituted by the private landowner, who had tolerated their existence without objection, on the insistence of the municipality - apparently because the existence of the informal dwellings contravened the health bylaws. In the circumstances of that case a detailed input from the municipality dealing with available alternative means of dealing with the situation was obviously called for before the court could be satisfied that it would be just and equitable to make an eviction order.

[25] In the current case the municipality's report makes it clear that the municipality is unable to accommodate any of the unlawful occupiers of the property who may be subject to eviction in these proceedings in its housing programme. Unpalatable as that information might be, nothing will be served by requiring further reports from the local authority. The reports have served a useful purpose in informing the court, to the extent that it might reasonably be expected of a local authority so to do, of the realities that any evictee without the means to obtain alternative accommodation will face if an eviction order should follow. These

realities form an important part of the matters that the court is required to weigh in deciding whether the grant of an eviction order would be just and equitable within the meaning of the PIE Act. I see no point in the circumstances of this case in imposing further on the local authority's limited resources by requiring a further supplemented report.

Mediation

[26] The other criticism directed at the municipality's reports was that they did not address the possibility of mediating the dispute between the applicant and the respondents. It is convenient to consider this complaint in the context of dealing with the respondents' third preliminary objection; viz. that the application should not be entertained until mediation by the local authority had been attempted.

[27] Section 7 of the PIE Act provides (insofar as currently relevant):

> **Mediation**
>
> (1) If the municipality in whose area of jurisdiction the land in question is situated is not the owner of the land the municipality may, on the conditions that it may determine, appoint one or more persons with expertise in dispute resolution

to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the municipality may determine.

(2) If the municipality in whose area of jurisdiction the land in question is situated is the owner of the land in question, the member of the Executive Council designated by the Premier of the province concerned, or his or her nominee, may, on the conditions that he or she may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the said member of the Executive Council may determine.

(3) Any party may request the municipality to appoint one or more persons in terms of subsections (1) and (2), for the purposes of those subsections.

(4) A person appointed in terms of subsection (1) or (2) who is not in the full-time service of the State may be paid the remuneration and allowances that may be determined by the body or official who appointed that person for services performed by him or her.

[28] In support of this ground of preliminary objection the respondent's counsel relied on the dicta of Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para.s [39] – [45]. At para. [45] of the judgment Sachs J said:

> In my view, s 7 of PIE is intended to be facilitative rather than exhaustive. It does not purport, either expressly or by necessary implication, to limit the very wide power entrusted to the court to ensure that the outcome of eviction proceedings will be just and equitable. As has been pointed out, s 26(3) of the Constitution and PIE, between them, give the courts the widest possible discretion in eviction proceedings, taking account of all relevant circumstances. One of the relevant circumstances in deciding whether an eviction order would be just and equitable would be whether mediation has been tried. In appropriate circumstances, the courts should themselves order that mediation be tried.

[29] Mr *Wilkin* also relied on a passage from the judgment in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg and others* 2008 (3) SA 208 (CC) at para. [13]:

> It became evident during argument that the city had made no effort at all to engage with the occupiers at any time before proceedings for their eviction were brought. Yet the city must have been aware of the possibility, even the probability, that people would become homeless as a direct result of their eviction at its instance. In these circumstances those involved in the management of the municipality ought at the very least to have engaged meaningfully with the occupiers both individually and collectively.

The dictum of Yacoob J at para. [13] was uttered in the context of furnishing the court's reasons for an interim order, made earlier in the proceedings, which had directed the City of Johannesburg 'to engage with' the potential evictees in an effort, amongst other matters, 'to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned'.[13]

[30] In *Port Elizabeth Municipality v Various Occupiers*, the parties at whom the eviction application by the Port Elizabeth municipality had been directed were 68 people, including 23 children, who occupied 29 shacks erected on undeveloped

[13] The terms of the order are set out at para. [5] of the judgment.

privately owned land. They were landless persons who had settled themselves on vacant land close to the City. The eviction proceedings in that case were instituted, not in terms of s 4 of the PIE Act, but in terms of s 6. While recognising that the provisions of s 25(3) to (8) make it plain that the right to property in terms of s 25(1) of the Constitution is not an absolute right, the societal considerations and constitutional implications of an eviction at the instance of an organ of state are different from those which pertain in an application by a private property owner.[14] An incidence of this is a duty on a municipality which seeks the eviction of persons on property within its jurisdiction to engage with them in order to try to achieve a resolution that recognises and addresses the needs and concerns of the potential evictees. The stark difference between the current case and that in *Port Elizabeth Municipality* is highlighted by contrasting the facts of this matter with those apparent in the discussion at para.s [48]-[59] of the *Port Elizabeth Municipality* judgment.

[31] *Occupiers of 51 Olivia Road* was also an application for eviction at the instance of a municipality. There was no order

[14] Cf *Port Elizabeth Municipality*, supra, at para. [24], where the observation is made that the PIE Act reflects the difference in the discreteness of the provisions of s 4 and s 6, respectively.

made that the dispute between the municipality and the occupiers of the condemned buildings in issue in that case should be referred to mediation. Rather, as pointed out above, the municipality was ordered to engage with the occupiers.

[32] I do not find it necessary to rehearse the reasoning of the Constitutional Court in making that order. Suffice it to say that a central consideration was the character of the application for eviction as one at the instance of the municipality, assessed in the context of the constitutional obligations of a municipality towards all persons living in its jurisdiction. The conclusion (stated in para. s [21] and [22]) is that 'in any eviction proceedings at the instance of a municipality therefore, the provision of a complete and accurate account of the process of engagement, including at least the reasonable efforts of the municipality within that process, would ordinarily be essential'… 'The ejectment of a resident by a municipality in circumstances where the resident would possibly become homeless should ordinarily take place only after meaningful engagement. Whether there had been meaningful engagement between a city and the resident about to be rendered

homeless is a circumstance to be considered by a court in terms of s 26(3)' of the Constitution.

[33] The order taken in the *Shorts Retreat* matter was (notwithstanding the absence of any reference thereto in the judgment) the consequence of a palpable failure by the municipality in that case to comply with the requirements described at paragraphs [21] and [22] of the judgment in *Occupiers of 51 Olivia Road*.

[34] I confess to some difficulty in understanding exactly how a court is expected to make an effective order directing private parties to refer their dispute to mediation. Mediation, like arbitration, is ordinarily premised on an underlying consensual reference by the parties. This is confirmed in the passage from Nupen '*Mediation*' in Pretorius (ed) *Dispute Resolution* (Juta, Cape Town, 1993) at p. 39, quoted at footnote 38 in para. [40] of the *Port Elizabeth Municipality* judgment: 'Mediation is a process in which parties in conflict voluntarily enlist the services of an acceptable third party to assist them in reaching agreement on issues that divide them.' In matters where mediation is compulsory by reason of a statutory provision, the legislation invariably makes provision

for the establishment and funding of a mediatory tribunal; take, for example, the Commission for Conciliation, Mediation and Arbitration established in terms of s 112 of the Labour Relations Act 66 of 1995.

[35] The position might be different when the municipality is the party applying for the eviction. In that situation it might be that the municipality could be said to be under a statutory obligation to consider mediation and the circumstances of a given case might justify a conclusion that it had been unreasonable in not referring the dispute to mediation. That, presumably, is the sort of situation that Sachs J had in mind when he ventured that it might be appropriate in a given case to order mediation. It seems to me, however, that the most this court could do in the current case to try to encourage a mediated settlement of the dispute would be to decline to make an order until the applicant had satisfied it that everything reasonably possible had been done by it to engage in such a process. However, the evidence indicates strongly that no positive purpose would be served by following such a course in this matter. It is not necessary to review the history in detail, but it is evident that various courses possible to resolve the issue have

already been the matter of lengthy and drawn out engagement and debate. Indeed, mediation under the auspices of one of the respected members of the family, Ms Tasneem Essop, a former member of the Executive Council of the Western Cape, was in fact attempted, with no success.

[36] It is moreover significant that notwithstanding that both sides in this case are legally represented, no request has been made to the municipality in terms of s 7(3) of the PIE Act for the appointment of a mediator. On the peculiar facts of the case, even had such a request been directed, it is not apparent to me why the municipality should have acceded to it. A rational basis for the exercise by the municipality of its discretion in terms of s 7(1) in favour of appointing a mediator would be afforded if the characteristics of the matter suggested a realistic possibility that a settlement could be facilitated. That does not appear to be the case. The dispute has dragged on for nearly nine years, despite the conscientious efforts of the applicant to bring matters to a mutually satisfactory conclusion. The dispute in question is suitable for determination by a court of law and this court would, in

my view, be failing in its duty if it were to further delay a determination of the matter in the prevailing circumstances.

The considerations in terms of s 4(7) of the PIE Act

[37] The applicant's rights are clear, but, as mentioned, they are not absolute. Whether it would be just and equitable to grant an eviction order as prayed depends on the circumstances; more particularly, on the one side, the personal circumstances of the occupiers of the property and their ability to procure alternative accommodation and, on the other side, the applicant's reasons for bringing the application.

[38] Before turning to consider the individual circumstances of the affected respondents, it is convenient to address the argument that it would not be just and equitable to grant an order for the eviction of any of the respondents because of the significance of the property as a remnant of the previously existing District Six and because the respondents' situation as persons who remained living in District Six when the surrounding area was subject to mass removals and extensive demolition of the built environment gave rise to some special form of 'community' which it would be

unjust and inequitable to destroy. These submissions were made with reliance on an affidavit made by the Provincial Manager in the Western Cape of the South African Heritage Resources Agency.

[39] I did not find these submissions particularly persuasive. The National Heritage Resources Act 25 of 1999 provides for the formal declaration of heritage sites and for the protection and management of such sites. The effect of those provisions, if made applicable to the property in issue, would be to prevent their realisation for commercial redevelopment in the manner contemplated by the applicant to enable him to raise a sum of money for distribution to the trust beneficiaries. Notwithstanding the passage of nearly three years since the answering papers were filed nothing has occurred to suggest that the property is likely to obtain heritage status in terms of the legislation.

[40] While I readily accept that there is a sense of community between the current occupiers of the property, the indications are that this sense of community is fundamentally related to family connection and neighbourliness established through a long period of living in close mutual proximity, rather than to the history of District Six. These considerations would arise irrespective of

where the property might be situated. It is only natural that people tend to grow attached to established neighbours and familiar facilities whenever they live in any one place for all, or a very significant part of their lives. In the current case that phenomenon is accentuated by the fact that the majority of the respondents are in occupation of various parts of the property by reason of family ties or connections.

[41] Insofar as District Six implications play a role, it cannot be overlooked that the eviction proceedings in issue arise because of the testamentary scheme of the head of an established District Six family and property owner; and that it is being effected at the instance of a scion of that family, specially entrusted by the patriarch with the task, so that several members of the second generation of that family can come into part of their inheritance. It seems that it is only those heirs currently in occupation that oppose the relief sought by the applicant. The generation that the founder of the trust wished to benefit are rapidly ageing. They are in their 70's and 80's and it is evident that if the winding up of the estate is to be further delayed they are in danger of not realising their inheritance within their lifetimes. (Indeed one of them passed

away during the three years that have intervened between the launch and the hearing of this application.) These – the non-resident beneficiaries - are also people who lived through and no doubt were traumatised by the tearing down of District Six and the forced removal of the great majority of the community that had been well-established there.

[42] In the result, while I do not entirely disregard the considerations invoked with reference to the history of District Six, they do not weigh with me as heavily in the decision that has to be made as do the socio-economic circumstances of each of the respondents. I am most centrally concerned in my approach to deciding the matter with the potential of any eviction order to render some of the respondents homeless.

[43] The first respondent is an heir and beneficiary of the Trust. At the time that he deposed to his supporting answering affidavit in the application, in September 2007, he was 75 years of age. He has resided on the property without interruption since 1964; initially at 128 Pontac Street and latterly (since about 1977) at 126-128 Pontac Street. According to his answering affidavit, the first respondent is a pensioner with an income of approximately

R4 000.00 a month (as at 2007). He averred, that considering his age, his state of health was fair. He pointed out that he resided at the property with his second wife, Dawn Mohamed, who is some eight years younger than him, but in a state of poor health. He claimed not to be in a financial position to fund alternative accommodation and pointed out that his children live in Johannesburg. During the time that he has lived at the premises he has affected repairs and improvements to the property, without reimbursement. He placed on record that he had no objection to the sale of the property, as long as the sale was subject to the continuing right of occupation of all residents who currently reside there.

[44] The second respondent, who is also a beneficiary of the Trust, has resided on the property since 1971. He initially lived on the part known as 126 Pontac Street with his wife and children. His wife's late mother and her two sisters, one of whom is the fourth respondent in these proceedings, lived at the same address. In about 1977 he and his immediate family moved to 138 Pontac Street because the first respondent wanted to incorporate 126 Pontac Street with the premises at 128 Pontac Street. At that

stage the fourth respondent moved into 121 Aspeling Street. At the time he made his supporting answering affidavit, in 2007, the second respondent was a 70 year old pensioner and in receipt of a pension of R820.00 per month. His wife was at that stage a 69 year old pensioner and retired teacher in receipt of a pension of R4 000.00 a month. Second respondent pointed out in his affidavit that during the time he had lived at the premises he had effected repairs and improvement to the property without reimbursement. He indicated that he was in agreement in principle to the subdivision of the property, or the sale thereof, subject, however, to the continuing right of occupancy of all current residents. He pointed out that the premises were his home and that he and his wife had lived in District 6 through out their lives 'and this is our community'. He stated that he could not afford to find reasonable alternative accommodation; certainly not in the area which had been his family home for so long. His family were unable to accommodate him.

[45] The third respondent is the son of the second respondent. He had lived with his mother and father on the premises until 2000 when he married, and moved with his wife to rented premises in

the Bo-Kaap. He said that he always hoped to return to the property and to what he refers to as ‘the community there’ when one of the dwellings might become available. He was able to move into the premises at 134 Pontac Street in late 2004. He paid a rental of R550.00 per month for the premises, which he says had been substantially renovated by him. At the time he made his supporting answering affidavit in the application in September 2007 he was 40 years of age and working as a freelance photographer with income earning capacity of approximately R8 500.00 per month. At the time he had been diagnosed with tuberculosis and regularly attended the TB clinic in Chapel Street just one road down from Pontac Street. He resided at the premises with his wife and daughter. His wife, at the time 32 years old, was employed as journalist at a well known Cape Town newspaper with a nett income in 2007 of approximately R15 000.00.

[46] The fourth respondent was 73 years of age when she deposed to her answering affidavit in September 2007. At that stage she had resided on the property for 36 years, having moved into 126 Pontac Street in 1971 and into 121 Aspeling Street in

1977. As at 2007 the fourth respondent received a pension of R870.00 per month. She pointed out that over the years of living at the premises she had effected many repairs and improvements to the premises, without reimbursement. Her married son lives in Grassy Park with his wife and three children in a two bedroom house which is too small to accommodate her as well. She stated that there is no alternative accommodation available to her and points out that 'this community is my home and my family. I have nowhere else to go.' Updated information, as at April 2010, indicates that the fourth respondent's pension has increased to an amount of R1010.00 per month. In a handwritten affidavit, made on 18 April 2010, fourth respondent reiterated her inability to move in with her son and his family pointing out, in addition to the facts mentioned above, that she is 'a very independent person and able to live on my own. I need my space and will not be able to adapt in an old age home. We are a very close knit community where we assist one another e.g. we go shopping together etc. We are close to all important amenities e.g. mosque, shops etc.'

[47] The seventh respondent, who was born on 23 December 1937, moved onto the property in or about 1980. At that time she

was employed by the first respondent at his ‘strapping factory’. One the seventh respondent’s children, the eighth respondent, also lives on the property, at a different address. The seventh respondent’s current income consists of an old age pension of R1 010.00 per month. She states that her health is poor and she has regularly to attend at Groote Schuur Hospital for treatment. In an update affidavit made on 19 April 2010, the seventh respondent pointed out that her husband had recently died. She stated further that she was ‘very independent and do all my own chores, therefore I do not see myself living in an old age home. … all my children are married and have their own families to take care of and cannot offer me accommodation. We have built up a very close knit community and do not see ourselves living elsewhere. We live in close proximity to all amenities liked church, hospital, shops etc’.

[48] As mentioned, the eighth respondent is a child of the seventh respondent. He has lived in premises, separate from those of the seventh respondent, on the property, at 126A Aspeling Street since 1995. He paid a low rental for the premises. He resides at the premises with his wife and three children. When he deposed

to an answering affidavit in September 2007 he was a 46 year old domestic waste manager with an income of R980.00 per week. He averred that he did not have the means to find alternative reasonable accommodation; certainly not in the same area.

[49] The ninth respondent had been living on the property since 1970. His wife has a family connection to the property, as at the time of her birth her maternal grandparents already lived there. His wife's family were tenants living at the premises at the time it was purchased by the late Mr Essop Mohamed Omar in the 1940's. When he deposed to his answering affidavit in September 2007 the ninth respondent was 63 year old plasterer with a monthly income of approximately R4 000.00. His wife was in receipt of pension of R870.00 per month, which, I have assumed, will have increased to R1 010.00 in line with the old aged pensions receipts of the other respondents referred to. The ninth respondent's adult daughter lives with her parents. As at 2007 she was employed as a clerk with a monthly income of approximately R4 000.00. The ninth respondent points out that during the time that his family had lived on the property various renovations and improvements had been effected, without reimbursement. He

avers that he does not have the means to find reasonable alternative accommodation; certainly not in the area which had been his home for most of his adult life and where his wife was born.

[50] In an updated affidavit, made on 19 April 2010, the ninth respondent stated ‘we do not see ourselves moving into an old age home as we are totally independent and our other two daughters are married and are not able to offer us alternative accommodation. We are very much part of this community and assist one another when the need arises e.g. do our shopping – collecting our pension etc’.

[51] The tenth respondent is a recently retired school teacher. She has lived on the property her entire life. Her mother had moved to the property in 1915, when she was 7 years old, and had lived there ever since until her death in her late nineties, some time after the institution of these proceedings. As at 2007, just before her retirement, the tenth respondent expected to be in receipt of a R60 000.00 once off pension payout and thereafter to receive approximately R2 000.00 per month as a monthly pension. She pointed out that her family was unable to offer her alternative

accommodation and that she herself did not have the means to find reasonable alternative accommodation; certainly not in the area in which she had lived since was born. In an updated affidavit, made on 19 April 2010, the tenth respondent stated 'I do not see myself living in an old age home as I am totally independent and value my space. I involved in my church and community doing voluntary work using my teaching expertise and are called up very often to assist at the neighbouring school were I taught for 20 years. My two sons are married and they are not able to offer me accommodation as their houses are just big enough for their families'.

[52] The eleventh respondent had married into a family which had occupied 130 Pontac Street since the 1940's. When she married her late husband in 1953, he set up home with her in Salt River. His mother and sister remained living in 130 Pontac Street. After her mother-in-law had passed away, and her sister-in-law's husband had obtained work in Paarl which occasioned them to move to that town and vacate 130 Pontac Street, the eleventh respondent and her husband moved into the premises in 1980. When she deposed to her answering affidavit in September 2007

the eleventh respondent stated that she paid a monthly rental in respect of the property of R550.00. She is widowed and has no children. She says the other residents of the property 'have become my family and we look after one another'. At the time of making her answering affidavit, in 2007, the eleventh respondent was in receipt of a monthly pension R870.00 and earned a little extra from casual sewing work. I have assumed that, in line with the other pensions referred to earlier, her pension will by now have escalated to R1 010.00 per month. In her 2007 affidavit the eleventh respondent stated that her health was deteriorating and that the other residents looked after her. She stated further that she needed the emotional and practical support of the other residents in the community. She had nowhere else to go and could not afford alternative accommodation.

[53] She gave a somewhat more optimistic description of her circumstances in an updated affidavit, made on 19 April 2010. In the latter affidavit she stated 'I am totally independent doing my own chores, sewing for the community and caring for myself. Therefore I do not see myself in an old age home. … I live in a very caring and close knit community which assists me in various

way e.g. doing shopping, paying my rent at the bank etc. I collect my own pension. I do not see myself moving out of this area as everything is in close proximity; shops, mosque, friends and very helpful neighbours always ready to assist in time of need'.

[54] In a supplementary affidavit made by Mr Goodwin of the City of Cape Town municipality on 29 March 2010, reference is made to further information as to the means of the occupiers supplied by the applicant's attorney (whom Goodwin had understood to be the respondents' attorney). He pointed out that only four of the respondents are not gainfully employed. These are identified as being the fourth, seventh, tenth and eleventh respondents.

[55] Mr Goodwin argued that, with the exception of the eleventh respondent, these respondents are 'well connected to family who would be (morally) obliged to care for them and will have the means and support to secure satisfactory and safe alternative accommodation.' The ability of these respondents' family connections to support them and provide them with alternative accommodation is, however, disputed on the papers.

[56] With regard to the eleventh respondent, Mr Goodwin averred 'as far as I am aware there are a number of State funded homes for the aged in the Western Cape. The Provincial Department of Social Development can subsidise the board and lodging fees for persons who are very frail and in need of assistance. Anyone who can pay the full board and lodging fees can also apply for accommodation in these homes.' Mr Goodwin concluded 'It is according(ly) the City's submission that the Applicant needs to investigate the possibility of [the eleventh respondent] being accommodated at one such home with the Western Cape Province's Social Development Department.., and advise the court accordingly, as the matter does not fall within the City's housing mandate.'

[57] I gained the impression that the update affidavits filed by the four respondents in question, mentioned above, were made in response to the suggestion by Mr Goodwin that the solution might be to place the elderly respondents who had insufficient means to obtain alternative accommodation in an old age home, with subsidised board and lodging if need be. I have assumed that the circumstances of the other respondents who did not make update

affidavits have not altered materially in real terms since the filing of the principal answering affidavits. (I think that this is a reasonable assumption in the context of their having been ably represented by privately engaged attorneys and counsel.)

[58] There is no information on the papers that enables me to assess meaningfully the prospect of the four respondents in question being able to obtain lodging in a home, or if they could, in what conditions they would be housed. The applicant had mentioned in his replying affidavit that he had been in communication with Communicare in regard to the possible accommodation of those respondents unable to obtain alternative accommodation. The affidavit was silent, however, about the results of such communication. I therefore requested further information to be provided in this respect. In a supplementary affidavit, filed during the hearing, the applicant averred that Communicare had advised that 'they were currently unable to assist any of the respondents as a result of a waiting list of three to five years'. That information took matters no further.

[59] While I understand and accept the emotional ties that the respondents have to the property on which they have lived for so

long and the mutually supportive structure that has been built up between them as close neighbours during that time, these considerations cannot, in my view, stand in the way of the exercise by the applicant of the right to dispose of the property to give effect to the terms of the Will trust. The respondents have been in occupation of the property cognisant in the main of its place in the testamentary scheme of the late Mr and Mrs Omar. The fact that they have been there for a long time must be judged in the context of how they came to be there, which cannot be done leaving the testamentary scheme out of account. In this regard it should also be said that the renovations effected to parts of the property by some of the respondents must be seen in the context of the terms under which they were originally given occupation. It seems clear from the evidence that the respondents were aware that they were responsible for the upkeep of the premises they occupied. This may be inferred from the very low rentals charged and the absence of any evidence that the respondents had ever claimed reimbursement for the work they did on the property.

[60] It must also be taken into account that the applicant has tendered assistance to the respondents to facilitate their move.

This takes the form of the offer of rent free accommodation at their current addresses until the end of October 2010 (a period of five to six months) and a payment of R7 500 each to cover their relocation expenses. The first and second respondents are offered loans from the Trust to re-establish themselves elsewhere. The loans would be repayable from those respondents' share of the proceeds of the sale of the property.

[61] The means and ability of the various respondents to find alternative accommodation for themselves differ in the sense that some appear objectively able to do so, and others not. On the basis of my assessment of the general circumstances, and in particular of the financial ability of some of the respondents to establish themselves elsewhere, I have concluded that it would be just and equitable to order those respondents to vacate the property. I consider that the period afforded by the applicant's tender, that is to the end of October affords a just and equitable period to enable the affected respondents to make the necessary arrangements.

[62] In my judgment the circumstances of the first, second, third, eighth and ninth respondents are such that it can reasonably be

expected of them to independently secure alternative accommodation. An order will issue accordingly directing them and the persons occupying the property under them to vacate by the end of October, failing which the applicant shall be entitled, as of 1 November 2010, to obtain and have executed a writ of eviction and to recover the attendant costs from the respondents concerned.

[63] The application in respect of the eviction of the fourth, seventh, tenth and eleventh respondents will be postponed *sine die*. The applicant shall be granted leave to set down the postponed application for hearing on supplemented papers regarding the provision of alternative accommodation for those respondents. In this regard the fourth, seventh, tenth and eleventh respondents are advised that it is expected of them that they should be proactive in seeking to obtain such alternative accommodation.[15] The postponement of the application does not have the effect of authorising their continued occupation of the property; it denotes no more than that the court is not able on the information currently to hand in the evidence to find that it would be

[15] Cf. *Occupiers of 51 Olivia Road*, supra, at para. [20]; *Ndlovu v Ngcobo, Bekker and Another v Jika* [2002] ZASCA 87; [2002] 4 All SA 384 (SCA); 2003 (1) SA 113 (SCA) at para. [19].

just and equitable, in the sense contemplated by s 4(7) of the PIE Act, to make an order for their eviction at this stage.[16]

[64] Section 26 of the Constitution does not afford a right to unlawful occupiers against eviction, even if that might result in homelessness. The effect of s 26(3) is to afford a right against arbitrary eviction: the constitutional scheme is that if eviction must occur, it must happen with due regard to the evictees' human rights, most especially their right to dignity. The right to dignity is a widely embracing concept; certainly homelessness is inimical to the maintenance of human dignity. It is the availability of alternative accommodation for fourth, seventh, tenth and eleventh respondents that is insufficiently dealt with on the evidence. It is important, however, that these respondents should disabuse themselves of any notion that they have a right to remain in occupation of the property. On the contrary, if the court were to be satisfied that reasonable alternative accommodation was available to them it would be just and equitable that the owner of the property should be allowed to assert its entitlement to regain full possession thereof.

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[16] Cf. *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (25 March 2010) at para. [11].

Order

[65] The following order will issue:

1. The first, second, third, eighth and ninth respondents and the persons occupying the property under them are directed to vacate the property on Erven 8504, 8505 and 8513 Cape Town by no later than 31 October 2010.

2. Upon compliance by each of the third, eight and ninth respondents with the provisions of paragraph 1 by the date therein stipulated, the applicant shall thereupon pay to each such respondent the sum of R7500 by way of a contribution to each such respondent's costs of relocation and re-establishment.

3. The undertaking by the applicant to advance a loan to the first and second respondents in an amount up to the estimated value of their share of the free proceeds of the realisation of the property to assist in those respondents' costs of relocation and re-

establishment incurred in the context of compliance with paragraph 1 of this order is formally noted.

4. In the event of non-compliance by any of the respondents or the persons holding under them with the provisions of paragraph 1 of this order, the applicant shall be entitled, as from 1 November 2010, to obtain the issue by the Registrar and execution by the Sheriff of a writ of eviction to enforce the removal of the said persons from the property.

5. The application against the fourth, seventh, tenth and eleventh respondents is postponed *sine die*, with leave granted to the applicant to apply to the Judge President for the setdown thereof, on directions to be given as to the exchange of affidavits and other procedures, for further consideration and determination on the basis of additional evidence concerning the availability of alternative accommodation for the said respondents.

6. Save that any respondent against whom it is necessary to issue and execute a writ of eviction shall be liable for the applicant's costs incurred in connection therewith, there shall be no order as to costs.

A.G. BINNS-WARD
Judge of the High Court