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

CASE NUMBER: 24710/2010

In the matter between:

CITY OF CAPE TOWN	Applicant
and	
JEFFREY BLANKENBERG	1st Respondent
DESIREE BLANKENBERG	2nd Respondent
ZEOLA BLANKENBERG	3rd Respondent
AMELIA GEORGE	4th Respondent
CHATELE GEORGE	5th Respondent
NAZEEM SADAM	6th Respondent
RICARDO VAN SCHALKWYK	7th Respondent
JUNE VENOSHAI ABRAHAMS	8th Respondent
FRANCIS SOLOMONS	9th Respondent
STEPHAN SAMSON	10th Respondent
BRENT SAULS	11th Respondent
CLIFFORD ROY	12th Respondent
XENIA BLANKENBERG	13th Respondent
GLENSTON PETERSON	14th Respondent
JASMIN MARINUS	15th Respondent
LINSLIE MARINUS	16th Respondent
HEINRICHT LODEWYK	17th Respondent
WAYNE LE ROUX	18th Respondent
CAROLYN WINDVOGEL	19th Respondent
DENVER AFRIKA	20th Respondent
NIGEL PETERSEN	21st Respondent
MARCO CONSTABLE	22nd Respondent
All those persons whose identities are to the Applicant unknown and who occupy Portion 5	23rd Respondent

of Cape Farm 478 Elsies River situate at the corner of Stellenbosch Arterial and Modderdam Road, Elsies River

Court: Acting Judge J I Cloete

Heard: 31 October 2011 and 8 November 2011

Delivered: 9 December 2011

JUDGMENT

CLOETE AJ:

[1] This matter concerns an application in terms of s 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998 (*'the PIE Act'*) and/or the common law to evict the first, second, third, thirteenth, fourteenth, seventeenth, eighteenth, twentieth and twenty-second respondents, and all who hold title under them, from certain land owned by the applicant in Elsies River, Western Cape, as also the house and any structures thereon, including those which encroach on a neighbouring piece of land owned by the Airport Company of South Africa Ltd (*'ACSA'*), together with certain ancillary relief.

[2] On 28 January 2011 an order was granted evicting the other respondents (who did not oppose the relief sought) from the applicant's property. All of the remaining respondents (save for the eighteenth and twentieth respondents) persist with their opposition to the relief claimed. For sake of convenience I will refer to the remaining respondents as *'the respondents'*.

[3] The applicant is the registered owner and landlord of Portion 5 of the Cape Farm 478, Elsies River situate at the corner of Stellenbosch Arterial and Modderdam Roads, Elsies River (*'the property'*). The property is more commonly referred to as *'Vredehof Farm'* or *'Little House on the Prairie'*. It is also known by other names such as *'Green House Prairies'* , *'Freedom Farm'* or *'The Farm'*.

[4] Since the respondents took occupation of the property pursuant to a lease entered into between the applicant and the first respondent in early 1992, a number of structures have been built by the respondents (and/or others who have at various times occupied it) on the property. Despite the respondents' denial in their answering affidavit, it is now common cause that some of these structures have encroached onto Erf 113476 Cape Town, an adjoining property of which ACSA is the registered owner. It is now also common cause that certain of these structures in fact straddle the boundary line between the two properties and are thus situated on both the applicant's property and ACSA's property. It is further common cause that ACSA is not a party to these proceedings although it has consented to and supports the relief sought.

[5] The first issue to be determined is whether the applicant can obtain the relief which it seeks in respect of the structures and occupants thereof on ACSA's land. Although not dealt with in their papers, during argument the respondents submitted that because (a) the applicant seeks relief in terms of s 4 of the PIE Act; (b) s 4 of the PIE Act cannot apply to ACSA's land; and (c) the applicant has not followed the specific procedural requirements set out in s 6 of the PIE Act in respect of ACSA's land, it would not be competent to grant an order in respect of ACSA's land in the

terms sought. Following this thread, the respondents contend that if I find in favour of the applicant in respect of its own property, that order would constitute a *brutum fulmen* because it will be well-nigh impossible to give effect to it in circumstances in which certain of the respondents' structures – some of which are permanent – straddle the boundary line between the applicant's property and the land owned by ACSA. I will thus consider this argument before turning to the merits of the matter.

[6] The background to this aspect of the dispute is the following. The applicant gave notice of its intention to terminate the lease on 23 May 2007. It cancelled the lease with effect from 31 August 2007. The applicant launched these eviction proceedings in November 2010. A special service order was granted on 18 November 2010 and was duly executed. The initial relief sought was the eviction of the respondents (and all who hold title under them) from the applicant's property (including from any houses and structures thereon). The applicant relied specifically on s 4(1) of the PIE Act in support of its *locus standi* to bring the application.

[7] Section 4(1) of the PIE Act confers *locus standi* on an owner or person in charge of land to institute proceedings for the eviction of an unlawful occupier. There is no dispute that the applicant is the registered owner of its own property. There is also no dispute that the applicant is not the owner of ACSA's property.

[8] The further relief initially sought by the applicant included a specific prayer that it (i.e. the applicant) and any law enforcement agency appointed by it be authorised to *'demolish that portion of the unauthorised building works which encroach on Erf 113476 Cape Town, registered in the name of the Airport Company of South Africa'.*

[9] The history of the applicant's dealings with ACSA on this issue was set out in the founding affidavit of the applicant's Director: Legal Services, Mr Lungelo Mbandazayo. He said that on or about 8 November 2004 the erstwhile Minister of Safety and Security, Mr Leonard Ramatlakane, addressed a letter to the erstwhile Mayor Nomaindia Mfeketo, advising that the applicant's property housed a syndicate dealing in different crimes and advising her of an application in terms of s 26 of the Prevention of Organised Crime Act 121 of 1998. This prompted the applicant to confirm with the assistance of the South African Police Services (*'SAPS'*) that illegal activities were being conducted at the property. It was then also discovered that illegal structures and extensions were built at the property. Some structures and their occupants also encroached onto the adjacent property owned by ACSA. Furthermore, business and criminal activities were being conducted at the property and unlawful occupiers were residing there while the former tenant (the first respondent) resided elsewhere as did his ex-wife, the second respondent, at least from time to time.

[10] Unauthorised structures had been erected and building works, alterations and extensions had been unlawfully carried out at the property without the applicant's knowledge, consent and/or without approved plans in terms of the National Building Regulations and Building Standards Act No 103 of 1977 (*'the NBR Act'*). The respondents' activities were in contravention of the law, in particular the Land Use Planning Ordinance 15 of 1985 (*'LUPO'*).

[11] The applicant is both the landlord of the property as well as the local authority whose approval is required for the erection of structures or building works to be

carried out. It must approve building plans prior to any work commencing in terms of the NBR Act. No plans had been submitted or approved for the aforementioned building works, alterations or additions, nor for the erection of structures, all of which the applicant said were patently unlawful.

[12] Accordingly, notices dated 19 February 2009 were served on the owners being the applicant (the Planning Department served on the Housing Department) and ACSA in terms of the NBR Act. Copies were also served at the property. The content of these letters (which were addressed in identical terms to both the applicant and ACSA although they obviously referred to each specific property) read as follows:

'Sir/Madame

UNAUTHORISED ADDITIONS AND ALTERATIONS: ERF 113476: MORGAN WAY: CAPE TOWN

An inspection of the above property has revealed that Sections 4(1) and Section 10(1)(i) & (ii) as well as Regulation A25(1) promulgated under Section 17(1) of the National Building Regulations and Building Standards Act, No 103 of 1977, as amended (the Act) are being contravened in that:-

1. ***Various alterations and additions have been made to the existing building without the necessary written approval from the local authority (Section 4(1)),***
2. ***The buildings are erected in such a manner that, in the opinion of the local authority,***
   - *(ii)* ***it is not in the interest of good health and hygiene and (Section 10(1)(a)(i))***
   - *(ii)* ***it is unsightly and objectionable (Section 10(1)(a)(ii).***
3. ***The buildings are used for a purpose which causes a change in the class of occupancy as contemplated in these regulations. (Regulation A25(1))***

In terms of Regulation A25(10) promulgated under Section 17(1), Section 10(b) and Regulation A25(2) you are hereby instructed to comply with the following requirements ***within 30 days from date hereof:-***

1. ***Building plans must be submitted in fourfold to the local authority for consideration.***
2. ***The use of the building must be reinstated to the original class of occupancy. (Single residential dwelling unit)***

Should you fail to comply with the above requirements, legal action will be instituted against you in terms of Sections 4(4) & 10(2) and Regulation A25(11) of the Act without any further notice.'

[13] A final notice was served on both the applicant and ACSA on 23 March 2009. ACSA responded and indicated that it was unaware of any alterations and additions to its property and did not consent to same. It also consented to the illegal buildings being demolished (at this juncture it should be mentioned that the relief sought by the applicant in respect of the structures on ACSA land does not include the informal housing settlement which has also sprung up on ACSA's land and which is reflected on the aerial photograph annexed to this judgment and to which reference will be made hereinbelow).

[14] The response from ACSA dated 23 March 2009 read as follows:

'Dear Sir

UNAUTHORISED ADDITIONS AND ALTERATIONS: ERF 113476: MORGAN WAY: CAPE TOWN

Your letters dated 19 February 2009, 23 March 2009 as well as a telephonic conversation last week between our Mr G Gopal and your Mr Riaan Booysen refers.

As ACSA we were unaware, nor did we grant approval for the alternations and additions

made to the existing building on erf 113476 Morgan Way, Cape Town.

The additions and alterations span across land owned by ACSA as well as land belonging to the City and we are therefore willing to grant permission, together with the City, to have the structures demolished.'

[15] The applicant is authorised by the applicable legislation (i.e. the NBR Act and LUPO) to enforce the zoning scheme and building regulations and cannot allow its lessees and others who hold title under them to unlawfully carry out businesses contrary to the zoning. The applicant can also not permit structures to be unlawfully erected or to encroach on bordering land. The applicant is under a duty to take steps to address such conduct. Section 39 of LUPO places an obligation upon the applicant to remedy this unlawful conduct. Section 39(1) of LUPO reads as follows:

'Every local authority shall comply and enforce compliance with –

(a) the provisions of this Ordinance or, in so far as they may apply in terms of this Ordinance, the provisions of the Townships Ordinance, 1934 (Ordinance 33 of 1934);

(b) the provisions incorporated in a zoning scheme in terms of this Ordinance, or

(c) conditions imposed in terms of this Ordinance or in terms of the Townships Ordinance, 1934,

and shall not do anything, the effect of which is in conflict with the intention of this subsection.'

[16] The respondents in conducting or allowing others to conduct various businesses from the property are acting in contravention of LUPO as the property is zoned rural. Although this zoning permits residential occupation, it does not permit business use. The respondents do not have the consent of the applicant as landlord or as local authority to do so. The respondents are operating a tavern selling liquor

without a licence and refrigerators for the storage of fish for commercial purposes were also found at the property. Affidavits by three individuals who conducted (or currently conduct) these businesses were annexed to Mr Mbandazayo's affidavit. These affidavits had been filed in another matter in this court in an application by the National Director of Public Prosecutions against Messrs Quinton and Calvin Marinus (the second respondent's relatives) and various others for the forfeiture of certain assets found at the property.

[17] A Mr van Tonder had also filed an affidavit in that matter (which is also annexed to Mr Mbandazayo's affidavit) confirming that he built various refrigeration units which are at the property for Mr Quinton Marinus. He states that he was always paid in cash for the work done (totalling R280 000). He was told that there should be no paper trail in respect of the work done. Mr van Tonder confirms that he witnessed liquor being sold at the property and that whilst he was working there he noticed that people were selling drugs. He also witnessed various people being assaulted at the property.

[18] Affidavits deposed to by various law enforcement officers confirm that when they conducted law enforcement operations at the property they found many taxis parked and operating from there and were told by those present that this was Mr Quinton Marinus' taxi business. They also found large refrigeration trucks ostensibly used for refrigeration of fish. The latest inspection of the property on 5 August 2010 confirmed that at least six persons were working there. The applicant has never authorised the running of businesses from the property, nor that

employees of these businesses may reside there.

[19] The unauthorised building works, alterations and extensions undertaken by the respondents (or other persons) also encroached onto ACSA's property. This is not only without the consent of the applicant or ACSA but in breach of LUPO. Annexed to the affidavit of Mr Mbandazayo was a set of black and white photocopies of aerial photographs depicting the encroachment and the unauthorised structures. These photographs had been taken on 4 February 2009. Visible on the photographs is a small dwelling with a dark roof described by Mr Mbandazayo as *'the building with the green roof'*. Only the main residence (which is the building with the green roof) was leased to the first respondent and is lawful, save that any alterations thereto would have had to have been authorised, and they were not. A further photocopied aerial photograph (annexure *'LM38'*) indicates the main residence, where the refrigeration truck is stored, where trucks are parked, where taxis are parked, where the liquor outlet is situated and where unlawful extensions have been constructed. It can be clearly seen from this photograph that the residence (as extended and altered by the respondents), the taxis, part of the refrigeration truck and other trucks have unlawfully encroached onto ACSA's property.

[20] Although annexure *'LM38'* is a black and white photocopy of an aerial photograph the boundary line between the applicant's property and ACSA's land is plainly visible. The handwritten annotations thereon clearly indicate where these various unlawful structures, trucks and taxis allegedly utilised for the purpose of conducting unauthorised activities are situated on these two properties.

[21] In response to these averments the respondents in their answering affidavit claimed that the photocopies of the aforementioned photographs *'are unfortunately such that I am unable to relate the photographs to the allegations that they are meant to support. I reserve the right to comment fully once I have been placed in possession of photographs of a quality to allow me to comment thereon'.* A similar submission was made by respondents' counsel in argument. He said that the aforementioned photocopies were simply too unclear to enable the respondents to deal properly therewith. According to respondents' counsel it was only when the applicant, in reply, delivered a full colour photocopy of the aerial photograph depicting the boundary line that the respondents were apparently able to see that their structures, etc. had encroached and were also to be found on ACSA's property.

[22] However their counsel was unable to explain why the respondents had not availed themselves of the provisions of rule 35(12) of the uniform rules of court. This rule provides that *'Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof...'*

[23] In *Protea Assurance Co and Another v Waverley Agencies CC and Others* 1994 (3) SA 247 (CPD) Marais J (as he then was) considered the purpose of rule 35(12). At 249A-E he said:

'Applicant's desire that second respondent should first have to file his affidavit in response to the allegations made by Roberts as to what second respondent said to him during the telephone conversations which were recorded on the tape before being allowed to listen to

the tape is understandable as a forensic strategy, but to gratify it would be to defeat the object of Rule 35(12). That Rule plainly entitles a litigant to see the whole of a document or tape recording and not just the portion of it upon which his adversary in the litigation has chosen to rely. That entitlement, unlike the entitlement to general discovery for which Rule 35(1) provides, does not arise only after the close of pleadings in a trial action, or after both answering and replying affidavits have been filed in motion proceedings: it arises as soon as reference is made in the pleading or affidavit to a document or tape recording. It is inherent in that that a litigant cannot ordinarily be told to draft and file his own pleadings or affidavits before he will be given an opportunity to inspect and copy, or transcribe, a document or tape recording referred to in his adversary's pleading or affidavits.' (emphasis supplied)

[24] It is thus clear that if the respondents were, as they claim, *'unable to relate the photographs to the allegations that they are meant to support'*, they could easily have availed themselves of the provisions of rule 35(12) and demanded production of the original, colour photographs for inspection. This of course they could have done prior to delivering their answering affidavit. This failure, coupled with the bare denial elsewhere in their affidavit that their structures and activities encroached upon ACSA's property leads me to believe that either they knew about the encroachment and were attempting to *'brazen it out'*, or that they simply did not care. In any event I am satisfied that the photocopies of the photographs complained of by the respondents are sufficiently clear to have required a proper answer from them.

[25] Prior to the commencement of argument the applicant successfully sought leave to file a supplementary affidavit by Mr Girish Gopal (*'Gopal'*), who is ACSA's assistant general manager of operations at Cape Town International Airport. In that affidavit Mr Gopal confirmed that ACSA has not given approval for anyone to build or place structures on its property and that ACSA has given the applicant permission to evict any person from the buildings and/or structures which encroached from the

applicant's property. He further confirmed that he had read the applicant's proposed draft order and that ACSA consents to the applicant taking an order in those terms insofar as it pertains to ACSA's property.

[26] In light of the contentions raised by the respondents regarding ACSA's property, the applicants sought amended relief (without objection by the respondents from a procedural point of view) to include the eviction of those of the respondents (and all who hold title under them) from the structures encroaching on ACSA's property.

[27] The question which now arises is whether, against this background, the applicant is entitled to the amended relief sought in respect of ACSA's property (provided of course that I am satisfied that it is entitled to the relief sought in respect of its own property, as the one will follow from the other).

[28] Returning to s 4(1) of the PIE Act, it is necessary to consider the meaning of a *'person in charge of land'*. This is defined in the PIE Act as meaning *'a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question.'* In a nutshell, the respondents' contention is that the applicant is not a *'person in charge'* of ACSA's land for purposes of the PIE Act, it being common cause that the applicant does not rely upon s 6 of that Act which makes provision for the eviction of an unlawful occupier by an organ of state from land which falls within its area of jurisdiction.

[29] The PIE Act caters for two different types of eviction applications, under s 4

and s 6 respectively. Section 4 contemplates that an applicant must be the owner or person in charge of the occupied land, while s 6 contemplates that the applicant is an organ of state, such as (in the present matter) a municipality with jurisdiction over the area concerned. The respondent argues that the applicant was not the person in charge of ACSA's property when it instituted the present proceedings against the respondents. In order to evict the respondents from ACSA's property and demolish the structures thereon, the applicant should have instituted proceedings in terms of s 6 of the PIE Act.

[30] The applicant denies that it was necessary for it to have proceeded in terms of s 6 of the PIE Act to obtain the relief which it seeks in respect of ACSA's land. In support thereof counsel for the applicant relied on *Unlawful Occupiers of the School Site v City of Johannesburg* [2005] 2 All SA 108 (SCA). In that case the respondent municipality had successfully applied for the eviction of the appellants (who resided in an informal settlement on land owned by the municipality and zoned for schools) from the municipal land concerned. In its application the municipality, without making specific reference to s 6 of the PIE Act, set out its relationship with the property concerned, namely that it was the local authority responsible for the property which was zoned for schools and referred to as a school site. It did not claim to be the owner or person in charge of the property.

[31] At 111d-f Brand JA said:

'PIE provides for essentially two different types of eviction applications, under sections 4 and 6 respectively. Both sections presuppose that those to be evicted are "unlawful occupiers" as defined in section 1. The difference is that under section 4 the applicant must be "the owner or person in charge" of the occupied land while section 6 contemplates that the applicant is

an organ of State, such as a municipality, with jurisdiction over the area encompassing the occupied land. In its application papers, the municipality made no specific reference to section 6. At the same time, however, it did not claim to be the owner or person in charge of the school site. On the contrary, its relationship with the property was plainly set out in the founding affidavit. On these facts it was apparent that the application could only be founded on section 6. That is how the matter was understood and dealt with by everybody concerned, both in this court and in the court a quo.'

[32] The high court had granted the eviction order. Three grounds were advanced on appeal, all of which were of a technical nature. The ground of appeal which is relevant to the present matter was the following. The appellants contended that the eviction application did not meet the procedural requirements of the PIE Act. Although the application was brought under s 6 the procedural requirements of s 4(2) applied. Section 4(2) stipulates that, apart from the service of the eviction application as prescribed by the rules of court, an additional notice must be served upon a respondent at least 14 days before the date upon which the application is to be heard. There were several defects in the content of that notice. The Supreme Court of Appeal agreed that there were several defects in the notice. The question however was whether, in spite of these defects, the object of the statutory provision had been achieved.

[33] At 116a-117b Brand JA said:

'[22] As to the first and second objections pertaining to the contents of the notice, it is clear that the reference to section 4(1) of PIE was a mistake. To that extent the notice was therefore defective. I am also in agreement with the contention that the grounds for the application stated in the notice were too sparse to meet with the requirements of section 4(5)(c). The respondents should at least have been told that their eviction was alleged to be in the public interest. As the appellants also correctly pointed out, it was held in Cape Killarney Property *(supra) at 1227E–F that the*

requirements of section 4(2) must be regarded as peremptory. Nevertheless, it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved (see eg Nkisimane and others v Santam Insurance Co Ltd *1978 (2) SA 430 (A) at 433H–434B;* Weenen Transitional Local Council v Van Dyk *2002 (4) SA 653 (SCA) paragraph 13).*

[23] The purpose of section 4(2) is to afford the respondents in an application under PIE an additional opportunity, apart from the opportunity they have already had under the rules of court, to put all the circumstances they allege to be relevant before the court (see Cape Killarney Property Investments *at 1229E–F). The two subsections of section 4(5) that had not been complied with were (a) and (c). The object of these two subsections is, in my view, to inform the respondents of the basis upon which the eviction order is sought so as to enable them to meet that case. The question is therefore whether, despite its defects, the section 4(2) notice had, in all the circumstances, achieved that purpose. With reference to the appellants who all opposed the application and who were at all times represented by counsel and attorneys, the section 4(2) notice had obviously attained the Legislature's goal. However, there were also respondents who did not oppose and who might not have had the benefit of legal representation. It is with regard to these respondents that the question arises whether the section 4(2) notice had, despite its deficiencies achieved its purpose. In considering this question it must be borne in mind that, as a result of the way in which the order of the court a quo was formulated, it will only affect those respondents who had been served by the sheriff with both the application papers and the notice under section 4(2).*

[24] The question whether in a particular case a deficient section 4(2) notice achieved its purpose, cannot be considered in the abstract. The answer must depend on what the respondents already knew. The appellant's contention to the contrary cannot be sustained. It would lead to results which are untenable. Take the example of a section 4(2) notice which failed to comply with section 4(5)(d) in that it did not inform the respondents that they were entitled to defend a case or of their right to legal aid. What would be the position if all this were clearly spelt out in the application papers? Or if on the day of the hearing the respondents appeared with their legal aid attorney? Could it be suggested that in these circumstances the section 4(2) should

still be regarded as fatally defective? I think not. In this case, both the municipality's cause of action and the facts upon which it relied appeared from the founding papers. The appellants accepted that this is so. If not, it would constitute a separate defence. When the respondents received the section 4(2) notice they therefore already knew what case they had to meet. In these circumstances it must, in my view, be held that, despite its stated defects, the section 4(2) notice served upon the respondents had substantially complied with the requirements of section 4(5).' (emphasis supplied)

[34] Applying the principles set out in the *Unlawful Occupiers* case to the present matter, the following facts appear to be relevant. The founding affidavit of Mr Mbandazayo clearly sets out the relationship which the applicant has with ACSA's land, namely that it is the authority responsible for enforcing compliance with LUPO and the NBR Act in respect of such land, which falls within its area of jurisdiction. The applicant makes the point that the encroachment onto ACSA's land is the direct result of illegal structures being erected and unlawful activities being conducted by unlawful occupiers on its own, adjoining, land (being the very reason for which the applicant approached this court in respect of its own property in terms of s 4 of the PIE Act). The applicant sent the required notices to ACSA informing it of the relevant contraventions of the NBR Act, and the steps which ACSA needed to take to rectify the position. ACSA responded by informing the applicant that it was unaware of these contraventions and that it had not consented thereto. ACSA agreed to the illegal structures being demolished. Photographs were attached to the applicant's founding papers which specifically showed the clear demarcation of the boundary line between the applicant's property and ACSA's land, and precisely where the various illegal structures (and mobile illegal units used for operating unlawful activities) were located. All of this was made known to the respondents from the outset. Accordingly, when the respondents filed their answering affidavit, they

already knew exactly what the applicant's averments were with regard to the ACSA land.

[35] How have the respondents dealt with these allegations? In short, with a bare denial that their structures and activities have encroached onto ACSA's land, coupled with a vague allegation that the photocopies of photographs annexed to the applicant's founding papers are of such a quality that the respondents are unable to relate the photographs to the allegations that they are meant to support. As I have already said the respondents had ample opportunity – before filing their answering affidavit – to satisfy themselves whether in fact the applicant's allegations were correct insofar as they related to ACSA and its property. The respondents failed to do so. They did not raise non-joinder as a separate defence. In addition there is no suggestion on the papers that any of the remaining respondents – irrespective of whether they reside or conduct business at the applicant's property or on ACSA's land or both – have not known about this application, including that the applicant sought demolition of the illegal structures on ACSA's land, from the outset.

[36] An important aspect which must be borne in mind is that the scope of the PIE Act is limited to evictions from a *'home'* and not from premises occupied for purposes other than dwelling or shelter. In *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 at 124H-125A Harms JA said:

'In this instance, having regard to the history of the enactment with, as already pointed out, its roots in section 26(3) of the Constitution which is concerned with rights to one's home, the preamble to PIE which emphasises the right to one's home and the interests of vulnerable persons, the buildings listed and the fact that one is ultimately concerned with "any other form of temporary or permanent dwelling or shelter", the ineluctable conclusion is that,

subject to the eiusdem generis *rule, the term* ['includes'] *was used exhaustively. It follows that buildings or structures that do not perform the function of a form of dwelling or shelter for humans do not fall under PIE …'.*

[37] It is not disputed by the respondents that they conduct various business activities from the land which they occupy. It is also not disputed that the land as demarcated by the applicants is the land which is in fact occupied by the respondents and from which they conduct their activities. The respondents simply deny that all of their activities are unlawful. In these circumstances can it really be said that the applicant's failure to rely on s 6 of the PIE Act in seeking the relief which it does in respect of ACSA's land is fatally defective to its case? I believe that the answer must be in the negative. As the Supreme Court of Appeal has said (in the *Ndlovu* case) the PIE Act is limited to evictions from a home in the sense of a dwelling or shelter. Accordingly, at worst for the applicant, its failure to rely specifically on s 6 in its papers would only impact on the relief which it seeks in respect of the homes which encroach onto ACSA's land. The applicant does not need to rely on s 6 in respect of structures from which the respondents are conducting their business activities. Annexure *'LM38'* to the applicant's founding papers – one of the aerial photographs clearly depicting the boundary line between the applicant's property and ACSA's land – shows that on ACSA's land a large refrigeration truck has been parked and that one of the buildings at least is being used to conduct the respondents' taxi business. This is not disputed by the respondents.

[38] Further, in the present case, one has the reverse of what occurred procedurally in terms of the PIE Act in the *Unlawful Occupiers* case. There the

municipality had brought the eviction proceedings in its capacity as an organ of state (as envisaged in s 6 of the PIE Act, although, as I have said, it made no mention of s 6 itself in its papers). Because the municipality approached the court in terms of s 6 it was obliged to follow the procedural requirements set out in s 4 of the PIE Act (see s 6(6)). In the present matter the applicant has approached court in terms of s 4 of the PIE Act (and/or the common law). It is common cause that, at least in respect of its own property, the applicant has complied with all of the procedural requirements set out in s 4. The only possible criticism which can be levelled at the applicant is that if it had proceeded in terms of s 6 in respect of ACSA's land the notices which it served on the respondents would have contained the necessary material to also provide specifically for ACSA's land. But in my view to elevate this possible criticism to the status of a finding against the applicant would lend the lie to the clear principles set out in the *Unlawful Occupiers* case. As was said in that case, even where the formalities required by statute are peremptory, it is not every deviation from the literal prescription that is fatal. The question nonetheless remains whether, in spite of the defects, the object of the statutory provision has been achieved. The object of the PIE Act (as is evident from its preamble) is to regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances. The respondents who still oppose the relief sought by the applicants have at all material times been legally represented. Their belated objection to the relief sought by the applicant in respect of ACSA's land on procedural grounds cannot, as was said by Brand JA, *'be considered in the abstract. The answer must depend on what the respondents already knew. The appellant's contention to the contrary cannot be sustained. It would lead to results which are untenable.'*

[39] Having regard to all of the aforegoing, I am satisfied that, notwithstanding that no specific reliance has been placed by the applicant on s 6 of the PIE Act, the applicant has substantially complied with the requirements of that Act for purposes of the relief which it seeks in respect of ACSA's land. It thus follows that it is not necessary to deal with the respondents' *brutum fulmen* argument.

[40] I now turn to the merits of the application. At the outset it should be mentioned that in argument the respondents' counsel did not address the merits of the application at all. He confined his submissions to those which I have already dealt with above, save that he also contended that the applicant is not entitled to an order that the respondents, once evicted, are interdicted and restrained from being upon the property for the purpose of unlawfully occupying or carrying on business thereat. This aspect will be considered later in this judgment.

[41] The applicant says that it previously leased the property to Mr Japie Marinus. The latter gave notice of his intention to cancel his tenancy with effect from 31 January 1992. The applicant then – on or about 1 February 1992 – entered into an oral lease agreement with the first respondent, who is the son-in-law of Mr Japie Marinus.

[42] The applicant claims that the lease agreement with the first respondent was subject to the following material terms, namely that: the first respondent would lease the property from the applicant at a monthly rental of R180 until the lease was validly cancelled; the rental would increase from time to time; the first respondent would

personally reside at the property with his immediate family (i.e. his spouse, children and other close family members); the property would be used solely for residential purposes and no other; no other persons were permitted to occupy the property without the prior consent of the applicant; building work, alterations, extensions and the like would not be permitted at the property without the applicant's prior written approval; building works undertaken at the property would not encroach on the property of any other person; the property could not be utilised contrary to the zoning scheme regulations, the rural zoning and LUPO; the first respondent could not sublet the property without the applicant's prior written consent; illegal activities were not permitted at the property; the first respondent was responsible for ensuring that good order was maintained at the property at all times; the lease was terminable on reasonable notice to the first respondent; and in the event that the first respondent committed any one or more breaches of the lease agreement, then the applicant would be entitled to cancel. (These terms are also contained in the applicant's standard written lease agreement.)

[43] The terms of the lease agreement are disputed by the first respondent. It is now common cause that the Marinus family (the second respondent's family) originally occupied a property situated at 18 Tenth Avenue, Elsies River (also known as Erf 10111 Elsies River), where the second respondent was apparently born. This property had been owned by the second respondent's parents, and it would appear, her grandparents before them. According to the first respondent 18 Tenth Avenue was a large property on which two houses had been built. The older Marinus family occupied the one house and the younger Marinus family the other. There was stabling for horses, vegetable stores (a requirement at the time for obtaining a

hawking licence), a fish processing area (with a cold store and packing area), accommodation for employees, parking facilities for the vehicles and equipment used in the hawking of fish and vegetables, and a venue where they held dances and from where they sold liquor.

[44] The first respondent says that in 1976 the applicant's predecessor, the Cape Divisional Council (*'the CDC'*) approached the second respondent's parents with a view to acquiring 18 Tenth Avenue in order to build a home for the elderly thereon. Initially her parents refused but, threatened with expropriation, agreed to relocate. The oral agreement then entered into between the second respondent's parents and the CDC (represented by a Mr Carpenter) was the following, namely that: the Marinus family living at 18 Tenth Avenue would be relocated to a similar property in order for the family to be able to continue its business activities; they would be able to improve the new property in order to make it suitable to conduct the aforementioned businesses therefrom; the CDC would pay the second respondent's parents compensation in the amount of R12 000; and the second respondent's parents were granted a right to purchase the new property after the expiration of a period of five years at a market related price. For sake of convenience I will refer to this agreement as the *'expropriation agreement'*.

[45] It thus came about that in 1979 the CDC showed the second respondent's parents two properties; the one being located behind the Civic Centre in Cape Town (which her parents declined as it was too small) and the other being the property from which the applicant now seeks to evict the respondents. The first respondent claims that despite various attempts thereafter by Mr Japie Marinus (who has since

passed away) to purchase the applicant's property, none of these attempts came to fruition, apparently due to dilatoriness and/or inefficiency on the part of the CDC. Mr Japie Marinus then transferred his *'rights'* to the applicant's property to the first respondent (and because the latter was by then married to the second respondent in community of property, to her as well). In or about 1987, and as an *'interim measure'* pending further attempts by the first and second respondents to purchase the property, a written lease agreement apparently incorporating the material terms of the expropriation agreement was concluded between them and the CDC. It is that lease which is at issue in these eviction proceedings. The respondents have not been able to produce either the written lease or a copy thereof. Nor for that matter has the applicant despite a diligent search on its part.

[46] The applicant points out various significant difficulties in the respondents' version. Firstly, the first respondent was born on 6 September 1966. At the time when the expropriation agreement which preceded the missing written lease agreement was concluded, the first respondent would have been approximately 10 years old. It is highly unlikely that he would have been present at those discussions (he does not claim that he was) since he only married the second respondent some years later. (The first and second respondent subsequently divorced in 2001.) Further, the second respondent herself was born on 25 November 1961. Accordingly, in 1976 – when the expropriation agreement was allegedly concluded – the second respondent would have been about 14 years old. It is not alleged by the respondents that the second respondent was present at any of the discussions between Mr Japie Marinus and the CDC. The second respondent has not filed any affidavit to that effect. The affidavit of Mr Lionel Marinus, which was filed in support

of the first respondent's answering affidavit, only confirms the correctness of the first respondent's affidavit insofar as it relates to him. From the first respondent's affidavit it is apparent that the involvement of Mr Lionel Marinus was limited to occasions when he accompanied Mr Japie Marinus to the CDC to make enquiries about the purchase of the applicant's property. Nowhere is it stated that Mr Lionel Marinus was a party to the discussions between Mr Japie Marinus and the CDC which resulted in the expropriation agreement governing the alleged terms of occupation by the Marinus family of the applicant's property.

[47] Further, the deed of transfer under which 18 Tenth Avenue was expropriated from Mr Japie Marinus in 1977 specifically reflects that included in the conditions of ownership of that property were the following:

'1. That no hotel, bottle-store, or bar, or any building used for or in connection with the manufacture or sale of intoxicating liquor shall be erected on the said land, nor shall the land be used in connection with the manufacture or sale of intoxicating liquor in any way.

2. That not more than one dwelling house shall be erected on an Erf.'

[48] It is thus difficult to accept the respondents' version that: (a) two houses had lawfully been built at 18 Tenth Avenue; and (b) liquor had lawfully been sold from that property during the period of ownership thereof by Mr Japie Marinus. By parity of reasoning it is also therefore difficult to accept that the CDC would have agreed – orally, with Mr Japie Marinus and subsequently, in writing with the first and second respondents – to permit the Marinus family, at the applicant's property, to erect buildings and to conduct business activities which had been unlawful at 18 Tenth Avenue.

[49] The applicant says that the lease was entered into on the basis that the first respondent qualified for low-cost subsidised housing by meeting certain criteria. This is denied by the first respondent who claims that he and the other respondents reside on the property, not in terms of a so-called housing scheme, but in terms of a written lease after having been relocated following an expropriation on agreed terms.

[50] The only document which records the terms upon which Mr Japie Marinus *'transferred his rights'* to the applicant's property to the first and second respondents is an internal memorandum produced by the applicants dated 1 February 1992 from Mr Carpenter to a Mr Dearham, the content of which reads as follows:

'The account of Mr J Marinus should be cancelled WEF 31/1/92.

His son in law & his family are in occupation of the property & a new rent card at same rental should be issued to him.

Details:

Jeffrey Blankenberg

Desiree

Mervyn	*15 yrs*	
Jasmine	*16 "*	
Zola	*5 "*	
Roxanne	*10 "*	
Aletha	*12 "*	
Lionel	*34 yrs)*	*Single sons of*
Quinton	*24 ")*	*Mr J Marinus*

Information obtained telephonically from Mr Marinus on 15th Jan 1992.'

[51] The applicant has also produced an internal memorandum dated 16 April

1999 from a Mr Adriaanse, the applicant's Housing Manager at the time, to the Head of Housing, the content of which reads as follows:

'RE I/S: C.D.C. Properties Elsies River
Attached please find the completed leases for CDC properties.
The only ones that are still outstanding are:

1) *J. Blanckenburg ERF 55222 Vredehof Farm*
2) *J. Van Wyk 21257 39th Ave*

Thanks
Ralph O.'

(Mr Mbandazayo has confirmed that the reference in the latter memorandum to *'Erf 55222'* is incorrect and that the correct Erf number is indeed that of the applicant's property. It is not disputed by the respondents that the applicant's property is, *inter alia*, referred to as *'Vredehof Farm'*. It should also be mentioned that the dates of these two memoranda belie the first respondent's contention that the missing lease agreement was concluded in 1987).

[52] It is against this background and by applying the well-known *Plascon-Evans* rule (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635A) that I find that the applicant's version as to the terms of the lease agreement must be accepted over that of the respondents'. I am not only satisfied as to the inherent credibility of the applicant's version, I am also satisfied that *'the allegations or denials of the respondents are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers'.*

[53] The applicant says that the first respondent has committed or permitted various breaches of the lease agreement and continues to do so. These breaches

include that he is not in personal occupation of the property; he and/or the other respondents have operated or allowed businesses to be operated from the property which, in addition to being in breach of the lease, is contrary to the use permitted in terms of the zoning scheme regulations and thus LUPO; he has employed persons at the property; he has allowed unlawful occupants to occupy the property without the applicant's consent; unlawful building works, alterations and extensions have been done at the property without approved plans or the applicant's consent in contravention of the NBR Act; he has encroached onto the adjacent property owned by ACSA in breach of LUPO; illegal activities have been conducted and illegal substances and firearms stored at the property; he has failed to maintain the property; unlawful structures have been erected at the property and containers have been brought onto the property, without the applicant's consent; and some of the respondents, notably the first and second respondents, are involved in the illegal activities conducted at the property.

[54] The applicant also says that a number of its rental housing stock and other properties rented out to persons who qualify for leases in respect of subsidised housing are used for illegal activities, such as drug dealing, shebeens and possession of and/or dealing in illegal weapons. The Asset Forfeiture Unit (*'AFU'*) has obtained court orders in connection with some of these unlawful activities and has, together with the SAPS, brought it to the attention of the applicant that unlawful activities have been conducted at properties owned by it. Consequently, and for the past five years, the applicant has been working in close co-operation with both the AFU and the SAPS as well as the Cape Town City Police in identifying its properties which are used for these activities. The applicant's property in the present matter

was identified as such a property. Since the co-operative drive between the applicant and other law enforcement agencies began, the reports of illegal activities at the applicant's property have been confirmed by both the SAPS and the Cape Town City Police. As mentioned above, various other breaches of the agreement of lease were also identified.

[55] The applicant has approximately 90 000 units as rental housing stock, all of which have been leased to tenants. The applicant says that it only evicts people from the rental housing stock who are in arrear with rentals as a last resort and that accordingly few houses become available for other occupants from this stock. The applicant has several measures in place in an attempt to keep rental defaulters in their homes rather than to evict them. The consequence of this is that, since there is already an inordinate delay in the provision of housing, the demand outstrips the supply by considerable margins. Leases are generally only terminated should a tenant no longer require a particular property or use same for illegal activities. Under these circumstances the applicant does terminate the leases as well as the tenant's right of occupation.

[56] A series of photocopied photographs (annexures *'LM20'* to *'LM36'*) taken by a Commander Alexander of the Cape Town City Police and his unit at the property in the early hours of 9 March 2007 plainly show that there have been illegal building works; that there has been damage to the property; that storage trucks are parked at the property; that a taxi rank is conducted from the property; and that illegal liquor is stored at and sold from the property.

[57] The applicant has also obtained information from one Inspector Rossouw

(*'Rossouw'*) who has been part of the Provincial Highflyer Task Team, Bellville South (*'the task team'*) since February 2004. This task team was formed to investigate crime syndicates and their leaders. According to Rossouw, he investigated the applicant's property which has become known to the SAPS as a property utilised by a prominent crime syndicate, allegedly headed by Mr Quinton Marinus. His investigations revealed that illegal activities have been conducted from the property for many years and have involved, *inter alia*, murder, robbery, assault, rape, kidnapping, illegal liquor sales, drug smuggling, drug dealing, drug possession and abalone smuggling. According to Rossouw some of these crimes were committed at the property and others elsewhere, but the illegal arms or drugs and illegal profits from such criminal activities were mostly brought to the property.

[58] Rossouw's investigations resulted in Messrs Quinton and Calvin Marinus, the first and second respondents and eleven co-accused facing criminal charges in this court. They were subsequently discharged in terms of s 174 of the Criminal Procedure Act 51 of 1977 in or about 2006 or 2007.

[59] However, Mr Mbandazayo says that the applicant has also been advised of more recent illegal activities at the property. The following incidents at the property have been reported to the applicant's officials by one Vellai, a law enforcement officer who was either part of the operations at the property or has obtained the information from police dockets under his control. These activities include murder, burglary, theft, robbery, possession of unlicensed firearms and ammunition, drug dealing and possession, arson and rape. From statements obtained from persons arrested for some of these activities it is clear that a shebeen is operated from the

property where people drink and smoke tik and are targeted for robberies. In addition, the informal settlement on ACSA's land is in close proximity to the property and the residents of the informal settlement are patrons of the shebeen. In support hereof the applicant has set out in some detail what transpired during the course of four lawful traps which the relevant law enforcement agencies had set at the property during the period 12 August 2008 to 17 December 2008.

[60] The applicant's allegations are largely met with denials by the respondents. However (and possibly because of the amount of detail set out by the applicant in its papers) the respondents are forced to concede that *'other than the sale of liquor, for which certain persons have been arrested, no other activities that can be labelled criminal have been conducted from the property.'* Accordingly, even on the respondents' own version – and without it being necessary for me to make any findings as to other activities conducted at the property as alleged by the applicant – the first respondent has breached and/or permitted a breach of his lease agreement with the applicant. This is a material breach. So too are those relating to the construction and/or erection of unlawful structures at the property, and the conducting of business activities (whether legal or otherwise) at the property which is zoned rural. In this regard the respondents admit that *'fish is stored on the property and that from time to time taxis were parked on the property.'* They also admit that Mr van Tonder built the refrigeration units at the property. In these circumstances, it is clear that the applicant was entitled to cancel its lease with the first respondent: see also the as yet unreported judgments of Gamble J in the matter of *Stad van Kaapstad v D Petersen & Ander*, case number 20577/09 (WCC) and Schippers AJ in the matter of *City of Cape Town v Gabeeba Daniels and 3 Others* case no

5090/2011 (WCC).

[61] By virtue of the fact that the lease has been properly and validly cancelled, the respondents and all who hold title under them have no right in law to occupy the property, and are unlawful occupiers within the meaning of the PIE Act. Since the respondents had been in occupation of the property for more than six months at the time when the eviction proceedings were initiated in November 2010, the application falls to be determined in terms of s 4(7) of the PIE Act, which reads as follows:

'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.'

[62] There are a number of legislative provisions which are relevant to the applicant's obligations in this setting. They include the following. Section 26 of the Constitution of the Republic of South Africa (*'the Constitution'*) provides that no-one may be evicted from their home or have their home demolished without an order of court made after considering all of the relevant circumstances. No legislation may permit arbitrary evictions. Section 152 defines the objects of local government. These include the promotion of social and economic development and a safe and healthy environment. Section 153 regulates the developmental responsibilities of municipalities. One of these responsibilities is that a municipality must *'structure and manage its administration and budgeting and planning processes to give priority to*

the basic needs of the community, and to promote the social and economic development of the community.'

[63] The Housing Act No 107 of 1997 (*'the Housing Act'*) spells out the duties resting on national, provincial and local government in respect of housing development. The latter is defined as the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of South Africa will, on a progressive basis, have access, *inter alia*, to *'permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements.'* Section 9 of the Housing Act sets out the role of local government in this process. It confers on every municipality the obligation to take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to:

'(a) ensure that –

(i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;

(ii) conditions not conductive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;

(iii) services in respect of water, sanitation, electricity, roads, storm water drainage and transport are provided in a manner which is economically sufficient;

(b) set housing delivery goals in respect of its area of jurisdiction;

(c) identify and designate land for housing development;

(d) create and maintain a public environment conducive to housing development which is financially and socially viable;

(e) promote the resolution of conflicts arising in the housing development process;

(f) initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction;

(g) provide bulk engineering services, and revenue generating services in so far as such services are not provided by specialist utility suppliers;

(h) plan and manage the land use and development.'

[64] In accordance with this legislative scheme the applicant is providing housing to persons on a progressive basis. Mr Mbandazayo has said that there is a backlog of over 400 000 housing units and that the demand for housing grows by 10 000 families each year. The applicant also has policies in place to accommodate persons in desperate need of housing.

[65] The PIE Act commenced on 5 June 1998 and was enacted, as I have said, to regulate the prohibition of unlawful eviction and the procedure for eviction of unlawful occupiers. The PIE Act has its roots in s 26(3) of the Constitution (see the *Ndlovu* case at 119J). Although the respondents took occupation of the applicant's property prior to both the Constitution and the PIE Act their eviction from the applicant's property clearly falls to be dealt with in terms of both.

[66] Returning to s 4(7) of the PIE Act. As I have said this section provides that a court may grant an order for eviction of persons in the position of the respondents if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including whether land has been made available or can reasonably be made available by the applicant or other organ of state or another land owner for the relocation of the respondents, and including the rights and needs of the four categories of persons referred to in s 4(6), namely the elderly, children, disabled

persons and households headed by women.

[67] The duty to place all relevant circumstances before the court rests upon the respondents. In *F H P Management (Pty) Ltd v Theron NO and Another* 2004 (3) SA 392 (C) at 404I-405B Van Heerden J (as she then was) said:

'As regards the effect of section 26(3) of the Constitution (as quoted above), read together with section 4(7) of PIE, it would appear from the judgment of Harms JA in Ndlovu v Ngcobo; Bekker & another v Jika (supra) at paras [17]–[19] that it is not necessary for an applicant, in proceedings to evict an unlawful occupier from such applicant's property, to place more before the Court by way of evidence than the facts that such applicant is the owner of the property in question and that the respondent is in unlawful occupation of such property. It is then up to the occupier to disclose to the Court "relevant circumstances" to show why the owner should not be granted an order for the eviction of the occupier (see also Ellis v Viljoen 2001 (4) SA 795 (C) at 805C–D; Ridgway v Janse van Rensburg 2002 (4) SA 186 (C) at 191I–192A; Brisley v Drotsky 2002 (4) SA 1 (SCA) at paragraphs [41]–[43]).'

[68] As to the meaning of *'relevant circumstances'* in *Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants* 2002 (1) SA 125 (T) at 142I-143G Rabie J said:

' The main thrust of both ss 4 and 6 is that the court should be satisfied that it is 'just and equitable' that the eviction be granted. However, the sections enjoin the court, prior to coming to a finding thereon, to consider all the relevant circumstances. The Legislator did not limit the circumstances which the court should consider and neither did it arrange the circumstances in order of priority. It referred to 'all the relevant circumstances' and left it to the court to determine which circumstances are relevant and to consider all those in conjunction. The fact that the Legislature referred specifically to the rights and needs of the elderly, the children, the disabled and households headed by women and, in certain instances, also the availability of alternative land does not mean that the Legislature intended to elevate these circumstances to absolute prerequisites which have to be met before an order may be granted. If the Legislator intended such a consequence, it would have said so specifically. To do so would, in any event, in many instances, including the

present case, probably have the effect that the private owner of property have the obligation to provide housing to the general public and is burdened to 'carry the can of [their] claim to "housing" (cf Betta Eiendomme *(*supra *at 473A)). Such a situation would wreak havoc with pre-determined housing procedures. It would wreak havoc with ownership and possessionary rights. Housing policies might as well be scrapped and any endeavour to create orderly housing standards would be futile (cf* Port Elizabeth Municipality *(*supra *at 1086I)). I have dealt with this aspect above and need not refer thereto again.*

If all the relevant circumstances of this case are weighed up, including the aforesaid rights and needs of the persons concerned and of those mentioned by s 4(6) and (7) and the availability of land, I am satisfied that it would be just and equitable to grant the order for ejectment prayed for. In this regard I again refer to the blatant invasion of the property, the short duration of the stay on the property, the probability of the occupants being able to return where they came from, the irreversible loss to the applicants should the order not be granted, the extreme danger to life and limb of the occupants themselves and of surrounding communities and, generally, to the public interest regarding the matter.'

[69] What *'relevant circumstances'* have the applicants placed before this court? The answer is none whatsoever, save for the first respondent's contention that *'I deny that it is in the interest of justice that the property be rented to a person on the subsidised housing list. What is in the interest of justice is that the applicant be compelled to comply with its own agreements'.* I am thus constrained to consider what the applicant says in this regard, which is as follows.

[70] When the applicant's founding affidavit was prepared in October 2010, the first respondent was not residing at the property but at an address in Gordon's Bay. It appears from a windeed search conducted by the applicant on 17 August 2010 that the first respondent had resided at that address since at least November 2005. He also owned immovable property elsewhere during the period 2004 to 2006, thus after the tenancy of the property had been transferred to him. According to the same windeed search, one of these properties was purchased by the first respondent for

the sum of R140 000. His ownership of immovable property renders him ineligible for subsidised housing.

[71] The second respondent was, as I have said, previously married to the first respondent. She resided at the property. However in a warning statement given to the SAPS and dated 24 October 2004 she indicated that she resided at another address in Elsies River. She informed Rossouw that this was her residential address and that she rented the applicant's property out to various third parties.

[72] The first respondent now alleges that he is indeed residing at the property. The second respondent does likewise. She was however arrested at the property for illegal dealing in alcohol. Accordingly, whilst she is plainly running a business unlawfully from the property, she may well also reside there from time to time or she may have moved back permanently to the property. Be that as it may, both the first and the second respondents have demonstrated that they have alternative housing at their disposal. None of the other respondents have deposed to affidavits setting out their personal circumstances. This fact, coupled with the fact that illegal activities are being conducted from the property, not only by the first and second respondents but in all likelihood the other respondents as well, surely cannot be regarded as a relevant circumstance which should weigh in favour of the respondents. This is particularly so in light of the backlog of over 400 000 housing units and the demand for housing which grows by 10 000 families annually. The housing shortage is such that the applicant cannot reasonably be expected to permit persons to rent its housing stock in order to carry out illegal activities and to act in contravention of planning and regulatory instruments. The prejudice that the applicant and the

community is likely to suffer were the respondents permitted to continue to occupy the property considerably outweighs the prejudice, if any, to the respondents should they be evicted.

[73] Furthermore there are no elderly or disabled persons residing at the property. Insofar as there may be a household *'headed by a woman'*, as regards the second respondent, she has other accommodation. She has no minor children.

[74] The respondents against whom these eviction proceedings are directed are all adults. Had there been minor children residing at the property, the obligation to provide them with housing would not rest in the first instance with the applicant, but with their parents: see *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at 82B-C where Yacoob J said:

'Through legislation and the common law, the obligation to provide shelter in ss (1)(c) [i.e. s 28(1)(c) of the Constitution] *is imposed primarily on the parents or family and only alternatively on the State. The State thus incurs the obligation to provide shelter to those children, for example, who are removed from their families. It follows that s 28(1)(c) does not create any primary State obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families.'*

[75] Having regard to these considerations, I am satisfied that there are no relevant circumstances which would militate against the granting of the eviction order sought by the applicants. This is also not a case where other land should be made available by the applicant to the respondents. The applicant has complied with all of the requirements of s 4 of the PIE Act. No valid defence has been raised by the respondents as unlawful occupiers. Accordingly, in terms of s 4(8) of the PIE Act, I must grant an order for the eviction of the respondents.

[76] Section 4(8) also stipulates that I must determine: (a) a just and equitable date on which the respondents must vacate the applicant's property under the circumstances; and (b) the date on which an eviction order may be carried out if the respondents have not vacated the applicant's property by the aforesaid date. In terms of s 4(9) of the PIE Act, in determining a just and equitable date by which the respondents must vacate, I must again have regard to all relevant factors, including the period that the respondents have resided on the applicant's land. Sections 4(10) and (11) empower me, when granting an eviction order, to also make an order for the demolition and removal of the buildings or structures occupied by the respondents, if necessary with the assistance of law enforcement agencies.

[77] The applicant submits that a period of one month is reasonable for the respondents to vacate the property. Whilst the applicant correctly says that the respondents have known about these proceedings for a long time, I do not believe that it would be just and equitable to order that they vacate within a period of one month. Even on the applicant's version there are a number of people residing at the property. There are a number of businesses operated at the property with the attendant infrastructure. Christmas is a few weeks away. The respondents have resided at the property for a long time. In these circumstances, it is my view that it would be just and equitable to order the respondents (and all who hold title under them) to vacate the applicant's property and the house and any structures thereon, including those encroaching on ACSA's land, by not later than 29 February 2012.

[78] I now return to the respondents' submission that the applicant is not entitled to

an interdict restraining the respondents and all who hold title under them once they have been evicted, from being upon the property for the purposes of unlawfully occupying and/or carrying on business thereat. Respondents' counsel correctly submitted that nowhere in the PIE Act is provision made for the granting of an interdict once occupiers have been evicted. The applicant's counsel pointed out however that this part of the relief is sought on the basis of the common law and not the PIE Act. Respondents' counsel then conceded that in terms of the common law a final interdict of this nature can be granted if the applicants have made out a case therefor. I am satisfied that the applicant has met the requirements for the granting of a final interdict, namely: (a) a clear right, which the applicant has to prove on a balance of probabilities; (b) an injury actually committed or reasonably apprehended; and (c) that there is no other satisfactory remedy available to the applicant (see: *Setlogelo v Setlogelo* 1914 AD 221 at 227). It thus follows that the applicant is entitled to this relief as well.

[79] In regard to costs, the respondents' counsel submitted that they simply do not have the financial wherewithal to meet a costs order. However there is nothing on the papers to support this submission. On the contrary, it appears that not only does the first respondent at least own immovable property, but that the businesses being conducted from the property are lucrative. In my view there is no reason why, in these circumstances, costs should not follow the result.

[80] On 31 October 2011 the respondents applied for a postponement of the matter. After hearing argument, I postponed the matter until 8 November 2011 but ordered the respondents who still oppose the application to bear the wasted costs of

the postponement jointly and severally. For sake of completeness I will include that costs order in the order which follows hereunder.

[81] **In the result I make the following order:**

'1. The first, second, third, thirteenth, fourteenth, seventeenth, eighteenth, twentieth and twenty second respondents ("the respondents") and all who hold title under them are evicted from Portion 5 of Cape Farm 478 Elsies River, situate at the corner of Stellenbosch Arterial and Modderdam Road, Elsies River and the house and any structures thereon, including those encroaching on Erf 113476, Morgan Way, Cape Town demarcated by the red hatched area on the aerial photograph annexed hereto marked "X" (hereinafter referred to as "the property"), in terms of section 4(8) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No.19 of 1998 and/or the common law;

2. The respondents shall vacate the property by not later than 29 February 2012, failing which the applicant shall be entitled to evict them in accordance with this order;

3. The respondents and all who hold title under them, once evicted, are interdicted and restrained from being upon the property for the purposes of unlawfully occupying and/or carrying on business thereat;

4. *The applicant and/or the sheriff and/or any persons appointed by them including members of the South African Police Service and/or the South African National Defence Force, is/are authorised to:*

   4.1 *Demolish and remove any unlawful structures or building works at the property; and*

   4.2 *Remove any materials used to erect such structures or building works referred to in paragraph 4.1 above, which shall be kept in safekeeping by the applicant and/or the sheriff until released to the lawful owner thereof within one month of the removal, whereafter it may be disposed of by the sheriff and/or the applicant and shall be deemed to be abandoned; and*

   4.3 *Remove any containers, refrigeration/freezer and/or storage facilities and all motor vehicles, together with any other goods and/or equipment found in or at the property which shall be kept in safekeeping by the applicant and/or the sheriff until released to the lawful owner thereof within one month of the removal, whereafter it may be disposed of by the sheriff and/or the applicant and shall be deemed abandoned; and*

   4.4 *The sheriff and all persons appointed by him are authorised to remove any possessions belonging to the respondents found in, at or near the property, and all or any structures erected at the property, which possessions shall be kept in*

safe custody by the applicant and/or the sheriff until released to the lawful owner thereof within one month of removal, whereafter it may be lawfully disposed of by the sheriff and/or the applicant and shall be deemed to be abandoned;

5. ***The respondents (save for the eighteenth and twentieth respondents) are ordered to pay the applicant's costs of suit, jointly and severally, the one paying the other's to be absolved, which costs shall include the costs of the special service application, the costs of issuing the notice by the court and the costs of these eviction proceedings, including the postponements on 26 January 2011 and 31 October 2011.***

J I CLOETE