OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

(Western Cape Division, Cape Town)

Case No: 1289/2019

In the matter between:

ROBERT PAUL SERNÉ NO	**First Applicant**
ALOYSUIS JOANNES MARIUS REIJNS NO	**Second Applicant**
GERT ALBERTUS VAN RHYN NO	**Third Applicant**

and

MZAMOMHLE EDUCARE	**First Respondent**
BONGEKA MQOLOMBENI	**Second Respondent**
MS SIPHOKAZI MQOLOMBENI	**Third Respondent**
ALL OTHER PERSONS WHO UNLAWFULLY OCCUPY ERF 22933 KRAAIFONTEIN	**Fourth Respondent**
THE CITY OF CAPE TOWN	**Fifth Respondent**

JUDGMENT HANDED DOWN VIRTUALLY ON: 17 SEPTEMBER 2021

MANTAME J

INTRODUCTION

[1] This is an eviction application. The applicants seek to evict the first to the fourth respondents from Erf 22933, Wallacedene Kraaifontein, in the City of Cape Town commonly known as 74 Grootboom Avenue, Wallacedene ("*the Property*"). The Mzamomhle Foundation Trust ("*the Trust*") having been represented by the applicants is said to be the registered owner of the property. The respondents are represented by the

second respondent, the daughter of Margaret Noxolo Ngaleka *("Mrs Ngaleka*") the former Principal of the first respondent who has since passed away.

[2] The application is opposed by the respondents and further raised some points in *limine.*

FACTUAL BACKGROUND

[3] The first respondent is an early childhood educare centre that was founded by Mrs Ngaleka in Wallacedene some twenty-two (22) years prior to the institution of these proceedings. Wallacedene is an impoverished informal settlement on the eastern outskirts of Cape Town. This place would be remembered when Ms Irene Grootboom *("Ms Grootboom")* made history in the case of *Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46* where she asserted her socio economic rights and challenged the government to provide adequate housing under Section 26 (right to housing) and Section 28(1)(c) (children's right to shelter) of the South African Constitution.

[4] This challenge came about after a community was evicted from an informal settlement in Wallacedene. Due to the appalling conditions and overcrowding in the area at the time, Ms Grootboom and others moved out of Wallacedene and put up minimal shelters of plastic and other materials on a vacant land (New Rust Land) that was privately owned and had been earmarked for low cost housing. The owner of the land obtained an ejectment order at the magistrates' court. After the eviction, Ms Grootboom

and others moved to the sports field adjacent to Wallacedene Community Centre. After their eviction, they approached the high court for its intervention as they continued to live under intolerable conditions. Effectively, they asked the municipality to meet its constitutional obligations and provide temporal accommodation and such order was granted. The state appealed this order to the Constitutional Court. The Constitutional Court held that Section 26 obliges the state to devise and implement a coherent, co-ordinated housing programme and that in failing to provide for those in most desperate need the government had failed to take reasonable measures to progressively realize the right to housing. The Court ordered various spheres of government to devise, fund, implement and supervise measures to provide relief to those in desperate need.

[5] It appears that some twenty-one years after the Grootboom judgment (*supra*) the state has not done enough to protect the interests of the children in that community, as the early childhood educare centre in which young and vulnerable children are educated is being threatened with eviction in these proceedings. It is against this background that the City of Cape Town *("the City")* was directed to file submissions amongst others, if it would provide alternative accommodation should the order of eviction be granted. Notwithstanding, as it would appear later on in the judgment, the City adopted a dismissive approach and decided to shirk its responsibilities on the basis that the educare centre is a non-profit organisation and should the eviction be granted its occupants would not be rendered homeless, as this is not a residential property. In other words, the City has no role to play in such circumstances.

[6] In 1997, Mrs Ngaleka established the Mzamomhle Educare ("*the educare / first respondent*") on the premises of the Methodist Church in Wallacedene. She held the position of a Principal of this educare centre and she managed and controlled its daily activities until she died in November 2016. According to the information at *www.sahistory.org.za*, in 2004, Wallacedene had an estimated population of 21 000 people. It made sense why this educare grew at such a rapid rate to this day. This necessitated that the educare move to different premises over the years as it no longer managed to contain the growing numbers of children in their early phase of education.

[7] In 2010, Mrs Ngaleka met one Robert Paul Serné ("*Mr Serné*") and his team who was on a Habitat for Humanity tour in their area. She requested assistance in obtaining sponsorship to build a new structure on which the educare could operate adequately. Indeed, Mr Serné appeared to be willing to assist as he took some photographs that were said would serve as support for an application for sponsorship in Netherlands.

[8] According to the second respondent, who is Mrs Ngaleka's daughter, the sponsorship was obtained in 2012. However, Mrs Ngaleka was not advised by Mr Serné or his team as to on whose behalf the sponsor was obtained, who was the sponsor or what was the amount of sponsorship and / or what were the terms of sponsorship and so on. Mr Serné and his team instructed Mrs Ngaleka to approach the City and request a bigger piece of land which would enable them to build a proper structure for the educare. Mrs Ngaleka managed to secure the land at a purchase price of R33 000.00 on behalf of the first respondent and not the trust.

[9] The trust asserted that it paid for the land from the City of Cape Town and that was strenuously denied by the respondents. The second respondent stated that her mother, Mrs Ngaleka paid for the land in which this educare was built. Notwithstanding, the respondents did not dispute that the property was constructed utilizing the funds from the sponsor and / or the trust. Based on these allegations, after completion of the building, the trust commenced leasing the property to the educare on 1 September 2012, despite the fact that the property was still in the name of the educare. It appears once more that Mrs Ngaleka was not aware that she tied the first respondent into a lease agreement when she signed the lease agreement with the trust in August 2012.

[10] The second respondent alleged that Mrs Ngaleka was an uneducated person who attended school until Grade Four (4) and was not fluent in English. Mrs Ngaleka signed a deed of donation to the trust. Even if the applicants required her to donate ERF 22933 in order to proceed with construction on the property, as this was what happened in this situation, Mrs Ngaleka did not understand the consequences of the deed of donation that in essence was to part ways with the ownership of the property. Mrs Ngaleka was confronted with a request from the applicant's attorneys to complete certain documents including a power of attorney in order to effect transfer of the property to the trust. She did not understand the language of the documents and was not legally represented in this process and did not understand the impact of the papers she was requested to sign.

[11] Upon realising that the owner of the property had been reflected as the trust, Mrs Ngaleka made enquiries to the trust and was advised that the property was still in the name of "Mzamomhle". Somehow, she believed the explanation by the representatives

of the applicants, but could not understand the difference that the property was actually in the name of the trust and not the educare. All these changes happened during the period the second respondent had temporarily relocated to the Eastern Cape. However, the second respondent stated that Mrs Ngaleka communicated all this information to her as she always assisted her mother in the educare.

[12] Immediately after signing the documents that were indicated with a mark "X" where to sign, the applicant's representatives advised Mrs Ngaleka that she would need to pay an amount of R1500.00 to the applicants. Upon enquiring the reason for this payment, she was advised that the payment was a contribution towards an insurance for the property and after five (5) years of payment, she would be refunded an amount of R100 000 if she did not make any claim.

[13] Though Mrs Ngaleka could not comprehend the exact meaning of this explanation, she made religious monthly payments to the applicants. Mrs Ngaleka was constantly under stress and immense pressure as she was in debt as a result of these payments. In her understanding, the applicants were supposed to assist her with the proper structure for the educare and not her paying the applicants. These payments were too much to bear as the educare operated in a poor community and other parents could not afford to pay the monthly fees of R300.00 per month.

[14] In fact, Mrs Ngaleka told the second respondent that the applicants placed her in a worse scenario than she was in before she met them as she was drowning in debt.

She questioned the 'philanthropic assistance' the applicants promised to provide her, when effectively she was stripped of everything. The last nail in the coffin was her discovery and actual understanding that the property had been transferred to the trust in May 2016. According to the second respondent, this did not sit well with her. It was the second respondent's contention that Mrs Ngaleka endured this pressure and was true to her word and made these payments to the applicant until her last breath in November 2016.

[15] Upon the demise of Mrs Ngaleka in November 2016, the applicant demanded Mrs Ngaleka's personal files from the second respondent. It then became evident that the applicants wanted to take over the running of the educare. They replaced Mrs Ngaleka with the new principal and further replaced her with a new bank signatory, one "Aziza Schreuder." The applicants denied that it was the trust that made these inroads to the educare. It was their assertion that the respondents confused the trust with the Centre for Early Childhood Development *("CECD")*.

[16] The second respondent claimed that the applicant's ownership of the property was fraudulent as it was acquired by way of misrepresentation. Mrs Ngaleka was misled by the applicant into signing documents which effectively transferred the property to the applicant by way of donation. Objectively, it would be notable from the documents themselves, that she was unaware of what she was signing, she thought the documents were in respect of a sponsorship application, which the applicant's representatives informed her of. She only appended her signature in the annotations and spaces marked with an "X".

[17] As the property was acquired by fraudulent means, the Deed of Transfer as proof of ownership does not guarantee title and if transfer was effected through fraud, there is no right created in favour of the applicants, so said the respondents.

[18] The applicants denied that the trust was formed in order to hijack the property of the first respondent. The applicants asserted that the trust was established in order to support poverty relief and establish welfare projects and self-help projects for the poor and the destitute.

[19] According to the applicants, the trust leased its property to the first respondent having been represented by Mrs Ngaleka in August 2012 for the purposes of an early childhood development centre. After the founder and principal of the first respondent passed away in November 2016, the applicants realised that the educare fell into arrears with their rentals and the educare was no longer run according to the Norms and Standards for Early Childhood Development Programmes. The second respondent denied that the first respondent had a rental agreement with the applicants, as payments were made towards insurance contributions.

[20] According to the applicants, the lease expired on 31 August 2017 and the respondents failed to negotiate a new lease. As a result thereof, a final notice to vacate the property was given in November 2018. The applicants further made their intentions known that they intended to replace the first respondent with an elected educare by the name of Abinisa NPO.

[21] Gathering from the affidavit that the City was required to file with regard to the sale of the property to the educare, it appears that on questioning, the relationship between the applicants and the first respondent and a further clearing of the property to the trust, the City was advised by the applicants' attorneys that: (i) the trust is a public benefit organisation with a purpose similar to that of the educare; (ii) the educare took transfer of the property from the City without having the finances to build on it; (ii) the trust negotiated with the educare to improve the property and fund the building on condition that the property was transferred to the trust; the trustees considered the financial risk of funding the building without owning the property and decided that the substantial investment in the property, valued at R1 727 195.00 (excluding VAT) could only be justified if the Erf was transferred to the trust; the trust would enter into a long term lease agreement with the educare and architects and contractors had been appointed by the trust, and the building was 70% complete at the time.

[22] The City further contended that the issue of an alternative accommodation is not legally relevant as the eviction of the respondents does not involve a residential property and the occupants would not be rendered homeless.

[23] The applicants submitted further that even if the respondents claim ownership of the property, they knew at least in 2016 that the property is registered in the name of the trust but did nothing to rectify the title deed. It was the applicants' contention that whatever claim the respondents had in that property has since prescribed.

Points in limine

[24] The respondents raised some points in *limine* with regard to the applicants' application in that *first*, the third applicant lacks the requisite authority to depose to the founding affidavit. It appears that this issue has since been put to bed as the third applicant has furnished a letter of authority that he was a trustee of the trust. As a result, this point was not persisted with at the hearing of this matter.

[25] *Second*, that there is a material dispute of fact which the applicants foresaw or should have reasonably foreseen when instituting these proceedings. The second respondent challenged the applicant's allegation of ownership of the property. The second respondent asserted that she does not claim to have inherited the property as per the applicants' allegations. However, the applicants' ownership of the property is fraudulent based on misrepresentation. In essence, the applicants misled Mrs Ngaleka (in her capacity as the principal of the first respondent which owned the property) into signing a power of attorney in favour of Gerhard Smit (who later became the trust's transferring attorney) in order to effect transfer of the property by way of a donation to the trust. This happened after her deceased mother, Mrs Ngaleka bought the property from the City of Cape Town for an amount of R33 000.00.

[26] The applicants contended that the trust is the registered owner of the property after it was donated to it by the educare. It was the applicants' further contention that an unlawful occupier's claim to ownership is not a defence in law to an eviction. The first

respondent did not seek or obtain an order from this Court declaring that it is the rightful owner of the property and directing the Registrar of Deeds to rectify the title deed accordingly.

[27] It was the applicants' assertion that there is no *bona fide* dispute in these proceedings that could necessitate referral of this matter to oral evidence. In any event, there was no relevant dispute of fact that was reasonably foreseeable by the applicants when instituting the proceedings.

ISSUES

[28] This Court is called upon to determine whether the respondents are unlawful occupiers and if indeed they are, whether the eviction of the respondents would be just and equitable in the circumstances.

SUBMISSION BY THE PARTIES

[29] The applicants submitted that they are entitled to an eviction order. It appears that the respondents' refusal to vacate the property is based on a challenge to the title of the trust. Accordingly, it is a trite principle that the lessee may not question the landlord's title as a defence in eviction proceedings after a valid termination of the lease agreement. In the circumstances, the respondents have not placed a valid defence before this Court.

[30] According to the applicants, it is trite law that in a case of eviction based on *rei vindicatio* the owner can prove ownership by handing in the title deed which indicates that the property is registered in its name.[1] The onus then shifts onto the occupier to prove that it has a valid right of occupation. When there is a lease under which the occupier had occupation the lessor need not be the owner of the property to evict the occupier on termination of the lease.[2]

[31] In a case such as the present, the applicant asserted that the party seeking eviction need not allege and prove any title to the property from which the lessee is to be evicted. A lessee is bound by the terms of the lease even if the lessor has no title to the property and, when sued for ejectment at the termination of the lease, it does not avail the lessee to show that the lessor has no title.[3] In *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another* [4] - the Court held:-

> "*[28] So, what is the common law position? As noted in Boompret, it is an established rule that when being sued for eviction at the termination of a lease, a lessee cannot raise as a defence that the lessor has no right to occupy the property. This flows naturally from the rule that a valid lease does not rest on the lessor having any title. In Fry's – for example – it was stated that there "can be no doubt that neither a sale nor a lease is void merely because the seller or lessor is not the owner of the property sold or leased." Unless expressly agreed, a lessor does not warrant that it is entitled to let.*

[1] Smith, Eviction and Rental Claims Lexis Nexus, p 1-3 ("Smith")
[2] Smith p 1-4
[3] Harms, Amlers Precedents of Pleadings, 2018, p 191 and related cases
[4] 2016 (1) BCLR 28 (CC)

[29] As far back as the 1893 Supreme Court of Transvaal decision in Salisbury, one finds abundant reference in our common law to the rule mentioned in Boompret. For example, in Loxton the Supreme Court of the Cape of Good Hope held in 1905 that "it is not competent to a lessee to dispute his landlord's title." It was prepared to apply this rule in the context of a lessee attempting to resist eviction (though the summons in that case claimed only damages). In Loxton the claim was brought by the owners. In Kala Singh the Transvaal Provincial Division in 1912 directly applied the rule in the context of a sub-lessor seeking to evict a sub-lessee after the termination of the sub-lease. In a manner analogous to Mighty Solutions' defence in this case, the sub-lease attempted to resist ejectment on the basis that the sub-lessor's head lease with the owner of the land was invalid. The Court rejected this argument because "as between lessor and lessee it does not lie in the mouth of the lessee to question the title of his landlord.

[30] In Boompret the Court considered whether a lessee can refuse to vacate a property upon termination of a lease in circumstances where the lessor does not have title and where the lessee has acquired an independent right to remain in occupation. The majority was sympathetic to the possibility that a lessee can rely on such a defence if the lessor brought its eviction claim on the basis of the actio locate, but not if the lessor's claim is based on a possessory remedy. The majority regarded it as unnecessary to decide this, because the appellants were unable to establish that they had acquired an independent title. The minority went further and found that the rule that a tenant may not dispute a lessor's title did not apply, where a claim for ejectment was based on the actio locate. The lessee's "alleged

independent titles being susceptible of relatively easy proof, may be raised as a defence," it said.

[31] Boompret therefore left the common law unchanged. The decision did not create a specific Boompret "rule" or "principle". The High Court applied the common law correctly. It was unpersuaded that Mighty Solutions was able to raise the defence that Engen no longer has a right to occupy the premises. This would be true even on the assumption (which counsel for Engen conceded may be made) that Engen no longer had title when it moved to evict Mighty Solutions.

…

[33] Mighty Solutions' submission that the common law rule "falls away," because its rationale does not apply in this case, is untenable. The rule is clear : a lessee or sub-lessee cannot rely on a defence that its lessor or sub-lessor lacks title in order to resist eviction upon termination of the lease. Mighty Solutions is a sub-lessee trying to do exactly that. Under the common law Engen had standing to evict Mighty Solutions. Questioning the rationale for the rule takes us rather to a separate question, namely, whether the law ought to be developed".

[32] In expanding on whether this common law principle required to be developed, it was submitted that the Constitutional Court in the same case concluded as follows:

"*[52] Logic and the reality of commercial practice support the rule. In the context of retail, commercial and industrial leases, the property-owning entity seldom leases the property out. Frequently it is an operating arm or subsidiary that does so. A defence which allowed a lessee without title to remain in rent-free occupation*

until the lessor proved its title could easily be exploited. A dispute over a lessor's title, regardless of its merits, could pave the way for prolonged occupation by lessees acting in bad faith. As Counsel for Engel emphasised, the position of sub-lessors could be even worse, as they still have to meet their obligations in terms of the head lease during the relevant periods. The argument made by Mighty Solutions that it always remains open to the original title-holder to evict a recalcitrant sub-lessee misses the point : owners are often reluctant to deal with sub-lessees and insist that their lessee does so.

…

[56] There is no apparent reason to develop the common law in this case. The rule does not offend the spirit, purport and objects of the Bill of Rights, or the values of our constitutional democracy. Fuel retailers like Mighty Solutions and the numerous applicants preceding it in cases like Gundu Service Station may have justified grievances about the structure of the fuel industry and the conduct of large oil companies in their dealing with retailers. However, Mighty Solutions chose the wrong avenue to prosecute these grievances. The High Court suggested approaching the Competition Tribunal if anti-competitive practices were alleged. To relax the common law rule as to allow Mighty Solutions to remain in occupation until Engen proved valid title would be unjust and commercially reckless and might well have far-reaching and unnecessary implications for the law of lease and of contract in general.

…

[67] Under the common law of lease Mighty Solutions may not question Engen's title as a defence in eviction proceedings after the valid termination of the lease

agreement between it and Engen. The common law position does not call for the development on the facts of this case. The enrichment argument cannot be entertained. Engen has standing to evict Mighty Solutions."

[33] The respondents, in this regard dispute that the trust is the owner of the property. Their contention has always been that Mrs Ngaleka, the deceased was misled into donating the property and giving power of attorney to transfer the property to the trust. In fact, it was the respondent's submission that the property donation and a subsequent transfer of the property into the name of the trust, which strategically shared a name "Mzamomhle" with the first respondent was unlawful, and in addition, a valid lease agreement was not entered into between the applicants and the first respondent.

[34] At all times material thereto, Mrs Ngaleka believed that the monthly payments to the applicant was the first respondent's contribution towards the property insurance. Even then, she was labouring under the hope that should there not be any claim lodged by the first respondent for a period of five (5) years, she would be entitled to a refund of R100 000.00. The amounts paid by Mrs Ngaleka were not in respect of rentals as contended by the applicants. After growing concerns and upon inquiring about the exact owner of the property at some point being referred to as belonging to the trust, Mrs Ngaleka was assured that the property was still in the name of "Mzamomhle."

[35] It was on that basis that the respondents challenged the trust's title to the property and contended that they hold an independent title to the property. In any event, it was

submitted that it was not competent for the applicants to conclude a lease with the first respondent whilst the property was still legally owned by the same first respondent. The lease agreement was signed by Mrs Ngaleka on 17 August 2012 and the commencement date was 1 September 2012. The property was in fact transferred to the applicant on 15 April 2016, and it was stated that upon Mrs Ngaleka becoming aware of this transfer, it bothered her and unfortunately that is the same year that she died without taking actions upon her discovery. According to the respondents, due to the similarity in the names of the Trust and Educare, Mrs Ngaleka was oblivious to the fact that the property was now registered in the name of the trust.

[36] It was the respondents' submission that even if it could accept that the applicants were the lessors, it is trite that the lessor must give the lessee vacant possession of the property and warrant that no one else has the right in law to disturb the lessee's use and enjoyment of the property.[5] In the present matter, the applicants as lessors could not warrant that no one else had the right in law to disturb the lessee's use and enjoyment of the property as the entity with the superior title or right in law to disturb the lessee's use and enjoyment of the property, was the very lessee. In leasing the property to the educare, the trust was neither the owner, nor agent, and could not warrant that no one else has the right in law to disturb the lessee's use and enjoyment of the property.

[5] "Principles of the law of sale and lease" – Bradfield, Kahn and Lemann (2013) Juta and Company Ltd, at page 150

[37] The respondents' response to this argument was that the applicants are not upfront with their analysis and they pointed out that the applicants' reliance on *Mighty Solutions* (s*upra*) is selective. It omitted paragraph 32 which stated as follows:

> "*The facts of this case do not require this Court to consider – as the Court did in Boompret – whether a lessee can rely on a defence that the lessor lacks valid title in circumstances where the lessee asserts its own independent title to the premises. Mighty Solutions did not establish that it had acquired any independent title to the premises […]*"

[38] It was argued by the respondents that the current matter is distinguishable from Mighty Solutions. The Constitutional Court in Mighty Solutions summarised the Boompret[6] judgment as follows:

> "*In Boompret the Court considered whether a lessee can refuse to vacate a property upon termination of a lease in circumstances where the lessor does not have title and where the lessee has acquired an independent right to remain in occupation. The majority was sympathetic to the possibility that a lessee can rely on such a defence if the lessor brought its eviction claim on the basis of the actio locate; but not if the lessor's claim is based on a possessory remedy.*"[7]

Based on the *actio locate* principle, the respondents contended that the educare has an independent title to the property.

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[6] Boompret Investments (Pty) Ltd & Another v Paardekraal Concession Store (Pty) Ltd 1990 (1) SA 347 (A) at 351
[7] Mighty Solutions at paragraph 30

[39] Further, it was submitted by the respondents that the *Mighty Solutions* (*supra*) is more distinguishable on the basis that the facts of it relate to commercial leases where a proper agreement was in place. In the contrary the applicants portrayed themselves as a “philanthropic trust” and the so-called unlawful occupier is an educare which is run and serviced by destitute persons within a poor community. In any event, in this matter, the applicants and the first respondent did not conclude a valid lease agreement, which it alleges is the basis of this eviction.

DISCUSSION

[40] To the extent that both the applicants and the respondents raised some preliminary points, *albeit* informally, this court will deal with all of them for the sake of completeness.

Condonation

[41] The applicants were late in filing their replying papers, and likewise, the respondents had difficulty in finding legal representation when their erstwhile attorneys withdrew based on financial instructions. It is therefore undeniable that these proceedings took a considerable time to be finalised. As both parties yearn for finality in these proceedings, it would be appropriate and in the interest of justice for this Court not to occupy itself with technical issues unnecessarily. In the result, condonation is granted, both to the applicants and the respondents for their delay in filing papers timeously and prosecuting the matter on time.

First respondent unrepresented

[42] The applicants' Counsel when addressing the Court on the preliminary points submitted that the first respondent is not represented before this Court and further, the second respondent did not depose on behalf of the first respondent. However, it was pointed out to the applicants' Counsel that the second respondent in opposing this application stated in her answering affidavit that in considering her family's historical involvement in the activities of the first respondent, she was duly authorised by the board of the first respondent to depose to the affidavit on its behalf. There was no need for the board members to file any confirmatory affidavits as suggested by the applicants. A copy of the resolution was then attached in the answering affidavit. In my view, the said averment and a copy of the resolution was enough to indicate that the second respondent was authorised to oppose this application and / or represent the respondents, including the first respondent in these proceedings.

Dispute of Fact

[43] The second respondent contended that the applicants foresaw or should have reasonably foreseen the material dispute of fact, as the first respondent challenged the applicants' ownership of ERF 22933 Wallacedene Kraaifontein. The Court noted this point and agrees with the applicants that the issue of ownership of this property is not a matter for determination before this court. The eviction application is capable of being decided on the papers placed before it. If the respondent is found to be an unlawful occupier, the apex court in recent decisions, insisted that the court hearing an eviction

application should call for an investigation of surrounding circumstances before the court grants a just and equitable order of eviction. With that background, this Court will keep that in mind when the merits are traversed later in the judgment.

Second respondent's opposition based on hearsay

[44] The applicants' Counsel submitted that the applicants concluded a lease agreement with Mrs Ngaleka. The second respondent does not have any personal knowledge of the facts that she deposed on, more especially that when the property was donated to the trust and subsequently transferred to the same trust, she was not in the Western Cape, but in the Eastern Cape. The second respondent indeed confirmed that she was not in the Western Cape during that period. However, throughout her growing years, she was part of this educare and her mother kept her abreast and informed her about what was happening at the educare as she worked and or assisted her mother in the educare when she was in the Western Cape. On her return from the Eastern Cape in 2016, it was at the time her mother, Mrs Ngaleka realised the effect of the power of attorney that she signed and the fact that she was drowning in debt as a result of the payment she made to the applicant all the years. Mrs Ngaleka advised the second respondent that she did not intend to transfer ownership of the property or sign a power of attorney which would have the effect of permitting transfer of the property to the applicants.

[45] Similarly, the deponent Gert Albertus Van Rhyn *("Mr Van Rhyn")* to the applicants' application was not a trustee when the applicants entered into the alleged lease

agreement with the first respondent. He replaced Susanna Jacoba Frank *("Ms Frank")* who was the trustee of the trust as evidenced by the Letters of Authority at least until 24 February 2017[8]. Mr Van Rhyn became the trustee of the trust, as evidenced by the Letters of Authority on 01 September 2017[9]. Equally, Mr Van Rhyn has no knowledge of the facts he deposed on.

[46] Section 3 of the Law of Evidence Amendment Act, 45 of 1988 states that:

> ***3. Hearsay evidence***
>
> *(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –*
>
> *(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*
>
> *(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*
>
> *(c) the court, having regard to –*
>
> *(i) the nature of the proceedings;*
>
> *(ii) the nature of the evidence;*
>
> *(iii) the purpose for which the evidence is tendered;*
>
> *(iv) the probative value of the evidence;*

[8] GVR 2 – Record page 31
[9] GVR 18 – Record page 243

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice."

[47] As stated, the test for the admissibility of hearsay evidence is whether it is in the interest of justice to admit such evidence. It is indeed so that each case should be decided on its own merits. The first respondent was founded by the second respondent's mother some twenty-two (22) years ago. It was the second respondent's evidence that besides the brief period that she went to the Eastern Cape, she worked and assisted her mother in the educare and she was familiar with the operation of the educare. Regardless of her mother's lowest level of education, the educare in their capable hands flourished, and that on its own was not disputed.

[48] The applicants did not file a formal objection on the second respondent's *locus standi* to depose on behalf of the respondents. However, the second respondents filed an objection to Mr Van Rhyn's *locus standi* in these proceedings, but same was not pursued at the hearing of the matter. Although there was no formal application in this regard, to the extent that this court was asked to make a finding on this point, it will be dealt with on that basis.

[49] The facts deposed to by the second respondent are hearsay in nature. Notwithstanding, the level at which she was *au fait* with the establishment and operations of this educare demonstrated that she had internal knowledge of the early learning facility that was her mother's brainchild. The evidence tendered by the second respondent could be easily ascertainable as in some respects it was corroborated by documentary evidence and further confirmed by the applicants.

[50] In addition, the fact that shortly after the demise of her mother, she stepped into her shoes and continued to run the educare with the third respondent is a reflection of her prior knowledge of the operations of the educare. That on its own gave credence to an assertion that the second respondent had an intimate knowledge of the educare based on the legacy that was passed on to her by her mother.

[51] The Supreme Court of Appeal in *Giesecke & Devrient v Minister of Safety and Security*[10]stated that the courts' power bestowed upon by s 3 (1) (c) is discretionary:

> *"[31] … The section requires that the court should have regard to the collective and interrelated effect of all the considerations in paras (i) – (iv) of the section and any other factor that should, in the opinion of the court, be taken into account. The*

[10] See (749/10) [2011] ZASCA 220 (30 November 2011); 2012 (2) SA 137 SCA

section thus introduces a high degree of flexibility to the admission of hearsay evidence with the ultimate goal of doing what the interests of justice require."

[52] Most importantly, such considerations are that the second respondent is party to these proceedings, and the nature of the proceedings should be taken into account holistically; the nature of the evidence tendered; the purpose for which the evidence is tendered, the weight / or the probative value of the evidence; the fact that Mrs Ngaleka has passed on and unable to give evidence and on whom the probative value of the evidence depends; the amount of prejudice to the applicants and the respondents if the evidence is rejected; that the respondents are sought to be evicted from the property, the legacy of which was built by Mrs Ngaleka; the fact that Mrs Ngaleka was an unsophisticated person and was not legally represented when he dealt with the trust; the fact that she bought the land where this property was built, this Court is of the opinion that it is in the interest of justice that the hearsay evidence of the second respondent should be admitted.

Eviction proceedings – Was the lease agreement upon which the eviction proceedings are based valid in law.

[53] It is common cause that in any contractual relationship, there should be a meeting of minds. There could be no one sided approach. So, the principle of legality is one of the requirements for the formation of a valid contract. In instituting these proceedings, the applicants purely stated that the property was leased to the first respondent for the purposes of operating the Mzamomhle centre. Though the applicants pitched themselves as a "philanthropic trust" that helped the needy and destitute, what comes out strongly

from its founding affidavit is that this eviction is based on a breach of contract. The proceedings were instituted in order to protect its investment which is worth almost R2 million. The purpose and objectives of this trust became relevant in their replying affidavit. The applicant's further concerns were that, when Mrs Ngaleka, the founder and the principal of the first respondent passed away at the end of November 2016, the second and third respondents, who lack the requisite qualification, training and expertise to operate the Early Childhood Development Centre, took over control of the first respondent. As a consequence thereof, the first respondent fell into arrears with the rental and the Mzamomhle centre was no longer run according to the National Norms and Standards for Early Childhood Development Programmes *("Norms and Standards").*

[54] The lease expired on 31 August 2017. The respondents failed to vacate the property, but held over in unlawful occupation of the property despite having no contractual or other basis in law. Hence the applicants instituted these proceedings.

[55] As stated above, upon considering the applicants' founding papers, the reasons for the institution of these eviction proceedings is the respondents' breach of contract, and the respondents' subsequent status as unlawful occupiers.

[56] The Court is faced with an unprecedented scenario where the Mzamomhle Foundation Trust, (the lessor) with an address in Stellenbosch leased the premises situated at Grootboom Street, ERF 22933 Wallacedene Kraaifontein to Mzamomhle Educare (the lessee) who was the owner of the property situated at Grootboom Street,

ERF 22933 Wallacedene Kraaifontein in September 2012. Strangely, the two entities share the same name “Mzamomhle”. Perhaps in their eyes, the fact that it erected a structure on the property entitled it to call for rental from the owner of the property. That cannot be.

[57] It is trite that the lessor must give the lessee vacant possession of the property and warrant that no one else has the right in law to disturb the lessee’s use and enjoyment of the property. In the present matter, the applicants as lessors could not warrant that no one else had the right in law to disturb the lessee’s use and enjoyment of the property as the entity with the superior title or right in law to disturb the lessee’s use and enjoyment of the property, was the very lessee. In the present matter, the applicants as lessors could not warrant that no one else had the right in law to disturb the lessee’s use and enjoyment of the property as the entity with the superior title or right in law to disturb the lessee’s use and enjoyment of the property, was the very lessee. The applicants might conveniently hide behind the fact that the lessor need not be the owner of the property, it might be so in the Mighty Solutions *(supra).* However, each case has to be judged according to its own merits. In fact, the manner in which the entire contract was concluded is absurd. It smacks of total disregard of the principle of legality. The contract itself is wildly illogical, ridiculous and mostly unreasonable, if regard is had to the fact that the so-called agreement was concluded with an innocent and uneducated person. In any event, even if the first respondent was not duped into leasing its own property, Mrs Ngaleka disavowed this lease agreement. According to Mrs Ngaleka’s understanding, she did not pay rent for this property, in her knowledge, she was contributing towards the property insurance. In fact, she was totally dismayed by the fact that the educare did not

own the property in May 2016. Somehow, the applicants hoodwinked and / or pulled the wool over Mrs Ngaleka's eyes, by making it sound and look like "Mzamomhle" a familiar name to her, owned and was in control of the property.

[58] Surprisingly, upon the City being asked whether it would provide alternative accommodation should the eviction be granted, its response was that "*The City cannot commit upfront to the provision of the alternative accommodation to those currently occupying Educare should the eviction succeed as this depends on the assessment of various factors, including the evictees' personal circumstances and whether an alternative accommodation is available for them. The Trust will most likely still operate an educare facility from the property*." It appears that the City's response was based on the premise that the trust and the educare were the same entity. Conveniently so, it did not realise that the trust and the educare as cited in these proceedings are different entities. In addition, the City's Counsel stated that the City has no obligation to accommodate the respondents as they do not fall in the category of "homeless persons". It did not, for a moment comprehend that the Constitutional Court in Grootboom *(supra)* once ordered various spheres of government including the City to devise, fund, implement and supervise measures to provide relief to those in desperate need. The City might argue that the first respondent is not the children's primary residence, however, the children's right to basic education is fundamental and should be protected at all costs. Coincidentally, this is the same area that had the socio economic issues in 2000 already that the City does not want to involve itself with.

[59] In fact, the City knew that the two entities are different when it authorised the transfer of the property. The City authorised the transfer of the property from the educare to the trust on the basis that the trust would use it for the same purpose for which it was approved by the City when the educare bought the property which in addition was consistent with the conditions of the sale agreement. Nonetheless, the City did not confirm these facts from the first respondent nor Mrs Ngaleka before it authorised the transfer of the property to the trust. It appears that the version or views of the owner of the property on these serious allegations was not important, as none was called for by the City. More importantly, Mrs Ngaleka was an unsophisticated vulnerable woman and was not legally represented throughout this process.

[60] Ironically, the City failed to take cognizance of the fact that this application was brought purely on a commercial basis. There is no other relationship between the applicants and the respondents, according to the applicants, other than that of a lessor and lessee. The applicants considered the financial risk of funding the building without owning the property and decided that the substantial investment in the property, valued at R1 727 195.00 (excluding VAT) could only be justified if the Erf was transferred to the trust. Quite contradictory, the applicants stated that it did not intend to take over nor hijack the respondents' educare. It totally forgot that it stated in its application that, once the respondents and all other persons who unlawfully occupy Erf 22933 Wallacedene Kraaifontein are evicted, the applicants intends replacing it with Abinisa NPO so that all children enrolled at Mzamomhle Educare will not be negatively impacted.[11] This

[11] Record page 91

statement is puzzling and goes against the assurance that the applicants would not be taking over the respondents' operations.

[61] In all earnest, if the applicants are upfront with the fact that the relationship between the applicants and the respondents is that of lessor and lessee, it then follows that the respondents and the vulnerable children will all be left to learn in the street and unaccommodated should this Court find that it is just and equitable to evict the respondents. That is where the City's involvement becomes crucial. This situation inadvertently brings back the destitute child to a similar situation it was twenty-two years ago. If the contractual lines have to be drawn, there is no way that the new entity Abinisa NPO would replace Mzamomhle Educare and take over its operations should the eviction be granted. The applicants are therefore not upfront with their motive before this Court.

[62] Further, the applicants made the situation even more murkier when on the day of Mrs Ngaleka's death, the representatives of the applicants and / or CECD attended at Mrs Ngaleka's house and not to grieve with the family, but to demand Mrs Ngaleka's Identity Document and Death Certificate for an undisclosed reason. Shortly thereafter, one Aziza Schreuder who was the representative of the applicants replaced Mrs Ngaleka as the new signatory in the first respondents' banking account. As a result, the said Aziza Schreuder diverted funds of the first respondent to the new banking account. The applicants were further instrumental in installing a new principal and her assistant after the demise of Mrs Ngaleka at the first respondent. With all these actions, the applicant denied that it intended taking over the respondent's educare. Clearly, since the trust and the CECD representative all took their mandate from the first applicant and or his

representative, it would be expected of the respondents not to know who they dealt with as they are unsophisticated persons. If they did not know the difference between the first respondent and the trust as they both shared the name “Mzamomhle” it is highly probable they did not know an entity by the name CECD, as the applicants disputed that the said Aziza was sent by them.

[63] In my view, the alleged lease agreement is peppered with illegality, and on the face of it unconscionable and contrary to public policy. Even if the lease agreement would be said to be legal, the question to be asked by this Court is whether the applicants by instituting the eviction proceeding based on the so-called contract, are not hampering the best interests of the child as entrenched in section 28 (2) of the Constitution and a right to basic education as protected in section 29 (1) of the Constitution.

[64] The Constitutional Court stated that the proper approach to the impugned contract or contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, those found in the Bill of Rights – *See Barkhuizen v Napier*[12]. The majority judgment explained that public policy as informed by the constitution imports “notions of fairness, justice and reasonableness. It also recognised that public policy, in general, requires parties to honour contractual obligations that have been freely and voluntarily undertaken.

[12] [2007] ZACC 5; 2007 (5) SA323 (CC); 2007 (7) BCLR 691 (CC) at para [30]

[65] In *Barkhuizen (supra),* it was noted that public policy is deeply rooted in our constitution and the values which underlie it. It was state at paragraph 27:

> *"Ordinary constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain; our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, 'is a cornerstone' of that democracy; it enshrines the rights of all the people in our country and affirms the democratic [founding] values of human dignity, equality and freedom'*
>
> *What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore unenforceable."*

[66] In *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*[13] the Constitutional Court (minority judgment) sought assistance from other jurisdictions with regard to divergent approach in these contractual – constitutional matters and stated as follows:

[13] (CCT 109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020)

"[182] German law, like ours, makes a distinction between invalidation on public policy grounds and the general operation of good faith. The former is governed by Articles 134 and 138 of the German Civil Code (Burgerliches Gesetzbuch or BGB), the latter primarily by Article 242.

[183] Article 134 provides that a legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion. Article 138 (1) provides that a legal transaction that is contrary to public policy is void. Article 138 (2) adds:

> *"In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgment or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted percuniary advantages which are clearly disproportionate to the performance."*

Likewise, the respondents explained that Mrs Ngaleka was an unsophisticated person and far away from understanding legal concepts. Such allegations are backed up by the documentary evidence that was filed of record. In many instance, her signature is not consistent in the documents she signed. *'Burkhuizen* requires that in a case of that kind the application of public policy in determining the unconscionableness of contractual terms and their enforcement must be done in accordance with notions of fairness, justice and equity and reasonableness cannot be separated from public policy. Public policy takes into consideration the necessity to do simple justice between individuals and is informed by the concept of ubuntu'[14].

[14] See *Beadica (supra) at para [201]*

[67] In Beadica *(supra)* the Constitutional Court expanded further as follows:

> [230] … "*The implementation of the eviction order for the failure to notify the renewal of the lease agreement timeously must be weighed up against the context already described. Its implementation must be weighed up against the principles of fairness and ubuntu which provides for a more expansive analysis which would include the inequality in bargaining power…*
>
> *[231] This approach leaves space for courts to scrutinise contractual autonomy whilst at the same time allowing courts to refuse enforcement of contractual terms that conflict with constitutional values, even though the parties may have consented to them. Public policy must take all these considerations into account and not implement contractual autonomy at the expense of transformative constitutionalism. The appropriate balance can readily be achieved upon a recognition of an "underlying moral or value choice" in which the constitutional values of ubuntu feature in this constitutionally transformative space".*[15]

This suggests that more analysis in this matter is needed more so that the parties in this contract had an unequal bargaining power.

[15] See *Beadica (supra) at para [230] and [231]*

[68] This Court accepts that the contract that was entered into between the applicant and the respondents is unenforceable due to its illegality. It appears that even if the contract was legal, the rights of the children still remain paramount. *In AB and Another v Pridwin Preparatory School and Others,*[16] the Constitutional Court (minority judgment) recently had an opportunity to consider the rights of children and the unconscionable contracts and had this to say:

> *"[91] Therefore, while Burkhuizen demands that contracts freely and consciously entered into must be honoured, the contractual autonomy of parties is curtailed when dealing with the right of basic education and the best interests of the child. In these instances, the enforcement of the contract must be subject to the constitutional precepts outlined above because of the direct applicability of rights in the Bill of Rights. Even if the more general public policy approach is preferred, the result will effectively be the same: it is against public policy to enforce a contractual claim that infringes the constitutional rights of children who are not parties to the contract."*

[69] This then brings the Court to the ineluctable conclusion that after the construction of the premises, the signature of the purported lease by the parties, the purported donation and transfer of the property, to the trust, in so doing the applicants controlled and managed the first respondent as its own property, hence no clear lines are drawn between the two entities. The fact that Mrs Ngaleka was totally oblivious to the fact that Mzamomhle Foundation Trust and Mzamomhle Educare was not the same entity was in

[16] (CCT 294/18) [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC) (17 June 2020) para 91

fact confirmed by her complaints and frustrations that she communicated to the second respondent.

[70] In fact, the intention of the applicants to take over the operations of the first respondent was apparent shortly after Mrs Ngaleka's demise, when they questioned the qualifications of the second and third respondents whereas, Mrs Ngaleka's lack of qualifications was tolerated and inconsequential. The level of disrespect that was demonstrated by the applicants is appalling, more especially when the departure of Mrs Ngaleka was still fresh in their minds, the applicants and their representatives in the form of ECDC went on to demand the first respondent's books, ID documents and death certificate of Mrs Ngaleka and changing the management of the first respondent without calling for the board meeting of the first respondent and table their issues at the meeting where all Board members are present. With all its behaviours and actions, the applicants disputed that it was not attempting to take over the administration and control of the educare.

[71] Moreover, it was evident at that point that the trust was in a mission to fully acquire its property investment when it started replacing personnel in the first respondent without negotiating with the respondents but rather extract them out of the institution that they worked for throughout their lives.

[72] Perhaps the applicants were justified in taking authority for its entitlement to eviction from the Mighty Solutions judgment, as its approach to the eviction was based

purely on the alleged contract and that in such circumstances, there is no requirement to own title or prove ownership of the property. However, in a situation where the existence of a binding contract is denied, or is said to be non-existent it is clear that the principle in the Mighty Solutions judgment is not applicable in this regard.

[73] In *Port Elizabeth Municipality v Various Occupiers* [17] the Constitutional Court emphasised the approach that courts must adopt an active role in adjudicating eviction matters and stated:

> "[23] *The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make. The Constitution and PIE require that, in addition to considering the lawfulness of the occupation the court must have regard to the interest and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable results.*"

[74] Before this Court, it appears that the applicants are selective in who exactly has to be evicted. If the children would not be impacted negatively as they suggested, it

[17] [2004] ZACC 7; 2005(1) SA 217 (CC); 2004 (12) BCLR 1268 CC at para 23

follows then that this particular fact should have been clearly pleaded in the founding papers and not be hidden elsewhere in the annexures.

[75] Sachs J in *Port Elizabeth Municipality (supra)* at paragraph 32 stated:

> "*The court is not resolving a civil dispute as to who has rights under land law; the existence of unlawfulness is the foundation for the enquiry, not the subject matter.*"

Similarly in this case, this Court will not occupy itself about who owns the property, as this is not the point for determination at this stage. It is a sad situation that the basis of this eviction is on the face of it an unlawful lease agreement.

[76] Even though this Court is not called upon to resolve a clear dispute of facts from both the applicants and the respondents, equally or at the same breath, it cannot simply fold its arms and allow the applicants to treat the respondents with disdain. Similarly, this Court cannot close its eyes to the allegations of fraud and misrepresentation of facts to Mrs Ngaleka by the applicants. In fact, it is this Court's finding that it was not competent for the applicant to enter into a lease agreement with the respondents, in circumstances where the property at the time belonged to the first respondent. In any event it makes sense that Mrs Ngaleka was not aware of the lease agreement that she signed in August 2012 because at that time the property belonged to the first respondent. I find it ridiculous for the applicants to even suggest that the first respondent leased its property for a period of five (5) years, whereas in fact the said transfer to the trust happened in April 2016.

Actually, the allegations of misrepresentation and fraud have substance and warrant some investigation in this regard.

[77] As a consequence thereof, the eviction of vulnerable children and the respondents is not competent at this stage as there was no lease agreement that the applicant relied upon for the application for eviction. Further, the applicants stated that they had a valid title deed to prove its ownership. The circumstances leading to the purchase of the land by the first respondent calls for investigation. Again, the denial by the respondents of a valid donation, the power of attorney and a subsequent transfer of the property to the applicants calls for the investigation of allegations of fraud and misrepresentation on the part of the applicants.

[78] Furthermore, the applicants paraded the trust as a 'philanthropic organisation' that assisted in the welfare projects for the poor and destitute. The applicants have to be investigated as to what extent have they implemented its objectives and strategies, if its purported assistance has a potential of leaving the respondents and vulnerable children more destitute than they were before the arrival of the applicants.

[79] In *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another,* [18] the Constitutional Court held that:

[18] (CCT 108/16) 2017 ZACC 18; 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC) (8 June 2017) at para [43]

"*As starting point, this Court in Machele held that "[t]he application of PIE is not discretionary. Courts must consider PIE in eviction cases." Furthermore, this Court in Pitje held that courts are not allowed to passively apply PIE and must "probe and investigate the surrounding circumstances."*

The surrounding circumstances in this case are such that this Court in its findings should not be engaged in a ticking box exercise as suggested by the applicants. Contrary to what the applicants want this Court to believe that there were clearly defined lines between the applicants and the respondents' relationship, the evidence at hand suggest a more shadowy relationship. Hence it calls for a thorough investigation.

[80] In my judgment, the contract of lease relied on by the applicants is void *ab initio.* In the circumstances, it has no force and effect as it is overwhelmingly tainted with illegality.

[81] In the circumstances, the following order is made:

81.1 Condonation is granted to both applicants and respondents;

81.2 The application for the eviction of the respondents is dismissed with costs.

_____

MANTAME J
WESTERN CAPE HIGH COURT

I agree :

_____

NUKU, J

WESTERN CAPE HIGH COURT

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Heard on: 29 July 2021

Judgment delivered on: 17 September 2021