



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

REPORTABLE

CASE NO: 2350/2020

In the matter between:

NAZEEM NELSON

First Applicant

NADIA NELSON

Second Applicant

and

BEGUM SAMUELS

First Respondent

SHAHIMA SAMUELS

Second Respondent

ZAUTOEN SAMUELS

Third Respondent

NURAAN SAMUELS

Fourth Respondent

(In her personal capacity and as guardian of
any minor children holding title under her)

NIZAAM SAMUELS

Fifth Respondent

REZA BOTHA

Sixth Respondent

RUZAIG SAMUELS

Seventh Respondent

YASSIEN HARIDEEN

Eighth Respondent

ALL OTHER OCCUPANTS OCCUPYING NO. 87

SIXTH STREET, KENSINGTON, CAPE TOWN,

UNDER THE FIRST TO EIGHTH RESPONDENTS

Ninth Respondent

CITY OF CAPE TOWN

Tenth Respondent

Bench: P.A.L.Gamble

Heard: 17 September 2020

Delivered: 29 March 2021

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 14h00 on Monday 29 March 2021.

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. This case involves the continued occupation of a family home located at 87 Sixth Street, Kensington, Cape Town ("the property") by the first to ninth respondents, to whom I shall refer collectively as "the respondents". The respondents are relatives of the original owner of the property, Mr. Yusuf Samuels, who acquired it in 1970. In July 1983 the property was donated by Mr. Samuels to the late Jalodien Williams ("Mr. Williams") and registered in the latter's name on 15 February 1984. During his lifetime, Mr. Williams granted some, or all, (it is not entirely clear) of the respondents the right to occupy the property on condition that they bore the municipal services, water and electricity costs associated with the property.

2. Mr. Williams died on 8 October 2011 leaving his wife Mariam Williams (to whom he was married in community property) as the sole heir in his estate: their joint will made provision for Santamtrust Ltd to act as the executor in the deceased

estate of the first dying and the estate of the surviving spouse. A representative of ABSA Bank Ltd (the ultimate corporate successors to Santamtrust), Ms. Maria Magrietha Louw, was appointed as the executor in the deceased estate and on 30 November 2016 she gave the respondents one month's notice to vacate the property. When the occupants failed to do so, Ms. Louw served a second notice to vacate on 25 January 2017. Still the occupants refused to quit the property. At the time the surviving spouse was still alive and Ms. Louw appears to have acted on the instructions of Ms. Mariam Williams.

3. While this was happening, and on 17 November 2016, the property was sold out of the deceased estate by Ms. Louw to the applicants ("the Nelsons") for a purchase consideration of R690 000,00. They eventually took transfer on 3 August 2017 and are still the owners of the property. The Nelsons took out mortgage finance when purchasing the property and have subsequently been responsible for the payment of the monthly bond instalments as well as the municipal accounts in respect of the property.

4. The Nelsons do not reside in the property but are desirous of doing so as they currently rent a house in Mitchells Plain where they are liable for rent, which occasions them considerable financial strain. Evidently, certain of the respondents are the aunts of Ms. Nelson, whose mother is their sister. Since they acquired the property (with the knowledge of the respondents), the Nelsons have permitted the respondents to occupy the property at their expense. They now wish to move into the property and have commenced eviction proceedings to obtain vacant occupation thereof. To this end, they lodged an application under s4 of PIE¹ in this court on 6 February 2020 under case no. 2350/2020.

5. Prior to the commencement of this application, Ms. Louw had commenced eviction proceedings in the Cape Town Magistrates Court under PIE during February 2017. That application was eventually set down for hearing on 26

¹ The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1988 ("PIE")

October 2017 but was postponed indefinitely because the respondents had launched an application in this Court which they termed an “Application to Vindicate [the] Property”. The “vindication claim” was based on acquisitive prescription and the Nelsons, who by that stage had taken transfer of the property, were joined in those proceedings.

6. Given that the respondents were not the owners of the property their purported “vindication application” was stillborn and was dismissed by Andrews AJ when she heard it on the semi-urgent roll on 5 February 2018. An application for leave to appeal was also dismissed by Andrews AJ on 4 May 2018. After an abortive application for leave to appeal directed to the Full Bench of this court in August 2018 failed, the respondents petitioned the Supreme Court of Appeal in February 2019. That application for leave to appeal was dismissed in May 2019. A threatened approach to the Constitutional Court to appeal the dismissal of the “vindication application” never materialized.

7. The PIE application in the Magistrates Court has continued to be held in abeyance because the executor in the deceased estate no longer has the requisite *locus standi*, ownership of the property having passed to the Nelsons. Because the current application in this Court is brought by the new owners of the property, a plea of *lis pendens* in relation to the Magistrates Court proceedings will not succeed in light of the fact that those proceedings involve a different party as applicant.

8. When the PIE application served before this court on 17 September 2020, the applicants were represented by Adv. J. Bence on instructions of Le Roux Attorneys Inc. of Cape Town, while the respondents were represented by

Mr.P.Sharuh of Sharuh Attorneys, Cape Town. Le Roux Attorneys formerly represented the executor of the deceased estate, while Mr. Sharuh has continuously represented the respondents in all the litigation in which they have been involved in relation to the property. Mr. Sharuh's involvement in the latest round of litigation stems from a *pro bono* appointment (at his express request) by the Legal Practice Council for the Western Cape. This appointment was only confirmed shortly before the hearing of this matter on 17 September 2020.

THE STAY APPLICATION OF 24 AUGUST 2020

9. On 24 August 2020 the respondents lodged an application in this court seeking, firstly, to stay the eviction proceedings under case number 2350/2020 pending the final determination of a trial action based on a summons issued out of this court by Sharuh Attorneys on 20 August 2020 under case no. 11408/2020 in relation to the property. A further prayer in the stay application sought an interdict in the following terms –

“3. Interdicting the first and second Respondents, their agents and/or assigns from taking any steps to sell, or in any way devolve, encumber and/or alienate the immovable property known as Erf 22324 Kensington, pending the final determination of the action filed under case number 11408/2020 in the honourable Court.”

10. In my view, the interdictory relief can be disposed of without more, given that there is no allegation in the stay application that the Nelsons are considering, or

have taken any steps, to dispose of the property. Simply put, there is no unlawful conduct on the part of the Nelsons which is capable of being interdicted at this stage.

11. The stay application and the eviction application were argued simultaneously on 17 September 2020, whereafter judgment was reserved. During the period in which judgment was reserved various levels of lockdown under the Disaster Management Act, 57 of 2002 in respect of the Covid-19 pandemic were in operation. At the conclusion of his address on behalf of the Nelsons, Mr. Bence asked that any order for eviction of the respondents that the Court might grant, be held in abeyance until it was appropriate to do so under the prevailing Lockdown Regulations. Given that the Government announced the introduction of Alert Level 1 with effect from 1 March 2021, the court considers that the time has now arrived for the final determination of this matter.

THE ACTION PROCEEDINGS UNDER CASE NO. 11408/2020

12. Not all of the respondents in the eviction application are cited as plaintiffs in the action proceedings. The four plaintiffs cited in the action are named as “Bergman (sic) Samuels, Shahiema Samuels, Zaitoen Samuels and Riedwaan Samuels”. While the first three plaintiffs are, notwithstanding the spelling differences, intended to refer to the first to third respondents in the PIE application, the fourth plaintiff does not reside in the property and no eviction order is sought against him.

13. The defendants cited in the action proceedings are Ms. Maria Louw N.O (similarly in her capacity as executor in the Estate Late Jalodien Williams), Mariam Williams, her son Whaleed Williams, the Nelsons and the Registrar of Deeds.

14. In the particulars of claim the relevant parties are described as follows.

“5. The Plaintiffs are the children and/or heirs of the late Yusuf Samuels.... who died on 12 October 1984 (“**Plaintiffs’ father**”) and the late Mrs. Galiema Samuels... who died on 22 May 2005 (“**Plaintiffs’ mother**”)....

7. The Second Defendant is Mariam Williams, an adult female pensioner, who is sued and cited here as heiress and/or surviving spouse of/in the Estate Late Jalodien Williams... [of]... Mitchell’s Plain.

8. The third Defendant is Whaleed Williams, an adult male, who is sued and cited herein heir (sic) in the Estate Late Jalodien Williams...[of]... Mitchell’s Plain.”

Having been described as the fourth and fifth defendants in the action, the Nelsons are respectively “sued and/or cited herein insofar as [they] may have interest (sic) as co-registered owner[s] of the property.”

15. The action proceedings are said to be grounded in Sharia law (“Islamic law”), as Mr Sharuh explained to the Court, and seek to assert proprietary claims for the plaintiffs under Islamic law including -

- (i) The law of *hibbah* (donation);

- (ii) The law of succession in the form of *wasiyyah* (bequest); and
- (iii) The law of *wadee'ah* (safekeeping).

The essence of the claims is that, notwithstanding the registration of ownership of the property in the name of the deceased and despite the express terms of the joint will, the property ought to have accrued to the plaintiffs under one or more of the abovementioned principles of Islamic law in order that they could live permanently (and indefinitely) thereon “without limitation to any member of the family”

16. The relief ultimately sought in the particulars of claim is formulated as follows.²

“30.1 Alleged donation by the Plaintiffs’ father to their half-brother in respect of the property be declared unlawful, invalid and set aside;

30.2 The registration process of property allegedly effected on 15 February 1984 be declared unlawful, invalid, without force or effect and, set aside;

30.3 The property be declared devolved and/or revested to the Plaintiffs; and/or

30.4 The property be declared devolved and/or acquired by the Plaintiffs by way of prescriptive title in terms of section 6 of the Prescription Act 68 of 1969; and/or,

² The grammar and syntax is as in the original

30.5 Payment of damages in the sum of Three Million Rand (R3 000 000.00) together with interest at 9% per annum calculated and compounded as follows:

30.5.1 R1 500 000.00 in respect of pain and suffering and;

30.5.2 R1 500 000.00 in respect of anxiety and *Contumelia*.

30.6 The amount set out herein above are estimated amounts in respect of general damages and is not reasonably practicable to attach a fixed amount in respect of each subhead and there are no actuarial standards applied.

30.7 R60 000.00 in respect of special damages for fees paid;

30.8 Costs of the suit and;

30.9 Such further and/or alternative relief that the Court deems fit.”

17. The particulars of claim reveal a veritable *potpourri* of legal principles that will no doubt attract some form of legal challenge at an early stage of the action proceedings. I thus expressly refrain from commenting on the integrity of the claims at this stage given that there may be an exception or special plea filed in response thereto.

18. It is trite that an applicant for a stay of other proceedings must make out a clear case for such relief and the court considering same will exercise a discretion

as to whether to grant the stay or not.³ Fundamental to any claim for a stay based on *lis pendens* (which is the case here) is that the applicant for the stay must show that the court in each case will have before it the same parties claiming the same relief on the same issue.⁴ That is manifestly not the case here. Furthermore, it has been repeatedly held that an application for a stay of proceedings based on *lis pendens* must not constitute an abuse of process of the court, all the more so where it is designed as a ploy to obstruct, for instance, a lawful order for eviction.⁵

19. In this matter, the action proceedings seek to interfere with the Nelsons' accrued rights of ownership in the property procured lawfully through the purchase thereof from a duly appointed executor of a deceased estate through a deed of sale and the registration of their title in the Deeds Registry. That, in and of itself, is a difficult obstacle for the plaintiffs to overcome.

20. But, there are further challenges. The plaintiffs base their claims on certain tenets of Islamic law relating to inheritance. Our law of inheritance is based on either testate or intestate succession, which is governed (in relation to the former) by, inter alia, the Wills Act, 7 of 1954, the Administration of Estates Act, 66 of 1965, and (in relation to the latter), the Intestate Succession Act, 81 of 1987 and the common law.⁶

³ Caeserstone Sdot-Yam Ltd v World of Marble and Granite and others 2013 (6) SA 499 (SCA)

⁴ Caeserstone at [12] *et seq.*

⁵ Belmont House (Pty) Ltd v Gore and another 2011 (6) SA 173 (WCC) at [13] – [19]

⁶ LAWSA Vol 31 2nd ed at para 234 *et seq.*

21. This matter concerns testate succession given that Mr Jalodien Williams left a valid will upon his demise on 8 October 2011. In this regard, in the stay application, Ms. Mariam Williams deposed to an affidavit in support of the Nelsons in which she stated that she and Mr. Jalodien Williams had been married in community of property and annexed a copy of their joint will in which she was declared to be the sole heir. In the circumstances, the validity of the will is to be determined under the Wills Act and the winding up of Mr Jalodien Williams' estate is governed by the terms of the Administration of Estates Act.

22. In the action proceedings the plaintiffs seek, so it would seem upon a generous interpretation of the peculiarly worded particulars of claim, to undermine Mr Jalodien Williams' ownership in, and the right to dispose of, the property registered in his name by testamentary instrument. The challenge is founded on certain tenets of Islamic law rather than the South African law of succession, and to the extent relevant, our law of property. In so doing, I understand the approach to be that the challenge is based on the plaintiffs' right to pursue a religion of their choice and the legal principles which that choice embraces.

23. In Doctors for Life International,⁷ the Constitutional Court reminded us that "under our constitutional democracy the Constitution is the supreme law". While the two statutes in question here (the Wills Act and the Administration of Estates Act) remain in force, it is the duty of this Court to enforce them. That duty continues until

⁷ Doctors for Life International v Speaker of the National Assembly and others 2006 (6) SA 417 (CC) at [38]

there is a constitutional challenge to the statutes in question, the High Court has found that they breach one or more of the rights protected under the Bill of Rights, the Constitutional Court has confirmed such unconstitutionality and Parliament has passed the necessary remedial legislation. Until that happens, however, there is no room for a party to rely, for example, on Islamic law principles which are *per se* inconsistent with the law in operation at the time. There is no room in our constitutional dispensation for reliance on legal pluralism *per se*.

24. In Fourie⁸ the Constitutional Court was called on to pronounce upon the validity of same-sex marriages. In so doing the court drew comparative analogies between such marriages and those contemplated in s15(3) of the Constitution⁹, which otherwise deals generally with the entrenched rights to freedom of religion, belief and opinion.

25. At [108] the Court observed as follows -

⁸ Minister of Home Affairs and another v Fourie and another 2006 (1) SA 524 (CC)

⁹ The section reads as follows.

"15(3)(a) This section does not prevent legislation recognizing-

- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
- (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of (a) must be consistent with this section and the other provisions of the Constitution."

“The special provisions of s 15(3) are anchored in a section of the Constitution dedicated to protecting freedom of religion, belief and opinion. In this sense they acknowledge the right to be different in terms of the principles governing family life. The provision is manifestly designed to allow Parliament to adopt legislation, if it so wishes, recognising, say, African traditional marriages, or Islamic or Hindu marriages, as part of the law of the land, different in character from, but equal in status to general marriage law. Furthermore, subject to the important qualification of being consistent with the Constitution, such legislation could allow for a degree of legal pluralism under which particular consequences of such marriages would be accepted as part of the law of the land. The section ‘does not prevent’ legislation recognising marriages or systems of family or personal law established by religion or tradition. It is not peremptory or even directive, but permissive. It certainly does not give automatic recognition to systems of personal or family law not accorded legal status by the common law, customary law or statute.”

26. By parity of reasoning, I am of the view that it is not open to a litigating party to rely on Islamic law principles in relation to property rights and succession, where there has been no constitutional challenge to the operative statutes or the common law in this field of the law. An example of such a challenge is to be found in Women’s Legal Centre¹⁰ where the court upheld a challenge to the unconstitutionality of the Divorce Act and the Intestate Succession Act insofar as these statutes failed to recognise the validity of Islamic marriages in certain defined circumstances.

¹⁰ President of the Republic of South Africa and another v Women’s Legal Centre Trust and others [2021] 1 All SA 802 (SCA)

27. However, there is no such constitutional challenge mounted by the plaintiffs in the action proceedings. In the circumstances, and regardless of what other attacks or defences may be considered by the defendants on the merits in the action proceedings, I am of the view that this fundamental flaw in the case is a material consideration in exercising my discretion to refuse to grant the stay of proceedings. In the result, the stay application must fail.

28. This ruling will not affect the validity of the action proceedings. The plaintiffs are entitled to proceed with the action and if they are able to persuade the court ultimately of the integrity of their case they might be entitled to lay claim to ownership of the property. *Non constat* that the plaintiffs are entitled to avoid eviction from the property at this stage on the basis of Islamic law.

THE EVICTION APPLICATION

29. In her affidavit dated 3 September 2020 filed in support of the Nelsons' opposition to the stay application, Ms Mariam Williams explains how the various respondents in the eviction application came to be in occupation of the property. Ms. Williams says that over the years her late husband took pity on certain of the respondents, some of whom were relatives who had fallen upon hard times and were unable to find suitable accommodation.

"18. It is important to mention that it was a condition of the applicants' continued occupation of the property, to which they were not entitled but which constituted a gesture of goodwill on the

part of my late husband, that they had to pay the electricity account, as well as the rates and taxes, water, refuse and sewerage accounts in respect of the property.

19. The electricity account was never transferred onto my late husband's name, and it remained in the name of the late Yusuf Samuels. By the end of 2016, this account was in arrears in an amount of R43 166.18 and I was extremely concerned about this outstanding account, as I simply did not have the money to settle the account.

20. The municipal accounts for rates and taxes, water, refuse and sewerage was (sic), by the middle of 2017, R34 029.62 in arrears, and I was similarly concerned about this account.

21...

22. Because neither myself, nor my late husband had any money, the property constituted the only asset in his deceased estate, and we were unable to do anything as far as the property is concerned in view of the fact that I was unable to settle the escalating municipal accounts.

23. I accordingly approached the first and second respondents [i.e. Mr and Ms Nelson] for assistance, and they indicated that they were willing to purchase the property, as the first respondent grew up in the property and he wished to make it his family home.

24. I went to the applicants, at the time, during late 2016, and informed them of the fact that the property had to be sold. They told me that they knew that this was a logical result of my late husband having passed away, and that they accepted the situation.

25. At no stage during our conversation did they allege that they had any rights to remain in occupation of the property whatsoever.

26. To the contrary, they indicated to me that they have made arrangements in order to obtain alternative accommodation.

27. I accordingly deny, in the strongest terms, their allegations to the effect that they have any rights to the property at all and furthermore that they demanded the return of the property from me, as is alleged in paragraph 18 of the founding affidavit.”

30. In the result, the Nelsons, as owners of the property, are entitled to invoke the *rei vindicatio* by alleging ownership and thereby assert possession and control of their property. It is then open to the person(s) in possession of the property to allege and prove any right to retain possession thereof.¹¹ As a pre-requisite, the Nelsons are obliged to comply with the procedural requirements of PIE, which they have done. Thereafter, and because the respondents in this application have been in unlawful occupation for more than 6 months, the Court is obliged to consider, s4(7) of PIE, which is to the following effect.

“4(7) If an unlawful occupier has occupied the land in question for more than six months at the time 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

¹¹ LAWSA Vol 27 (2nd ed) p299 para 233

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.”

31. The subsection, read with s4(8), thus contemplates a two-stage process. Firstly, a finding that it is just and equitable to evict and then a second enquiry in which the court decides what conditions, if any, are to be incorporated in its eviction order and by when the unlawful occupiers must quit the property. At all times the court’s decision as to what is just and equitable must have regard to the interests of all parties – both the occupiers and the landowner.¹²

32. In Changing Tides the Supreme Court of Appeal suggested, the following approach.

“[11] In terms of s4(7) of PIE an eviction order may only be granted if it is just and equitable to do so, after the court has had regard to all the relevant circumstances, including the availability of land for the relocation of the occupiers and the rights and needs of the elderly, children, disabled persons and households headed by women. If the requirements of s4 are satisfied and no valid defence to an eviction has been raised the court ‘must’, in terms of s4(8)¹³, grant an eviction order. When granting such an order the court must, in terms of

¹² City of Johannesburg v Changing Tides 74 (Pty) Ltd and others 2012 (6) SA 294 (SCA) at [12]

¹³ S4(8) reads –

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

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

s4(8)(a) of PIE, determine a just and equitable date on which the unlawful occupier or occupiers must vacate the premises. The court is empowered in terms of s4(12) to attach reasonable conditions to an eviction order.”

VALID DEFENCE TO THE NELSONS’ TITLE?

33. In the present matter, the occupiers have made out no case in our law to resist the owners’ claim under the *rei vindicatio*. Their initial attempt to assert a claim for ownership through acquisitive prescription was dismissed in this court and also in the Supreme Court of Appeal. Further, their last minute attempt in August 2020 to assert a claim (and it is not entirely clear whether this is a claim for ownership or a lifelong right of occupation) through Islamic law is fundamentally flawed and certainly does not at this stage confer on the occupiers any rights or title which defeat that of the owners.

34. It has repeatedly been said that the effect of PIE is not to expropriate private landowners of their land.¹⁴ Rather, the courts have held that PIE delays (or suspends) the owners’ rights to exercise control over their property until a determination has been made as to whether an eviction will be just and equitable and, if so, under what circumstances.

circumstances; and

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

¹⁴ Ndlovu v Ngcobo; Bekker and another v Jika 2003 (1) SA 113 (SCA) at [17]; City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another 2012 (2) SA 104 (CC) at [40].

35. The circumstances of the present application are such that the owners, the Nelsons, have paid for their new home and have been precluded from occupying same (an act tantamount to expropriation by the respondents). Further, they have had to endure the financial burden of paying the bond instalment on the Kensington property while continuing to pay for their rented accommodation in Mitchell's Plain. Finally, as owners, they are liable for the municipal rates and taxes, electricity and water charges at the Kensington property and have not been compensated by the occupants for the considerable expense they have incurred in this regard. Simply put, the Nelsons are paying twice as much per month for their accommodation as they would otherwise be required to.

36. The opposition by the respondents to the eviction application is brazen and uncompromising. They seek to advance some form of entitlement to the property under Islamic law and demand cancellation of the sale to the Nelsons by the executor without any consideration or *quid pro quo* being offered to the owners for the current value of the property, nor is any compensation tendered for the monthly service costs associated with the Kensington property. That approach is indeed demonstrative of an attitude tantamount to expropriation.

37. In my view, the claims of the respondents herein amount to nothing more than a shameless attempt to protract the litigation with the Nelsons in an endeavour to ward off the inevitable. Their defence to the eviction application (and the lodging of the accompanying stay application) is thus manifestly groundless and in bad faith. In the circumstances, I conclude that it would be just and equitable to evict

the occupiers. That being so, this Court is obliged (under s4(8)) to grant an order for the eviction of the respondents herein from the Kensington property.

DATE AND TERMS OF THE EVICTION ORDER

38. Under s4(9) of PIE the Court is obliged (“must”), when determining a just and equitable date for the eviction, to “have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.” In considering that date, I have regard to the fact that the first respondent, Ms. Begum Samuels, is said to have lived in the property for about 50 years – since she was 6 years old. Likewise, given that this is a family home, some of the other occupiers have been on the property for, at least, more than 10 years with the permission of the erstwhile owner.

39. On the other hand, upon enquiry by the Court, Mr. Sharuh indicated that certain of the younger occupiers were then in fixed employment, as were the Nelsons (according to Mr. Bence), while it appears that Ms. Begum Samuels and her sister Ms. Shahima Samuels are social and/or disability grant recipients. The point is that, as a group, the family of occupiers have limited resources with which to procure alternative accommodation. Further, in a report dated 17 September 2020, the tenth respondent (“the City of Cape Town”) reported in terms of its obligations under s...of PIE that there was temporary emergency accommodation then available in an area known as “Kampies” in Philippi.

40. It is most regrettable that what has been a family home to many for such a long time has led to a family feud of the kind which has played out in these proceedings. But the Nelsons, who bought the property on the alleged assurance from the occupiers that they would move on when the time came for them to do so, are entitled to demand occupation of their property. At the same time, it is this Court's duty to ensure that potentially vulnerable members of society are properly treated under PIE.

COVID-19 REGULATIONS

41. In addition to the requirements of PIE, this Court must have regard to the fact that since this matter was heard in September 2020, the country has been in various stages of lockdown due to the Covid-19 pandemic, some more restrictive than others. The current Disaster Regulations were promulgated on 28 February 2021 in Government Gazette No 11246. ("the Covid Regs"). As has been the case in previous regulations, provision is made therein for evictions. Currently the Covid Regs provide as follows in that regard.

"Eviction and demolition of places of residence

73. (1) A person may not be evicted from his or her land or home or have his or her place of residence demolished for the duration of the national state of disaster unless a competent court has granted an order authorizing the eviction or demolition.

(2) A competent court may suspend or stay an order for eviction or demolition contemplated in sub regulation (1) until after the lapse the termination of the national state of disaster unless the court is of the opinion that it is not just or equitable to suspend or stay the order having regard, in addition to any other relevant consideration, to –

(a) the need , in the public interest for all persons to have access to a place of residence and basic services to protect their health and the health of others and to avoid unnecessary movement and gathering with other persons;

(b) any restrictions on movement or other relevant restrictions in place at the relevant time in terms of these Regulations;

(c) the impact of the disaster on the parties;

(d) the prejudice to any party of a delay in executing the order and whether such prejudice outweighs the prejudice of the persons who will be subject to the order;

(e) whether any affected person has been prejudiced in their ability to exercise legal services as a result of the disaster;

(f) whether affected persons will have immediate access to an alternative place of residence and basic services;

(g) whether adequate measures are in place to protect the health of any person in the process of a relocation;

(h) whether any occupier is causing harm to others or there is a threat to life; and

(i) whether the party applying for such an order has taken reasonable steps in good faith to make alternative arrangements with all affected persons, including but not limited to payment arrangements that would preclude the need for any relocation during the national state of disaster.

(3) A court hearing an application to authorize an eviction or demolition may, where appropriate and in addition to any other report that is required by law, request a report from the responsible member of the executive regarding the availability of emergency accommodation or quarantine or isolation facilities pursuant to these Regulations.”

42. It seems to me that, in applying the Covid Regs, a court has to consider many of the criteria applicable to an eviction which it has already taken into account under PIE. One must thus be careful to avoid a duplication of relevant factors. When the initial Covid Regs were made in March 2020, the country was placed under a so-called “hard lockdown” under Alert Level 5 in which the ordinary movement of citizens was very severely restricted in an endeavour to limit the spread of the virus. It would thus have made sense, at that time, to prevent people being put out of their homes (and possibly onto the streets) in circumstances where they might be exposed to the Covid-19 virus, or where they might expose others to the spread thereof if they were themselves ill.

43. However, since May 2020, the Alert Levels under the Covid Regs have been incrementally relaxed from time to time (save for a shift back to Level 3 over the Festive Season in 2020), so much so that at present, freedom of movement is only

limited to a 4 hour curfew commencing at midnight. The current Alert Level 1 thus makes it possible for people looking for accommodation to leave their homes during the day unhindered and to essentially make unrestricted enquiries in regard thereto. Similarly, should persons require to move home, they will now have little difficulty in obtaining movers to assist them.

44. The residual considerations of which a court must take account under the Covid Regs seem to me then to focus on the health of unlawful occupiers in the context of the Covid-19 pandemic. The Court did not know whether any of the respondents are currently infected with the Covid-19 virus and to that end the parties' legal representatives were contacted by the Court's registrar and asked to inform the Court thereof in the event that it was so. The legal representatives were also requested to furnish the Court with written proof of any positive diagnosis of the Covid-19 virus on the part of any of the litigants.

45. It appears now that the third respondent was contracted the virus in July 2020 and is said to be still suffering the consequences thereof. In addition, the third respondent is hypertensive, asthmatic and only has one kidney. Save for her, none of the other parties to the PIE application has been affected by the Covid-19 virus.

46. In the circumstances, and for the reasons already set out above, I am of the view that the prejudice to the Nelsons in effectively having to fund the costs of accommodation of the respondents in addition to their own living expenses outweighs the prejudice which will be occasioned to the respondents if they are put out of the

property. After all the latter have known for a number of years that they will have to move on when the Nelsons seek to move into their property and, on Ms. Mariam Williams' version in the stay application (which must carry the day in terms of the rule in Plascon-Evans¹⁵), they agreed to do so well-knowing that their occupation of the premises was, at the very least, on the basis of *precarium tenens*¹⁶.

47. I conclude therefore that, notwithstanding the Covid Regs, it is just and equitable to order the respondents to vacate the property.

THE DATE FOR EVICTION

48. There are a number of factors which are relevant to fixing a date for eviction. In the first place, the report by the City of Cape Town is outdated by more than 6 months. The Court needs to be informed of the latest situation as far as emergency housing is concerned. Then, there is the suggestion in the evidence of Ms. Mariam Williams referred to above, that the respondents might have alternate accommodation available to them. This is not properly addressed in the opposing affidavits in the PIE application.

49. Further, the Court does not know anything about the size of the property – how many rooms there are and how many people can be accommodated therein. Nor does the court know what the accommodation requirements of the Nelsons' are. There was a suggestion in argument that Mr and Ms Nelson have since divorced and

¹⁵ Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

¹⁶ LAWSA Vol 27 (2nd ed) p140, para 122, footnote 5.

it may be that their combined accommodation needs are now less demanding. Is it perhaps possible that certain of the elderly occupants could be accommodated in the property by the Nelsons for a fixed period before they move out, while the Nelsons move in in the meantime? The Court just does not know.

50. Given that we are dealing with a family dispute, and mindful of the erstwhile benevolence of Mr. Jalodien Williams, I am of the view that the parties would benefit from an attempt at mediation in this matter. Knowing that the Court has found that the respondents are liable to be evicted, the parties (duly guided by a skilled mediator) might be better placed to agree a process for the respondents' departure from the premises rather than the Court imposing its will on them by an order. In other words, the parties might better be able to determine their own destinies with the aid of mediation.

51. S7 of PIE is designed to afford litigating parties the benefit of a mediated solution to their litigation. In my respectful view, the parties to this dispute would benefit from such a process. I therefore intend making certain declaratory orders so that the parties know where they stand overall and then affording the parties the opportunity to mediate the terms of the respondents' departure from the property. Once that process is complete, the matter will return to this Court, either for a duly mediated agreement to be made an order of court, or, if the mediation is unsuccessful, for the Court to fix the terms for an order under s4(8) of PIE. In the event that the parties reach an amicable solution to their dispute before the postponed date, they are at liberty to approach the Court for an order by agreement.

ORDER OF COURT

Accordingly, it is ordered that:

- A. The First to Ninth Respondents herein are declared to be unlawful occupiers of 87 Sixth Street, Kensington, Cape Town (“the property”).
- B. The First to Ninth Respondents are liable to be evicted from the property on a date to be determined by this Court after the steps contemplated hereunder have been undertaken.
- C. The Tenth Respondent (“the City of Cape Town”) is ordered to file a Supplementary Report within 3 weeks of the date of this Order relating to such suitable alternative accommodation and/or low-income rental housing, either owned by the City of Cape Town or of which it might otherwise be aware, as may be made available to the First to Ninth Respondents and those holding under them when they are evicted from the property. Such report is to address the issues raised by the Applicants and the First to Ninth Respondents in their affidavits filed herein.
- D. The parties may file short supplementary affidavits responding to the City of Cape Town’s aforesaid Supplementary Report not later

than 2 weeks after it has delivered its report to the Court and the parties' legal representatives.

- E. In accordance with the provisions of section 7(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, the City of Cape Town is hereby directed to appoint, within 2 weeks of service on the Court of the Supplementary Report referred to in para C above, a person with the necessary expertise in dispute resolution to attempt to mediate a settlement of the dispute as between the Applicants and the First to Ninth Respondents in relation to the date and terms upon which the said respondents will vacate the property.
- F. The parties shall attend at such mediation as stated aforesaid on a date as agreed between the parties and the mediator.
- G. The matter is postponed for further hearing before Gamble, J in the Fourth Division on Monday 26 July 2021.
- H. All costs are to stand over for later determination.



GAMBLE, J