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

Case number: 4180/2021

In the matter between:

ANTOINETTE DU PLESSIS	Applicant
and	
BENJAMIN MOUTON	First respondent
GERTRUIDA DOROTHEA MOUTON	Second respondent
SWARTLAND MUNICIPALITY	Third respondent
ROBI PARKS (PTY) LTD	Fourth respondent

REASONS GIVEN ON 21 FEBRUARY 2022

VAN ZYL AJ:

Introduction

1. On 7 February 2022 I granted an order in the following terms:

1.1. The counter-application is dismissed.

1.2. The first, second and fourth respondents ("the respondents") are to vacate the property known as **ERF [....] YZERFONTEIN**, situated at **[....] VERSVELD STREET**, **YZERFONTEIN**, **WESTERN CAPE** ("the premises") by no later than Monday, 28 March 2022.

1.3. In the event of the respondents failing to vacate the premises by Monday, 28 March 2022, then the Sheriff of this Court is directed and authorized to evict the respondents from the premises.

1.4. The Sheriff is authorized and directed to employ the services of the South African Police Service to assist him, if it is necessary to do so, to remove the respondents from the premises.

1.5. The respondents are to pay the costs of the main application and the counter-application jointly and severally, the one paying, the other to be absolved, on the scale as between attorney and client.

2. I indicated that the reasons for the order would follow. These are the reasons.

The main application: the lease agreement

3. These proceedings commenced as an application for the eviction of the first and second respondents from the property situated at [....] Versfeld Street, Yzerfontein, Western Cape Province, also known as erf [....], Yzerfontein ("the property"). The matter was instituted and prosecuted in accordance with the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). The application was brought by the applicant as the registered owner of the property as contemplated in section 1 (the definitions section) of PIE.

4. At the hearing of the application, the applicant sought an amendment of the notice of motion so as to include the fourth respondent (which had been joined to the proceedings after the institution of the application) in the ambit of the relief sought. The respondents did not oppose the proposed amendment, and it was duly granted.

5. The case for the applicant was, in summary, as follows: During October 2018 she entered into a lease with the fourth respondent ("the lease agreement"), a company of which the first and second respondents have variably been directors.

The lease was to continue for a period of two years until 31 October 2020. The lease agreement was concluded so as to afford the first and second respondents residential accommodation by way of subletting the property to the first and second respondents.

6. The fourth respondent would be liable for monthly rental in the amount of R16 000,00.

7. The first and second respondents took occupation of the property on 1 November 2018.

8. An option to purchase the leased property had been given on the same day as the conclusion of the lease agreement, by way of an addendum to the lease agreement. The terms of the option included the following:

8.1. The purchase price of the property, should the option be exercised, would be R3 750 000.00.

8.2. The purchase price was to be secured with a guarantee issued by an approved financial institution to be delivered within a reasonable period, and payable to the applicant in cash upon registration of transfer.

8.3. The option would endure for a period of three calendar months after termination of the lease agreement.

9. The addendum added a term to the lease agreement to the effect that the fourth respondent would be entitled to do business from the premises provided that such business was lawful

10. On 14 August 2020, the applicant delivered a notice to the respondents advising that the lease would expire on 31 October 2020. Such notification was required in terms of clause 17.1 of the lease agreement.

11. Pursuant to negotiations relating to the possible purchase of the property by the respondents following the fourth respondent’s exercise of the option (about which

more will be said below), the respondents were given an indulgence to remain in the property on a month-to-month basis until 30 January 2021. No new agreement of lease was entered into during this period, or subsequently. The proposed purchase of the property came to naught. Accordingly, as of 30 January 2021, the respondents have been in occupation of the property without any consent or right in law. They were accordingly, according to the applicant, unlawful occupiers, and fell to be evicted.

12. The respondents have not made any payment in respect of their occupation of the property since April 2021.

The counter-application: the alleged agreement of sale

13. The respondents, in answering the main application, responded with a counter-application in which they contended they should not be evicted based on the purported exercise of an option to purchase the property and a resultant agreement of sale having come into being. That agreement was sale was the core of the respondents' opposition to the main application and the focus of the counter-application.

14. The respondents also contended that the application had been brought on the wrong basis, in that PIE was not applicable to circumstances such as theirs. This argument was premised on the contention that they were not unlawful occupiers, as they occupied the property under the terms of the agreement of sale allegedly concluded between the parties upon the exercise of the option. They contended, further, that the agreement of sale had, upon the exercise of the option, replaced the agreement of lease and that they were therefore no longer bound by the provisions of the lease agreement.

15. The relief sought in the counter-application includes, insofar as was relevant for the determination of the disputes, the following:

15.1. Declaring that the applicant was bound by the agreement of sale concerning the property, as embodied in the option document as read with

the lease agreement, and further read with the notice by the fourth respondent of its exercise of the option on 7 December 2019.

15.2. Directing the applicant to pass transfer to the fourth respondent of the property against payment of the purchase consideration stipulated in the agreement of sale.

15.3. Directing that, should the applicant refuse or fail tossing all relevant documentation to the extent necessary to pass transfer within ten days of being requested to do so in writing, the Sheriff or his deputy for the District of Malmesbury be authorised and empowered to sign the necessary documentation on the applicant's behalf.

15.4. Ordering the applicant to pay the fourth respondent's costs of suit.

16. A number of issues arise from the allegations in the affidavits supporting the counter-application and resisting the main application. These issues will be addressed in the course of the discussion below in the context of the legislative framework in terms of which applications for eviction should be determined.

General principles in relation to eviction

17. The grant or refusal of an application for eviction in terms of PIE is predicated on a threefold enquiry:

17.1. Firstly, it is determined whether the occupier has any extant right in law to occupy the property, that is, is the occupier an unlawful occupier or not. If he or she has such a right, then the matter is finalised and the application must be refused.

17.2. Secondly, it is determined whether it is just and equitable that the occupier be evicted.

17.3. Thirdly, and if it is held that it is just and equitable that the occupier be evicted, the terms and conditions of such eviction fall to be determined

(*Transcend Residential Property Fund Ltd v Mati and Others* 2018 (4) SA 515 (WCC) at para [3]).

First leg of the enquiry: a continuing right to occupy

18. The onus to be applied in matters such as the present one, in relation to the common-law or statutory rights of the parties, is as enunciated in *Graham v Ridley 1931 TPD 476* and *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20C-D*: "It is inherent in the nature of ownership that possession of the* res *should normally be with the owner, and it follows that no other person may withhold it from the owner unless he has vested in some right enforceable against the owner (e.g., a right of retention or a contractual right). The owner, in instituting a* rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the* res *– the* onus *being on the defendant to allege and establish any right to continue to hold against the owner".*

19. This onus remains unchanged despite the many procedural amendments introduced by PIE and the Constitution of the Republic of South Africa, 1996 ("the Constitution"). In *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) at 124E-F the Supreme Court of Appeal held that: "*Another material consideration is that of the evidential* onus*. Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent's unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction.*"

20. In *Ridgway v Janse Van Rensburg* 2002 (4) SA 186 (C) it was stated at 191A-192D*: "I accept, on the authority of Ellis, that it is not necessary for an applicant in these circumstances to place more before the court by way of evidence than the facts that he or she is the owner of the property and that the respondent is in unlawful occupation thereof. It is then for the respondent to place 'relevant circumstances' before the court to show why the ordinary result should not follow, namely that an owner is entitled to vindicate his or her property*."

21. These *dicta* are subject to some qualification as regards the question of onus in the context of the requirements of justice and equity, where questions of onus play a far more limited role on the particular facts of a matter (this is not such a matter). Nevertheless, it remains clear that, barring a common law right to occupy the property, which must be alleged and proven by the occupier, he or she would be an unlawful occupier and the second stage of the enquiry would eventuate.

The right in law contended for by the respondents: the exercise of the option

22. The respondents contend that on 6 December 2019 the fourth respondent exercised its option to purchase to purchase the property. This issue is the principal focus of both the eviction application and the counter-application. The respondents allege, in essence, that they are not unlawful occupiers because during December 2019 a new agreement was entered into replacing the lease agreement. In terms of the new agreement, they could occupy the property until transfer into the name of the fourth respondent.

23. Five issues arise from the respondents' contentions as regards the agreement of sale resulting from the exercise of the option, and the replacement of the lease agreement by such new agreement.

24. The first issue is whether the option was properly exercised. I have already referred to the terms of the option as contained in the addendum to the lease agreement. An option is an offer contained in an agreement which, when accepted, gives rise to a valid (in the present context) sale agreement (*Venter v Birchholtz* 1972 (1) SA 276 (A) at 284A). The manner in which the option was exercised must be addressed.

25. The fourth respondent exercised the option on 7 December 2019 by way of a notice dated 6 December 2019 to the applicant, which notice contained the following conditions:

> 25.1. "*The purchase price* [in the agreed sum of R3 750 000,00] *shall be secured by the issue of an approved financial institution's guarantee,*

payable to the Lessor or his nominee or any bondholder, in cash against registration of transfer of the Property in the name of the Purchaser";

25.2. *"As the Lessee is in occupation of the Property, occupational interest at the rate of R16 000.00 … per month plus metered water and electricity shall be due and payable to the Lessor/Owner as from date of exercise of this option, i.e. 06 December 2019 to date of registration of transfer, pro rated per day.*"

25.3. *"As the Lessee has paid a deposit of R16 000.00 … to the Lessor in terms of clause 7 of the Agreement of Lease, the Purchaser/Lessee hereby releases the Lessor from her obligations in respect thereof under the Agreement of Lease, and hereby authorises the Lessor to apply the amount of R16 000.00 towards the first payment to be made by the Lessee in respect of occupational interest with effective date as from the 7th day of December 2019*".

26. It is clear from a comparison of the terms of the option with those contained in the fourth respondent's notice exercising the option, that the fourth respondent effectively made a counter-offer to the applicant. In other words, the notice does not indicate a mere acceptance of the terms of the option agreement, but imposes further terms and conditions materially different from what was included in the option agreement. It seeks effectively to replace the lease agreement with the sale agreement.

27. There is nothing on record to indicated that the applicant accepted the counter-offer in writing. In *Pretoria East Builders CC and another v Basson* 2004 (6) SA 15 (SCA) the Supreme Court of Appeal held at 20F-H: "… *on the facts there was no enforceable contract between the respondent and Pretoria East Builders. The insertion of para 18 in the offer made by the respondent and submitted to Ms Badenhorst on behalf of Pretoria East Builders amounted to a counter-offer which was not accepted by him in writing. This means that the provisions of s 2(1) of the [Alienation of Land] Act were not complied with, and no enforceable contract came into being. There can be no doubt, to my way of thinking, that the insertion of para 18*

alters the whole content of the contract. It couples the original offer to buy the land with the building of a house on the land, and makes these two things dependent on each other. It therefore amounts to a rejection of the original offer and the submission of a different offer with a different content and different obligations."

28. Since the evidence does not show that the fourth respondent had accepted the terms of the option unequivocally and in the terms as stated in the option agreement, or that the applicant had accepted the fourth respondent's counter-offer in writing because of the prescripts of the Alienation of Land Act, 1981, it cannot be found that the exercise of the option resulted in a valid agreement of sale in respect of the property.

29. The fact that the applicant had hoped to give effect to the exercise of the option and instructed conveyancers to prepare the necessary documentation to commence with the registration process, including a draft deed of sale compliant with the provisions of the Alienation of Land Act (which draft had not been signed by any of the parties), does not change the fact that the exercise of the option by the fourth respondent did not give rise to a valid agreement of sale.

30. The second issue is that, even if this Court were to hold that the exercise of the option agreement had given rise to a valid agreement of sale, all that this would grant the respondents would be the right to take transfer of the property in due course. It does not necessarily give them a right to occupy the property. There is a dispute between the parties as to the effect of the exercise of the option on the continued existence of the lease agreement, dealt with in more detail below. Given, however, the express terms of the lease agreement, the respondents' allegations in this respect are untenable and may be rejected on the papers (and insofar as the applicant is the respondent in the counter-application, the applicant's version must be accepted (*Plascon Evans Paints (Tvl) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C)).

31. The third issue is that the respondents' version of the consequences of the exercise of the option (on the assumption that it gave rise to a valid agreement) is precluded by the express terms of the lease agreement.

32. The right which the respondents rely upon for their continued occupation of the property is that the lease was "*replaced by the agreement of sale*" and that it was in the "*common contemplation of the parties*" that they could remain in occupation pending transfer for which "*occupational interest*" would be payable. These allegations are lacking detail to substantiate them. In any event, clause 21 of the lease agreement contains a non-variation clause which provides "*No variation or consensual cancellation of this lease will be of any force unless reduced to writing and signed by both parties*". There is no dispute on the papers that no consensual cancellation of the lease agreement, signed and in writing, ever took place. This precludes the respondents' argument as to the "replacement" of one contract with the other (*SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A)).

33. The contention of the respondents that they occupied the property by virtue of the sale agreement allegedly having come into existence in December of 2019 also disregards the provisions of section 24 of the lease agreement which specifies that the lease agreement "*will not in any way be affected if the Lessor sells the premises*".

34. The terms of the option agreement do not in any way detract from the terms of the lease agreement. In the circumstances, the agreement between the parties relating to the occupation of the property can be deemed to be common cause, namely that they occupied the property in terms of a written lease agreement which expired by effluxion of time on 31 October 2020 on due notice, that they were granted leave to remain in the property until the end of January 2021, and that they thereafter became unlawful occupiers.

35. <u>The fourth issue</u> is that, on the assumption that the option agreement did in fact become a valid sale agreement, it is apparent from the papers that the fourth respondent failed to comply with its obligations under such agreement in that, despite demand, no guarantee for the purchase price of R3.75 million was ever provided as required by the option, and it is common cause that the transfer duty – despite demand - had not been paid.

36. The respondents argue that (1) the applicant never demanded a guarantee and (2) the guarantee for the payment of the purchase price did not constitute a suspensive condition of the sale agreement, contrary to what the applicant and her husband had apparently previously indicated.

37. As regards the first point, the correspondence on record indicates that a guarantee for the full purchase price was to have been provided by close of business on Friday, 23 September 2020, as well as payment of transfer duties in the amount reflected on the attached statement. On 22 October 2020 the respondent were warned that if the guarantee would not be forthcoming by 23 October 2020, the fourth respondent would be in breach of this obligation under the sale agreement. This was reiterated, and a further opportunity of seven days to provide a guarantee was afforded to the respondents, on 26 October 2020, in which correspondence it was stated that if no guarantee would be provided the sale agreement would be cancelled.

38. These failures were reiterated in a letter dated 30 November 2020 in which it was stated on behalf of the applicant that the applicant elected to "*cancel the agreement of sale as we hereby do*".

39. The contention that the respondents had not been put to terms to provide the guarantee and that the agreement of sale had not been duly cancelled pursuant to the failure to do so is therefore without merit.

40. The second point raised by the respondents, namely that the provision of a guarantee was not a suspensive condition of the sale agreement, does not assist them. The fact is that they failed to comply with a material term of the sale agreement (assuming such agreement was valid) which failure resulted in the cancellation of the agreement by the applicant.

41. The respondents argued, further, that the guarantee for the purchase price, and the transfer duties, did not have to be provided on demand, but only had to be given and paid when the seller's conveyancers were ready to lodge the necessary

documentation necessary to give effect transfer. There is no merit in this argument.

42. There is nothing in the option agreement that stipulates that the provisions of the guarantee may be postponed until the date of registration of transfer. Failing a specific time for performance of an act, the ordinary common-law rule is that it shall be forthwith, that is, simultaneously with the acceptance of the option, or within a reasonable time.

43. The general principle was stated in *Alfred Mcalpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 535A: "*The general rule of law is that contractual obligations for the performance of which no definite time is specified are enforceable forthwith; but the rule is subject to the qualification that performance cannot be demanded unreasonably so as to defeat the objects of the contract or to allow an insufficient time for compliance. Thus, for example, in a contract of loan the borrower is, in the absence of express provision, allowed a reasonable time for repayment to enable him to have some real benefit from the transaction".*

44. The provision of a guarantee, as well as payment of transfer duties, was demanded on several occasions, including twice on seven days' notice. The respondents did not adduce any evidence to indicate that these time periods were unreasonable. The applicant was accordingly entitled to provision of the guarantee and transfer duties on the acceptance of the option, alternatively, upon reasonable demand, which had been made. Failing performance, she was entitled to terminate the agreement.

45. <u>The fifth issue</u> arises from the fact that it appears that the respondents, given the nature of their defence, effectively contend for a novation, even though that was never specifically pleaded. The respondents allege that during December 2019 the lease agreement came to an end and was replaced by a new agreement in terms of which they could occupy the property until transfer thereof into the fourth respondent's name.

46. Novation is described in *Christie's Law of Contract in South Africa* (7ed, 2016)

at pages 521-524 as "…*replacing an existing obligation by a new one, the existing obligation being thereby discharged, but novation is not to be regarded as a form of payment… There is a presumption against novation because it involves a waiver of existing rights. A creditor who has rights under an existing contract and then enters into another connected contract will be presumed to intend rather to strengthen and confirm its existing rights than to waive them and accept its rights under the new contract in substitution, or there may be any one of a number of reasons for entering into the new contract. The onus of proving novation therefore lies on the party who asserts that it has taken place, and it must be specifically pleaded. Where it cannot prove an express intention to novate, it must prove a tacit intention; the intention must be clearly proved, and must itself reflect a clear and unequivocal intention to novate".* (Emphasis added.)

47. The respondents never pleaded a novation and accordingly cannot rely thereon. I have already referred to the express terms of the lease agreement, which would in any event preclude reliance on this defence.

48. In all of the circumstances, it is clear that the respondents do not have any right in law to be in occupation of the property. They are thus unlawful occupiers. This means that their objection to the fact that the eviction application had been brought under the provisions of PIE has no merit.

Second leg of the enquiry: justice and equity

49. The bases upon which the respondents rely for their contention that it would not be just and equitable that they be evicted from the property are that they are elderly, retired persons whose health and fitness are deteriorating, that they have no alternative place of residence, and that their eviction in the midst of the continuing Covid pandemic will expose them to the virus. Apart from broad allegations, the respondents do not provide any useful detail of their financial circumstances, their health and their ability to rely on family and friends for assistance. Given the paucity of information provided, it appears that the essential question that must be asked is whether they might be rendered homeless should they be evicted.

50. It cannot be expected of private persons indefinitely to accommodate unlawful occupiers.

51. The Supreme Court of Appeal held as follows in *Modderfontein Squatters, Greater Benoni CC v Modderklip Boerdery (Pty) Ltd (Agri SA & Legal Resources Centre, Amici Curiae); President of the RSA v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA) at 57C-E: "*Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law, while s 9(2) states that equality includes the full and equal enjoyment of all rights and freedoms. As appears from para 1.6.4 of the order, De Villiers J found that Modderklip was not treated equally because, as an individual, it has to bear the heavy burden, which rests on the State, to provide land to some 40 000 people. That this finding is correct cannot be doubted. Marais J, in the eviction case, said that the 'right' of access to adequate housing is not one enforceable at common law or in terms of the Constitution against an individual land owner and in no legislation has the State transferred this obligation to such owner.*"

52. The applicant's counsel pointed out that the rule is subject to minor qualifications depending on the circumstances. In this regard, he referred to *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at paragraph [18]: "*The position is otherwise when the party seeking the eviction is a private person or entity bearing no constitutional obligation to provide housing. The Constitutional Court has said that private entities are not obliged to provide free housing for other members of the community indefinitely, but their rights of occupation may be restricted, and they can be expected to submit to some delay in exercising, or some suspension of, their right to possession of their property in order to accommodate the immediate needs of the occupiers*."

53. The Supreme Court of Appeal in *Changing Tides 74* specified, at paragraph [16], that only in what could be deemed exceptional circumstances would a court interfere with a party's proprietary rights.

54. In the present matter, no such exceptional circumstances have been alleged and none appear from the affidavits filed of record. The respondents have not made

any substantive allegation that they would be rendered homeless by the relief sought. The applicant provided evidence of accommodation available in the immediate area.

55. The respondents do not stipulate what steps they have taken to source or investigate the availability of alternative accommodation. In *Patel N.O. And Others v Mayekiso and Others (WCC 3680/16, delivered on 23 September 2016)* the court recognised the obligation of an occupier alleging potential homelessness, and by extension any further prejudice, to place the necessary information before the court, noting at paragraph [33]: "*But the Mayekisos have not attempted to show how their eviction would render them homeless save to say that all the assets were tied up in the insolvent estate. This is not sufficient. What they had to show was how they have tried and failed to find alternative accommodation within their available resources*."

56. As far as their financial circumstances are concerned, the respondents' allegations of possible homelessness must be considered against the fact – their defence in the eviction application and their case in the counter-application – that they are desirous and presumably financially in a situation to purchase the property for R3.75 million, including transfer costs and duties.

57. The second respondent is also the sole director of three companies, being the fourth respondent and two others. The respondents are, moreover, running a catering/restaurant business from the property, albeit illegally. This renders their allegations of being unable to obtain alternative accommodation hollow.

58. The respondents' fear of being exposed to the Covid virus in the case of their eviction from the property does not create a bar to such eviction. Should they need to self-isolate, that could be done from the alternative accommodation that they will have to obtain. There is nothing contained in the current disaster management regulations which would preclude the eviction of the respondents or the suspension of an eviction order.

The respondents' previous experiences in eviction application brought against them

59. The applicant indicated in her replying affidavit in the main application (serving as answering affidavit in the counter-application) that this was not the first time that the respondents' eviction had been sought in the courts.

60. The first and second respondents were previously evicted from an immovable property situated in Pretoria by that division of the High Court under case number 25893/2015, in which matter the court noted that their allegations of a valid lease agreement being in place were "*contrived*" (*Botha NO and Another v Mouton and Others* (25893/2015) [2016] ZAGPPHC 377 (4 March 2016)).

61. The first and second respondents were also evicted by the magistrates' court of Johannesburg North on 29 September 2016, which decision was confirmed, together with a punitive costs order, on appeal by the Gauteng Local Division, Johannesburg, on 23 August 2018, under case number A3004/2017 (*Powerline Communications (Pty) Ltd v Power* 2018 JDR 1734 (GJ)). In that matter the respondents had also entered into a lease agreement using a juristic person as a vehicle. This occurred just under two months prior to the fourth respondent signing the lease agreement with the applicant.

62. The applicant accordingly submitted that it would appear that the respondents are not merely unlawful occupiers, but that they are serial unlawful occupiers whose practice is to take occupation of the premises through a third party and then to use the process of Court to continue in occupation for as long as possible without payment or tender of consideration.

63. The respondents have not denied these allegations.

<u>The illegal activities on the property</u>

64. As mentioned earlier, the respondents have been conducting a catering/restaurant business from the property. This was being done in contravention of the relevant zoning scheme regulations applicable to the property.

65. At the hearing of these proceedings I was informed that, on 27 January 2022, this Court granted an order interdicting the respondents from, *inter alia*, operating a restaurant or catering business at the applicant's property in contravention of the third respondent's ("the municipality's) municipal planning by-law. A copy of the order was provided to me.

66. The fact that the respondents were using the property in contravention of the relevant zoning scheme regulations is therefore beyond doubt.

Conclusion, *and the third leg of the enquiry: any terms of conditions to be imposed in relation to the eviction*

67. In all of these circumstances, there was no reason why the eviction of the respondents should not be ordered, and I have accordingly done so in the terms referred to at the outset of these reasons.

68. I have provided the respondents with more time to vacate than the applicant had argued for. This was because of the timing of the grant of the order, already one week into February 2022. Having at least one full calendar month available to obtain alternative accommodation, possibly with zoning rights that would allow for the continued running of their business, should ease the respondents' burden.

Costs

69. It is clear from what is set out above that the respondents have not made out any case that would justify the refusal of the relief sought or that should have delayed the applicant's vindication of her property. The counter-application was patently without merit. The proceedings were opposed solely for the purposes of delaying the inevitable – a course of action previously taken by the respondents in other divisions of the High Court.

70. The respondents have, as a consequence, caused the applicant to incur substantial additional and unnecessary expenses, motivated by nothing more than a desire to continue in gratuitous occupation of the applicant's property, after having

decided that they do not even have to pay the “occupational interest” (on the assumption that a contract of sale had come into being) and having ceased to pay any consideration for the occupation of the property since April 2021.

71. The applicant’s counsel submitted that a punitive costs order was warranted in the circumstances. I was in agreement with the submission, hence the order made on 7 February 2022 to the effect that the respondents had to pay the applicant’s costs on the scale as between attorney and client.

P. S. VAN ZYL
Acting judge of the High Court

HEARING DATE: 1 February, 21 February 2022 & 24 March 2022

Appearances:

For the applicant: L. Wilkin, instructed by Von Lieres, Cooper & Barlow
The first, second and fourth respondents in person