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

Appeal case number: A81/2022

Magistrate's Court case number: 787/2020

In the matter between:

HENDRIK PLAATJIES Appellant

and

GEORGE MEINTJIES First respondent

OVERSTRAND MUNICIPALITY Second respondent

JUDGMENT DELIVERED ON 19 SEPTEMBER 2022

VAN ZYL AJ:

INTRODUCTION

1. This is a civil appeal arising from an eviction order granted against the appellant in favour of the first respondent by the Hermanus Magistrate's Court on 18 February 2022. The order was granted in terms of section 4(8) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). This appeal has been instituted in

accordance with the provisions of Rule 50 of the Uniform Rules of Court.

2. The eviction application entailed removing the appellant from his place of residence, and the proceedings were thus regulated by the provisions of PIE.

3. The first respondent opposes the appeal, whilst the second respondent has not taken any part therein.

THE EVICTION APPLICATION

4. On 29 September 2020 (although the notice of motion is, curiously, dated 8 October 2020) the first respondent instituted an application for eviction in terms of section 4(1) of PIE, so as to have the appellant evicted from the property situated at [...], G[...], V[...], S[...], H[...] (“the property”). The application was served on the appellant on 19 February 2021.

5. It is necessary to set out the facts on record in some detail. From the papers as a whole it appears that the first respondent is the appellant’s nephew, the first respondent’s father having been married to the appellant’s sister.

6. The first respondent alleged the following as the grounds for the application:

6.1. He (the first respondent) purchased the property from his parents. He alleges that, at the time of his deposing to the founding affidavit, registration of transport into his name was in the process of being attended to.

6.2. He elaborates that his parents (the previous owners) had moved to Johannesburg while they still owned the property – this appears from the appellant’s papers to have been many years ago, although the first respondent does not give any details in this respect.

6.3. The appellant, who was an occupant of the property at the time, offered to maintain the property whilst the owners were in Gauteng. The appellant was to pay the municipal rates and taxes by way of rental. The arrangement appears to have been a lease at the will of the first respondent’s parents. Although the appellant was, according to the first

respondent, not entitled to sublet the property, he in fact subsequently did so by erecting a “wendy” house in the yard in which to accommodate a family with children. The appellant also, without consent from the owners or the relevant authorities, allowed the running of a small spaza shop from a shipping container placed on the property.

6.4. The first respondent gave written notice to the appellant to vacate the property within 60 days of receipt of the letter. The date of that letter is unknown, but it was signed “The owner George Meintjies”. The first respondent’s attorney thereafter caused further written notice to be delivered, addressed to and requiring the “occupier of container” (presumably the person allegedly allowed by the appellant to run a shop from a shipping container on the property) to vacate the property by 30 September 2020. In that letter, dated 20 August 2020, it was expressly stated that the first respondent was the owner of the property and that registration of transfer had already taken place in his name. (As will become clear below, this was in fact not the true state of affairs at the time.)

6.5. The deed of sale was not annexed to the founding papers, but the first respondent attached a letter dated 22 September 2020 from a conveyancer, Mr Lucas Steyn, confirming that registration of transfer was being attended to.

7. The appellant opposed the application and indicated as follows in his answering affidavit:

7.1. He is a disabled pensioner, and has lived in the property for more than 30 years. He has never lived in another house. Prior to occupying the property he had lived in a single garage with his then partner (his “ex-girlfriend”).

7.2. The property had initially been allocated by the local authority (the Caledon Divisional Council) to the appellant’s mother, Mrs Maggie Plaatjies. At some point (no date is given) the appellant’s sister, Mrs Josephine Meintjies, caused Mrs Plaatjies and other family members to go to Johannesburg, and further caused an agreement of sale of the property to be concluded between the appellant’s brother-in-law (Mr Lester Meintjies, to whom the appellant’s sister was married) and Mrs Plaatjies. It seems that the appellant’s brother-in-law was the first respondent’s father. It was, according to the

appellant, a condition of the sale that various persons, including the appellant, would have the lifelong right to inhabit the property. The condition was imposed by Mrs Plaatjies and agreed to by Mr Meintjies. This he learnt only much later, however, as the conclusion of the sale agreement had never been discussed with him.

7.3. The appellant never saw the agreement of sale, does not have a copy thereof, and does not know whether the condition (effectively a right of *habitatio*) had been incorporated therein. He also does not have a copy of the relevant deed of transfer, and there is thus no indication on record as to whether the right had been registered in the Deeds Office. The only documentary evidence on record relating to the condition is a note from the appellant's mother to the Divisional Council, reading as follows (I translate from Afrikaans to English):

"Transfer of house B41 to my son-in-law, Lester Meintjies.

Dear Sir

I wish herewith to transfer said house to the abovementioned, provided that I, Dinah Esau and Henry Corner would have lifelong habitation. Also that my son, Henry Plaatjies [the appellant], and daughter Rebekka Plaatjies would have habitation rights until they marry.

[Signed] M. Plaatjies"

7.4. The appellant only learnt of the existence of the agreement of sale when he approached the municipality's Housing Office to transfer the municipal account into his name, as he was the person responsible for payment thereof.

7.5. Contrary to what the first respondent states, the appellant says that his responsibility to pay the municipal account did not arise as a result of a lease concluded with the first respondent's parents. Rather, it arose because he was the one who had remained in the property and it had generally been accepted within the family that he would take over the property after his mother's death, which he did.

7.6. The appellant does mention, somewhat confusingly, that his sister, Ms Josephine Meintjies, had sold the property to various persons prior to her death, and had taken the proceeds of the sale with her to Johannesburg. The appellant's brother-in-law requested the appellant the day after Mrs Meintjies's funeral to vacate the property. The appellant refused, given what he knew by then about the agreement between his mother and his brother-in-law, and the condition contained therein. According to the appellant, his brother-in-law applied for an interdict which was dismissed: the Court decided that the appellant had a right of "vruggebruik" over the property and that he could use the property in accordance with such right. Although the appellant referred to a copy of the court order, he did not attach it to his answering papers, and I do not know which Court made the decision.

7.7. The appellant heard nothing further until he received a notice to vacate the property from the first respondent. He denies in his answering affidavit that he is in unlawful occupation of the property, and states that the application is premature because the first respondent was, at that stage, when the application was instituted, not yet the owner of the property.

8. On 8 April 2021 the first respondent delivered an affidavit in which he set out the details of the appellant's relatives in the area, for the purposes of consideration of the question of possible homelessness under PIE.

9. The appellant, in turn, indicated in a supplementary affidavit that he was indigent and would be rendered homeless in the event of eviction. His one leg is shorter than the other and he wears a special shoe. He has cancer, which is in remission, and he suffers from diabetes.

10. He receives a SASSA grant of R1 800,00 per month. When he turned 60 years of age his disability pension was converted into old-age pension. He receives, in addition, rent of R1 500,00 per month from the person who operates the spaza shop from the property (and to whom the first respondent refers in the founding affidavit).

11. The appellant resides in the property alone. He has a major daughter by his ex-girlfriend. The appellant explains why he would not be able to reside with family members

in the area as suggested by the first respondent. It clear from his affidavit as a whole that he had married (and thus, on his version, is still entitled to inhabit the property in terms of the condition of sale in the agreement between his mother and his brother-in-law). In spite of the appellant's opposition to the application, the magistrate nevertheless granted an eviction order.

GROUND OF APPEAL

12. Various grounds of appeal were raised on the appellant's behalf against the decision of the magistrate's court. I shall deal with the grounds that I regard as dispositive of the appeal in the course of the discussion below.

The ground of appeal relating to the first respondent's *locus standi* and related aspects

13. One of the appellant's grounds of appeal is that the magistrate erred in finding that effective termination of appellant's right of occupation occurred by notice, and specifically by (so the appellant submits):

13.1. Finding that it was common cause that the first respondent is the registered owner of the property, insofar as it means that he was the registered owner at the relevant time when the first respondent attempted to terminate the appellant's right of occupancy and at the time of the institution of the eviction application, whilst it appears from the first respondent's own documents, the title deed, that registration of transfer only occurred on 12 November 2020. The first respondent filed a copy of his title deed with the Court on 8 April 2021. It appears therefrom that he took transfer of the property from Mr Lester Meintjies on 12 November 2020, which was about a month and a half after the institution of the application.

13.2. Finding that the first respondent had put the appellant on terms to vacate by way of a valid notice to vacate.

13.3. By, despite what has been stated in the preceding paragraphs, taking into consideration the dates of the notices to vacate, and finding that the appellant has been

in unlawful occupation of the property for about two years.

14. The magistrate thus, according to the appellant, erred in effectively disallowing and rejecting the appellant's complete defense (which was largely based on undisputed evidence) and despite the fact that the first respondent was not the owner of the property prior to the institution of the eviction application, or at the time when he served the two consecutive notices to vacate. According to the appellant, the first respondent's eviction application was premature and invalid under PIE, and could not be remedied by the later filing of the title deed.

15. The issue in respect of lack of ownership at the time prior to and at the institution of the application raises three questions.

15.1. First, whether the first respondent had the necessary *locus standi* to institute the application and obtain an eviction order;

15.2. Secondly, and if the answer to the first question is in the negative, whether it could be cured by the mere filing of the title deed, or at all at a later stage; and

15.3. Thirdly, and irrespective of the foregoing, whether on the first respondent's version the right to occupy has duly been terminated, rendering the appellant an unlawful occupier prior to the institution of the eviction application.

16. The appellant contends that the first respondent did not have *locus standi* when he instituted the application, as he was neither the owner of the property nor the person in charge thereof. The application was instituted whilst the property was still registered in the name of Mr Lester Plaatjies and/or the estate of his late spouse, depending on the marriage regime that had existed between them. As a result, so the appellant contends, all of the proceedings thereafter are null and void, and the magistrate erred in entertaining the application.

Discussion

17. I proceed to discuss the three aspects arising from this ground of appeal as identified

in paragraph 15 above.

First aspect: the lack of initial ownership and the first respondent's *locus standi*

18. The onus to prove *locus standi* was on the first respondent (see *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at para [10]).

19. Section 4(1) of PIE provides that

“[n]otwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier”.

20. “Owner”, insofar as is relevant, is defined in PIE as

“the registered owner of land”. “Person in charge”, in turn, means *“a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question”.*

21. Coupled with this issue, as alluded to earlier, is whether the appellant was in fact an “unlawful occupier” in terms of PIE at the time of the institution of the application, as an unlawful occupier is a person

“who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, ...”

I shall return to this aspect in paragraph below.

22. In *Adams v Manuel and others* [2022] ZAWCHC 4 (3 February 2022) the court considered whether a *bona fide* possessor would have the necessary *locus standi* as an applicant in eviction proceedings:

“[19] It is common cause that the applicant is not the owner of the land. The question which then arises is whether she qualifies as a “person in charge of land”. Such a

person is defined in s 1 of PIE as meaning ...a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question....

[20] In heads of argument counsel for the respondent referred to Smith CP et al: Eviction and Rental Claims: A Practical Guide where the authors state that a "person in charge of land" could be a lessee or a person acting as agent of the owner of the land. There is no suggestion that the applicant falls into the second category mentioned by the authors. The question which then arises is whether she may be considered to be a lessee."

23. In *Adams*, the Court found that the applicant was neither the owner nor a lessor, and she did not meet the description of a *bona fide* possessor. She therefore lacked the necessary *locus standi* to institute the application. The Court left open the question whether a *bona fide* possessor could qualify as a "person in charge of land".

24. In the present matter it cannot, in my view, be said that the first respondent stepped into the shoes of his father as a "lessor", as it should be clear that on the papers the appellant raised a material dispute of fact in relation to the authority under which he had been occupying the property. In any event, even if the first respondent's version was accepted, he could only step into the shoes of his predecessor as lessor at the time of registration of transfer. There is also no allegation on the papers to the effect that the first respondent had acted as agent for his father in relation to the property from the date of his purchase of the property to the date of transfer.

25. I do not think that a person, like the first respondent, who has a mere contractual right to receive transfer of ownership of the property, can on that basis alone acquire the status of a person in charge of land as contemplated in PIE. The first respondent did not advance any other basis for the institution of the applicant than that he was the owner of the property – at a time when he was not. In the circumstances, he did not have *locus standi* in terms of section 4(1) of PIE to institute the eviction application at the time that he did. In addition, the registered owner of the property, the first respondent's father, was not joined as co-applicant in the proceedings (see *Peter v Nkonde and others* [2022] ZAWCHC 122 (27 May 2022) at paras [15] and [16]).

Second aspect: could the lack of *locus standi* be cured?

26. In *Minister of Safety and Security v Phakula and others* [2018] ZAGPPHC 256 (22 February 2018) the Court referred to two cases dealing with attempts to cure a lack of *locus standi* as follows:

“[34] In SOUTH AFRICAN MILLING CO (PTY) (LTD) V REDDY the court appears to have discouraged the tendency where a party who sought to cure lack of locus standi in its founding papers, attempts to do so by rectification or resolution. Failure to establish original authority, entitles the respondent to acquire a right to dismiss the application on the ground of lack of locus standi. In this case to allow the confirmatory affidavits as the court a quo did, was blatantly prejudicial to the appellant's application for rescission of judgement. This was an error.

[35] Similarly, it was held in UNITED METHODIST CHURCH OF SOUTH AFRICA V SOKUFUNDUMALA that the ratification of the applicant's lack of locus standi in an attempt to clothe him retrospectively with authority would be prejudicial to the respondent.”

25. The decision in *South African Milling Company Co (Pty) Ltd v Reddy* 1980 (3) SA 431 (SECLD) was not followed in the matter of *Baeck & Co SA (Pty) Ltd v Van Zummeren and another* 1982 (2) SA 112 (W) at 119E-F:

“Accordingly, I am of the opinion that the fact alone that the question of ratification has been raised for the first time in reply, in the absence of prejudice to the first respondent, is not fatal to the success of the application. The Court has a discretion to come to the aid of the applicant. Insofar as this conclusion is inconsistent with the judgment of KANNEMEYER J, I respectfully decline to follow that judgment.”

27. The *Baeck* case found approval in the Supreme Court of Appeal in the matter of *Moosa and Cassim NNO v Community Development Board* 1990 (3) SA 175 (A). This position was also affirmed in the case of *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (A) at para [15] where it was said, in dealing with the subsequent ratification as a

“procedural defect”:

“The rule against new matter in reply is not absolute (cf Juta & Co Ltd and others v De Koker and others 1994 (3) SA 499 (T) at 511F) and should be applied with a fair measure of common sense. For instance, in the present case, the point provided no material or substantial advantage to Smith.”

28. The present case, however, does not entail the ratification of a lack of authorisation as was the case in all of these matters. In *Baeck*, for example, the Court accepted the ratification on the following basis (at 119C-D):

“In the present case Keller alleged incorrectly that he had authority to represent the applicant. If in law the deficiency in his authority can be cured by ratification having retrospective operation, I am of the opinion that he should be allowed to establish such ratification in his replying affidavit in the absence of prejudice to the first respondent. It is clear that in this case, subject to the question of ratification and retrospectivity, the first respondent would not be prejudiced by such an approach. Indeed, it is not disputed that the applicant could start again on the same basis, supplemented as needs be, to establish the authority of Keller.” [Emphasis supplied.]

29. The first respondent’s lack of *locus standi* in the present matter (not being an owner or a person in charge of land) at the time of the institution of the application is not a mere procedural defect, but goes to the heart of whether he could have instituted PIE proceedings at all. He could on the express provisions of PIE not do so, and his lack of *locus standi* could not be ratified or rectified retrospectively by a change of ownership that regulated only his future status.

30. The present situation may be compared to that in *Lupacchini NO and another v Minister of Safety and Security* 2010 (6) SA 457 (SCA). That case concerned the question whether non-compliance with section 6(1) of the Trust Property Control Act 57 of 1988 rendered any acts by the trustees in contravention thereof a nullity. Action had been instituted by trustees of a trust, but one of them was authorised by the Master to act as a trustee only after the action was instituted. Section 6(1) reads as follows: “Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order

comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master.”

31. It was not in issue that institution of the action in those circumstances was in contravention of section 6(1). In deciding that the proceedings instituted by a trustee without authorisation were a nullity, the Court analysed a number of decisions and came to the conclusion (at para [22]) that “[*there are*] no indications that legal proceedings commenced by unauthorised trustees were intended to be valid. On the contrary, the indications seem ... to point the other way.” An important consideration in reaching that conclusion was the fact that there is no criminal sanction stipulated in respect of a trustee who acts without authorisation, leading to the inference that the legislature intended such acts to be a nullity, because otherwise a contravention of the prohibition would have no consequences at all (at paras [17] and [18] of the judgment).

32. PIE also do not impose a criminal sanction for the institution of proceedings in contravention of the requirements of section 4(1). That, however, is not in my view the main reason for the invalidity of the proceedings that followed. As stated above, the lack of *locus standi* is of a type that cannot be cured retrospectively. It follows that the first respondent’s lack of *locus standi* could not be cured by the filing of the title deed (which was in any event not done under cover of any affidavit).

Third aspect: validity of notice of termination of the lease

33. On the assumption that the appellant had occupied the property under a lease agreement as alleged by the first respondent, it is trite that in terms of the common law eviction proceedings cannot commence unless the lease had been cancelled. The common law requires, in the case of a non-fixed term lease agreements as is alleged by the first respondent, a one calendar month notice period, to expire at the end of the month (see, for example, *Tiopaizi v Bulawayo Municipality* 1923 AD 317-325).

34. In *Morkel v Thornhill* [2010] ZAFSHC 29 (4 March 2010) at para [22] it was held that a notice of cancellation must be clear and unequivocal and only takes effect from the time it is communicated to the relevant party (see also *Letsoalo and others v Thepanyega NO and others* [2020] ZALMPPHC 74 (28 August 2020) – an appeal to the Supreme Court of

Appeal was dismissed: *Thepanyega N O and others v Letsoalo and others* [2022] ZASCA 30 (24 March 2022)). In *Letsoalo* there was no such cancellation on the papers, and it was therefore accepted that the agreement was never cancelled. The Court found that the court *a quo* should not have entertained the eviction proceedings.

35. In *Phillips v Grobler and others* [2020] 1 All SA 253 (WCC) (upheld on appeal: *Grobler v Phillips and others* [2021] ZASCA 100 (14 July 2021)) it was held as follows at para [32]:

“The initiating process of the eviction application was taken out before the right to evict had accrued to the first respondent. Thus, at the time the process was issued out, no cause of action had accrued to the first respondent. Without going into all the authorities, it seems to me that the rule of law is stated correctly by Voet (Book 5.1.27), in that there can be no action before anything is due and owing.”

36. In the present matter, the first respondent was not the owner or lessor of the property, and he could not have legally terminated the alleged lease. On the first respondent's own version, therefore, no notice was given to the appellant for purposes of terminating his alleged right of tenancy.

37. In the circumstances, even if there was a lease agreement in place, such agreement had not been terminated at the time of the institution of the application, and on that basis there was no proof that the appellant was an unlawful occupier.

The ground of appeal relating to the magistrate's failure to take proper account of the appellant's personal circumstances in considering a just and equitable order

38. In the event that I am wrong in relation to the first respondent's *locus standi* and the related issues discussed above, there are, in my view, certain other misdirections in the magistrate's judgment. I proceed to discuss these misdirections. The main focus is the appellant's ground of appeal to the effect that the magistrate failed to take proper account of his personal circumstances. He accordingly failed to make a just and equitable order.

39. The first aspect is that the magistrate's accepted as common cause that the property

belonged to the first respondent. He did not take into account that, at the time that the application was launched, registration of transfer had not yet taken place, and therefore did not consider the first respondent's *locus standi* and whether the application was properly before him. On the contrary, he was of the view that it was common cause between the parties that the first respondent was the registered owner of the property, and thus failed to deal with the appellant's argument that the application had been instituted at a time when the first respondent did not have the *locus standi* under PIE to do so, and, moreover, that effective notice of cancellation had not been given. I have dealt with these issues in paragraphs 17 to 37 above.

40. The magistrate dealt with the application on the basis that the first respondent had been in unlawful occupation of the property for more than six months, and therefore applied section 4(7) of PIE in considering whether the grant of an eviction application would be just and equitable. What is sometimes overlooked is that the 6-month period applies only to unlawful occupation, in other words, it is when a person has been an unlawful occupier for more than six months that section 4(7) comes into play (*Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) at para [17]).

41. On this note (and ignoring for the moment the application of the rule relating to factual disputes in motion proceedings as set out in *Plascon Evans Paints (Tvl) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C), the first respondent's case was that the appellant had been in occupation of the property with the consent of his (the first respondent's) parents. I do know that the first respondent's mother (the appellant's sister) is deceased, but his father is not. In the case of an indefinite lease, such as the arrangement apparently was, the lease would come to an end upon the lessor's death (*Mergold Beleggings Bpk v Bhamjee en 'n ander* 1983 (1) SA 663 (T) at 674G-675D). Assuming that the first respondent's father was the owner of the house (given the content of the appellant's mother's note to the Divisional Council), he was presumably the lessor and thus the lease is still in existence if he is in fact still alive. Whilst it appears that he had tried to give the appellant notice to vacate shortly after his wife's death, a subsequent court order found that the appellant had "vruggebruik" of the property. There is no documentary evidence of the order on record, however. The situation is opaque, to put it mildly.

42. It was only after the first respondent had purchased the property that he (not his

father) gave notice to the appellant to vacate. Unfortunately the date of the notice, and thus the date upon which the applicant was requested to vacate the property, is not on record. Given that the application was instituted in September 2020, served in February 2021, and only heard in February 2022, the magistrate was probably correct (having accepted that the appellant was an unlawful occupier on the first respondent's version of events) in treating the situation as one covered by section 4(7) of PIE.

43. The second, and most important, aspect is that in considering whether the grant of an eviction order was just and equitable, the magistrate took into account that the appellant had lived in the property for more than 30 years. The magistrate however erroneously interpreted the appellant's defence as being one of having a servitude of *habitatio* over the property because of the 30-year period, and found that the existence of such servitude had not been proved. This was not the appellant's case.

44. I do not intend to deal with this issue in detail, as there is a paucity of information on record in relation to the right of occupation that had allegedly been conferred upon the appellant. It is nevertheless clear that the appellant did not claim a servitude, but based his claim on the written note from his mother to the Divisional Council in the course of the sale of the property to the first respondent's father. The magistrate did err in finding that there was no documentary evidence of such right of habitation (whether registered or not) in the face of the written note. This, coupled with the fact that the first respondent's father would have discussed the transaction with the appellant's mother, signed the deed of sale and transfer documents and would thus, on a balance of probabilities, have known about the condition (see *Troskie and another v Liquidator of RSD Construction CC Wilbecar Liquidators CC t/a Bureau Trust Gauteng RSD Construction CC and others* [2015] ZAGPPHC 321 (8 May 2015) at para [28] on the applicability of the doctrine of notice in relation to personal rights) created a material dispute of fact in relation to whether the appellant was in fact an unlawful occupier of the property, which dispute could not be resolved on the papers, and which should therefore have been dealt with either in accordance with the principles underlying the *Plascon Evans* rule or by referring the issue to oral evidence, as he could have done in order to clear up uncertainties (see *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others* 2012 (6) SA 294 (SCA) at paras [19]).

45. The magistrate further, in relation to justice and equity, discussed relevant case law but failed to consider the appellant's personal circumstances at all save for stating the following:

"It seems from the respondent's personal circumstances the Court cannot make out as much, save for the fact that the first respondent being one adult male person, whether he is married or not, or does not have any children, this aspect is not clear before the Court".

46. Clearly, the magistrate did not take into account the content of the appellant's supplementary answering affidavit at all (I have referred to the content thereof in broad terms earlier in this judgment). He also did not take account of the fact that even in his initial answering affidavit the appellant had indicated that he was elderly and disabled. The magistrate also – apart from referring to the relevant legal principles – did not scrutinize the appellant's defence of homelessness in the event that an eviction order was granted, and the fact that there was no accommodation available for the appellant with relatives. He did not refer to the facts placed on record by the appellant in this respect at all. He also failed to take into account that the appellant is not on the housing database as he at all relevant times believed that he had a lifelong right of use of the property.

47. The magistrate failed to consider that the appellant lives from hand to mouth and affirmed that he cannot afford alternative rental and other accommodation. He will not be able to cope in Standford as suggested by the Overstrand Municipality in their report. He has a support structure in Hermanus.

48. Even if the appellant's right of habitation is not legally enforceable, it nevertheless remains a relevant consideration. In *Grobler v Phillips and others* at para [43] the Supreme Court of Appeal held that the fact that occupants had been granted an oral right of occupation of the property for life remains a relevant consideration in relation to whether it would be just and equitable to grant an eviction order or within what period such eviction order ought to be carried into effect. According to the Court there are two reasons for this:

48.1. The first, and perhaps obvious, reason is that all facts must be taken into account when deciding what is just and equitable.

48.2. The second is that considerations of what is just and equitable may persuade a court not to evict a person who is found to be in unlawful occupation. Of particular relevance was the fact that the occupant could "*hardly be expected to have known that her right was precarious inasmuch as it had not been reduced to writing and registered against the title deeds of the property. The fact is that she lost the absolute protection against eviction precisely because she was unaware that she needed to take further legal steps to ensure that her rights were enforceable against successors in title*" (at para [44] of the judgment).

49. Consequently, I agree with the appellant's counsel that the magistrate erred in not taking into consideration all relevant circumstances into account as set out, for example, in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others* at paras [11] and [21]. This was a material misdirection that justifies the setting aside of the eviction order.

50. If all the circumstances are taken into consideration, this may well be a case in which considerations of justice and equity outweigh protection of the exercise of the right to property that an entitlement to an order of ejectment provides, with reference to the findings in the matters of *Phillips v Grobler and others* and *Grobler v Phillips and others*, referred to above.

51. Counsel for the first respondent was in agreement that the appellant's personal circumstances had not been properly taken into account, and urged this Court to refer the matter back to the magistrate's court for hearing afresh. In the light of my view on the first respondent's *locus standi*, however, I think that the better course would be to uphold the appeal, and to allow the first respondent to start eviction proceedings afresh should he be so minded and advised.

COSTS OF THE APPEAL

52. The appellant has been successful, and there is no reason why costs should not follow the result. As only the first respondent opposed the appeal, he is to bear the costs to the extent that any has been incurred, given that the appellant was represented by Legal Aid South Africa.

ORDER

53. In all of the circumstances, the following order is made:

53.1. The appeal is upheld.

53.2. The eviction order granted by the Hermanus Magistrate's Court on 18 February 2022 is set aside, and replaced with an order dismissing the eviction application, with costs.

53.3. The first respondent shall bear the costs of the appeal.

VAN ZYL, AJ

I agree and it is so ordered.

FORTUIN, J

Appearances:

For the appellant: Adv. H. Jonck, instructed by Legal Aid South Africa

For the first respondent: Adv. J. du Toit, instructed by Du Toit Attorneys

No appearance for the second respondent