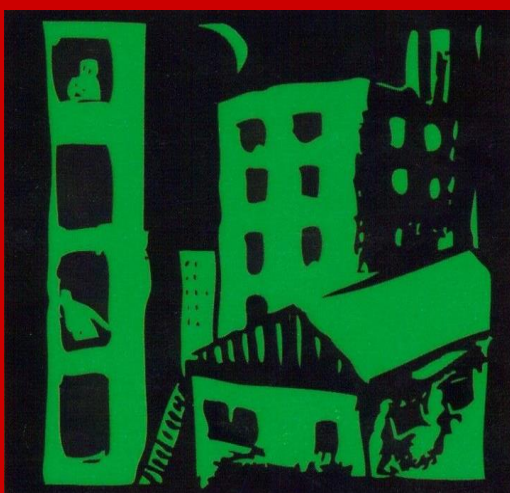


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**Judicial problem-
solving: An
evaluation of
*Grobler v Phillips
and Others* [2022]
ZACC 32**

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ABSTRACT

The South African Constitutional Court was recently tasked with considering whether the “just and equitable” requirement of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act had been complied with when an eviction order was granted in the Somerset West Magistrates’ Court. The Magistrates’ Court found that the occupier unlawfully occupied the land and determined that the eviction was just and equitable in the circumstances. However, the High Court and the Supreme Court of Appeal held that the order of the Magistrates’ Court could not be confirmed. With certain conditions attached, the Constitutional Court held that the eviction was just and equitable. These judgments are noteworthy as they highlight the inconsistencies in the reasoning of the various courts that considered the same facts. The conclusion is that judicial reasoning which creates

tension between the rights of private landowners and unlawful occupiers is not constructive. Ideally, evictions should be resolved by enforcing a potentially homeless person's right to access adequate housing by holding the state to account for its constitutional obligations.

Keywords: eviction; Prevention of Illegal Eviction Act; just and equitable; unlawful occupier; meaningful engagement.

1 INTRODUCTION

*"It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins."*¹

The South African courts are enjoined with the "effective, efficient and expeditious adjudication and *resolution* of all disputes".² Judicial officers are, for their part, expected to "*resolve* disputes [expeditiously] by making findings of fact and applying the appropriate law in a fair hearing".³ The resolution of disputes typically demands no more than ordinary judicial reasoning. However, some complex and contentious disputes will arise, requiring innovative, context-sensitive problem-solving to achieve a just, equitable and legally sound outcome.⁴ The adjudication of eviction applications in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act⁵ (hereafter, the PIE Act) often requires both ordinary and complex problem-solving reasoning. Determining whether a person qualifies as an unlawful occupant of private land is generally uncomplicated. However, the actual eviction of an unlawful occupant and the potential for homelessness has proven to be immensely difficult to manage.

In *Emfuleni Local Municipality v Builders Advancement Services CC*, Willis J commented that he was "bewildered and confused as to how a court is expected to deal appropriately with applications for eviction".⁶ In referring to this comment, Van Oosten J stated that it is not "appropriate or desirable for a full court to provide the clarity and guidance in the general terms sought",⁷ as there is "[n]o general rule, which the wit of man could devise, [that] would be likely to cover all the varying circumstances, which

¹ Cardozo BN *The nature of the judicial process* New York: Dover Publications (1921) at 21.

² Section 2 of the Norms and Standards for the Performance of Judicial Functions, GN R147, GG 37390 of 28 February 2014 (emphasis added).

³ The South African Judicial Code of Conduct, article 9(a) (Fair Trial), issued in 2012, pursuant to the Judicial Service Commission Act 9 of 1994, section 12, GN R865 GG 35802 of 18 October 2012 (emphasis added).

⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) at para 23; *Occupiers Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 9 BCLR 911 (SCA) at para 11; Gordon M "Analogical reasoning by reference to statute: What is the judicial function?" (2019) 42(1) *University of New South Wales Law Journal* 4 at 5–8.

⁵ Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act).

⁶ *Emfuleni Local Municipality v Builders Advancement Services CC and Others* 2010 (4) SA 133 (GSJ) (28 April 2010) at para 31.

⁷ *Emfuleni Local Municipality v Builders Advancement Services CC and Others* (A 5047/11) [2012] ZAGPJHC 39 (23 March 2012) at para 7.

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may arise in applications of this nature”.⁸ The challenges inherent in eviction applications have resulted in contradictory assumptions and philosophies by different judicial officers in their attempts to resolve the tension between “tradition and transformation, stability and change and ownership and land reform”.⁹ Unfortunately, some of these disputes have been formulated as a contest between the landowner and the unlawful occupier. This reasoning is not conducive to attaining a predictable and humane approach to evictions, as it ignores the role of the state in ensuring adequate access to housing for those experiencing homelessness. The inference is that the adjudication of eviction matters must be accurately framed to focus on the actual human rights issue (of homelessness) that may result from the eviction. This emphasis generates the opportunity for the courts to craft a just and equitable outcome that holds the state accountable to its constitutional obligations to protect, promote and fulfil the rights of vulnerable persons.

The South African Constitutional Court (CC)¹⁰ was recently tasked with considering whether the “just and equitable” requirement¹¹ of the PIE Act had been complied with when an eviction order was granted in the Somerset West Magistrates’ Court (hereafter, Magistrates’ Court). The Magistrates’ Court found that the first respondent was an unlawful occupier of private land and eventually ordered that the eviction was just and equitable. However, the Western Cape Division of the High Court, Cape Town (WCC)¹² and the Supreme Court of Appeal (SCA)¹³ did not confirm the order of the Magistrates’ Court. These courts reasoned that the right to the full exercise of ownership, at times, and in the interests of justice and equity, must yield to the right of vulnerable persons to a home. The decisions of the WCC and SCA did not resolve the dispute between the parties. Their judgments effectively burdened the property owner with an indefinite obligation to provide free housing to the occupier, who was left in a precarious position, knowing that the property owner did not condone her continued (unlawful) occupation of the land. These courts further did not deal with the state’s failure to provide access to adequate housing to the unlawful occupier and to protect the owner’s property rights. Thereafter, the CC considered the matter and resolved the dispute by finding that the eviction was indeed just and equitable, with certain conditions attached. However, more

⁸ Referring to Innes CJ in *Cohen Brothers v Samuels* 1906 TS 221 at 224.

⁹ Van der Walt AJ “Exclusivity of ownership, security of tenure and eviction orders: A critical evaluation of recent case law” (2002) 18(3) *South African Journal of Human Rights* 372 at 377.

¹⁰ *Grobler v Phillips and Others* [2022] ZACC 32 (CC Judgment) – Tshiqi J, in a unanimous judgment (Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ).

¹¹ Section 4(7) of the PIE Act.

¹² *Phillips v Grobler and Others* (A291/17) [2019] ZAWCHC 157; [2020] 1 All SA 253 (WCC) (21 November 2019) (WCC Judgment), Le Grange and Wille JJ sitting as court of appeal; *Grobler v Phillips* at para 1.

¹³ *Grobler v Phillips and Others* (446/20) [2021] ZASCA 100 (14 July 2021) – Hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town, Goosen AJA (Petse DP, Dlodlo, Mocumie JJA and Phatshoane AJA).

than 13 years elapsed, and four judgments were delivered, before the dispute was resolved.

The judgments are noteworthy as they highlight the inconsistencies in the reasoning of the various courts that considered the same facts. In exploring these issues, this article is divided into four sections. The first will deal with the facts of the dispute; the second section will provide a summary of the various judgments, after which the different courts' reasoning will be scrutinised individually and compared. The objective is to establish whether countervailing substantive reasons, such as moral, economic, political, institutional, or other social considerations, influenced the judicial reasoning and eventual decisions. The last part of the article considers the implications of the judgments and present conclusions and recommendations.

2 FACTUAL BACKGROUND AND SALIENT FEATURES OF THE CASE

The dispute concerned the occupation of a residential house on an erf in Somerset West (hereafter, the property) by the first respondent, Mrs Clara Phillips, an elderly "illiterate and indigent" woman,¹⁴ and her physically disabled son,¹⁵ who was represented in the eviction litigation by a *curator bonis*.¹⁶ The Helderberg Municipality was also cited as a respondent. Phillips initially occupied the property with her parents in 1947 and later with her husband when the property formed part of agricultural land.¹⁷ A previous property owner consented to Phillips' residing on the property in terms of what Phillips described as a life-long unregistered right of *habitatio* or *usus*.¹⁸ This "right" was recorded in a previous sale agreement, where it was confirmed that Phillips and her late husband resided on the property. The "exact nature of the rights of occupancy they may have, if any", were not recorded. Nonetheless, the agreement stipulated that the purchaser and any successors-in-title would not be entitled to evict the occupants.¹⁹ The various courts determined that the rezoning of the property from agricultural to residential occurred before 1991²⁰ or during 2001²¹ or 2002.²² The property was again subdivided into several smaller erven in 2001 after being sold to a company for development purposes. The Phillips' house was located on one of the newly subdivided ervens. It was this erf that the applicant, Mr Willem Grobler, purchased in 2008 at a public auction as a residence for his elderly parents.²³

¹⁴ See the WCC Judgment at para 12; Phillips was 85 years old at the time that the Constitutional Court considered the matter.

¹⁵ SCA Judgment at para 5; CC Judgment at para 1.

¹⁶ CC Judgment at para 3.

¹⁷ SCA Judgment at para 6.

¹⁸ SCA Judgment at para 8.

¹⁹ WCC Judgment at para 2.

²⁰ SCA Judgment at para 12.

²¹ CC Judgment at para 19.

²² WCC Judgment at para 43.

²³ CC Judgment at para 2.

There was some dispute over Grobler and Phillips's interactions before and after the sale and transfer. Grobler apparently met with Phillips on at least three occasions over eight months and verbally requested that she vacate the property. After the auction, Grobler personally engaged with Phillips and again verbally requested that she vacate the property. After that, Grobler, formally, by way of his legal representatives, caused notice to be given to Phillips to vacate the property on two months' notice.²⁴ Grobler offered to make a two-bedroom flat available to Phillips "for the rest of her life" and pay for the reasonable removal and relocation costs.²⁵ Phillips rejected the offers.

Some five months later, Grobler instituted legal proceedings against Phillips and her son in the Magistrates' Court, seeking their eviction from the property as unlawful occupiers in terms of the PIE Act. Phillips, who was unrepresented at this stage, opposed the application. She alleged that a previous owner granted her an oral limited real right of habitation on the property and that she was a protected occupier in terms of the PIE Act. The parties could not agree on the time when Grobler became aware of Phillips's right to reside on the property.²⁶ The application was, as a result, referred to oral evidence.²⁷ The Magistrates' Court held that the life-long "right" of *habitatio* was invalid and unenforceable, as it was not registered against the title deed. The Phillips's thus occupied the property without the further consent of the owner and, therefore, were unlawful occupiers. The Magistrates' Court granted the eviction order, but the determination of an effective date thereof was postponed for consideration at a later date.²⁸

Grobler, at this time, made an additional offer in terms of which Phillips could remain on the property for a further two months. Thereafter, he would assist Phillips in relocating and cover the reasonable costs of her accommodation in a retirement centre for one year.²⁹ Again, this offer was rejected. The Magistrates' Court then considered Phillips's personal circumstances, the impact of the eviction, and whether alternative accommodation was available. The matter was postponed in order to obtain evidence from the local social services department and municipality regarding the availability of alternative, suitable, state-funded accommodation. Unfortunately, the content of the reports is not discussed in any of the judgments. Phillips was eventually ordered to vacate the property more than a year after the initial eviction order had been granted.³⁰

Dissatisfied with the judgment, Phillips obtained legal representation and appealed to the Full Court of the WCC High Court. Phillips, at this time, introduced a further defence.

²⁴ SCA Judgment at para 6.

²⁵ CC Judgment at paras 5 and 43.

²⁶ WCC Judgment at para 1.

²⁷ CC Judgment at paras 5–6.

²⁸ CC Judgment at para 7.

²⁹ CC Judgment at para 8.

³⁰ WCC Judgment at para 2; CC Judgment at para 9.

She contended that she qualified as an occupier in terms of the Extension of Security of Tenure Act (ESTA).³¹ Despite a pre-trial agreement that the appeal would be determined based only on the provisions of PIE, the WCC found that ESTA was applicable. It further held that Grobler had not provided reasonable notice to Phillips to vacate the property and had thus failed to prove that Phillips was an unlawful occupier in terms of the PIE Act. The WCC upheld the appeal.³²

Grobler appealed against the WCC's judgment to the SCA.³³ The President of the SCA requested the involvement of counsel as *amicus curiae* to assist Phillips with the legal issues raised in the appeal.³⁴ The SCA held that the provisions of ESTA did not apply, as the property was previously, and before Grobler acquired it, rezoned as residential.³⁵ The SCA further confirmed that the right of *habitatio* was not enforceable against Grobler.³⁶ Grobler had continually, and over an extended period, "clearly and unequivocally" communicated the termination of Phillips's right to occupy the property. Phillips, therefore, became an unlawful occupier of the property.³⁷ After considering Phillips's circumstances and the rezoning of the property, the SCA concluded that Phillips qualified as a vulnerable person.³⁸ The SCA further reasoned that there was no reason to interfere with the discretion of the WCC, held that it was not just and equitable to order the eviction of Phillips, and accordingly dismissed the appeal.³⁹ In their judgments, the WCC and SCA did not once refer to the municipality or its role in evictions.

Grobler applied for leave to appeal to the CC. In dealing with an objection to its jurisdiction, the CC found that an eviction that may result in homelessness will always raise a constitutional issue.⁴⁰ The CC found that Phillips was an unlawful occupier and that it was just and equitable to order her eviction, subject to Grobler's offer of alternative accommodation. The CC, therefore, granted leave to appeal, upheld the appeal, and set the SCA order aside. The CC made no order as to costs.⁴¹

3 DISCUSSION OF THE JUDGMENTS OF THE VARIOUS COURTS

Phillips's occupation of the property was not unlawful from its inception, as there was no active invasion or settlement of the property without legal cause. Phillips also believed that she possessed a limited real right to occupy the property and thus

³¹ Extension of Security of Tenure 62 of 1997; CC Judgment at para 10.

³² CC Judgment at para 11.

³³ CC Judgment at para 12.

³⁴ SCA Judgment at para 3.

³⁵ CC Judgment at para 14.

³⁶ CC Judgment at para 17.

³⁷ CC Judgment at para 16.

³⁸ CC Judgment at para 19.

³⁹ CC Judgment at para 20.

⁴⁰ CC Judgment at para 21, referring to *Machele v Mailula* 2009 (8) BCLR 767 (CC).

⁴¹ CC Judgment at para 49.

remained passive after Grobler had withdrawn his consent for her to occupy the property. As a result, Phillips never asserted a need for alternative accommodation or indicated that she might become homeless, thereby placing her “in an emergency situation”.⁴² Grobler’s circumstances were not discussed in detail, and little is known about him. These facts set the stage for a challenging adjudication process wherein the judicial officers’ dispute-resolution and problem-solving skills would be tested.

3.1 Specific defences

It is unclear whether Phillips argued that she, due to open, peaceful and uninterrupted occupation for at least 30 years, possibly acquired rights to the property by way of acquisitive prescription.⁴³ An argument of acquisitive prescription seems viable on initial scrutiny, as Phillips had occupied the property for approximately 62 years by the time Grobler acquired it. However, the property was classified as agricultural land until 1991 or possibly 2001, depending on the interpretation of the different courts. No occupier of any portion of the property could, therefore, acquire an occupied portion of land through prescription due to the prohibition on subdivision by the Subdivision of Agricultural Land Act.⁴⁴

3.1.1 Protection afforded by ESTA

It is accepted that the property was legally changed or rezoned prior to the auction to allow for residential land use rights on the property. The Land Use Planning Ordinance⁴⁵ of 1985 was the legal mechanism in the Western Cape that provided for all land-use-change applications, including rezoning and subdivision applications, when the rezoning of the property occurred. There is no indication in the judgments of whether the decision to approve the reclassification of the property and the subsequent subdivision considered the respective rights and obligations of all those affected by the application.⁴⁶

Consequently, Phillips received a notice under section 4(2) of the PIE Act.⁴⁷ This 14-day notice period aims to allow a respondent to obtain legal representation and put all the relevant circumstances before the court.⁴⁸ Phillips was, however, unrepresented in the

⁴² Van der Westhuizen J in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33 at para 81.

⁴³ See the Prescription Act 18 of 1943 and Prescription Act 68 of 1969; *Stoffberg NO and Others v City of Cape Town* (1325/2017) [2019] ZASCA 70 (30 May 2019).

⁴⁴ Section 3 of the Subdivision of Agricultural Land Act 70 of 1970; ministerial consent would have been required in terms of section 3 of the Subdivision of Agricultural Land Act to give effect to the prescriptive title in respect of a portion of the agricultural land by way of acquisitive prescription. See also *Ploughmann NO v Pauw* 2006 (6) SA 334 (C) at paras 39–40.

⁴⁵ Land Use Planning Ordinance 15 of 1985.

⁴⁶ See the current requirements in the Spatial Planning and Land Use Management Act 16 of 2013, article 42.

⁴⁷ See *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) at paras 12–13.

⁴⁸ *Cape Killarney Property Investments* (2001) at para 20.

Magistrates' Court. The new defence based on section 2(1)(b), read with section 8(4) of ESTA, was thus introduced only on appeal to the WCC.⁴⁹ Phillips, therefore, effectively relied on the special statutory protection offered by both PIE and ESTA in the WCC. These defences required evidence that Phillips simultaneously qualified as an occupier under ESTA and PIE on the same property. Both statutes aim to prevent unfair evictions, but ESTA focuses on occupiers of rural land belonging to another and aims to protect a different category of occupiers than that envisioned in the PIE Act. The PIE Act expressly excludes a person who is an occupier in terms of ESTA,⁵⁰ which, in turn, specifically excludes "land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law ..."⁵¹

The WCC found that Phillips was entitled, on appeal, to raise the new defence without determining whether she provided a basis for this defence. Instead, the WCC held that Grobler had the onus to establish that ESTA did not apply and that Grobler did not discharge this onus.⁵² The WCC made this finding despite this defence having been introduced on appeal only and despite a pre-trial agreement that excluded further reliance on ESTA.⁵³ The WCC then found that the eviction must be considered in terms of ESTA and that the eviction order of the Magistrates' Court was, as a result, improperly issued. The WCC specifically concluded that, in 2008, Phillips still benefitted from the protection afforded by ESTA as the rezoning occurred without her participation.⁵⁴ As a result, Phillips did not have an opportunity to assert her rights to the property in terms of ESTA before the rezoning.⁵⁵ This conclusion is debatable, as the circumstances regarding the rezoning were not explored adequately enough to justify this conclusion.

The judgment of the WCC incorporates several further contradictions, the most obvious of which relates to how the interaction between ESTA and the PIE Act was considered. The WCC initially stated that "the disputed property only ceased being a farm in 2001, and accordingly, section 2(1)(b) of ESTA finds application in favour of the appellant".⁵⁶ The WCC thus found that ESTA applies to the dispute and that Phillips did not "have to establish a right of occupation to resist an eviction on the basis that the result is not just and equitable".⁵⁷ However, the WCC later stated that Phillips would have enjoyed protection under ESTA if she could have provided proof of the right to occupy the property as granted by the former owner. The WCC, however, despite its finding that ESTA was applicable to the matter, also found that the PIE Act was applicable, as it

⁴⁹ 62 of 1997; CC Judgment at para 10.

⁵⁰ Section 1(xi) of the PIE Act.

⁵¹ Section 2 of ESTA.

⁵² SCA Judgment at para 7.

⁵³ See SCA Judgment at para 9.

⁵⁴ WCC Judgment at para 74.

⁵⁵ CC Judgment at para 12.

⁵⁶ WCC Judgment at para 46.

⁵⁷ WCC Judgment at para 64.

regulates evictions from “all land” in South Africa. The WCC accordingly held that it was not just and equitable to grant the eviction of Phillips as an unlawful occupier under the PIE Act based on her personal circumstances.⁵⁸

The convoluted judgment of the WCC creates the impression that a measure of cognitive bias affected its reasoning. ESTA was relevant in the past but no longer applicable at the time of the eviction application. However, the mere mention of ESTA as a new defence affected the reasoning of the WCC to such an extent that the Court relied on the failure by Phillips to exercise the protection that ESTA offered in the past to justify its application in the present.⁵⁹ The SCA appropriately reasoned that the WCC should have been persuaded that the property was urban in character, and that Grobler did, as a result, demonstrate that ESTA did not apply.⁶⁰

3.1.2 *Right of habitatio*

The Magistrates’ Court correctly found that the life-long right of *habitatio* was invalid and unenforceable, as the requirements for the acquisition or vesting of a limited real right of *habitatio* were not present.⁶¹ However, the WCC’s reasoning on the issue is somewhat vague. The WCC reasons that “it matters not” whether the right is classified as a “personal servitude”, a right of “*habitatio*”, “*usus*” or a “*precarium*”. The WCC, therefore, did not find it necessary to classify the exact nature and extent of the rights conferred on Phillips.⁶² The WCC merely concluded that Phillips had an entitlement (to lawfully) remain on the property for life.⁶³ It is unclear what meaning the WCC attached to the term “entitlement”. Nonetheless, the WCC reasoned that (all) servitudes, in general, constitute a subtraction from the owner’s *dominium* while simultaneously placing certain of the rights of use and enjoyment at the disposal of a third party, in this instance Phillips.

It is appropriate to briefly evaluate the nature of the possible rights Phillips might have acquired in relation to the property. A *precarium* may be in the nature of a servitude or

⁵⁸ SCA Judgment at paras 7–8.

⁵⁹ See in general Eyal P & Eyal G “Heuristics and biases in judicial decisions” (2013) 49(2) *Court Review: The Journal of the American Judges Association* 114 at 114–118.

⁶⁰ SCA Judgment at para 35.

⁶¹ CC Judgment at para 17.

⁶² A personal servitude confers the right to use and enjoy another’s property and is enforceable against the owner of the property who is burdened with it. A servitude of use or *usus* is also a limited real right that allows for the holder to occupy immovable property and take the fruits for subsistence needs. See Sonnekus C “Bewoningsreg (*habitatio*) – Verval dit weens versteuring (*vernietiging*) van die bouwerk?” (2009) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 450 at 454–5. See also Van der Walt AJ “Development of the common law of servitude” 130 *South African Law Journal* (2013) 130(4) at 722; *Vairetti v Zardo NO* (12423/2007) [2010] ZAWCHC 146 (12 April 2010); *Setlogelo v Setloge* 1921 CPD 161 at 168–169; *Kidson v Jimspeed Enterprises CC* 2009 (5) SA 246 (GNP) at 250C–E.

⁶³ WCC Judgment at paras 14 and 16.

a *precarium* proper.⁶⁴ A *precarium* proper is revocable at will, as it is in nature purely personal to the grantee, based on liberality or friendship. The existence of a *precarium* would have obliged the previous owner to give Phillips reasonable notice of the sale of the property and the termination of her right to occupy the property. An existing *precarium* would only have bound Grobler, as a successor in title, had a tacit re-grant of the concession under a *precarium* occurred. This situation would have required evidence of knowledge of the *precarium* by both Grobler and Phillips at the time of registration of the transfer of the property.⁶⁵ Phillips would have become an unlawful occupier for purposes of PIE on the date Grobler took transfer of the property without such a re-grant of the *precarium*. Despite its possible application, the judgments do not explore this matter further.

A right of *habitatio* is classified as a personal servitude and specifically as a limited real right that confers on its holder the right to reside in the house owned by another without detriment to the substance of the property. The object of the servitude of *habitatio* is the servient land and not the building. A servitude constitutes an interest in land and, therefore, must be reduced to writing and registered against the title deed as a real right.⁶⁶ The SCA thus confirmed the Magistrates' Court's finding that Phillips lost the absolute protection against eviction provided by an unregistered lifelong right of *habitatio*.⁶⁷ The question was then whether the oral agreement between Phillips and the previous owner provided her with any entitlement to occupy the property after it had been transferred to Grobler.⁶⁸ Phillips alleged that Grobler was made aware of her right to occupy the property at their first engagement, some five weeks prior to the auction where he purchased the property.⁶⁹ Grobler stated that he received the previous sale agreement after the auction. The WCC and the SCA found that Grobler was at least aware of the alleged unregistered right of *habitatio* before transferring the property into his name.⁷⁰ As a result, Grobler did not obtain clean and unencumbered rights to the property at the registration of the transfer. This knowledge created an obligation on Grobler to terminate any right to occupy that Phillips enjoyed. Grobler further needed to provide a reasonable period for Phillips to vacate the property.

3.2 Unlawful occupation

⁶⁴ *City of Cape Town v Abelsohn's Estate* 1947 (3) All SA 429 (C) at para 20.

⁶⁵ *Abelsohn's Estate* (1947) at 439.

⁶⁶ *Baront Investments (Pty) Ltd v West Dune Properties 296 (Pty) Ltd* (AR 372/12) [2014] ZAKZPHC 19 at paras 56–57.

⁶⁷ SCA Judgment at para 44.

⁶⁸ *Mason v Swanepoel* (4505/2013) [2016] ZAFSHC 28 (19 February 2016); see in general Sonnekus JC "The quantification of the total loss suffered because of a breach of contract should include positive interest" (2022) 1 *Journal of South African Law* 143.

⁶⁹ WCC Judgment at para 6.

⁷⁰ WCC Judgment at para 11; SCA Judgment at para 6.

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The jurisdictional requirement that triggers an eviction under the PIE Act demands a factual finding that the respondent “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”.⁷¹ The Magistrates’ Court held that Phillips was indeed an unlawful occupier of the property. The WCC found that Phillips was not an unlawful occupier, as she was not provided with reasonable notice of termination of her right to occupy the property. The High Court previously determined that the reasonableness of a notice period must be tested at the date the notice was given⁷² in view of all the relevant circumstances and must be “infused with constitutionality”.⁷³ It is essential to determine whether persons facing eviction have had sufficient time to regulate their affairs before they are required to vacate the property.⁷⁴ Over an eight-month period, Grobler communicated the withdrawal of his consent for Phillips to occupy the property.⁷⁵ The formal notice of termination effectively gave Phillips 65 days’ notice to vacate the property, whereafter she remained on the property for at least a further 107 days before the application proceedings were initiated.⁷⁶ Nonetheless, this exercise is of little consequence, as Phillips never asserted that she considered the notice period inadequate. She merely relied on a right to occupy the property and thus did not consider it necessary to enter into any meaningful engagement with Grobler regarding the adequacy of the notice period.

The WCC, in its reasoning, seems to conflate unlawful occupation with reasonable notice to vacate the property. The WCC reasons that the occupation by Phillips remains lawful until this right is lawfully terminated, which would require an appropriate notice and “the lapse of a reasonable time period”.⁷⁷ The further reasoning of the WCC on this point becomes even more puzzling, as it states that “any reasonable period purportedly given to vacate the property cannot remedy the defect in failing to give reasonable notice of termination of the right to occupy”.⁷⁸ It seems that the WCC foresaw a situation whereby Grobler was required to first change the status of Phillips from lawful to unlawful occupant by giving reasonable notice that he would, at some future time, terminate Phillips’ right to occupy the property. The SCA commented that the reasoning

⁷¹ Section 1 of the PIE Act. See also *Davidan v Polovin NO* (167/2020) [2021] ZASCA 109 (5 August 2021) at para 11.

⁷² *Amalgamated Beverage Industries Limited v Rond Vista Wholesalers* 2004 (1) SA 538 (SCA) at paras 17–18.

⁷³ See *Philander v Makiet* (A61/2020) [2020] ZAWCHC 106 (18 September 2020) at para 33.

⁷⁴ *Amalgamated Beverage Industries* (2004) at paras 19 and 23.

⁷⁵ CC Judgment at paras 5 and 43.

⁷⁶ CC Judgment at para 11.

⁷⁷ WCC Judgment at para 16.

⁷⁸ WCC Judgment at paras 20–21.

of the WCC on this issue was “difficult to follow”, as it ignored the relevant factors when it concluded that Phillips was an unlawful occupier.⁷⁹

The WCC made three further findings regarding Phillips’s occupation. It held that ESTA finds application in favour of Phillips, who, as a result of her circumstances, is afforded a “statutory life right” and “complete protection from eviction”.⁸⁰ The WCC thus found that the initiation of the application was a “nullity” since there was no cause of action (Phillips was not an unlawful occupier). Therefore, the judgment of the Magistrates’ Court was “void and of no effect”.⁸¹ However, the WCC, despite finding that Phillips was a lawful occupier and that the application was fatally defective, then proceeded to consider whether it was just and equitable to order eviction.⁸² Logically, no eviction may follow where the application is a nullity or where a person is in lawful occupation of a property, either under ESTA or PIE. Nonetheless, the WCC proceeded to consider the personal circumstances of Phillips and the provision, or lack thereof, of alternative accommodation by the local government and/or the suitability of Grobler’s offer of alternative accommodation.

The SCA stated that a court of appeal would not readily interfere with the discretion of the court *a quo* to determine whether it is just and equitable to evict the unlawful occupier. The SCA then concluded that the WCC “was entitled to exercise a discretion even though the occupation was unlawful”.⁸³ The SCA, therefore, considered the matter as if the WCC were the court of first instance. As a result, the SCA failed to consider whether the Magistrates’ Court’s postponement of the eviction order to allow the eviction to be executed humanely was the correct procedure. Thus, the SCA never considered whether the eviction might become just and equitable once the statutory requirements were fulfilled.⁸⁴ The CC ultimately confirmed that the SCA erred in this regard.⁸⁵

There is another peculiar aspect in the reasoning of the WCC. The WCC, in what can reasonably be described as an attempt to minimise the adverse effect of the judgment, states that Phillips did not seek to limit Grobler’s right of ownership “altogether and ad infinitum”.⁸⁶ The WCC thus addresses its duty to balance the rights of both parties by reasoning that “the value of her [Phillips’] right of occupancy is relatively limited” as she

⁷⁹ CC Judgment at paras 15–16 and SCA Judgment at para 38.

⁸⁰ WCC Judgment at paras 46–47 and 49.

⁸¹ WCC Judgment at para 29.

⁸² CC Judgment at para 31.

⁸³ SCA Judgment at para 47.

⁸⁴ See Fick S & Vols M “Best protection against eviction: A comparative analysis of protection against evictions in the European Convention on Human Rights and the South African Constitution” (2016) 3(1) *European Journal of Comparative Law and Governance* 40 at 58.

⁸⁵ CC Judgment at para 24.

⁸⁶ WCC Judgment at para 76.

was elderly and in a state of “indigence and illiteracy”.⁸⁷ The reasoning, therefore, and by implication, justifies the obligation that was imposed on Grobler by speculating that the limited life expectancy of Phillips would somehow act as a mitigating factor to reduce the impact of her continued (unlawful) occupation of the property. The WCC indirectly acknowledges its discomfort but reasons that its judgment would not have long-term consequences. The SCA decision also does not provide a more plausible justification for its ultimate effect, that is, forcing Grobler to endure Phillips’ continued unlawful occupation against his will.⁸⁸ The SCA merely found that it would not be just and equitable to order the eviction of Phillips but provided no solution to the dispute. Phillips remained an unlawful occupant and received no assistance from the state to improve her situation.

The reasoning of the WCC and the SCA must be interpreted in the light of the judgment of the SCA in *Ndlovu*.⁸⁹ The SCA held that “[t]he effect of PIE is not to expropriate the landowner and cannot be used to expropriate someone indirectly, and the landowner retains the protection of [section] 25 of the Bill of Rights”.⁹⁰ The continued unlawful occupation of land essentially results in a deprivation of property under section 25(1) of the Constitution. The CC, in *Claytile*,⁹¹ also found that imposing a further obligation on a property owner who accommodated unlawful occupiers for several years should be treated with caution.⁹² The application of the PIE Act was, therefore, never intended, in its pursuit to prevent the arbitrary deprivation of property, to allow for the expropriation of that land from a private landowner.⁹³ A landowner should not be required to shoulder the state’s responsibility to house an unlawful occupant for an indefinite or even extended period, especially where the occupation becomes detrimental to the landowner.⁹⁴

⁸⁷ WCC Judgment at para 76.

⁸⁸ Section 25(1) of the Constitution of the Republic of South Africa, 1996. See also *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) at para 40 and *Changing Tides* (2012) at para 18.

⁸⁹ *Ndlovu v Ngcobo, Bekker v Jika* [2002] ZASCA 87.

⁹⁰ *Ndlovu v Ngcobo, Bekker v Jika* at para 17. See also in general *Modderklip Boerdery* (2005) at para 40 and Dugard J “Modderklip revisited: Can courts compel the state to expropriate property where the eviction of unlawful occupiers is not just and equitable?” (2018) 21 *Potchefstroom Electronic Law Journal* at 1.

⁹¹ *Baron v Claytile (Pty) Ltd* [2017] ZACC 24.

⁹² CC Judgment at para 22; Various Occupiers at para 11.

⁹³ See also *Occupiers of Erven 87 and 88 Berea v De Wet NO* 2017 ZACC 18 (8 June 2017) (referring to *Ndlovu* at paras 17 and 80). See also Scott J “The precarious position of a landowner vis-a-vis unlawful occupiers: Common-law remedies to the rescue” (2018) *Journal of South African Law* 158 at 158.

⁹⁴ See in general *Theewaterskloof Holdings (Edms) Bpk, Glazer Afdeling v Jacobs* 2002 (3) SA 401 (LCC).

3.3 The just and equitable test for eviction

After determining that Phillips was indeed an unlawful occupier, the SCA considered certain relevant factors, including her age and the fact that she occupied the property with her disabled son. The SCA, however, also considered Phillips's "wish" to remain in unlawful occupation of the property as opposed to the benefits offered to her regarding the alternative accommodation.⁹⁵ This significance which the SCA attached to Phillips's wish confirms the subjective experience of familiarity, habit, security, and identity that people associate with a home. The SCA found that these factors outweighed those that entitled the property owner to obtain an eviction order. The CC found that Phillips's wish or preference does not constitute a factor in determining what is just and equitable. The focus should appropriately be on the effect of the eviction on the constitutional rights of the unlawful occupier. An unlawful occupier may not refuse to be evicted based on a preference to remain in unlawful occupation of the property. The right to access to adequate housing also does not include a claim to choose precisely where the unlawful occupier wants to reside.⁹⁶ The SCA previously held that ESTA also does not provide a person with the right to choose a house,⁹⁷ and the CC confirmed that the right of residence was not necessarily attached to the specific house.⁹⁸ Phillips rejected the offer of alternative accommodation as she was "accustomed to life in the house she presently occupies and enjoys not only the freedom and space it affords but also the environment around it".⁹⁹ Grobler went as far as to forward a list of several properties to Phillips, who viewed some but did not deem them acceptable. Grobler also offered to take responsibility for the removal and transportation costs of Phillips's furniture and personal goods to her new home.¹⁰⁰

The SCA found that Phillips was justified in refusing to accept these offers¹⁰¹ and that the Court could not make an order amounting to a "compelled ejection notwithstanding the overriding considerations of justice and equity".¹⁰² The SCA further reasoned that the fact that alternative accommodation was offered "would negate the first respondent's dignity rather than protect it".¹⁰³ The SCA, as a result, did not consider the obligations of the state to provide access to alternative accommodation for those who may become homeless. The SCA insisted on respecting Phillips's preferences, possibly to her detriment. The offer by Grobler would have placed Phillips in an advantageous position, as the alternative accommodation would have been registered in her name, which would have provided Phillips with the psychological and legal

⁹⁵ SCA Judgment at para 56.

⁹⁶ CC Judgment at para 36.

⁹⁷ *Oranje v Rouxlandia Investments* (2018) at para 21; CC Judgment at para 35.

⁹⁸ *Snyders v De Jager* [2016] ZACC 55; 2017 (3) SA 545 (CC) at para 78.

⁹⁹ CC Judgment at para 42.

¹⁰⁰ SCA Judgment at para 55.

¹⁰¹ CC Judgment at para 34.

¹⁰² SCA Judgment at para 56.

¹⁰³ SCA Judgment at para 57.

advantage of property ownership, thereby removing the possibility of future attempts to evict her from the property.¹⁰⁴

When considering the offer of alternative accommodation, the CC focused on the lack of effort made by Phillips to seriously consider the “generous offers” of alternative accommodation made by Grobler to reach a compromise.¹⁰⁵ The CC stated that Phillips might have initially “laboured under this wrong impression” but that she later obtained legal representation. The CC did not speculate whether Phillips’s lack of meaningful engagement was due to “poor legal advice”, but commented that her actions, or lack thereof, should not disadvantage Grobler.¹⁰⁶ However, it was evident that Phillips initially, and after obtaining legal representation, pursued a strategy of adversarial defiance with no regard for the difficulties experienced by Grobler. Grobler endured the continued unlawful occupation of Phillips on his property for more than 13 years, as well as the realities of the time- and cost-implications of litigation. The CC referred to Phillips’s failure to engage meaningfully as a “disturbing feature” of the case.¹⁰⁷ The CC ultimately determined that Grobler had to purchase a two-bedroom dwelling, which was to be registered in his name, and that Phillips and her son would only have the right to reside in this home for the rest of Phillips’s life.¹⁰⁸

3.4 Failure of the local municipality to provide alternative accommodation

The courts have stated that it would generally not be just and equitable to order the eviction of unlawful occupiers that would render them homeless.¹⁰⁹ The *Grootboom* judgment confirmed that the state must ensure that evictions are executed humanely, which requires the state to progressively provide access to adequate housing.¹¹⁰ The local municipality has the primary duty to satisfy the housing needs of the people within its jurisdiction.¹¹¹ The municipality should thus be joined to the proceedings as an

¹⁰⁴ SCA Judgment at para 55.

¹⁰⁵ CC Judgment at para 41.

¹⁰⁶ CC Judgment at para 43.

¹⁰⁷ CC Judgment at para 40.

¹⁰⁸ CC Judgment at para 49.

¹⁰⁹ See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) and *Various Occupiers; Section 26(3) of the Constitution of the Republic of South Africa, 1996* (read with section 172(i)(b)); *Hattingh v Juta* [2013] ZACC 5; 2013 (3) SA 275 (CC) at para 32; CC Judgment at para 39. See also *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BC LR1268 (CC) at para 4; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights and Evictions, amici curiae)* 2010 (3) SA 454 (CC) at para 148; *Modderklip Boerdery* (2005) at para 64; *Blue Moonlight Properties* (2011) at para 40; *Changing Tides* (2012) at para 8; *Dihlabeng Local Municipality v Makhotsa* (569/2005) [2005] ZAFSHC 63 (22 September 2005) at para 22; *Ark City of Refuge v Bailing* 2011 (1) BCLR 68 (WCC) at para 18.

¹¹⁰ *Modderklip Boerdery* (2005) at para 26.

¹¹¹ See Van Wyk J “The role of local government in evictions” (2011) 13(3) *Potchefstroom Electronic Law Journal* 50 at 66; *Blue Moonlight Properties* at para 78; *Changing Tides* (2012) at para 38; *Lingwood v*

interested party with constitutional obligations to people facing eviction.¹¹² In compliance with its obligations, the state must determine the needs of the unlawful occupiers by engaging with them meaningfully and then draft a report on its capacity to provide alternative accommodation to those facing homelessness.¹¹³ It would generally not be appropriate for a court to grant an eviction order without prior and meaningful engagement and “a complete and accurate account” of the efforts already made by the state to engage with the occupiers by the state with those affected.¹¹⁴ Engagement between the private landowner and the unlawful occupant only is not sufficient. Meaningful engagement is based on a good-faith collaborative examination of possible solutions that requires the existence of institutional structures and the involvement of persons with appropriate sensitivity and engagement skills, especially when dealing with vulnerable or illiterate persons.¹¹⁵ However, meaningful engagement should not be interpreted as consistently generating an actual agreement between the state and the affected person. Meaningful engagement here is less onerous than the doctrine of “free, prior and informed consent”.¹¹⁶

The Unlawful Occupiers of R/E of Erf 9 Highlands 2008 (3) BCLR 325 (W) at para 38; *Sailing Queen Investments v The Occupants La Colleen Court* 2008 (6) BCLR 666 (W) at para 20; *Chieftain Real Estate Incorporated in Ireland v Tshwane Metropolitan Municipality* 2008 (5) SA 387 (T) at para 32; *Cashbuild (South Africa) (Pty) Ltd v Scott* 2007 (1) SA 332 (T) at para 42; See also Muller G and Liebenberg S “Developing the law of joinder in the context of eviction of people from their homes” *South African Journal on Human Rights* 29(3) (2013) 554 at 557; Clark M “Evictions and alternative accommodation in South Africa: An analysis of the jurisprudence and implications for local government” (2016) SERI Research Report at 27; Chenwi L “Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions” (2008) 8(1) *Human Rights Law Review* 105 at 126.

¹¹² *Occupiers of ERF 101,102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd* 245/08 [2009] ZASCA 80 at paras 13–14.

¹¹³ *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) at para 5; *Residents of Joe Slovo Community* (2009) at para 167; *Blue Moonlight Properties* (2012) at para 64; *Changing Tides* (2012) at para 40; *Sailing Queen Investments v The Occupants La Colleen Court* at para 18; *Ritama Investments v The Unlawful Occupiers of Erf 62, Wynberg* 2007 JOL 1896 (T) at para 13. See also Muller and Liebenberg (2013) at 565-566; Clark M “Evictions and alternative accommodation in South Africa: An analysis of the jurisprudence and implications for local government” (2013) SERI Research Report at 27; *ABSA Bank v Murray* 2004 2 SA 15 (C) at para 41; *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 1 SA 470 (W) at paras 53, 68.

¹¹⁴ *Occupiers of 51 Olivia Road* (2008) at para 21.

¹¹⁵ *Occupiers of 51 Olivia Road* (2008) at para 15.

¹¹⁶ *Residents of Joe Slovo Community* (2009) at para 244. See also article 6 of the International Labour Organisation Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989) 28 ILM 1382; articles 10, 19, 29 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples, 61/295, 13 September 2007, A/RES/61/295 (2007); Committee on Economic, Social and Cultural Rights, General Comment No. 21: Right of everyone to take part in cultural life (article 15, para 1(a) of the Covenant), 21 December 2009, E/C.12/GC/21, at paras 36 and 55(e); 276/2003; Centre for Minority Rights Development (Kenya) and Minority Rights Group International

With regard to Communication No. 5/2015, *Djazia and Bellili v Spain*, the Committee on Economic, Social and Cultural Rights commented in its views under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights that procedural protections must include a “real opportunity for genuine prior consultation” between the affected parties when eviction proceedings are instituted.¹¹⁷ The Committee noted that domestic courts should consider the impact of the eviction, with particular emphasis on vulnerable persons and the availability of other, less onerous, alternative measures to an eviction. Lastly, the courts must evaluate the reasonable measures taken by the state to provide alternative housing to those who may become homeless due to the eviction.¹¹⁸ Meaningful engagement allows the courts to promote and manage participation by all the parties and to ensure that the state is involved in resolving tensions between private property rights, the health and safety duties of local authorities, and the housing rights of individuals.

The CC, in *Modderklip Boerdery*, acknowledged that the role of local government in evictions is complicated, as the latter is “[c]onfronted by intense competition for scarce resources from people forced to live in the bleakest of circumstances ...”.¹¹⁹ The state should preferably anticipate the probability of an eviction that might cause homelessness and engage with the unlawful occupiers before litigation even commences.¹²⁰ Where the state fails to anticipate such situations, there would be a positive obligation on the state, within its housing programme, to provide temporary emergency alternative accommodation to those facing homelessness due to an eviction.¹²¹ The realisation of this obligation is appropriately placed on the state due to the interrelated, interdependent and indivisible nature of human rights. Therefore, it is not appropriate for a court to make an order in which a private landowner becomes obliged to provide ongoing access to housing for an unlawful occupier.

Muller and Liebenberg discuss the possibility of a “stalemate” in the apparently intractable contest between the competing rights of unlawful occupiers and private landowners.¹²² This impasse may be framed in terms of vulnerability and potential homelessness set against the state’s inability or reluctance to provide alternative accommodation. The authors argue that the joinder of the relevant local government is

on behalf of Endorois Welfare Council v Kenya 27th Annual Activity Report of the ACHPR (2009), at paras 226, 280–283 and 289–293.

¹¹⁷ *Djazia and Bellili v Spain* (5/2015), Views, E/C.12/61/D/5/2015, 20 June 2017 at paras 13.2, 14.1–14.2 and 15.1. Para 13.4 referred to the Constitutional Court’s decision in *Occupiers of 51 Olivia Road* (2008).

¹¹⁸ *Djazia* (2015) at paras 15.2, 6.4, 15.1 and 15.5.

¹¹⁹ *Modderklip Boerdery* (2005) at para 49.

¹²⁰ As soon as the state becomes aware of the unlawful occupation. See *Grootboom* (2000) at para 87; *Occupiers of 51 Olivia Road* (2008) at para 10.

¹²¹ *Grootboom* (2000) at para 66; *Blue Moonlight Properties* (2012) at paras 96–97.

¹²² Muller & Liebenberg (2013) at 554–570.

essential in finding a “tiebreaker” to resolve this dispute.¹²³ The government’s meaningful, proactive, and constructive involvement, including the eventual provision of suitable alternative accommodation, creates the platform for appropriate solutions to homelessness. These solutions, by necessary implication, require the courts to monitor and pronounce on the state’s compliance with its constitutional and statutory obligations to respect, protect, promote and fulfil the right of access to adequate housing, actions which must be performed in a transparent, accountable, and equitable manner.¹²⁴

The WCC and SCA failed to appreciate that the participation by the local government was integral to the considerations they were required to entertain. Ultimately, the CC did not need to consider this issue further, as Grobler had made alternative accommodation available at his own cost: Grobler was willing to give Phillips six months’ notice to vacate the present property and occupy the new dwelling. The CC found that this constitutes a reasonable period.¹²⁵ Nonetheless, it stressed that there is no quasi-constitutional obligation of horizontal application on private landowners to provide alternative accommodation to an unlawful occupier.¹²⁶ The offer by Grobler to make alternative accommodation available should not be interpreted as creating an obligation on other landowners to offer alternative accommodation in similar circumstances. An offer by the landowner of alternative accommodation is, therefore, not a precondition but rather a factor to be considered when the Court considers the terms of the eviction order.¹²⁷ Any offer of alternative accommodation by the landowner should thus not be interpreted as setting a precedent that may bind other landowners in similar circumstances. Phillips was ultimately, through the offer by Grobler and the intervention of the CC, required only to relocate from one home to another in the same community that she resided in before the eviction.¹²⁸ Nonetheless, 13 years elapsed after Grobler made the initial offer of alternative accommodation. During this time, there was an average increase of 85 per cent in property prices of sectional title scheme property in Somerset West.¹²⁹

The *Modderklip* case proposed an alternative approach to ordering the state to provide alternative accommodation. The Court found that the continued unlawful occupation of the land necessitated an order for the payment of constitutional damages by the state to the landowner for as long as the unlawful occupation continues.¹³⁰ Compensation mitigates the harmful consequences of the unlawful occupation on the private owner.

¹²³ Muller & Liebenberg (2013) at 554–570.

¹²⁴ Muller & Liebenberg (2013) at 554–570.

¹²⁵ CC Judgment at para 47.

¹²⁶ CC Judgment at para 48.

¹²⁷ *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001 (4) SA 759 (E) at 769C-E.

¹²⁸ CC Judgment at para 46.

¹²⁹ See Property24 “Somerset property trends and statistics” (n.d) available at <https://www.property24.com/somerset-west/property-trends/390> (accessed on 6 December 2022).

¹³⁰ *Modderklip Boerdery* (2005) at paras 8 and 24.

This remedy is, however, ultimately suboptimal, where the landowner is not amenable to this arrangement. The courts created a further possible remedy of last resort to protect the rights of both the landowners, one whereby the state may be ordered to expropriate the land and to pay just and equitable compensation to the landowner.¹³¹ The SCA, in *Ekurhuleni*,¹³² however, overturned an order of the Johannesburg High Court wherein the municipality was ordered to, inter alia, “purchase a property on which an informal settlement had been established ...”.¹³³

4 EVALUATION OF POSSIBLE BIAS IN THE JUDGMENTS

Judicial officers must remain independent and impartial. They are expected to provide access to quality justice by resolving disputes without fear, favour or prejudice.¹³⁴ In *Port Elizabeth Municipality v Various Occupiers*, the CC added that judicial officers must also infuse their reasoning with a measure of principled empathy and appropriate sympathy in pursuit of a just and equitable outcome to an eviction application.¹³⁵ Against this background, the reasoning of the WCC and SCA should be measured. The judgment of the WCC incorporates some statements that provide an early insight into the judicial officer’s thought-processes and predisposition to arrive at what was regarded as an attractive outcome to the dispute.¹³⁶ The WCC stated that the property, in the past and at present, “was and is” Phillips’s only home.¹³⁷ The SCA, in turn, focused on the “fraught history” of evictions and the “visceral reality of what is sought, namely the ejection of a person from their home in vindication of a superior right to property”.¹³⁸ These statements are factual. However, the focus on the past reduced the focus on the benefits that could be obtained by ensuring the current meaningful involvement of the state in the prevention of homelessness.¹³⁹

The WCC further reasoned that “the consent [awarded to Phillips] under the right to occupy was for her lifetime”, thereby depicting the unregistered right as enforceable against successors in title and, by implication, against Grobler.¹⁴⁰ The SCA, in turn, states that “[u]ntil 2009 her [Phillips’s] continued occupation was *entirely* secured, by reason of the consent of successive owners some of whom accepted that she had been given a

¹³¹ *Modderklip Boerdery* (2005) at paras 43–44.

¹³² *Ekurhuleni Municipality v Dada* 2009 4 SA 463 (SCA) at para 8.

¹³³ *Ekurhuleni* (2009) at para 1.

¹³⁴ Section 165(2) of the Constitution of the Republic of South Africa, 1996.

¹³⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) at para 23.

¹³⁶ Capurso TJ “How judges judge: Theories on judicial decision making” (1998) 29(1) *University of Baltimore Law Journal* 1 at 4.

¹³⁷ WCC Judgment at paras 12 and 24.

¹³⁸ SCA Judgment at para 1.

¹³⁹ SCA Judgment at para 1.

¹⁴⁰ WCC Judgment at para 24.

lifelong right of occupation and were prepared to honour it”.¹⁴¹ This reasoning must be interpreted in the light of the previous sale agreement, which recorded that the “exact nature of the rights of occupancy they [including Phillips] may have, if any, are unknown to the seller” but that no successors-in-title may evict the Phillips’s.¹⁴² This clause ostensibly attempted to create an interest in land by way of a *stipilatio alteri* and should have been registered against the title deed. The meaning of the clause in the sale agreement does not describe the specific part of the land in question. As a result, the possibility of registering it as a personal servitude against the title deed is debatable. This discussion is, however, not within the ambit of this note, save to state that the occupation of Phillips was by no means secured.

As stated above, the SCA curiously also deemed that Phillips’s wishes outweighed Grobler’s constitutional rights. Therefore, the reasoning of both the WCC and the SCA incorporate various biases. These courts initially articulated and framed the dispute emotionally, with Phillips’s interests being regarded as paramount. The CC confirmed that this approach effectively placed “too much emphasis on Mrs Phillips’ peculiar circumstances”.¹⁴³ The reasoning of the WCC and the SCA further display a bias in support of the omissions of Phillips, who effectively remained passive by failing to engage meaningfully with Grobler.¹⁴⁴ These risk-averse biases result in inaction, and no change to the existing state of affairs is required or ordered. The courts thus avoided a decision that required action leading to a different state of affairs, that is, the just and balanced resolution of the dispute and the relocation of Phillips to a nearby home.¹⁴⁵ These judgments eventually resulted in the unintentional exclusion of available and viable alternative options, such as the offer of alternative accommodation.¹⁴⁶ Legal reasoning that incorporates these biases lacks the appearance of rationality and predictability, and results in inconsistent and suboptimal decisions.

5 CONCLUSIONS

The PIE Act stipulates that the courts must deal with a broad and varied spectrum of facts and issues when adjudicating eviction proceedings. The CC, with regard to eviction matters, stated that “[t]he application of PIE is not discretionary”¹⁴⁷ and that the court must “probe and investigate the surrounding circumstances” and “go beyond its normal functions and ... engage in active judicial management ...”.¹⁴⁸ Furthermore, courts must

¹⁴¹ SCA Judgment at para 49 (emphasis added).

¹⁴² WCC Judgment para 4.

¹⁴³ CC Judgment at para 44.

¹⁴⁴ Zeelenberg M et al. “Attributions of responsibility and affective reactions to decision outcomes” (2000) 104 *Acta Psychologica* 303 at 304.

¹⁴⁵ See in general Nelson JR “Judge-made law and the presumption of arbitrability” (1992) 58(2) *Brooklyn Law Review* 279; Samuelson W & Zeckhauser R “Status quo bias in decision making” (1988) 1(1) *Journal of Risk & Uncertainty* 7 at 8.

¹⁴⁶ CC Judgment at para 44; Capurso (1998) at 4.

¹⁴⁷ *Machele v Mailula* 2010 (2) SA 257 (CC) at para 15.

¹⁴⁸ *Pitje v Shibambo* 2016 JDR 0326 (CC) at para 19.

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comprehensively consider fairness and related constitutional values to produce a just, equitable and legally sound outcome to the dispute.¹⁴⁹ Courts, accordingly, have a duty to seek concrete case-specific solutions based on fairness and equity. The courts may, therefore, not restrict themselves to a passive application of the PIE Act.¹⁵⁰ Obviously, judicial officers must remain neutral, but simultaneously, they are expected to go beyond the normal adversarial process of dispute determination.¹⁵¹ The adjudication of eviction matters requires that judicial officers make sensitive and sensible context-sensitive decisions by engaging in innovative problem-solving reasoning. The courts must be alive to their constitutional duty to ensure meaningful participation by the state in eviction matters. This approach creates the conditions for a just, equitable and legally sound eviction. Meaningful engagement between landowners, potentially homeless persons, and the state also gives effect to the substantive safeguards created in the PIE Act. This approach acknowledges the dignity of all the affected parties. The further benefit is that the courts can monitor the reasonableness of the measures taken by the state to make alternative housing available to those facing homelessness.

The reasoning of the WCC and the SCA did not realise Grobler's rights to his property while, at the same time, providing Phillips with an opportunity to obtain ownership of her own home. Their judgments ultimately left Phillips in unlawful occupation of the property belonging to Grobler. These judgments demonstrate that judicial officers are still inconsistent in their eviction reasoning. A just, equitable and legally sound resolution is not achieved by creating obligations for landowners to provide free housing for an indeterminate period to an unlawful occupant. A landowner may, indeed, be required to endure the continued unlawful occupation of a vulnerable person for a reasonable time when the occupant faces a real prospect of homelessness. Under these circumstances, the effective date of the eviction must be subject to a reasonable period of suspension until the state makes alternative accommodation available to the unlawful occupant. A court order that places an indefinite quasi-constitutional obligation on a private landowner to accommodate an unlawful occupant erodes the protection that the Bill of Rights offers against the arbitrary exercise of state power through inaction.

The courts should, therefore, frame evictions as the enforcement of the rights of a potentially homeless unlawful occupier to hold the state to account for its constitutional obligations. Only then will the courts be placed in a position to ensure reasonable outcomes that avoid homelessness and the imposition of quasi-constitutional obligations on private landowners.

¹⁴⁹ *Various Occupiers* (2008) at para 23.

¹⁵⁰ *Pitje v Shibambo* 2016 (4) BCLR 460 (CC) at para 19. See also Cloete C and Boggenpoel ZT "Re-evaluating the court system in PIE eviction cases" (2018) 135(3) *South African Law Journal* at 432.

¹⁵¹ See *National Commissioner of Police v Gun Owners of South Africa* [2020] ZASCA 88 (23 July 2020).

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