DISPUTE RESOLUTION
ALERT

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INCORPORATING
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Factual disputes in review proceedings? Trial or application

A leadership dispute in the Babirwa BaGa Mamadi traditional community ended up in court recently when the Premier of Limpopo Province appointed Aborekwe Thomas Mamadi as the community's acting traditional leader. Disgruntled members of the Mamadi family applied to the High Court to review and set aside the Premier's decision in terms of Rule 53 of the Uniform Rules of the High Court.

Eviction under the PIE Act: *If wishes were horses*

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Factual disputes in review proceedings? Trial or application

A leadership dispute in the Babirwa BaGa Mamadi traditional community ended up in court recently when the Premier of Limpopo Province appointed Aborekwe Thomas Mamadi as the community's acting traditional leader. Disgruntled members of the Mamadi family applied to the High Court to review and set aside the Premier's decision in terms of Rule 53 of the Uniform Rules of the High Court.

The High Court dismissed the application, finding that the case involved material disputes of fact which could not be resolved on the papers. Since these disputes had been reasonably foreseeable, the Court held that the challenge should have been brought by way of summons, which would prompt a trial to resolve the factual disputes, rather than on application, where the disputes would be resolved on the papers.

On appeal, the Constitutional Court in *Mamadi and Another v Premier of Limpopo Province and Others* [2022] ZACC 26 disagreed. The Court interrogated Rule 53, finding that litigants looking to review a decision may forgo the expediency which an application under Rule 53 confers and instead institute action proceedings. That said, the Court also confirmed that litigants are not obliged to do so when foreseeable factual disputes arise as they may apply for a referral of the matter to oral evidence or to trial, or the disputes of fact may be resolved through an application of the *Plascon-Evans rule*.

The rule laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] (3) SA 623 (A) is a staple reference in application proceedings. It holds that where disputes of fact arise on affidavit, a final order can be granted only if those facts alleged in the applicant's affidavits which are admitted by the respondent, together with the facts alleged by the respondent, justify such an order. This, at least in theory, means that a party wishing to take an administrative decision on review but who anticipates a factual dispute, is not obliged to go by way of summons which may delay a resolution as the process leads to a trial.

This is an interesting judgment for businesses that occasionally bid for and secure state tenders, as Rule 53 provides the mechanism through which they may challenge the actions of administrative bodies on review. These reviews tend to be two-pronged: first, an interim interdict is brought to halt the commencement of a project pending a court's decision on the main application,

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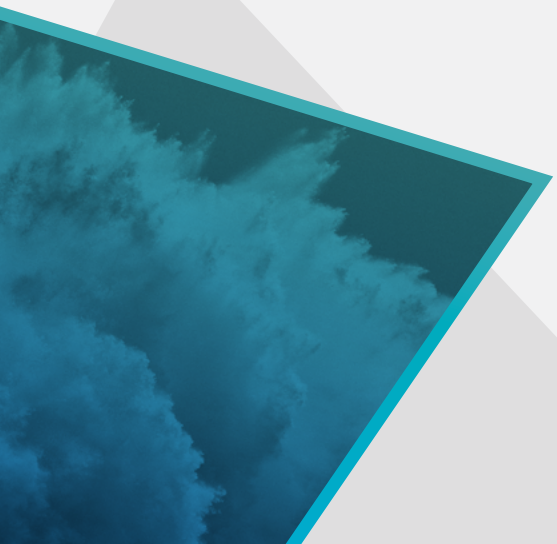
followed by the main application itself. If the interdict is granted, no work can begin until the review proceedings have been concluded and application proceedings in terms of Rule 53 are preferable as they are generally a speedier process. But the Constitutional Court's ruling does not substantially change the available options in review proceedings where there are pre-existing and material disputes of fact. What the court has done is to clarify that the *Plascon-Evans rule* can be applied to disputes of fact that have arisen on the papers, even where those disputes were pre-existing and material and that parties are not bound to proceed by way of action.

The "*in theory*" caveat arises from the risk that an applicant takes when aware of a dispute of fact, that the court will be prepared or even able to decide the matter on an application of the Plascon-Evans rule, bearing in mind that the applicant never knows for certain at the outset of a matter what a respondent will say in its answering affidavit. Also, a respondent in an opposed application proceeding is likely to make the best use of any dispute of fact in order to secure a dismissal of the application. The cautious litigant will be very hesitant to go by way of application in the face of a significant and pre-existing dispute of fact.

TIM FLETCHER, LISA DE WAAL AND LISO ZENANI



Eviction under the PIE Act: *If wishes were horses*

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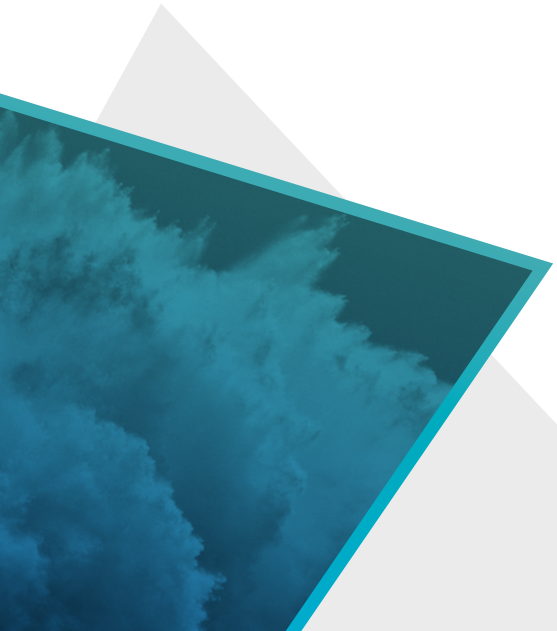

In the case of *Grobler v Phillips and Others* [2022] ZACC 32 the Constitutional Court was tasked with assessing whether it was just and equitable to grant an order to evict an 86-year-old occupier who had been residing on the property for 75 years, with her disabled son.

Mr Willem Grobler, the appellant, purchased an immovable property at a public auction in 2008 with the intention that his elderly parents would live in it. The property was at all material times occupied by Mrs Clara Phillips and her disabled son. Following the acquisition, Grobler held meetings with Phillips on three separate occasions to arrange for her and her son to vacate the property. Not only did Grobler offer to relocate Phillips and her son, but he also offered to provide them with alternative accommodation, all at his own cost.

Phillips rejected all of Grobler's offers. Moreover, in response to a letter sent to her by Grobler's attorneys on 27 November 2008 requesting that she vacate the property by 31 January 2009, Phillips stated that she was granted an oral right of life-long *habitatio* by a previous owner, enabling her to reside on the property for the duration of her life.

Following the impasse, Grobler launched eviction proceedings in the Magistrates' Court in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE Act). In her opposition to the application Phillips relied on her oral right of *habitatio* and alleged that she was a protected occupier in terms of the PIE Act. The Magistrates' Court, however, granted the eviction order, rejecting her defence and reliance on the *habitatio* on the ground that the alleged right was not registered against the title deed and was therefore not enforceable against Grobler.

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BEFORE THE HIGH COURT

On appeal to the full bench of the High Court, Phillips relied on an alternative ground of appeal that she was an occupier in terms of the provisions of the Extension of Security of Tenure Act 62 of 1997 (ESTA). The High Court upheld the appeal on the following grounds: (i) Phillips was not an unlawful occupier in terms of PIE since the notice period given by Grobler on 27 November 2008 for her to vacate the property by 31 January 2009 was too short and therefore unreasonable; (ii) since the property ceased to be a farm in 2001, ESTA was applicable and its provisions afforded Phillips protection; and (iii) it was not just and equitable to grant the eviction order sought.

SCA'S FINDINGS

Grobler appealed to the Supreme Court of Appeal (SCA) which, in turn, identified three issues for determination: (i) whether the High Court was correct in allowing Phillips to raise a new defence on appeal in relation to the application of ESTA; (ii) whether Phillips was an unlawful occupier in terms of PIE; and (iii) whether it was just and equitable to order the eviction.

Having considered these issues the SCA found that the High Court erred in finding that ESTA found application in this matter because, on the undisputed facts, the property was incorporated into a township by no later than 1991 when its status as an erf was registered, thus converting it from agricultural land. The SCA, however, held that while Phillips was an unlawful occupier, it was not just and equitable to grant the eviction order upon a consideration of a number of factors such as her age and her status as a vulnerable person, the length of her occupation, and the fact that the farm became part of urban development in circumstances which were beyond her control. Further, the SCA considered the fact that Phillips was accustomed to life on the property which she presently occupied and on which she enjoyed not only the freedom and space, but also the environment around it, therefore it was her "*wish*" to remain in the property and not to be moved to alternative accommodation. In the result, the SCA dismissed Grobler's appeal.

BEFORE THE CONSTITUTIONAL COURT

The aggrieved Grobler subsequently approached the Constitutional Court (CC). Since the defences raised by Phillips were rejected by the SCA, the crux of the case as it stood before the CC was whether it was just and equitable to order the eviction. The CC was of the considered view that the Magistrates' Court, being the court *a quo*, failed to consider whether it was just and

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equitable to order the eviction, this being a mandatory test in respect of all applications for the eviction of unlawful occupiers.

In its assessment of whether it was just and equitable to grant an order of eviction the CC was critical of the fact that the SCA took into account Phillips' preference to reside on the property simply because she had become accustomed to life there. Drawing on the CC judgment of *Snyders and Others v De Jager* [2017] (3) SA 545 (CC) and the SCA judgment of *Oranje and Others v Rouxlandia Investments (Pty) Ltd* [2019] (3) SA 108 (SCA) the court held that while the question of whether the constitutional rights of an unlawful occupier are affected by eviction is one of the relevant considerations in terms of PIE, the wish of a party to remain on someone else's property, unlawfully, and not to be relocated to alternative accommodation is not one of the factors that have previously been taken into account in determining what is just and equitable.

Consequently, an unlawful occupier such as Phillips does not have a right to refuse to be evicted on the basis that she prefers or wishes to remain on the property that she is occupying unlawfully. In terms of section 26 of the Constitution, everyone has the right to have access to adequate housing. The Constitution, however, does not give Phillips the right to choose exactly where she wants to live.

Importantly, the CC stated that eviction proceedings in terms of PIE require a just and equitable balance to be struck between the rights of the unlawful occupier and those of the owner. Therefore, when assessing whether to grant an eviction order a court must weigh up the competing interests with due regard to justice and equity and in order to achieve this and a just and equitable outcome, compromises have to be made by both parties.

The CC found that, in line with the judgment in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; it could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure their continued occupation for some time. However, a property owner cannot be expected to provide free housing for the homeless on their property for an indefinite period.

OBLIGATION ON THE STATE

Moreover, the CC emphasised that the obligation to provide alternative accommodation rests with the municipality, or other organ of state or another landowner in terms of section 4(7) of PIE. Accordingly, a private owner bears no obligation to provide alternative housing to an unlawful occupier.

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In this regard the CC took issue with Phillips' staunchness in rejecting the numerous offers of relocation with alternative accommodation made by Grobler, instead demonstrating her persistent reluctance to seriously consider them. The SCA's failure to consider these factors meant that it had failed to balance the rights and interests of both parties as it placed undue emphasis on Phillips' personal preferences to the detriment of Grobler's interests as a property owner.

Having considered the above factors and in light of the fact that Phillips would not be rendered homeless given the fact that Grobler's offer of alternative accommodation remained on the table, the CC granted the eviction order against Phillips in line with Grobler's offer that he would purchase a dwelling similar to the property and that Phillips would move in within six months of registration of transfer into her name.

Thus, the CC has re-confirmed the principle that any assessment of whether to grant an eviction order necessitates a balancing of the rights of both the owner and the occupier for it is this "*balancing act*" which renders an order truly just and equitable.

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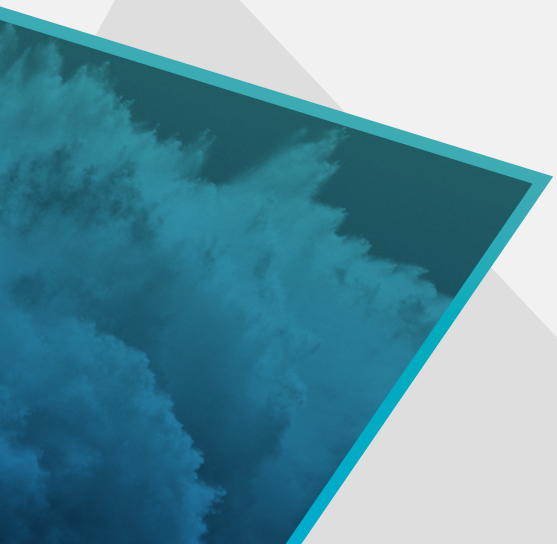

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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