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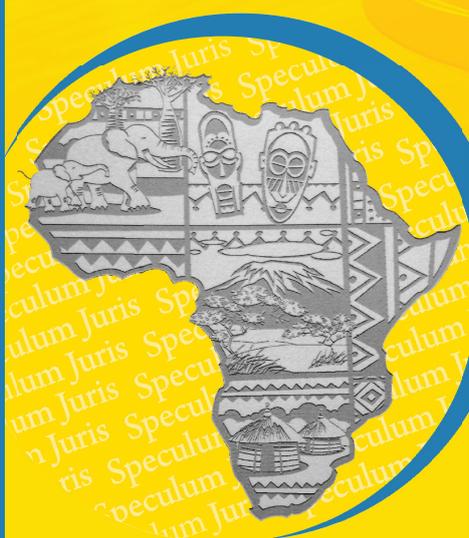
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Loosening the Grip on the Landowners in Eviction Disputes: An Appraisal of *Grobler v Phillips* [2022] ZACC 32

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Abstract

In Grobler v Phillips, the Constitutional Court had to determine whether it was just and equitable for the applicant to evict an 85-year-old woman (who had occupied the property since 1947 when she was eleven years old) and her disabled son. The Court ruled in favour of the applicant that an eviction order is just and equitable under the circumstances and accordingly ordered an elderly woman and her disabled son to vacate the property. This case note considers the basis of this judgment, and it is argued that the case makes a seminal contribution to the jurisprudence of eviction law and private property relationships in South Africa. It is further argued and demonstrated that this position compares favourably with matured jurisdictions across the world, such as the English experience as seen in McDonald v McDonald where the UK Supreme Court upheld a similar position by confirming a possession order evicting a 45-year-old woman who suffered mental health issues.

Keywords: eviction; landowner; housing rights; just and equitable; the Constitution; South Africa

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1 INTRODUCTION

The constitutionalisation¹ of the right of access to adequate housing and its corollary protection against unlawful eviction remains a decisive feat when considered against a repulsive history of the apartheid regime that is characterised by deep social inequality in South Africa.² During this era, forced eviction was an institutionalised norm to marginalise and humiliate black people.³ Forced evictions would often occur at the behest of private landowners through two remedies⁴ they had at their disposal, namely the proprietary remedy of *rei vindicatio*⁵ and the statutory eviction remedy in terms of the repealed Prevention of Illegal Squatting Act⁶ (PISA).⁷ Not only that, but the State could also exercise its police powers to evict unlawful occupiers from properties for various reasons such as health, safety, and the so-called “influx control” initiatives.⁸ Incidents of forced evictions were rife then (and arguably still are) for the reason that, in part, the right to ownership was strictly viewed from a common-law perspective as the most comprehensive and absolute right in the hierarchy of rights.⁹ For that, an action for eviction of unlawful occupiers from private property was very simple and straightforward given the uncomplicated requirements that the landowner had to satisfy for the action to succeed.¹⁰

Under the current constitutional dispensation, the position has improved for the better, and

1 See s 26 of the Constitution of the Republic of South Africa, 1996.

2 Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* (LLD-thesis, University of Stellenbosch, 2011) 33.

3 Strauss and Liebenberg “Contested Spaces: Housing Rights and Evictions Law in Post-Apartheid South Africa” 2014 *Planning Theory* 428. See also Mathiba “Evictions and Tenure Security in South Africa: A Review of *Baron and Others v Claytile (Pty) Ltd and Another* [2017]” 2018 *ESR Review: Economic and Social Rights in South Africa* 12. Further, in *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 8, the Constitutional Court described evictions during apartheid as “fast and drastic”.

4 For more on property remedies, read generally Boggenpoel *Property Remedies* (2017); Boggenpoel and Pienaar “The Continued Relevance of the *mandament van spolie*: Recent Developments Relating to Dispossession and Eviction” 2013 *De Jure* 999.

5 For a more interesting discussion on the historical background of evictions in South Africa, see generally Muller “The Legal-Historical Context of Urban Forced Evictions in South Africa” 2013 *Fundamina* 386; and Pienaar *Land Reform* (2014) 667.

6 The Prevention of Illegal Squatting Act 52 of 1956 (PISA). In *Despatch Municipality v Sunridge Estate and Development Corporation* 1997 4 SA 596 (SE), the court declared that section 3B of PISA, which permitted the forceful removal of people and demolition of their homes by the state without a court order, to be “no longer [applicable]”.

7 See Van der Merwe *Sakereg* 2 ed (1989) 346. See also Cloete and Boggenpoel “Re-evaluating the Court System in PIE Eviction Cases” 2018 *SALJ* 432.

8 And they still can (unlike during apartheid, this now takes place under strict judicial scrutiny). See Mathiba *Assessing the Impact of Section 26 of the Constitution, 1996 on Evictions and Ownership Rights in South Africa* (LLB mini-dissertation, NWU, 2018) 2. See also Brand “Introduction to Socio-Economic Rights in South Africa” in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 30; Van der Merwe “Land Tenure in South Africa: A Brief History and Some Reform Proposals” 1989 *Journal for South African Law* 663 and Muller “Evicting Unlawful Occupiers for Health and Safety Reasons in Post-Apartheid South Africa” 2015 *SALJ* 616.

9 According to this position, a landowner’s right to property enjoyed relative superiority and significance when contrasted against that of the unlawful occupier, which suffered a weak posture. See Van der Walt *Property in the Margins* (2009) 53. See also Visser “The ‘Absoluteness’ of Ownership: The South African Common Law in Perspective” 1985 *Acta Juridica* 39; Dhliwayo *A Constitutional Analysis of Access Rights that Limit Landowners’ Right to Exclude* (LLD-thesis, Stellenbosch University, 2015); Van der Walt and Dhliwayo “The Notion of Absolute and Exclusive Ownership: A Doctrinal Analysis” 2017 *SALJ*; Van der Walt “Sharing Servitudes” 2015 *European Property LJ*; Boggenpoel “(Re)defining the Contours of Ownership: Moving Beyond White Picket Fences” 2019 *Stell LR* 234; Birks “The Roman Law Concept of Dominion and the Idea of Absolute Ownership” 1985 *Acta Juridica*.

10 For instance, see *Chetty v Naidoo* 1974 3 SA 13 (A) para 20A–E. See also Van der Walt “Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation” 2002 *TSAR* 254 and Chenwi “Housing Rights” in Khoza (ed) *Socio-Economic Rights in South Africa: A Resource Book* 2 ed (2007) 234.

now the eviction of unlawful occupiers, either by the State or a private landowner, is heavily regulated.¹¹ This improvement is in such a way that landowners are now strongly prohibited from carrying out evictions unscrupulously and willy-nilly i.e. as and when they wish to evict.¹² Instead, the eviction process is now carried out under the strict oversight of a competent court.¹³ Such a court is under a constitutional duty to ensure that all the relevant circumstances around the case are thoroughly considered whenever approached with an application for eviction from the property and, in extension, demolition of a home structure.¹⁴ By subjecting this process to strict judicial scrutiny,¹⁵ the Constitution seeks to recognise and ameliorate the injustices of the past and to address self-help and the legacy of historical divisions while establishing a society that is founded on core democratic values, social justice, and respect for fundamental human rights, especially human dignity.¹⁶ Considering a need to give further substantive content to this constitutional commitment,¹⁷ the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE Act)¹⁸ was introduced in 1998. Among its key objectives, the PIE Act seeks to ensure that evictions are decriminalised; that adequate procedural protections are put in place to circumvent arbitrary evictions; and that substantive rights are included for courts to consider in determining whether it would be “just and equitable” under the circumstances to grant an order of eviction or demolition of a home.¹⁹

Despite all these post-apartheid reforms on housing rights and eviction law, the contemporary reality is that evictions still occur at an alarming scale across the country.²⁰ They occur, like during the apartheid, at the behest of private landowners who rightfully claim possession of their properties for their own use and enjoyment. They also occur through applications by the State (often municipal authorities) seeking the removal of people from the land and buildings for reasons of health, safety, and other public interest considerations.²¹ When this occurs, the courts are approached with eviction applications for which, in making a determination, the courts must strike a fair balance between the need to protect the landowners’ right to property and its undisturbed possession on the one hand, and the unlawful occupiers’ right to housing and protection against unlawful evictions on the other.²² This role is directly linked to the “just and equitable” requirement in the PIE Act, which fundamentally signifies the position that the

-
- 11 See, among other statutory enactments that give effect to s 26(3) of the Constitution, the Restitution of Land Rights Act 22 of 1994, Land Reform (Labour Tenants) Act 3 of 1996, the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA), the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Rental Housing Act 50 of 1999.
- 12 Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters* 33; Mathiba *Impact of Section 26 2* and Joshua *A Critical Analysis of the Approach of the Courts in the Application of Eviction Remedies in the Pre-Constitutional and Constitutional Context* (LLM-thesis, Stellenbosch University, 2016).
- 13 *Ibid.*
- 14 Further to this, there is to be no piece of legislation that permits arbitrary evictions as well. Section 26(3) of the Constitution is clear on this.
- 15 See Mathiba *Impact of Section 26 2*.
- 16 See *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* [2005] 8 BCLR 786 (CC) para 36.
- 17 That is s 26(3) of the Constitution.
- 18 Act 19 of 1998.
- 19 See the Long Title to the PIE Act.
- 20 Mathiba 2018 *ESR Review* 12.
- 21 See for instance, *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 3 SA 208 (CC) (hereafter *Olivia Road*).
- 22 In this regard, it has been argued elsewhere that property rights should not be treated as if they are absolute and superior to other rights. Instead, the rights must be balanced in a manner that both rights are sufficiently accommodated to the extent possible. See Mathiba “The Constitutionality of the COVID-19 Moratorium on Evictions in South Africa” in Boggenpoel *et al* (eds) *Property and Pandemics: Property Law Responses to COVID-19* (2021) 209.

adjudication of eviction disputes under the current dispensation requires more context-sensitive scrutiny and analysis that seeks to find case-specific settlements to unique and individual disputes.²³ In other words, a court must consider, quite critically, what would be just and equitable for both an unlawful occupier and the landowner in a given case.²⁴ For instance, the granting of an eviction order may not be just and equitable in a situation where it will result in the unlawful occupiers being rendered homeless, on the one hand.²⁵ On the other, the refusal of such an order by a court may similarly not be deemed just and equitable in so far as the landowner who must then endure further deprivation of possession over their properties is concerned,²⁶ due to the State's failure to provide an alternative adequate housing — as is the case in most instances.²⁷

Recently, the Constitutional Court had an opportunity to deal with exactly this issue i.e., balancing the conflicting rights of a landowner and an unlawful occupier in the *Grobler v Phillips* case,²⁸ which is the focus of this note. In this case, the Constitutional Court had to decide whether it was just and equitable under the circumstances for the applicant to evict an 85-year-old woman, Mrs. Phillips (who occupied the property in question since 1947 when she was just eleven years old) and her disabled son.²⁹ The Constitutional Court ruled in favour of the applicant, that the granting of an eviction order is just and equitable under the circumstances and accordingly ordered the elderly woman and her disabled son to vacate the property once the applicant had availed an alternative accommodation.³⁰ While this decision may have served a great relief for the landowner, one may argue in reverse that the court considered the eviction to be just and equitable with far greater ease at the expense of human cost and hardship that flows from such action and, even more, that the court failed to properly engage the rights and interests of Mrs. Phillips and her son in an international legal context.³¹ This counter-argument may or may not necessarily hold. With a view of ascertaining whether it does, among others, the purpose of this article is to highlight this judgment as a welcome occurrence, and to evaluate and comment on its specific effect and significance in asserting the property rights of the landowner when

23 See Muller (LLD 2011) 325.

24 See *Ekurhuleni Metropolitan Municipality v Various Occupiers, Eden Park Extension 5* (873/12) [2013] ZASCA 162 para 12 (hereafter *Ekurhuleni Metro*). See also Mathiba “The Constitutionality of the COVID-19 Moratorium” (2021) 211.

25 The South African jurisprudence is very clear that, as a general position, an eviction action that tends to render the unlawful occupiers homeless would not be just and equitable. See, for instance, *Occupiers of Erven 87 and 88 Berea v De Wet NO and Another* (CCT108/16) [2017] ZACC 18; 2017 8 BCLR 1015 (CC) para 57; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2012] 2 SA 104 (CC) para 92 (hereafter *Blue Moonlight*); *City of Johannesburg v Changing Tides 74 (Pty) Ltd* [2012] 6 SA 294 (SCA) para 12 (hereafter *Changing Tides*) and also *Port Elizabeth Municipality v Various Occupiers* (2005) 1 SA 217 (CC) para 28.

26 It is observed elsewhere that property rights are subject to some limitations under certain strict circumstances (and thus they are not absolute rights). This observation is qualified that, even so, those limitations must have regard to certain parameters for permissibility as provided in law. See Mathiba “The Constitutionality of the COVID-19 Moratorium” (2021) 219.

27 For a detailed discussion on this specific dilemma, see generally Van der Walt “The State's Duty to Protect Property Owners v the State's Duty to Provide Adequate Housing: Thoughts on the Modderklip Case” 2005 *SAJHR* 144.

28 *Grobler v Phillips and Others* [2022] ZACC 32.

29 That an elderly and a disabled person stand to be affected by a sought eviction order is critical. These two categories of people form part of the list included in ss 4(7) and 6(3)(c) of the PIE Act. Apart from the disabled and elderly, other specified categories are children and female-headed households. The interests of these people must also be considered seriously for considering the availability of alternative land or accommodation.

30 See *Grobler* para 49.

31 Nowhere in this judgment reference is made to the relevant and applicable international law norms and standards on evictions and the protection of housing rights.

dealing with, as it would appear, an unreasonably difficult unlawful occupier.³² For context purposes, the case note commences with a brief description of law and jurisprudence on the “just and equitable” matrix in eviction disputes in South Africa before dealing with the facts of the case; the thrust and merit of arguments advanced by respective litigants; the court’s decision and reasons for it, followed by an evaluation of the case.

2 THE “JUST AND EQUITABLE” MATRIX IN EVICTION DISPUTES

Under the current constitutional dispensation, imperatives of justice and equity have been made the standard for evictions of unlawful occupiers.³³ The PIE Act provides for three instances where an application for eviction can be launched.³⁴ The first instance is when a landowner or person in charge of the property seeks to evict unlawful occupiers from the private property notwithstanding anything contrary to what is provided in legislation or common law.³⁵ In doing this, the court must have specific regard for the rights and needs of the elderly, children, disabled persons, and female-headed households.³⁶ As to the extent to which the court must consider these rights and needs, a distinction is drawn between a situation where the unlawful occupation has lasted for less than six months at the time of the institution of eviction proceedings,³⁷ and where it lasted longer than six months.³⁸ The second instance flows directly from the first, where a landowner or person in charge of the unlawfully occupied property is permitted (notwithstanding section 4 of the PIE Act) to launch urgent eviction proceedings pending the outcome of proceedings for a final eviction order.³⁹ To succeed on this one, the landowner must convince the court on three key averments, namely: (1) that they need the remedy urgently;⁴⁰ (2) that they stand to suffer greater hardship than the unlawful occupier;⁴¹ and (3) that they have no other effective remedy available at their disposal.⁴² The last instance is when eviction proceedings are instituted by an organ of state in whose jurisdiction the unlawful occupation of the land is taking place.⁴³ This can only happen if the unlawful occupiers are occupying the

32 What is meant by “unreasonably difficult unlawful occupier” will be explained later under the evaluation section.

33 In terms of ss 4(6), 4(7), 4(8), 6(1) and 6(3) of the PIE Act. Examples in case law include *Molusi & Others v Voges NO & Others* 2016 3 SA 370 (CC) para 39; *Lochner NO v Gardner & Others* (6026/2023) [2023] ZAWCHC 39; *Madulammoho Housing Association NPC v Shotodzo & City of Johannesburg* (22/023954) [2023]; *Isedor Skog NO & Others v Koos Agullus & Others* [2023] 2 All SA 631 (SCA) para 48.

34 To summarise and simplify an inquiry into an eviction matter, the *first* question is whether the respondent is a lawful or unlawful occupier in terms of the PIE Act (in other words, whether the respondent is in unlawful occupier of the applicant’s property). If the answer is affirmative, then the *second* question is whether it would be just and equitable under the circumstances to evict the respondent. The PIE Act provides for some factors that can be considered when determining that, and it is at this stage of the inquiry that the court must also consider the property interests of the applicant. If it would be just and equitable to evict (having considered all the relevant factors), then the *third and last* question is when such an order must be executed.

35 Section 4(1) of the PIE Act.

36 See s 4(6) of the PIE Act.

37 In this case, the court must only consider the rights and needs of these categories of people, nothing beyond that.

38 In which case the court, in addition to considering the rights and needs of these categories of people, must have regard to whether alternative accommodation for relocation of unlawful occupiers has been availed or may reasonably be availed by the State or another landowner. See s 4(7) of the PIE Act.

39 Section 5(1) of the PIE Act.

40 That is, “... there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the [property]”. See s 5(1)(a) of the PIE Act.

41 Section 5(1)(b) of the PIE Act.

42 Section 5(1)(c) of the PIE Act.

43 Section 6(1) of the PIE Act.

unlawfully⁴⁴ erected building or structure on the land in question.⁴⁵ The *Grobler* case resonates with the first instance,⁴⁶ and thus the focus of this case note will accordingly be limited to that in the subsequent discussions.

Generally, a court approached with an eviction application in all the instances mentioned above must satisfy itself that the granting of an eviction order will be “just and equitable” having considered all the relevant circumstances.⁴⁷ In other words, a court is barred from ordering an eviction if it is not satisfied that doing so would be just and equitable.⁴⁸ This requires the court to make a value judgment based on all relevant facts.⁴⁹ Further, the court’s determination on whether the granting of an eviction order is just and equitable in a given case must be informed by both the property interests of the landowner and the housing interests of the unlawful occupier.⁵⁰ Thus, the granting of an eviction order would otherwise not be deemed just and equitable if it only took into consideration the circumstances of only one party in coming to its determination. Given that, one should emphasise that in arriving at a fairly balanced scale on these conflicting interests, the courts must go beyond pure legalistic and mechanic inquiry and have regard for additional factors such as fairness, morality, social values, and any other relevant consideration that can inform a fair and equitably principled decision.⁵¹ This would mean that the courts have to operate in an expanded space beyond their ordinary role and engage in active judicial management.⁵² If the court, having considered all the relevant circumstances, is of a view that justice and equity requirements exist in a particular case, and the unlawful occupier fails to invoke a valid defence, then such court must grant an eviction order.⁵³ This is clearly a constitutional responsibility and/or mandate on the courts.⁵⁴

Having established the nature of this role and/or responsibility (i.e., that it is a constitutional one) in this regard, an important question that arises is: to what extent are the courts expected to consider all the relevant circumstances necessary to determine the presence or absence of justice and equity requirements? A short and straight answer is that the extent is limitless, broad, and expansive.⁵⁵ In *Berea*, the Constitutional Court emphasised that the scope of the obligation on the courts in ensuring just and equitable evictions extends enough to cover grey-area instances where, for example, the unlawful occupiers have purportedly consented to their

44 In other words, without consent of an organ of state.

45 Or when such unlawful occupation is deemed to be against public interest.

46 *Grobler* para 1.

47 This imperative highlights the significance of an inquisitorial court in eviction disputes to safeguard and advance the objectives of s 26(3) of the Constitution and the PIE Act.

48 See ss 4(6) and 4(7) of the PIE Act.

49 See *Changing Tides* para 29.

50 In *Ekurhuleni Metro* para 18, the SCA draws reference from the wisdom of Horn AJ in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 2 SA 1074 (SE) para 1081E (hereafter *Peoples Dialogue*), that “[t]he use of the term just and equitable relates to both interests, that is what is just and equitable not only to the persons who had occupied the land illegally, but to the landowner as well. The term also implies that a court, when having to decide a matter of this nature, would be obliged to break away from a purely legalistic approach and have regard to extraneous factors such as morality, fairness, social values and implications and any other circumstances which would necessitate bringing out an equitably principled judgment.”

51 *Peoples Dialogue* 1081E.

52 In order to, according to Sachs J, “... promote the constitutional vision of a caring society based on good neighbourliness and shared concern.” See *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37 (hereafter *PE Municipality*).

53 Section 4(8) of the PIE Act.

54 See *Occupiers of Erven 87 & Berea v De Wet NO & Another* [2017] 5 SA 346 (CC) para 54 (hereafter *Berea*).

55 See generally the order in *Berea*, especially paras 52 and 53. See also Liebenberg *Socio-Economic Rights Adjudication Under a Transformative Constitution* (2010) 278 and Pienaar *Land Reform* (2014) 667.

eviction.⁵⁶ This implies that even in instances where the court has been furnished with the settlement agreement and the unlawful occupiers consent to their eviction, the court has a constitutional duty to consider all the relevant circumstances to pass a fair judgment on the just and equity requirement of a case.⁵⁷ This is an important imperative because it provides a safety net for unlawful occupiers who might, out of poor choice, consent to their eviction even when they are not fully aware of their rights or the implications of that to which they are consenting.⁵⁸

Further, Liebenberg argues convincingly that such a broad discretion and responsibility of the courts is not only confined to determining substantive questions of the case (i.e., what would or would not be just and equitable in a given case), but also extends to procedural aspects of the inquiry.⁵⁹ Taking this further, Cloete and Boggenpoel have also grappled with a crispy question of what should then happen when the parties fail to present all the relevant circumstances before the court.⁶⁰ They make it even more interesting and ask:

[d]o “all relevant circumstances” refer only to those circumstances that are included in the parties’ pleadings, or can it refer to further relevant circumstances not included in the parties’ pleadings? [I]f the latter is the case, is there any obligation on courts to ensure that they are furnished with all relevant circumstances, and if so, how do we explain the operation of the adversarial court system within this proactive framework required by PIE in eviction proceedings?⁶¹

In answering this evaluative set of questions, they commence with the holding by Sachs J in *PE Municipality* that, in very simple terms, the court has a wide discretion to inquire into all the relevant circumstances of a specific case before it; above and beyond the listed factors in the PIE Act that “are peremptory but not exhaustive”.⁶² Interestingly, the court may enjoin other interested parties, such as government authorities, if it believes that such parties may provide more relevant factors and circumstances central to the determination of the case.⁶³ It is noteworthy that the court’s powers to enjoin interested parties to solicit more relevant factors is one aspect where opinion is still diverse insofar as academic commentary is concerned, with some thoughts problematising the fact that it drifts away from a traditional manner of adjudicating evictions passively on a litigant-led arrangement to a more inquisitorial approach. Though it is beyond the focus of this case note, it is noteworthy that the responsibility of the courts to craft just and equitable eviction orders having considered the relevant circumstances (which must be pleaded and furnished by the parties) could require a court to play an active role to an extent reasonably justified in gathering those relevant circumstances. This is if the parties themselves fail to do so.

3 THE FACTUAL BACKGROUND IN *GROBLER v PHILLIPS*

The matter in *Grobler* followed a long and winding road. In this case, the Constitutional Court

56 *Berea* paras 52–53.

57 *Berea* para 54.

58 *Berea* para 17.

59 In that the courts are now entitled or rather empowered “to go beyond the facts established on the papers before [them], and play a more inquisitorial role in procuring “ways of establishing the true state of affairs, so as to enable it to ‘have regard’ to relevant circumstances”. See Liebenberg *Socio-Economic Rights Adjudication* 278.

60 Cloete and Boggenpoel *SALJ* 438.

61 *Ibid.*

62 See *PE Municipality* para 30. See also Cloete and Boggenpoel *SALJ* 438.

63 For more on this aspect, read the key reasons that led to the SCA setting aside the decision of a court *a quo* on the matter. See generally *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments & Others* 2009 4 All SA 410 (SCA) and paras 13 and 14.

had to deal with section 4(7) of the PIE Act which outlines the compulsory factors that the court must consider when determining whether the granting of an eviction order is just and equitable under given circumstances.⁶⁴ The relevant facts can be summarised as follows: The applicant, Mr. Willem Grobler — who was a businessman based in Somerset West — sought an order evicting two unlawful occupiers (namely, Mrs. Clara Phillips and her disabled son, Mr. Adam Phillips)⁶⁵ from his private property.⁶⁶ The applicant bought the property in question at a public auction and got it registered in his name in September 2008.⁶⁷ This (i.e., Grobler’s ownership) was never disputed by the respondents.⁶⁸ Though he did not have to do it, the applicant explained that he bought the property for his parents to reside in since it is situated within walking distance from his own home in Somerset West.⁶⁹ The applicant was aware of the fact that Mrs. Phillips, who was 85 years old when the judgment was delivered,⁷⁰ had lived on the property since 1947 when she was just eleven years old, and the property had formed part of a larger farm at the time.⁷¹ The applicant was also aware that the previous owners had granted Mrs. Phillips a lifelong right of occupation on the property.⁷²

While the applicant requested Mrs. Phillips to furnish the lifelong *habitatio* agreement between her and the previous owners, Mrs. Phillips could not do so, reasoning that it was just an “oral right” to reside on the property for a lifetime as conferred orally by the previous owners and was never reduced to writing.⁷³ After buying the property in 2008, the applicant through his attorneys reached out to Mrs. Phillips on at least three different occasions where he sought to notify and inform her that he required her and her son to vacate the property.⁷⁴ In all material times, the applicant informed Mrs. Phillips that he was even willing to pay a certain amount towards their relocation costs and, if needed to, provide them with an alternative accommodation arrangement (i.e. two-bedroom flat) where they could live for a lifetime at his own cost.⁷⁵ Unfortunately, Mrs. Phillips did not accept any of the generous proposals made by the applicant and, instead, she was determined not to vacate the property.⁷⁶ She relied on her “oral right” conferred by the previous owners which, according to her, constituted a valid defence enforceable against the applicant.⁷⁷ Mrs. Phillips was clearly being unrealistic and unreasonably difficult towards the applicant by being unwilling to compromise and improvise, not to mention being selfish. Only

64 *Grobler* para 1.

65 Due to his disability, Mr. Adam Phillips was not cited in the proceedings and on his behalf, Mr. Johan Venter, an adult attorney who appears as the second respondent, acted in his representative capacity as the *curator bonis* of Mr. Adam Phillips. See *Grobler* para 3.

66 *Grobler* para 1.

67 *Grobler* para 2.

68 Thus, it may be safe to conclude that it was common cause.

69 The property is said to be situated approximately 500 metres from the applicant’s own home. *Grobler* para 2.

70 *Grobler* para 2.

71 *Ibid.*

72 *Grobler* para 5.

73 *Grobler* para 5.

74 *Grobler* para 4.

75 *Ibid.*

76 *Ibid.*

77 *Grobler* para 5.

her rights and interests seemed to matter over and above everything else.⁷⁸

Aggrieved by Mrs. Phillips’ refusal and uncooperative attitude, the applicant instituted eviction proceedings at the Somerset West Magistrates’ Court, where Mrs. Phillips opposed the application relying on the oral right of lifelong *habitatio* and that she is protected by the PIE Act.⁷⁹ The Magistrates’ Court ruled in favour of the applicant on two main fronts, namely (1) that he proved his ownership in respect of the property; and (2) that the alleged oral right of lifelong *habitatio* was invalid and unenforceable against him on the basis that, among others, the right of *habitatio* was not registered against the title deed.⁸⁰ The Magistrates’ Court also indicated that at the time of the proceedings, Mrs. Phillips no longer had the applicant’s consent to occupy the property, hence an order that it was just and equitable to grant eviction against Mrs. Phillips.⁸¹ The eviction date was to be determined at a later stage.⁸² Aggrieved by this outcome, Mrs. Phillips then decided to appeal to the full bench of the Western Cape Division of the High Court in Cape Town,⁸³ where she strangely relied on the provisions of both the PIE Act and the Extension of Security of Tenure Act (ESTA),⁸⁴ a misnomer never seen before.⁸⁵ Making its determination, the High Court upheld the appeal and set aside the eviction order.⁸⁶ It reasoned that a change of Mrs. Phillips’ status from a “lawful occupier” in terms of the PIE Act to an “unlawful occupier” in terms of ESTA could not hold without her being given reasonable notice terminating her right to occupy the property.⁸⁷ The High Court further held that Mr. Grobler failed to establish three key points of determination. First, that Mrs. Phillips was an unlawful occupier under the PIE Act.⁸⁸ Second, that Mr. Grobler failed to discharge the onus to conclude that ESTA was not applicable in this matter.⁸⁹ Finally, that Mr. Grobler failed to convince the court that granting an eviction order would be just and equitable considering the age of Mrs. Phillips and the disability of her son.⁹⁰

Mr. Grobler was dissatisfied with the outcome, and appealed the matter further at the Supreme Court of Appeal (SCA), which identified three points for determination.⁹¹ The first was whether Mrs. Phillips could raise a new defence under ESTA on appeal; the second, was whether Mr. Grobler established that Mrs. Phillips was an unlawful occupier under the PIE Act; and lastly, was whether the High Court had the discretion to deny an eviction order on the basis that it would not be just and equitable to do so. On the first point, the SCA held that there was

78 When the Magistrates’ Court ordered eviction, “Mr Grobler was willing to assist Mrs Phillips with her relocation costs. He further informed the Court that Mr Grobler was willing to allow Mrs Phillips to continue to reside on the property for another two months and that when she had relocated, he would bear the reasonable costs of accommodation in a retirement centre for a period of 12 months. Mr Grobler’s counsel informed the Court further that those costs would be limited to R 4000 per month”. This explains “unreasonably difficult” in this context, as referred to above. See *Grobler* (2022) para 8.

79 *Grobler* paras 6 and 7.

80 *Ibid.*

81 *Grobler* para 7.

82 *Ibid.*

83 *Grobler* para 10.

84 Extension of Security of Tenure Act 62 of 1997 (ESTA). The ESTA deals with the eviction of ESTA occupiers and sets out a different set of requirements for an eviction from those in the PIE Act.

85 A respondent in an eviction application would either invoke protection under the PIE Act or ESTA, not both simultaneously. I will explain this further under the “evaluation” heading below.

86 *Grobler* para 11.

87 *Ibid.* Thus, a notice of termination given on 27 November 2008 for her to vacate the property by 31 January 2009, was deemed too short and unreasonable.

88 *Ibid.*

89 *Ibid.*

90 *Ibid.*

91 *Grobler* para 12.

no express agreement between the parties that ESTA did not apply, despite the matter being instituted in terms of the PIE Act.⁹² The SCA went on to correctly rule that ESTA did not apply because the property, although it was first a farmland, was converted into a township and/or urban area by no later than 1991.⁹³ Concerning the second point, the SCA found that Mrs. Phillips was indeed an unlawful occupier as per the evidence of Mr. Grobler, whose intention to terminate Mrs. Phillips' right to occupy the property was clear by withdrawing his consent for her continued occupation.⁹⁴ The SCA agreed with Mr. Grobler that the alleged oral lifetime right of *habitatio* was unenforceable against him as it had not been reduced to writing nor registered against the title deed.⁹⁵ Despite the latter, the SCA found that an eviction order was not just and equitable under the circumstances.⁹⁶ In arriving at this, the SCA considered greatly "the fact that Mrs Phillips was accustomed to life in the house which she presently occupies and the fact that she enjoyed not only the freedom and space, but also the environment around it".⁹⁷ The court went on to rule that the circumstances that led to the property becoming an urban development were beyond Mrs Phillips' control and had it not been for that, she would have enjoyed the protection under ESTA.⁹⁸ Ultimately, the SCA ruled that the circumstances of Mrs. Phillips, as a vulnerable person, outweighed those of Mr. Grobler, as a property owner, and that Mrs. Phillips' refusal to consider the applicant's proposal was justified.⁹⁹ As such, Mr. Grobler's appeal was dismissed, and he appealed again to the Constitutional Court, of which the judgment is discussed below in detail.

4 THE HOLDING IN *GROBLER*

The matter finally found its way up to the Constitutional Court. The key question was whether it was just and equitable to grant an order evicting Mrs. Phillips and her disabled son from the applicant's Somerset West property.¹⁰⁰ As already stated, the High Court and the SCA were clear in that it is not just and equitable to do so.¹⁰¹ Tshiqi J of the Constitutional Court commenced her judgment with an emphasis on whether the granting of an eviction order was just and equitable in the circumstances, and obviously the just and equitable date for its execution,¹⁰² was strictly subject to the court's discretion.¹⁰³ She lamented the fact that the Magistrates' Court as a trial court did not exercise this discretion. Instead, the Magistrates' Court simply granted an eviction order solely on the basis of Mrs. Phillips' unlawful occupation of the property, without determining a further inquiry namely, whether such an order would be just and equitable under the circumstances.¹⁰⁴ However, Tshiqi J held that such a technical omission by the Magistrates' Court "is not of such a nature that the eviction order granted by [it] should have been set aside" by the High Court and the SCA.¹⁰⁵

On the question of justice and equity in an eviction matter, Tshiqi J pointed out that this is an

92 *Grobler* para 13.

93 *Grobler* para 14.

94 *Grobler* para 15.

95 *Grobler* para 17.

96 *Grobler* para 18.

97 *Grobler* para 34.

98 *Grobler* para 19.

99 *Grobler* paras 20 and 34, respectively.

100 *Grobler* paras 1 and 32.

101 *Grobler* para 27.

102 Once the first question is answered in the affirmative.

103 *Grobler* para 29.

104 *Ibid.*

105 *Ibid.*

exercise requiring a court to exercise value judgment by considering all relevant circumstances including whether alternative accommodation is available or can reasonably be availed,¹⁰⁶ as well as the consideration of the rights and needs of the elderly, children, disabled persons, and women-headed households.¹⁰⁷ Tshiqi J referred to *Snyders*¹⁰⁸ where the Constitutional Court held that the right of residence of an occupier protected under ESTA was not necessarily tied to the specific house they occupied on the farm.¹⁰⁹ The SCA adopted the same reasoning a year later in *Oranje*,¹¹⁰ where it held that the ESTA does not provide security of tenure to an occupier in the house of their own choice or preference.¹¹¹ Although *Snyders* and *Oranje* were considered in terms of ESTA, Tshiqi J rightfully held that there is no basis as to why, in principle, the same approach or reasoning should not be applied in matters considered in terms of the PIE Act.¹¹² Deciding whether Mrs. Phillips could refuse the applicant's proposals for alternative accommodation, Tshiqi J relied on these two decisions and held that:

The question whether the constitutional rights of the unlawful occupier are affected by the eviction is one of the relevant considerations, but the wishes or personal preferences of the unlawful occupier are not relevant. An unlawful occupier such as Mrs Phillips does not have a right to refuse to be evicted on the basis that she prefers or wishes to remain in 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 does not give Mrs Phillips the right to choose exactly where in Somerset West she wants to live.¹¹³

Tshiqi J must be commended for this tough yet fair determination. Considering the quoted paragraph alone, it is already clear what her ultimate decision would be, namely: that the granting of an eviction order is just and equitable under the circumstances.¹¹⁴ As it is conventional in eviction proceedings, next was for her to grapple with the question of who must provide alternative accommodation to Mrs. Phillips. The clearcut answer is to be found in section 4(7) of the PIE Act, that such obligation, which is positive in nature,¹¹⁵ lies with a “municipality, or other organ of state or another land owner.” In dealing with this further, Tshiqi J had to remind us that the PIE Act “was enacted to prevent the arbitrary deprivation of property and is not designed to allow for the expropriation of land from a private landowner from whose property the eviction is being sought.”¹¹⁶ She went on to rely on the Constitutional Court reasoning in *Blue Moonlight* that “a private owner has no obligation to provide free housing”¹¹⁷ to an unlawful occupier and that “[u]nlawful occupation results in a deprivation of property under

106 By a municipality or other organ of state or another property owner for the relocation of the unlawful occupier.

107 *Grobler* para 33.

108 *Snyders v De Jager* [2016] ZACC 55; 2017 5 BCLR 614 (CC).

109 *Snyders* para 78.

110 *Oranje v Rouxlandia Investments (Pty) Ltd* [2018] ZASCA 183; 2019 3 SA 108 (SCA).

111 *Oranje* para 21. On the justifications justifying the no-choice approach, see Ngwenyama “Alternative Accommodation of an Unlawful Occupier’s Choosing: Some Reflections from *Grobler v Phillips* [2022] ZACC 32” 2023 *Obiter* 658–659.

112 *Grobler* para 36.

113 *Ibid.*

114 *Grobler* para 49.

115 See *PE Municipality* para 28 and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre for Housing Rights and Evictions and Another; Amici Curiae)* 2010 3 SA 454 (CC) para 148, hereafter *Residents of Joe Slovo*.

116 *Grobler* para 37, citing also *Ndlovu v Ngcobo, Bekker v Jika* [2002] ZASCA 87; 2003 1 SA 113 (SCA) para 17.

117 *Blue Moonlight* para 31.

[section] 25(1)” of the Constitution.¹¹⁸

According to Tshiqi J, the property owner’s capacity to provide alternative accommodation and the peculiar circumstances of an unlawful occupier are relevant considerations in dealing with justice and equity in eviction matters.¹¹⁹ In this case, the applicant clearly had the capacity to provide alternative accommodation, which was evident from the repeated proposals he made to the evictee.¹²⁰ However, Tshiqi J cautioned strongly against this, that private property owners should not be burdened and expected to always act generously like Mr. Grobler. She asserts that “the fact that Mr Grobler has repeatedly made offers of alternative accommodation to Mrs Phillips should not be taken as creating any obligation on him to offer alternative accommodation.”¹²¹ Such an expectation would be inappropriate.

Drawing from *Claytile*,¹²² Tshiqi J observed that the just and equity inquiry in an eviction matter requires that compromises be made by both parties and lamented how Mrs. Phillips failed to compromise notwithstanding the generous proposals made by the applicant.¹²³ Expressing her main disagreement with the SCA judgment, Tshiqi J went on to hold that the SCA “failed to balance the rights of both parties” and, instead, it “placed too much emphasis on Mrs Phillips’ peculiar circumstances.”¹²⁴ This is a well-reasoned position, that “[a] just and equitable order should not be translated to mean that only the rights of the unlawful occupier are given consideration and that those of the property owner should be ignored.”¹²⁵ Having considered all the relevant factors, Tshiqi J disposed of the matter and found that an eviction order would be just and equitable in that it would not render Mrs. Phillips homeless for Mr. Grobler’s offer for alternative accommodation still stands.¹²⁶

5 EVALUATION: THE CONTRIBUTION BY *GROBLER*

The *Grobler* judgment is commendable in many respects. It is one rare instance where the Constitutional Court adopts a decisive stance in protecting property rights or interests against unlawful deprivation perpetuated by egocentric unlawful occupiers. It has been observed elsewhere that a fair and delicate balance must be struck between the property rights in section 25 and the prohibition of arbitrary and unlawful evictions in section 26(3) of the Constitution.¹²⁷ In my view, *Grobler* has achieved exactly that balance, though its dissents may argue that it tends to promote property absolutism. Without purporting to be a modern property-rights absolutist, I contend that this judgment is a welcome occurrence that loosens the grip off the property owners. The discourse on this inquiry has always been that courts tend to favour the unlawful occupiers, especially in the Western Cape High Court where the *Grobler* dispute emerged.¹²⁸

118 *Blue Moonlight* para 37.

119 *Grobler* para 36.

120 *Ibid.*

121 *Ibid.*

122 *Baron & Others v Claytile (Pty) Limited and Another* 2017 10 BCLR 1225 (CC).

123 *Grobler* paras 40 and 41.

124 *Grobler* para 44.

125 *Ibid.*

126 *Grobler* paras 46 and 47.

127 Mathiba *Impact of Section 26 2*.

128 For instance, the Western Cape High Court ruled in favour of Mrs. Phillips when this matter went to the High Court. There are other several recent cases (2021/2022) where the same court ruled in favour of the unlawful occupiers, such as in *Commando and Others v Woodstock Hub (Pty) Ltd and Another* [2021] 4 All SA 408 (WCC); *South African Human Rights Commission and Others v City of Cape Town and Others* 2021 2 SA 565 (WCC); *Peter v Nkonde and Others* (A73/2021) [2022] ZAWCHC 122 and *Plaatjies v Meintjies and Another* (A81/2022; 787/2020) [2022] ZAWCHC 185.

One must stress that these two competing rights are both protected in the Constitution, the same Constitution that empowers the courts to adjudicate disputes that may arise at the tension of these two rights. Further, such a court must consider all the relevant circumstances to arrive at a fair, balanced, and appropriate determination.

The idea that property rights or interests must always be compromised when competing against other interests on property such as unlawful occupation or security of tenure is not only elusive, but both dangerous and mythical. While mindful of the societal foundations of property,¹²⁹ and the historical background of skewed property ownership in South Africa under apartheid, I am yet to be convinced that it will present as appropriate before public policy and constitutional scrutiny for ownership rights to be de-emphasised and devalued to such extreme levels that private property owners would always have to be burdened. Tshiqi J is clear on this: no private property owner should bear an obligation to provide free alternative accommodation to unlawful occupiers.¹³⁰ Further, neither the new democratic heritage nor constitutional law would support such a skewed formulation of how private property ownership rights should be viewed against other rights and interests within the bigger scheme of things. To this end, and for the reason of contradicting the norm by upholding private property ownership rights over unlawful occupation, it is argued that *Grobler* qualifies to be a seminal judgment that is highly developmental, influential, and important in the discourse around private property law relationships.

The effect of this judgment is nothing unheard of. Some of the matured jurisdictions worldwide have grappled with this question before and upheld the same position. The case in point is the English experience seen in *McDonald v McDonald*.¹³¹ In *McDonald*, the Supreme Court in the United Kingdom was approached with an appeal that raised a similar question (as in *Grobler*) as to whether, in the circumstances, the trial judge would have been justified in dismissing the application for a possession order (tantamount to an eviction order) based on disproportionality (tantamount to justice and equity).¹³² The facts can be summarised as follows: The case involved a 45-year-old appellant, Ms. Fiona McDonald who suffered from severe disabilities (i.e., mentally, behaviourally, and physically since she was five years old).¹³³ Given this condition, she has been unable to secure employment since 1999, and her parents purchased, with a mortgage loan, a property for her to occupy.¹³⁴ While Ms. Fiona would contribute in part towards the cost of the mortgage loan repayments using her disability welfare grant, it was her parents who had the financial obligation to Capital Home Loans Ltd, the bank that provided the mortgage loan.¹³⁵ Unfortunately, at some point, the parents experienced some financial difficulties and failed to meet the loan repayments as they fell due.¹³⁶ As a result, the bank appointed a receiver who then terminated the tenancy by serving notices to quit and of intention to seek possession of the property, as permitted under the regulatory scheme on assured shorthold tenancies.¹³⁷

Ms. Fiona then resisted her eviction by the bank. She argued that the granting of a possession

129 That property is an important social interest which affords several entitlements and constitutional guarantees to the owner thereof, but it is not an absolute interest and cannot be understood outside its societal context. That I agree with, but to contend either philosophically or otherwise that property interests should always be treated as if they are less significant than all other rights in the Constitution, is simply wrong.

130 *Grobler* para 36.

131 *McDonald v McDonald* [2016] UKSC 28 On appeal from: [2014] EWCA Civ 1112.

132 *McDonald* paras 1 and 71.

133 *McDonald* para 2.

134 *McDonald* para 3.

135 *Ibid.*

136 *McDonald* para 4.

137 *Ibid.*

order would be disproportional and infringe on her right to a home as guaranteed in section 6 of the Human Rights Act of 1998, and Article 8 of the European Convention on Human Rights of 1999.¹³⁸ While the UK Supreme Court accepted her argument that the eviction would interfere with her right to a home, it went on to highlight that the bank enjoyed certain rights relating to the property as well, such as the right for the undisturbed possession of its property under Article 1 of the First Protocol to the Convention.¹³⁹ Resultantly, the court found that the eviction was consistent with the terms of the statutory scheme, despite Ms. Fiona's unfortunate personal circumstances of being sick and unemployed. The UK Supreme Court held that permitting Ms. Fiona's right to a home to trump the bank's ownership right over the property would have effectively altered private rights and duties generally and private property law relationships in particular.¹⁴⁰ It may be added that when comparing Ms. Fiona's case and Mrs. Phillips' case, the likely observation is that the latter was more advantaged in that the applicant had offered alternative accommodation, thus disposing of the risk of homelessness.

Further, on a lighter note, the *Grobler* decision also provides one with an opportunity to reflect on the requirements for a lifetime right of *habitatio* to succeed, namely that such right must have been reduced into writing and be registered against the title deed of the property in order to be enforceable and binding on the successive owners.¹⁴¹ The decision also reminds us of a distinction between ESTA and the PIE Act, the most simple and basic one to draw. It must trouble everyone that the High Court failed to appreciate such a basic rule (that where the PIE Act applies, ESTA does not) and agreed with Mrs. Phillips' wrong proposition that she could invoke a defence in both statutes simultaneously.¹⁴²

6 CONCLUSION

Grobler is an important judgment, depending on one's perspective. It is a welcome occurrence particularly to private property owners who might for whatever reason have to deal with egocentric unlawful occupiers with similar tendencies to that of Mrs. Phillips who opportunistically and conveniently claimed vulnerability and poverty when being evicted. I must emphasise this caveat: I strongly acknowledge that there are unlawful occupiers who are in genuine and desperate need of land as a result of land dispossessions under the apartheid regime. For this reason, every means possible must be radically employed to afford them access to land. Therefore, it is important to draw the line between this category of genuine unlawful occupiers on the one hand, and the likes of Mrs. Phillips on the other. The *Grobler* judgment also signals that the Constitutional Court may be revisiting the tone and sense of its jurisprudence around evictions by private property owners of over the past three decades in which one can generalise and say it almost always seemed to favour unlawful occupiers. *Grobler* may be a launchpad for a new trajectory that reclaims and affords property rights some level of significance (not necessarily superiority) like other rights when considered in eviction disputes. By emphasising that the private property owner has no obligation to provide alternative accommodation to an unlawful occupier, this judgment reckons with the fact that all human rights rank equal and both litigants are protected by the same Constitution. This jurisprudential breakthrough, of course,

138 *McDonald* para 39.

139 Which provides that: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

140 *McDonald* para 41.

141 *Grobler* para 43. See also Muller *et al The Law of Property Silberberg and Schoeman's* 6 ed (2019).

142 *Grobler* paras 10 and 11.

will not go without some resistance in various forms.¹⁴³

143 For instance, some scholars are criticising the *Grobler* judgment. See Geduld “No Country for Old Women: A Critique of *Grobler v Phillips* 2023 1 SA 321 (CC)” 2023 *PELJ* 18.