THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 446/2020

In the matter between:

WILLEM GROBLER	**APPELLANT**
and	
CLARA PHILLIPS	**FIRST RESPONDENT**
JOHAN VENTER NO	**SECOND RESPONDENT**
HELDERBERG MUNICIPALITY	**THIRD RESPONDENT**

Neutral citation: *Grobler v Phillips and Others* (446/20) [2021] ZASCA 100 (14 July 2021)

Coram: PETSE DP, DLODLO and MOCUMIE JJA and PHATSHOANE and GOOSEN AJJA

Heard: 6 MAY 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 14 July 2021.

Summary: Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 – relationship with Extension of Security of Tenure of Land Act 62 of 1997 – onus to establish that evictee is an unlawful occupier – oral right to reside on property for life conferred by previous owner not constituting *habitatio* – right of occupation terminated – occupier aged widow living with disabled son – not just and equitable to grant an eviction order – appeal dismissed.

ORDER

On appeal from: The Western Cape Division of the High Court, Cape Town (Le Grange and Wille JJ sitting as court of appeal):

1. The appeal is dismissed.

2. The appellant is directed to pay such disbursements as may have been incurred by the first respondent's attorneys in preparing for the appeal.

JUDGMENT

Goosen AJA (Petse DP and Dlodlo and Mocumie JJA and Phatshoane AJA concurring):

Introduction

[1] No case in which an order of eviction from a residence is sought can ignore the visceral reality of what is sought, namely the ejectment of a person from their home in vindication of a superior right to property. Nor can the legal process by which the order is obtained be divorced from our fraught history of eviction and ejectment of vulnerable persons from their homes. It is to this visceral reality that our Constitution addresses itself in s 26[1], and in this context that relevant legislation is to be interpreted and applied.

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[1] Constitution of the Republic of South Africa, 1996.

[2] This matter is no different. At issue is the question whether an 84 year old widow and her disabled son ought to be evicted from a home she has lived in since she was 11 years old. Also at issue is whether the appellant's rights of ownership of the property in question ought to be vindicated by such an eviction order.

[3] The appellant, Mr Willem Grobler, brought an application for eviction against Ms Clara Phillips and Mr Johan Venter, the first and second respondents (the latter in his representative capacity) in the Magistrates' Court at Somerset West. The application was referred to trial. The magistrate, at the conclusion of the trial, granted an order of eviction. On appeal to the Western Cape Division of the High Court (the high court), the order of eviction was set aside and replaced with an order dismissing the action. The appeal to this Court is with its special leave. The President of this Court requested the appointment of counsel as *amicus curiae* to address the legal issues raised in the appeal on behalf of the respondents, who were at that stage unrepresented. We are grateful to all counsel for their submissions which were of assistance to the Court.

[4] The appeal raised several issues. The first concerned the interrelation between the Prevention of Illegal Evictions and Unlawful Occupation of Land Act, 19 of 1998 (PIE) and the Extension of Security of Tenure Act, 62 of 1997 (ESTA) and the application of the latter Act to the matter. The second concerned the effect, if any, of reliance upon an oral right of *habitatio* or *usus* upon the entitlement of an owner to an order of eviction in terms of ESTA or PIE. The third issue concerned the determination of whether, notwithstanding

the unlawful occupation, it would be just and equitable to grant an order of eviction.

Background

[5] The appellant is the registered owner of erf 14611, Somerset West (the property). He purchased the property at a public auction and it was registered in his name on 15 September 2008. It is common cause that the first respondent (Mrs Clara Phillips), who is now an 84-year-old widower, occupies a residential house on the property together with her son, Adam living with disabilities. The second respondent is the duly appointed curator representing the son. It is also common cause that the first respondent has resided in the house on the property since 1947 when she was 11 years old, when she lived on the property with her parents. The property formed part of a much larger farm at the time. When she married her late husband, who was employed on the farm, she continued to occupy the house. I shall return to the narrative of her occupation of the property hereunder when dealing with the history of the property. Following the appellant's purchase of the property, the appellant met with the first respondent to arrange that she vacate the property.

[6] The appellant admitted that he was informed that a previous owner of the property had granted to the first respondent a lifelong right of occupation of the property. The appellant requested a copy of the agreement. When this was not furnished, the appellant then gave the first respondent notice to vacate the property on or before 31 January 2009. When the first respondent did not vacate the property, the appellant launched an application in the Magistrates' Court, Somerset West, for eviction of the first respondent in terms of PIE. The

application was referred for the hearing of oral evidence. At the conclusion of the trial on the issues the magistrate granted an order evicting the first respondent.

[7] On appeal to the high court the respondents raised a new issue as an alternative ground of appeal, namely that the first respondent was an occupier as defined by ESTA; that the provisions of ESTA accordingly applied and that the appellant could not obtain an order other than in terms of ESTA.

[8] The high court upheld the appeal and set aside the order of eviction. The high court came to this conclusion upon three bases. The primary basis was that the appellant had not established that the first respondent was an unlawful occupier as defined by the PIE Act. The appellant was accordingly not entitled to an order of eviction as obtained from the Magistrates' Court. The second basis was founded upon the first respondent's contention that the provisions of ESTA applied. In this regard, the high court took the view that the first respondent was entitled, on appeal, to raise that as a new issue. It held that the appellant had not, on the evidence before it, discharged the onus to establish that ESTA did not apply. Accordingly, no order of eviction or ejectment could be issued except in terms of ESTA. The eviction order obtained was accordingly not properly issued. The third basis upon which the high court relied was an overarching one upon the assumption that ESTA did not apply and that the first respondent was indeed an unlawful occupier. It held that, taking into account the advanced age of the first respondent; the period for which she had been resident on the property; and that her household was also occupied by a disabled dependent, it would not be just and equitable to grant an eviction order.

[9] Before this Court, the appellant argued that the high court was wrong to allow the first respondent to advance a new case on appeal. By doing so significant prejudice was occasioned to the appellant, since the appellant could not adduce evidence to meet the argument relying upon ESTA at such late stage in the proceedings. The appellant argued that, in any event, reliance upon the application of ESTA ought not to have been countenanced. The parties had entered into a pre-trial agreement in which they had agreed that the case was to be adjudicated on the basis that PIE applied. For this reason, so it was submitted, the first respondent was precluded from asserting that ESTA applied.

[10] In regard to whether the requirements of PIE had been met, it was submitted that the appellant had given the first respondent due notice terminating her right of occupation and rendering her continued occupation unlawful. The appellant had, in addition, offered the first respondent alternative accommodation. On this basis, no impediment existed to preclude an eviction order. At the hearing of the appeal the appellant re-iterated the offer to provide suitable alternative accommodation to the first respondent.

The facts

[11] As already mentioned, the appellant is the registered owner of the property. He purchased the property at a public auction and it was registered in his name on 15 September 2008. The previous owner was Quickcon Development (Pty) Ltd (Quickcon) which had been placed in liquidation.

[12] The history of the property is as follows. On 22 March 1939 Portion 36, Lot F of the farm Parel Vallei was transferred from its then-owner Mr Purdan,

to Mr John Ince. He was the registered owner of the farm upon which the first respondent came to reside with her parents when she was 11 years old in 1947. Mr John Ince transferred the farm to a Mr Rex Ince in 1969. At some stage prior to 1991 Portion 36, Lot F of the farm Parel Vallei came to be designated as erf 7124. Whether this was a portion of the farm or the whole of it, is not apparent from the record. During this period the transfer of erf 7124 was effected to a Mr Daniels.

[13] In 1991, a Mr Rack purchased erf 7124 from Boland Bank. It is unknown why this occurred but it may be surmised that Boland Bank held a mortgage bond over the property. Mr Rack confirms, by way of affidavit, that the first respondent and her husband were renting the property at the time having been given a life right to occupy the property by the previous owners. He was aware of this right and considered himself bound thereby.

[14] On 13 February 2001, Mr Rack sold and transferred a portion of erf 7124 to Quickcon. This portion was registered as erf 14421 and was held under title deed 797747/2001. It appears that Quickcon subdivided erf 14421 into several erven for development purposes. This is reflected in a subdivision diagram issued by the Surveyor-General, SG 4613/2002. One of the subdivided erven – erf 14611 – is the property on which the first respondent resides. It is this property which was acquired by the appellant by public auction in 2008.

[15] This outline of the history of the property illustrates a process of subdivision of the original farmland into erven over time. The first respondent resided on the farm throughout this process.

The issues

[16] The first key issue raised on appeal concerns the propriety of the high court allowing the respondent to raise a new issue on appeal. This concerned the contention by the first respondent that she is an occupier as defined by ESTA. The second issue concerns the question whether the appellant had established that the first respondent was an unlawful occupier within the meaning of the term as envisaged by PIE. This issue turns on the notice of termination of occupation given to the first respondent. It also concerns the broader question of compliance with the requirements for eviction as set out in PIE.

[17] The third issue related to the exercise of the high court's discretion not to order the eviction of the first respondent on the basis that such an order was not just and equitable. At issue in this regard was the nature of the discretion; this Court's entitlement to interfere with the exercise of that discretion and, to the extent it may, whether grounds for interference had been established.

The new issue on appeal

[18] The first respondent raised the question regarding the application of ESTA on the eve of the appeal hearing before the high court. In essence, she contended as a further ground of appeal, that the appellant had not established that ESTA does not apply.

[19] The high court allowed the first respondent to rely upon the point. In doing so, it characterized it as, essentially, a point of law. The high court, however, allowed the appellant to file a set of affidavits to present such

evidence as it wished to address the issue. No affidavits were filed on behalf of the first respondent.

[20] It was common cause that the action before the magistrate was prosecuted on the basis that the provisions of PIE applied. The appellant's cause of action was formulated on that basis. It was also common cause that the parties had, at a pre-trial meeting, agreed that the matter be adjudicated on the basis that PIE was applicable.

[21] Based on this, the appellant took the view before the high court and this Court that both courts were bound by such agreement. The appellant further argued that the high court ought not to have allowed the issue because the appellant would be severely prejudiced. Had the issue been raised before the trial court, the appellant would have presented evidence, including that of an expert conveyancer to establish from the history of the property that ESTA did not apply.

[22] Section 1 of PIE defines an unlawful occupier as:

'. . . a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, *excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997,* and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996).' (My emphasis.)

[23] In terms of s 2 of PIE, the Act applies to all land throughout the Republic. In terms of s 4(1) of PIE the provisions of that section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

[24] Section 1 of ESTA defines an occupier as:

'a person residing on land which belongs to another person, and who has on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding . . .'.

[25] The exclusions provided for in the definition are not relevant in the present matter. The relevant portions of s 2 of ESTA provide as follows:

'(1) Subject to the provisions of section 4, this Act shall apply to all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships, but including—

(a) any land within such a township which has been designated for agricultural purposes in terms of any law; and

(b) any land within such a township which has been established, approved, proclaimed or otherwise recognised after 4 February 1997, in respect only of a person who was an occupier immediately prior to such establishment, approval, proclamation or recognition.

(2) Land in issue in any civil proceedings in terms of this Act shall be presumed to fall within the scope of the Act unless the contrary is proved.'

[26] It is trite that an owner or person in charge of land who wishes to evict another person who resides on that land must comply with s 26(3) of the Constitution. That section requires that a court order first be obtained. It also provides that legislation may not permit arbitrary evictions. The principal legislation regulating eviction from land is PIE.

[27] PIE serves to regulate evictions from 'all land' in the Republic. It does so by prescribing its application only to 'unlawful occupiers' as defined and sets out both procedural and substantive safeguards to avoid arbitrary eviction. Finally, it provides that the court dealing with an eviction must be satisfied that the eviction is just and equitable.

[28] A party relying on PIE must bring its case for eviction within the ambit of its provisions. It bears an onus to establish, as an essential jurisdictional requirement, that the person sought to be evicted is an *unlawful occupier*. This means that it must be established that the occupier is not an occupier as defined by ESTA.[2] This much is clear from a reading of the plain language of PIE read with ESTA. In the light of this, the 'new issue' on appeal was, properly considered, a point of law which could be raised on appeal, notwithstanding that it was not raised before the magistrates' court. The high court was accordingly not in error to allow the issue to be raised on appeal. Insofar as the raising of the new point constituted a defence not fully canvassed by the evidence, the high court permitted the appellant to file further affidavits to present such evidence as was considered germane to the new issue. I will return to this aspect hereunder.

Was the high court precluded from adjudicating the new issue on the basis of the pre-trial agreement?

[29] As indicated earlier in this judgment, the appellant proceeded on the basis that PIE applied. An oral pre-trial agreement, which was brought to the magistrate's attention at the commencement of the trial, was concluded between the parties. According to the appellant, it was agreed that the matter would be adjudicated on the basis that the provisions of PIE were of application.

[2] See *Isaacs and Others v City of Cape Town and Another* [2018] 1 All SA 135 (WCC) at para 32.

[30] Before this Court it was argued that the terms of the agreement precluded the respondents from relying on the provisions of ESTA. They were bound by the agreement, as were the high court and the magistrates' court.

[31] The answer to this contention is twofold. In the first instance, the terms of the agreement, as presented on the record, are by no means clear. It is not apparent that it amounts to anything more than that the parties agree that the formal requirements of PIE have been met and that the court is to deal with the substantive questions on the basis of PIE. It is certainly not clear that there was an express agreement that the provisions of ESTA do not apply. In any event, it certainly was the case that a principal dispute between the parties throughout the trial remained the question whether the first respondent was an unlawful occupier. Accordingly, it remained for the appellant to prove that the first respondent was an unlawful occupier as provided by PIE. It appears from the magistrate's judgment that he did not understand the pre-trial agreement to mean that ESTA was irrelevant. Had he done so, there would have been no cause to refer to ESTA in his judgment in the following terms:

'We can also at this stage exclude and accept the extension – that the extension of security of 10 year Act of 1997 (sic) does not apply in the circumstances, due to the subdivision of the farm in 2001, although at this stage in the proceedings, I must note that I have special regard and specific regard to the spirit of the extension of security of 10 year Act of 1997, given the history of the matter and it is against this background, that the matter was then argued not only on the papers, but also with the leading of oral evidence.'[3]

[32] The second answer is determinative. Section 25(3) of ESTA provides that no waiver of rights conferred by ESTA shall be of any force or effect

[3] I have reproduced the passage as it appears in the record without correcting obvious errors that arose in the transcription of the orally presented judgment.

unless reduced to writing. There are obvious reasons for such a requirement. ESTA seeks to protect identified vulnerable groups of persons from eviction. Such vulnerable groups include: persons who, for historical reasons, are illiterate or undereducated; and, marginalised persons who do not enjoy access to the resources to protect their rights. The only basis upon which it could be found that the pre-trial agreement precluded consideration of the provisions of ESTA, is if that agreement constituted a valid waiver of rights in terms of ESTA. The pre-trial agreement, such as it is, does not meet this threshold.

Does ESTA apply?

[33] The high court, having considered the evidence presented by the appellant in its additional affidavits, came to the conclusion that the evidence does not discharge the onus which rests upon a party seeking an eviction in terms of PIE, to establish that ESTA does not apply. This finding was one made in conjunction with a further finding, namely that the appellant had failed to establish that the first respondent was an unlawful occupier by reason of the termination of her right to occupation of the property.

[34] It was argued before this Court that the high court was incorrect to find that the appellant had failed to discharge the onus. The evidence which was presented by the appellant was not challenged by the first respondent who, it was submitted, had elected to file no answer thereto. Since it was not disputed, the facts alleged by the appellant ought to have been accepted.

[35] The undisputed facts established that the property in question, as its history indicates, came to be incorporated into a township by no later than 1991, when its status as a erf was registered in the land register. This, coupled

with the assertion by the appellant that the land ceased to be farm land progressively over time as urban development extended around it, ought to have persuaded the high court that the land was urban in character and that the exception in s 2(1)(*b*) of ESTA does not apply, since the cut-off date provided for therein is 4 February 1997. The high court considered that the assertion, contained in the appellant's founding affidavit, to the effect that the farm had, decades earlier, developed into a highly developed residential area was insufficient to discharge the onus.

[36] Even taking into account the presumption provided for in s 2(2) of ESTA, I am not persuaded that the high court was correct to conclude that the onus was not discharged. I accept that the evidence presented by the appellant may be lacking in cogency. It is certainly open to criticism, inasmuch as it is not apparent upon what basis the appellant is able to assert an interpretation of the objective evidence. Quite possibly that might only fall within the province of an expert in conveyancing or in town planning. There is, however, the evidence that urban development had occurred over a protracted period and that the land in question in this application had been encircled by such urban development since 1991. These are factual averments with which the first respondent did not join issue, notwithstanding that she sought to rely upon the interrelationship between ESTA and PIE. In the absence of challenge they ought to have been accepted. These averments, read together with the objective evidence, establish a balance of probability in favour of finding that s 2(1)(*b*) of ESTA does not apply. In the circumstances the high court erred in finding that the appellant did not discharge the onus of establishing that ESTA does not apply.

Unlawful occupier

[37] The high court found that the first respondent was not an unlawful occupier, as required for an order of eviction in terms of PIE. It made this finding on the basis that the period of notice given to the first respondent to vacate the property was not a reasonable period.

[38] The high court's reasoning on this aspect is difficult to follow. It accepts that prior to notice being given the appellant entered into discussions with the first respondent regarding her continued occupation of the property. It accepted that in these discussions the appellant signified that he was prepared to arrange alternative accommodation for the first respondent. Yet, these interactions, the time that elapsed from then to when formal written notice to vacate was given, and the period that elapsed from the end of the period of notice to the issuing of legal proceedings were not taken into consideration.

[39] In my view, the high court approached the issue upon an incorrect basis. The appellant signalled, clearly and unequivocally, his intention to terminate the first respondent's right to occupy the property. He withdrew his consent for first respondent's continued occupation. Accepting, for the sake of argument, that he was entitled to do so, the time period within which to vacate is relevant only to the granting of an eviction order in those circumstances. If the period is a reasonable one, then the owner may approach a court for an eviction order. The occupation is rendered unlawful by the termination of the right of occupation, since it is such notice which withdraws the express or tacit consent to occupy.

The oral life-right

[40] In resisting the eviction order the first respondent asserted '[an]other right in law to occupy the land', namely an oral right of occupation of the property for life, conferred upon her and her late husband by a previous owner of the property. She explained that her husband had worked for a previous owner, Mr Ince. Mr Rack, a subsequent owner, had expressly agreed that she and her husband would be entitled to live in the house upon the property for the rest of their lives.

[41] The appellant did not dispute that such a 'right' had been conferred upon the first respondent. He denied however, that it was enforceable against successive owners, more particularly himself, since it was not reduced to writing and registered against the title deeds of the property. The 'right' was accordingly not one of *habitatio* which would preclude a termination of the right of occupation.

[42] The magistrates' court found in favour of the appellant. The high court did not, in terms address this aspect. Before this Court counsel for the first respondent did not pursue reliance upon the existence of a right of *habitatio*. It was accepted that the right, conferred by Mr Rack and in respect of which there was objective evidence to be found in a subsequent deed of sale of the property, had not been reduced to writing and had not been registered against the title deed. To qualify as a right of *habitatio* enforceable against successors in title this was required.[4]

[4] See *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 at 16; *Janse van Rensburg and Another v Koekemoer and Others* 2011 (1) SA 118 (GSJ) para 19.

[43] In the light of this it is unnecessary to deal with this aspect. The assertion of a life-right, did not preclude the termination of the first respondent's right of occupation. Nevertheless, the fact that she and her husband were granted an oral right of occupation of the property for life remains a relevant consideration in relation to whether it would be just and equitable to grant an eviction order or within what period such eviction order ought to be carried into effect.[5]

[44] There are two reasons. The first, and perhaps obvious reason, is that all facts must be taken into account when deciding what is just and equitable. The second is that considerations of what is just and equitable may persuade a court not to evict a person who is found to be in unlawful occupation.[6] As I have said, it was not disputed that the first respondent and her husband were given the right to occupy the property for the rest of their lives. It was also not in dispute that some, if not all, of the previous owners were aware of this right and were prepared to honour it. The first respondent believed, albeit incorrectly, that the right protected her from eviction and she continued to occupy the property in this belief. She can hardly be expected to have known that her right was precarious inasmuch as it had not been reduced to writing and registered against the title deeds of the property. The fact is that she lost the absolute protection against eviction precisely because she was unaware that she needed to take further legal steps to ensure that her rights were enforceable against successors in title.

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[5] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* [2012] ZASCA 116; [2013] 1 All SA 8 (SCA); 2012 (6) SA 294 (SCA) para 12.
[6] Ibid at 302 fn 22.

A just and equitable order

[45] This brings me to the essential basis of the high court's judgment, namely its finding that it would not be just and equitable to grant and order of eviction. It considered this aspect on the assumption that the first respondent was an unlawful occupier in terms of PIE. Since I have found that the high court was wrong to conclude that the first respondent was not an unlawful occupier, it is necessary to deal with this finding.

[46] In coming to the conclusion that it would not be just and equitable to grant an eviction order, the high court took into consideration several factors. Among these was the length of time (over seven decades) that the first respondent had been in occupation of the property; the first respondent's advanced age; and the fact that she occupied the property with her disabled son, Adam. The high court also considered the purpose for which the appellant had acquired the property and what he intended to do with it.

[47] Before this Court it was argued, on behalf of the respondents, that when a court exercises its discretion as to what is just and equitable, it exercises a true discretion. Accordingly, a court on appeal will not readily interfere. It will only do so if it is satisfied that the discretion was wrongly exercised or exercised upon a wrong principle.

[48] Whether, in the context of an eviction order, the discretion to determine what is just and equitable consists of a 'true' discretion or not, need not be decided. That is so because even if the discretion is of the more limited kind, there is, in my view, no basis to interfere. The high court was entitled to

exercise a discretion even though the occupation was unlawful.[7] There was therefore no misapplication or misdirection. There is also no discernible misdirection in relation to the facts relevant to the exercise of that discretion.

[49] It bears emphasis that the first respondent has been in occupation of the property since she was 11 years old. She is now (at the time of this appeal), 84 years old. Until 2009 her continued occupation was entirely secured, by reason of the consent of successive owners some of whom accepted that she had been given a lifelong right of occupation and were prepared to honour it. During the greater part of her occupation the property formed part of a farm. Gradually, and in circumstances beyond her control, the farm became absorbed by the growth of urban developments. Until 1991, when the remaining portion of what was previously farmland, was encircled by urban development, the first respondent would undoubtedly have enjoyed the protection of ESTA. While she may have lost the absolute protection conferred by s 2(1)(*b*) read with s 8(4) of ESTA[8] as a vulnerable person, her status as a vulnerable person, even in the context of PIE, has essentially remained unchanged.

[50] These are very weighty considerations. In my view, they outweigh the protection of the exercise of the right to property that an entitlement to an order of ejectment provides. PIE recognises that in appropriate circumstances

[7] See fn 4 above. See also *Baron and Others v Claytile (Pty) Ltd and Another* 2017(4) SA 108 (LCC) para 14; *Occupiers of erven 87 & 88 Berea v De Wet N O and Another* [2017] ZACC 18; 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC) paras 44-47.

[8] The section provides, *inter alia*, that the right of residence of an occupier who has resided on the land for 10 years and has reached the age of 60 years may not be terminated, save in specified circumstances set out in s 10 of ESTA.

the right to full exercise of ownership must give way, in the interest of justice and equity, to the right of vulnerable persons to a home.

[51] This is such a case. Indeed, it is difficult to conceive that the circumstances of this case would not justify a refusal of an order of eviction in the interests of justice and equity. In my view, the high court was correct to find that an order of eviction ought not to have been granted by the magistrates' court.

Alternative accommodation

[52] It is necessary to deal briefly with a tender, made by the appellant at the hearing of the appeal, to provide the respondents with suitable alternative accommodation. The tender was made from the bar by way of a 'renewal' of an earlier tender to similar effect.

[53] It was pointed out by counsel for the first respondent that, at the time of the appeal hearing before the high court, there was no extant tender to provide suitable alternative accommodation to the respondents. At a much earlier stage of the litigation such a tender was made but since it was not accepted by the first respondent it had fallen by the wayside.

[54] In order to facilitate consideration of the tender, the appellant was allowed an opportunity to formulate a tender based upon an investigation of the availability of accommodation and to present same to the respondents for their consideration. The appellant was given an opportunity to file an affidavit detailing his offer and the respondents' response thereto.

[55] Subsequent to the hearing an affidavit was filed, to which were annexed documents detailing properties that were considered and correspondence between the parties. It is not necessary to set out the nature of the offer. It suffices to note that the appellant offered to purchase a unit in a secure complex in the area of Somerset West which would be transferred into the name of the first respondent. The first respondent indicated that she did not accept the offered accommodation as a suitable alternative. She was accustomed to life in the house she presently occupied and enjoyed not only the freedom and space it afforded her but also the environment around it.

[56] Whilst I accept that the appellant's offer, now made, was made in good faith and in recognition of the obviously adverse effects that ejectment of the first respondent would bring about, I do not consider that it tilts the scales in favour of granting an order of ejectment subject to the first respondent being accommodated as proposed. Such an order would clearly be one made contrary to the first respondent's wishes and would amount to no less than compelled ejectment notwithstanding the overriding considerations of justice and equity referred to above.

[57] This was not a case in which the reasonableness or otherwise of an unlawful occupier's refusal to vacate was a central issue. The question arose tangentially and belatedly. The true issue concerned the dignity of an elderly and vulnerable woman and a person with disabilities in the circumstances of the first respondent and her son. To hold that these weighty considerations are to give way merely because an alternative abode is offered would negate the first respondent's dignity rather than protect it.

[58] It follows that the order of the high court was correctly made. The appeal must therefore fail. We were advised that counsel for the first respondent appeared *pro bono*. The second respondent filed a notice to abide. Accordingly no costs were sought other than an order allowing recovery of such disbursements as may have been incurred by the first respondent's attorneys in preparing for the appeal. In the circumstances that would be an appropriate order.

[59] I therefore make the following order:

1 The appeal is dismissed.

2 The appellant is directed to pay such disbursements as may have been incurred by the first respondent's attorneys in preparing for the appeal.

G G GOOSEN
ACTING JUDGE OF APPEAL

Appearances

For appellant:	W Vos
Instructed by:	Miller, Bosman, Le Roux Attorneys, Somerset West Phatshoane Henney, Bloemfontein
For first respondent:	E Fagan SC (with him A Morrisey)
Instructed by:	Stellenbosch University Law Clinic, Stellenbosch UFS Law Clinic, Bloemfontein
For Amicus Curiae:	M C Louw