

OFFERING ALTERNATIVE HOUSING IN HARD CASES NOT NECESSARILY ENOUGH TO GET THE EVICTION ORDER

Grobler v Phillips and Others (446/2020) [2021] ZASCA 100 (14 July 2021)

The judgment highlights many aspects that commonly arise in eviction orders. Specifically of interest here was the court's finding that although the owner offered alternative secure housing to the occupier, who was 84 years old and had lived on the property since she was 11, an eviction order would not be just and equitable in these circumstances, even though she was an unlawful occupier (as this term is defined in the PIE Act). Also of interest was the role played by consideration of the fact that the land once was agricultural land, but that the rights that the occupier would have had under the Extension of Security of Tenure Act (ESTA), no longer applied as the land had become urban land.

The Judgment can be viewed [here](#).

FACTS

Mr Grobler had purchased a property in Somerset West at a public auction. It was a portion of what was, initially, a farm and which had been subdivided into smaller portions over years. After taking transfer, Mr Grobler sought to evict Mrs Phillips and her disabled son from the property. At the time of the purchase, Mr Grobler was aware that Mrs Phillips had verbally been granted a lifelong right of occupation of the property by the successive previous owners of the land.

The eviction procedures commenced in 2009. Mrs Phillips had commenced living on the property, which was then part of a large farm, in 1947 when she was 11 years old. She later lived on the property with her husband, since deceased, who worked on the farm.

The eviction application, which was brought in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, 19 of 1998 (PIE), was first launched in the magistrate's court, where the order for eviction was granted. (Mr Grobler offered alternative accommodation to Mrs Phillips and her son.)

On appeal to the High Court, the eviction was set aside. The High Court allowed Mrs Phillips to raise a new legal issue on appeal, namely that the provisions of the Extension of Security of Tenure Act, 62 of 1997 (ESTA) applied to the matter and accordingly, that no eviction under PIE could be obtained.

The legislation

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...**".

Re the land to which ESTA applies, the relevant portions of section 2 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.”

In setting aside the order of the magistrates' court, the High Court concluded that: (i) it was not shown that Mrs Phillips was indeed an unlawful occupier (as defined in PIE) and that the eviction under PIE was therefore not sound; (ii) Mr Grobler had not shown that ESTA did not apply and that an order in terms of PIE was therefore not (yet) appropriate on the evidence; and (iii) assuming that PIE did in fact apply and that Mrs Phillips was an unlawful occupier, that an eviction order was incorrectly granted because it was not just and equitable in the circumstances.

Mr Grobler then appealed to the Supreme Court of Appeal.

HELD

Unlawful Occupier

- Mrs Phillips contended, as a further ground of appeal and which was not before the magistrates' court, that Mr Grobler had not established that ESTA does not apply.
- In terms of section 2 of PIE, the Act applies to all land throughout the Republic. In terms of section 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.
- 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 ...”. The relevant portions of section 2 of ESTA provide further that ESTA applies “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 ...”
- 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.
- On a proper reading of the definition of an unlawful occupier in PIE (“... 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* ...”) it is apparent that Mrs Phillips was an unlawful occupier, living on an urban property without consent from the owner.

Does ESTA apply?

- The High Court 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.
- On the facts, it was clear 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 an 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 section 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 Mr Grobler'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. This was incorrect as it was clear that the land was in a township and that ESTA was not applicable; in the circumstances the High Court erred in finding that Mr Grobler did not discharge the onus of establishing that ESTA does not apply.

The oral life-right

- The assertion of a life-right granted orally did not preclude the termination of Mrs Phillips' 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.
- There are two reasons for this. 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.
- It was not disputed that Mrs Phillips 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. Mrs Phillips 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.

A just and equitable order

- The essential basis of the High Court's judgment, namely its finding that it would not be just and equitable to grant an order of eviction, must now be considered. It considered this aspect on the assumption that Mrs Phillips was an unlawful occupier in terms of PIE.
- 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 Mrs Phillips had been in occupation of the property; Mr Grobler'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 Mr Grobler had acquired the property and what he intended to do with it.
- The High Court was entitled to exercise a discretion even though the occupation was unlawful. 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.
- It bears emphasis that Mrs Phillips 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, Mrs Phillips would undoubtedly have enjoyed the protection of ESTA. While

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she may have lost the absolute protection conferred by ESTA as a vulnerable person (because the land was no longer agricultural land, long before 1997, for ESTA to apply), her status as a vulnerable person, even in the context of PIE, has essentially remained unchanged.

- These are very weighty considerations. 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 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. This is such a case.

Alternative accommodation

- It is necessary to deal briefly with a tender, made by Mr Grobler, to provide Mrs Phillips and her son with suitable alternative accommodation.
- Whilst it is accepted that Mr Grobler's offer, was made in good faith and in recognition of the obviously adverse effects that ejectment of Mrs Phillips would bring about, it does not tilt the scales in favour of granting an order of ejectment subject to Mrs Phillips being accommodated as proposed. Such an order would clearly be one made contrary to Mrs Phillips' wishes and would amount to no less than compelled ejectment notwithstanding the overriding considerations of justice and equity referred to.
- It must be remembered that 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 specific circumstances of this matter. To hold that these weighty considerations are to give way merely because an alternative abode is offered would negate Mrs Phillips' dignity rather than protect it.

CONCLUSION

It followed that the order of the High Court was correctly made. The appeal therefore failed.