THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 588/2023

In the matter between:

ROBERT PAUL SERNé N O	**FIRST APPELLANT**
ALOYSIUS JOANNES MARIUS REIJNS N O	**SECOND APPELLANT**
GERT ALBERTUS VAN RHYN N O In their capacity as Trustees of the MZAMOHLE FOUNDATION TRUST IT 620/2010	**THIRD APPELLANT**

and

MZAMOMHLE EDUCARE	**FIRST RESPONDENT**
BONGEKA MQOLOMBENI	**SECOND RESPONDENT**
SIPHOKAZI MQOLOMBENI	**THIRD RESPONDENT**
ALL OTHER PERSONS WHO UNLAWFULLY OCCUPY ERF 22933 KRAAIFONTEIN	**FOURTH RESPONDENT**
THE CITY OF CAPE TOWN	**FIFTH RESPONDENT**

Neutral citation: *Robert Paul Serné N O and Others v Mzamomhle Educare and Others* (588/2023) [2024] ZASCA 152 (12 November 2024)

Coram: PONNAN, MAKGOKA and MOKGOHLOA JJA and MJALI and NAIDOO AJJA

Heard: 29 August 2024

Delivered: 12 November 2024

Summary: *Rei vindicatio* – owner need do no more than allege and prove ownership and that the respondents are holding the *res* – onus on respondents to allege and establish any right to continue to hold as against the owner.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Mantame and Nuku JJ, sitting as court of first instance):

a The appeal succeeds with costs.

b The order of the high court is set aside and replaced with the following:

'1 The application succeeds.

2 The respondents are directed to vacate Erf 22933 Kraaifontein in the City of Cape Town, described as 74 Grootboom Avenue, Wallacedene, Cape Town (the property) within five days of the date of this order.

3 In the event of the respondents failing to comply with paragraph 1 hereof, the sheriff of the court be and is hereby authorised to evict from the property, the respondents and all who hold title under them.

4 The respondents are interdicted and restrained, once they have vacated or been evicted, from re-occupying the property or in any way interfering with the applicants' use and enjoyment of the property.'

JUDGMENT

The Court

[1] This appeal arises from an ostensibly commonplace application by an owner for the eviction of certain unlawful occupiers from immovable property owned by it. That it failed is a matter of some surprise. Why it failed, induces some measure of alarm and cannot but provoke strong feelings of judicial disquiet.

[2] The appeal, with the leave of this Court, is against the judgment and order of the Western Cape Division of the High Court, Cape Town (the high court), delivered on 17 September 2021, refusing an order, at the instance of the appellants, for the

eviction of the first to fourth respondents from the property described as Erf 22933, Kraaifontein, situated at 74 Grootboom Avenue, Wallacedene, Cape Town (the property).

[3] In 2006, the first appellant, Robert Paul Serné, was on a 'Habitat for Humanity' tour to South Africa, when he, together with others who were on the tour, met Ms Margaret Noxolo Ngaleka (Ms Ngaleka), who was then running an unregistered day-care centre. At her request, they initially assisted by fixing a leaking roof and thereafter, in 2008, purchased containers to which the centre was relocated.

[4] In 2010, the Mzamomhle Foundation Trust (the Trust), a non-profit trust, which was established for the purpose of supporting poverty relief, welfare and self-help projects for the poor, was registered. In 2011, the fifth respondent, the City of Cape Town (the City), offered to sell the property, which was then a vacant stand, to Ms Ngaleka. Ms Ngaleka, who was unable to pay the nominal purchase price sought by the City, enlisted the assistance of the Trust, who paid the purchase price of R33 000.

[5] The property was transferred into the name of the first respondent, the Mzamomhle Educare, in August 2011. When other funding, which had been promised to the first respondent, did not materialise, the Trust agreed, in 2012, to construct an Early Childhood Development Centre (ECDC) on the property at a cost in excess of R2 million. In order to facilitate the building of the ECDC, the first respondent, represented by Ms Ngaleka, agreed to donate the property to the Trust. The Trust, in turn, concluded a lease agreement with the first respondent, which, absent any further renewal, was to endure for a period of five years and terminate on

31 August 2017. The property was transferred and registered into the name of the Trust in 2016.

[6] Upon the death of Ms Ngaleka in 2016, the second respondent, Bongeka Mqolombeni, and the third respondent, Siphokazi Mqolombeni, being respectively, the daughter and granddaughter of Ms Ngaleka, took over the property, which they claimed to have inherited from her. This despite the fact that neither the second, nor the third respondent, were qualified to run an ECDC. The first respondent soon fell into arrears in respect of the rental due and also failed to pay the municipal rates and other charges timeously.

[7] In an endeavour to resolve these and other issues (that are not relevant for present purposes) and also to facilitate the continuation of the ECDC, the parties convened a meeting on 29 November 2017, when it was agreed in writing that the respondents will pay the arrear rental as well as the rental for the period November 2017 to April 2018, so as to enable them to negotiate a new lease in April 2018. The agreement was signed by the second and third respondents, as well as Ms Nomvethe Nozuko, who it had been agreed would act as the principal of the ECDC. The respondents failed to abide the agreement, which lapsed in May 2018.

[8] When further attempts at resolution proved fruitless, on 26 November 2018, the appellants' attorney served a notice to vacate on the second and third respondents, which went unanswered. An application was thereafter issued by the first to third appellants, the Trustees of the Trust, out of the high court, on 1 February 2019.

[9] The application cited Mzamomhle Educare, Bongeka Mqolombeni, Siphokazi Mqolombeni and all other persons who unlawfully occupy the property, as the first

to fourth respondents. In due course, and, in circumstances that will be elaborated upon presently, the City of Cape Town (the City), came to be joined and cited as the fifth respondent.

[10] The following relief was sought:

'1. [The] matter be heard as one of urgency in terms of the provisions of Rule 6(12), dispensing insofar as may be necessary with the forms, service and time periods provided for in the Rules of Court.

2. [T]he First to Fourth Respondents be directed to vacate Erf 22933 Kraaifontein, in the City of Cape Town, more commonly known as 74 Grootboom Avenue, Wallacedene ('the property') within 5 (five) days of the date of the Order.

3. [T]he Sheriff of this Honourable Court be authorised, in the event that the First to Fourth Respondents fail to comply with the order to vacate the property within the period of five (5) days, to evict from the property the First to Fourth Respondents and all others who hold title under them.

4. [T]he First to Fourth Respondents shall be interdicted and restrained, once they have vacated or been evicted, from re-occupying the property or interfering with the Applicant's use of the property.'

[11] The application, which was a fairly simple and straightforward one, resting as it did on the *rei vindicatio*, came to be opposed. The second respondent deposed to the answering affidavit, purportedly in her personal capacity and as a representative of the first respondent, whose Board she claims authorised her to do so on its behalf. Nothing was said of the third respondent, nor did she oppose the application for eviction.

[12] Whilst the second respondent acknowledged that the property had indeed been transferred into the name of the Trust, she alleged that her mother was misled into signing the power of attorney and other documents. She asserted that her mother was poorly educated and not proficient in English and therefore did not understand the

import of the documents that she had signed. She levelled a number of serious accusations of impropriety and dishonesty against the Trust and its Trustees. On the strength of this, she disputed that the Trust had lawfully acquired ownership of the property and further denied the validity of the lease that had been entered into between the Trust and the first respondent. The second respondent alleged that her mother had understood that the amount that she had been paying was a contribution towards an insurance premium for the property and not a rental pursuant to a lease agreement, as claimed by the Trustees.

[13] According to the second respondent, upon noticing that the property was in the name of the Trust, her mother enquired and was told that the property was still in the name of 'Mzamomhle'. She thus did not understand that the property had been registered in the name of the Trust. The second respondent contended that it was 'incongruous' that the alleged commencement date of the lease, 1 July 2012, pre-dated the transfer of the property into the name of the Trust, which only occurred in 2016. On this basis, she alleged that no valid lease could have come into existence and as such it could not have expired by effluxion of time. The respondents, so the contention proceeded, were therefore not in unlawful occupation of the property and they were accordingly not obliged to vacate the property.

[14] On 18 November 2019, and in circumstances that are not apparent from the record, the then Judge President of the Western Cape Division, Hlophe JP, issued the following directive:

'In terms of Section 14(1)(a) and (b) of the Superior Courts Act 10 of 2013 it is directed that this matter be heard by a full court of this Division comprising of Mantame and Nuku JJ. The City of Cape Town is directed to join the matter as party to these proceedings.

The issues to be considered by this Court are the following:

1. Does the Mzamomhle Foundation Trust ('Trust') have *locus standi* to bring these proceedings before this Court.

2. Whether Erf 22933 Kraaifontein, Cape Town, commonly known as No 74 Grootboom Avenue, Wallacedene was leased by the First, Second and Third applicants to the First to Fourth respondents; Was Margaret Noxolo Ngaleka ('the deceased') aware that she was entering into a lease agreement when she signed the lease; Can the lease have force and effect in circumstances where it was entered at a time the property belonged to the first respondent.

3. Whether the City of Cape Town in selling the land to [the] first respondent and/or the deceased for purposes of building an Educare was aware that such land would immediately be donated to the Trust.

4. Whether the land so acquired for purposes of assisting the welfare project for the poor and disadvantaged could be passed to the third parties and be utilized for business or any other purposes. What proposals were made by the first respondent and the deceased for them to acquire the land at such a reduced amount from the City of Cape Town.

5. Whether the City of Cape Town would provide alternative accommodation to the first respondent should they be evicted, in circumstances where it had already sold land to them at a reduced amount.

6. Was the City of Cape Town made aware that [the] first respondent was used as a 'front' to purchase the land to develop the property for the Trust's business or any other purposes.

7. Was the deceased aware that she was giving away her property including her brainchild, the crèche when she allegedly donated the land to the Trust. Was there a meeting of minds when this donation occurred. Does the donation agreement so attached a legal document and does it meet all the requirements of a donation agreement. Can this document pass the constitutional master (sic).

8. Whether the Trust in making the deceased sign the donation agreement did not hijack the land and operations of the first respondent under the guise of assisting the respondents financially.

9. Whether the deceased was misled into giving power of attorney to transfer the land to the Trust.

10. Whether the applicant's acquisition of land was lawful. Was there no fraud and/or misrepresentation of facts by the applicants.

11. Whether the deceased was aware that she was paying monthly rentals to the applicants and not contributing towards insurance.

12. Whether the first respondent was not unlawfully dispossessed of its land, and thereby violating the provisions of Section 25 of the Bill of Rights (The Constitution of the Republic of South Africa, Act 108 of 1996).

13. Whether in evicting the first to fourth respondents the applicant[s] did not violate the rights of the children and education as provided for in Section 28 and 29 of the Bill of Rights (The Constitution of the Republic of South Africa, Act 108 of 1996).

14. Any other issue that the Judges wish to be addressed on by the parties.

In [the] light of [the] Constitutional issues that have arisen in this matter, these directives shall be placed on notice board by the Registrar of this Court for any interested party to be admitted as *amicus curiae* on such terms and conditions as may be agreed upon in writing by the parties as contemplated in Rule 16A of the Uniform Rules of Court.'

[15] As per the directive of the learned Judge President, the matter served before Mantame *et* Nuku JJ. In a written judgment delivered per Mantame J (Nuku J concurring), the application was dismissed.

[16] It is unclear why the learned Judge President saw fit to issue practice directives in this matter or how it came about that he did so. It is so that heads of court issue practice directives from time to time, but these are in general designed to facilitate and promote the orderly working of the court. As Harms points out: '[p]ractice notes cannot fetter the discretion of any judge who, if the exigencies of a particular case so demand, is free to deal with the matter in a different way. So too, a judge who is satisfied that the substantive law demands different treatment of a specific case, is to apply the law as the judge finds it.'[1]

[17] Given the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits, to set out and define the nature of their dispute

[1] D Harms *Civil Procedure in the Superior Courts* Service Issue 64 at A3.4.

and it is for the court to adjudicate that dispute and that dispute alone.[2] Not only did the practice directive range beyond the issues identified by the parties, but, as shall presently become apparent, it rested, in several fundamental respects, on a misconception as to the essential nature of the application and the relief that was sought. In the event, the judgment delivered by the high court in the matter was largely tailored to the issues identified in the practice directive rather than those defined by the parties in the pleadings.

[18] Moreover, there was also simply no warrant for the Judge President to have directed that the matter be heard by a full court (by which he evidently meant a full bench). Aside from the general undesirability in handpicking judges for a matter such as this, the appointment of two judges to hear a straight-forward eviction application meant that any appeal would have to be heard by this Court. Instead, if the matter had been considered by a single judge, as it rightly should have been, then any appeal would, in the ordinary course, have served before the full court (consisting of three judges) of the high court. The consequence is that a matter such as this, which is not truly deserving of the attention of this Court, adds to our already congested court roll and delays the finalisation of other matters that are more deserving.

[19] It would seem that neither Hlophe JP nor the two judges who dismissed the application, truly recognised that the answering affidavit was replete with hearsay or appreciated the true effect and import of such evidence. In addition to being hearsay, almost all of the allegations did not raise triable disputes of fact on the well-established principles in *Plascon-Evans Paints Ltd. v Van Riebeck Paints (Pty) Ltd*[3]

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[2] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA), 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) paras 15 and 19; *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) paras 13 and 14.

[3] *Plascon-Evans Paints Ltd. v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A) at 368; 1984 (3) SA 623; 1984 (3) SA 620 at 634E-635C.

and *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another*.[4] In that regard, the two judges misconceived the nature of the enquiry. The evidence adduced by the second respondent, even on the assumption that it could correctly have been admitted, did not constitute a defence to a vindicatory claim.

[20] Hearsay evidence is, as a general rule, inadmissible in our law. There are however exceptions to this rule in terms of s 3(1)*(a)–(c)* of the Law of Evidence Amendment Act 45 of 1988 (the Evidence Act).[5] Hearsay is defined in s 3(4) of the Evidence Act as statements either oral or written, whose probative value depends upon the credibility of another independent person not testifying before court. 'For many years our law knew a rigid exclusionary rule which allowed specific exceptions but no relaxation. Now there is no exclusion as such. Hearsay evidence may now be accepted subject to the broad, almost limitless criteria set out in s 3(1)'.[6] Of that section, Schutz JA in *S v Ramavhale*[7] stated: '. . . it is necessary to emphasise . . . that s 3(1) is an exclusionary subsection and that the touchstone of admissibility is the interest of justice'. The section provides that '. . . hearsay evidence shall not be

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[4] *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) para 23.

[5] Section 3(1)*(a)-(c)* of the Law of Evidence Amendment Act 45 of 1988, reads as follows:
'(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –
(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
(c) the court, having regard to –
(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.'

[6] *Seemela v S* [2015] ZASCA 41; 2016 (2) SACR 125 (SCA) para 13.

[7] *S v Ramavhale* [1996] ZASCA 14; 1996 (1) SACR 639 (A) at 647 D.

admitted as evidence . . . unless . . . the court, having regard to (the considerations in ss (c)) is of the opinion that such evidence should be admitted in the interests of justice'.

[21] The factors set out in s 3(1)*(c)*(i)-(vii) should not be considered in isolation and must be approached on the basis that they are interrelated and that they overlap. These factors are to be considered in the light of the facts of the case.[8] Moreover, where the evidence sought to be admitted bears on a central issue in the case, the court should be slow to admit it.[9] The high court clearly accepted the version proffered by the second respondent, without regard to the version of the Trust, the objective facts or the circumstances of the matter, as it was obliged to do in terms of s 3(1)*(c)* of the Evidence Act. The nature of the evidence that the second respondent sought to introduce was what she alleges had been told to her by her mother over a protracted period of time. The evidence, such as it was, constituted her mere say-so. It was totally unsubstantiated by any other testimony or corroborated in any way by any documentary evidence.

[22] The high court appeared not to appreciate that admissibility aside, it was, in addition, required to consider whether the evidence proffered by the second respondent was sufficiently credible and reliable such as to gainsay the appellants' case and whether the evidence raised a defence on the papers so as to defeat the appellants' claim for an order of eviction. In that, the high court failed. The undisputed evidence is that during her lifetime Ms Ngaleka managed and successfully ran the ECDC, with the assistance of the Trust and the ECDC. She made regular monthly payments and met her other obligations in terms of the lease

[8] *Makhathini v Road Accident Fund* [2001] ZASCA 120; [2002] 1 All SA 413 (A); 2002 (1) SA 511 (SCA) para 27.
[9] *Hlongwane and Others v Rector, St Francis College and Others* 1989 (3) SA 318 (D) at 325D; *Hewan v Kourie NO and Another* 1993 (3) SA 233 (T) at 239B-C.

agreement. Such disputes as there were, only arose after the second and third respondents assumed control of the first respondent and the ECDC. The version of the Trust is set out in some detail and corroborated by the objective evidence. In contrast, given the second respondent's prolonged absence from Kraaifontein, and her lack of involvement in the affairs of the first respondent and the running of the ECDC, her version is short on detail and sketchy at best. The second respondent is remarkably silent on precisely when, how and under what circumstances her mother informed her of the matters to which she testified.

[23] Absent in the judgment of the high court is any enquiry as to: (a) the purpose for which the evidence was tendered – it plainly was self-serving; (b) the weight to be attached to such evidence, when juxtaposed against the evidence adduced on behalf of the appellants; (c) the prejudice or potential prejudice, if any, to the appellants, if such evidence were to be admitted. Had the high court subjected the evidence of the second respondent to the necessary scrutiny, it should have been abundantly clear to it that the acceptance of her version called for great circumspection. What is more, even on the acceptance of her version, she had failed hopelessly to raise any defence on the papers to resist the Trust's claim for eviction.

[24] Following upon the directive issued by Hlophe JP, the City placed evidence before the high court that: (a) it was aware that the property was to be transferred to the Trust and it had approved the donation and transfer of the property; and, (b) proper internal procedures were followed by the City in the passing of transfer of the property to the Trust. The high court did not meaningfully engage with that evidence.

[25] The appellants attached a deed of transfer as well as a title deed reflecting the Trust as the registered owner of the property. There was no attempt to challenge the

fact that the Trust was the registered owner of the property. Such failure is not without its consequence. It is well-settled that the abstract theory of transfer applies to immovable property. As Brand JA explained in *Legator McKenna Inc and Another v Shea and Others*:

'In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery – which in the case of immovable property, is effected by registration of transfer in the Deeds Office – coupled with a so-called real agreement or "saaklike ooreenkoms". The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property . . . Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass – despite registration of transfer – if there is a defect in the real agreement . . .' [10]

[26] Thus, contrary to the allegations raised by the second respondent that Ms Ngaleka had expressed misgivings about the transfer of the property through fraudulent means, she kept the contract alive and enabled the transfer of the property into the name of the Trust.[11] And, after the transfer of the property, she authorised the conclusion of a lease agreement between the first respondent and the Trust and further complied with the terms thereof up until her death. These facts bely the contention that she was fraudulently misled into donating the property or had any misgivings about its subsequent transfer to the Trust.

[27] Indeed, as Jansen JA pointed out in *Chetty v Naidoo (Chetty)*:

'It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right). The owner, in instituting a *rei vindicatio,* need, therefore, do no more than allege and prove that he is

[10] *Legator Mckenna Inc and Another v Shea and Others* [2008] ZASCA 144; 2010 (1) SA 35 (SCA); [2009] 2 All SA 45 (SCA) para 22.
[11] Wessels *The Law of Contract in South Africa*, Vol.1, sec.141.

the owner and that the defendant is holding the *res* - the *onus* being on the defendant to allege and establish any right to continue to hold against the owner.'[12]

[28] Thus, the Trust, relying as it did on the *rei vindicatio*, was required to do no more than allege and prove that: it is the owner of the property; the property is in the possession of the respondents; and, the property is still in existence.[13] The respondents sought to resist the relief sought by alleging that: (a) the Trust's ownership was obtained by dishonest means; and, (b) there was no valid lease agreement. However, neither (a), nor (b), establishes a right in law for the respondents to be in continued occupation of the property.

[29] As to (a): Absent a successful challenge to the manner in which the Trust obtained ownership of the property, the registration of the property by Registrar of Deeds remains valid until set aside by an order of court.[14] In any event, as the Constitutional Court confirmed in *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another*,[15] a challenge to the title of the lessor by the lessee is no defence to an eviction application.

[30] As to (b): At the outset, the right to hold as against the owner derived solely from the lease agreement. However, first, the lease agreement had run its course by effluxion of time and had not been renewed; and, second, the respondents had sought, in any event, to impugn the validity of the lease agreement. The high court struck down the lease agreement. In doing so, it agreed with the respondents. But, failed to

[12] *Chetty v Naidoo* 1974 (3) SA 13 (A) (*Chetty*) at page 20B-D.
[13] G Muller et al *Silberberg and Schoeman's The Law of Property* 6 ed (2019) LexisNexis at 270.
[14] *Knysna Hotel CC v Coetzee NO* [1997] ZASCA 114; 1998 (2) SA 743 (SCA) at 754C; [1998] 1 All SA 261 (A) at 266.
[15] *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another* [2015] ZACC 34; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC) para 67.

appreciate that absent a valid agreement there was no lawful basis for the continued withholding of possession from the owner. As explained in *Chetty*:

'[A]lthough a plaintiff who claims possession by virtue of his ownership, must *ex facie* his statement of claim prove the termination of any right to hold which he concedes the defendant would have had but for the termination, the necessity for this proof falls away if the defendant does not invoke the right conceded by the plaintiff, but denies that it existed. . . '[16]

[31] The respondents cannot content themselves with a denial of the existence of the lease agreement, yet simply remain in occupation of the property in perpetuity without any lawful basis. No doubt, taking its cue from the Judge President's directives, the high court considered factors that would ordinarily be relevant to an application under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE).[17] But the property is not residential property. It is trite that PIE does not find application to a non-residential property. As Brand JA put in *Barnett v Minister of Land Affairs*:[18]

'I believe it can be accepted with confidence that PIE only applies to the eviction of persons from their *homes.* Though this is not expressly stated by the operative provisions of PIE, it is borne out, firstly, by the use of terminology such as 'relocation' and 'reside' (in ss 4(7) and 4(9)) and, secondly, by the wording of the preamble, which, in turn establishes a direct link with s 26(3) of the Constitution (see eg *Ndlovu v Ngcobo* 2003 (1) SA 113 (SCA) para 3). The constitutional guarantee provided by s 26(3) is that "no-one may be evicted from their home, or have their home demolished, without an order of the court made after considering all the relevant circumstances".'

[32] Therefore, considerations of fairness and equity that a court is enjoined to consider in terms of s 4(7) of PIE, did not find application in this case. The high court seemed concerned that the children who attended the ECDC would be evicted. That

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[16] *Chetty* fn 12 above at 21G-H.
[17] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
[18] *Barnett and Others v Minister of Land Affairs and Others* [2007] ZASCA 95; 2007 (6) SA 313 (SCA); 2007 (11) BCLR 1214 (SCA) para 37.

concern, with respect, was misplaced. The Trust stated it was intent on continuing an Educare facility on the property. Thus, the interests of the children would not have been negatively impacted. Moreover, the eviction of the children was never sought by the Trust, a fact that the high court acknowledged in its judgment. The order of the high court has placed the Trust in an intolerable position. It has, without proper justification, been not only deprived of the use of its property for several years, but also unable to fulfil an important condition registered against the title of the property, namely the operation of an ECDC. That notwithstanding, it continues to face an enormous bill for utilities consumed by the respondents.

[33] It follows that had the high court: (a) confined itself to the nature of the dispute as defined by the parties in the affidavits; (b) disregarded, as it was obliged so to do, the inadmissible hearsay evidence relied upon by the respondents; (c) properly applied the applicable substantive law; and, (d) not allowed its discretion to have been impermissibly fettered by the practice directives, the application for the eviction of the respondents should have succeeded before it.

[34] In the result:

a The appeal succeeds with costs.

b The order of the high court is set aside and replaced with the following:

‘1 The application succeeds.

2 The respondents are directed to vacate Erf 22933 Kraaifontein in the City of Cape Town, described as 74 Grootboom Avenue, Wallacedene, Cape Town (the property) within five days of the date of this order.

3 In the event of the respondents failing to comply with paragraph 1 hereof, the sheriff of the court be and is hereby authorised to evict from the property, the respondents and all who hold title under them.

4 The respondents are interdicted and restrained, once they have vacated or been evicted, from re-occupying the property or in any way interfering with the applicants' use and enjoyment of the property.'

_____

VM PONNAN

JUDGE OF APPEAL

_____

T MAKGOKA

JUDGE OF APPEAL

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FE MOKGOHLOA

JUDGE OF APPEAL

_____

GNZ MJALI

ACTING JUDGE OF APPEAL

_____

S NAIDOO

ACTING JUDGE OF APPEAL

Appearances

For the appellants:	LF Wilkin
Instructed by:	Oosthuizen & Co., Cape Town
	Claude Reid Inc., Bloemfontein.