



IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

CASE NO: 16347/2016

In Re: The matter between:

RH SCHONEGEVEL

First Applicant

MAGNA BUSINESS SERVICES (PTY) LTD

Second Applicant

and

**THE OCCUPIERS OF PARADISE PARK
HOLIDAY RESORT, VERMONT, WHOSE
NAMES APPEAR ON THE LIST ANNEXED
HERETO AS ANNEXURE "A"**

1st to 284th Respondent

**THE OCCUPIERS OF PARADISE PARK HOLIDAY
RESORT, VERMONT, WHOSE PARTICULARS ARE
UNKNOWN**

285th Respondent

OVERSTRAND MUNICIPALITY

286th Respondent

JUDGMENT DELIVERED: 20 APRIL 2022

Le Grange J

Introduction:

[1] This is an opposed Application for the eviction of all the occupiers of the Paradise Park Holiday Resort in Vermont, otherwise and also known as Erf 927, Vermont, Western

Cape Province, in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998 ("PIE"). On 12 April 2017, while the matter was still pending, the Second Applicant, Magna Business Services (Pty) Ltd ("Magna") purchased the property from the First Applicant ("Schonegevel") and transfer of the property occurred on or about 22 May 2017. An application was launched by Schonegevel in August 2017 to join Magna as the Second Applicant to the eviction application. On 14 August 2017, the Court granted the joinder application. Magna, on 7 September 2017, filed a supplementary affidavit in support of the eviction proceedings.

Background:

[2] This matter has a long and intricate history. During the term of his ownership, Schonegevel established a caravan park and camping site on the property which later became known as Paradise Park Holiday Resort ("Paradise Park"). The property is located adjacent to the "Trunk Road" 43 between the towns of Hermanus and Fisherhaven, located approximately 11 km outside of Hermanus. It is also adjoining a lake and in close proximity of the ocean.

[3] The property falls under Resort Zone 1, zoning scheme of the Overstrand Municipal Zoning Scheme which in the interim had been replaced by the new Overstrand Zoning Scheme of June 2013. The zoning scheme of Resort Zone 1 only permits short term renting and the maximum extent of a Resort Zone 1 unit must not exceed 120m².

[4] Paradise Park consisted of 295 dwellings (a few had been demolished since the start of these proceedings), of various sizes and descriptions, some of which are permanently occupied, some of which are occupied on a semi-permanent basis and others are utilized for short term renting. There are also approximately 30 camping sites on the property.

[5] According to Schonegevel's founding affidavit, verbal indeterminate leases were entered into with the occupiers with regard to the use of the plots and a set of resort rules was drawn up by which they had to comply with. Over a period of time, he allowed parties to erect rudimentary timber structures which progressed to a stage where basic brick and mortar dwellings were also erected on some of the plots. In respect of many of the structures erected on the property no proper Municipal authorisation was obtained by the occupiers. The occupiers were also allowed to sell their structures on the open market on the basis that a 10% deposit of such sale need to be paid to Schonegevel. According to Schonegevel the sellers are making a profit when selling the units and as such he is entitled to a percentage thereof as he provides the infrastructure and amenities on the property.

[6] The lease agreements were placed in dispute by the occupiers. According to them, Schonegevel entered into a 99 year "Huurpacht" lease with each of them with the understanding that they can even allow their successors to inherit the structures and remain on the plots. I will return to this issue.

[7] It appears Paradise Park was living up to its name until 2010, when the Municipality started to bill the park on 312 sewage connections points instead of the two points it did in the past. This led to a huge increase in municipal charges. Schonegevel being upset with the Municipality, demanded that they do their billing correctly and deliver proper municipal services to the park. Schonegevel, at the time, also submitted a Land Use Planning application for rezoning, for Subdivision of the park to create a further 20 residential erven, from Resort Zone 1 to Resort Zone II. The latter Zoning (Resort Zone II) in terms of the Land Use Planning Ordinance, 15 of 1985 (LUPO)¹ apparently permitted residency. All of this did not sit well with the Municipality and a dispute arose. It all culminated in Schonegevel and the Municipality instituting High Court proceedings against each other, and the proverbial can of worms was opened with regard to Paradise Park's non-compliance with the Municipality's relevant statutory and regulatory requirements. Schonegevel was ultimately ordered by the High Court on 12 March 2012 to comply with all of the relevant and applicable statutory and regulatory requirements before 30 June 2012. The essence of the court order was that Schonegevel should comply with the following:

- i. Complete the entire sewage network of Paradise Park in accordance with the plans as submitted by the Municipality's engineers;
- ii. Deliver a surveyor diagram showing the layout of all the structures on the property;
- iii. Deliver a report by a town planner approved by the Municipality describing all contraventions of all the applicable laws; and

¹ S 3.20. 2(a) of LUPO

- iv. Deliver a written proposal to regularise the situation on the property.
- v. In the event of non- compliance, the Municipality was permitted to apply on the same papers for orders compelling Schonegevel to comply, declaring him to be in contempt of court and imposing an appropriate sanction, and requiring him to immediately cease using and permitting the property to be used unlawfully.

[8] Schonegevel, in order to comply with the Court Order, instructed a private consulting firm, namely Wright Approach Consulting (WRAP) to draw up the necessary proposals to regularise Paradise Park to comply with the municipal and other laws. WRAP complied a report in June 2012 wherein it sets out all contraventions resulting from the structures erected in Paradise Park and the proposals to regularise the situation including and the timeframes. That report was submitted to the Municipality. The report and the Municipality's response was annexed to the founding papers. WRAP's report highlighted a number statutory contraventions which *inter alia* includes, the contravention of the Municipal Zoning Scheme, which in the interim had been replaced by the new Overstrand Zoning Scheme of June 2013, which came into effect in February 2014; the Land Use Planning Ordinance, 15 of 1985 (which in the interim had been replaced by the Western Cape Land Use Planning Act, 1 of July 2015, and the National Environmental Management Act, 107 of 1998, the National Building Regulations, and the upgrade of the sewerage system and fire safety issues. The Municipality responded by stating that considering the irregularities on the property Schonegevel must, among other, do a proper Land Use Planning application for a

rezoning and any consent use and or departures required to rectify the contraventions on the property.

[9] As these considerations took almost 18 months, the Municipality in September 2015 gave Schonegevel a final written notice to comply with the Court Order of 12 March 2012 failing which they would apply for an interdict stopping from him using and permitting Paradise Park to be used unlawfully.

[10] According to Schonegevel, he considered various proposal to regularise Paradise Park, including the sub-division of the property in smaller plots as the payment of rent by the occupiers had deteriorated to such an extent that the expenses to operate Paradise Park were not covered by the rental paid. This led to various objections by interested and affected parties including the Paradise Park's Home-Owners Association ("PPHOA") who instructed the Jono Trust to lodge a full scale objection against such proposed sub-division. According to Schonegevel, after considering all the proposals, he realised it would be financially impossible to comply with Court Order as an amount in the excess of R 17 million was required from him to do so.

[11] In the meantime, whilst Schonegevel and the Municipality was engaged with legal proceedings in 2013, he increased the rental at Paradise Park. The rent initially charged was R950.00 for permanent occupiers and R600.00 for semi-permanent occupiers per month. Schonegevel wanted to increase the rental to R 1825 pm and R 1 550 pm respectively. The

increase in the rent caused serious unhappiness among the majority of occupiers. A complaint was lodged with the Western Cape Rental Housing Tribunal by the PPHOA. A full hearing was held by the Tribunal on 17 December 2013 and delivered its written ruling 31 July 2014, which was attached to the founding papers.

[12] The Tribunal at para 8.1.7 recorded the following:

"8.1.7 It seems that when the Respondent (Schonegevel) indicated that rentals will increase at the end of the 3 year lease agreements expiring in March 2014, the Complainants/Tenants became suspicious that the Respondent is looking to recover the legal fees and costs of the sewage upgrade from the Tenants."

[13] I was during that proceedings, two occupiers alleged Schonegevel granted them a 99-year lease "Huurpacht".

[14] The Tribunal in its ruling on the question of the "Huurpacht", came to the following conclusion at para 21:

"21. Breach of contract Huurpacht

21.1 The Complainants called two witnesses who testified that they were told that their leases were "99 year huurpacht leases".

21.2 None of the witnesses could explain why they never requested the registration of these leases as per the Formalities in Respect of Leases Act, no 18 of 1969.

21.3 The Tribunal further finds it strange that this issue was never raised before, not even when a previous complaint was lodged at the Tribunal in 2010 and when subsequent lease agreements were signed.

21.4 The Respondent, Mr Schonegevel denied that a huurpacht was offered to the Tenants. Mr Schonegevel seemed to be aware of what of 99 year huurpacht entails.

21.5 The authority cited by Mr Chafeker in his heads of argument Toufeeqah Ismail vs Yusuf Ismail and others (High Court Eastern Cape case 2002/2006 unreported) relates to a different set of facts.

21.6 The Tribunal finds itself unable to make a ruling in compelling the Respondent/Landlord to register 99 year leases."

[15] The Tribunal, in its conclusion, found that Schonegevel had been caught up with the drastic economic realities and escalated costs in running Paradise Park, and the rental increase was not exploitive for what the tenants have. It also took into account that many tenants thought they could retire at Paradise Park but inflation had caught up with them including the risk they took in staying at Paradise Park. The Tribunal further bemoaned the confrontational and aggressive approach the PPHOH had adopted in the matter. It further ruled that an amount of R1 350 pm and R1 200 pm rental for permanent and semi-permanent would be just and equitable from 1 September 2014.

[16] Despite the Tribunal Ruling, the PPHOA advised their members not to pay the increased amount and the majority of tenants followed that advice and essentially started with a rent boycott.

[17] It needs to be mentioned that in 2010, the Tribunal also dealt with a rental complaint against Schonegevel. It was then decided that the oral rental leases needs to be converted into 3 year renewable written lease agreements.

[18] According to Schonegevel, he could not financially afford to bring about the statutory compliance as ordered by the High Court and had no option but to terminate all the lease agreements of the occupiers. The lease agreements of all the Respondents were cancelled by way of written notice given by his Attorneys and delivered personally to the occupiers of Paradise Park during December 2015. The occupiers were granted until 31 January 2016 to vacate the premises.

[19] Despite some occupiers vacating their plots, the majority of the Respondents refused to vacate the premises and a second written demand was delivered to the remaining Respondents on 22 March 2016 in terms of which it confirmed cancelation of any lease agreement and once again allowing them more than a month to vacate the premises.

[20] Schonegevel commenced with the eviction proceedings in October 2016 and sought the eviction of all the occupiers that are specifically known to the Applicant, and cited as the 1st to 284th Respondents, as well as all the occupiers whose particulars are unknown to the Applicant and who obtained occupation on the property either by gaining access to the property themselves, or are holding title under one or more of the 1st to 284th Respondents.

[21] During the months of September 2017 to January 2018 opposing affidavits were filed by the Respondents that were legally represented. The Respondents represented by the attorney's firm of Mr Du Toit also issued a counter application. In the counter-application the following relief was sought against Schonegevel: (a) the initial amount each Respondent invested in the property plus any amounts invested in improvements; (b) an additional amount each Respondent calculated from the day his/her investment and improvements, equivalent to interest which would have been earned, had the money been left in an interest bearing account; (c) that these amounts be calculated by a court appointed liquidator, the costs of such liquidator for the account of Schonegevel and Magna.

[22] The attorney Mr. Van Zyl from Smith Attorneys also appeared for some of the Respondents, and 41 of them filed affidavits. Van Zyl also filed an affidavit. The purpose of his affidavit was to collate all the affidavits deposed to by the individual Respondents and to place the report of a forensic auditor Mr Charles Clacher ("Clacher") on record.

Clacher's report with annexures, specifically dealt with the periods 13 April 2016 to 30 May 2016 and comprised the following:

(a) Written Report with Annexures

- i) Engagement Scope
- ii) Court cases linked to Paradise Park
- iii) Paradise Park Lease Agreement and High Level Background information

- iv) Consequences/ impact of Paradise Park Home Owners Association Actions
- v) Consequences/ impact of Overstrand Municipality Actions and Chronology of Municipal /Landowner interventions
- vi) Consequences/ impact of Paradise Park Landowner Actions
- vii) Results of Survey Conducted with Individual Clients Represented by Smith Attorneys
- viii) Conclusion.

(b) A database summarising all information as documented in individual affidavits of all Smith Attorney Clients interviewed during the survey engagement; and

(c) Individual Client Affidavits documented during interviews with supporting documentation to be used as Confirmatory Affidavits.

[23] The conclusion reached by Clacher can be summarised as follows: no proof of a huurpacht or (written) lease agreement has been provided to him by the Respondents; All the leases were verbal leases between the landowner and the tenants as were the huurpacht; from the available data and records it is undisputed that the huurpacht contracts were never documented and never registered as stipulated by law Leases of Land Act 18 of 1969; all on-site residential dwelling sales at Paradise Park until July 2011 do not have any written lease agreements; all were verbal lease agreements; all written lease agreements were introduced in July 2011 and expired on 28 February 2014; none of the residential

dwelling owners exercised the right or option to renew their written lease agreements; none of the older residential dwelling owners could provide substantive evidence of the so-called 99 year huurpacht lease. The 99 year huurpacht leases were never documented and never registered by law; many dwelling owners cannot now afford to settle their current area plot rental payments making them unlawful occupiers of the land; dwelling owners cannot blame the landowner of Paradise Park for their own bad financial planning and demise due to their own or ineffective planning; the residential dwelling owners who invested in Paradise Park all took a risk investing in a dwelling where they could never own the land on which the dwelling was erected; the militant confrontational approach of the Paradise Park Home Owners Association had been one of the major destabilising factors in the Park, which lead to Schonegevel's decision to close his business and to institute mass eviction of all the residents; when the notice of evictions were served, the PPHOA initial strategy was to delay or stop the eviction by processes outside the legal framework or to create expensive legal battles with the use of technicalities and slowing down the legal process; the ultimate aim of the local activists involved was to delay the eviction to enforce the land to be expropriated in the public interest which would not have benefited the clients of Smith Attorneys; the clients of Smith Attorneys stand to lose a substantial part of their life investments if evicted, which would be unfair and inhumane especially to those that are staying in the park for a considerable number of years and who regularly paid their rent; the actions and events instituted by the Municipality and the PPHOA, coupled with ineffective management were the root cause which directly or indirectly led to Schonegevel's financial problems; and

Schonegevel who at the time was 89 years' old had seen his dream disintegrate, is sick and tired and was not willing to continue with his business anymore.

[24] The Municipality, on 1 March 2018 filed, an extensive report. In short the Municipality addressed the interaction it had with all the relevant roll players including the occupiers; the information it could obtain from the occupiers and whether an eviction order would likely result in all or any becoming genuinely homeless; and, the steps it proposes should any occupier become homeless by providing alternative land or emergency accommodation. According to the Municipality despite some discrepancies in the information available it was of the view that an eviction order is unlikely to result in all the occupiers becoming genuinely homeless.

[25] The Municipality also filed a Supplementary Affidavit in May 2019. In that report the municipality recorded the concern that 47 of the occupiers have not co-operated with the social worker appointed. They refused to disclose their income and 54 occupiers have refused to disclose their identity numbers. According to the municipality, the fact that those persons refused or failed to co-operate will result in the municipality failing to assist them if an ultimate order of eviction is granted. It was also reported that negotiations between the Municipality, the Western Cape Provincial Government: the Department of Human Settlements and Magna were entered into and although no final agreement was reached, it appears that the Municipality was open for negotiations and eager find a permanent solution to the eviction dispute.

[26] Magna was not averse to consider a joint venture with all the role players, provided that the joint venture did not materially affect their profit margins. The municipality indicated that they could not act outside of its constitutional mandate and can in no ways prioritize or differentiate between the occupiers of Paradise Park or anyone else enquiring emergency housing.

[27] The Municipality continued to file further updated reports which in total was five and the latest was dated 24 February 2022. In its 3rd report dated September 21, the Municipality set out why it could not acquire the land in terms of the provisions of the Housing Act 107 of 1997 read with the National Housing Code, 2009. According to the Municipality the Provincial Government has followed due process and could not acquire the land due the difference in the valuation of the land between Magna and the Province. Magna's valuation of the land apparently includes all the necessary work it had done since purchasing it which is to comply with the statutory regulatory framework whereas the Province's valuation exclude all the work Magna had done since becoming owner. The Municipality also set out the attempts it made to engage with the occupiers of Paradise Park. It needs to be mentioned that a number of attempts had been made by the parties, in particular the Municipality, the Western Cape Provincial Government: Department of Human Settlements, to come to an amicable solution regarding the dispute between the parties. Adv Sven Olivier SC was at one stage appointed, by agreement between all the parties, to mediate. Unfortunately, his attempts to mediate were all unsuccessful.

[28] When the matter came before in August 2019, and having regard to the serious dispute of fact regarding the terms of the lease agreements it was decided on the hearing of oral evidence in order to dislodge that dispute between the parties, which will also include evidence whether an eviction order will be just and equitable under these circumstances.

[29] Adv. A de Villiers assisted by Adv. L Theron (previously Wade) appeared for the Second Applicant ("Magna"). At that stage, Adv. van Zyl appeared for a number of the Respondents, their names have been attached to the papers filed of record. The attorney Mr du Toit also appeared for a number of the Respondents, their names were also attached to the papers filed of record. Adv. Erasmus appeared for the municipality. At a later stage, on 10 December 2019, the attorney Mr Sharuh came on record for some of the Respondents and later received instructions from the majority of the Respondents to appear on their behalf. On 29 July 2021 he expressed a desire to withdraw as attorney from record. An issue to which I will also return.

[30] It is common cause that some of the Respondents did not oppose the relief sought and settled with Magna. In all 46 Respondents settled with Magna.

[31] The matter was postponed on a number of occasions as the parties were trying to engage each other to reach a settlement agreement. On 24 October 2019 it was

postponed to 2 of December 2019 for the leading of oral evidence over a period of two weeks.

[32] During December 2019, Adv van Zyl was in the process of leading oral evidence, when the parties again requested the matter to stand down to make a final attempt to settle the matter. Magna indicated that they will only seek an eviction order for those Respondents that up to that stage did not oppose the relief sought against them.

[33] On 10 December 2019, Mr Sharuh appeared on record. According to Mr Sharuh, he has received a mandate to appear for a number of Respondents. There was some confusion as to Mr Sharuh's clients and that of Mr van Zyl and whether there was a conflict of interest. Mr Sharuh, then requested a postponement to another date, in order to establish which of the Respondents have indeed given him a mandate to appear on their behalf. I was inclined to grant the request provided that Mr Sharuh's clients agree to pay the costs occasioned by the postponement.

[34] The matter stood down for Mr Sharuh to take proper instructions. On resumption Mr Sharuh could only identify the names of 6 Respondents from whom he obtained instructions to appear, namely, Respondent 22 - A Pieterse with plot 74; Respondent 71-B Hatem- with plot 140; Respondent 78 - Smith with plot 149; Respondent 120 - PG de Nekker with plot 194, Respondent 181 - A van der Merwe with plot 253 and Respondent 205 - M Ferreira with plot 265A.

[35] An order was then granted in terms of a Draft Order that was marked 'X' and dated 10 December 2019, whereby, among other, the matter was postponed to 9 March 2020 for the further hearing of oral evidence and the remaining 57 Respondents who did not oppose the eviction application, were ordered to vacate the relevant plots on or before 01 September 2020. The eviction date was later amended to 1 December 2020.

[36] On 24 February 2020, Mr Sharuh filed a Notice of Substitution of Attorneys of record. According to the notice Mr Sharuh had obtained the mandate to represent 150 of the Respondents. Those Respondents were previously represented either by Mr Van Zyl or Mr Du Toit.

[37] On the same date an Application for the rescission of my order dated 10 December was also filed by Mr Sharuh on behalf of 39 Respondents. The relief sought in the Notice of Motion contained a Part A and B. In Part A, the relief sought was among other, to rescind the eviction order granted on 10 December 2019, and in Part B, in prayers 4. 1 – 4.5 the relief sought was *inter alia* to compel Magna to restore unhindered access to certain facilities, including the swimming pool, cleaning and the removal of rubbish services, and to restore electricity supply to plots 168 and 178. In prayer 5.1- 5.5 the Applicants sought to interdict Magna from certain conduct, inter alia, spraying harmful chemicals, limiting the movement of and or obstructing the movement of the Respondents on the property. At the time the swimming pool was apparently not in use and filled up with building rubble.

[38] During 2020, the hearing of oral evidence continued and the onset of the Covid-19 pandemic created further havoc in dealing with this matter and the matter was often postponed.

[39] On 31 August 2020, the rescission application was subsequently dismissed. Leave to Appeal was sought and refused. The Supreme Court of Appeal was petitioned for leave to appeal. I believe the petition was successful and that matter is currently pending.

[40] In December 2020 and January 2021 the matter proceeded. Some of the Residents of Paradise Park were called to give evidence, and Magna called one expert witness Mr Duncan Heard that testified about the negative ecological impact Paradise Park, in particular its sewerage system, has on the local environment and lake.

[41] Mr Sharuh also subpoenaed the late Mr Schonegevel and his daughter, Mrs Potgieter, who worked at the offices in Paradise Park to testify. Attempts were made to hear the evidence of Schonegevel via an electronic platform but due to poor Wi-Fi connection it was abandoned. Before Schonegevel, a nonagenarian in age, could testify in open court he passed on due to Covid-19 complications. Mrs Potgieter however testified in July 2021 in open court.

[42] During the proceedings the following Respondents gave *viva voce* evidence:

1. Ms Maria Magdalena Swart

2. Mr Hermanus Pieterse
3. Mr Daniel Johannes Jacobus Van Niekerk
4. Mr Johann Oswald Sieberhagen
5. Mr Hendrik Jacobus Loubser Heydenrych
6. Ms Priscilla Sheriff
7. Mr Christoffel Groenewald
8. Ms Rebecca Johanna Le Grange
9. Ms Martha Wandrag
10. Ms Aletta Tiulana Van Dyk
11. Mr John Morgan
12. Ms Lutritia Tredoux
13. Mr Willem Stoman
14. Mr Russel Hawton
15. Mr Henk Swart
16. Ms Corne Slabbert
17. Mr Costa Kassimatis
18. Mr Philip Du Toit
19. Mr Murdoch Steele
20. Ms Hendrike Shepard
21. Ms Jacqueline Veronica Maré

[43] I do not intend to summarise the testimony of each of the individual witness but will refer to their evidence where necessary. Most of witnesses referred to the fact that Schonegevel in no uncertain terms told them that they can stay as long as they like at the park, provided they abide by the parks' rules and pay their monthly rent. They also referred to the fact that they were told their successors can inherit the structures on the plot and he repeatedly said 'his word is his word' and did not want to put the lease agreements into writing. According to the witnesses they verily believed the agreement they entered into with him was a 99 year 'huurpact' otherwise they would never have considered purchasing a unit at Paradise Park. Some also testified that Schonegevel indeed mentioned the words of a 99-year lease to them and that is the reason they decided purchase a unit at the park.

[44] Mrs Potgieter, in her testimony, confirmed that her late father (Schonegevel) agreed that occupiers in the park may stay as long as they are able to on the premises as long as they pay the rental and abide by the rules. According to her, due to the demands of the Municipality and lack of funds her father had to sell the park. She further denied that 99-year lease was entered into with the occupiers.

[45] Magna called Duncan Heard, an environmental specialist. His evidence was largely about the negative impact the permanent residents have on the local environment and the pollution by the inadequate sewerage system on the adjacent lake and the consequences thereof.

[46] Having had regard to the evidence of the Respondents that testified, the history of the matter and the delay therein, I decided after the testimony of Potgieter that it will be in the interest of justice to proceed further with the matter on affidavit, except where it concerns expert evidence. Mr Sharuh, expresses some concern about my decision as according to him approximately 41 occupiers still want to come and testify, that about 109 occupiers never filed an affidavit and that 18 who filed affidavits want to supplement their affidavits as some of their information could be out of date.

[47] A draft order was circulated to all parties with a time table and the further conduct of the matter. On 29 July 2021 Mr Sharuh expressed a desire to withdraw as attorney from record and was waiting for formal instructions from his clients to confirm it as none of the leadership members of the PPHOA were at court that day. Mr Sharuh also expressed some reservations as to the time-table which will essentially allow his clients four weeks to file supplementary affidavits. He was of the view a much longer period should be considered due to the advance age of his clients and the difficulties posed by the Covid-19 pandemic. The matter stood down until 2 August 2021 for Mr Sharuh to obtain the necessary instructions and appear or formally withdraw as attorney and or his replacement be in court.

[48] Mr Sharuh failed to appear on 2 August 2021. Mr Pieterse, a retired primary school principal, appeared in person and started to address the court. In essence Mr Pieterse

sought answers from the Court as to the reasons why Mr Sharuh was considering withdrawing as attorney from record.

[49] Mr Pieterse's request was rather perplexing, as Mr Sharuh was the obvious person to provide the answers for wanting to withdraw from the case. Moreover, no formal notice of withdrawal was filed by Mr Sharuh as required in terms of Rule 16 (4) of the Uniform Rules² of this Court. The matter stood down for Mr Pieterse to contact Mr Sharuh. On resumption, Mr Pieterse reported that Mr Sharuh was on his way to Gauteng to attend to a crisis and cannot be at court, even-though the matter was on the continuous roll of this court.

[50] The order made on 2 August 2021 was read to Mr Pieterse who indicated he understood it. According to the order Magna had until 6 August to file two further affidavits. The 1st – 284th Respondent had until Monday 30 August to file any additional

² 16 Representation of Parties

16 (4) (a) Where an attorney acting in any proceedings for a party ceases so to act, he shall forthwith deliver notice thereof to such party, the registrar and all other parties: Provided that notice to the party for whom he acted may be given by registered post.

(b) After such notice, unless the party formerly represented within 10 days after the notice, himself notifies all other parties of a new address for service as contemplated in subrule (2), it shall not, be necessary to serve any documents upon such party unless the court otherwise orders: Provided that any of the other parties may before receipt of the notice of his new address for service of documents, serve any documents upon the party who was formerly represented.

(c) The notice to the registrar shall state the names and addresses of the parties notified and the date on which and the manner in which the notice was sent to them.

(d) The notice to the party formerly represented shall inform the said party of the provisions of paragraph (b). [Subrule (4) substituted by GN R235 of 18 February 1966, by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

witness affidavits and answering affidavits, if any, to Magna's further affidavits. Magna had until Friday, 3 September 2021 to file replying affidavits, if any, to the affidavits that 1st – 284th Respondent may file. The Municipality had until 20 September to file its third supplementary report. On Monday, 4th October 2021 Magna had to file its heads of argument. The Respondents had until 11 October 2021 to file their head of argument and the parties had to jointly by 18 October 2021 comply with Practise Note 43 of this Division.

[51] Mr Pieterse also explained that he was instructed by Mr Sharuh not to accept any documents from the court. This was rather odd as Mr Pieterse fully understood what was explained to him and common sense dictates that in the event Mr Pieterse and his group wanted to appoint another attorney a copy of the order would be at hand. The matter was then postponed to 25 -27 October 2021 for argument. Except for Mr Pieterse and those supporting him, the rest of the parties, substantially complied with the order. In Mr Pieterse's replying affidavit he tried to suggest a mistake was made as Mr Sharuh never instructed him not to accept any documents from the court.

[52] Mr Sharuh thereafter failed to appear on behalf of his clients. He also failed to file a formal notice of withdrawal from the record as required. Mr Pieterse then started to appear in person, with the support of 145 other occupiers.

[53] On 10 August 2010 some residence of Paradise Park, the bulk which Mr Sharuh appeared for, wrote a letter of complaint to the Judicial Service Commission about my

alleged bias in the matter and wanted the JSC to replace me with another judge. I was not formally informed by the JSC about the complaint and assume it was dealt with accordingly. On 20 August 2021, PPHOA (under the hand of Tracy-Lynn Henn) send a letter to the Judge-President of this Division to complain about the manner in which I am dealing with the matter and sought his intervention to replace me with another judge. The Judge-President responded by stating he cannot interfere in the matter and the complainants are at liberty to bring a recusal application.

[54] An application for my recusal was subsequently launched by Mr Pieterse. He was repeatedly informed that he cannot act on behalf of the other occupiers. He also mentioned that individual application for my recusal will then be launched. It needs to be mentioned that efforts to obtain pro bono legal assistance for Mr Pieterse and his group was met with scepticism. The attorneys firm, Weber Wentzel, was willing to come on record to assist Mr Pieterse and his group of supporters on a pro bono basis. They however insisted on the services of Mr Sharuh and the offer of Weber Wentzel was not taken up. Mr Pieterse on 27 October 2021 requested a further postponement to obtain the services of an attorney. Mr Pieterse agreed to pay the wasted costs occasioned by the postponement. A postponement was granted with costs including an order that if Mr Sharuh is to be appear, he needs to explain his absence from court whilst still on record, as well as his failure to file a notice of withdrawal of attorneys of record. Needless, to say Mr Pieterse applied for leave to appeal the order of costs. That was subsequently refused.

[55] Mr Sharuh's office was visited on two occasions in late October 2021 by members of the PPHOA. The visits prompted Mr Sharuh to write a letter to the Court to record that he has no instructions and has not accepted a mandate to appear on behalf of Mr Pieterse in the recusal application. It was also recorded that in the absence of any clear mandate from his clients he has withdrawn as attorney of record in the eviction proceedings.

[56] Mr Pieterse proceeded in person with the recusal application. The application was subsequently dismissed on 31 January 2022. Mr Pieterse then wanted to file an application for leave to appeal against my judgement and order. In view of the interest of justice and the long history of the matter, I declined to hear such an application and suggested to Mr Pieterse, I will consider such an application at the conclusion of the eviction application. Mr. Pieterse requested a further postponement to consult with the members of PPHOA. A postponement of more than 3 weeks was granted to allow Mr Pieterse to consult with whomever he wants, to allow him and his supports who are Respondents, to file updated supplementary affidavits and for argument. The Respondents failed to file further supplementary and or updated affidavits.

[57] On 1 March 2022, Mr Pieterse indicated he had no mandate from the PPHOA to address the court and has nothing to say in his personal capacity. The Respondents, in person, were given an opportunity to address the Court. They however declined to do so. It was only Mr Nicholas Hydenreich who addressed the court. According to him, he allowed his elderly parents to stay with him after the eviction notices were served upon

them. He expressed his disappointment with the eviction and the manner in which Paradise Park was managed. He further mentioned that both his parents which in the meantime had succumbed during the Covid-19 pandemic, were looking forward to their retirement at Paradise Park. It needs to be mentioned that Mr Pieterse also sought a further postponement as an urgent application was apparently launched at the Constitutional Court against my refusal to hear the application for leave to appeal against the recusal judgement. The latter was refused and argument proceeded.

[58] Mr De Villiers, Mr Du Toit and Ms Erasmus also addressed the court extensively. I deem it unnecessary to repeat their argument save to say Magna persisted with the relief sought and the Municipality is willing to assist those that qualify for emergency housing and frail care help.

[59] The Respondents are a diverse group of people, with diverse and unique circumstances. Most of the witnesses that testified are currently occupying dwellings in Paradise Park on a permanent basis; others do during holidays with a desire to ultimately retire there permanently; some of the Respondent concluded written agreements of lease with Schonegevel during the period 1 March 2011 and 28 February 2104, when that period expired, it reverted to indeterminate oral lease agreements as none of the lessees elected to exercise their rights in terms of the option by giving six months written notice prior to the termination date, to renew the lease on similar terms. Others claim they only entered into a 99-year oral lease agreement with him. Some of the witness also expressed

their resentment with Schonegevel as he allowed people to sell and claiming a 10% facility fee without informing them of the impending evictions. The witnesses also felt hard done by Schonegevel's conduct as some are 60 years' and older, had been staying in the park for many years and verily believed that they can peacefully retire at Paradise Park, and allow their successors to inherit the units.

[60] The income and lifestyle of the Respondents also differ significantly from each other. There are those who are enjoying a decent lifestyle whilst some are not so fortunate. The evidence of the witnesses also revealed that most of the Respondent currently living in Paradise Park receive a social pension grant "SASSA grant" in addition to any other income they may receive from another pension fund or be it from running a small business from the park, or from retirement funds and or other savings. The witnesses further voiced their grievances with the manner in which Magna are currently running the park. According to the witnesses they are not unlawful occupiers and established a real right in Paradise Park and want to stay on indefinitely.

[61] At the heart of the dispute is the claim by the Respondents that: firstly, Schonegevel entered into 99-year lease agreement with them and accordingly they are not unlawful occupiers; and secondly, whether it will be just and equitable to grant an eviction order as most of the current occupiers claim they have no alternative accommodation and would like to remain living as permanent residents in Paradise Park.

The Law:

[62] It is now well-established that an enquiry in terms of PIE as to whether to grant an order for eviction is grounded in a three legged inquiry process:³ First, it must be determined whether the occupier has any right in law to occupy the property. If he or she has such a right and it remains existent, it is the end of the enquiry and the application must be refused. Secondly, if no existent right to occupy is shown, it must be determined whether or not it is just and equitable that the occupier be evicted; and finally in the event that it is held to be just and equitable that the occupier be evicted, then the terms and conditions of such eviction fall to be determined.

[63] In respect of the first leg, the definition of an unlawful occupier is defined in PIE as being: *"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."* Accordingly, in the event that no right in law is demonstrated by the Respondents to occupy the property or that the right was duly cancelled or run its course, the Respondents are indeed unlawful occupiers as contemplated in PIE.

[64] In determining the second and third legs, justice and equity plays a substantial role and the court is enjoined to adopt a more inquisitorial procedure.

³ See *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA)

[65] In The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele⁴

the Supreme Court of Appeal held the following at para [10].

[10] Section 26 of the Constitution, which entrenches the right to housing, provides that:

- '(1) Everyone, has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

... Section 26(2) creates a positive obligation on the state to devise and implement a reasonable housing programme. In *Government of the Republic of South Africa & others v Grootboom & others*, the Constitutional Court held that a housing programme could only be reasonable if it provided emergency shelter to people in desperate need who, for whatever reason, faced the prospect of homelessness. The right to be protected from arbitrary eviction, as contained in s 26(3) of the Constitution, is given effect to through various provisions of PIE. One of the primary objectives of PIE is to ensure that evictions take place in a manner consistent with the values of the Constitution. PIE prescribes the requirements which must be satisfied before a court may grant an order of eviction. Of relevance to this application are ss 4(6) and 4(7) which provide that a court may only grant an eviction order if it is just and equitable to do so, after considering all the relevant circumstances.

...

In terms of s 4(6) and 4(7), a court is obliged to consider the rights and needs of the elderly, children, disabled persons and households headed by women. These are specifically listed as relevant factors to which a court must have regard. In terms of s 4(7), the court is also obliged to consider the availability of alternative land for the

⁴ (102/09 and 499/09) [2010] ZASCA 28 (25 March 2010) – see par 10-16

relocation of an occupiers. Where information relating to these matters is not placed before the court, the court will not be in a position to consider these circumstances in determining whether the eviction was just and equitable.”

The 99-year lease.

[66] On the objective facts, it is evident that Schonegevel verbally agreed with each tenant that they can stay in Paradise Park as long as they like on condition they pay their monthly rental and abide by the parks rules. He furthermore, repeatedly stated to the tenants “his word is his word” and essentially refused to enter into any written contracts until the PPHOA instituted a complaint in 2010 against him with the Renting Housing Tribunal. That complaint caused Schonegevel to enter into a 3 year written lease agreement with the majority of the tenants from 1 March 2011 to 28 February 2104. When that period expired, the written leases were not renewed and none of the Respondents or tenants exercised their option to renew their lease agreements and it reverted to indeterminate oral lease agreements. The witnesses could not provide any documentary proof to their claim that Schonegevel entered into a 99 year lease with them and obtain a real right to stay permanently in the park.

[67] In cross-examination the witnesses were at pains to explain their reasoning behind entering into 3 year written lease agreement in 2011, when Schonegevel agreed to a long term lease of 99 years. They also had difficulties explaining the findings of the Rental Tribunal in 2014 and the forensic report of Clacher in May 2016 that; firstly, the 99-year

lease agreement was not mention in the 2010 complaint with the Rental Board; and secondly, no written notation or documentation could be found to substantiate the claim of a 99-year lease agreement. The witnesses could also not explain their reluctance to register the said leases in terms section 2 of the Formalities in Respect of Leases Act, 18 of 1969⁵ if it had been agreed upon.

[68] On a conspectus of all the evidence, the version by the Respondents that they obtained a real right to permanently stay on the property by virtue of a long lease of 99 years, is simply untenable. What the Respondents did establish is that Schonegevel entered into undetermined leases with them. That position continued even after the expiry date of the 3 year written leases he signed in 2011. On that basis, the provisions of section 5(5) of the Rental Housing Act⁶ is applicable which provides that if a tenant on expiration of the lease remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions as the expired lease,

⁵ (2) No lease of land which is entered into for a period of not less than ten years or for the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee indefinitely or for periods which together with the first period of the lease amount in all to not less than ten years, shall, if such lease be entered into after the commencement of this Act, be valid against a creditor or successor under onerous title of the lessor for a period longer than ten years after having been entered into, unless-
(a) it has been registered against the title deeds of the leased land;

⁶ Act 50 of 1999

except that at least one month's written notice must be given of the intention by either party to terminate the lease⁷.

[69] It follows that Schonegevel was required to give the Respondents and or tenants at least one month written notice in order to terminate the lease and was not obliged to advance any grounds for such cancellation. On the facts before me, it is clear that the Respondents were provided with a much longer period than legally required. The notice of cancellation of the leases clearly do not require that the grounds of such cancellation need to be disclosed. Accordingly the Respondents were all served with proper notices to cancel their lease agreements.

Unlawful Occupation:

[70] Turning to the issue, whether the Respondents and or the current occupiers are in unlawful occupation. According to the long title of PIE, the purpose of the Act is on the one hand to provide for the prohibition of illegal eviction and on the other to provide procedures for the eviction of unlawful occupiers. The purpose of PIE is therefore to protect both the occupier and the landowner.

⁷ Provisions pertaining to leases: section 5 (5) provides that:

(5) If on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions as the expired lease, except that at least one month's written notice must be given of the intention by either party to terminate the lease.

[71] In terms of s 1 (xi) of PIE an "*unlawful occupier*" means 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 No. 31 of 1996).

[72] With regard to the eviction of unlawful occupiers section 4(8) of PIE provides that; If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determined - (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a). The latter section thus creates the jurisdictional requirement that: If the Court is satisfied that all the requirements of this section has been complied with and no valid defence has been raised by the unlawful occupier, it must grant an order for eviction.

[73] On a conspectus of all the facts in this case Schonegevel clearly complied with the necessary prescripts of PIE. His attorneys delivered to each of the Respondents the required notices to cancel the leases prior to instituting the eviction proceedings and the Respondents

were given more than a month to comply with the eviction order. The defence that their leases were not lawfully cancelled by Schonegevel is thus baseless and without merit.

[74] But there is another reason why the Respondents' defence, of being lawful occupiers, is unsustainable. According to the papers filed of record, the PPHOA started to play a crucial role in matters of Paradise Park since laying a complaint in 2010 with the Rental Tribunal. Since then it became extremely vociferous to the extent that their conduct was even criticized by the Rental Tribunal in 2014 and the Clacher report in 2016. That conduct complaint about also started to rear its ugly head in these proceedings, but that aside. In June 2012 WRAP released its report about the contraventions Schonegevel is committing by allowing structures to be erected by tenants for residential purposes whilst Paradise Park falls under Resort Zone 1. That report highlighted the following contraventions *inter alia*: the contravention of the Municipal Zoning Scheme, which in the interim had been replaced by the new Overstrand Zoning Scheme of June 2013, (which came into effect in February 2014); the Land Use Planning Ordinance, 15 of 1985 (which in the interim had been replaced by the Western Cape Land Use Planning Act, 1 of July 2015), the National Environmental Management Act, 107 of 1998, the National Building Regulations, the upgrade of the sewerage system and fire safety issues which still needed some attention.

[75] The Order of Court dated 12 March 2012 was obviously to allow Schonegevel a period of time to come up with a proposal to regularise his illegal conduct and to provide the

Municipality with the necessary information. And, if necessary the Municipality can bring fresh proceedings to compel him to do so, declaring him in contempt of court with an appropriate sanction and stop him from using and permitting the Paradise Park to be used in an unlawful manner. It is common cause Schonegevel failed to comply with that Court Order.

[76] This all means that Schonegevel's use of Paradise Park for residential purposes was not permitted by law and unlawful. He also constructed a mini-golf course on the property with a club house after 2010, for which no approval was granted in terms of the Land Use Planning Ordinance, 1985.

[77] There can be no doubt that the PPHOA was clearly aware since 2014, if not earlier, about Schonegevel's contraventions of the Municipal Zoning Scheme. In fact, a comprehensive report by the Jono Trust was filed on their behalf to object to the proposed rezoning and sub-division of Paradise Park in June 2015. So to sum up. Before the current eviction proceeding had commenced, the PPHOA was fully aware about the contraventions that were committed by Schonegevel and simply acquiesced to it.

[78] From all the above-mentioned there can be no doubt that the Respondents and all those occupiers currently occupying Paradise Park are doing so unlawfully. It is also unlawful

as it is a contravention in terms of s 39 of LUPO (which is still operative⁸), to not comply with the zoning regulations which binds everyone, including the Respondents⁹.

Just and equitable grounds to evict:

[79] As the Respondents and those currently occupying Paradise Park has no existent right to occupy Paradise Park, the question now is whether on the available evidence, it would be just and equitable to grant an eviction order against them.

[80] The Municipality filed extensive reports in this matter. A social worker was also appointed to investigate the personal circumstances of those Respondents and tenants that are occupiers in the park. The municipality has identified a portion of land where they could accommodate those occupiers that qualify near Stanford which is an area close to Hermanus. On 9 December 2020, the Municipality held a meeting at a hall adjacent to Paradise Park to engage with the residence of the park. An invitation was also sent to Mr Sharuh, who at that stage was still on record, to advise his clients about the venue of the meeting. According to the Municipality despite numerous appeals to all the residents at Paradise Park to place their names on its housing list, only 23 households have done so at the time. Only 28 residents of the park attended the meeting with the Municipality.

⁸ Despite the repeal of LUPO by s 77 Western Cape Land Use Planning Act, 1 of July 2015), (a) a zoning scheme, including a zoning map, register and scheme regulations in existence in terms of section 7, 8, 8A, 9, 10 or 12 of the Ordinance immediately before the commencement of this Act, remains in force, and sections 2, 7 to 14, 39 to 41, 46 and 47 of the Ordinance apply to that zoning scheme, as if not repealed, unless those provisions are inconsistent with this Act or an applicable by-law.

⁹ See *Emilel Investments v Silvestri & Others* [2012] ZASCA 181 (29 November 2012 at paras [13] and [14].

Mr Sharuh's clients expressed a concern about the venue as they were apparently more than a 100 and were vulnerable due to their age and comorbidities to attend such a meeting as there was a resurgence of Covid-19 at the time. The residents at the meeting were again advised to place their names on the Municipality's housing list. The concerns by some residence about the Stanford emergency housing project was discussed at the meeting as they felt that they cannot go from a formal house to an informal structure. According to the residents the Municipality must provide them with a similar house to what they currently have in Paradise Park. It was explained by the Municipality that they were not entitled to housing of their choice or in an area of their choice.

[81] In 2018, the social worker obtained information and data from the occupiers in Paradise Park and created a profile which shows the following: in 2018, 168 of the 245 occupiers resided on a permanent basis at the park; in relation to income 47 did not disclose their income; 38 were in the income bracket of between R 0 and R 3 500 pm; 38 in the income bracket of R 3501 to R 7 000 pm; and 45 in the income bracket of R 7001 and above; in relation to age, 44 did not disclose their age; 73 occupiers were above 60 and 51 occupiers below 60.

[82] The evidence has also shown some occupiers utilised their savings and retirement funds to purchase a structure at the park. The structures were publicly advertised in newspapers. Many believed that they can stay permanently and retire at Paradise Park and allow their successors to inherit the structures. A number of occupiers are sexagenarians

and older. However, according to the Municipality many of the elderly occupiers insist that they are still independent and resisting to live in an old age facility. However, it needs to be mentioned that three occupiers that reached out for assistance and fell within the requirements for assisted living and frail care, have with the help of the Western Cape Social Welfare been placed in frail care facilities.

[83] The present difficulties facing the occupiers at Paradise Park can therefore not be underestimated. But having said that, the current dreadful consequences facing them was lurking in the background for time. It is inconceivable that the occupiers did not realise the serious risk of purchasing a structure on a plot in a resort that unlawfully permitted its use for residential purposes. The occupiers were also repeatedly warned by Schonegevel that he is the owner of the plots. In fact, since 2010, if not earlier, the occupiers knew that the rental agreement with Schonegevel has become a serious problem. In 2014, the Rental Tribunal sounded the alarm of the unrealistic expectations of the occupiers in terms of the rental they want to pay and what they have as it is not commensurate with inflation. Despite all of these warnings it appears the PPHOA was hell bend to undermine the efforts of Schonegevel to cover the rising inflationary expenses of the Park and to bring it within the statutory regulatory framework.

[84] The evidence of Mrs Aletta Van Dyk and Mrs Sheppard is also indicative of the general attitude of the people residing at Paradise Park. Van Dyk, who is wheelchair bound, applied to be placed on the Municipality housing list in 2010. She was for a long time the only

resident of Paradise Park to have so applied. In September she was informed that she was allocated a house in Hawston and received a housing subsidy in the amount of R 128 814.00 which paid for the full costs of the house. During her evidence Van Dyk gave all short of reasons why she could not move into her new allocated house. None of them made any real sense. In fact, since February 2021 she has conveniently rented the house out for an amount of R 3000 pm and is now virtually staying rent free at Paradise Park. Sheppard on the other hand, after receiving the eviction notice, used her pension pay from her previous employer to buy at least three more structures in Paradise Park which she now rents out for an income. According to her version she is now financially hamstrung and cannot afford to live elsewhere.

[85] There are also those like Mr and Mrs De Villiers, Mr Herman Pieterse and Mr Henk Swart that owns other properties. Pieterse owns a house in Ceres and Swart in Kuilsriver. Pieterse in his evidence claimed that he cannot move back to Ceres as his daughter and her family is staying in that house.

[86] The evidence of the occupiers has clearly demonstrated a serious irrational sense of entitlement to permanently reside at Paradise Park, at the expense of the current landowner. Infusing grace and compassion into the process of eviction does not mean that private entities are obliged to provide free housing for unlawful occupiers indefinitely.

[87] The Municipality in its September 2021 report has highlighted the health and safety issues at the park. Magna had settled with 45 occupiers and the structures of those occupiers that settled were demolished. Some of the electrical kiosks were locked whilst others were left open. It is not in dispute that one of the occupiers was electrocuted when trying to do an illegal connection. The sewerage system in the park is also unsatisfactorily as some occupiers refuse to connect their existing septic and conservancy tanks to the reticulation system that was installed as they refuse to pay the cost for testing the tanks for tightness to prevent leakages as required by the Municipality.

[88] The municipality was ultimately of the view that having regard to their investigations that an eviction order would unlikely result in all the occupiers becoming genuinely homeless.

[89] Magna has filed an extensive affidavit to explain the factual circumstances and the actual position of Paradise Park since the eviction application was instituted in 2016. According to Magna it has spent almost R 3.5 Million towards improvements and compliance with the necessary legal framework. It also paid in excess of R 270 000 towards the private social worker who have done a comprehensive social study of the inhabitants of Paradise Park. Magna has also complaint that it is currently subsidising the occupants with its municipal services which include rates, taxes, water and sewerage. According to Magna Paradise Park owes the Municipality in the amount of R 1 025 769, 32 in arrears municipal services which the Respondents should have covered.

[90] It is evident that Magna did engage with the occupants of Paradise Park in an attempt to reach a satisfactorily solution acceptable to all and to engage the Municipality in order to reach a solution to help those which may genuinely be destitute and in need of care.

[91] The attempts to settle with the occupiers in the Paradise Park have however been met with limited success as settlements could only be reached with 45 occupants. According to Magna, currently a large portion of occupants are not paying any levies and are rather utilising the money to pay their legal fees.

[92] Our Higher Courts have repeatedly stated that it cannot be expected of the landowner to accommodate the occupiers indefinitely. The right to housing contained in section 26 of the Constitution is neither in common law nor in accordance with the Constitution, enforceable against individual landowners.

[93] In City of Johannesburg v Changing Tides 74 (Pty) Ltd¹⁰ the Supreme Court of Appeal held that:

"The position is otherwise when the party seeking the eviction is a private person or entity bearing no constitutional obligation to provide housing. The Constitutional Court has said that private entities are not obliged to provide free housing for other members of the community indefinitely, but their rights of occupation may be restricted, and they can be expected to submit to some delay in exercising, or some suspension of, their right to possession of their property in order to accommodate the immediate needs of the occupiers."

¹⁰ 2012 (6) SA 294 (SCA) at 308 B-C:

[94] In considering an appropriate remedy this Court is enjoined to seek a balance between the interests of the landowner with those of the occupiers. The rights on both sides of the scale enjoy protection under ss 25 and 26 of the Constitution, respectively.

[95] The contention by Magna that their investment in Paradise Park should not be sterilised, is a valid and weighty consideration. The decision by the Constitutional Court in Occupiers, Berea v De Wet NO and Another¹¹ where it held the following is instructive.

".. The effect of PIE is not and should not be to effectively expropriate the rights of the landowner in favour of unlawful occupiers. The landowner retains the protection against arbitrary deprivation of property. Properly applied, PIE should serve merely to delay or suspend the exercise of the landowner's full property rights until a determination has been made whether it is just and equitable to evict the unlawful occupiers and under what conditions.

The availability of alternative land or accommodation is a relevant consideration to both enquiries into what is just and equitable. These are considerations which should, as far as possible, be resolved without undue delay to avoid the seeping-in of unintended consequences that may cause irreversible prejudice."

[96] In view of the above-mentioned and despite my own sense of empathy with the circumstances in which some of the Respondents find themselves, the evidence has certainly established that it will be just and equitable to grant an eviction order. The

¹¹ of 2017 (5) SA 346 (CC) at paragraph 79 – 80:

Respondents are also in flagrant breach of the Municipal Zoning Scheme, which remains an offence.

Terms and Conditions of the Eviction:

[97] In view of the above-mentioned the terms and conditions of the eviction must now be determined. It is so that Magna's right to its property has effectively been suspended since the time it became the sole owner of the property which is almost 5 years ago.

[98] It is clear that despite the Municipalities best efforts it is still unknown how many occupiers will ultimately qualify for emergency housing. The calcitrant approach by the PPHOA in these proceedings did also not assist. It is obvious that the Municipality cannot work on historic information to determine whether an occupier is eligible for emergency housing. It needs contemporary information to determine that issue. According to the Municipality a period of three months will be required to deal with these issues. In my view that request is to suspend the exercise of Magna's full property rights for a further three months would not be unreasonable and or unjust in these circumstances.

[99] It was also recorded by Magna that due to the time elapsed of almost 5 years, even-though the 1- 284th Respondent were initially cited separately and by name many of these parties has since the inception of the proceedings either sold their structures, causing them to be replaced by a new resident or some even obtained additional

structures. As a result, reliance will be placed to the reference of all unknown parties as cited the 285th Respondent in the proceedings if an eviction order is granted.

[100] Lastly, a counter application was instituted by some of the Respondents. It was submitted by Mr Du Toit, in the event an eviction order is granted that the counter-application be postponed to be argued. I am of the view that the counter-application is unripe for hearing and need to be removed from the roll and can be re-enrolled when it is ripe for hearing.

[101] For all the above stated reasons I am satisfied that Magna is entitled to an eviction order.

[102] In the result the following order is made:

- 1.) The 1st to 285th Respondents, as well as the occupiers who has obtained occupation on the property without either the Applicant's consent and or by gaining access to the property themselves, or are holding title under one or more of the 1st to 285th Respondent are herewith ordered to vacate the property known as Paradise Park Holiday Resort, Vermont, described as Erf 927, Division of Caledon ("the property") within 3 months of granting this order, failing which the Sheriff, assisted by such law enforcement agencies as may be necessary, is hereby authorised and directed to evict such Respondents from the property.

- 2.) The occupiers who are unable to source alternative accommodation from their own resources, must within a period of 1 month of date of this order, approach the Overstrand Municipality to apply for emergency accommodation by giving all necessary details of their personal circumstances as required by the Municipality, including whether they have special needs.
- 3.) The Overstrand Municipality must report back to this court within three months by way of an affidavit, advise who will be helped, how they will be helped, how long it will take for those the Municipality will be helping to erect their structures, and what assistance the Municipality will be giving with the construction of those structures.
- 4.) The Applicant is further authorised to demolish the remaining structures after the property has so been vacated and needs to comply with any Municipal By-Law, where applicable, before such demolishing of structures occur.
- 5.) The costs to be paid by those Respondents that opposed the application, such costs to include the costs occasioned by the employment of two counsel.
- 6.) The counter-application is struck from the roll with no order as to costs.



Le Grange, J