The ongoing battle for secure tenure for non-owners in light of *Grobler v Phillips*

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SUMMARY

The SCA and CC judgments in *Grobler v Phillips* highlight the complexity of land relations, the continued vulnerability of non-owners and the extent to which laws, which are often very progressive, are sometimes limited in their potential to give substantive rights. This is a problem that manifested because of the SCA judgment in *Grobler v Phillips*. Where it is held that an eviction is not just and equitable, it could prove to be highly problematic, especially in terms of what an owner is obliged to accept, and regarding the tenure security of the unlawful occupier who is not evicted. The uncertainty in the context of what happens when an eviction order cannot be granted requires urgent attention, whether you are dealing with single owners and unlawful occupiers or unlawful occupation on a large scale, the need for longer-term, more sustainable, solutions is imperative. The question of where the authority for such a solution lies, and how such rights should be constructed or developed in future, should be prioritised in the coming years. The *Grobler* debacle has also revealed the further questions around what can be expected of landowners in the new constitutional dispensation. More specifically, it has sparked renewed questions about the duty on private individuals in providing alternative accommodation to evicted occupiers. Although the court was vehement in its denial of any obligation on landowners to provide alternative accommodation, this article has challenged this denial especially in so far as such a conclusion does not necessarily line up with prior judgments in this regard.

1 Introduction

On 20 September 2022, the Constitutional Court (CC) handed down the judgment of *Grobler v Phillips and Others* – a judgment in which the court held that it would be just and equitable to evict Mrs Phillips from the property belonging to Mr Grobler.[1] The Supreme Court of Appeal (SCA) had held just a year earlier that the eviction order should not be granted.[2] At the time the CC handed down its judgment, Mrs Phillips was a 85-year-old widow residing on property belonging to Mr Grobler. She was living on the property with her disabled son and had resided there since 1947 when she was 11 years old. Mr Grobler had purchased the property on 15 September 2008 and there were numerous owners before him – some of whom had actually consented to Mrs Phillips' occupation. The

1 2022 ZACC 32 (hereinafter *Grobler CC*).
2 *Grobler v Phillips* 2021 ZASCA 100 (hereinafter *Grobler SCA*).

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property had also undergone a process of subdivision of the original farmland into erven. However, Mrs Phillips resided on the farm throughout the subdivision. Mr Grobler had met with Mrs Phillips on three separate occasions asking her to vacate the property. Mr Grobler also offered Mrs Phillips alternative accommodation and was willing to pay so that she could rent other accommodation, which she refused. Mrs Phillips believed that she had been granted an oral right of *habitatio*[3] by the previous owner, a right she mistakenly believed was also enforceable against Mr Grobler.

The CC had to decide whether it was just and equitable to evict Mrs Phillips and her disabled son in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).[4] In the end, the court held that it would be just and equitable to evict Mrs Phillips and her son, subject to a number of conditions that had to be complied with first before such an eviction order could be executed. The *Grobler v Phillips* saga has sparked many reactions, including headlines in news, like: *Top court finds eviction of woman who has been in house since 1947 lawful*.[5] This contribution considers the SCA and the CC judgments. The hope here is to interrogate some of the main implications of the judgments with the view to highlighting problematic aspects in both decisions.

With this purpose in mind, the article is divided into three parts. Section two (after this introduction) will consider why the CC held that it would be just and equitable to evict Mrs Phillips, seemingly in contrast to the SCA's judgment, which in fact held that it would *not* be just and equitable to grant the eviction order. Section two will therefore reflect upon the interplay between the reasoning of the SCA and the CC and why the respective courts came to diverging outcomes on whether an eviction would be just and equitable. In section three of the article, the focus falls on the consequence of the outcome of the SCA judgment. Some aspects of the SCA judgment that are particularly problematic are highlighted, which to a certain extent was alleviated by the outcome in the CC – although, as will be argued in section four, the outcome in the CC is not completely unproblematic either. Two aspects of the CC judgment are analysed in section four, namely, the way the court foregrounded the interests of the owner in eviction matters and the court's take on the obligation on private individuals when it comes to providing alternative accommodation in cases where potential evictees would be rendered homeless. Overall, the article seeks to provide a sense of where the

3 This is a right to reside on the property for life. For more on the right of *habitatio*, see Muller, Brits and Boggenpoel *Silberberg and Schoeman's The Law of Property* (2019) 387; Pope and du Plessis (eds) *The Principles of the Law of Property in South Africa* (2020) 258.

4 *Grobler CC* para 1.

5 See Top court finds eviction of woman who has been in house since 1947 is lawful (timeslive.co.za) https://www.timeslive.co.za/news/south-africa/2022-09-21-top-court-finds-eviction-of-woman-who-has-been-in-house-since-1947-is-lawful (last accessed 2024-10-07).

Grobler matter has left eviction jurisprudence in South African law. This is done through the lens of two overarching questions: Can the judgment really be faulted, and what are some of the major implications of the judgment for South African law?

2 To evict or not to evict?

Let us begin with the difference between the SCA and the CC judgments in terms of the granting of the eviction order. Similar to the high court, the SCA held that there were various reasons to justify coming to the conclusion that it would *not* be just and equitable to evict Mrs Phillips, namely her advanced age, the fact that she lived on the property for over seven decades, and that she occupied the property with her disabled son.[6] The court also mentioned the fact that Mrs Phillips thought she had a right to occupy (which was in fact secure before 2009 when the property still belonged to the previous owners). This impacted on the court's decision of whether it was just and equitable to evict her. Based on these factors, the SCA concluded that:

> These are very weighty considerations. In my view, they outweigh the protection of the exercise of the right to property that an entitlement to an order of ejectment provides. PIE recognises that in appropriate circumstances the right to full exercise of ownership must give way, in the interests of justice and equity, to the right of vulnerable persons to a home.[7]

In contrast, as briefly alluded to already, the CC set aside the order of the SCA and substituted it with a substantially amended version. Essentially, the CC granted the eviction order subject to a number of conditions that first had to be met. The court began by setting out what should be taken into consideration in deciding whether it would be just and equitable to grant an eviction order.[8] The court agreed with the SCA that Mrs Phillips' advanced age, disabled son and the fact that she would have been protected under ESTA had the farm not been converted into urban developments are indeed relevant factors that should be taken into account in line with section 4(7) of PIE. However, according to the court, there were other considerations that impacted on whether it would be just and equitable to evict Mrs Phillips. The court made a number of important statements that are worth reiterating.

The CC disagreed with the SCA decision to take the personal preference or wishes of the unlawful occupier into account in the decision of whether it would be just and equitable to evict.[9] The court mentioned that "[t]he question whether the constitutional rights of the unlawful occupier are affected by the eviction is one of the relevant considerations, *but the wishes or personal preferences of the unlawful*

6 *Grobler SCA* paras 46, 49.
7 *Grobler SCA* para 50.
8 *Grobler CC* para 33.
9 *Grobler CC* paras 34-36.

occupier are not relevant".[10] The court also mentioned that the right of residence is not tied to a specific house of his/her choice.[11] Therefore, Mrs Phillips did not have the right to choose where in Somerset West she wanted to live.[12] In this regard, contrary to the SCA judgment, the CC did not regard this factor as relevant to determining whether it was just and equitable to evict.

Besides the consideration of the wishes of the unlawful occupier that should not have been taken into account, the court also emphasised what the SCA arguably should have considered. Here, the CC pointed out that the capacity of the landowner to provide alternative accommodation and the peculiar circumstances of the evictee are relevant. The court showed in line with *PE Municipality v Peoples Dialogue*[13] that an offer of alternative accommodation can be considered, but it is not a pre-condition for the granting of an eviction order. Therefore, the fact that Mr Grobler offered Mrs Phillips alternative accommodation is relevant in determining whether it would be just and equitable to evict her.[14] The SCA also noted that Mr Grobler had indeed offered Mrs Phillips alternative accommodation, which according to the court was "in a secure complex in the area of Somerset West" and such property would be transferred into the name of Mrs Phillips.[15] She, however, rejected the alternative accommodation on the basis that "[s]he was accustomed to life in the house she presently occupied and enjoyed not only the freedom and space it afforded her but also the environment around it".[16] The SCA refused to compel Mrs Phillips to accept the alternative accommodation against her wishes, because that would go against Mrs Phillips' dignity, rather than protect it.[17] This approach was openly rejected by the CC – an aspect to which this article returns in section four.

Another substantial difference between the SCA and the CC judgment in determining whether it would be just and equitable to evict Mrs Phillips, was the fact that the CC brought into the picture to a much greater extent the rights of the landowner – which aspect is elaborated on in section four of this article. The CC mentioned that "[t]he Supreme Court of Appeal failed to balance the rights of both parties".[18] In various places in the CC judgment, the court pointed out the imbalance with the determination of whether it would be just and equitable to evict,

10 *Grobler CC* para 36 (own emphasis added).
11 Here the CC relied on *Oranje v Rouxlandia Investmentes (Pty) Ltd* 2019 3 SA 108 (SCA) and *Snyders v De Jager* 2017 3 SA 545 (CC).
12 *Grobler CC* para 36.
13 2001 4 SA 759 (E).
14 See *Grobler CC* paras 38-41. At paragraph 43, the court mentioned that "[t]he efforts made by Mr Grobler from the time the property was registered in his name until the present application show that Mr Grobler has consistently been at pains to resolve the matter amicably, and no effort was made by Mrs Phillips to meet him halfway".
15 See *Grobler SCA* paras 52–57.
16 *Grobler SCA* para 55.
17 *Grobler SCA* para 57.
18 *Grobler CC* para 44.

especially from the landowner's perspective.[19] The court highlighted that "[a] just and equitable order should not be translated to mean that only the rights of the unlawful occupier are given consideration and that those of the property owner should be ignored".[20] If one looks at the impact the judgment would have for the landowner, Mr Grobler argued that it would result in him having to provide Mrs Phillips with free housing indefinitely, which was excessive, also given the fact that Mr Grobler already had to endure Mrs Phillips' unlawful occupation for 14 years.[21] Mr Grobler was at pains to point out that no obligation rests on private individuals to provide alternative accommodation.[22] This impact on Mr Grobler was all contrasted with the fact that Mrs Phillips would not be rendered homeless by the eviction order, since she would be able to relocate to another home within the same immediate community and "the order will not have the effect of uprooting her from the community she has known for decades".[23] Having regard to the weighing up of the rights of both parties, the CC held that it would be just and equitable to order eviction, subject to certain conditions, not the least of which is the provision of alternative accommodation by Mr Grobler for Mrs Phillips and her son.[24] As mentioned, this is of course a substantially different outcome to that of the SCA. The following two sections (sections three and four) will analyse the two outcomes, first the outcome of the SCA and then the CC judgment, with the view to highlighting several concerns with both decisions.

3 The SCA outcome: No eviction, but continued insecurity?

It is interesting to consider the SCA outcome. One of the big concerns with an outcome such as the one by the SCA in *Grobler* was the continued tenure insecurity of Mrs Phillips after the eviction order was denied. There is insufficient clarity in South African law regarding the legal consequences when an eviction order is held not to be just and equitable or when an eviction order becomes impossible to execute.[25] Arguably, the range of consequences of a decision not to order eviction varies, depending on whether one is dealing with one occupier (like in *Grobler*)

19 See *Grobler CC* para 40 ("*Claytile*, as well, reminds us that there has to be 'some give by both parties'. In essence, when balancing the interests, compromises must be made by both parties, in order to reach a just and equitable outcome"); *Grobler CC* para 41 ("However, one cannot overlook that Mr Grobler, even after having been granted an eviction order, attempted to assist Mrs Phillips.").

20 *Grobler CC* para 44.

21 *Grobler CC* para 45.

22 *Grobler CC* paras 37, 38 and 48. For a longer discussion of the positive obligation on landowners, see section 4 below.

23 *Grobler CC* para 46.

24 *Grobler CC* para 49.

25 Boggenpoel and Mahomedy "Reflecting on Evictions and Unlawful Occupation of Land in South Africa: Where do Some Gaps Still Remain?" 2023 *PELJ* 1-44.

or a group of occupiers (like in *President of the Republic of South Africa, Minister of Agriculture and Land Affairs v Modderklip Boerdery Bpk (Pty) Ltd*[26] or *Fischer v Persons Whose Identities are to the Applicants Unknown and Who Have Attempted or are Threatening to Unlawfully Occupy Erf 150 (Remaining Extent) Philippi in re: Ramahlele v Fischer*).[27] Nonetheless, it is clear that this situation is problematic in terms of its consequences for occupiers and owners alike.

To reiterate, the SCA held that it would not be just and equitable to evict Mrs Phillips. Although many would likely view that outcome as laudable, it is questionable whether there was any real or meaningful tenure security that Mrs Phillips obtained by virtue of the SCA judgment not to evict. It is a small victory really. On a smaller scale, it leaves one with the same type of discomfort as with the *Modderklip-* and *Fischer-*type situations, where eviction was also denied or could not be executed, but where appropriate long-term remedies were insufficient to grant any form of tenure security for the occupiers, or clarity for the owners for that matter. One's sense of justice and victory in the remedy awarded does not quite meet the long-term sustainable (tenure secure) solutions that a constitutional property law system should envisage.

It should be remembered that the right not to be evicted does not ordinarily, or even evidently, include a substantive right to continue occupying the property. Does it effectively result in the same type of occupation? Well, maybe. Mrs Philips may even have been able to occupy the property indefinitely. But, certainly, in terms of the property right that it gives such an occupier, there is insufficient tenure security simply in a right not be evicted. It is shield, not a sword. Stated differently, PIE was not meant to give unlawful occupiers substantive rights to continue occupation; it was meant to serve as a shield to prevent illegal evictions. Moreover, PIE was certainly not designed to convert unlawful occupation into rights to occupy (resulting in greater tenure security). The CC also reiterated that PIE was not designed to expropriate. Therefore, when landowners are expected to be tolerant in cases where it is not just and equitable to evict or where execution of an eviction order becomes impossible for some reason, section 25 of the Constitution may be violated.[28] The SCA (simply) held that it was not just and equitable to evict Mrs Phillips, it did not pronounce on the impact of such an order on the right of the landowner, *or* the type of right that Mrs Phillips would henceforth continue to hold.

One may argue that the effect of the SCA judgment was that Mrs Phillips (and her disabled son) would have been allowed to continue

26 2005 5 SA 3 (CC). See also Muller and Viljoen *Property in Housing* (2021) 24.

27 2014 3 SA 291 (WCC).

28 See *Grobler CC* para 37. The court relied on *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA) (hereinafter *Blue Moonlight*). See also Muller and Viljoen (2021) 29.

living on the property till her death, but that is not altogether clear, and the rights would arguably have continued to be precarious, even after the eviction order was denied. It is clear that this was a concern for the owner as shown in the CC decision.[29] If the owner did not appeal to the CC, and ultimately win that appeal, the uncertainty regarding Mrs Phillips' right to occupy may have continued.[30] In a real sense, the CC dodged this question because of its finding that an eviction order would be just and equitable. However, in coming to that conclusion, namely that it was just and equitable to evict Mrs Phillips, the court had to deal with another difficult issue of whose responsibility it is to provide alternative accommodation in the case where an eviction order is in fact granted. The CC outcome is critically discussed in the following section.

4 The CC outcome: Whose responsibility is it to provide alternative accommodation?

4 1 Introduction

As mentioned already, the CC set aside the order that was granted by the SCA and held that it was just and equitable to evict Mrs Phillips. Very importantly, the court held that the SCA failed to balance the rights of *both* parties appropriately, not giving sufficient weight to the interests of the landowner, Mr Grobler.[31] The CC brought the landowner – and his interests – into the spotlight (again).[32] This is very interesting if one considers the "constitutional matrix" that Justice Sachs in *PE Municipality v Various Occupiers*[33] initially emphasised.[34] In this respect, it is important to briefly set out the vision for the approach to evictions in the new constitutional era, with the ultimate purpose of determining whether the CC's approach in *Grobler* can be faulted. Thereafter, the article will focus on the CC's discussion of the obligations that can (or *cannot*) be placed on private individuals when it comes to the provision of alternative accommodation.

29 *Grobler CC* para 45.

30 This of course raises the possibility of a claim based on section 25(1) of the South African Constitution. The court in *Grobler CC* mentioned that in *Blue Moonlight* the court held that unlawful occupation of property results in deprivation of property in terms of section 25(1). If such unlawful occupation is allowed to continue indefinitely, it may result in arbitrary deprivation of property. See further Strydom and Viljoen "Unlawful Occupation of Inner-city Buildings: A Constitutional Analysis of the Rights and Obligations Involved" 2014 *PELJ* 1207-1261.

31 *Grobler CC* para 44.

32 For an interesting take on this aspect of the judgment, see Pienaar "The Tale of Two Women: Is the Transformative Thrust Embodied in the Property Clause a Theory or a Lived Reality for Land Reform" in Zenker, Walker and Boggenpoel (eds) *Beyond Expropriation without Compensation: Law Land Reform and Redistributive Justice in South Africa* (2024).

33 2005 1 SA 217 (CC).

34 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 14–23 (hereinafter *PE Municipality*).

4 2 The constitutional approach to evictions

Considerable ink has been spilled to describe the constitutional approach to evictions in South Africa. It is certainly not the purpose of this article to provide a comprehensive discussion in that regard. The purpose here is to present an overarching reflection of the main features of the approach to evictions in South African law in the constitutional democracy with the view to determining whether the approach adopted by the CC in *Grobler* is problematic.

It is trite law that the inhumane and undignified treatment of those evicted under the apartheid regime necessitated the enactment of section 26(3) of the Constitution and PIE (a concomitant piece of legislation seeking to prevent illegal evictions and unlawful occupation of land). PIE seeks to give effect to section 26(3) of the Constitution, which makes provision for the right *not* to have your home or shelter demolished without a court order, which order may only be granted after all relevant circumstances had been considered.[35] PIE was also enacted to give effect to section 25(1) of the Constitution, protecting the right not to be arbitrarily deprived of property. Ensuring that a balance is struck between sections 25(1) and 26(3) of the Constitution has proven particularly difficult over the years. When considering the approach to evictions in terms of PIE, it is important to note that evictions in the new constitutional dispensation impact upon socio-economic issues and, as such, cannot be approached from a mere legalistic view, as evidently done in the apartheid era. Instead, the approach to evictions should be informed by concepts such as fairness, morality, social values, humanity and dignity.[36] This is required because of the historical injustices associated with apartheid evictions and limited access to land to the black population. This understanding and appreciation should form the backdrop for the interpretation and implementation of PIE, as emphasised in *PE Municipality*. Key statements were made in this groundbreaking judgment that are worth reiterating when one tries to distil a constitutional vision or approach to evictions in South Africa. For instance, the court explained the role of PIE in the process of eviction:

35 See Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* (LLD dissertation 2011 Stellenbosch University); Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution* (2010) 344-350; Van der Walt *Property in the Margins* (2009) 146-160; Pienaar and Muller "The Impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on Homelessness and Unlawful Occupation within the Present Statutory Framework" 1999 *Stell LR* 370-396; Pienaar "Unlawful Occupier in Perspective: History, Legislation and Case Law" in Mostert and De Waal (eds) *Essays in Honour of CG van der Merwe* (2011) 309-330. Of specific importance is section 8(1) of PIE, which explicitly prohibits evictions without a court order.

36 *PE Municipality* para 33; *South African Human Rights Commission v City of Cape Town* 2021 2 SA 565 (WCC) para 47. See also Boggenpoel and Mahomedy 2023 *PELJ* 7.

> PIE not only repealed PISA but in a sense inverted it: squatting was decriminalised and the eviction process was made subject to a number of requirements, some necessary to comply with certain demands of the Bill of Rights. The overlay between public and private law continued, but in reverse fashion, with the name, character, tone and context of the statute being turned around. Thus the first part of the title of the new law emphasised a shift in thrust from prevention of illegal squatting to prevention of illegal eviction. The former objective of reinforcing common-law remedies while reducing common-law protections, was reversed so as to temper common-law remedies with strong procedural and substantive protections; and the overall objective of facilitating the displacement and relocation of poor and landless black people for ideological purposes was replaced by acknowledgment of the necessitous quest for home of victims of past racist policies.[37]

The following oft-quoted statement in *PE Municipality* is also instructive when it comes to figuring out how a court should go about exercising its discretion to determine whether to grant an eviction order to not:

> In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. *The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa.* Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.[38]

Sachs J provided a "broad constitutional matrix" for managing the appropriate constitutional relationship between section 25 and section 26 of the Constitution when dealing with evictions. In a critical account of the Constitutional Courts' failures and successes in their first term of office, Theunis Roux explains that in so far as reconciling the right to property with the right to housing in terms of section 26 is concerned, *PE Municipality* does not attempt to formulate a comprehensive theory on the Constitution's property rights morality, but rather attempts to indicate an ethic of compassion both with regard to courts and state agencies that are tasked with the job of mediating competing property interests. Therefore, in his view, "s 26(3) may be said to have created a new form of property right, one that does not provide an absolute barrier against eviction, but which rather requires the courts to treat common-law ownership rights and the right not to arbitrarily be evicted from one's home in a non-hierarchical way".[39] It is therefore clear that courts have a wide discretion when it comes to managing (or re-imagining) eviction

37 *PE Municipality* para 12 (own emphasis added).
38 *PE Municipality* para 23.
39 Roux *The Politics of Principle: The First South African Constitutional Court, 1995 – 2005* (2013) 326.

proceedings, and should do so cautiously by not simply prioritising ownership rights above the right not be arbitrarily evicted. Interestingly, in this regard, in *Ndlovu v Ngcobo; Bekker v Jika*[40] Olivier JA pointed out that –

> No longer does the owner have an absolute right to evict the unwanted and unlawful occupier. The court is now given a discretion to evict or to allow the occupier to remain in possession. The discretion is given in wide and open terms – is it, in the opinion of the court, "just and equitable" to grant an eviction order. … It is clear that PIE created a new perspective on the age-old conflict of interests between the traditional rights of a landowner and the statutory protection of the unlawful occupier.[41]

In this way, as Van der Walt puts it, the "perspective of the outsider, the fringe dweller … the weak and the marginalised"[42] is taken into consideration before summary eviction is ordered. PIE pertinently makes it clear that evictions may only be granted if it is just and equitable to do so after considering all relevant factors, which may include factors not specifically listed in PIE.[43] Additionally, the landowners' circumstances should also be considered, and a balance should be struck between the landowners' rights under section 25 and the occupiers' rights in terms of section 26.[44] Of course, the devil is in the detail in terms of how a particular eviction case will be decided, and how the balancing will eventually play out in individual cases.

De Vos indicates that jurisprudence in the context of whether it is just and equitable to evict, is very often tilted in favour of the vulnerable, whereas the CC decision in *Grobler* changes this and in this respect the

40 2003 1 SA 113 (SCA).

41 *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA) paras 48, 50 (own emphasis added)(hereinafter *Ndlovu v Ngcobo*).

42 Van der Walt "Property and Refusal" in Van Marle (ed) *Refusal, Transition and Post-apartheid Law* (2009) 39 – 56.

43 Section 4(7) states that: "If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women".

44 In *Ndlovu v Ngcobo*, the court found that the onus rests on the applicant to prove that they are the owner of the land after which the onus shifts to the respondent to provide the court with specific information such as whether the household is female headed or whether those involved are children, disabled or elderly. However, it is unclear whether the court will take these circumstances into account on its own if the respondent does not provide the necessary information. One would assume that this would be necessary under section 26(3).

case is somewhat of an anomaly.[45] De Vos goes on to call upon those that are interested in the appropriate role (and ability) of courts to dismantle past injustices, to consider a few questions in light of the *Grobler* judgment. One, was "grace and compassion" as emphasised in *PE Municipality* infused into the formal structures of the law in this case? Secondly, what should be made of the fact that Mrs Phillips was not legally protected because she did not have the knowledge and access to resources to transform the promise of a life right to live on the property into a legally enforceable right? Finally, are the two competing rights even capable of being balanced, if they are so diametrically opposed? These are difficult questions, and it is hard to answer them abstractly. However, it remains critical to engage with questions such as these, especially if one is to make sense of the *Grobler*-judgment. What follows is some overarching comments on these three questions.

First, it has certainly remained difficult to determine what it would look like for grace and compassion to be infused into the formal structures of the law. Perhaps it is not so much (or at least not always) about infusing grace and compassion *into the formal structures of the law* more than it is about determining how the court in *Grobler* interpreted the law with or without the necessary grace and compassion. We may understand grace to mean treating others with fairness and honestly, while compassion may imply having a level of empathy towards others, especially in the context of their perceived misfortune. In *Grobler*, would it incorporate some sense of appreciation for the fact that this is someone that has been living in a house for almost her entire life? Should it be less likely to see an eviction in those instances? Or, would the fact that Mrs Phillips did not have any choice in the matter show that the court is actually quite rigid, and not in fact infused with elements of grace and compassion? The CC seems to be very clear that an unlawful occupier does not have a choice in the matter of alternative accommodation.[46] The court reiterated that the "wishes and the personal preferences of the unlawful occupier are not relevant" in deciding whether an eviction order is just and equitable.[47] Therefore, "[t]he Constitution does not give Mrs Phillips the right to choose exactly where in Somerset West she wants to live".[48] Pienaar makes the argument that "[a]pproached in this way, non-ownership rights remain *subject* to landowners' rights".[49] These are just some aspects that may be linked to the question of whether the law (also

45 See De Vos "On the Recent Con Court Eviction Judgment: Knowing the Price of Everything, and the Value of Nothing" (19 October 2022) *Constitutionally speaking*, see online *On the recent Con Court eviction judgment: knowing the price of everything, and the value of nothing - Constitutionally Speaking* https://constitutionallyspeaking.co.za/on-the-recent-con-court-eviction-judgment-knowing-the-price-of-everything-and-the-value-of-nothing/ (last accessed 2024-02-20).

46 *Grobler CC* para 36.

47 *Grobler CC* para 36.

48 *Grobler CC* para 36.

49 Pienaar (2024).

in terms of how it is interpreted by courts) is in fact infused with elements of grace and compassion.

The second question raises important issues about how to deal with the fact that Mrs Phillips did not have the knowledge and/or access to resources to ensure that the right granted to her many years ago to live in the property *could* actually become a legally enforceable right. This requires some contextualisation in terms of property laws of the past and those applicable now. In other words, it requires some unpacking about whether the oral right could have been registered under apartheid, but also some discussion of what courts should presently make of that conclusion in its interpretation of the requirements for the *habitatio*. It is important to consider what impact the apartheid restrictions on property had for non-whites and one should also consider how a court should then redress these injustices through a transformative interpretation of property law. These two issues are addressed respectively.

At the time the promise was granted for the lifelong right to reside on the property, Mrs Phillips would have had to register this right against the property so that it could be enforced in perpetuity against subsequent landowners. The strict common law requirements for registration of a personal servitude would therefore have had to be complied with. The SCA and the CC accepted quite easily that the requirements were not complied with and that no formal limited real right therefore came into existence in favour of Mrs Phillips – consequently making her an unlawful occupier. However, there is a lot of history and nuance that are not altogether crystal clear from the facts of the case (or the supporting title deeds and affidavits) that are worth remembering, and that make such easy conclusions very difficult to sustain. It appears from the title deeds and the affidavits that the Ince's, who allegedly granted the oral right to live on the property, purchased the property in 1983. The property was subsequently transferred to Heinrich Rack (1991-2001), Quickcon Development (2001-2008) and Grobler (2008-date). The details are not perfect if one peruses the necessary title deeds and affidavits, but it is clear that no servitude was registered, and Mrs Phillips did not think it was necessary to have such the right registered because she thought the permission granted by the owners was sufficient for the right to exist in perpetuity. It is also clear that there was some time before Mr Grobler purchased the property in which the previous owners did not question Mrs Phillips' occupation of the property and accepted some form of permission for her to be there.

A further complexity weaved into South Africa's historical DNA is of course the question of whether this right granted by the Ince's somewhere between 1983 and 1991 could actually have been formalised. Mrs Phillips and her husband were a coloured family living on white-owned land. It is not altogether clear that the common law requirements for the registration of the *habitatio* when it was granted to Mrs Phillips and her husband could or would necessarily have been complied with – even if the intention was always there on the part of

both parties that this right would result in a lifelong right to live in the property. It remains crucial to remember that the land control system as it existed in 1991 (in pre-constitutional South Africa) was – in Juanita Pienaar's words – excruciatingly complex.[50] Different tenure forms existed for different jurisdictional areas. Therefore, where property was situated (and in favour of whom the right was/could be granted) was regulated strictly. This had an impact on the types of rights (formal or otherwise) that could be created or registered in favour of certain racial groups. Even rights granted in so-called "white" South Africa were severely limited.[51] This leaves the question of how to view the application of the common law in this case. Stated differently, if registration was a common law requirement for the enforcement of the *habitatio*, and Mrs Phillips did not have access to or knowledge of resources that would have enabled her to register the right, *or* she could not register the right because of the time period in which the purported right arose, it remains crucial to consider what to make of that? The common law-requirements could not have been complied with because of the law at the time. This should arguably serve as mitigating reasons to explain the failure to register a *habitatio* in favour of Mrs Phillips. There are sound reasons for developing the common law requirements of the *habitatio* in these particular instances.

Van der Walt explains that "[o]nce the common-law position has been established, the decision whether the common law can be applied as it stands or whether it might require development cannot be reached purely on the basis of common-law doctrine or policy considerations, it must be informed by constitutional provisions and considerations in every particular set of facts and disputes".[52] As a starting point, this requires proper historical analysis on the possibility of registering a *habitatio* in favour of Mrs Phillips during the period 1983-1991. In Van der Walt's view, having established what the common law position is and what its effect would be in the case at hand, the first question is whether this outcome is directly or indirectly in conflict with any particular constitutional provision. This would ensure that constitutional analysis should feature throughout any dispute, even when it involves what looks like a purely private servitude question based on the common law.[53] Could there be an exception to the common law rule? This may in some instances entail "a flexible development that would allow for exceptions to the common-law rule in some cases without abandoning it completely".[54] One wonders if that could have been recognised in *Grobler* if it were established that the common law requirement of registration could not have been complied with in this case. Either way,

50 Pienaar (2014) 379.
51 Pienaar 142-153. See also section 1 of the Natives Land Act 27 of 1913; Kloppers and Pienaar "The Historical Context of Land Reform in South Africa and Early Policies" 2014 *PELJ* 679-682.
52 Van der Walt "Developing the Common Law of Servitudes" 2013 *SALJ* 741.
53 Van der Walt 2013 *SALJ* 744.
54 Van der Walt 2013 *SALJ* 749.

a somewhat deeper analysis of the applicability of the common law requirements – and its ability to have been met within a very particular context – would arguably have been necessary in this case rather than simply assuming its requirements had (out of own volition) not been complied with.

The third question that De Vos raises highlights the importance of the judicial discretion in eviction cases. De Vos mentions that the claims are so diametrically opposed in this case that it is difficult (if not impossible) to balance them. In this respect, De Vos is correct. The right that Mrs Phillips lost as a result of the potential relocation to another site, may not be able to be quantified, measurable or valued in the same way as Mr Grobler viewed one of his properties. Pienaar points out that "[w]hen the CC confirmed the eviction order, Mrs Phillips, as an elderly woman living with a disabled son in the only home she had known for most of her life, pursuant of a promise made to her by previous landowners, became an outsider again, living on the margins."[55] The outline of the constitutional vision for evictions law as shown above speaks to this illusive right on the other side of ownership. It speaks to the difficulty courts face when they exercise their discretion in deciding whether an eviction will be just and equitable. It speaks to whether those who are non-owners will remain outsiders,[56] on the margins of society.[57]

Muller asserts that:

> In *PE Municipality*, the Constitutional Court confirmed that the traditional enquiry into evictions had been recast into a new "constitutional matrix" of relationships that flow from the intersection of sections 25 and 26 of the Constitution. In this constitutional matrix the question of eviction will not be approached from the position where the property rights of the owner and the housing rights of the unlawful occupiers are characterised as diametrically opposed interests. Instead the question of eviction will be approached in a manner that tries to reconcile the interests of the landowner and the unlawful occupiers by engaging with the specific circumstances of the case so as to reach a just and equitable solution.[58]

Muller discusses three cases in which courts have had to grapple with the justice and equity requirement in the context of evictions from private land in terms of PIE.[59] He concludes that courts have not tolerated invasions of private law because private individuals should not have to be burdened with the responsibility of providing housing to tens of

55 See Pienaar (2024). Pienaar relies on Wilson and Van der Walt who adopt the imagery of insiders and outsiders so as show that the vulnerable are often left (or continue to be left) on the margins of society, especially in the context of evictions. See Van der Walt *Property in the Margins* (2009) 24, 53-76 and Wilson *Human Rights and the Transformation of Property* (2021) 12-13.
56 Wilson (2021)12-13.
57 Van der Walt (2009) 24, 53-76.
58 Muller LLD Dissertation (2011) 155.
59 Muller LLD Dissertation (2011) 117-131.

thousands of people.[60] Tellingly, he notes that "[t]he key point to be observed in the *Modderklip*, *Dada NO* and *Blue Moonlight Properties* cases is that section 4 requires courts to find case-specific solutions for complex cases by striking the appropriate balance between the conflicting property rights of the land owner and the housing rights of the unlawful occupiers by crafting innovative remedies that remain within its powers".[61]

It should be remembered that as far as *PE Municipality* is concerned, a court is not supposed to "establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa". What it is supposed to do is to "[r]ather … balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case". De Vos's warning serves as a stark reminder that the discretion cannot be exercised in a mechanical, hierarchical manner – because the rights are just *so* different. I would argue that a deeper sense of the vulnerability of occupiers like Mrs Phillips needs to be fully appreciated. Fineman explains that embodied differences exist that form the basis for distinguishing between individuals along developmental lines, like the elderly and those in need of special treatment such as disabled persons.[62] She develops the vulnerability theory to recognise a socially and materially dynamic vulnerable legal subject, based on a richer account of how actual peoples' lives are shaped by an inherent and constant state of vulnerability across the life-course.[63] Fineman argues that "[w]hat vulnerability theory offers is a way of thinking about political subjectivity that recognizes and incorporates differences and can attend to situations of inevitable inequality amount legal subjects".[64] Vulnerability theory certainly offers a lens to better probe the question of whether Mrs Phillips' vulnerability is less of an individual failure caused as a consequence of individual irresponsibility, but more due to the failure of society and its institutions.[65] I would argue that there are important contextual, sometimes subtle circumstances that need to be appreciated if one is to get a full(er) picture of the value attached to property/rights/interests in land, the circumstances around how the right was created or came into being and the inherent inequalities that exist on either side of the dispute simply must be sufficiently considered.

60 Muller LLD Dissertation (2011) 132.
61 Muller LLD Dissertation (2011) 132-133.
62 Fineman "Vulnerability and Inevitable Inequality" 2017 *Oslo LR* 15.
63 Fineman 2017 *Oslo LR* 11-12.
64 Fineman 2017 *Oslo LR* 13.
65 See specifically Fineman 2017 *Oslo LR* 21.

4 3 The provision of alternative accommodation: Whose responsibility is it anyway?

Very interestingly, the CC mentioned specifically that "[a] just and equitable order should not be translated to mean that only the rights of the unlawful occupier are given consideration and that those of the property owner should be ignored".[66] The fact that Mr Grobler has had to "endure Mrs Phillips' unlawful occupation … for 14 years" did not according to the court comply with the "some time principle" as set out in the *Blue Moonlight* judgment.[67] Although an owner may be expected to be patient for some time according to the decision in *Blue Moonlight*, that does not mean that an owner has to provide free housing indefinitely.[68]

What therefore emerges from the utterings and conclusion of the court as mentioned briefly is a (very clear) picture of what can be expected of landowners in the context of unlawful occupation of their land – more specifically, when it comes to the provision of alternative accommodation. It is important to scrutinise the court's approach to this aspect in more detail.

First, the CC mentioned that section 26(2) of the Constitution guarantees the right to access to adequate housing but places a positive obligation on the *state* to realise the right.[69] Furthermore, PIE (specifically section 4(7)) states that the obligation to provide alternative accommodation lies with a "municipality, or other organ of state or another land owner".[70] The CC mentioned very pertinently that just because Mr Grobler had offered to provide Mrs Phillips a dwelling of similar size to the one she was occupying, and that he undertook to pay the relocation costs, should not be "construed as setting a precedent on what other private landowners are obliged to do in similar circumstances".[71] The court therefore emphasised the fact that no obligation rests on private landowners to provide alternative accommodation to an unlawful occupier.[72] In the end, the court ordered that Mrs Phillips was obliged to accept the offer of accommodation provided by the owner.

The question of what can be expected of private landowners in the new constitutional dispensation has certainly been a vexing issue. We have seen this question arise in many different contexts – even outside of land – and we have also seen different levels of engagement by courts on when certain obligations (especially positive ones) fall upon private

66 *Grobler CC* para 44.
67 See *Blue Moonlight* para 40.
68 *Blue Moonlight* para 40. See also *Grobler CC* para 48.
69 *Grobler CC* para 37.
70 See *Grobler CC* para 37.
71 *Grobler CC* para 48.
72 *Grobler CC* para 48.

individuals.[73] Even in the context of land itself, we have seen different types of obligations being imposed on landowners (ranging from what landowners should tolerate (creating the so-called negative obligation) to what landowners are required to do and give (purportedly creating some positive obligations)).[74]

In *Baron v Claytile*, the CC stated that "it has long been recognised in our constitutional dispensation that ownership of land comes with certain duties or responsibilities, which may differ significantly from the duties and obligations that rested on private landowners in the pre-constitutional context".[75] The court went on to state that the true question in each particular case would be "whether, within the relevant constitutional and statutory context, a greater "give" is required from certain parties. Any "give" must [according the court] be in line with the Constitution."[76] The court relied on its earlier decision in *Daniels v Scribante*, in which it grappled with the question of whether a positive obligation can be placed on a landowner to ensure that occupiers live in conditions that afford them human dignity. The court in *Daniels* concluded that:

> In sum, this Court has not held that under no circumstances may private persons bear positive obligations under the Bill of Rights. Ultimately, the question is whether – overall – private persons should be bound by the relevant provision in the Bill of Rights. In the context of that broad formulation, this question is easy to answer insofar as the right to security of tenure is concerned. By its very nature, the duty imposed by the right to security of tenure, in both the negative and positive form, does rest on private persons. People requiring protection under ESTA more often than not live on land owned by private persons. Unsurprisingly, that is the premise from which this matter is being litigated. And I dare say the obligation resting, in particular, on an owner is a positive one. A private person is enjoined by section 25(6) of the Constitution through ESTA to accommodate another on her or his land. It is so that the obligation is also negative in the sense that the occupier's right should not be "improperly invaded".[77]

Van der Sijde writes that the "[t]he potentially positive impact of the Constitutional Court's progressive approach [in *Daniels*] to attaching affirmative, positive or more extensive duties to ownership of land seemingly did not come to fruition mere months later when the Court

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73 See Liebenberg and Kolabhai "Private Power, Socio-economic Transformation, and the Bill of Rights" in Boggenpoel (ed) *Law,Justice and Transformation* (2022) 245-283.

74 Ngwenyama *A Common Standard of Habitability? A Comparison between Tenants, Usufructuaries and Occupiers* (LLD dissertation 2021 Stellenbosch University); Liebenberg and Kolabhai (2022) 263-267.

75 *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 35 (hereinafter *Baron*).

76 *Baron* para 36.

77 *Daniels v Scribante* 2017 4 SA 341 (CC) paras 48-19 (hereinafter *Daniels*). Interestingly, Jafta J reasoned that although certain provisions in the Bill of Rights do apply horizontally in terms of section 8(2) of the Constitution, it does not imply that a positive obligation can be placed on private persons. See *Daniels* para 156.

granted an eviction order for Mr Baron and his fellow applicants in *Baron v Claytile*".[78] The court in *Baron* noted that

> [s]ection 10(2) has a narrow scope: *it only applies in circumstances where an owner wishes to evict an occupier where there has been no breach or breakdown of the employment relationship.* Eviction under those conditions should therefore be allowed only in exceptional circumstances. Within this narrow scope, it might therefore be appropriate to expect the private landowner to assist with the finding of, or, failing that, in truly exceptional circumstances, to provide suitable alternative accommodation. This must be a contextual enquiry, having due regard to all relevant circumstances.[79]

This actually leaves very little room for the expectation that an owner would be saddled with the responsibility to provide alternative accommodation in the case where occupiers are evicted. Therefore, although bold statements were made by the court in *Baron* in terms of whether a landowner could be saddled with the responsibility of providing alternative accommodation, when one looks at the application of the theory to the facts in the particular case, the court held that "[t]he first respondent has been accommodating the applicants for several years. This is a factor that weighs heavily against imposing a further obligation on the first respondent" and "it cannot be expected of the first respondent to accommodate the applicants indefinitely when an offer of alternative accommodation has been made by the City"[80] in line with the *Modderklip* judgment. Van der Sijde points out that the *Baron* judgment, "can be read as a step forward in developing improved security of tenure, despite the outcome (which did not favour the position of the farm labourers)".[81] Van der Sijde makes the argument that *Baron* actually opened the door for greater tenure security for ESTA occupiers, especially in terms of what can be expected of landowners.[82]

Of course, it is impossible to go into detail here in terms of where the obligation of the state stops and where such an obligation starts (if at all) for landowners.[83] Suffice it to say that section 8(2) of the Constitution can be used a point of departure to determine when a provision of the Bill of Rights will bind a private party. Liebenberg asserts that the formulation of section 8(2) "suggests that there are no definitive categories of rights or duties which can be excluded from horizontal application in any a *priori* fashion".[84] A court should therefore "decide in the context of a particular dispute between private parties whether the nature of the right

78 Van der Sijde "Tenure Security for ESTA occupiers: Building on the *Obiter* Remarks in *Baron v Claytile Limited*" 2020 36 *SAJHR* 76.
79 *Baron* para 37.
80 *Baron* para 43.
81 Van der Sijde 2020 36 *SAJHR* 78.
82 Van der Sijde 2020 36 *SAJHR* 77-78. Here, Van der Sijde develops the argument in favour of an obligation on landowners to provide alternative accommodation in line with section 10(3) of the ESTA.
83 For an excellent exposition of the positive obligations on private persons, see Van der Sijde 2020 36 *SAJHR* 85-88.
84 Liebenberg *Socio-economic Adjudication under a Transformative Constitution* (2010) 327.

in issue in the case, and the nature of any duty imposed by that right render it capable of application in the dispute".[85] Therefore, context matters. It matters for instance whether it is a lawful occupier in terms ESTA or an unlawful occupier in terms of the PIE, as also pointed out by Van der Sijde,[86] and there are various factors that need to be taken into account to determine whether private persons are in fact responsible for certain positive obligations.[87] This was also shown by Ngwenyama where he focussed on establishing when landowners could potentially be saddled with ensuring the habitability of dwellings in different contexts.[88] He shows that context matters, and it is not an accurate reflection of the law to say that owners will *never* have any responsibility when it comes to giving effect to rights in the Bill of Rights.[89]

It is interesting to observe that the CC in *Baron* was in fact a lot more amenable to such an obligation resting on the owner, than the same court in *Grobler*, with Pretorious AJ in *Baron* indicating that "[t]his Court has long recognised that complex constitutional matters cannot be approached in a binary, all-or-nothing fashion, but the result is often found on a continuum that reflects the variations in the respective weight of the relevant considerations".[90] I would argue that a blanket disqualification of any positive obligation on private persons in the land context, is very problematic and negates some of the strides that have already been made in this context.[91] I therefore agree with Liebenberg when she asserts that

> Section 8(2) [of the Constitution] suggests a nuanced and contextual approach for determining whether in a particular case it is appropriate and reasonable to place either a negative or positive duty imposed by a particular right in the bill of rights on a private actor. This will inevitably be a value judgment which must be made in light of the transformative commitments and founding values of the Constitution. These commitments include the redress of socio-economic deprivations and systemic inequalities.[92]

I would therefore assert that *Grobler* is probably not – and should not be – the end of the matter in terms of the obligation on private landowners

85 Liebenberg (2010) 327.
86 Van der Sijde 2020 36 *SAJHR* 81-82.
87 See *Daniels* paras 38-39.
88 Ngwenyama (2021) 78-88, 106-114, 148-165.
89 Ngwenyama (2021) 172-184.
90 *Baron* para 36.
91 See *Daniels* and *Baron* specifically. In Liebenberg and Kolabhai 266, the authors argue that "[t]he denial that private parties bear positive duties under our transformative constitution is a manifestation of the pervasive tendency of classical liberal and neoliberal legal culture to shield private power from responsibility for contributing to the public good". See further De Vos *On the recent Con Court eviction judgment: knowing the price of everything, and the value of nothing » Constitutionally Speaking, who makes the point that "[the] ruling [Grobler] favours the powerful party's property rights, [… and] fails to accord sufficient weight to the interests and dignity of Mrs Phillips and her son".*
92 Liebenberg "The Application of Socio-economic Rights to Private Law" 2008 *TSAR* 469.

in the context of land more generally, even though the court was adamant that such an obligation to provide alternative accommodation cannot be placed on the landowner. It cannot be denied that the court, in its assessment of whether the eviction was just and equitable, did take into account the fact that *Grobler* was able to provide alternative accommodation. In many respects, the *Grobler* judgment is the start of further questions (or perhaps a continuation of the ongoing conversation) about the ambit of the obligation on landowners in the eviction context. Van der Sijde very aptly puts it: "If we accept (as we must, after *Daniels*) that more extensive positive and negative obligations can be imposed on private landowners in pursuit of the realisation of constitutional objectives, it creates the space to have a frank discussion about how and when to limit an owner's right to evict".[93]

One needs to acknowledge that *Grobler* was in a sense an easier case because the landowner was willing and able to provide alternative accommodation, which is not always going to be the case. In those (more difficult) cases, the CC's vehement denial of any obligation on a private landowner to provide alternative accommodation will really be tested. It begs the question of what greater "give" would be expected of a landowner, whether by coercion or voluntarily. If the landowner is unable or unwilling to provide alternative accommodation, which the court clearly indicates they are not obliged to do, the eviction order may have had much more harsh or dire consequences than the outcome in this case. The conditions that the court set, in line with what the owner was willing to provide, which hinged on the provision of alternative accommodation, saved the far-reaching consequences that could have ensued. I think the conversations and contestations around what can realistically be expected of landowners are important as the problem of unlawful occupation of land escalates, with relatively few viable solutions to the problem.

5 Conclusion

Given the overall failure of land reform to bring about sufficient equality in land relations, cases like *Grobler* present small windows of opportunity to show the transformative potential of section 25. Its impact may be limited, but its precedent value is immeasurable and should not be underestimated. The judgments in *Grobler* highlight the complexity of land relations, the continued vulnerability of non-owners and the extent to which laws, which are often very progressive, are sometimes limited in their potential to give substantive rights.

PIE is reactive and does not purport to give substantive rights to those that are successful in preventing evictions. This is a problem that manifested as a result of the SCA judgment in the *Grobler* sage. PIE does not provide a solution in instances where it is held that an eviction will

93 Van der Sijde 2020 36 *SAJHR* 86.

not be just and equitable, which in the long run can prove to be highly problematic, especially in terms of what an owner is obliged to accept, and also with regard to the tenure security of the unlawful occupier who is not evicted. The CC in *Grobler* reiterated the role of PIE and emphasised the fact that PIE was not designed to expropriate landowners from whose property the eviction is sought. The uncertainty in the context of what happens when an eviction order cannot be granted requires urgent attention, whether you are dealing with one-to-one owner unlawful occupiers or unlawful occupation on a large scale, the need for longer-term, more sustainable, solutions is imperative. The question of where the authority for such a solution lies, and how such rights should be constructed or developed in future, should be prioritised in the coming years.

The *Grobler* debacle has also revealed the further questions around what can be expected of landowners in the new constitutional dispensation. More specifically, it has sparked renewed questions about the duty on private individuals in providing alternative accommodation to evicted occupiers. And, although the court was vehement in its denial of any obligation on landowners to provide alternative accommodation, this article has challenged this denial especially in so far as such a conclusion does not necessarily line up with prior judgments in this regard.