NDLOVU v NGGPBP;
BEKKER AND ANOTHER v JIKA 2003 (1) SA 113 (SCA)

Citation	2003 (1) SA 113 (SCA)
Case No	240/2001 and 136/2002
Court	Supreme Court of Appeal
Judge	Nienaber JA, Harms JA, Olivier JA, Mpati JA and Mthiyane JA
Heard	May 23, 2002
Judgment	August 30, 2002
Counsel	W H Trengove SC for the appellant in the Ndlovu matter. M D Kuper SC for the appellants in the Bekker matter. No appearance for the respondent in either matter.
Annotations	None

Flynote : Sleutelwoorde

Land - Land reform - Eviction - Unlawful occupation - What constitutes - 'Unlawful occupier' in terms of Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 includes owner who has mortgaged property but who continued to remain in occupation despite rights of ownership having been terminated by sale in execution and tenant whose lease lawfully terminated but who refuses to vacate property - Provisions of Act applying to all unlawful occupiers irrespective of whether possession lawful at earlier stage - Act delaying or suspending exercise of landowner's full proprietary rights until determination made as to whether it was just and equitable to evict unlawful occupier and under what conditions - Provided procedural requirements of Act met, owner entitled to approach court on basis of ownership and relevant occupier's unlawful occupation - Unless occupier opposing or disclosing circumstances relevant to eviction order, owner, in principle, entitled to order for eviction - Buildings or structures not performing function of form of dwelling or shelter for humans not falling under Act and, since juristic persons not having dwellings, their unlawful possession not protected by Act.

Headnote : Kopnota

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 gives 'unlawful occupiers' some procedural and substantive protection against eviction from land. The question which arose in the

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present appeals was whether 'unlawful occupiers' were only those who had unlawfully taken possession of land, ie squatters, or whether the term included persons who at one stage had had lawful possession but whose possession had subsequently become unlawful. In the *Ndlovu* matter, the tenant's lease had been terminated lawfully but he had refused to vacate the property. The magistrate hearing the matter initially had held that the Act did not apply to the circumstances of the case. On appeal, the High Court upheld this decision. In the *Bekker* matter, a mortgage bond had been called up, the property sold in execution and transferred to the present appellants but the erstwhile owner had refused to vacate. In the application for eviction in the High Court, the Judge had *mero motu* raised the question of non-compliance with the Act and had subsequently dismissed the application. The appeal to

a Full Bench was dismissed. In neither case had the applicants for eviction complied with the procedural requirements of the Act and the only issue for the Court to decide was whether they had been obliged to do so. As there was no appearance for the respondents and as the appellants intended to argue the same issue from different perspectives, it was decided to hear the appeals in the two matters concurrently.

Both matters under consideration were cases of holding over. In *Ndlovu* the consent of the owner had lapsed, while in *Bekker* the occupier, who had originally held *qua* owner, never had the consent of the present owner. At the time of the launch of the applications to evict, both occupiers had, according to the ordinary meaning of the term in the Act, been 'unlawful occupiers' because they occupied the land without consent. To exclude persons who hold over from the definition of 'unlawful occupier' would necessitate an amendment to the definition to apply to a person who occupied and still occupied land without express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land. (Paragraph [5] at 120D/E - G.) It therefore needed to be considered whether there were indicators in the Act justifying such an emendation. In the *Bekker* case the argument was that, since the Legislature regarded the mortgagor as an unlawful occupier, it had to follow that the definition could not be restricted to persons who took occupation unlawfully.

Held (*per* Harms JA; Mpati JA and Mthiyane JA concurring; Olivier JA and Nienaber JA dissenting), that by the very nature of things a mortgagor, being an owner, could not be an unlawful occupier. Only once the property had been sold in execution and transferred to a purchaser could the possession of the erstwhile mortgagor/owner become unlawful. To call a mortgagor an 'unlawful occupier' was not only incongruous but also absurd. (Paragraph [8] at 121D - E and E/F.)

Held, further, that the Act distinguished between unlawful occupiers who had occupied for less than six months (see s 4(6) of the Act) and those who had occupied for more than six months (see s 4(7) of the Act). The former had fewer rights in that the court considering the application for their eviction did not have to consider whether land had been made available or could reasonably be made available for their relocation. However, in the event of a sale in execution over bonded property, those with less than six months' occupation received more protection because the court had to have regard to the needs of the elderly, children, disabled persons and households headed by women (s 4(6)), something it did not have to take into account in the case of s 4(7). (Paragraph [10] at 121J - 122C.)

Held, further, that the ordinary definition of the term meant, textually, that the Act applied to all unlawful occupiers, irrespective of whether their possession at an earlier stage had been lawful. (Paragraph [11] at 122C/D - D.)

Held, further, that, in enacting the Act, there had clearly been a substantial class

of persons whose vulnerability might have been a concern of Parliament. The Bill of Rights and social or remedial legislation often conferred benefits on persons for whom they were not primarily intended. There seemed to be no reason in the general social and historical context of the country why the Legislature would not have wished to afford the vulnerable class of the landless poor the protection of the Act. (Paragraph [16] at 123C - E.)

Held, further, that the landlord's problem with the affluent tenant was not as oppressive as it seemed at first. The tenant would obviously be entitled to the somewhat cumbersome

procedural advantages of the Act to the annoyance of the landlord. However, what the Act did was to delay or suspend the exercise of the landowner's full proprietary rights until a determination had been made whether it was just and equitable to evict the unlawful occupier and under what conditions. This discretion was one in the wide, not the narrow, sense. (Paragraph [17] at 123F - F/G and 123J - 124A and para [18] at 124B/C.)

Held, further, that a court of first instance did not have a free hand to do whatever it wished and the Court of appeal was not hamstrung by the traditional grounds of whether the Court *a quo* had exercised its discretion capriciously or upon a wrong principle, or that it had not brought its unbiased judgment to bear on the question, or that it had acted without substantial reasons. (Paragraph [18] at 124C - D.)

Held, further, that, provided the procedural requirements had been met, the owner was entitled to approach the court on the basis of ownership and the respondent's unlawful occupation. Unless the occupier opposed or disclosed circumstances relevant to the eviction order, the owner, in principle, would be entitled to an order for eviction. (Paragraph [19] at 124E - E/F.)

Held, further, that buildings or structures that did not perform the function of a form of dwelling or shelter for humans did not fall under the Act and, since juristic persons did not have dwellings, their unlawful possession was not protected by the Act. (Paragraph [20] at 124J - 125A.)

Held, further, that it could not be discounted that Parliament had intended to extend the protection of the Act to cases of holding over of dwellings and the like. The *Ndlovu* appeal therefore had to succeed and the *Bekker* appeal fail. This did not imply that the owners concerned would not be entitled to apply for and obtain eviction orders. It only meant that the procedures of the Act had to be followed. (Paragraph [23] at 125G - H.)

Cases Considered

Annotations

Reported cases

ABSA Bank Ltd v Amod [1999] 2 B All SA 423 (W): discussed, criticised and not followed

Administrators, Estate Richards v Nichol and Another 1999 (1) SA 551 (SCA): considered

Bekker and Another v Jika [2001] 4 B All SA 573 (SE): referred to

Bekker and Another v Jika 2002 (4) SA 508 (E): confirmed on appeal

Betta Eiendomme (Pty) Ltd v Ekple-Epoh 2000 (4) SA 468 (W): discussed and dicta in criticised

Boyers v Stansfield Ratcliffe & Co Ltd 1951 (3) SA 299 (T): referred to

Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others 2001 (4) SA 1222 (SCA): dictum at 1229E applied

Chetty v Naidoo 1974 (3) SA 13 (A): referred to

Ellis v Viljoen 2001 (4) SA 795 (C) (2001 (5) BCLR 487): considered

Esterhuyze v Khamadi 2001 (1) SA 1024 (LCC): considered

Ex parte Neethling and Others 1951 (4) SA 331 (A): considered

Ex parte the Minister of Justice: In re *R v Jekela* 1938 AD 370: referred to

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Graham v Ridley 1931 TPD 476: referred to

Hoban v ABSA Bank Ltd t/a United Bank and Others 1999 (2) SA 1036 (SCA): compared

Jeena v Minister of Lands 1955 (2) SA 380 (A): referred to

Kayamandi Town Committee v Mkhwaso and Others 1991 (2) SA 630 (C): referred to

Kent NO v South African Railways and Another 1946 AD 398: referred to

Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A): compared

Land- en Landboubank van Suid-Afrika v Cogmanskloof Besproeiingsraad 1992 (1) SA 217 (A): referred to

Land- en Landboubank van Suid-Afrika v Die Meester en Andere 1991 (2) SA 761 (A): referred to

MEC for Business Promotion, Tourism & Property Management, Western Cape Province v Matthyse and Others [2000] 1 B All SA 377 (C): referred to

Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor') 1992 (4) SA 791 (A): compared

Palvie v Motale Bus Service (Pty) Ltd 1993 (4) SA 742 (A): referred to

Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others 2000 (2) SA 1074 (SE): discussed

Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others 2001 (4) SA 759 (E) ([2001] 1 B All SA 381): discussed

R v Debele 1956 (4) SA 570 (A): referred to

R v Vos; R v Weller 1961 (2) SA 743 (A): referred to

R v Zulu 1959 (1) SA 263 (A): referred to

Reynders v Rand Bank Bpk 1978 (2) SA 630 (T): referred to

Ridgway v Janse van Rensburg 2002 (4) SA 186 (C): considered

Ross v South Peninsula Municipality 2000 (1) SA 589 (C): discussed

Sedgefield Ratepayers' and Voters' Association and Others v Government of the Republic of South Africa and Others 1989 (2) SA 685 (C): referred to

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Sentrale Karoo Distriksraad v Roman; Sentrale Karoo Distriksraad v Koopman; Sentrale Karoo Distriksraad v Krotz 2001 (1) SA 711 (LCC): considered

Spoor & Fisher v Registrar of Patents 1961 (3) SA 476 (A): referred to

Van Heerden and Others NNO v Queen's Hotel (Pty) Ltd and Others 1973 (2) SA 14 (RA): referred to

Van Zyl NO v Maarman 2001 (1) SA 957 (LCC): discussed.

Statutes Considered

Statutes

The Constitution of the Republic of South Africa Act 108 of 1996, chap 2: see *Juta's Statutes of South Africa 2001* vol 5 at 1-146 - 151

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, ss 4(6), (7): see *Juta's Statutes of South Africa 2001* vol 6 at 2 - 464.

Case Information

Appeal from a decision in the Natal Provincial Division (Galgut J, Combrinck J and Aboobaker AJ) and a decision in the Eastern Cape Division (Somyalo JP, Jennett J and Leach J), the latter reported at 2002 (4) SA 508. The facts appear from the judgment of Harms JA.

W H Trengove SC for the appellant in the *Ndlovu* matter.

M D Kuper SC for the appellants in the *Bekker* matter.

No appearance for the respondent in either matter.

In addition to the authorities referred to in the judgment of the Court, counsel for both appellants referred to the following authorities:

Adampol v Administrator, Transvaal 1989 (3) SA 800 (A) at 804B - C and 809F - G

Albany Home Loans v Massey [1997] 2 All ER 609 at 612

Armitage NO v Mtetwa 1950 (1) SA 439 (T) at 443

Attorney-General, Eastern Cape v Blom and Others 1988 (4) SA 645 (A) at 668 - 9

Bhyat v Commission for Immigration 1932 AD 125 at 129

Black-Clawson International Ltd v Waldhof-Aschaffenburg AG [1975] 1 All ER 810 (HL) at 828*f - h*

Blomson v Boshoff 1905 TS 429

Bok v Allen (1884) 1 SAR 119 at 131, 132

Case v Minister of Safety and Security 1996 (3) SA 617 (CC) (1996 (5) BCLR 608) at para

[12]

Davis v Johnson [1978] 1 All ER 1132 at 1157*f* - *g*

Despatch Municipality v Sunridge Estate & Development Corporation 1997 (4) SA 596 (SE)

Dilokong Chrome Mines v Direkteur-Generaal, Departement van Handel en Nywerheid 1992 (4) SA 1 (A) at 31

Downsview Ltd v First City Corporation Ltd [1993] AC 295 (PC) at 321F - G

Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC) at para [84]

Fothergill v Monarch Airlines Ltd [1981] AC 251 at 279 - 80

Freeman Cohens Consolidated Ltd v General Mining and Finance Corporation Ltd 1906 TS 585

Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer 1997 (1) SA 710 (A) at 729 - 31

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) at para [34]

Jaga v Dönges NO; Bhana v Dönges NO and Another 1950 (4) SA 653 (A) at 662G - 664H

Kimberley-Clark of SA (Pty) Ltd (formerly Carlton Paper of SA (Pty) Ltd) v Procter & Gamble SA (Pty) Ltd 1998 (4) SA 1 (SCA) at 13G - I

Kruger v Monala 1953 (3) SA 266 (T) at 270

Land- en Landboubank van SA v Rousseau NO 1993 (1) SA 513 (A) at 518H - 519C

Lister v Incorporated Law Society, Natal 1969 (1) SA 431 (N) at 434A - C

Lovius & Shtein v Sussman 1947 (2) SA 241 (O) at 243

Mathiba v Moschke 1920 AD 354 at 362

Mavromati v Union Exploration Import (Pty) Ltd 1949 (4) SA 917 (A) at 927

McKelvey and Others v Deton Engineering (Pty) Ltd and Another 1998 (1) SA 374 (SCA) at 381

Melluish (Inspector of Taxes) v BMI (No 3) Ltd and related appeals [1995] 4 All ER 453 at 468

Messenger of the Court v Pillay 1952 (3) SA 678 (A) at 683G

Millar v Taylor (1769) 4 Burr 2303 at 2332

Minister of Land Affairs and Another v Slamdien and Others 1999 (4) BCLR 413 para [13] - [14] at 421

Myaka v Havemann 1948 (3) SA 457 (A) at 461, 467

National Bank v Cohen's Trustee 1911 AD 235

Ngcobo and Others v Salimba; Ngcobo v Van Rensburg 1999 (2) SA 1057 (SCA) at 1064C - G

Nino Bonino v De Lange 1906 TS 120

Pabst v The Sheriff and Others 1952 (3) SA 252 (T) at 255G - 256E

Palabora Mining Co Ltd v Coetzer 1993 (3) SA 306 (T) at 310J - 311B

Pepper v Hart [1993] 1 All ER 42 (HL) at 50, 65*e*, 69

Poswa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape 2001 (3) SA 582 (SCA) at paras [10], [11]

Potgieter and Another v Van der Merwe 1949 (1) SA 361 (A) at 374

Progress Shippers (Pty) Ltd v Van Staden 1963 (1) SA 87 (T) at 91G - 92A

Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others 1990 (1) SA 925 (A) at 943C - I

Quennell v Maltby and Another [1979] 1 All ER 568 at 571*b* - *f*

R v Gorekwang 1961 (3) SA 407 (A) at 413E - H

R v Secretary of State for the Environment, Transport and the Regions and Another, Ex parte Spath Holme Ltd [2001] 1 All ER 195 (HL) at 211 - 12, 216 - 17, 222 - 3

S v Conifer 1974 (1) SA 651 (A) at 655F

S v Govender 1986 (3) SA 969 (T) at 971F - G

S v Makwanyane 1995 (3) SA 391 (CC) (1995 (6) BCLR 665) at paras [13], [14] - [20]

S v Mpetha 1985 (3) SA 702 (A) at 713

S v Naidoo 1974 (4) SA 574 (W) at 598

S v Peter 1976 (2) SA 513 (C) at 515E - G

S v Shangase 1972 (2) SA 410 (N) at 414E - G

S v Zuma and Others 1995 (2) SA 642 (CC) (1995 (4) BCLR 401) at 650H - 653B

Shepstone & Wylie and Others v Geyser NO 1998 (3) SA 1036 (SCA) at 1044A - B

Sheriff for the District of Wynberg v Jakoet 1997 (3) SA 425 (C)

Simpson v Klein 1987 (1) SA 405 (W)

Sookdeyi v Sahadeo and Others 1952 (4) SA 568 (A) at 572

Swanepoel v Johannesburg City Council; President Insurance Co Ltd v Kruger 1994 (3) SA 789 (A) at 794A - D

Thoroughbred Breeders' Association v Price Waterhouse 2001 (4) SA 551 (SCA) at paras [12], [25]

Van Reenen v Kruger 1949 (4) SA 27 (W) at 29

Voortrekker Pers v Rautenbach 1947 (2) SA 47 (A) at 50

Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 (2) SA 555 (A) at 562 - 3

Bale 'Parliamentary Debates and Statutory Interpretation: Switching on the Light or Rummaging in the Ashcans of the Legislative Process' 1995 *Canadian Bar Review* 1

Budlender 'Citizenship and Residents' Rights: Taking Words Seriously' 1989 *SAJHR* 37 at 57 - 9

Cooper *The Rent Control Act* (Juta) at 1

Cross *Statutory Interpretation* 3rd ed at 152 - 64

Devenish *Interpretation of Statutes* at 122 - 30

Digest 13,7,35,1

Hahlo and Kahn *The South African Legal System and its Background* (1968) at 184 - 5

Haysom and Thompson 'Labouring under the Law: South Africa's Farmworkers' (1986) 7 *ILJ* 218 at 236

Scott and Scott *Wille's Law of Mortgage and Pledge* 3rd ed at chap X, 203 - 5

Steyn *Die Uitleg van Wette* 5th ed at 134 - 6

Voet *Commentarius ad Pandectas* at 4.4.17 6.1.13, 6.10.

Cur adv vult.

Postea (August 30).

Judgment

Harms JA:

[1] The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (herein called 'PIE') gives 'unlawful occupiers' some procedural and substantive protection against eviction from land. The question that arises is whether 'unlawful occupiers' are only those who unlawfully took possession of land (commonly referred to as squatters) or whether it includes persons who once had lawful possession but whose possession subsequently became unlawful. In the *Ndlovu* appeal the tenant's lease was terminated lawfully but he refused to vacate the property. In the *Bekker* appeal a mortgage bond had been called up; the property was sold in execution and transferred to the appellants; and the erstwhile owner refused to vacate. In neither case did the applicants for eviction comply with the procedural requirements of PIE and the single issue on appeal is whether they were

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obliged to do so.

[2] The *Ndlovu* matter originated in a magistrate's court; the magistrate held that PIE did not apply to the circumstances of the case. The appeal to the Natal Provincial Division (*per* Galgut J, Combrinck J and Aboobaker AJ concurring) was dismissed as was the application for leave to appeal. This Court granted the necessary leave. The *Bekker* case began as an application for eviction in the Eastern Cape. Plasket AJ *mero motu* raised the question of non-compliance with PIE and subsequently dismissed the application. The judgment is reported: [2001] 4 B All SA 573 (SE). The appeal to the Full Court (Somyalo JP, Jennett and Leach JJ) was dismissed, each member delivering a separate judgment. These have also been reported: 2002 (4) SA 508 (E). This Court granted special leave to appeal. In view of the fact that there was no appearance for the respondents and since both appellants were to argue the same issue from different perspectives, the appeals were heard concurrently.

[3] PIE has its roots, *inter alia*, in s 26(3) of the Bill of Rights, which provides that 'no one may be evicted from their home without an order

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HARMS JA

of court made after consideration of all the relevant circumstances'. *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA) at 1229E. It invests in the courts the right and duty to make the order, which, in the circumstances of the case, would be just and equitable and it prescribes some circumstances that have to be taken into account in determining the terms of the eviction.

[4] PIE defines an 'unlawful occupier' in s 1 to mean

> '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 31 of 1996'.

(Emphasis added.)

[5] When the applications for eviction were launched the consent of the owner in the case of *Ndlovu* had lapsed and in the case of *Bekker* the occupier, who originally held *qua* owner, never had the consent of the present owner. Both are cases of holding over. The quoted definition is couched in the present tense. Consequently, at the time of the launch of the applications to evict, both these occupiers - according to the ordinary meaning of the provision - were 'unlawful occupiers' because they occupied the land without consent. By the very nature of things the definition had to be in the present tense because the question of eviction cannot arise in relation to someone who, at the time of the application, is a lawful occupier albeit that he had formerly been in unlawful possession. In other words, someone who took occupation without the necessary consent but afterwards obtained consent cannot be an unlawful occupier for the purposes of eviction. To exclude persons who hold over from the definition would require more than a mere change in tense and one would have to amend the definition to apply to 'a person who *occupied and still* 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'.

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[6] The first question is whether there are indicators in PIE as a whole that can justify such an emendation. Mr *Kuper*, for the landlords, did not suggest that there were any. Mr *Trengove*, who argued the case of the occupiers, submitted that everything in PIE in fact points in the opposite direction. First, he sought support for the ordinary meaning in the fact that occupiers protected by the Extension of Security of Tenure Act 62 of 1997 (ESTA) are by the quoted definition expressly excluded from the provisions of PIE. ESTA protects persons who, at some stage or another, had consent or some other right to occupy (basically) agricultural land. It would not have been necessary to exclude that class from PIE, he submitted, if PIE did not protect persons whose occupation, at a prior stage, had been lawful. The argument has some force but is not conclusive because persons protected by the provisions of the Interim Protection of Informal Land Rights Act 31 of 1996 are also excluded from PIE's protection. Those persons do not appear to be otherwise

covered by the definition in PIE and their exclusion from PIE appears to be unnecessary and meaningless.

[7] Another pointer suggested by Mr *Trengove* is s 6(1) of PIE, a provision heavily relied upon by the Full Court in the *Bekker* case. Section 6(1) gives organs of State legal standing to apply for the eviction of unlawful occupiers from land belonging to others. It has an exception, underlined in the quote that follows:

> 'An organ of State may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, *except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage*, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, ...'

The argument is that since the legislator regards a mortgagor as an unlawful occupier, it has to follow that the definition cannot be restricted to persons who took occupation unlawfully.

[8] The problem is that, on a literal interpretation, the phrase makes no sense at all. By the very nature of things a mortgagor, being an owner, cannot be an unlawful occupier; only once the property has been sold in execution and transferred to a purchaser can the possession of the erstwhile mortgagor/owner become unlawful. Another problem is that the purpose of the exception is not at all discernible. One can surmise that it was inserted during the Bill's passage through Parliament as the result of some lobbying by banks and the like who wished to ensure that their security would not be eroded by PIE. To call a mortgagor an 'unlawful occupier' is not only incongruous but also absurd and it follows that the use of the term in s 6(1) cannot be used to interpret the definition. Compare *Hoban v ABSA Bank Ltd t/a United Bank and Others* 1999 (2) SA 1036 (SCA) at para [19].

[9] Somyalo JP and Jennett J, in their respective judgments in *Bekker*, relied upon s 4(7) for support for the proposition that the Legislature included mortgagors within the definition of 'unlawful occupiers'. It provides (with added emphasis):

> '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.'

Neither counsel embraced the argument. The words italicised mean that, if land is sold in a sale of execution, the court, in determining the relevant circumstances, does not take into account the factors listed after the exception. It has nothing to do with the question of holding over by a mortgagor.

[10] The phrase nevertheless gives rise to an inexplicable anomaly. PIE distinguishes between unlawful occupiers who have occupied for less

than six months (s 4(6)) and those who have occupied for more than six months (s 4(7)). The former have less rights than the latter in the sense that the court is not mandated to consider in their case whether land has been made available or can reasonably be made available for their relocation (a consideration that can be traced to the Prevention of Illegal Squatting Act 52 of 1951 (herein referred to as 'PISA'): *Kayamandi Town Committee v Mkhwaso and Others* 1991 (2) SA 630 (C)). However, in the event of a sale in execution of the bonded property, those with less than six months' occupation receive more protection because the court has to have regard to the rights and needs of the elderly, children, disabled persons and households headed by women (s 4(6)), something it need not take into account in the case of s 4(7).

[11] Since the factors discussed are essentially neutral, one is left with the ordinary meaning of the definition which means that (textually) PIE applies to all unlawful occupiers, irrespective of whether their possession was at an earlier stage lawful. Mr *Kuper*, as did other courts, relied on external factors that would indicate that Parliament could not have intended to cast the net so wide, and I proceed to consider them.

[12] It is apparent from the long title that PIE has some roots in PISA. PISA had its origin in the universal social phenomenon of urbanisation. Everywhere the landless poor flocked to urban areas in search of a better life. This population shift was a threat to the policy of racial segregation. PISA was to prevent and control illegal squatting on public or private land by criminalising squatting and by providing for a simplified eviction process. PIE, on the other hand, not only repealed PISA but in a sense also inverted it: squatting was decriminalised (subject to the Trespass Act 6 of 1959) and the eviction process was made subject to a number of onerous requirements, some necessary to comply with certain demands of the Bill of Rights, especially s 26(3) (housing) and s 34 (access to courts).

[13] The first reported judgment on the present issue is *ABSA Bank Ltd v Amod* [1999] 2 B All SA 423 (W) (*per* Schwarzman J). It held that PIE did not apply to cases of holding over. The learned Judge referred to the history of PIE and its relationship to PISA. PISA, he said, was limited to squatters *strictu sensu*; the intention of PIE was to invert PISA; PIE was consequently likewise limited; since PISA did not extend to persons whose lawful occupation became unlawful, the same limitation ought to apply to PIE. This reasoning found favour with the Full Court in *Ellis v Viljoen* 2001 (4) SA 795 (C) at 800 - 1 and the Court *a quo* in the *Ndlovu* appeal.

[14] This reasoning is based upon a misreading of PISA. PISA did not only deal with persons (irrespective of race) who unlawfully took possession of land but it also dealt with

persons (irrespective of race) whose possession was lawful but became unlawful (s 1*(a)*). Holding over was a crime and eviction could have been effected without due process of law. *R v Zulu* 1959 (1) SA 263 (A).

[15] Schwartzman J raised another point. He found it difficult to accept

that PIE could be interpreted as turning common-law principles on their head, for instance, by granting a tenant a 'right' of holding over. He postulated the example of the affluent tenant who rents a luxury home for a limited period. Such a person should not be entitled to the protection of PIE. Mr *Trengove*, on the other hand, postulated other cases: the tenant of a shack in a township who loses his work or falls ill and cannot afford to pay rent or the tenant in a township whose tenancy is terminated by virtue of some township regulation and has nowhere else to go. He asked rhetorically why these persons should be in a worse position than those whose initial occupancy was illegal.

[16] There is clearly a substantial class of persons whose vulnerability may well have been a concern of Parliament, especially if the intention was to invert PISA. It would appear that Schwartzman J overlooked the poor, who will always be with us, and that he failed to remind himself of the fact that the Constitution enjoins courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights, in this case s 26(3). The Bill of Rights and social or remedial legislation often confer benefits on persons for whom they are not primarily intended. The law of unintended consequences sometimes takes its toll. There seems to be no reason in the general social and historical context of this country why the Legislature would have wished not to afford this vulnerable class the protection of PIE. Some may deem it unfortunate that the Legislature, somewhat imperceptibly and indirectly, disposed of common-law rights in promoting social rights. Others will point out that social rights do tend to impinge or impact upon common-law rights, sometimes dramatically.

[17] The landlord's problem with the affluent tenant is not as oppresive as it seems at first. The latter will obviously be entitled to the somewhat cumbersome procedural advantages of PIE to the annoyance of the landlord. If the landlord with due haste proceeds to apply for eviction the provisions of s 4(6) would apply:

> 'If an unlawful occupier has occupied the land in question for less 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 the rights and needs of the elderly, children, disabled persons and households headed by women.'

If the landlord is a bit slower, s 4(7) would apply, but one may safely assume that the imagined affluent person would not wish to be relocated to vacant land possessed by a local authority and that this added consideration would not be apposite. The period of the occupation is calculated from the date the occupation becomes unlawful. The prescribed circumstances, namely the rights and needs of the elderly, children, disabled persons and households headed by women, will not arise. What relevant circumstances would there otherwise be save that the applicant is the owner, that the lease has come to an end and that the tenant is holding over? The effect of PIE is not to expropriate the landowner and PIE cannot be used to expropriate someone indirectly and the landowner retains the protection of s 25 of the Bill of Rights. What PIE does is to delay or suspend the exercise of

the landowner's full

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proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions. Simply put, that is what the procedural safeguards provided for in s 4 envisage.

[18] The court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated (s 4(8)), has to exercise a discretion based upon what is just and equitable. The discretion is one in the wide and not the narrow sense (cf *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 800, *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 360G - 362G). A court of first instance, consequently, does not have a free hand to do whatever it wishes to do and a Court of appeal is not hamstrung by the traditional grounds of whether the court exercised its discretion capriciously or upon a wrong principle, or that it did not bring its unbiased judgment to bear on the question, or that it acted without substantial reasons (*Ex parte Neethling and Others* 1951 (4) SA 331 (A) at 335E, *Administrators, Estate Richards v Nichol and Another* 1999 (1) SA 551 (SCA) at 561C - F).

[19] Another material consideration is that of the evidential *onus*. Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent's unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties. Whether the ultimate *onus* will be on the owner or the occupier we need not now decide.

[20] A further area of concern is the lease of commercial properties. Does it fall within the purview of PIE? *Prima facie* the answer would be in the affirmative because of the definition of 'building or structure' which

> '*includes* any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter'.

The word 'includes' is as a general rule a term of extension. It may, however, depending upon the circumstances, be one of exhaustive definition and synonymous with 'comprise'. *R v Debele* 1956 (4) SA 570 (A) at 575. In this instance, having regard to the history of the enactment with, as already pointed out, its roots in s 26(3) of the Constitution which is concerned with rights to one's home, the preamble to PIE which emphasises the right to one's home and the interests of vulnerable persons, the buildings listed and the fact that one is ultimately concerned with 'any other form of temporary or permanent dwelling or shelter', the ineluctable conclusion is that, subject to the *eiusdem generis* rule, the term was used exhaustively. It follows that buildings or structures that do not perform the function of a form of dwelling or shelter for humans do not

fall under PIE and since juristic persons do not have dwellings, their unlawful possession is similarly not protected by PIE.

[21] Another factor relied upon by Mr *Kuper* in support of the proposition that PIE was not intended to deal with holding over cases, is the legislative landscape surrounding PIE. He listed three statutes. There are probably more. ESTA is an enactment geared to deal with the eviction of a particular class of persons whose lawful occupation has been terminated. It contains detailed procedures that flow from the fact that consent to occupation was terminated. Similar procedures are not to be found in PIE. Then there is the Rental Housing Act 50 of 1999. Its preamble is in many respects strikingly similar to that of PIE; it purports to protect a landlord's right to apply for the eviction of a tenant at the conclusion of the tenancy (s 4(5)*(d)*); and it even anticipates regulations regulating evictions (s 15(1)*(f)*(v)). Last, the Land Reform (Labour Tenants) Act 3 of 1996 regulates the eviction of labour tenants. These Acts and PIE, he submitted, formed a mosaic. Each was intended to protect a different class of occupier. The rights of tenants who hold over have to be found exclusively within the parameters of the Rental Housing Act and not in PIE.

[22] The answers to the submission are manifold. The submission skirts around the issue of interpretation of PIE and does not confront it directly. It assumes that these pieces of legislation form, by design or chance, a mosaic and it discounts the possibility that they are but pieces of an incomplete jigsaw puzzle. It relies on a later Act (the Rental Housing Act) to interpret an earlier enactment (PIE). It assumes that Parliament does not pass overlapping Acts. If one examines these laws even cursorily it is obvious that they were not intended to form a mosaic in the sense suggested by counsel: they deal with related matters in often completely different ways and there are at the same time overlapping and uncovered areas. It follows that this argument must also fail.

[23] The conclusion is that it cannot be discounted that Parliament, as it said, intended to extend the protection of PIE to cases of holding over of dwellings and the like. In the result the *Ndlovu* appeal must succeed and the *Bekker* appeal must fail. This does not imply that the owners concerned would not be entitled to apply for and obtain eviction orders. It only means that the procedures of PIE have to be followed. No costs will be ordered since neither counsel asked for costs and because the respondents were not represented.

[24] The order in *Ndlovu v Ngcobo* (appeal No 240/2001) is that:

(a) the appeal is upheld;

(b) the order of the Court *a quo* is set aside and replaced with an order upholding the appeal from the magistrate's court and replacing it with an order of absolution from the instance with costs.

[25] The order in *Bekker and Bosch v Jika* (appeal No 136/2002) is that the appeal is dismissed.

Mpati JA and Mthiyane JA concurred in the judgment of Harms JA.

Olivier JA:

A Background

[26] The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) regulates both procedurally and substantively the eviction of what is referred to in PIE as 'unlawful occupiers' of land. There are divergent judgments both in the High Court and the Land Claims Court as to the proper interpretation of the expression 'unlawful occupiers' in PIE. Two strongly opposed interpretations have been given to the expression. On the one hand it has been held that it applies only to people who *unlawfully* took occupation of land and *remain* in unlawful occupancy (for example informal settlers or squatters). On the other hand it has been held that it applies also to people who *lawfully* took occupation of the land under a contractual or other right to do so but unlawfully *remain* in occupation after their right to do so has come to an end (for example ex-tenants, ex-mortgagors, ie defaulters).

The two appeals before us raise squarely the issue of the correct interpretation of the said expression and consequently the scope and ambit of PIE.

[27] In the first appeal (*Ndlovu*) the appellant was a tenant of an urban residence by virtue of an agreement with the respondent. The lease was lawfully terminated. The appellant refused to vacate, praying PIE in support. He was ordered to vacate by a magistrate. His appeal against that order was dismissed by the Full Bench of the Natal Provincial Division of the High Court. With the leave of this Court, his appeal is now before us.

[28] In the second appeal (*Bekker and Bosch*), now reported in 2002 (4) SA 508 (E), the appellants are the registered owners of urban residential property known as 52 Avondale Road, Kabega Park, Port Elizabeth. The respondent is the former owner of that property. He and his family resided there. In order to secure an indebtedness to the First National Bank, respondent passed a mortgage bond over the property in favour of the bank. He allegedly failed to honour his obligations under the bond. The bank issued summons and obtained judgment by default on 9 February 2000. A warrant for execution was issued on 10 February 2000. Pursuant thereto the property was sold in execution on 23 March 2001. On the same day, more than a year after the default judgment was taken against him, the respondent launched an application for rescission of the default judgment. The basis of the application was that the bank had overcharged him in respect of interest. The Sheriff conducting the sale was requested by the respondent to notify the prospective purchasers of the property of his pending application. The appellants purchased the property at the sale in execution and, on 22 May 2001, obtained registration of transfer into their names.

[29] The judgment, sale in execution and registration of transfer notwithstanding, the respondent refused to vacate the property, contending that the default judgment should be rescinded. The appellants in the mean time had leased the property to a third party and, in order to

provide their tenant with vacant and undisturbed occupation, launched an application for the eviction of the respondent. According to their allegations, the respondent had not taken any further steps in the application for rescission, which was opposed, since 26 April 2001.

[30] When the application for eviction was called, Plasket AJ *mero motu* and without dealing with the respondent's main defence relating to the rescission of the default judgment and, presumably, of the sale in execution, raised the issue whether the provisions of PIE were not applicable. After hearing argument on this issue, the learned Judge held that PIE applied and that the appellants had not complied with its requirements; and he dismissed the application. (This judgment is reported in [2001] 4 B All SA 573 (SE).)

[31] The appellants appealed to a Full Bench of the Eastern Cape Division of the High Court (Somyalo JP, Jennett and Leach JJ). The appeal was unsuccessful. The matter came to this Court, the necessary leave having been obtained.

[32] The two appeals were heard concurrently. Mr *Trengove* appeared for the appellant, Ndlovu, in the first appeal; Mr *Kuper* for the appellants, Bekker and Bosch, in the second appeal. The unrepresented parties abide the decision of this Court. We thus had the benefit of having the position of the 'unlawful occupier' argued from the opposing perspectives by counsel for the parties in the two appeals.

B The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

[33] The solution of the problems presented by the two appeals before us depends on the interpretation and application of the provisions of PIE. It is necessary to relate some of the features of PIE at the outset.

[34] PIE came into force on 5 June 1998. Its long title reads as follows:

> 'To provide for the prohibition of unlawful eviction; to provide for procedures for the eviction of unlawful occupiers; and to repeal the Prevention of Illegal Squatting Act, 1951, and other obsolete laws; and to provide for matters incidental thereto.'

Its preamble reads:

> 'WHEREAS no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property;
>
> AND WHEREAS 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;
>
> AND WHEREAS it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances;
>
> AND WHEREAS special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and that it should be recognised that the needs of those groups should be considered; . . . .'

[35] The most important provision is that of s 4(1). It provides that:

> 'Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or

> person in charge of land for the eviction of an unlawful occupier.'

[36] Section 4, then, contains both procedural and substantive provisions. The procedural

provisions are to be found in ss 4(2), (3), (4) and (5) which read as follows:

'(2) At least 14 days before the hearing of the proceedings contemplated in ss (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

(3) Subject to the provisions of ss (2), the procedure for the serving of notices and filing of papers is as prescribed by the Rules of the court in question.

(4) Subject to the provisions of ss (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the Rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.

(5) The notice of proceedings contemplated in ss (2) must -

(a) state that the proceedings are being instituted in terms of ss (1) for an order for the eviction of the unlawful occupier;

(b) indicate on what date and at what time the court will hear the proceedings;

(c) set out the grounds for the proposed eviction; and

(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.'

[37] The substantive provisions are those contained in ss 4(6), (7) and (8):

'(6) If an unlawful occupier has occupied the land in question for less 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 the rights and needs of the elderly, children, disabled persons and households headed by women.

(7) 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.

(8) 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 determine -

(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 para *(a)*.'

[38] From the aforegoing provisions, it is abundantly clear that the concept of 'unlawful occupier' is of pivotal importance. PIE defines the term in s 1:

'"(U)nlawful 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

would be protected by the provisions of the Interim Protection of Informal Land Rights Act 31 of 1996.'

[39] Finally, s 2 provides that PIE applies to all land throughout the Republic, ie urban and rural land.

C The term 'unlawful occupier': the problem of its meaning

[40] The definition of 'unlawful occupier' in PIE appears, on a first perusal, to be clear and unambiguous. But this appearance is illusory and deceptive, and Courts have struggled to fathom its correct meaning and in the process to demarcate the purview of PIE: to whom is it applicable and to which categories of property?

[41] The problem inherent in the expression 'unlawful occupier' is that it is latently capable of two expositions. The verb 'occupy' can legitimately be used in two senses, viz, firstly, 'to hold possession of . . . reside in; to stay, abide'; or, secondly, 'to take possession of (a place) by settling in it, or by conquest' (see *The Shorter Oxford Dictionary sv* 'occupy'). On the face of it, the words 'a person who occupies land without the express or tacit consent of the owner . . .' means anyone who *now* continues in occupation without the necessary consent irrespective of whether that person originally took occupation of the land with or without the necessary consent. But the words can also refer to a specific act, viz the taking of possession or occupation without the necessary consent.

[42] The Afrikaans text of PIE is the unofficial one and arguably favours the interpretation referring to a specific act. The term used for 'unlawful occupier' is 'onregmatige okkupeerder', which is defined as

"n persoon wat grond sonder die uitdruklike of stilswyende toestemming van die eienaar of persoon in beheer *beset*, of sonder enige ander wettige reg om sodanige grond te *beset* . . . '

(my emphasis).

Die *Woordeboek van die Afrikaanse Taal* P C Schooneess *et al*) explains 'beset' as follows:

'**beset**. 1. w. 1. In besit neem: *Die pioniers het hul plase beset.* 2. (*mil.*) Van troepe, van 'n garnisoen voorsien: *'n Vesting beset met 'n groot garnisoen.* 3. (*mil.*) Inneem, bemeester: *Die rante, die hoogtes beset.* 4. In beslag neem: *Al sy aande met lesse beset.* 5. Volsit: *Die voorste ry stoele, alle sitplekke beset.* 6. Beklee: *Hulle nakomelinge het tot* 1910 *die troon beset.* 7. Belê, aanbring op: *'n Kledingstuk met kant beset.* 8. Beplant: *'n Pad met bome beset.* 9. Ook **besit**. Bevrug, beswanger: *Die merrie laat haar beset;* vgl. BESIT[2].'

(See also the *Verklarende Handwoordeboek van die Afrikaanse Taal*, (*HAT*) *sv* 'beset'.)

There is thus an indication, in the Afrikaans text, that PIE was intended to apply to the unlawful occupation of land as a positive action, as in the case of squatters *taking* occupation of land, and not to apply to defaulting ex-tenants and ex-mortgagors who simply remain in unlawful occupation.

[43] The problem of ascertaining to which situations PIE applies is,

however, not capable of a definite and final solution by a mere textual interpretation of the definition itself. The answer is to be found in broad, context-sensitive to PIE and its place in

the constitutional and legislative framework of land tenure laws.

[44] There seems to be general agreement that PIE applies to the situation where an informal settler (a squatter) moves onto vacant land without any right to do so and without the consent of the landowner or his or her agent. There are thousands, if not millions, of such squatters in our country. They are usually unemployed, the poorest of the poor, and live with their families in self-erected tin, cardboard or wooden shacks.

[45] But does PIE also apply to the following situations?

[45.1] A widow, the head of a household, has been the lessee of a house in Randburg, Johannesburg. The lease expires but, unable to find any other accommodation, she remains in the house.

[45.2] A young couple buys a house in a suburb. In order to afford the purchase price, they borrow money from a bank. The loan is secured by a registered mortgage bond over the property. Falling on hard times, they fail to keep up with the bond payments. The bank takes judgment and the property is sold in execution. They remain in occupation, desperately looking for other accommodation, which they are unable to find or afford.

[45.3] The owner of a holiday home in Plettenberg Bay allows a friend to use his home, free of charge, for the winter season. Come the summer season, the owner wants to let the house at very profitable rates to tenants. His friend refuses to vacate.

[45.4] A company owns a factory in an industrial urban area. The company goes into liquidation. The liquidator intends to sell the property, but the former directors simply carry on using the machinery in the factory for their own profit.

[45.5] A purchaser of a house in town takes occupation but defaults in payment of the purchase price. The seller cancels the contract. The obstinate 'purchaser' refuses to vacate.

[45.6] Conversely, a seller refuses to vacate although the purchaser has complied with all his or her obligations.

[46] Can these occupiers be evicted? Leaving aside, for the moment, other legislation that may come into play, the common law answer would have been clear and simple: the owner (or the liquidator, by virtue of applicable legal provisions) can without more ado apply to court for an eviction order, simply alleging his or her ownership of the property in question and stating that the property is occupied by someone else. This has been trite law ever since *Graham v Ridley* 1931 TPD 476. The underlying principle and resultant procedure and *onus* of proof was succinctly encapsulated in *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A as follows:

> 'It may be difficult to define *dominium* comprehensively but there can be little doubt that one of its incidents is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found,

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

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

When the owner acknowledges (without there being any legal obligation to do so) that the occupier has or had a right of occupation (for example in terms of a lease), the owner has, in addition, to prove that the right no longer exists or is no longer enforceable, for example that the lease between them has expired or been cancelled lawfully (see *Graham v Ridley* (*supra*); *Chetty v Naidoo* (*supra* at 21)).

[47] But, *in those cases where PIE is admittedly applicable*, for example in the case of squatters, the common law has been changed drastically, both as to procedure and to substance. No longer is there in such cases a simple *rei vindicatio* procedure available to the owner. Section 4 of PIE introduces a unique and peremptory procedure. Section 4(2) requires that notice of the eviction proceedings be given to the unlawful occupier and the municipality having jurisdiction, at least 14 days before the hearing of those proceedings. The juxtaposition of this procedure and that prescribed by the Court Rules is opaque, and has already given rise to an appeal to this Court - *vide Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA). In terms of that judgment, both the ordinary court procedures and the procedure under PIE must be followed. Furthermore, it seems that a further *ex parte* application is necessary in order to obtain the court's directions for serving the notice required by s 4(2).

Be that as it may, it is clear that if PIE is applicable the procedure for the eviction of an unlawful occupier is cumbersome, costly and time-consuming.

[48] The important impact of PIE, however, is to be found in the substantive provisions of s 4(6), (7) and (8). These provisions turn the common law on its head and they draw a thick black line through *Graham v Ridley* (*supra*) and *Chetty v Naidoo* (*supra*) as far as proceedings under PIE are concerned, ie if PIE is applicable. 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? The circumstances to be taken into account by the court in forming such an opinion are also wide-ranging - all the relevant circumstances must be considered, including the rights of the elderly, children, disabled persons and households headed by women. If the period of occupation exceeds six months, further considerations must also be taken into account, viz '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'.

[49] Even if it is accepted, as it must be, that the discretion given to the particular judicial officer hearing the case will be exercised judicially, the result of the conditions and qualifications contained in ss 4(6), (7) and (8) may, in a particular case, be extremely injurious to the landowner. Suppose that s 4(7) is applicable and no other land can be found to accommodate the widow and her family. The consequence is that they must remain on the property, obviously to the detriment of the owner who will not be able to use, sell or

lease the property. And so examples of hardship to the landowner can be multiplied.

[50] 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. No surprise, therefore, that the landowners would energetically endeavour to avoid the application of PIE to their eviction proceedings and that the ex-tenants holding over, ex-mortgagors and former precarists would with equal vigour contend for its application.

D The previous judgments

[51] There has been a plethora of judgments in the Provincial Divisions of the High Court and the Land Claims Court dealing directly or indirectly with the meaning of 'unlawful occupier' in PIE and consequently with the purview of that statute. They are:

- *ABSA Bank Ltd v Amod* [1999] 2 B All SA 423 (W) (*Amod*);
- *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) (*Ross*);
- *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) (*Betta*);
- *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE) (*Peoples Dialogue 1*);
- *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Another* 2001 (4) SA 759 (E) ([2001] 1 B All SA 381 (E)) (EC Full Bench) (*Peoples Dialogue 2*);
- *Sentrale Karoo Distriksraad v Roman; Sentrale Karoo Distriksraad v Koopman; Sentrale Karoo Distriksraad v Krotz* 2001 (1) SA 711 (LCC) *(Sentrale Karoo Distriksraad*);
- *Esterhuyze v Khamadi* 2001 (1) SA 1024 (LCC) (*Esterhuyze*)
- *Ellis v Viljoen* 2001 (4) SA 795 (C) (2001 (5) BCLR 487) (*Ellis*);
- *Van Zyl NO v Maarman* 2001 (1) SA 957 (LCC) (*Van Zyl*);
- *Ridgway v Janse van Rensburg* 2002 (4) SA 186 (C) (*Ridgway*);
- The judgments in the two appeals before us.

E *Amod*

[52] The applicant bank was the owner of a property in a residential suburb which, together with the improvements (a house) thereon, was worth approximately R495 000. The respondent was in occupation of the property. The bank sought his eviction. The respondent alleged that he was in occupation by virtue of an oral lease with the bank; the bank denied the alleged agreement. The matter was referred for the hearing of

oral evidence. Before the trial, the parties had come to an agreement, *inter alia*, that the respondent would vacate the property on or before 31 March 1999. They asked the presiding Judge, Schwartzman J, to make this agreement an order of Court. The learned

Judge, however, was faced with an alternative defence (which had not been abandoned) relied upon by the respondent, that the bank, in applying for eviction, had not complied with the provisions of PIE. Schwartzman J held (at 430*e* - *g*) that PIE cannot

> '. . be reasonably interpreted or understood to mean an Act designed to change the common law of landlord and tenant or to affect the common-law right of an owner of an immovable property to recover his or her immovable property from a person who took occupation in terms of a contract but whose contractual right to occupy has terminated On my reading of the 1998 Act, it is intended solely to regulate and control persons who occupy what are called informal settlements I also conclude that the reference to the common law in s 4 of the Act is limited to the common law insofar as it may deal with persons who move onto another's land without the owner's express or tacit approval, eg a trespasser, and that the provisions of the Act cannot and do not apply to other common-law relationships and in particular agreements pursuant to which parties agree that land or the improvements built thereon shall be occupied for a period of time as determined by them in terms of their agreement '

The defence based on the provisions of PIE having failed, the agreement was then made an order of Court.

[53] The reasons expressed by Schwartzman J for favouring the 'narrow' interpretation of PIE can be summarised as follows:

[53.1] The learned Judge (at 428*d* - *f*), took as his point of departure certain principles that govern the interpretation of statutes.

[53.2] He then stated that the laws repealed by PIE included the Prevention of Illegal Squatting Act 52 of 1951 ('PISA') and that PIE and PISA pursued 'diametrically opposed objects' (at 429*e*).

[53.3] The learned Judge next stated (at 429*e* - *h*) that, notwithstanding s 4(1) of PIE,

> '. . I find it difficult to accept that the 1998 Act can be interpreted as turning on its head the common law of landlord and tenant or the common-law right of an owner of immovable property who has, in terms of a contract, given another the right to occupy his or her immovable property to recover same But this is what Mr *Fehler* submitted was the effect of the 1998 Act. If he is correct, it means that a property owner say in Hyde Park, Bishops Court or La Lucia, who leases his or her residential property for 12 months to say a millionaire, cannot recover possession of the property on termination of the lease from what is then an "unlawful occupier" unless and until he or she complies with s 4 of the 1998 Act. Nor can the property owner recover any amount for the holding over by the tenant who is at common law in unlawful occupation of the property (see s 3(1) of the 1998 Act), nor can an eviction order be granted unless the court is satisfied that it is just and equitable to do so and then only after considering whether there is land available to which the millionaire tenant can be relocated. A similar position would arise if such property owner sold the property to a purchaser who took occupation of the property and failed or refused to pay the purchase price Here again such property owner's right to evict would be subject to equitable consideration and the court being satisfied that the occupier has alternative land that he or she can occupy (see s 4(6) and 4(7) of the 1998 Act) These apparently absurd results can only follow if it is clear from the 1998 Act that this was the

> clear and manifest intention of Parliament. I cannot find such an intention in the 1998 Act.'

[53.4] The learned Judge further held (at 429*i* - 430*b*) that, having regard to the definition in PIE of 'unlawful occupier',

> '. . . and notwithstanding the definition of "evict" the meaning I give to these words is that the person referred to is a person who has without any formality or right moved on to vacant land of another and constructed or occupied a building or structure thereon Had it been the intention of the Legislature to affect the common-law right of property owners, to which I have referred, the definition of unlawful occupier would have

included a person who, having had a contractual right to occupy such property, is now in unlawful occupation by reason of the termination of the right of occupation. The absence of such a provision must affect the extent to which it can be said that the 1998 Act was intended to affect persons' common-law right to determine who may occupy their immovable property in terms of agreements. Furthermore, the words "the person who occupies land" in the context of the definition of an unlawful occupier can only, as I understand it, mean a person who moves onto the land of an owner without the permission of the owner and cannot without more be said to include a person who has, in terms of a contract or otherwise, been in lawful occupation of a property but whose common-law right to possession has ended.'

[53.5] The learned Judge held (at 430*c* - *d*) that PIE applies, in any event, only to persons moving onto vacant land who then erect dwellings thereon that accord with the definition of the buildings or structures mentioned in s 1 of PIE and which may be demolished in terms of s 4(10), ie

'. . . any hut, shack, tent or similar structure, or any other form of temporary or permanent dwelling or structure'.

[53.6] The learned Judge on the basis of these arguments came to the conclusion that the Act had the narrow meaning and was not applicable to the ex-tenant holding over.

F *Ross*

[54.1] Josman AJ delivered the judgment of the Full Court of the Cape Provincial Division, Desai J concurring. The appellant, Mrs Ross, occupied the premises at 15 Lilac Court, Lotus River, which is a residential suburb, with the permission of the respondent-owner. The permission was revoked and the respondent issued summons for her eviction.

[54.2] The summons was issued in July 1997. PIE came into operation on 5 June 1998. Josman AJ (at 597B) accepted that PIE was clearly not applicable to the case if the time frame had been different. Nevertheless, the learned Judge embarked on a discourse as to whether PIE would have applied to the present case. He referred to an article by Ranjit Purshotam (in 1999 *De Rebus*), who was of the view (not substantiated by analysis and debate) that PIE would be applicable in future to cases such as that of Mrs Ross (see at 597I - J). But, opined Josman AJ, there is the judgment in *Amod*. After quoting lengthy passages from *Amod*, the learned Judge concluded (at 599A) that he agreed with the interpretation of Schwartzman J. The implication is clear: had PIE been applicable, the appellant would not have been entitled to its protection.

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G *Betta Eiendomme*

[55.1] The judgment of Flemming DJP contains a number of *obiter* remarks, highly insensitive to the plight of squatters, whose legal position was not relevant to the issue before the Court. The applicant, the owner of premises (unspecified in the judgment), had let them to the respondent, who failed to pay the stipulated deposit and, after paying rental for four months, stopped paying altogether. At first the appellant instituted action for eviction in the magistrate's court, which was not defended. In the magistrate's view PIE requires, in an action for eviction of an ex-tenant, more than mere allegations of ownership and termination of the right of the tenant to occupation. He refused ejectment. The applicant then commenced an application in the Witwatersrand High Court, for the eviction of the respondent. This time the applicant sought to comply with PIE, the papers now running to

55 pages (at 470E - F). The application was not opposed. Flemming DJP, after a number of contentious remarks as regards the general method of legislation and 'the normal legal principles of interpretation of statutes' (at 472C) and as regards the 'vertical application' of s 26(3) of the Constitution (at 473A - B) and its non-applicability to the present case (at 473B - E), at last dealt with PIE. In a single sentence he endorsed *Amod* (at 473I), noted that *Amod* was also endorsed in *Ross* (at 473I - J), and issued an eviction order.

[55.2] It is clear that the perspective from which Flemming DJP viewed s 26(3) of the Constitution and the provisions of PIE is based on the common law view of ownership, from which follows that unless legislation clearly limits that right, the common-law position as expounded in *Graham v Ridley* (*supra*) and *Chetty v Naidoo* (*supra*) is still good law even in those cases where PIE was applicable. It is necessary, for my analysis *infra*, to quote what the learned Judge actually said:

> '[10.1] I conclude that the right of ownership as recognised before the Constitution has not been affected by the Constitution. Compare s 39(3) of the Constitution. No necessity arises to restrict rights of an owner against an illegal occupier to "promote the values that underlie" the Constitution or to "promote the spirit, purport and objects of the Bill of Rights". (Sections 39(1) and 39(2).) If the Legislature in the Constitution or elsewhere intended a change in law or in equity, it should have made itself clear. Ownership still carries within it the right to possession. Similar to the inflatable ball, ownership still reflates to its full content as and when any burden such as the rights created by tenancy falls away.
>
> [10.2] In the absence of legislative interference, postulating that nothing more is known than that the plaintiff is owner and that the defendant is in possession, it is right and proper that an owner be granted an ejectment order against someone who has no business interfering with the possession. A court must protect a legal right when it is not clearly barred from doing so. That applies also to ownership and the right to possession which is its core. A court should require a clear restraint before it fails to act against a wrong. That applies also to theft of land and to the grabbing the right to possess, which is after all of the same quality and has the same effect.'

H *Peoples Dialogue 1*

[56] In this matter, the municipality was the owner of a piece of vacant

land, approximately 12 hectares in size, which it had earmarked for future low-cost housing development. During the latter part of 1998 the municipality agreed that 20 squatter families, who had moved onto the land and erected shacks there, could temporarily remain on the land. But soon after that further squatters moved onto the land, so that, when the litigation arose, at least 340 structures had been erected and were occupied. The municipality, desiring to commence with the development of the property, instituted an application for the eviction of the 'further squatters', ie those who moved onto the land without permission. The opposed application was heard by Horn AJ. There was no dispute that PIE applied because the 'further squatters' had moved onto the property without any permission or right to do so. What is commendable about this judgment is Horn AJ's grasp of the legal and social background of the squatter problem and his balanced approach to the conflicting rights of the landowner and the squatters. He issued an order for the eviction of the further squatters, but suspended the execution of the order pending the availability of suitable alternative land or accommodation for their resettlement. (For a similar approach, see Moosa J in *MEC for Business Promotion, Tourism & Property Management, Western Cape Province v Matthyse and Others* [2000] 1 B All SA 377 (C), where the execution of the

eviction order was suspended for four months and three weeks.)

I *Peoples Dialogue 2*

[57] This was an appeal by the municipality against the suspension of the eviction order issued by Horn AJ, discussed above. The appeal succeeded and the eviction of the further respondents one month after the date of the delivery of the judgment, was ordered. Smith AJ (with whom Pickering and Liebenberg JJ agreed) referred to *Amod*, apparently accepting that PIE would not apply to those squatters who occupied the land with the permission of the municipality.

J *Sentrale Karoo Distriksraad*

[58] All that needs at this stage to be said about this case is that Dodson J stated that the approach expressed in *Amod* seems correct, but as it was not necessary to decide the issue, the learned Judge correctly refrained from voicing a definite opinion.

K *Esterhuyze*

[59] The case concerned a contract of employment between a farmer and an employee which had been terminated. The ex-employee refused to vacate the farm. An action was instituted, the plaintiff alleging that he had complied with the procedural provisions of PIE. The action was not opposed and default judgment for eviction was granted, but subject to review by the LCC.

Dodson J, following *Amod*, held that PIE '. . . does not apply where the person sought to be evicted previously occupied the property concerned in terms of an agreement with the owner' (at 1026 para [6]). The learned Judge consequently came to the conclusion that the plaintiff was not entitled to an eviction order on the basis of PIE, and also that

there had not been compliance with ss 4(7) and (8) of PIE. In terms of PIE the LCC has no automatic review jurisdiction, and as that Court could thus not entertain the matter, Dodson J remitted the case to the magistrate (at 1029 para [12]).

L *Ellis*

[60.1] The judgment in this case was delivered by Thring J (Blignault and Van Heerden JJ concurring). It dealt with the situation where the previous owner of a farm had given permission to a Mrs Viljoen to live in a house on the farm *a precario*, viz that she had the use and occupation of the house belonging to the landowner on sufferance, by the latter's leave and licence. In law the permission so to use and occupy is revocable at the will of the landowner, provided reasonable notice is given. In this case sufficient notice of revocation of the new owner's permission was given. The new owner applied for the eviction of Mrs Viljoen. She relied on the protection of PIE.

[60.2] In the Court *a quo*, Griesel J had found that PIE was not applicable. On appeal by Mrs Viljoen, Thring J confirmed this conclusion. He followed *Amod*, quoting extensively from the judgment in that case and endorsing the view that PIE does not apply to a situation where property is occupied by a person who initially took occupation thereof in terms of a contract,

or with the consent of the owner, but whose right to remain in occupation has since been terminated (at 493I - 494A). Thring J granted the eviction order.

M *Van Zyl*

[61.1] This case dealt with an application in a magistrate's court for an order for the eviction of a defendant from a house on a farm let to him by the plaintiff who was the owner. The plaintiff alleged that the lease was for a period of 12 months, that it had come to an end but the defendant had failed to vacate, despite demand. The application was not opposed and default judgment was granted and a warrant of execution issued. Thereafter the defendant brought an application for rescission of the default judgment and suspension of the warrant of execution. He alleged that he was protected from eviction because he was an occupier as defined in the Extension of Security of Tenure Act 62 of 1997 (ESTA). He alleged that he was entitled to reside permanently on the farm because he had lived there for ten years and had reached the age of 60 years. He denied the lease. This application was opposed, and dismissed. The magistrate held that the defendant had been a lessee and had never been employed by the plaintiff. The matter was then sent to the Land Claims Court for automatic review in terms of s 19(3) of ESTA.

[61.2] Dodson J assumed in favour of the plaintiff that the defendant had been a lessee and not an employee. On this basis, the question was whether the existence of a former lessor-lessee relationship precluded the application of ESTA. The learned Judge stated that the magistrate had based his conclusion that a lease agreement precluded the application of ESTA on the *Amod* judgment.

[61.3] The learned Judge then referred to *Amod*, stating that he agreed with the decision in that case insofar as it concluded that PIE applied only to persons who have never had consent to reside on the land

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concerned. The learned Judge correctly stated that the *Amod* decision was based primarily on the view that PIE merely replaced PISA (at 962 para [11]). Dodson J, however, in a footnote (at 962 fn 11) qualified his acceptance of *Amod* in these terms:

> 'I am not necessarily convinced that PIE does not apply where existing lawfully erected improvements on land are occupied unlawfully from the outset of the occupation. This appears to be the import of the *Amod* judgement at 429*c* - *e*, although the reference to "or occupied a building . . . thereon" at 429*f* seems to contradict what is said earlier in the judgement.'

[61.4] Dodson J also correctly distinguished between PIE and ESTA, the latter aiming to provide more secure tenure to persons who have or had consent or a legal right to occupy rural land which belongs to another person. The *Amod* decision thus cannot be applicable to an interpretation of ESTA.

N *Ridgway*

[62] The facts in this case were identical to those of the appeal in *Bekker and Bosch* before us.

The applicant is the registered owner of a residential property in Gordons Bay, which he had bought at a sale in execution. The respondent was the former owner and mortgagor who

had failed to comply with his obligations under the mortgage. He refused to vacate the property, apparently on the basis of some undisclosed defence against the bank's claim.

Griesel J, following the decision of the Full Bench in *Bekker and Bosch*, held that the concept 'unlawful occupier' in PIE includes a former mortgagor (at 190A - B). The learned Judge nevertheless granted an eviction order against the respondent. The only defect in the notice required by s 4(2) of PIE relied upon by the respondent was that the required notice had not been given to the municipality concerned. Griesel J held that the requirement that notice be given to the municipality was not peremptory and, on the facts of the case, held that the applicant had complied substantially with s 4 of PIE. As far as the question of *onus* is concerned, the learned Judge agreed with the approach followed in *Ellis* (at 191I - 192B).

O *Ndlovu v Ngcobo* (the first appeal before us)

[63.1] I have related the facts which gave rise to this appeal. Galgut J, who delivered the judgment (Combrinck J and Aboobaker AJ concurring) endorsed and followed *Amod*.

[63.2] Galgut J adopted the view that the application of PIE to ordinary tenants would lead to absurd results. He repeated the example given by Schwartzman J of the millionaire tenant in Hyde Park, Bishops Court or La Lucia, all upmarket residential areas populated by affluent members of society. He also agreed with Schwartzman J that PIE was not intended to alter the common law of ownership. But Galgut J also found further considerations which, in his view, supported the *Amod* result.

[63.3] First, if PIE was intended to apply to leases, why was the Rent Control Act 80 of 1976, which laid down limits to a lessor's right to evict a lessee from so-called controlled premises not repealed, or why was nothing said in the PIE about those provisions in the Rent Control Act

which were inconsistent with PIE? The Rent Control Act was repealed in 1999 and replaced by the Rental Housing Act 50 of 1999. But, asked the learned Judge, why was this Act necessary, especially because the express terms of its purpose and preamble, in part at any rate, are the same as those in PIE? The learned Judge also pointed out that the provisions of the Rental Housing Act are to some extent inconsistent with those of PIE, yet it contains no provision to explain how the two Acts are to be reconciled.

[63.4] Galgut J also postulated another absurd result which would occur if PIE were to apply to leases. If the tenant sublet the premises concerned, and did not therefore use them as his home, s 4 of PIE would not necessarily protect him, because he would not strictly be in 'occupation' of the land concerned, and for the purposes of s 4(7) at any rate, there would be no question of enquiring into whether other land is available for his occupation. If he failed to pay the rental, an order for his eviction might therefore be made. But the sublessee, who used the premises for his home would not be in the same position: he would not necessarily be liable to eviction at the instance of either the landlord or the tenant.

[63.5] Finally, the learned Judge also relied on the sanctity of contract (*pacta sunt servanda*) principle:

'When a party to a contract conscientiously undertakes an obligation the other acquires a right which the law

recognises and enforces. The Legislature would therefore not lightly interfere with the sanctity of contracts, and in particular with rights properly acquired thereby, especially in an established field, such as landlord and tenant, which has been with us for ages. There are in the Republic doubtless hundreds of thousands of houses or flats that have been let as homes to the lessees concerned. If the Act had been intended to apply to those leases, it would drastically and prejudicially affect the rights of the landlords concerned, and it would have done so without any warning. The result would unquestionably give rise to alarm, if not chaos, in the industry, and I find it difficult to imagine that the Legislature could have intended such results.'

P *Bekker and Bosch v Jika* (the second appeal before us)

[64.1] The first recorded judgment in which disagreement with *Amod* was expressed is that of Plasket AJ in the first instance in the appeal now under discussion (see [2001] 4 B All SA 573 (SE)). His approach differs *toto caelo* from that of Schwartzman J. He took as his starting point the Constitution, *inter alia*, ss 7(2), 26(3) and 39(2). PIE, he found, must be interpreted broadly and purposively and should not be subjected to trimming to bring it into line with the common law.

[64.2] Plasket AJ also dealt with, and disagreed with, the argument of absurdity which had featured so prominently in the judgment of Schwartzman J. He held that s 4 of PIE created a procedure and placed an obligation on the court to consider all relevant factors before ordering an eviction, in much the same way as was required by the erstwhile Group Areas Act and, by implication, by PISA.

[64.3] Plasket AJ held that in the instant case there was no contract between the applicants and the respondent. The latter occupies the land (to which the dwelling has acceded and is part of it) without the express or tacit consent of the applicants and without having any other right in

law to occupy it. He was, therefore, an unlawful occupier as envisaged by PIE.

[64.4] An appeal against the order made by Plasket AJ was heard by the Full Court of the Eastern Cape Division (Somyalo JP; Jennet and Leach JJ) and was dismissed. Each of the members of the Bench delivered a concurring judgment.

[64.5] Somyalo JP took as point of departure the Constitution and its proper interpretation. The learned Judge President also found support for his conclusion in the definition of 'evict', from which it appears that land includes buildings or structures on land. He concluded that the definition of 'unlawful occupier' in PIE was clear and unambiguous, and that a person is an unlawful occupier whether he originally took occupation of the land unlawfully or whether he refuses to vacate on the termination of his lawful occupancy. The definition is also couched in the present tense which means that the time for determining the unlawfulness or otherwise of the occupancy is at the time of the institution of eviction procedures. The learned Judge President also expressed the view that the landlord or owner of property would be entitled to recover rental or damages from a tenant holding over. Reliance was also placed on s 6(1) of PIE which clearly refers to a mortgagor, who holds over after a sale in execution as an unlawful occupier. Reference was also made to PISA. As far as the Rental Housing Act is concerned, the fact is that it contains no procedures for eviction, which led the learned Judge President to remark:

'For a statute to achieve fairness and equity this would be beyond comprehension. The answer in my view is

that the Legislature is aware of and intended that the procedure in [PIE] would apply.'

The learned Judge President expressed his belief that the fears raised in *Amod* are unwarranted, and that there are in any event no absurdities resulting from PIE in the present case.

[64.6] Jennett J concentrated on the question posed in the matter before him, viz whether the ex-mortgagor was protected by PIE. He relied on ss 4(7) and 6(1) to find that PIE was in fact applicable.

[64.7] Leach J, in a more wide-ranging discussion, came to the same conclusion as his two Colleagues on the Bench. He referred to the *Amod* decision and subsequent judgments and to the definition of 'unlawful occupier' in PIE, which he, correctly, found to be ambiguous. In such a case, he held, it is permissible to have regard to any absurdity which would result from a particular interpretation: absurdity, he reasoned, is a means of divining what the Legislature could not have intended and therefore did not intend. One can thus arrive at what it did actually intend. He referred to the absurdities mentioned in *Amod* and by Galgut J in *Ndlovu*, adding a new example of absurdity if *Amod* is not followed: if the tenant fails to pay the rental and the landlord cancels the lease, the tenant would be in unlawful occupation and PIE would apply. But if the landlord sues for specific performance and, failing such, then in the alternative for an order for cancellation and eviction, PIE would not apply:

'. . . (I)t would be absurd to think that in the latter case an eviction order could not issue upon the cancellation order unless and until the provisions of the Act

had been complied with. Indeed it seems to me to be absurd to suggest that having obtained the cancellation order, the landlord should have to go through yet a further judicial process to obtain an eviction order.'

[64.8] However, Leach J also dealt with s 6(1) of PIE. He found that it clearly implies that the former owner (the mortgagor) was an 'unlawful occupier'. Solely in the light of s 6(1), Jika was an 'unlawful occupier', and PIE was applicable.

Analysis

[65] Our common law was based on the view, ingrained since Roman times, that ownership of land is the most extensive and absolute real right, protecting the owner against all unwanted intrusions and affording the owner an absolute right of eviction against those whom he did not want on his property. This view of ownership permeated not only the whole field of the law of things, but informed the law of contract and was the basis of the entire socio-political pattern and fabric of our society prior to 1996. This was the basis of decisions such as *Graham v Ridley* (*supra*) and *Chetty v Naidoo* (*supra*) in which the minimum assertions to be made by an owner in an eviction case were established. Since 1996, Parliament has embarked on a land reform programme which may justly be designated as revolutionary. Basic to the land reform programme is the Constitution. It prescribes land reform in three directions: the restitution of land rights, the redistribution of land and the protection of tenure, the last mentioned including limitations of eviction in various ways.

Professor A J van der Walt ('Exclusivity of Ownership, Security of Tenure and Eviction Orders: a Model to Evaluate South African Land Reform Legislation' 2002 *TSAR* 254 at 258)

correctly remarks that:

> 'The "normality" assumption that the owner was entitled to possession unless the occupier could raise and prove a valid defence, usually based on agreement with the owner, formed part of Roman-Dutch law and was deemed unexceptional in early South African law, and it still forms the point of departure in private law. However, it had disastrous results for non-owners under apartheid law, which developed the distinction between owners and non-owners of land and the implied preference for the former to establish and maintain apartheid land law: the strong position of ownership and the (legislatively intensified) weak position of black non-ownership rights of occupation made it easier for the architects of apartheid to effect the evictions and removals required to establish the separation of land holdings along race lines.'

[66] A comprehensive picture of the post-apartheid constitutional land tenure reform measures is usefully sketched by Budlender, Latsky and Roux *Juta's New Land Law* (1998); Carey Miller (with Pope) *Land Title in South Africa* (2000) at 282 - 555); Van der Walt '*Property Rights and Hierarchies of Power: a Critical Evaluation of Land Reform Policy in South Africa*' (1999) 64 (2 and 3) Koers at 259 - 94, 281 *et seq*; Catherine O'Regan 'No More Forced Removals? An Historical Analysis of the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361 - 94; Horn AJ in *People's Dialogue 1* at 1079 *et seq*, and *Van der Walt* (*supra* at 259 *et seq*).

[67] To bring about post-apartheid tenure reform:

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- Section 26(3) of the Constitution lays down the constitutional rule that prohibits evictions from and demolitions of homes without a court order;
- the Rental Housing Act 50 of 1999 protects the occupation rights of (lawful) occupiers of (rural and urban) residential property;
- the Land Reform (Labour Tenants) Act 3 of 1996 protects (lawful) occupiers of agricultural (rural) land;
- the Extension of Security of Tenure Act 62 of 1997 (ESTA) protects the occupation rights of persons who (lawfully) occupy (rural) land with consent of the landowner;
- the Interim Protection of Informal Land Rights Act 31 of 1996 protects (lawful) occupiers of (rural and urban) land in terms of informal land rights;
- the Restitution of Land Rights Act 22 of 1994 protects (lawful and unlawful) occupiers of (urban and rural) land who have instituted a restitution claim;
- the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) regulates eviction of unlawful occupiers (from urban and rural land).

[68] What should be the approach of this Court, in interpreting the laws tabulated above? A realistic and healthy view is that proposed by Prof *A J van der Walt* (*supra* at 255) where he says:

> 'Despite mixed reaction from the courts, it is clear that the traditional, common-law right to sue for eviction is deeply affected by new land-reform developments. Some would describe the relationship between common-law eviction and reform-oriented anti-eviction provisions as a head-on conflict that forces the courts to choose between two irreconcilable political goals or value-systems. The moderate version of this view finds support in the theory of context-sensitive adjudication, describing the courts' function in terms of

context-sensitive and -determined balance between the protective common-law approach and the reformist statute-based approach, in an attempt to mediate between the opposing views and legal rules in search of equilibrium.'

After a review of the relevant legislation, Prof *Van der Walt*, at 288, comes to the following conclusion:

'Analysis of the land-reform legislation provisions that deal with eviction orders suggests that these statutory innovations have amended the common-law right to eviction quite substantially, without establishing a new paradigm within which the right to eviction is subjected fundamentally or institutionally to security of tenure considerations. The overall impression is that land-reform legislation has brought about a more or less *ad hoc* but nevertheless reasonably standardised set of qualifications, restrictions and controls to ensure that evictions are not undertaken lightly or arbitrarily.'

[69] In endeavouring to fathom what the expression 'unlawful occupier' in PIE means, our task is to find a balanced and justifiable interpretation, without fear, favour or bias. Let me once again emphasise: the class of occupiers which we deal with are not poor, homeless squatters who have been forced by past laws to occupy the property of another without the latter's consent or other right to do so, simply out of necessity. We are dealing with a class of occupiers who have entered into valid contracts to acquire or occupy the property of another, but due to their own default,

breach of contract and refusal to vacate land which is not theirs, are in occupation. Was it the Legislature's intention to protect these defaulters against the lawful owners?

[70] The land tenure reform laws find their basis and justification in the Constitution. The following sections seem to me to be relevant:

[70.1]

'7(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'

[70.2]

'9(3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

[70.3]

'25(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

[70.4]

'25(5) The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.'

[70.5]

'26(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.'

[70.6]

'39(1) When interpreting the Bill of Rights, a court, tribunal or forum -

(a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

[71] It can hardly be denied that our Constitution addresses the problem of land tenure reform in a balanced and even-handed manner, recognising, on the one hand, the right to property and protection of the home, and, on the other, the right of access to land, through legislation, but in a fair and just way.

[72] In interpreting the statute under consideration, one must keep in

mind that the defaulter now occupies the property of another without being contractually obligated to pay compensation for such occupation. The defaulter holds the property adversely to the rights of a lawful owner and to the latter's detriment and loss. The equities of the situation are obvious, but may also be tested against the following: suppose the owner is sequestrated (or, if it is a company, liquidated). The trustee claims occupation of the land. The defaulter relies on PIE and remains in occupation. Not only the owner, but the mortgagee and other creditors can be severely prejudiced and this can conceivably be seen as a form of expropriation without compensation, something which neither the Constitution nor our common-law permits (see *Land- en Landboubank van Suid-Afrika v Cogmanskloof Besproeiingsraad* 1992 (1) SA 217 (A) at 243D - G).

[73] I can find in the provisions of the Constitution, read on its own, no justification for the protection of the defaulters and class of persons now under consideration as against the lawful owners, landlord or other persons with similar rights. On the contrary, a correct interpretation of the Constitution points the other way.

[74] The question then arises whether one can find justification for such protection in the laws mentioned and, in the present case, in PIE.

[75] As far as the first appeal is concerned, our point of departure must then be the text of PIE. The definition of 'unlawful occupier' in s 1 is ambiguous. Are there any indications in the other provisions of PIE as to the intention of the Legislature?

[76] Mr *Trengove's* argument in favour of a wide interpretation runs as follows:

PIE excludes from its protection occupiers protected under ESTA. PIE effects this exclusion by two of its provisions. The first is its definition of 'unlawful occupier' in s 1 which excludes occupiers within the meaning of ESTA. The second is s 11(2) and Schedule II of PIE, which amended s 29(2) of ESTA to provide that PIE does not apply to an occupier protected under ESTA. Their exclusion is significant for the following reasons:

Section 1 of ESTA defines an 'occupier' as someone who lives on land that belongs to another, 'who has, or on 4 February 1997 or thereafter had, consent or another right in law to do so'. ESTA in other words protects two classes of occupier. The first is an occupier who has consent or another right to reside on the land. Let us call them 'lawful occupiers'. The second is an occupier who had but no longer has consent or another right to live on the land. They are the unlawful occupiers that can be called 'ex-tenants' or defaulters.

The purpose of excluding occupiers protected under ESTA from the protection of PIE could not have been to exclude lawful occupiers from its protection. That would have been pointless because PIE does not protect lawful occupiers in the first place. Its definition of an 'unlawful occupier' is limited to those who occupy unlawfully.

The purpose of excluding occupiers protected under ESTA from the

protection of PIE could, in other words, only have been to exclude the tenants protected under ESTA, that is to exclude those occupiers who once had but no longer have consent or another right to reside on the land and who are protected under ESTA. They are excluded because they have greater protection under ESTA than they would have had under PIE.

The exclusion makes sense only if PIE's definition of an 'unlawful occupier' includes tenants in the first place. If it did not include tenants and was limited to squatters, the exclusion would have been pointless.

It follows that the Legislature must have intended PIE's definition of an 'unlawful occupier' to include tenants because it would otherwise not have made sense to exclude occupiers protected under ESTA.

The exclusion of occupiers protected under ESTA from the protection of PIE is moreover significant for another reason. It means that, when PIE's definition of an 'unlawful occupier' was drafted, the drafters were alive to ESTA's definition of an 'occupier'. The latter definition expressly refers to occupiers who had but no longer have consent or another right to reside on the land. The drafters of PIE's definition, in other words, had that class of unlawful occupier in mind. If they intended to exclude them from PIE's definition of an 'unlawful occupier', they would have done so. Their failure to do so and their adoption of a definition which includes them (subject to the exclusion of those of them who are protected under ESTA), could not have been inadvertent. It must have been deliberate.

[77] Mr *Kuper*, on the other hand, argued as follows:

Had the Legislature intended PIE to have such a wide and unrestricted ambit, it would have expressly provided therefor. For example, it would have included a definition similar to that

employed in s 1 of PISA (albeit with a different purpose). Section 1 of PISA made it an offence to 'enter upon or into without lawful reason, *or remain* on or in any land or building without the permission of the owner or lawful occupier of such land or building' (my emphasis).

The exclusion in PIE of persons who are occupiers in terms of the ESTA is, if anything, an indicator of the intention *not* to include within the ambit of the definition of occupier in PIE, occupiers who lawfully took occupation, but whose occupation may have subsequently become unlawful.

Mr *Kuper* also referred to the observation by Dodson J in *Sentrale Karoo Distriksraad* (*supra* at 712), viz:

> 'In *ABSA Bank Ltd v Amod* th[e] [definition of "unlawful occupier" in PIE] . . . was held to mean
>
> > "a person who has without any formality or right moved onto vacant land of another and constructed or occupied a building or structure thereon".
>
> Although this approach seems correct, it is not necessary for me to decide that issue here. What is particularly important for present purposes is that the definition expressly excludes "a person who is an occupier in terms of the Extension o Security of Tenure Act". I will refer to this Act as ESTA.

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> *The latter exclusion is logical because an occupier in terms of ESTA is by definition a person who has or at a certain time had consent or another right in law to occupy the land of another.*'

(Emphasis added, footnotes omitted.) It was not necessary to include such category of occupiers within the ambit of PIE precisely because they receive extensive protection under ESTA, *and are excluded from the provisions of PIE.*

In my view, the exclusion in PIE of the application of ESTA is a strong indication in favour of the more limited ambit of PIE. It is clear that the Legislature wished to avoid any overlap between the two statutes. True, it could have defined the scope and ambit of PIE in a lengthy definition of the category of persons to whom it should apply. But it followed a well-known legislative technique, viz to identify the persons subject to the statute by way of a short definition and then, to make assurance doubly sure, to exclude the operation of other statutes.

But, be that as it may, the net result is that PIE excludes a person who has or at a certain time had consent or another right to occupy the land of another. PIE does not apply to them. Ex-tenants are persons who had at a certain time consent to occupy the land of another. By definition they are excluded from PIE.

[78] Mr *Trengove* also relied on the provision of s 6(1) of PIE, which, as I have mentioned above, refers to an ex-mortgagor as an unlawful occupier. He argued that the mortgagor must be the former owner of the land sold in execution because only an owner can mortgage land. The section in other words also makes it clear that the unlawful occupiers protected under PIE include an owner who lawfully occupied the land but whose occupation of it has become unlawful by virtue of its sale in execution under a mortgage bond. Consequently, he argued, it is not feasible that PIE's protection is limited to squatters who unlawfully acquired occupation of the land.

The counter-argument was the obvious and correct one: if PIE applies not only to squatters but also to those who took occupation by virtue of agreement and whose right to occupy has been terminated, it would not have been necessary specifically to refer to the ex-mortgagor. The fact that it was necessary to refer specifically to the ex-mortgagor is a very strong indication that PIE does not apply generally to a person who had at a certain time consent to occupy the land now belonging to another.

[79] Mr *Kuper* also, correctly in my view, relied in argument on the definition of 'building or structure' in s 1 of PIE. It defined 'building or structure' as including

'any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter'

Mr *Kuper* argued that the Legislature clearly had in mind the type of building or structure erected by squatters who move onto land. Had it been the intention of the Legislature that PIE would apply to urban houses, townhouses, apartments, flats or rooms, it would have said so specifically. The words 'permanent dwelling' in the definition, when read *ejusdem generis* with the rest of the definition must be understood to

refer to permanent dwellings or shelters erected by some squatters, and not to refer to the urban houses, townhouses, etc, as was argued by Mr *Trengove*.

[80] Mr *Kuper* also, correctly in my view, referred to s 3 of PIE, which prohibits the receipt of or solicitation for payment of money for arranging or organising or permitting a person to occupy land without the consent of the owner or person in charge of the land. Mr *Kuper* argued, correctly in my view, that this provision, which precedes s 4, clearly has in mind land occupation by squatters, and is incompatible with the letting and hiring of houses, townhouses, etc.

[81] Mr *Kuper* also relied on the requirement in s 4(2) of PIE, that notice must be given by the court of the proceedings not only to the unlawful occupier, but also to the municipality having jurisdiction. He argued, correctly in my view, that the requirement of notification to the municipality is incompatible with the eviction of ex-tenants but understandable if one deals with squatters. What interest does the municipality of, say, Cape Town have with the ordinary, daily, eviction of tenants of houses, townhouses, etc in the area? But it does have an interest, and should be given a say, in the eviction of squatters in its area, because, under s 4(7) of PIE, it may be called upon to make land available for the evicted squatters.

[82] Mr *Kuper* also referred in support of his argument to the procedure laid down in ss 4(2) - (12) of PIE. He convincingly argued that these procedures are compatible with the eviction of squatters and incompatible with the eviction of ex-tenants from houses. He highlighted the following points:

(a) the requirement of the involvement of the court in a procedure which is clearly inquisitorial and intended to protect those who cannot protect themselves, for example squatters;

(b) the involvement of the municipality concerned;

(c) the discretion given to the court in ss 4(6), (7), (8) and (9);

(d) the provisions relating to the demolition and removal of the buildings or structures that were occupied by the occupier on the land in question - ss 4(10), (11) and (12). This is incompatible with the lease of urban houses, flats, townhouses, rooms, etc.

[83] Mr *Kuper* also relied on the following indications to support his interpretation of PIE, viz that it does not apply to ex-tenants:

(a) the apprehension of real and imminent danger to persons or property in s 5(1)*(a)* arises only in the context of informal land settlement;

(b) the grant to an organ of State of *locus standi* to act in certain cases is compatible only with a possible need to clear informal settlements which may give rise to public health or like concerns (s 6);

(c) the use of mediation as a dispute resolution technique, particularly as the relevant municipality is given the power to intervene in the public interest. This form of mediation is suited to solving problems of informal settlement. It is out of place in ordinary letting and hiring.

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[84] Both counsel referred to the background and history of the law relating to landlords and tenants and the rights of the former to evict a tenant whose tenancy had been terminated. A close analysis of the statutory position and history shows conclusively, in my view, that the interpretation of PIE argued for by Mr *Kuper* must be the correct one. At the time of the introduction of PIE, the position was regulated by the common law as laid down in *Graham v Ridley* and *Chetty v Naidoo* and by the Rent Control Act 18 of 1976. The latter Act had a limited ambit, and protected only tenants of 'controlled premises', ie 'any dwelling, garage, parking space or business premises' (see s 1(iii)). It was applicable only to premises occupied before 21 October 1949, in the area of a rent board, did not apply to State property (see *Jeena v Minister of Lands* 1955 (2) SA 380 (A) at 383B), and was not applicable to farms, churches and schools, nor to vacant land (see *Boyers v Stansfield Ratcliffe & Co Ltd* 1951 (3) SA 299 (T)).

When PIE came into operation, the Rent Control Act was still in force, as well as the common law as set out above. PIE must be interpreted against that background, and not against that of the Rental Housing Act 50 of 1999, which came into operation only on 1 August 2000.

[85] If one compares PIE and the Rent Control Act so as to reconcile the provisions of the two Acts (as we must do; see, *inter alia*, *Sedgefield Ratepayers' and Voters' Association and Others v Government of the Republic of South African and Others* 1989 (2) SA 685 (C) at 700J - 701C) it becomes obvious that PIE was not intended *(a) en passant* to turn the common law on its head, and *(b)* stealthily, to do away with the Rent Control Act.

[86] If the introduction of PIE was intended to reverse the common law as laid down in *Graham v Ridley* and *Chetty v Naidoo* and followed and applied by all courts as daily practice, one would have expected the Legislature to do so explicitly. There is, after all, a

strong legal presumption of statutory interpretation that the existing law is not presumed to have been altered unless the language used makes it clear that an alteration was intended. What is required in order to effect an amendment of the common law, especially where existing rights are diminished, is a '. . . distinct and positive provision' (see *Spoor & Fisher v Registrar of Patents* 1961 (3) SA 476 (A) at 482H - 483A).

This rule also puts paid to the suggestion that PIE must be applied to ex-tenants as a result of some 'law of unintended consequences'. There is no such 'law' in the legal rules relating to statutory interpretation. Such a 'law' would obviate the existing rules relating to the interpretation of statutes, and would permit one to argue that if the legislature intended result A, result B is also intended by the 'law of unintended consequences'.

What has to be ascertained is nothing more and nothing less than the true intention of the Legislature, and one way of ascertaining that intention is to apply the presumption that the Legislature did not wish to interfere with the common law, unless the intention to interfere appears clearly or by necessary implication. (See also *Palvie v Motale Bus Service (Pty) Ltd* 1993 (4) SA 742 (A) at 748A - B; *Land- en Landboubank van*

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Suid-Afrika v Die Meester en Andere 1991 (2) SA 761 (A) at 771A - C.)

If one thing is clear from the definition of 'unlawful occupier' in PIE, the rest of the provisions in PIE referred to, the debate in the Courts since *Amod* and the argument before us, it is that one cannot find in PIE an intention to alter the common law (and that in a drastic and far-reaching manner), whether clearly or by necessary implication.

[87] But, the comparison between PIE and the Rent Control Act goes further. It shows that the Legislature was aware of the provisions of the Rent Control Act and did not intend PIE to do away with them.

First, there is a strong legal presumption that an existing statute is not repealed by a later one, unless such an intention appears plainly from the later Act, whether expressly or by necessary implication (see *Kent NO v South African Railways and Another* 1946 AD 398 at 405). A *possible* implication of an intention to amend or repeal an existing statute will not suffice (see *R v Vos*; *R v Weller* 1961 (2) SA 743 (A) at 749A - F; *Ex parte the Minister of Justice: In re R v Jekela* 1938 AD 370 at 377 - 8; *Van Heerden and Others NNO v Queen's Hotel (Pty) Ltd and Others* 1973 (2) SA 14 (RA) at 23H - 24C, 38B - C, 32A - 35A).

Once again, there is no inkling in PIE that it was the intention of the Legislature to do away with the Rent Control Act. In fact, the Rent Control Act of 1976 was repealed, not by PIE, but by the Rental Housing Act 50 of 1999 on 1 August 2000. PIE and the Rent Control Act 1976 existed, side by side, from 5 June 1998 to 1 August 2000. It was never argued or suggested that PIE had repealed the Rent Control Act, and, apart from the presumptions referred to above, for good reason. The preamble to PIE, and the main provisions of PIE, make it clear that PIE was intended to apply to 'land' and, incidentally, to the demolition of structures erected or occupied by unlawful occupiers on such land (see s 4(10), (11) and (12) of PIE). The Rent Control Act never applied to vacant land, as indicated above. It does not even refer to 'land', and deals only with certain types of leased dwellings, garages, parking spaces and business premises. The reconciliation of PIE and the Rent Control Act is both

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clear and compelling. PIE was never intended to apply to leased dwellings, garages, parking spaces and business premises; the Rent Control Act was never intended to deal with vacant land.

[88] Next, it was argued that the definition of 'unlawful occupier' in PIE is couched in the present tense. According to the ordinary meaning of the provision, the ex-tenant holding over is in unlawful occupation. But it was conceded that by the very nature of things the definition had to be in the present tense because the question of eviction cannot arise in respect of someone who, at the time of the application, is a lawful occupier but who was formerly in unlawful possession. In other words, someone who took occupation without the necessary consent but afterwards obtained consent cannot be an unlawful occupier for the purposes of eviction. It was then suggested that to exclude persons holding over (for example tenants) from the definition requires more

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than a change in the tense and one would have to amend the definition so that it applies to

> 'a person who *occupied and still* 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'.

I disagree. The squatter who unlawfully occupied the land and remains there without consent or any other right is, at the time of the eviction application, in unlawful occupation and no emendation is necessary to bring him or her under PIE. The squatter who unlawfully occupied the land and later was given consent to remain there or acquired any other right to do so, is, at the time of the eviction application not an unlawful occupier and falls outside the scope of PIE. His or her position is dealt with by ESTA.

The ex-tenant who holds over without the consent of the owner and without any other right to do so is, if one reads the only definition of 'unlawful occupier' in PIE and applies it grammatically, an 'unlawful occupier' and PIE would apply without more ado. The suggested emendation is not necessary to bring him or her under the protection of PIE. The whole argument, however, turns around the said definition as it stands and how it should be interpreted. As I have indicated, it does not and cannot bear the simple present tense sense.

[89] Finally, it was suggested that PISA did not apply to squatters only, but also to persons who had at a certain time consented to occupy the land or a part of it. PIE was intended to replace PISA. *Ergo*, PIE must be applied to the same categories of persons.

The argument is without any merit. It is true that in *R v Zulu* 1959 (1) SA 263 (A) at 268A it was argued that the Legislature could not have intended to penalise under the provisions of PISA all persons who, whether as lessees or otherwise, have held over after the termination of their rights of occupation. But Schreiner ACJ at 268A stated that there was no good reason for saying that the Legislature cannot have intended its language to be given the meaning which would include those persons.

Two points must, however, be made. The first is that the wording of PISA and PIE relating to the categories of persons to whom the respective statutes, apply, differ considerably. The logic of transferring the legislative intent behind PISA to PIE is therefore suspect.

But secondly, and more importantly, the effect of *R v Zulu* and the applicability of PISA to

persons holding over were terminated by the introduction of ESTA on 28 November 1997. ESTA then became applicable to persons who have or had consent or another right to occupy the land of another. When PIE was introduced later, on 5 June 1998, only one category of persons formerly dealt with by PISA, remained to be dealt with, viz squatters. This is the category dealt with by PIE.

[90] For the reasons set out above, I have come to the conclusion that PIE does not apply to persons who have occupied residential, business or industrial dwellings or buildings under a contractual or other right to do so and who continue to occupy them after their rights to do so have lawfully been terminated or have come to an end.

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[91] I now turn to the second appeal before us, that of *Bekker and Bosch*.

[92] Section 4(7) of PIE reads as follows:

> '(7) 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.'

[93] Section 4(7) of PIE must be read also in the light of s 6(1), which provides as follows:

> '(1) An organ of State may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if -
>
> *(a)* the consent of that organ of State is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or
>
> *(b)* it is in the public interest to grant such an order.'

[94] Sections 4(6) and 4(7) must now be considered and, if possible, reconciled. It will be noticed immediately that, by virtue of the limitation imposed by the phrase, viz 'except where the land is sold in a sale of execution pursuant to a mortgage' in s 4(7), the considerations to be taken into account by a court when asked to issue an eviction order are the same, viz whether the 'unlawful occupier' has occupied the land for less or more than six months at the time when the proceedings are instituted.

Secondly, s 4(6) and (7) do not say who the 'unlawful occupier' in question is. Is it the mortgagor or the informal settlers (squatters) who moved onto the land while it was mortgaged by the landowner in favour of a bank, building society, etc?

[95] In dealing with the first appeal, I have come to the conclusion that the words 'unlawful occupier' in s 1 of PIE do not refer or include ex-tenants and other like occupiers, and that PIE applies only to persons who moved onto the land and who never had and does not now have consent or another right to be in occupation. Thus interpreted, the 'unlawful occupier' in s 4(6) and (7) cannot be the ex-mortgagor, because he or she had, in the past, the right to

be on the land, viz as owner. Up to the moment of transfer of the property out of his or her name pursuant to the sale in execution, he or she is still, as owner, in lawful occupation. Only after the registration of transfer can one say that he or she is in unlawful occupation. But even at that stage the definition of 'unlawful occupier' would not be applicable to him or her, because of the uninterrupted right he or she has enjoyed in the past as owner - and

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this is incompatible with the definition of 'unlawful occupier' in PIE itself.

[96] Section 4(6) and (7) therefore, in my view, deal with the situation where informal settlers have moved onto land mortgaged by the owner. The owner then fails to honour the loan obligations and the property is declared executable and sold in execution. The new owner must take the necessary steps to evict the informal settlers, in which event the considerations mentioned in s 4(6) and (7) must be taken into account. Those considerations have no place in the eviction of the ex-mortgagor. Had it been the Legislature's intention to alter the common law relating to the unassailable position of a purchaser at a sale in execution (see *Reynders v Rand Bank Bpk* 1978 (2) SA 630 (T) at 634F *et seq*) so drastically, and to undermine the whole institution of providing home loans on the security of a mortgage bond, it should and would have said so clearly and expressly.

[97] Insofar as the above conclusion seems to be in conflict with the words 'except where the unlawful occupier is a mortgagor' in s 6(1) of PIE, the only rational explanation of that phrase is, in my view, that the Legislature had confused the object it had in mind, ie to provide some security of tenure for informal settlers, with the person in occupation of the land at the time. The phrase is nonsensical: the mortgagor is still owner, is in lawful occupation and cannot be an 'unlawful occupier'. In my view, the unhappy designation of a mortgagor as an unlawful occupier cannot detract from the correct interpretation of PIE.

[98] It follows that PIE is not applicable to ex-mortgagors. In the result, the second appeal must succeed.

No costs orders were requested by the parties involved in both appeals.

[99] In the result I would accordingly have ordered that

1. The appeal in the case of *Peter Ndlovu v Mpika Lawrence Ngcobo*, case No 240/2001, be dismissed.

2. The appeal in the case of *Charles Alfred Bekker and Michael John Bosch v Jimmy-Rodgers Bonginkasi Jika*, case No 136/2002, succeed on the basis that the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 provide no defence against the order sought by the appellants; and that the matter be remitted to the Court of first instance for the determination of the remaining issues between the parties.

Nienaber JA:

[100] I have had the benefit, after listening to argument of quality from counsel on both sides, of reading the judgments prepared by my Brothers Harms JA and Olivier JA respectively. There is, if I may say so with respect, much to be admired in both judgments.

Both deal in depth with the textual hash that is PIE (Act 19 of 1998) and with its contiguity to other enactments such as PISA (Act 52 of 1951), ESTA (Act 62 of 1997) and the Rental Housing Act (Act 50 of 1999), amongst others, in an effort to discern a pattern of meaning as to its true reach. What is evident

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from studying the two judgments in conjunction with divers others cited therein are, first, that the provisions of PIE unquestionably do apply to the occupation of land by squatters properly so called, ie homeless people who settle on publicly or privately owned land without legal title or permission to do so; and, secondly, that the solution to the further problem posed in this case (whether the terms of PIE extend to a different class of persons, ie those who once were but are no longer lawful occupiers of the land) cannot unquestionably be abstracted from within the four corners of PIE itself or its juxtaposition to other antecedent or contiguous pieces of legislation. Cogent arguments in favour of one solution, based on particular sections of the Act, are counter-balanced by equally cogent arguments in favour of the other. Even so, I find myself in broad agreement with the line of reasoning expressed in *ABSA Bank v Amod* [1999] 2 B All SA 423 (W) and the cases following it and with the points made by Olivier JA in his judgment. In addition there are two general considerations which in my opinion tend to support the conclusion and the orders proposed by him.

[101] The first such consideration is this. The occupation of land without colour of right is by definition wrongful. It is wrongful even when the land is vacant and there is no imminent competition for its occupation. Squatting is therefore wrongful. PIE does not purport to legitimise such wrongful occupation. But in protracting the process of eviction it created the apparatus for prolonging it. In that sense and to that extent PIE condones and indeed rewards the wrongful conduct of the squatter, if it is to be compared to the conduct of someone, perhaps also poor and homeless, who, out of respect for the property rights of another, refrains from taking the land and the law into his own hands. The Legislature, if it applied its parliamentary mind to this complexity at all, would presumably have been disposed to limit rather than expand a circumstance that would reward wrongful conduct. The bias should therefore be towards interpreting the legislation to be inclusive of the category to which it is manifestly intended to apply and to be exclusive of all other categories where, as in the present case, there is doubt.

[102] The second general consideration is closely allied to the first. The occupation of land that is by definition wrongful will more likely than not be adverse to the interests of the party who is rightfully entitled to it. That will more particularly be so where the land is privately owned. It is implicit in the provisions of PIE that the party entitled to occupation may be kept out of his property for longer or shorter periods. Occupation delayed is occupation denied. Occupation denied can be hugely detrimental to the party so affected. That such harm may be considerable is demonstrated by the many instances quoted or postulated in the judgments dealing with this issue. In the case of genuine squatters the provisions of the Act are designed to achieve a reconciliation of sorts between the hardship of the one and the harm of the other. But it by no means follows as a matter of course, as the discussions in the two judgments show, that these provisions were in addition intended to assist a completely different type of wrongful occupier, whom I may call a

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'holder-over', a person who deliberately refuses to vacate the property when his claim or term for occupying it has terminated. The mechanisms introduced by PIE for dispossessing recalcitrant occupiers have made it more difficult and time-consuming to evict them. As such it has created the potential, if it is to apply to 'holders-over', for the latter class to exploit the procedural provisions of PIE to keep owners and other rightful claimants at bay for some considerable time. Even in more deserving cases, where the equities between rightful claimant and wrongful occupier are more evenly balanced (as in the much recited case of the widow who can no longer afford her rent in circumstances where alternative accommodation is not readily available for her relocation), the criteria to be applied are so vague and so dependent on the subjective value system and preconceptions of the judicial officer concerned that the *status quo* may well be prolonged for an extended period. A claim for compensation in delict will often prove to be ephemeral rather than real. Once again it must be presumed that the Legislature, being even-handed in its approach, would have intended to contain rather than to extend the potential for harmful interference with recognised rights. It is no answer to say that such harm is to be discounted as being one of the many relevant circumstances to be taken into account in any event when the equities are assessed; harm to the rightful claimant is not a conclusive factor in itself. Consequently, when the Legislature does in principle sanction conduct that is admittedly wrongful and potentially harmful, even if only for the time being, one is entitled to presume that the provisions of the Act were intended to be restricted to those instances to which they incontestably apply, namely to squatters; and not to others.

[103] For all the above reasons I believe that the Legislature, in enacting PIE, had in mind squatters properly so called and that it was not preoccupied with, and never intended to legislate for, the case of the ex-tenant, the ex-owner or the ex-mortgagor. I accordingly concur in the orders proposed by Olivier JA.

Attorneys for the Appellant in the *Ndlovu* appeal: *Mahendra R Chetty*, Durban; *Webbers*, Bloemfontein. Attorney for the Respondent in the *Ndlovu* appeal: *McClung, Mustard, McGlashan & Bosch*, Pinetown. Attorneys for the Appellants in the *Bekker* appeal: *Spilkins Inc*, Port Elizabeth; *Israel & Sackstein Inc*, Bloemfontein. Attorney for the Respondent in the *Bekker* appeal: *R P Totos & Associates*, Port Elizabeth; *Webbers*, Bloemfontein.

AKTIEBOLAGET HÄSSLE AND ANOTHER v TRIOMED (PTY) LTD 2003 (1) SA 155 (SCA)

Citation	2003 (1) SA 155 (SCA)
Case No	63/2002
Court	Supreme Court of Appeal
Judge	Hefer AP, Harms JA, Farlam JA, Navsa JA and Nugent JA
Heard	August 19, 2002
Judgment	September 12, 2002

Counsel P Ginsburg SC (with C J van der Westhuizen) for the appellants.
L C Bowman SC (with J N Cullabine) for the respondent.

Annotations None

Flynote : Sleutelwoorde

Patent - The specification - Interpretation of - Purposive interpretation - Language of patent specification to be construed purposively, so as to extract from it essence or essential elements of invention - Each word not to be viewed in isolation - Words to be viewed in context of invention as whole - Court to guard against too textual an approach in interpretation of claims in patent specification because, by peering too closely at language of claim, Court may overlook infringement that takes substance of invention.

Headnote : Kopnota

The patent at issue in the appeal related to a pharmaceutical preparation containing omeprazole, a potent inhibitor of gastric acid secretion, making it useful in the treatment of gastric and duodenal ulcers. The drug was, however, unstable, degrading rapidly in the presence of acid solutions and, in order to be administered orally, had to be prepared in a form which enabled it to pass through the stomach without making contact with the acidic stomach fluids so that it could be delivered intact to the small intestine where it was suitable for the drug to be dispersed.

The respondent imported and distributed a pharmaceutical preparation known as Ulzec, which, it was alleged by the appellants, infringed the patent. The Commissioner of Patents found that Ulzec did not infringe the patent and dismissed an application by the appellants to restrain the respondent from distributing the drug. The appellants were granted leave to appeal. The appeal was confined to the issue of infringement.

The aim to the invention, according to the patent specification, was to enable an oral dose of omeprazole to be delivered intact to the small intestine. There it would be absorbed through the intestinal wall into the bloodstream. To fulfil this purpose, the drug was encapsulated in an enteric coating resistant to dissolution in the stomach. The drug was mixed with an alkaline compound to enhance its storage ability. The alkaline core was then coated with a substance which formed a barrier between the core and the outer enteric coating. The composition of this subcoating layer was what lay at the centre of the dispute between the parties. In the patent specification it was envisaged that the alkaline core be subcoated with one or more layers. The alkaline core of Ulzec was coated with a single compound. The respondent alleged that it was an essential element of the patent specification that the subcoating layer or layers be constituted of more than one excipient or compound and that, because the alkaline core of Ulzec was subcoated with a single compound, the patent was not infringed.

Held, that while the enquiry into infringement required the allegedly infringing article or process to be compared against the language of the patent specification, it had to be remembered that the language of the patent specification had to be construed purposively, so as to extract from it the essence, or the essential elements, of the invention. (Paragraph [8] at 159F - G.)

Held, further, that a Court should always guard against too textual an approach in the interpretation of claims in a patent specification because, by peering too closely at the language of the claim, it might overlook an infringement

that took the substance of the invention. While the claim in the patent specification had to be construed to ascertain the intention of the inventor as conveyed by the language he used, what was sought by a purposive construction was to establish what were intended to be the essential elements, or the essence, of the invention, which would not be found by viewing each word in isolation but rather by viewing them in the context of the invention as a whole. (Paragraph [9] at 160B - D.)

Held, further, that the words 'excipients' or 'compounds' in the patent specification, expressed as they had been in the plural, could indeed in literal terms mean at least two different excipients or compounds. But when seen in the context of the invention as a whole and the remaining parts of the patent specification, it was most doubtful that the inventor would have intended that to be essential. (Paragraph [10] at 160G - H/I.)

Held, further, that the purpose served by the subcoating layer or layers was merely to form an effective water-soluable barrier between the alkaline core and the enteric coating. The chemical composition of the subcoating layer was considered to be immaterial by the inventor, provided only that it fulfilled the functional requirements specified in the claim. The fact that the inventor was indifferent to the composition of the subcoating layer made it doubtful that it had been intended that two or more excipients or compounds were essential elements of the invention. Had it been thought essential, something to that effect would have been said. (Paragraphs [11] and [15] at 160H/I - I/J, 161A/B - B/C and 162B - B/C.)

Held, further, that, seen in context, the words in the patent specification had not been intended to claim as an essential element of the invention a subcoating layer that consisted of more than one excipient compound and to exclude a subcoating layer that consisted of only one, notwithstanding that the words had been used in plural. The words had been intended instead to refer merely to a quantity of excipient or compound rather than to excipients or compounds of more than one kind. In these circumstances, the respondent's product infringed the patent. (Paragraph [16] at 162D - F.) Appeal upheld and the order of Commissioner of Patents was reversed.

Cases Considered

Annotations

Reported cases

Catnic Components Ltd and Another v Hill and Smith Ltd [1982] RPC 183 (HL): dictum at 242 applied

Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer 1997 (1) SA 710 (A): dictum at 726H - 727B applied

Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A): dicta at 614B - C and 615F - G applied

H K Porter Company Inc v The Gates Rubber Company 187 USPQ 692: referred to

In re Bertsch 56 USPQ 379: referred to

Letraset Ltd v Helios Ltd 1972 (3) SA 245 (A): dictum at 274G - H applied

Monsanto Co v MDB Animal Health (Pty) Ltd (formerly MD Biologics CC) 2001 (2) SA 887 (SCA): referred to

Multotec Manufacturing (Pty) Ltd v Screenex Wire Weaving Manufacturers (Pty) Ltd 1983 (1) SA 709 (A): dictum at 721C - E applied

Nampak Products Ltd and Another v Man-Dirk (Pty) Ltd 1999 (3) SA 708 (SCA): dictum at 714A criticised and not followed

R v Secretary of State for the Home Department, ex parte Daly [2001] 3 All ER 433 (HL): dictum at 447*a* applied

Sappi Fine Papers (Pty) Ltd v ICI Canada Inc (formerly CIL Inc) 1992 (3) SA 306 (A): referred to

Stauffer Chemical Co and Another v Safsan Marketing and Distribution Co (Pty) Ltd and Others 1987 (2) SA 331 (A): referred to.

Case Information

Appeal from a decision of the Court of the Commissioner of Patents (Southwood J). The facts appear from the judgment of Nugent JA.

P Ginsburg SC (with *C J van der Westhuizen*) for the appellants.

L C Bowman SC (with *J N Cullabine*) for the respondent.

In addition to the authorities referred to in the judgment of the Court, counsel for the parties referred to the following authorities:

Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd) 1999 (4) SA 1149 (SCA) at 1157E

Commissioner for South African Revenue Service v Woulidge 2002 (1) SA 68 (SCA) para 8 at 73D - G

Frank & Hirsch (Pty) Ltd v Rodi and Weinenberger AG 1960 (3) SA 747 (A)

Lubrizol Corporation v SA Petroleum Ltd 1998 RPC 727 (CA) at 742 - 3

Societe Technique De Pulverisation STEP v Emson 1993 RPC 513 (CA) at 522 lines 16 - 20

Water Renovation (Pty) Ltd v Goldfields of SA Ltd 1994 (2) SA 588 (A) at 599D - E

Joubert (ed) *The Law of South Africa* (First Re-issue) vol 20 part 1 at para 91 at 104

Reid *A Practical Guide to Patent Law* 3rd ed (1998) at 107 - 16

Reid *Cases on Patents: A New Anthology* (1988) para 309 at 47 - 50

Terrell *The Law of Patents* 15th ed paras 6.04 - 6.24 at 107 - 24.

Cur adv vult.

Postea (September 12).

Judgment

Nugent JA:

[1] 'In law', remarked Lord Steyn in *R v Secretary of State for the Home Department, ex parte Daly*, 1(1) 'context is everything'. And so it is when it comes to construing the language used in documents, whether the document be a statute, or a contract, or, as in this case, a patent specification.

[2] Patent No 87/2378, which is in issue in this appeal, relates to a pharmaceutical preparation containing omeprazole. Omeprazole is a potent inhibitor of gastric acid secretion, which makes it useful in the treatment of gastric and duodenal ulcers. It is relatively unstable, however, and degrades rapidly in the presence of acid solutions. If the drug is to be administered orally it must be prepared in a form that enables it to pass through the stomach without having contact with the acidic stomach fluids, so that it can be delivered intact to the proximal part of the small intestine where the environment is suitable for the drug to be dispersed.

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[3] The first appellant is the patentee and the second appellant has been licensed to use the invention. The respondent imports and distributes a pharmaceutical preparation known as Ulzec, in 10 g and 20 g doses, which is alleged by the appellants to infringe the patent. The appellants applied to the Commissioner of Patents, as a matter of urgency, for interim relief aimed at restraining the respondent from distributing Ulzec pending the outcome of an action for final relief. Several issues were raised in those proceedings but the Commissioner (Southwood J) found it necessary to deal with only one of them - he found that Ulzec does not infringe the patent and on that ground alone the application was dismissed. Leave to appeal having been granted by the Commissioner, this Court directed in terms of Rule 11 of the Uniform Rules of Court that the appeal would be confined to the issue of infringement and that if the appeal were to succeed the application would be remitted to the Commissioner for the remaining issues to be dealt with.

[4] The aim of the invention, according to the patent specification, is to enable an oral dose of omeprazole to be delivered intact to the proximal part of the small intestine, there to be rapidly dispersed so that it can be absorbed through the wall of the intestine into the bloodstream. In order for the drug to pass through the stomach without having contact with the acidic stomach fluids it is encapsulated in an enteric coating that is resistant to dissolution in the stomach but dissolves in the proximal part of the intestine. Enteric coatings that are in common use, however, are themselves acidic, which would ordinarily cause the drug to deteriorate while in storage, but the storage stability of the drug is enhanced if it is mixed with an alkaline compound. It was found that when such an alkaline

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core is enteric-coated some diffusion of moisture through the coating occurs during the time that the dosage resides in the stomach, which dissolves part of the core in the proximity of the coating with the result that an alkaline solution forms under the enteric coating and dissolves it from within. That problem is overcome, according to the invention, by coating the alkaline core with a substance that forms a barrier between the alkaline core and the outer enteric coating. It is the composition of that subcoating layer that lies at the centre of the present dispute.

[5] The invention is claimed as follows in claim 1 of the patent specification (some of the remaining claims are of secondary relevance to this appeal and I will return to them later in this judgment):

> '1. An oral, pharmaceutical preparation in the form of enteric coated tablets or pellets, containing omeprazole as the active ingredient characterized in that it is composed of:
>
> *(a)* alkaline core material containing omeprazole together with an alkaline reacting compound, or an alkaline salt of omeprazole optionally together with an alkaline reacting compound, and
>
> *(b)* on said alkaline core material one or more inert reacting subcoating layers comprising tablet excipients which are soluble or rapidly disintegrating in water, or polymeric, water soluble, filmforming compounds, optionally containing pH-buffering, alkaline compounds between the alkaline core material and

> *(c)* an outer layer, which is an enteric coating.'

[6] The dispute falls within a narrow compass. Paragraph *(b)* of claim 1 envisages the active alkaline core of para *(a)* being subcoated with one or more layers 'comprising tablet excipients which are soluble or rapidly disintegrating in water, or polymeric, water soluble, film-forming compounds'. The active alkaline core of respondent's product, Ulzec, is subcoated with a single compound (polyvinyl pyrrolidone, which is a water soluble, film-forming polymer). The respondent alleges that it is an essential element of the claim that the subcoating layer or layers should be constituted of more than one excipient or compound and that because the alkaline core of Ulzec is subcoated with a single compound the patent is not infringed.

[7] In *Letraset Ltd v Helios Ltd* 1972 (3) SA 245 (A) at 274G - H, Van Winsen JA, writing for the Court on that issue, described the nature of the enquiry into infringement as follows:

> 'The determination of the question as to whether or not plaintiff has proved an infringement of his patent turns upon a comparison between the article or process, or both, involved in the alleged infringement and the words of the claims in the patent. If the article or process falls within the ambit of the claims, properly construed; an infringement is proved. But the article or process will not be regarded as falling outside the scope of the claims if such differences as the comparison may disclose are not matters of any substance. In making the comparison the law looks at the essence of what is contained in the claim and will not allow what is described as the "pith and marrow" of the protected invention to be pirated. The evaluation of what is the substance or essence of an invention is a matter for the "good sense" of the judicial tribunal seized with the enquiry.'

[8] While the enquiry into infringement requires the allegedly infringing article or process to be compared against the language of the claim, it appears from that *dictum,* and has subsequently been repeated by this Court, that the language of the claim must be construed purposively, so as to extract from it the essence, or the essential elements, of the invention

(*Multotec Manufacturing (Pty) Ltd v Screenex Wire Weaving Manufacturers (Pty) Ltd* 1983 (1) SA 709 (A) at 722A - D; *Stauffer Chemical Co and Another v Safsan Marketing and Distribution Co (Pty) Ltd and Others* 1987 (2) SA 331 (A) at 343A - 344D; *Sappi Fine Papers (Pty) Ltd v ICI Canada Inc (formerly CIL Inc)* 1992 (3) SA 306 (A) at 319I). For as pointed out by Lord Diplock in *Catnic Components Ltd and Another v Hill and Smith Ltd* [1982] RPC 183 (HL) at 242, in a passage that was approved and adopted by this Court in the cases I have referred to,

> '. . . a patent specification is a unilateral statement by the patentee, in words of his own choosing, addressed to those likely to have a practical interest in the subject matter of his invention (ie "skilled in the art"), by which he informs them what he claims to be the essential features of the new product or process for which the letters patent grant him a monopoly. It is those novel features only that he claims to be essential that constitute the so-called "pith and marrow" of the claim. A patent specification should be given a purposive construction rather than a purely literal one derived from applying to it the kind of meticulous verbal analysis in which lawyers are too often tempted by their training to indulge. The question in each case is: whether persons with practical knowledge and experience

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> of the kind of work in which the invention was intended to be used, would understand that strict compliance with a particular descriptive word or phrase appearing in a claim was intended by the patentee to be an essential requirement of the invention so that *any* variant would fall outside the monopoly claimed, even though it could have no material effect upon the way the invention worked.'

[9] In *Multotec Manufacturing* (*supra* at 721C - E) Corbett JA observed that a Court should always guard against 'too "textual" an approach' in the interpretation of claims in a patent specification because by 'peering too closely at the language of a claim the Court may overlook an infringement that takes the substance of the invention'. While the claim must be construed to ascertain the intention of the inventor as conveyed by the language he has used (*Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 614B - C) what is sought by a purposive construction is to establish what were intended to be the essential elements, or the essence, of the invention, which is not to be found by viewing each word in isolation but rather by viewing them in the context of the invention as a whole. To the extent that it might have been suggested in an *obiter dictum* in *Nampak Products Ltd and Another v Man-Dirk (Pty) Ltd* 1999 (3) SA 708 (SCA) at 714A that it might be called in aid only to construe an ambiguous claim I do not think that is supported by the decisions of this Court and, in my view, it is not correct. It is merely an approach to construction that is aimed at establishing what was meant in a particular context. As pointed out by Hefer JA in *Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 726H - 727B (in a passage that was adopted in relation to the construction of patent specifications in *Monsanto Co v MDB Animal Health (Pty) Ltd (formerly MD Biologics CC)* 2001 (2) SA 887 (SCA) at 892B - C):

> 'The task of the interpreter is, after all, to ascertain the meaning of a word or expression in the particular context of the statute in which it appears (*Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 (W) at 846G *ad fin*). As a rule every word or expression must be given its ordinary meaning and in this regard lexical research is useful and at times indispensible. Occasionally, however, it is not.'

[10] The words 'excipients' and 'compounds' in para *(b)* of the claim, expressed as they are in the plural, might indeed in literal terms mean at least two different excipients, or compounds, as the case may be (the literal meaning was adopted by the Commissioner). But when seen in the context of the invention as a whole, and also when seen in the context of one of the remaining claims, in my view it is most doubtful that the inventor could have

intended that to be essential.

[11] The purpose that is served by the subcoating layer or layers (for convenience I will refer hereafter to the subcoating layer or layers only in the singular) is merely to form an effective but water-soluble barrier between the alkaline core and the enteric coating. It is apparent from the claim itself that the chemical composition of the subcoating layer was considered by the inventor to be immaterial, provided only that it fulfilled the functional requirements specified in the claim, for the claim does not insist upon, or even specify, what its chemical composition should be. If the subcoating layer may consist of a mixture of any two

excipients or compounds it must follow that its composition is immaterial (provided only that it has the functional characteristics specified in the claim) and there is then no apparent reason, nor could one be suggested, why it should not consist of any one of those compounds alone. The fact alone that the inventor was indifferent to the composition of the subcoating layer (provided only that it had the characteristics described in the claim) makes it most doubtful that it was intended that two or more excipients or compounds were essential elements of the invention.

[12] Moreover, that doubt only increases when the words are read in the context of claims 3 and 4 (which indirectly incorporate all the elements of claim 1). Claims 3 and 4 provide as follows:

> '3. A preparation according to claim 1 wherein the subcoating comprises two or more sublayers.
>
> 4. A preparation according to claim 3 wherein the subcoating comprises hydroxypropyl methylcellulose, hydroxypropyl cellulose or polyvinylpyrrolidone.'

[13] A preparation according to claim 4 will have a subcoating that comprises at least two layers, but those subcoating layers will nonetheless conform with para *(b)* of claim 1. It will be a subcoating, however, that might 'comprise' any one of the three compounds described in claim 4. If the word 'comprise', as it is used in claim 4, was intended to mean 'consists of', then clearly claim 1 was not intended to exclude a subcoating consisting of only one compound, for otherwise the provisions of claim 4 would be internally inconsistent. It was submitted by the respondent, however, that the word 'comprises' in claim 4 is used as a synonym for 'includes' (which would not be inconsistent with modern usage - *Fowler's Modern English Usage* 3rd ed (by R W Burchfield) - and is also the meaning that has been accepted in patent cases in the United States - see *In re Bertsch* 56 USPQ 379 at 384; *H K Porter Company Inc v The Gates Rubber Company* 187 USPQ 692 at 715) and that claim 4 thus does no more than specify that the multiple compounds that are required by claim 1 are to include at least one of the compounds specified in claim 4. Whether the word 'comprise' is used in claim 4 synonymously with 'includes' is itself questionable, for that would seem to be inconsistent with its use in claim 3, but it is not necessary for present purposes to decide whether that is so.

[14] In my view, both those considerations, if not decisive of the meaning to be given to the words in the claim, at least raise considerable doubt that the inventor intended to exclude from the ambit of the claim preparations in which the subcoating layer consists of one compound, notwithstanding the use of the word in the plural. Where the words used in the claim are ambiguous, in the sense that when read in their proper context their meaning is

doubtful or not reasonably clear, the body and title of the specification may be invoked to ascertain whether at least a reasonably certain meaning can be given to the claim (*Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 615F - G).

[15] The description of the invention in the body of the specification

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contains no suggestion that the subcoating layer should consist of more than one excipient or compound: if anything it suggests the contrary. In describing the subcoating layer the specification says no more than that it 'consists of one or more water soluble inert layers, optionally containing pH-buffering compounds' and that the material for the subcoating layer 'is chosen among the pharmaceutically acceptable, water soluble, inert compounds or polymers used for film-coating applications'. Had it been thought essential that the subcoating layer should consist of more than one compound one would have expected something to that effect to have been said. What is decisive, however, is the composition of the subcoating layer in the various examples that are given in the specification of what are said to be 'the invention . . . described in detail'. In many cases the subcoating layer consists of a single compound (usually dissolved in distilled water or ethanol). That is entirely inconsistent with a construction of claim 1 that confines the invention to preparations in which the subcoating layer consists of at least two different excipients or compounds.

[16] It is clear, when seen in that context, that the words in claim 1 were not intended to claim as an essential element of the invention a subcoating layer that consisted of more than one excipient or compound, and to exclude a subcoating layer that consisted of only one, notwithstanding that the words were used in the plural. In my view, the words were intended instead to refer merely to a quantity of excipient or compound rather than to excipients or compounds of more than one kind. In those circumstances the respondent's product infringes the patent and the application ought not to have been dismissed on that ground.

[17] Accordingly the appeal is upheld with costs, including the costs occasioned by the employment of two counsel, and the following orders are made:

(a) The order of the Commissioner of Patents is set aside.

(b) It is declared that the respondent, by importing, making, disposing of or offering to dispose of its Ulzec products infringes claim 1 of Patent No 87/2378.

(c) In accordance with the order made by this Court on 17 May 2002 the application for the temporary interdict is remitted to the Commissioner of Patents.

Hefer AP, Harms JA, Farlam JA and Navsa JA concurred.

Appellants' Attorneys: *Adams & Adams*, Pretoria; *Honey & Partners Inc*, Bloemfontein.
Respondent's Attorneys: *Spoor & Fisher*, Pretoria; *Israel & Sackstein Inc*, Bloemfontein.

Endnotes

1 (Popup - Popup)

[2001] 3 All ER 433 (HL) at 447*a*.