IN THE SOUTH GAUTENG HIGH COURT,

JOHANNESBURG

CASE NO: 2011/30368

REPORTABLE

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

JOHANNESBURG HOUSING CORPORATION (PTY) LIMITED

Applicant

and

THE UNLAWFUL OCCUPIERS OF THE NEWTOWN URBAN VILLAGE Respondent

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JUDGMENT

WILLIS J:

[1] The applicant seeks the eviction of the occupiers of what is known as 'The Newtown Urban Village'. The applicant is the registered owner of the immovable property on which this Newtown Urban Village has been erected. It is a housing complex consisting of 340 dwelling units. The property is more formally known as Portion of erf 4507 Johannesburg Township, Registration Division I.R. Gauteng and is situate at 3 Malan Street, Burghersdorp, Johannesburg. The provisions of sections 4 (7) and (8) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No.19 of 1998 ('PIE'), loom large in this application.

[2] The applicant took transfer of the property on 11 April 2011, on registration of the property into its name. The applicant purchased the property at a public auction held on 26 November 2009. The auction was conducted at the instance of one Michael Moloto. Mr Moloto was the liquidator of the previous owner, Newtown Housing Co-operative Limited ('the Co-Op'). The Co-Op was placed under a final winding-up order granted in this, the South Gauteng High Court on 7 August 2009, a provisional order having been granted on 7 May 2004. The Co-Op's application for leave to appeal against this final winding-up order was dismissed on 20 October 2009, as was the subsequent petition to the Supreme Court of Appeal ('the SCA').

[3] The applicant purchased the property for R27,9 million, which sum of money it has duly paid. The applicant is what has commonly been known as a 'section 21 company'. It is an incorporated association, not for gain, in terms of section 21 of the old Companies Act, No 61 of 1973, as amended. It primary objective, indeed its *raison d'être*, is the provision of affordable rental accommodation within the City of Johannesburg ('the City').

[4] The Newtown Urban Village itself was purposely developed and built in order to provide adequate or low cost housing to low income members of society. In partnership with the Norwegian Government (which provided financial support), the Newtown Urban Village was created, developed, financed and managed through the Co-Op, which had previously owned the property.

[5] It is common cause that, in an all-too-depressingly familiar scenario, the entire housing scheme collapsed as a result of mismanagement, fraud and corruption. This resulted in the liquidation of the Co-Op and the sale of the property to the applicant.

[6] The Newtown Urban Village has been home to a large number of persons consisting of women, children, households headed by women, unemployed, elderly and sickly persons.

[7] The respondents are not the tenants of the applicant. It is common cause that, at common law, the respondents have no right to occupy the property. There appears to be no real dispute that the property is controlled by one Zacharia Matsela who, in another all-too-familiar-scenario with which the judges in the South Gauteng High Court are familiar, but which does not seem to have received attention further afield, has hijacked the property. Mr. Matsela appears to exercise control over the property through his security guards. These guards have used physical violence to deny the applicant access to the property.

[8] It has not been denied by Mr Matsela that he collects 'rent' from the occupiers. This is a criminal offence in terms of section 3 (1) of PIE. There are two factions among the occupiers in this contest: the 'Matsela Group' and the Khumalo Group'. Mr *McKelvie* appears for the 'Khumalo Group'. At this stage, there is no appearance on behalf of the Matsela Group.

[9] The Matsela group opposed the eviction by disputing the applicant's ownership of the property and, for that purpose, they launched a substantive application to set aside the appointment of Mr Moloto as the liquidator of Newtown Housing Co-operative and to set aside Mr Moloto's sale of the property to the applicant. This matter was also allocated to me by my sister Satchwell, the senior judge responsible for the allocation of opposed motion court matters that week. Satchwell J did so at the request of the counsel for the applicant in the present matter. The request that the same judge hear the matters together arose because of the linkage between them.

[10] The Matsela group (the applicants in the matter in which was sought the removal of the liquidator and the setting aside of the sale), applied for that application to be postponed. After hearing argument from all parties, I dismissed that application for a postponement with costs and, having heard the substantive application, dismissed that with costs too. These applications, like the present one, were argued on 17 October 2012. The dismissal of the application for a postponement and the application for the removal of Mr Moloto and the setting aside of the sale occurred on 17 October, 2012. The judgments in those two matters were delivered *ex tempore*.

[11] During one of the many hearings with which the High Court has been

seized with the matter, the Matsela group took the point that the City should have been joined as a party to these proceedings. That matter was argued before Wise AJ. On 17 June 2012, Wise AJ directed that the parties, including the Khumalo group should apply for a joinder of the city within 15 court days of his order. The Khumalo group did not avail itself of this opportunity but the Matsela group did. This application for joinder was dismissed by Wepener J on 4 October 2012.

[12] The Khumalo group initially chose not to file any answering affidavits in the eviction application. Instead, they launched an application for the joinder of, *inter alia*, the President and the National and Provincial Governments, stating that they intended to seek restitution of the property and/or damages against these entities once joined. Senior and junior counsel appeared for these occupiers and, after hearing argument, their application was dismissed by Mlonzi AJ on 25 April 2012.

[13] On 4 June 2012, i.e. some 10 months after the applicant had launched its application for eviction, the Khumalo group filed an answering affidavit to the eviction application, attaching the affidavits of 79 occupiers. The Khumalo group now contends in argument before me that the applicant '... has not joined the City as a party to the proceedings, has refused to do so and opposed all attempts by the occupiers to join the municipality'. This statement ignores the fact that 2012, when the application for eviction was postponed *sine die* by Wise AJ on 17 June 2012, he pertinently made an order that they should so apply for the joinder of the City within 15 days of

his order. The Khumalo group elected not to apply for the joinder of the City within the time permitted in terms of the order of Wise AJ (or within any other time-frame).

[14] To the extent that the respondents had rights at common law to occupy the property, these expired years ago. What would have been a legally straightforward matter before the coming into operation of PIE on 5 June 1998 has now become fraught with complexity. I shall take the unusual step of outlining in a judgment, before any analysis of the facts, the law as I understand it to be in regard to applications for eviction of this kind. The reason is that any judge whose unhappy lot it is to decide such applications, needs to know the issues in respect of which he or she needs, in an alerted watch, to be prepared.

[15] In the case of *Port Elizabeth Municipality v Various Occupiers*,[1] Sachs J, delivering the unanimous judgment of the Constitutional Court, said:

> (T)he Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather, it is to balance out and reconcile the opposed claims in

[1] 2005 (1) SA 217 (CC)

as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case.[2]

[16] Section 26 of our Constitution reads as follows:

(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.[3]

[17] None of those who trace their intellectual and moral commitments to constitutionalism back to the Putney Debates could, conceivably, have the slightest difficulty with this section.[4] As for the prohibition on legislation

[2] *Ibid*. at paragraph [23]

[3] Those who have to make decisions in terms of this section need to read, absorb and inwardly digest the following cases: *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC); *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC); *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC); *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Limited and Another* 2012 (2) SA 104 (CC) and *Occupiers of Mooiplaats v Golden Thread Limited and Others* 2012 (2) SA 337 (CC)

[4] The Putney Debates took place at St Mary's Church in Putney, England from 28th October to 9th November 1647 in the midst of the English Civil War. They were chaired by Oliver Cromwell and transcribed. They took place between officers and soldiers of Cromwell's New Model Army and a group known as 'the Levellers'. The parties met to discuss a new constitution and the future of England. Fascinating among the topics debated were whether there should be a king or a House of Lords, who should have the right to vote and whether democratic changes would lead to anarchy and chaos? These debates are widely considered to have paved the way for civil liberties and human rights gained around the world today. They were the first of their kind ever recorded. Inscribed in the church are the famous words of Colonel Thomas Rainsborough, the highest ranking officer to support the ordinary soldiers: 'For really I think that the poorest he that is in England hath a life to live as the greatest he'. Rainsborough dared to imagine that the poor might live as well as the rich. See, for example, http://www.putnetdebates.com/ (Accessed 30

which permitted arbitrary evictions, this evokes the horrendous forced removals of black people through administrative action authorised by such a shameful litany of notorious pieces of legislation as the Black Land Act, No 27 of 1913 as amended (previously the Natives Land Act), the Black (Urban Areas) Act, No. 21 of 1923, as amended (previously the Natives (Urban Areas) Act), Development Trust and Land Act, No. 18 of 1936, as amended (previously the Natives Development and Trust Act), the Black (Urban areas) Consolidated Act, No.25 of 1945, as amended and the Group Areas Act, No. 41 of 1950, as amended.[5]

[18] The structure and form of our Constitution was informed, *inter alia*, by the German experience this century.[6] There have been parallels in the race-based ideologies of apartheid and Nazism. The concept of 'arbitrary evictions' evokes horrific memories of Jews being evacuated from their homes in Nazi Germany simply because they were Jewish. The position of owners of immovable property seeking to enforce, under the common law, the eviction of those who occupy their properties without the owners' consent is not remotely comparable to the forced removal, by reason of

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October, 2012). Those who think that 'the English' are not a passionate people, will soon have such prejudices dispelled when they read these debates.

[5] See, for example, *Forced Removals in South Africa – Overcoming Apartheid*: http://overcomingapartheid.msu.edu/multimedia.php?id=5 (Accessed 8 November 2012) and Laurine Platzky and Cherryl Walker for the Surplus People Project (1985); *The Surplus People: Forced Removals in South Africa*; Johannesburg: Ravan Press. Laurine Platzky is my former wife. Through a process of osmosis, I gained some insights, as a result of her work, into the horrors of forced removals that were taking place under apartheid, especially in the rural areas. Removals in the urban areas under the Group Areas Act were obvious for all to see, especially in Cape Town.

[6] The affinity between our Constitutional Court and the German Constitutional Court is apparent in the *Port Elizabeth Municipality* case (*supra*) at paragraph [38].

statutorily created administrative law, of blacks under apartheid or Jews living under the National Socialist regime in Germany.

[19] It is now trite that PIE has its roots, *inter alia*, in the provisions of section 26 of our Constitution.[7] Section 4 (7) of PIE provides that:

> If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land 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 landowner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

[20] None whose intellectual and moral paradigms are consistent with the rationalism born of the Enlightenment could have any difficulty with the requirement that a court, before deciding to make an eviction order, should consider all relevant circumstances, including the rights and needs of

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[7] *Ibid*. at paragraph [24]. See, also: *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (*Centre on Housing Rights and Evictions and Another, Amici Curiae*) 2010 (3) SA 454 (CC) at paragraph [233] (where in five separate judgments (Moseneke DCJ, Ngcobo J, O'Regan J, Sachs, J and Yacoob J an order for eviction was made in the Constitutional Court, conditional upon the applicants (i.e. the occupiers) being relocated to 'temporary residential units' and the parties were ordered to engage meaningfully with each other with a view to reaching agreement'); *Cape Killarney Property Investments (Pty) Limited v Mahamba* 2001 (4) SA 1222 (SCA) at paragraph [20] (where the SCA confirmed the disallowance of the eviction); *Ndlovu v Ngcobo and Others*; *Bekker and Another v Jika* 2003 (1) SA 113 (SCA) at paragraph [3] (where, in two cases heard simultaneously, the SCA (i) upheld an appeal against a decision of the full court in Kwazulu/Natal, which had confirmed an eviction order and (ii) confirmed a full court decision in the Eastern Cape which had, in turn, confirmed a decision to refuse an eviction order made by a single judge; in the same case, *Ndlovu v Ngcobo*, the SCA criticized Schwartzmann J for his decision - which was the first reported case dealing with evictions of this nature - in *ABSA Bank Limited v Amod* [1999] 2 All SA 423 (W), for having 'overlooked the poor' (at paragraph [16] of *Ndlovu v Ngcobo*)).

children, the elderly, the disabled and households headed by women. As to what, potentially, a municipality can contribute to the resolution of a problem that arises from the occupation of land without the owner's consent, this may in circumstances be relevant, although not always. Eviction from a large informal settlement that has been in existence for years would ordinarily benefit from the plans, recommendations and advice of a city or town's urban and regional planners.

[21] Having regard to the provisions of section 4(7) of PIE (and the interpretation given to those provisions and the requirements in respect thereof subsequently laid down by the Constitutional Court and the SCA), this case has to be decided according to whether it would be 'just and equitable' to grant an eviction order against the respondents, after considering all the relevant circumstances, including the availability of land for the relocation of the occupiers, the rights and needs of the elderly, children, disabled persons and households headed by women.[8] A conundrum arises from what is meant by 'just and equitable'.

[22] In the *Port Elizabeth Municipality* case the court said:

> As *Grootboom* indicates,[9] municipalities have a major function to perform with regard to the fulfilment of the rights of all to have access

[8] See, for example, *The City of Johannesburg v Changing Tides 74 (Pty) Limited and the Unlawful Occupiers of Tikwelo House, No. 48 and 50 Davies Street, Doornfontein, Johannesburg and 97 Others* (*the Socio-Economic Rights Institute of South Africa intervening as amicus curiae*) [2012] ZASCA 116 (14 September 2012).

[9] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at paragraph [58]

> to adequate housing. Municipalities, therefore, have a duty systematically to improve access to housing for all within their area. They must do so on the understanding that there are complex socio-economic problems that lie at the heart of the unlawful occupation of land in the urban areas of our country. They must attend to their duties with insight and a sense of humanity. Their duties extend beyond the development of housing schemes, to treating those within their jurisdiction with respect. [10]

[23] In *Machele and Others v Mailula and Others*,[11] Skweyiya J, delivering the unanimous judgment of the Constitutional Court, said:

> The application of PIE is not discretionary. Courts must consider PIE in eviction cases. PIE was enacted by Parliament to ensure fairness in and legitimacy of eviction proceedings and to set out actors to be taken into account by a court when considering the grant of an eviction order. Given that evictions naturally entail conflicting constitutional rights, these factors are of assistance to courts in reaching constitutionally appropriate decisions.[12]

In the same case, Skweyiya J went on to say: 'That the High Court authorised the eviction without having regard to the provisions of PIE is inexcusable'.[13]

[24] One of the files in the case before me is a 'duplicate file', created after the original file went missing. The disappearance of files from the registrar's

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[10] 2005 (1) SA 217 (CC) at paragraph [56]
[11] 2010 (2) SA 257 (CC)
[12] *Ibid*. at paragraph [15]. (In this case the Constitutional Court set aside an eviction order that I had granted.)
[13] *Ibid*. at paragraph [16]

office occurs not infrequently in this court, especially in matters related to eviction. From my later analysis of events, it would appear that there were indeed several more postponements and interlocutory applications in this case than those which were recorded on the duplicate file placed before me. This is not unusual when original files go missing and duplicates have to be reconstructed.

[25] Motion Court proceedings are brought by way of application.[14] These matters, brought by way of application, are decided on affidavit.[15] A key feature of motion proceedings is that they are meant to be (and in the South Gauteng High Court, normally are 'immeasurably less costly and more expeditious than a trial action.'[16]

[26] It is clear from the notes on the court files in the matter now before me, as well as the orders made my aforesaid colleagues, that they have been anxious to explore the possibility of a resolution of this dispute and were careful to allow the parties ample time to ventilate the issues between them as well as to explore alternatives. Judges presiding in motion courts do so 'in series' with one another rather than 'in parallel' with one another: in other words, the electrical current, when a judge in motion court makes an interim order (which may include an order for

[14] A useful introduction may be found in Herbstein and Van Winsen's *The Civil Practice of the Supreme Court of South Africa*, Fourth Edition, 1997, Juta's: Cape Town, chapter nine at p230 *et seq*.
[15] *Ibid*. at p 233-241.
[16] *Ibid*. at p 233.

postponement), is passed directly from one judge to another, by way of baton (if I may be permitted to switch the metaphorical allusion).

[27] The issues considered previously in the same case by one judge in motion court are taken into account by the other judges of the High Court who hear the matter down the line. In other words, when a motion matter is considered 'by the High Court', this means it is considered by all the judges before whom the matter previously came and each successive judge takes into account what went before and what exercised the mind of the judges previously entrusted with the matter. In short, this is how the Motion Court functions.

[28] My *cri de Coeur* in *Emfuleni Local Municipality v Builders Advancement Services CC and Others* [17] arose from the following:

(i) By reason of the fact that the record will show that, for months on end, various colleagues of mine, as well as me, had been trying to find a way to deal fairly with the competing interests in terms of PIE, it seemed to me that the Constitutional Court, when deciding *Machele v Mailula*, must either have made its decision without having the full record before it or without having an understanding of how application proceedings are dealt with in the High Court (both of which propositions are curious in my view); and

[17] 2010 (4) SA 133 (GSJ)

(ii) The business of judging is, at its core, about making decisions and when persons are occupying immovable property against the will of the owner, without paying any agreed rent to the owner, a court needs clear, certain, implementable guidelines as to how it is to go about making its decision as to what it should order (if a court determines that the owner has no right to evict in these circumstances, property rights are meaningless and if the owner does indeed have a right to evict, the owner and the tenants also have a concomitant right to know when this is to take place).

[29] In the *Emfuleni Municipality* case which was heard by me, I postponed the hearing of the application *sine die* and respectfully requested the Deputy Judge President to appoint a full court to hear the matter so that guidelines could be given as to the granting or refusal of applications for eviction should be made in terms of PIE.

[30] The full court, hearing the matter, said in *Emfuleni Local Municipality v Builders Advancement Services CC and Others*[18] that it was not 'either appropriate or desirable for a full court to provide the clarity and guidance (on how to deal appropriately with applications for eviction) in the general terms sought by Willis J.'[19]

[18] A5047/110 [2012] ZAGPJHC 39 (23 March 2012)
[19] At paragraph [7]

[31] In the *Port Elizabeth Municipality* case, Sachs J decried those who relied on 'concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances'.[20] He went on to say:

> Such a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity.[21]

[32] It is not stated whom Sachs J had in mind when he referred to those who consider squatters to be 'obnoxious social nuisances'. Certainly, none of the judges in the South Gauteng High Court could reasonably be imagined as thinking this of respondents in applications for evictions. The shared humanity of those against whom eviction orders are sought is palpable: those affected pack the court rooms every week in the Johannesburg High Court. The court takes on the character which it would have had in Victorian times, before the advent of cinema and television. There is an atmosphere of high drama with audible reactions in the gallery to the respective submissions of counsel and the interpositions of the bench. Ululations not infrequently emanate when the court grants a further extension of time.

[33] The applicant contends that it would be just and equitable to grant the eviction order, the respondents that it would not. The words 'just and

[20] 2005 (1) SA 217 (CC) at paragraph [41]
[21] *Ibid*.

equitable' glide from the tongue with facility. Their precise meaning eludes easy description. It must also be borne in mind that it one reads section 4 (7) and section 4 (8) of PIE together, the court has to make two 'just and equitable' determinations: the first as to whether it would be 'just and equitable to grant an order for eviction and the second as to the date upon which it should be ordered that the occupier is to vacate the property.[22] The determinations as to the date upon which the occupier is to vacate the property is then followed by another determination, which presumably should also be 'just and equitable', even though the subsection does not expressly say so, as to date when the occupier should be evicted. [23]

[34] In the case of *Wormald N.O. and Others v Kambule,*[24] Maya AJA (as she then was) delivering the judgment of the court referred with approval to what Harms JA (as he then was) said in the *Ndlovu* case (supra):

> The court, in determining whether or not to grant an order or in determining the date on which the property is 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 Limited* ('*Perskor*') 1992 (4) SA 791 (A) at 800, *Knox D'Arcy Limited and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 360G-362G [*Port Elizabeth Municipality v Various Occupiers* (*supra*) at par [31].] 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

[22] See, section 4 (8) (a) of PIE
[23] See, section 4 (8) (b) of PIE
[24] 2006 (3) SA 562 (SCA) (where the court confirmed the eviction order as the respondent did 'not belong to the poor and vulnerable class of persons whose protection was foremost in the Legislature's mind when it enacted PIE.' (at paragraph [18]).)

> 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.[25]

[35] In the *Ndlovu* case, Sachs J speaks of a 'broad judicial discretion' that has to be exercised 'in the proper application of PIE'.[26] In the *Media Workers*' ('*Perskor*') case, Grosskopf JA, delivering the unanimous decision of the court, held that:

> The essence of a discretion in this narrower sense is that, if the repository of power follows any one of available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him.[27]

That which Grosskopf JA has described as a discretion 'in this narrrower sense' refers to a discretion being exercised from a range of permissible options. This, in plain English, is normally referred to as a 'broad discretion'. In the *Knox D'arcy* case, decided a few years after the *Media Workers*' ('*Perskor'*) case, Grosskpf JA, again delivering the unanimous judgment of the court, warmed to this theme. He said that:

> In the present context the statement that a Court has a wide discretion seems to mean no more than that the Court is entitled to have regard to

[25] *Wormald v Khambule* case, 2006 (3) SA 562 (SCA) at paragraph [18]; *Ndlovu* case, 2003 (1) SA 113 (SCA) at paragraph [18].
[26] At paragraph [31]
[27] At p800e-F.

> a number of disparate and incommensurable features in coming to a decision.[28]

Grosskopf JA then went on to say:

> Finally, in regard to the so-called discretionary nature of an interdict: if a Court hearing an application for an interim interdict had a truly discretionary power, it would mean that, on identical facts, it could in principle choose whether or not to grant the interdict and that a Court of appeal would not be entitled to interfere merely because it disagreed with the lower court's choice (*Perskor* case at 800D-F). I doubt whether such a conclusion could be supported on the grounds of principle or policy. As I have shown, previous decisions of this Court seem to refute it.[29]

[36] When Harms JA endorsed the *Media Workers*' ('*Perskor*') test and the *Knox D'Arcy* test in their application to the PIE matter in the *Ndlovu* case (followed by Maya AJA in the *Wormald v Khambule* case), this may have had far-reaching implications. It seems to mean that a court, hearing this matter (or any other eviction matter), can make only one right decision not only as to (a) whether to order an eviction or not but also (b), if it succeeds in correctly deciding to order an eviction, as to the precise date of the eviction order. This, in my respectful view, is not helpful. It would create an intolerable situation, rendering the functioning of the courts in regard to eviction matters unworkable. It would be grossly unfair to judges.

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[28] At p361H-I
[29] At p362C-E

[37] It is questionable, on so intensely ideological an issue and one so hugely divisive, how there can be only one correct answer not only on whether to grant an eviction order or not but also, if one survives the hurdle of deciding correctly, that an eviction must be ordered, the actual date in the future from which it is to take effect. It is unsurprising that there seems to be so much confusion when dealing with eviction matters. This confusion may explain the inordinate postponements of such applications.

[38] Intrinsic to the rule of law is predictability, reliability and certainty.[30] In the case of *Cassell & Co Limited v Broome and Another*[31] the then Lord Chancellor of England, Lord Hailsham of St Marylebone, explained why it is so important to have this feature of predictability, reliability and certainty in the courts. After referring to the embarrassing nature of disputes between different courts, he said:

> But, much worse than this, litigants would not have known where they stood. None could have reached finality short of the House of Lords, and, in the meantime, the task of their professional advisers of advising them either as to their rights, or as to the probable cost of obtaining or defending them, would have been, quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection.[32]

[30] The article, "The Rule of Law" by Professor Ben Beinart in 1962 *Acta Juridica*, Balkema: Cape Town at 99 is a classic on the subject.
[31] [1972] AC 1027; [1972] All ER 801 (HL)
[32] Appeal Cases, at p1054

[39] The *Cassell* case has been referred to with approval by the SCA in the matter of *S v Kgafela*.[33] Is South Africa's great constitutional experiment, after 1994, to be put in jeopardy because we have defenestrated the rule of law? Have we sacrificed the great principle of legal certainty, developed by the giants of constitutional law over several centuries because of a penchant to be described as 'progressive'? I shall carefully attempt to examine what might be meant by 'just and equitable'.

[40] Lawyers are likely to be rather more familiar with the words 'just and equitable' in the context of the liquidation of companies, rather than PIE by reason of the longevity of legislation relating to company liquidations. This longevity extends beyond the Companies Act No.61 of 1973, as amended ('the old Companies Act') or even its predecessor, the Companies Act, No.46 of 1926, as amended, back to Law 1 of 1894 in the old Transvaal Republic. The context of PIE and the liquidation of companies are, respectively, rather different. Words and phrases generally have an inherent, inner coherence, despite their being used trans-contextually. I am mindful that Lewis Carroll immortalised, in *Through the Looking Glass*, the expression: '"When I use a word', Humpty Dumpty said in a rather scornful tone, 'it means what I choose it to mean – neither more nor less'." Undaunted, I shall attempt to uncover the meaning, including the implications of the expression 'just and equitable'.

[33] 2003 (5) SA 339 (SCA) at para [3]

[41] In *Hull v Turf Mines Limited,*[34] Innes CJ said:

> (I)t should be noted that the words do not in themselves constitute a statement of fact; they indicate a conclusion of law to be derived from facts placed before the Court. The idea was very felicitously expressed by the Master of the Rolls in the case of *The Emma Silver Mining Company v Grant*[35] and it is clear upon a consideration of the language of the statute that it is so.

[42] In *Moosa N.O. v Mavjee Bhawan (Pty) Limited & Another,*[36] Trollip J (as he then was), when considering the meaning of 'just and equitable' in section 111(g) of the 1926 Companies Act, followed Innes CJ's understanding as set out in *Hull v Turf Mines* above and said:

> That paragraph, unlike the preceding paragraphs of sec.111, postulates not facts but only a broad conclusion of law, justice and equity, as a ground for winding up...In its terms and effect, therefore, section 111(g) confers upon the Court a very wide discretionary power, the only limitation originally being that it had to be exercised judicially with due regard to the justice and equity of the competing interests of all concerned.[37]

Trollip J went on to say:

> Inevitably, in the course of time, the Courts have evolved certain general principles which are useful as guides in particular cases for the exercise of that discretion. A most helpful collection and discussion of

[34] 1906 TS 68 at p75
[35] 11 Ch.D 918
[36] 1967 (3) SA 131 (T)
[37] *Ibid*. at p136G-137H

> some of the leading decisions by the English, Australasian and Canadian Courts (with some reference too to certain South African cases) appears in an article by B.H. McPherson, a lecturer in law at the University of Queensland, in vol.27 (1964) Modern Law Review 282, which Mr. *Mendelow*, for the applicant , made available to me.[38]

[43] Contrary to the view expressed in *Emfuleni Local Municipality v Builders Advancement Services CC and Others*[39] that it was not 'either appropriate or desirable for a full court to provide the clarity and guidance (on how to deal appropriately with applications for eviction) in the general terms sought by Willis J',[40] the highest court in the land has recognised the need for guidance to be received by all courts from other courts elsewhere in the world and to be given directly from above within a hierarchy of courts.

[44] In *Tjospomie Boerdery (Pty) Limited v Drakensberg Botteliers (Pty) Limited and Another*[41] Stegmann J said:

> Deciding as to justice and equity... does not involve the preference of the particular Court or Judge according to what he finds appropriate in the circumstances. Difficult though justice and equity are to define, they have to be seen as setting an objective standard that will be the same in every court in the land.[42]

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[38] *Ibid*. at p137A-B
[39] A5047/110 [2012] ZAGPJHC 39 (23 March 2012)
[40] At paragraph [7]
[41] 1989 (4) SA 31 (T)
[42] *Ibid*. at p42A-B

Stegmann J was sceptical of the words 'just and equitable' being interpreted so as to confer a discretion, holding that the discretion was more apparent than real.[43]

[45] In the context of determining the constitutional validity of a provincial regulation relating to racing and betting, Van der Westhuizen J, delivering the unanimous judgment of the Constitutional Court in *Weare and Another v Ndebele N. O. and Others*[44] said:

> This court may make any order that is just and equitable. The duty to give just and equitable relief recognises that the position dictated by the objective doctrine may not always be a feasible one in practice. A decision as to what is just and equitable involves a balancing of the interests of the individuals affected with the interests of good governance and the smooth administration of justice.[45]

[46] In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* ,[46] Chaskalson CJ in the context of an application to declare invalid certain provisions of the Electoral Act, No.73 of 1998 invalid insofar as they restricted the rights of prisoners to vote, said that a wide range of considerations could be considered when making a 'just and equitable' order in terms of section 172 (1) (b) of our Constitution. Chaskalson CJ delivered the judgment with which a further eight of the eleven Constitutional Court judges concurred.

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[43] I*bid*. at p42J-43A
[44] 2009 (1) SA 600 (CC) at paragraph [42]
[45] I*bid*. at pargraph [42]
[46] 2005 (3) SA 280 (CC)

[47] In British Columbia Hyslop J, in the case of *Higginson and Another v RTD Enterprises Limited and Another*,[47] also in the context of the liquidation of a company, referred with approval to what Southin J had said in *Safarik v Ocean Fisheries Limited*:[48]

> [90] "Just and equitable" in this context, is so vague a notion as to call to mind what Selden said (Table Talk of John Selden (ed. Pollock, 1927) p.43), as quoted by Sir Robert Megarry (Miscellany-at-Law (London: Stevens &Sons, 1955) at p.139: Equity is a Roguish thing.[49]

She went on to say that: 'However, the Legislature, having created such a vague standard, the judges must do their best with it.'[50]

[48] Referring to the cases of *Boffo Family Holdings Limited v Garden Construction Limited*[51] and *Re Rogers and Agincourt Holdings Limited,*[52] Hyslop J confirmed the view that the words 'just and equitable' are 'of the widest significance and confer a broad discretion on the court'.[53]

[49] Referring to *Paley v Leduc*[54] and *Walker v Betts*,[55] she approves the description of the words 'just and equitable' as entailing a 'modified

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[47] 2112 BCSC 1208 at paragraph [20]
[48] (1995), 64 B.C.A.C. 14, 12 B.C.L.R. (3d) 342
[49] *Higginson v RTD Enterprises* (*supra*) at paragraph [20]
[50] *Ibid*.
[51] 2011 BCSC 1246
[52] (1976) 74 D.L.R. (3d) 152 (Ont.C.A.) at p156
[53] *Higginson v RTD Enterprises*(*supra*) at paragraph [21]
[54] 2002 BCSC 1757
[55] 2006 BCSC 128

objective test'.[56] This seems to mean that the test is objective but not entirely so. On an issue as important as the meaning of 'just and equitable', the ancient quip, '*Quot homines, tot sententiae*'[57] seems apposite. Opinions, even among reasonable men and women, may differ and, at times, quite markedly. There is a spectrum of opinion ranging from the conviction that the words confer upon a court the widest possible discretion that could, conceivably, be given to a court in a democratic state to the belief that the application of the word 'discretion' to the interpretation of 'just and equitable' is almost a misnomer, that such discretion as exists is more imagined than real.

[50] The recurring emphasis, in the case law, in other contexts, on the objectivity of the test may be an indicator that a court, in making a decision that is just and equitable in terms of PIE, is allowed the same margin of error as that set out for individual judges exercising a discretion in the case of *National Coalition for Gay and Lesbian Equality and Others v the Minister of Home Affairs and Others.*[58] In that case it was held that that the exercise of a judicial discretion entails a latitude of individual judicial freedom but nevertheless requires that it must not be influenced by wrong principles or a misdirection of the facts and the court must not reach a decision the result of which result could not reasonably have been made by the court

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[56] *Ibid*. at paragraph [24]

[57] The author was the Roman comic playwright, Publius Terentius Afer (Terence) writing more than 2000 years ago in *Phormio*. The fuller quote is: "*Quot homines, tot sententiae*: *suo quoique mos*". – "There are as many opinions as there are people: each has his own correct way". See, also *Haffejee v Licensing Officer, Pietermaritzburg* 1943 NPD 239 *per* Hathorn J at p 242.

[58] 2000 (2) SA 1 (CC)

properly directing itself to all the relevant facts and principles.[59] Once a court starts to talk about 'reasonableness', this is, ordinarily, a pointer to the fact that it is referring to an objective test.[60]

[51] The power that judges wield is, or ought to be institutional, not personal. This is why in both what are known as 'English' and 'Continental' systems of jurisprudence, senior members of the judiciary are appointed only after they have acquired years of scholarship and experience. Judicial decision-making requires what is known as the 'sacrifice of personality'. No court in any advanced modern society has, in the words of Harms JA, 'a free hand to do whatever it wishes to do'.[61] As it is a court of law which must make the final determination as to whether it would be 'just and equitable' to grant the eviction order, the test has to be, in theory, an objective one.

[52] One accordingly, comes full circle. As observed above, opinions among reasonable men and women may differ. A decision may be reasonable (and therefore objectively defensible) even though one may not have made it oneself. If this test is applied, the task of the courts having to decide upon eviction matters is much easier if there is a range of decisions which may correctly be made, given a particular set of facts. The rule of law favours certainty although this certainty need not be absolute. Later, I shall suggest what I hope will be a practical, sensible, just and fair way to resolve the

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[59] *Ibid*. at paragraph [11]. This is similar to what Harms JA said in the *Ndlovu* case (*supra*) at paragraph [18].
[60] *R v Mbombela* 1933 AD 269 at 272
[61] *Wormald v Khambule* case, 2006 (3) SA 562 (SCA) at paragraph [18]; *Ndlovu* case, 2003 (1) SA 113 (SCA) at paragraph [18].

tension. It will first be necessary to get a sense of context and texture in this particular case in order to understand why I believe this is the only viable way forward.

[53] After the applicant had taken transfer of the property on 11 April 20011, it terminated the occupiers right to occupy the property with effect from 31 July 2011. It gave notice on 30 June 2011.

[54] The application in this matter was launched on 10 August 2011. The applicant applied for and was given leave to serve the application by way of edictal citation on 16 August 2011. The Masetla group gave notice of intention to oppose on 26 August 2011, the Khumalo group on 29 August 2011.

[55] The Khumalo group filed an answering affidavit on 19 September 2011 and, on the same day, launched its application for removal of the liquidator. This was the application, referred to above, which I dismissed on 17 October 2012.

[56] On 22 November 2011, the applicant applied for and was granted leave to serve a notice on the respondents in terms of section 4 (2) of PIE. This notice was served on 28 November 2011. On 1 December 2012 the Khumalo group launched the joinder application. This was the first application for a joinder of the City. Another such application was brought later and heard separately by the other group, the Masetla group. On 5

December 2011 the first respondent filed an answering affidavit in the application to remove the liquidator. In 1 March 2012, the applicant filed its answering affidavits in both the application to remove the liquidator and the joinder application. The notice of set-down of the joinder application for the week of 24 April 2012 was served on 16 April 2012. The Khumalo group filed its replying affidavit on 25 April 2012. On the same day Mlonzi AJ heard that application and dismissed it.

[57] On 2 and 3 May 2012 the notice of set down for the hearing of the opposed application for eviction was served on the respective attorneys acting for the different groups among the respondents. The application was set down for 15 May 2012. On 14 May 2012 the Khumalo group brought a substantive application for the postponement of the application for eviction. On the same day, the Masetla group brought a substantive application for their application to remove the liquidator. Both applications were postponed. Thereafter a flurry of correspondence flowed between the attorneys for the applicant and the attorneys acting for the two groups among the respondents, relating to the groups' request for further postponements and the default of both sets of groups to file affidavits as they were required to do. On 1 June 2012 the applicant's attorney made it clear that no further indulgences as to time would be allowed by the applicant.

[58] On 4 June 2011 the Khumalo group filed an answering affidavit consisting of several hundred pages. On 5 June the Masetla group filed a

'counter application' in the eviction application. As noted earlier, this application was heard by Wise AJ on 7 June 2012. He dismissed the application and ordered that any party which contended that the City is a necessary party should apply for such joinder within 15 days of the court order.

[59] On 28 June 2012 the Masetla group launched its application for a joinder of the City in which the group sought certain substantive relief against the City. After filing an answering affidavit to this joinder application, the applicant's attorney wrote to the Masetla group's attorneys on 14 September 2012 advising them that it intended setting down the application on the opposed motion court roll on 2 October 2012. On 19 September, the applicant's attorneys wrote to the Khumalo group's attorneys confirming the set down for 2 October 2012. After a further flurry of correspondence in which the two groups sought further postponements and which was opposed by the City's attorneys, the application for joinder was heard by Wepener J on 3 October 2012 and, as noted earlier, dismissed by him on 4 October 2012.

[60] In dismissing the application, Wepener J said as follows:

> In the present matter the applicants have failed to set out facts to show that they are indigent. They have failed to show that an emergency situation will arise. They have failed to show that the applicants are persons who are entitled to assistance for accommodation by the second respondent. There is no attempt to show that the applicants

> will be homeless, should they be evicted. Indeed, there are *indiciae*[62] to the contrary, i.e. that the occupiers are persons who can afford to pay monthly levies, rent and the cost of security guards.[63]

[61] The applications which were argued before me on 17 October 2012 were set down for hearing on 16 October 2012 by notice of set down served by the applicant's attorneys dated 10 October 2012. The attorneys for both groups sought further postponements. On 12 October 2012 the Khumalo group's attorneys wrote a letter to the applicant's attorneys in which they protested at the course of action adopted by the applicant. On 15 October 2012, the Masetla groups's attorneys advised that their counsel would not be available at the hearing.

[62] Mr *Both*, who together with Mr *Pullinger*, appears for the applicant, has submitted that the jurisdictional prerequisites (including both the factual and the procedural elements thereof) for the relief sought have been satisfied by the applicant inasmuch as it is the registered owner of the property. Section 1 of PIE defines the owner as being 'the registered owner of land' who, in terms of Section 4 of PIE may apply to court for an eviction order.

[63] Section 1 of PIE, which is the definitions section, defines an unlawful occupier as being:

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[62] (*Sic*)
[63] *Ex tempore* judgment, p3

> 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 1997, and excluding a person whose informal right to land, but for the provisions of this Act would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996).

[64] The applicant submits that neither of the two factions of occupiers has shown that they occupy the property with the applicant's consent or that they have 'any (other) right in law to occupy' the property. It is hoped that the *discursus* above makes it plain that it is this 'any other right in law to occupy the property' that presents the huge problems for courts trying to decide a matter such as this.

[65] Mr *Both* has submitted that the court, in hearing an application for eviction, exercises judicial oversight over the process to prevent abuses of rights and that, in this particular case, no abuse of the rights of the occupiers appears from the papers. Mr *Both* has emphasised that the occupiers do not make out a case that their eviction will render them homeless. Mr *Both* accordingly has submitted that the only argument left for the occupiers is that the date upon which the eviction order should become executable should be such as to enable them to deal with the inevitable and unavoidable inconvenience caused by the displacement brought about by their eviction. Mr *Both* submits that the occupiers have had more than enough time to arrange their affairs.

[66] The respondents have marshalled the following facts which, so they contend, favour the refusal to grant an eviction order:

66.1 The Newtown Urban Village is currently home to approximately 2000 occupiers.

66.2 The Newtown Urban Village was created in response to Government's obligation to provide low cost housing to persons of low income and who would ordinarily not be in a position to acquire property of their own.

66.3 At the time of its inception the financial threshold for persons eligible to participate in the housing scheme was an income of R3 500.00 per month and less. Occupiers were required to pay a levy per unit of approximately R900.00 per month.

66.4 It appears that none of the occupiers are currently paying any rental to the applicant but may be willing to do so in order to regularise their occupation.

66.5 Many of the occupiers have been residing in the Newtown Urban Village since its inception approximately 12 years ago.

66.6 Many of the occupiers (as families and individuals) are well established within their community. They are fully integrated

in their community relevant to employment, education and social.

66.7 All the occupiers have indicated that an eviction will be detrimental to themselves, their employment and their children's schooling.

66.8 On the available evidence before the court (i.e. the affidavits of some 85 families comprising 364 persons) there are:

66.8.1 43 households headed by woman of which 17 are unemployed and 6 are elderly.

66.8.2 180 children residing in the Newtown Urban Village

66.8.3 19 elderly persons – over the age of 50 years

66.8.4 11 sickly persons

66.9 According to Mr *McKelvie*, many of the occupiers will, in all probability, be rendered homeless if the eviction is granted, especially those who are unemployed and cannot afford any other accommodation.

66.10 Many, if not all, the occupiers request alternative accommodation.

66.11 The occupiers in the Khumalo group took up their plight with the Gauteng Department of Housing and held a meeting with a certain Mphumi Kubeka. Although the issues remained unresolved, Kubeka indicated that the matter will be taken up with the MEC: Housing to establish if a resolution to the matter can be found. This consultation process seemingly has yet to run its course.

66.12 The Khumalo group consists of 125 families of which only 85 families have, to date, provided information regarding their personal circumstances. There are still a further 50 families whose personal circumstances are unknown to the court.

68.13 The Matsela group of occupiers have evidently pinned their hope on a counter application wherein they seek the removal of the liquidator and to have the sale of the property to the Applicant reviewed. This group consists of 352 persons. No information whatsoever regarding this group has been placed before the court. Their personal circumstances are unknown.

66.14 If it is accepted (and there is no concrete information to the contrary) that there are more than 2000 occupiers in the Newtown Urban Village, then there are more than a 1000 other occupiers whose personal details and situation are unknown.

66.15 The occupiers in the Khumalo group have held discussions with the Gauteng Department of Housing and have been advised that the matter will be taken up with the relevant MEC in order to find a resolution to the matter.

[67] All of the occupiers have made the same allegation that:

> I believe that I will be detrimentally affected by any sudden removal without alternative arrangements made for my family and I within the vicinity of Newtown.

Counsel's arguments about the homelessness of the respondents has not been something pertinently alleged by any of the occupiers. This is rather an inference which he asks the court to draw. He submits: 'From the information gleaned from the various affidavits of the occupiers it is highly probable that many occupiers will be rendered homeless should an eviction order be granted'.

[68] Counsel for the applicants contend that if the entry level for the occupiers in the original scheme was an income of R 3 500.00 per month, 12 years ago and they were paying R900.0 per month as levies then, which sum, with inflation, would now have risen to R1600.00 per month, the occupiers can hardly be considered indigent. They also pay 'rental' to Mr Masetla in an undisclosed amount. The City, in its affidavit resisting the application for its joinder in this matter, has been scathing about the opportunism of the respondents, pointing out that they have not even

attempted to indicate that they are unable to obtain suitable accommodation for the same or a similar amount to what they are paying. It is clear from the City's affidavit that it considers the respondents to be opportunists, who are and have been playing for time.

[69] My supplications in *Emfuleni Local Municipality v Builders Advancement Services CC and Others,* [64] may have produced some positive results in terms of assisting the High Courts, which have been suffering from 'eviction fatigue', to know how to go about their task. Since then, whether co-incidentally or not, the following judgments have emanated from various superior courts in the country.

[70] In *Sohco Property Investments (Company Incorporated under section 21) v Hlophe and 95 Others*[65] in which the applicant had sought the eviction of more than 96 occupiers of a social housing complex because they did not pay their rentals to the applicant, as owner, Swain J followed the decision of the SCA in *Ndlovu v Ngcobo, Bekker & Another* v *Jika:*[66]

> 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 an issue

[64] 2010 (4) SA 133 (GSJ)
[65] KZN Case No.11474/2010
[66] 2003 (1) SA 113 (SCA)

between the parties.[67]

[71] Swain J also took into account the fact that the applicant, too, had interests that had to be considered.[68] Swain J said that the applicant had been left in a parlous financial situation and that the programme to provide a cross-subsidised housing project for other deserving cases had been compromised.[69] On 10 March 2011, Swain J ordered the eviction of the respondents, which order was to take effect on 30 April 2011. Swain J dismissed the application for leave to appeal which was confirmed by the SCA on 4 August 2011 and the Constitutional Court on 26 September 2011.

[72] Although the full court in *Emfuleni Local Municipality v Builders Advancement Services CC and Others*[70] pertinently declined to give advice and guidance in such matter, it nevertheless did so indirectly, inasmuch as on 23 March 2012, it ordered the eviction of the occupiers from a squatter camp (or informal settlement) within 30 days of its order. This, as I understand it, is the first order of its kind since the enactment of PIE. In view of the pervasive presence of squatter camps, the case is significant.

[73] In *City of Johannesburg v Changing Tides 74 (Pty) Ltd & 97 Others (the Socio-Economic Rights Institute of South Africa intervening as amicus*

[67] At paragraph [19] of the *Ndlovu* judgment and paragraph [12] of the *Sohco v Hlophe* judgment
[68] At paragraph [19] of the *Sohco v Hlophe* judgment
[69] *Ibid*.
[70] (A5047/110 [2012] ZAGPJHC 39 (23 March 2012)

curiae)[71]delivered on 14 September 2012, for the first time actually pointed out, in clear terms, in the context of PIE evictions, that the right to property is a 'constitutionally protected right' and that the effect of PIE was 'not to expropriate private property'.[72] The SCA went on to say that:

> What it (i.e. PIE) does is delay or suspend the exercise of the owner's rights until a determination has been made whether an eviction would be just and equitable and under what conditions.[73]

[74] In the *City of Johannesburg v Changing Tides* case the SCA went on to say that:

> Whenever the circumstances alleged by an applicant for an eviction order raise the possibility that the grant of that order may trigger constitutional obligations on the part of a local authority to provide emergency accommodation, the local authority will be a necessary party to the litigation and must be joined … <u>That does not mean that the local authority will need to become embroiled in every case in which an eviction order under PIE is sought</u>. The question in the first instance is always whether the circumstances of the particular case are such as may (not must) trigger the local authority's constitutional obligations in regard to the provision of housing or emergency accommodation …(emphasis added)[74]

[75] In expressing this view, the SCA drew encouragement from the

[71] [2012] ZASCA 116 (14 September 2012)
[72] At paragraph [16]
[73] At paragraph [16]
[74] At paragraph [38]

observation by Van der Westhuizen J, delivering the unanimous judgment of the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Limited and Another*[75] who said: 'Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period'.[76] Recognition of property rights seems to have received a nod in the two courts having authority over the High Court, the SCA and the Constitutional Court.

[76] In the *Blue Moonlight Properties* case,[77] the Constitutional Court dealt at length with the constitutional and legal framework, referring to the Housing Act, No.107 of 1997 and the National Housing Code.[78] It also dealt extensively with the question of eviction and PIE, [79] as well as chapter 12 of the Housing Code.[80]

[77] In this *Blue Moonlight Properties* case Van Der Westhuizen J said:

> The present challenge deals with s 9(1) (the right to equality) and s 26 (2) (the State's obligation progressively to achieve the realisation of a right to housing) of the Constitution. The concepts of rationality and reasonableness are thus central. A policy which is irrational could hardly be reasonable. Whether a policy which meets the requirements for rationality would necessarily be reasonable does not have to be

[75] 2012 (2) SA 104 (CC)
[76] *Changing Tides* case at paragraph [16]; *Blue Moonlight* case, paragraph [40]
[77] 2012 (2) SA 104 (CC)
[78] See paragraphs [16] to[29]
[79] See parapraphs [30] to [46]
[80] See parapraphs [47] to [95]

> decided here.[81]

The words in brackets in the above quotation have been inserted by me (Willis J).

[78] Van Der Westhuizen J continues:

> I find that whereas differentiation between emergency housing needs and housing needs that do not constitute an emergency might well be reasonable, the differentiation the City's policy makes is not[82]. To the extent that eviction may result in homelessness, it is of little relevance whether the removal from one's home is at the instance of the City or a private property owner. The policy follows from the City's incorrect understanding of its obligations under Ch 12 and its claim that it lacks resources. The City's housing policy is unconstitutional to the extent that it excludes the Occupiers and others similarly evicted from consideration for temporary accommodation. The exclusion is unreasonable.[83]

[79] At a certain stage in *Blue Moonlight Properties,* Van Der Westhuizen J says:

> Besides its entitlement to approach the province for assistance, the City has both the power and the duty to finance its own emergency housing scheme. Local government must first consider whether it is able to address an emergency housing situation out of its own means. The right to apply to the province for funds does not preclude this. The

[81] At paragraph [87]
[82] See paragraph [80] of the same judgment – my insertion of the footnote.
[83] See paragraph [95]

> city has a duty to plan and budget proactively for situations like that of the occupiers. This brings the issue of available resources to the fore.[84]

In this *Blue Moonlight Properties* case the Constitutional Court granted the eviction order but ordered the City to provide temporary accommodation nearby.[85]

[80] In the context of engaging the City in eviction proceedings there has been much 'homeless' talk. In the following cases: the *Grootboom* case;[86] the *Port Elizabeth Municipality* case;[87] the *Blue Moonlight* case;[88] the *Mooiplaats* case;[89] *The Occupiers of Erf 102, 103, 104 & 122, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Limited & Others*;[90] *Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*;[91] and the *Changing Tides* case[92] the courts have insisted that where there is a likelihood that the occupiers will be rendered homeless as a result of an eviction the municipality should be engaged with a view to finding alternative accommodation and, in the *Mooiplaats* case, where the question of homelessness was not considered by the High Court, the

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[84] At paragraph [67]
[85] At paragraph [104]
[86] (*supra*) at paragraphs [52], [63] and [69]
[87] (*supra*) at paragraph [28]
[88] (*supra*) at paragraphs [27], [47] and [92]
[89] (*supra*) at paragraph [17]
[90] 2009 (4) All SA 410 (SCA) at paragraph [10]
[91] (2010) 9 *BCLR* 911 (SCA) at paragraphs [14] and [15]
[92] (*supra*) at paragraphs [14], [15], [31], [37], [38], [42] and [47]

eviction was set aside.[93]

[81] As far as I have been able to ascertain, neither the Constitutional Court nor the SCA has ever defined 'homeless'. PIE also does not do so. The only instance that I have been able to find where the word has been judicially defined is the case of *Makama and Others v Administrator,Transvaal*,[94] in which Van Dijkhorst J who had to consider the meaning of the phrase 'homeless persons' in section 6 of the notorious Prevention of Illegal Squatting Act[95] which provided that a local authority could provide emergency accommodation for homeless persons said:

> In my view it would be unwarranted to stretch the interpretation of the word 'homeless' to include the meaning 'lacking in proper facilities'. Its ordinary meaning is lacking a home and, though the concept of 'home' is of wide and varied nature when applied to persons, it does connote a shelter against the elements providing some of the comforts of life with some degree of permanence. The large number of dictionaries referred to do not lead to a different conclusion, and the Afrikaans 'dakloos' enforces this interpretation.[96]

A perusal of the rich array of dictionaries in the library of the South Gauteng High Court indicates that, in my respectful view, Van Dijkhorst J was correct in ascribing a degree of permanence to the concept of a home.

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[93] At paragraph [17]
[94] 1992 (2) SA 278 (T)
[95] No. 52 of 1951, as amended
[96] Ibid. at 285-286I

[82] In the context of applications for eviction, the following question arises: to what degree of permanence is a person occupying a property against the will of its owner entitled? Brian Garner, in the preface to the first edition of *A Dictionary of Modern Legal Usage*:[97]

> For a specialist language, the language of law remains remarkably variable, largely because it has been incompletely recorded and mapped. In this respect it is analogous to English before 18th-century grammarians attempted to reduce its variability and make logical its many quiddities. This is not to say, of course, that the language of the law has the malleable capacity of Elizabethan English, which, in the hands of a creative genius like Shakespeare, could be supremely expressive and evocative. Quite the opposite. *Stare decisis* remains at the core of our system of law – so much so that the continual search for precedents often discourages legal writers from straying beyond precisely how things have been said before.

Garner bows to the need for the language of law to have this quality of precision. In *The Cambridge Encyclopedia of the English Language* it is said that statements in legal language have, above all, 'to be expressed in such a way that people can be certain about the intention of the law respecting their rights and duties. No other variety of language has to carry such a responsibility.'[98] This need for precision is bound up with the element of certainty which, as mentioned earlier, is a key component of the rule of law.

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[97] 1987 and 1995 (second edition) Oxford: Oxford University Press
[98] Davis Crystal, (1995), Cambridge: Cambridge University Press, p374

[83] In the Preface to the First Edition of Stroud's *Judicial Dictionary*, published in 1890,[99] the learned author says of his publication:

> Its chief aim is that it may be a practical companion to the English-speaking lawyer, not only in the Mother Country, but also in the Colonies and Dependencies of the Queen. The hope is also indulged that it may be not without utility to the man of business, nor without interest to the student of word-lore.

Stroud concludes his preface by saying:

> It is, however, impossible to rise from these labours without a deepened admiration for the Judges of our land. It is extraordinary that so many minds, working through so many centuries, and upon such various matters, should have been able so harmoniously to lay down the law for such an expansive and ever-widening civilisation as that of the British Empire. And probably in no sphere of their duties has the work of Judges been more distinguished than in their dealing with the composite subtleties of English Diction. To study that work, although involving labour, has brought delight; and this attempt to systematise its result will, it is hoped, be useful.

There are, of course, a few archaisms in these extracts from Stroud's preface but the fact that his dictionary has been republished so many times, and is so widely used, would suggest that, veiled behind these archaisms, is a compelling ideal. That ideal, having a close affinity with the rule of law, is that wherever the English language is used by lawyers, and in

[99] Published in the fifth edition (1986) London: Sweet & Maxwell

whatever part of the world they may be, those words which lawyers use should be clear, precise and readily understandable by all. Stroud also recognises that the work of judges, in giving access to justice for all, includes providing clarity for the complex subtleties of the English language.

[84] No municipality, no government, no politician, no court, no king, no emperor and no potentate can guarantee to any person unqualified permanence in his or her place of residence. Quite apart from anything else, the floods, earthquakes, winds and fires that keep the insurance industry in business are testimony to the superior power of the laws of nature over 'the best laid schemes o' mice an' men'.[100] When the Constitutional Court and the SCA refer to 'homelessness', they must, of necessity, have had in mind some qualification as to time (or, more particularly, the happening or non-occurrence of an uncertain future event). This seems clear when, as noted earlier, Van der Westhuizen J said in the *Blue Moonlight* case: 'Of course a property owner cannot be expected to provide free housing for the homeless for an indefinite period.'[101]

[85] Accordingly, in context, 'homelessness' must mean this (or something closely similar thereto):

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[100] These lines are taken from Robbie Burns' poem *To a Mouse*. Some commentators on my judgments have been critical of the fact that I have provided explanatory footnotes for extracts from nursery rhymes. I therefore record that I accept that, as with Humpty-Dumpty, everyone is familiar with this poem and that the footnote may hardly be necessary.

[101] At paragraph [40]. This is a sentence on to which the SCA latched in *Changing Tides.*

'Without any reasonable prospect, between the date of the court order which it is proposed be made that the occupier is to vacate the property to the date upon which the eviction order is to be effected (in the event that the occupier does not vacate the property), of the occupier being able to find alternative accommodation that is (a) of a comparable or better standard to and (b) at a similar rental to and (c) within reasonable proximity to that of the property from which the eviction is sought'.

This proposed definition is my own. The occupiers, *in casu*, have not claimed that they will be 'homeless' within the meaning that I have proposed. Accordingly, there is no need to involve the municipality in this matter at all.

[86] Of course, my understanding of what 'homelessness' must mean may be incorrect. I am under no illusions that my jurisprudence on evictions enjoys universal acceptance. It is therefore necessary to provide further reasons why I see no point in involving the City in this matter further than has already been the case. The City is subject to severe financial constraints. This is a matter that is quite regularly discussed freely in open court. It is also common knowledge that the City leaves potholes unattended for lengthy periods of time, that traffic lights are frequently out of order, that our parks and municipal gardens are in a state of neglect. This is not a *numerus clausus* as to the lamentable state of the services (or lack thereof) which the City provides.

[87] A matter that also frequently arises in the South Gauteng High Court is the 'billing crisis'. This refers to problems which occur with statements of account for utilities which should be sorted out within a few days that take months, if not years, to resolve. In some instances, these issues have remained unresolved for homeowners, even after many years, despite the efforts of ratepayers and the courts to do so. Schools and hospitals in Gauteng (which are matters falling within the authority of the provinces) bear the signs of dilapidation and neglect.

[88] The provinces, to which the municipalities in the country may turn if they are short of funds, are almost entirely dependent on funding from the central government.[102] The capacity of the municipalities to deliver on questions of housing is therefore, ultimately, dependent on the financial capacity which they receive from the National Executive (Government).

[89] Accordingly, when it comes to the provision of housing in South Africa, the Constitutional Court has made and is likely to continue to make orders which may impact, to a major degree, on questions of funding for projects of national development which, in classical constitutional theory and upon an ordinary reading of the Constitution, it is the National Government's

[102] See, for example,*Understanding Local Government in South Africa* in which it is said that 'The Provincial Government gets most of its money from the National Treasury'. (www.etu.org.za) Accessed 7 November 2012.

prerogative to decide, subject to approval by Parliament.[103]

[90] With the exception of the case of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*,[104] every case decided in the Constitutional Court which has dealt with the provisions of section 26 of our Constitution relating to the realisation of the right of access to housing has, since *Government of the Republic of South Africa and Others v Grootboom and Others*,[105] been decided unanimously. In the *Joe Slovo Community* case, there were five judgments prepared by different members of the court but they all supported the same order of the court which ordered the residents of the Joe Slovo informal settlement to vacate provided they were 'relocated to temporary residential units situated at Delft or another appropriate location' on certain conditions. In the *Joe Slovo Community* case the Constitutional Court ordered the parties to 'engage meaningfully with each other with a view to reaching agreement' on issues related to the relocation, including the date thereof.

[91] In view of the unanimity of these Constitutional Court decisions and the fact that judges of the Constitutional Court are appointed by the President of the Republic of South Africa from a list submitted to him by the Judicial Service Commission ('JSC'), it must be accepted that successive South African Presidents as well as the JSC have, since 2000 (when the

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[103] See A.V. Dicey (1885) *An Introduction to the Study of the Law and the Constitution*; London: MacMillan and Company, chapter X, 'The Revenue' and section 43, read with section 85 of the Constitution.
[104] 2010 (3) SA 454 (CC)
[105] 2001 (1) SA 46 (CC)

Grootboom case was decided), been content that these constitutional anomalies with regard to state funding of national objectives should continue. The *puisne* judges in the High Courts will have to do their best in a trying situation.

[92] The High Courts are duty bound to have regard to the provisions of PIE and the injunction of the Constitutional Court to apply their mind to the contribution which municipalities can make to the resolution of the problems of housing. In doing so, it would be intellectually dishonest for a court not to take into account the real problem that exists at a municipal level with its capacity in terms both of finance and its administrative personnel, to solve problems.[106] If a city cannot even mend potholes promptly and resolve billing crises expeditiously, what hope does it have of addressing adequately the needs of housing? The courts cannot blink, Bambi-like, at the real dangers that are posed through a lack of capacity at a municipal level. The judges on duty in the motion court in the South Gauteng High Court stare real evil in the face every week. Among these evils is the hijacking of buildings in the City. This hijacking is not only criminal but brings with it attendant evils of exploitation, squalor and degradation.

[106] In the *Blue Moonlight* case (*supra*) from paragraphs [48] to [95], the City's own case was that it lacked the capacity to resolve the issues relating to the provision of housing within its borders. Section 4 (2) (f) of the Local Government: Municipal Systems Act, No.32 of 2000 provides that a municipal council has a duty to provide services 'within the municipality's financial and administrative capacity and having regard to practical considerations'.

[93] I fully accept what was said by the English Lord Chancellor, Lord Hailsham of St Marylebone, in *Cassell & Co Ltd v Broome:*[107]

> The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers.[108]

Lord Reid concurred with Lord Hailsham, as did Lord Morris of Borth-Y-Gest, Lord Wilberforce (on the question of the importance of precedent), Lord Diplock and Lord Kilbrandon. Lord Reid noted that the Court of Appeal chose to 'attack the decision of this House as bad law'.[109] He said they were 'quite entitled to state their views and reasons for reaching that conclusion'[110] but was dismayed that they did not apply the decision of the House of Lords. He described this as an 'aberration'.[111] Later he said that '(i)t is perfectly legitimate to think and say that we were wrong'.[112]

[94] The point is this: courts lower in the hierarchy may disagree with decisions of those that are higher and may even say so. They are, however, bound to follow the decisions in higher courts. My respectful but nevertheless fundamental difficulty with the Constitutional Court's decision in the *Blue Moonlight Properties* case is that I have no doubt that its

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[107] (*supra*); [1972] AC 1027; [1972] All ER 801 (HL)
[108] Appeal Cases at p1054
[109] Appeal Cases at p1084
[110] Appeal Cases at p1084
[111] Appeal Cases at p1084
[112] Appeal Cases at p1092

notions of 'rationality' and 'reasonableness' in this particular context are not universally shared.

[95] In emphasising that '(t)he concepts of rationality and reasonableness are thus central',[113] the Constitutional Court has steered its course towards the application of an objective test as to when a court can or cannot to make an order for eviction. Ordinarily, the adjective 'objective' denotes a large degree of freedom from controversy of the noun which it qualifies. It is indubitably desirable that an aura of intellectual incontestability should be distinctive of the Constitutional Court's determinations. Unfortunately, controversy has dogged its judgments on eviction matters since the *Grootboom* case.[114]

[96] Ordinarily, a quote from a book, dealing with 'politics-and-religion' would be inappropriate in a judgment of a court of law. The quote below is given because the intellectual standing of the author, John Habgood, rather than his religious authority, adds credence to a view which already has a fairly widespread secular currency:

> We may accept John Habgood's argument that in a pluralistic nation, although there is no one dominant or universally accepted ideology or world view, there still must be enough agreement on values, goals and underlying assumptions to hold the nation together and give some basic sense of national identity. A radically pluralistic society with a

[113] In the *Blue Moonlight* case (*supra*), at paragraph [87]
[114] 2001 (1) SA 46 (CC)

> state that is entirely neutral is inconceivable; there has to be some minimal consensus to provide the necessary degree of coherence.[115]

[97] We, in South Africa, are fortunate that the Bill of Rights in our Constitution gives us an across-the-board consensus as to the nature of our being, as South Africans. The National Development Plan of the National Planning Commission gives us a further opportunity to unite as to how we can achieve the socio-economic rights reflected in sections 22 to 27 of our Constitution. This National Development Plan has received the support of all political parties represented in our Parliament.[116]

[98] The extensive support, transcending most political divisions, which the National Development Plan has been able to attract, creates a special opportunity. The judiciary, as a whole, can identify with this plan. It would be helpful to our progress as a nation if the courts were to identify with it and, to the extent that it is possible for them to do so, encourage its implementation. It would be well if the economics of the plan could infuse our jurisprudence.

[98.1] In the National Development Plan it is said that:

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[115] See Duncan Forrester's essay, "Christianity and Politics" in *Keeping the Faith;* 1989; Geoffrey Wainwright, editor, London: SPCK, at p257. See, also, *Church and Nation in a Secular Age*; 1983; John Habgood; London: Darton, Longman & Todd, at 28ff. Duncan Forrester was Principal of New College and Professor of Christian Ethics and Practical Theology at The University of Edinburgh. John Habgood, now more formally and correctly known as The Right Reverend and Right Honourable The Lord Habgood PC, was Archbishop of York from 1983 to 1995. Prior to his retirement as Archbishop of York, he was one of the most intellectually prominent of commentators in Britain on current social, political, ethical and theological issues.

[116] See: www.info.gov.za (Accessed on 7 November 2012). This is recorded as having occurred on 16 August 2012.

> Achieving full employment, decent work, and sustainable livelihoods is the only way to improve living standards and ensure a dignified existence for all South Africans. Rising employment, productivity and incomes are the surest long-term solution to reducing inequality. Similarly, active steps to broaden opportunity for people will make a significant impact on both the level of inequality and the efficiency of the economy.
>
> This will be achieved by expanding the economy to absorb labour and improving the ability of South Africa's people and institutions to respond to opportunities and challenges.[117]

[98.2] The plan calls for a change in our thinking: "There must be a change in mind-set across all sectors of society – public, private and civil society – and increased focus on implementation and real change.'[118]

[98.3] The Commission goes on to say:

> Given the scale and ambition of the task, leadership and vision are needed from all sections of society, with leaders who are able to rally constituencies around long-term goals, recognising that the benefits may be unevenly distributed and may take time to realise. Similarly, leadership in government will be crucial in ensuring a more concerted and coordinated effort to implement agreed programmes.[119]

[98.4] Then:

> The proposals in this plan are aimed at creating about 11 million net new jobs over this period and thus reducing the rate of unemployment to about 6 percent by 2030. This should be attained at the same time

[117] National Planning Commission: National Development Plan, 2011, p90.
[118] I*bid*. at p94.
[119] *Ibid*. at p94

> as we increase labour force participation rates from the current 41 percent of the working-age population to 61 percent.[120]

[98.5] The Commission says: 'We need to recognise the importance of the engine of growth (rising outputs from tradable sectors), the sources of jobs (often domestically oriented and service firms) and the linkages between the two'.[121]

[98.6] The Commission proceeds:

> The plan's central goals are expanding employment and entrepreneurial opportunities on the back of a growing, more inclusive economy. This will require far greater commitment to deepening the productive base, whether in agriculture, mining, manufacturing or services. By 2030, South Africa should have a more diversified economy, with a higher global share of dynamic products, and a greater depth and breadth of domestic linkages. Intensified stimulation of local and foreign markets will be needed, as well as strengthening conditions to promote labour-absorbing activities. Traded activities will act as a spur to growth, as will active stimulation of domestic opportunities and the linkages between the two. Specific actions will need to be taken to break out of the current path dependency. This will require decisive action on the part of the state and other social partners.[122]

[98.7] The Commission says also that:

> Lifting constraints to growth that are within our power to influence can be an effective way of spurring growth. These must be factors that have an economy-wide effect of lowering prices or raising productivity,

[120] *Ibid*. at p95
[121] *Ibid*. at p102
[122] *Ibid*. at p103

> or else a targeted effect on groups of activities that underpin investment in dynamic sectors. Often a combination of actions is required, as one improvement in isolation of others may not be sufficiently enabling for firms.[123]

[98.8] It continues:

> Labour-absorbing growth will be stimulated by identifying major constraints that hinder investment and production in key sectors. These can be addressed in a sequenced manner. A few significant binding constraints will be lifted through committed action. The first commitments will include constraints in electricity, supply, water, business registration, urban planning approvals, mining licensing, and high-skilled labour supply – the elements that stop business in its tracks. The rolling nature of this commitment is intended to support growth acceleration and sustain it over time, with a bias to labour absorption. Many of these are already policy commitments, but require rapid decision-making and stronger institutional oversight.[124]

[98.9] And:

> The majority of new employment will arise in activities that are domestically oriented, where global competition is less intense, and there is a high labour component. It may be functionally possible to trade in these activities, but in essence, they must take place in situ.[125]

[99] Building units of accommodation, whether these be houses, apartments, flats or cluster developments has socio-economic advantages which extend way beyond that of providing people with 'roofs over their

[123] *Ibid*. at p104.
[124] *Ibid*. at p105.
[125] *Ibid*. at p109.

heads'. It has what is known in economics as a 'multiplier effect'. The construction industry is labour intensive. The artisan skills required for the building of homes can be acquired reasonably quickly. The building industry has what are known, somewhat quaintly, as 'backward and forward linkages'. [126]

[100] The building industry stimulates the manufacturing industry with the demand for bricks, cement, windows, cupboards, doors, tiles, screws, nails, handles and materials for roofing. These are known as 'backward linkages'. 'Forward linkages' are to be found in the stimulus that new housing provides for items such as furniture and fittings. Building homes simply requires good, old-fashioned, 'boer-maak-'n-plan' skills and technology. The building industry creates jobs and more jobs. The thousands who work in the building industry spend their money which, in turn, stimulates other sectors of the economy.

[101] In economics, the following is what Sherlock Holmes would describe as 'Elementary, my dear Watson'[127]: apart from certain rare exceptions

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[126] See, for example, http:// www.businessdictionary.com (Accessed 9 November 2012)

[127] Sherlock Holmes, the super-detective and sleuth is a fictional character invented by Sir Arthur Conan Doyle. Holmes is perhaps not as famous as Humpty Dumpty in English literature but much loved nonetheless. The spoilsports will remind us that the well-known expression, 'Elementary, my dear Watson' did not actually appear in Doyle's books but in popular films about made later about Sherlock Holmes and his assistant, Dr. Watson. The phrase was, in fact, used by P.G. Wodehouse in *Psalmist Smith* in 1915. In Doyle's books, Sherlock does, however, very nearly say so on a few occasions. Holmes says 'Elementary' in *The Crooked Man* and 'It was very superficial, my dear Watson, I assure you' in *The Cardboard Box*. Sherlock Holmes, using the expression 'Exactly, my dear Watson', appears in three different stories. See http://www.phrases.org.uk/meanings/elementary-my-dear-watson.html (Accessed 7 November 2012).

(known as Giffen goods), if you want less of something, you must do one or more of the following:

(i) tax it;

(ii) increase its price;

(iii) increase the price of producing it;

(iv) increase the price of delivering it;

(v) increase the cost of holding it;

(vi) increase the cost of maintaining it; or

(vii) make it more difficult to keep.

This is what is known as 'the law of supply and demand'.[128] It really is so elementary that one is almost embarrassed to mention it.[129]

[102] Section 26 (2), read with section 26 (1) of our Constitution, makes the progressive realisation of access to adequate housing one of the State's imperatives. The legend of King Canute, having his chair carried down to the shore and commanding the tide of the sea to stop, arose not because the king was vainglorious but because he wanted to underline the point that no human being, no matter what his or her power or status may be, can make effective commands in defiance of the laws of nature.[130] The king said:

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[128] See, for example, http://.socialstudieshelp.co/economics_supplydemand.htm (Accessed 7 November 2012) and http://www.whatiseconomics.org/the-law-of-supply-and-demand (Accessed 7 November 2012).

[129] The writer assures the gentle reader that he is not even contemplating auditioning for the role of Sherlock Holmes. There are more complex glosses on the law of supply and demand. The theory of marginal utility is an example. These glosses need not concern us in this case.

[130] The first written account appears in *Historia Anglorum*, written by Henry of Huntingdon about 60 years after the death of the king in 1035. 'Canute' is an Anglicism. The king, called Knut, was one of theViking rulesr of England. See the report on what Professor Simon Keynes of the

> Let all the world know that the power of kings is empty and worthless and there is no king worthy of the name save Him by whose will heaven and earth and sea obey eternal laws.[131]

[103] In economics, the law of supply and demand is incontestable, as iron-like in its strength, as the law of gravity. If we want more people to have access to housing, it must be made easier to own property and not more difficult. It is as simple as that. 'Progressive' rhetoric is no more capable of changing this fact than King Canute could stop the tide.

[104] Anywhere in the world, when it comes to funding programmes for socio-economic development, the state has only three levers which it can pull: profits from state enterprises, taxation or debt. For municipalities, the lever of 'tax' is municipal rates. If we wish to attract people to build accommodation for themselves and others, shops, factories, and offices in our cities to absorb the huge inflow of millions who flock to our cities over relatively short periods of time, according to the latest census, we must ensure not only that our levels of rates do not become prohibitive but also that those who acquire and build new properties will be able to use them.

[105] In contrast to the inherent financial limitations which every state must face, the private sector has unlimited potential. It draws upon creativity, human ingenuity, imagination, discipline, incentivises risk-taking and, responsive to market forces, promotes swift decision-making as well

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department of Anglo-Saxon, Norse and and Celtic at the University of Cambridge has to say, summarized at http://wwww.bbc.co.uk/news/magazine-13524677 (Accessed 7 November 2012).

[131] *Ibid*.

as the correction of mistakes. The institutions of the state, including the courts, can foster social progress by encouraging private sector initiatives rather than by stifling them.

[106] Martin Ravallion of the Development Research Group of the World Bank has written an article called *Pro-Poor Growth: A Primer*.[132] In that report Ravallion shows that, across the world:

(i) Economic growth has brought down overall poverty measures; and

(ii) While investments in education and health among the poor accelerate the reduction of the inequality ratio, high rates of economic growth are the single most potent factor in bringing down this ratio as measured by the Gini coefficient or index.[133]

The paper has some intriguing mathematical models to scrutinize. I invited counsel for both sides to make submissions on the issue but they declined to do so.

[107] During the apartheid era, certain intellectuals argued, correctly, that apartheid was doomed to fail by reason of its irrationality.[134] Attempting to

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[132] See, for example, http://www.ideas.repec.org/p/wbk/wbrwps/3242.html (Accessed 9 November 2012)

[133] See, also, for example, *Our Future-Make It Work: National Development Plan 2030* published by the National Planning Commission on 15 August 2012

[134] This has been widely known as the *O'Dowd thesis* which traces its origin to an article first published by Michael O'Dowd in 1966. The thesis was supported by persons such as Helen Suzman, Harry Oppenheimer, Zach De Beer and John Kane-Berman. See, for example Christopher Hill (1983) *Change in South Africa, Blind Alleys or New Directions*; London: Rex

keep the races, and even cultures, apart from each other, ran counter to the homogenising forces of modernity.[135] Apartheid was a centrifugal (centre-fleeing) force, while the economic forces at work were centripetal (centre-seeking). In a rapidly integrating economy, the irrationality of the effort to maintain social and political segregation reached breaking-point while, at the same time, the moral reprehensibility of the system became ever more acutely apparent.

[108] An irrationality, which is notionally inverse to that of apartheid, but eerily reminiscent of that which was exercised by the apartheid apparatchiki is to be found in the belief that we can engineer our way out of apartheid by behemoth interventions in the natural economy. As I mentioned in the *Emfuleni Local Municipality* case,[136] all the available evidence points to the fact that if one wishes to transform a society out of poverty, it is best to promote the innate, revolutionary potential of a modernising economy driven by market forces.

[109] It would be tragic if our country, so pregnant with promise, so pulsating with possibilities, when we reached the turning point of our first

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Collings; and B. J. Van Wyk (2005) *The Balance of Power and the Transition to Democracy in South Africa*, Master's Dissertation at the University of South Africa - See http:// www.etd.up.ac.za/thesis/available/etd-10042005.../oodissertation.pdf (Accessed 7 November 2012). I am grateful that, 16 years of age, I had the privilege of listening to Helen Suzman in 1969 when she visited our school and explained why failure was inevitable when politicians attempt to impose economically irrational stratagems in a globally modernising world. She was so lucid and compelling that I have never abandoned my conviction that she was right. It is often forgotten that, before her career in politics, Suzman had been a highly accomplished economist who, *inter alia* had been an adviser to the South African government during the Second World War and a senior lecturer in the subject at the University of the Witwatersrand.

[135] A book, helpful to understand this process is Anthony Gidden's *The Consequences of Modernity*, 1990, Stanford, California: Stanford University Press.

[136] 2010 (4) SA 133 (GSJ) at paragraphs [19] to [26]

democratic elections in a constitutional state in 1994, should fail because those who steer the ship of state, including the courts, have succumbed to economic irrationality. In Berlin, in Germany, there is a museum to life under the DDR (Deutsche Demokratische Republik). The exhibition puts on show the absurdity of the belief that one can, through state administration, engineer the way to human happiness. On display is a panoply of items, (including the largest collection of rubber stamps in the world) and film footage that exposes, among other follies, the ridiculousness of the idea of a secular priesthood, whether that 'priesthood' consists of politicians, judges or bureaucrats (or some combination of these three categories of persons). The DDR was the German state that was behind the 'iron curtain' before the fall of the Berlin wall in 1989.

[110] Our economic growth rate, hovering around 3 % per annum, will not redress the problem of poverty, with all its attendant evils, in our country. The courts should, where possible, assist in redressing the causes. We need the winds of trade. If we do not sail with them, we risk lolling about in the doldrums, with all the attendant dangers of being trapped therein.

[111] Redress is within our grasp. As a country which is not yet developed, we have a natural economic potential. We have a wonderful people, an abundance of natural resources, a vibrant entrepreneurial spirit, a sound infrastructure, solid professional institutions, great centres of learning in the institutions such as our universities, excellent moral cohesiveness and

direction in our religious institutions, easy access to the methods, systems and ideas of the most successful countries in the world.

[112] In our law there is what is known as the doctrine of election. This doctrine was first set out in our courts by Watermeyer AJ (as he then was) in the case of *Segal v Mazzur*.[137] The doctrine holds that an innocent party to a contract that has been breached by another party cannot blow hot and cold; he or she cannot approbate and reprobate the contract.[138] *Segal v Mazzur w*as expressly approved by the SCA in *Du Plessis and Another NNO v Rolfes Ltd*.[139] The principle has been extended to other contexts. In the case of *Chamber of Mines of South Africa v National Union of Mine Workers and Another*,[140] it was said:

> One or other of two parties between whom some legal relationship subsists is sometimes faced with two alternative and entirely inconsistent courses of action or remedies. The principle that in this situation the law will not allow that party to blow hot and cold is a fundamental one of general application.[141]

[113] As was said by the learned author Christie, in *The Law of Contract*, the law does not allow parties to be inconsistent, to cleave to mutually exclusive positions. The courts have applied this principle to others. What is sauce for the goose is good for the gander. The courts should apply this principle to themselves. The courts cannot be saponaceous. The

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[137] 1920 CPD 634 at 644-5
[138] RH Christie. 2006. *The South African* Law of Contract. 5th Edition. LexisNexis: Durban, p540.
[139] 1997 (2) SA 354 (SCA) at 364G-365A
[140] 1987 (1) SA 668 (A)
[141] *Ibid*. at 690 D-G. See also: *Administrator, Orange Free State v Mokopanele* 1990 (3) SA 780 (A) at 788 B-H

colloquialism that 'You cannot have your cake and eat it at the same time' summarises the position. We must be, as is said in Afrikaans, 'konsekwent' instead of 'wispelturig'.[142] We shall not solve our socio-economic problems by adopting policies, whether these emanate from the courts or elsewhere, that, in practice, operate to frustrate the achievement of our constitutional objectives.

[114] I return to the Putney Debates. Prominent among the participants were a group, considered radical at the time, known as 'The Levellers'.[143] They have been oft been forgotten for their contribution to modern political discourses. Part of the reason for this may be that the notion of who constitutes a 'progressive' has been hijacked, in many countries of the world, by those who believe in the theory of a triumphal intellectual vanguard. Intellectual and moral humility may be more appropriate than an exultant millenarianism for those who inhabit the world of ideas.

[115] Let us level up and not level down. There is no other way to success. We must thieve with our eyes but not with our hands. As far as the law of intellectual property allows, we must steal the ideas that will help build our progress as a nation. What the rich have today, the poor must have tomorrow. How long ago was it that only the rich could afford television? How long ago was it when only the rich could afford new clothes and new shoes? How long ago was it when even the rich had to use 'drop-toilets' in

[142] The word loses some of its meaning and potency when it is translated as 'consistent'. Similarly 'wispelturig' is somewhat insipid when translated as 'whimsical'.
[143] See, for example, www.historylearningsite.co.uk (Accessed 7 November 2012).

an ‘uithuisie’? How long ago was it that, to have a shower in one’s own home, was considered to be ‘grand’? How long ago was it when only the rich could wear jewellery? Today all but the very poor do so. How long ago was it that only the rich could afford electrical appliances such as fridges, stoves, washing-machines, dish-washers, etc which the middle-class now take for granted? How long ago was it that only the super-rich had features such as radios, seat-belts, automatic transmission, electric windows and air conditioning in their motor vehicles? These facilities are now standard for middle-class motor car owners, even if motor vehicles are not yet affordable by the poor.

[116] Very recently, when cellular (mobile) telephones (generally known as ‘cellphones’) were invented, they were considered the play-things of the rich. Today they are ubiquitous among the poor in the rural areas and in what South Africans still call ‘the townships’. Hundreds of thousands of small-scale entrepreneurs in South Africa now use cellular telephones as their offices, secretaries and receptionists.

[117] Soweto is a good example of rapid, positive socio-economic transformation taking place. Twenty years ago it was a grim, depressing place. Today it is pulsating with shopping malls, replete with cinemas and ‘gyms’, that are on a par with the best in Europe. There are restaurants and taverns galore. As chairperson of the Board of Trustees for Anglican Diocese of Johannesburg, I am aware of the fact that there is no shortage of cash in

Soweto. *Ubuntu*, working in tandem with capitalism, has gone a long way in this part of the world.

[118] If one travels further back in time, beyond the recollections of those alive today, one has even more dramatic illustrations of how the material conditions of human beings can change for the better over a comparatively short period of time. Queen Marie Antoinette, who lost her head in the French Revolution, was literally, illiterate. It was not so very long ago that the ability to read and write was found exclusively among those who were privileged not merely by reason of their relative affluence. In addition, they received the benefit of an investment in their formal education that was given to few indeed. Mass adult literacy brings with it the treasures of access to information and knowledge, as well as and the kaleidoscope of the fantasies of the human imagination. These treasures were not distributed by confiscating books from the rich or by making it ever more difficult and expensive to publish literature.

[119] In London, at Kensington Palace, where Queen Victoria grew up as a child, there is an exhibition of the toys which she had as a young girl. The rudimentary quality of the toys of the future queen and empress is educative. Children playing outside the shacks and the huts of South Africa today have better. The queen was a child before the invention of plastic. There were no Barbie dolls, or anything similar, for H.R.H. Princess Alexandrina Victoria.

[120] The examples of changes in the material conditions of members of our society, given in the paragraphs above, are all illustrative of what is meant by 'levelling up'. These changes were achieved by encouraging aspirations, and allowing enterprising initiative to flourish rather than by employing predatory tactics on the rich.

[121] There is a transformative power in emulating and replicating prototypes, the good examples of success. Are there excellent schools in South Africa? Indeed there are! We must copy them (levelling up) and not take from them (levelling down). Are there excellent health services in South Africa? Yes, indeed! We must copy them (levelling up) and not take from them (levelling down). Grasping the idea of levelling up rather than levelling down will give us the purchase of the grip on the last cliff before we shall have reached the mountain top. Then we shall have seen the promised land. Then there will be no turning back. We shall be a winning nation.

[122] All counsel who have struggled to resist an application for summary judgment, will be familiar with the case of *Breitenbach v Fiat*[144] in which Colman J made it plain that it would be difficult indeed to show good cause why such judgments should not be granted where the defence had been set out 'baldly, vaguely or laconically'.[145] There is no reason why this principle should not apply to occupiers seeking to resist the application for their eviction. Of course, every move from one dwelling to another carries

[144] 1976 (2) SA 226 (T)
[145] At 229A

with it its own traumas and disadvantages. That is not enough to resist an eviction order where an occupier has no right, recognised at common law, to remain in occupation of a particular property. The case for remaining in occupation of the property has been set out by the occupiers laconically.

[123] Mr *McKelvey* has submitted that an eviction order 'at this stage' would be premature and that a court ordered mediation process should be sanctioned to enable the parties and the City to negotiate a possible settlement of the matter. Apart from the reservations, mentioned above, that I have about the likely capacity of the City to mediate the process, 'mediation' is neither a panacea nor an *abracadabra*. In order for mediation to have a chance of success the parties must be *bona fide* (there has been scant evidence of this on the part of the occupiers) and there must be a proposal which is credible (none has been put forward by the occupiers). [146]

[124] In order that decision-making may be rational in eviction matters, it may be best first to apply binary code to the decision as to whether or not to evict. Here there can be only one correct answer at any given point in time. Binary code, 'yes' or 'no', counting only in 0's and 1's, switching on or off, following a positive or a negative current has been the principle upon which the computing genius and revolution of our time has been predicated.[147] If the answer to an eviction application is 'No', that does not

[146] This insight is gained from the fact that I was a founding panelist of the Independent Mediation Service of South Africa ('I*MSSA*') in 1984 and was much involved in the process right up to my appointment as a judge of the High Court in 1998. I am an enthusiastic supporter of the concept, provided the necessary preconditions have been established.

[147] See, for example, *Binary Codes-The Mathematical Language of Computers* http://www.theproblemsite.com (Accessed 9 November 2012)

mean that another time, when more information has come to light or there has been the happening or non-occurrence of an uncertain future event the decision cannot become a 'yes'. This methodology is consistent with the SCA's decision *Ndlovu v Ngcobo, Bekker & Another* v *Jika.*[148]

[125] Section 4 (8) of PIE provides as follows:

> If the court is satisfied that all requirements of this section have been complied with and that no valid defence has been raised by the lawful 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 paragraph (b).

[126] Once the court has decided, after having been satisfied that all the other requirements of section 4 of PIE have been met, and that it would be 'just and equitable' for an eviction order to be made, the court then has to make a decision as to the 'just and equitable date' in terms of section 4(8) of PIE. This entails a determination as to the date in respect of which the court should order the vacation of the land,[149] followed by a date on which an eviction order may be carried out if the unlawful occupier has not so vacated the land.[150]

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[148] 2003 (1) SA 113 (SCA) at paragraph [19]
[149] Section 4 (8) (a) of PIE
[150] Section 4 (8) (b) of PIE

[127] I hope my analysis of the meaning of 'just and equitable' will have shown that it is intellectually and morally impossible to insist that there can be only one correct date in the determination of (a) the date upon which an occupier is to vacate the property and (b) failing which, the occupier is to be evicted therefrom. The principles set out in the case of *National Coalition for Gay and Lesbian Equality v the Minister of Home Affairs*[151] for the exercise of a discretion should apply. The *Gay and Lesbian Equality* case envisages that a court may act within a permissible range of options which should be considered carefully.

[128] Having regard to all the above, I am satisfied in the present matter, that the only correct decision that the court can make is to order the eviction the occupiers in the event that they do not voluntarily vacate the premises on a date to be determined. Clearly the occupiers need time to get their affairs in order and to look for alternative accommodation. The year-end is almost upon us, with all the conventional festive-making that is such a great feature of the South African social landscape at the end of the year. Mr *Both* originally proposed 15 January 2013 as the date by when the property should be vacated. In supplementary heads of argument, he has suggested that the 'vacation date' should be no later than 9 January 2013 when the government schools re-open. Not all the occupiers have children of school-going age. It seems just and equitable, in all the circumstances to make Saturday, 15 January 2013 the date by when the occupiers should vacate. It will take some time for the applicant to assess the situation.

[151] 2000 (2) SA 1 (CC)

Thursday 20 January seems the appropriate, just and equitable date upon which an eviction should ensue if the occupiers do not voluntarily vacate the premises. By the end of January, the premises will be free for the applicant to implement its plans in regard thereto. If I understood Mr *Both* correctly, quite extensive repairs and renovations will have to be undertaken before new tenants can occupy the premises. Mr *Both* made it clear, on behalf of his client, that once his client had restored the condition of the village, if the occupiers are willing to pay direct to the applicant the new and agreed rentals, they will be welcome to return.

[129] The applicant has asked for the costs of two counsel. These costs have been justified in this gruelling case. Whether the order as to costs should result in the occupiers being jointly and severally liable or merely jointly liable was not debated before me. It seems that an injustice could result from an order that makes the occupiers jointly and severally liable. This issue became lost in all the court-room drama. My order shall be that they are jointly liable but if the parties wish to argue that there should be a different costs order they may set the matter down before me to argue the question of costs.

[130] The order of the court is the following:

1. The respondents, together with all members of the respondents' families and any other persons who are in occupation of the property without the applicant's consent ('the unlawful occupiers') are to vacate the property, known as Portion 1 of Erf

4507 Johannesburg Township, Registration Division I.R. Gauteng, situate at 3 Malan Street, Burgersdorp, Johannesburg, and more commonly known as the Newtown Urban Village ('the property') by no later than 4 pm on Saturday 15 January 2013.

2. In the event that the unlawful occupiers of the property do not vacate the property on or before 15 January 2013, the Sheriff of the Court or his lawfully appointed Deputy is authorised and directed to evict the unlawful occupiers of the property as from 8.00 a.m. on Thursday, 20 January 2013.
3. The unlawful occupiers are interdicted and restrained from entering the property at any time after they have vacated the property or been evicted therefrom by the Sheriff of the Court or his lawfully appointed Deputy.
4. In the event that the any of the unlawful occupiers contravenes the order in paragraph 3 above, the Sheriff of the Court or his lawfully appointed Deputy is authorised and directed to remove them from the property as soon as possible after their re-occupation thereof.
5. The respondents are jointly liable to pay the costs of this application, which costs shall include all costs previously reserved, the costs of the various applications made in part A of the application (brought in terms of the Prevention of Illegal Eviction and From and Occupation of Land Act, No. 19 of 1998) and the costs consequent upon the employment of two counsel.

DATED AT JOHANNESBURG THIS 15th DAY OF NOVEMBER 2012

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N. P. WILLIS

JUDGE OF THE HIGH COURT

Counsel for the applicant: Adv. *J. Both* SC (with him, Adv. *A. W.* Pullinger)

Counsel for the respondents (the Khumalo Group thereof): Adv. *C.T.H. McKelvey*

Attorney for the applicant: Vermaak & Partners Inc.

Attorneys for the respondents (the Khumalo Group thereof): Khumalo Masondo Inc.

Dates of hearing: 17 October 2012

Date of judgment: 15 November 2012