

Republic of South Africa

Reportable

IN THE HIGH COURT OF
SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO. 8946/02

In the matter between:

ABSA BANK BPK

Applicant

and

P J J MURRAY

First Respondent

D D MURRAY

Second Respondent

JUDGMENT DATED THIS 18th DAY OF SEPTEMBER 2003

BINNS-WARD AJ:

1]The applicant is a commercial bank. As security for a loan advanced by the applicant, a mortgage bond was registered in its favour against the title deed of the residential property owned jointly by the respondents. The property was, indeed still is, the respondents' family home. The respondents were sequestrated after first respondent lost his employment. The sequestration resulted in the bank eventually selling the respondents' house in realisation of its security. The bank itself purchased the respondents' property at the sale by public auction held

in terms of s 83(8) of the Insolvency Act, No. 24 of 1936.

2]The applicant subsequently resold the property, but it was not able to give vacant possession to the buyer because the respondents remained in occupation. It therefore instituted an application for the eviction of the respondents from the property.

3]The application was brought in accordance with the provisions of s 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 ('PIE'). On 12 August 2003, I made an order evicting the respondents and all those who occupied the property under them¹. I directed that the execution of the eviction order be suspended until 30 September 2003. I undertook to furnish reasons for the order at a later date. These are those

¹ It has been suggested that it is no longer competent to claim eviction 'of all who occupy by, through, or under the unlawful occupier'; see Tarica 'PIE and its application to defaulting tenants and mortgagors', De Rebus, March 2003, at p.18. In the present case there is no suggestion that the property is occupied by any persons other than the respondents and their dependants (cf. s 4(9) of PIE) and accordingly, I have not found it necessary to consider the validity of the argument.

reasons.

4]The respondents had no defence at common law to the application for their eviction. They, however, opposed the application. They contended that it would not be ‘just and equitable’ in the circumstances for the court to grant an order for their eviction.

5]The respondents had been in unlawful occupation of the property for more than six months when proceedings were initiated. The provisions of PIE which were central to the determination of the application were subsections 4(7) and 4(8):

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

(8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine-

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

(b) the date on which an eviction order may be carried out if the

unlawful occupier has not vacated the land on the date contemplated in paragraph (a).’

6]The respondents relied on the following circumstances in support of their contention that it would not be just and equitable for an eviction order to be granted:

1. They and their family had lived in the house for almost 20 years;
2. They had not wilfully defaulted on the mortgage bond repayments. The reason for the default was first respondent’s loss of employment by reason of a worker complement reduction retrenchment process instituted by first respondent’s erstwhile employer. The first respondent had paid R36 000,00 of his retrenchment package in reduction of the mortgage debt, before being sequestrated.
3. The first respondent conducts a business from the garage on the property with the permission of the trustee of respondents’ insolvent estate. The first respondent needed the space thus provided to earn a living.
4. The first respondent had offered to pay rent on the property.
5. The first respondent had asked the bank for time until the end of 2002 to raise the funds to repurchase the property. He explained that he intended to do this from the proceeds of an MVA award which his brother expected to receive.
6. The respondents’ grandchild (just over 2 years of age) and an 11 year old girl placed in the respondents’ care lived in the house together with the respondents.
7. The respondents and their family have no alternative place to stay.

7]The circumstances summarised in the preceding paragraph were set out in a statement filed in proceedings previously instituted by the bank in the magistrates’ court. This statement was incorporated by reference in the first respondent’s answering affidavit in this court. (The bank’s magistrates’ court action for the eviction of the respondents had been withdrawn in September 2002, prior to the institution of the current application in December 2002.) The applicant did not file a replying affidavit, or apply to cross-examine the first respondent and

accordingly, the evidence tendered in support of the circumstances relied upon by the respondents must be accepted.

8]The respondents were unrepresented. They appeared in person at the hearing. The first respondent addressed the court and in answer to questions directed from the Bench, he confirmed the basis of the opposition to the application. The first respondent accepted that the property had been resold by the bank in the intervening period since the aforementioned statement had been filed in the magistrates' court. He explained that settlement of his brother's MVA claim had been unexpectedly delayed. Accordingly, the funds which it was expected to provide had not yet become available.

9]The bank's counsel contended that the personal circumstances of the respondents were legally irrelevant and afforded no basis to refuse an eviction order. Counsel submitted that the only relevance of the requirement in

s 4(7) of PIE that the court form an opinion as to the justness and equitability of granting an eviction order was in order to determine whether or not a period of notice should be afforded to the respondents before the eviction order could be enforced, and if so, the period of such notice. He relied in support of this argument on a passage in the majority judgment of the in *Brisley v Drotsky* 2002 (4) SA 1 (SCA), at paragraphs [41] and [42]:

[41] Dit volg dat ook in 'n geval soos die onderhawige art 26(3) vereis dat 'n hof, alvorens 'n uitsettingsbevel gemaak word, oorweging moet skenk aan alle relevante omstandighede. Davis, Cheadle and Haysom 22 sê:

'The relevant circumstances which the court must consider before it makes such an order should include at least the personal circumstances of those being deprived of accommodation, and the availability of alternative accommodation. These were among the factors which were considered relevant to the exercise of a court's discretion in issuing an ejectment order in terms of s 46(2) of the repealed Group Areas Act 36 of 1966 (S v Govender 1986 (3) SA 969 (T) at 971H - J). These factors should be weighed against the reasons for the party seeking the order (for example, an illegal occupation, a default on bond or rent payments, the resettlement of a community in another area).'

[42] Ons stem nie saam dat die bogenoemde omstandighede sonder meer relevante omstandighede sal wees nie. Artikel 26(3) vereis dat alle relevante omstandighede in ag geneem moet word maar bepaal nie self dat enige omstandighede relevant sal wees nie. Daarvoor moet na die algemeen geldende reg gekyk word. Omstandighede kan slegs relevant wees indien hulle regtens relevant is. Indien die artikel aan 'n hof 'n diskresie verleen het om 'n uitsettingsbevel te weier onder sekere omstandighede, soos byvoorbeeld indien die hof dit reg en billik sou ag, sou alle omstandighede wat relevant is met betrekking tot die vraag of dit in 'n bepaalde geval reg en billik sou wees natuurlik relevant wees by die uitoefening van daardie diskresie. Die artikel verleen egter geen diskresie aan die hof om onder sekere omstandighede te weier om 'n uitsettingsbevel toe te staan aan 'n eienaar wat andersins op so 'n uitsettingsbevel geregtig sou gewees het nie.

10]In my view the decision in *Brisley* does not constitute authority for the construction of s 4(7) of PIE advanced by the applicant's counsel.

11]*Brisley's* case concerned an appeal against an eviction order granted by Vorster AJ in the Transvaal High Court. The appeal was dismissed. The only issue in *Brisley* relevant to the present matter was the effect of s 26(3) of the Constitution which provides:

‘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.’

12]In *Brisley’s* case, the appellant relied on the provisions of s 26(3) of the Constitution and the *obiter dicta* of Josman AJ (as he then was) in *Ross v South Peninsula Municipality 2000 (1) SA 589 (C)* to argue that the court of first instance should have taken into account the circumstances under which the lease in terms of which the appellant occupied the premises had been cancelled and also the socio-economic consequences that any eviction order was likely to have on her and her dependant mother and child. The argument was rejected. The matters relied upon by the appellant were held by the majority not to be ‘legally relevant’.

13]It is apparent, however, from a contextual consideration of the judgments in *Brisley* that the eviction proceedings there in issue had not been instituted in terms of s 4 of PIE. As the history giving rise to the appeals in *Ndlovu v NGGPBP; Ngcobo, Bekker and Another v Jika 2003 (1) SA 113 (SCA)* illustrates, until just a year ago, it was a matter of contentiousness whether PIE applied in eviction cases like the present or that in *Brisley*. The majority judgment of the Supreme Court of Appeal in *Ndlovu* determined that it does. The decision in *Brisley* would appear, however, to have been made in the context of an assumption by the parties in that case that PIE did not apply.

14]The appeal in *Brisley* was decided some five months before that in *Ndlovu*. Had the judgment in *Ndlovu* preceded that in *Brisley*, it seems to me that the focus in *Brisley* would have been on subsections 4(6) or 4(7) of PIE rather than s 26(3) of the Constitution read in isolation.

15]Now that it has been authoritatively confirmed that PIE does apply even in cases where the unlawful occupiers' occupation of residential property was initially lawful (in *Brisley* by reason of a lease which was subsequently cancelled, or here, by reason of the respondents' previous ownership of the property subsequently terminated by their sequestration and the consequent realisation of the property by the bank) it must follow that the *dicta* of the majority, at paragraph [43] of *Brisley*, are of more relevance in the present matter than the passage relied upon by the bank's counsel:

‘[43] Regtens is 'n eienaar geregtig op besit van sy eiendom en op 'n uitsettingsbevel teen 'n persoon wat sy eiendom onregmatiglik okkupeer behalwe indien daardie reg beperk word deur die Grondwet, 'n ander Wet, 'n kontrak of op een of ander regsbasis. 'n Voorbeeld van sodanige beperking is te vinde in die Wet op die Voorkoming van Onwettige Uitsetting en Onregmatige Besetting wat, soos hierbo aangetoon, 'n uitsettingsbevel in die omstandighede genoem in daardie Wet onderhewig maak aan die uitoefening van 'n diskresie deur die hof. ...’ (my emphasis).

16]What was said in paragraph [43] of *Brisley* reflects an acceptance by

the majority of the court² in that matter that the provisions of PIE do result in a limitation or restriction ('beperking') of a property owner's common law right to obtain possession of it and, to that end, to obtain an eviction order against any person unlawfully occupying it. That the impingement on a property owner's common law right to possession of its property introduced by PIE is not only procedural, but substantive was confirmed by the decision in *Ndlovu*: see para [1] of the judgment. The limitation of a property owner's common law rights constituted by PIE has been described as having occurred 'imperceptibly and indirectly'. Insofar as its substantive effect is concerned, the limitation is subject to the constraints that only relevant circumstances may be taken into account and that constitutional conformity means that the provisions cannot be used to expropriate indirectly. See *Ndlovu* at paragraph [17]³

17]The substantive reforming effect of s 26(3) of the Constitution read with PIE is at least twofold. It

² The learned judges who wrote the minority judgments expressed no contrary view.

³ See also the following statement in the preamble to PIE: 'WHEREAS no one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property.' PIE is of course a law of general application, but it is important not to overlook the distinction between depriving and expropriation in s 25 of the Constitution.

unambiguously imposes a duty upon the courts to investigate and address considerations of justice and equity in the determination of any application for the eviction of any person from his or her home. And it provides a discretionary power to the judiciary in such cases to impinge on the property owner's common law right to obtain possession of the property, to the extent that considerations of justness and equity demand.

18]If the argument advanced by counsel for the bank were correct, it would entail that the provisions of subsections 4(6) and 4(7) were more procedural than substantive in nature. The nature of the court's discretion would be not as to whether or not to grant an eviction order, but only on what terms to make it. The wording of the statutory provisions and the aforementioned dicta in *Brisley* do not support the argument advanced on behalf of the bank in this respect. On the contrary, the wording of the provision indicates that the 'relevant circumstances' might in a given case give rise to the court declining to grant a property owner relief in accordance with his or her common law rights unless and until the pertinent circumstances were addressed or ameliorated⁴. The requirement that a court may grant an order for eviction in terms of s 4 of PIE only if it is of the opinion that it is just

⁴ In *Ndlovu*, supra, at para [17] the effect of PIE is described as being 'to delay or suspend the exercise of the landowner's full proprietary rights' until it is just and equitable to grant an eviction order. Cf. also the orders made in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SEC), at 1087G-I (the orders were set aside on appeal in a judgment of the Full Bench, reported under the same name at 2001 (4) SA 759 (E), on the basis of a finding that the judge of first instance had misdirectedly elevated the availability of alternative housing to a precondition for an eviction in terms of the Act).

and equitable to do so in all the relevant circumstances confirms the point.

19]A duly formed opinion that it would be just and equitable in all the relevant circumstances to grant an order for eviction is one of the ‘requirements’ of s 4, compliance with which is necessary before a court becomes obliged to grant an eviction order in terms of s 4(8) of PIE. Furthermore, an allegation by an unlawful occupier that his or her eviction would be unjust and inequitable in the prevailing circumstances is in the nature of raising a defence to eviction proceedings under the Act. The ‘validity’ of the defence depends upon the determination of what would be just and equitable.

20]Were the enquiry into relevant circumstances circumscribed in the manner contended for on behalf of the bank, the provisions of ss 4(8) and 4(9), which prescribe a further and additional consideration of what is just and equitable in determining an eviction date would be superfluous. It is trite that one does not readily construe a statute in a way that renders any of its provisions superfluous. The construction contended for by the bank’s counsel would in my view render the provisions of ss 4(6) and (7) nugatory. Notwithstanding certain problems with the implementation of the statutory provisions, to which I shall come presently, there is no basis in principle to uphold such a reading of the provisions.

21]The statement at paragraph [43] of the majority judgment in *Brisley* that PIE makes the grant of an eviction order in matters to which the relevant provisions of PIE apply subject to the exercise of a discretion by the court seems to me, with respect, to accurately reflect the apparent meaning of subsections 4(6) and 4(7) of PIE⁵. See also *The City of Cape Town v Rudolph and Others* CPD case no. 8970/01 (delivered on 7 July 2003, as yet unreported), especially at pp.39-40, where Selikowitz J held:

‘There is, in the final analysis, only one test under PIE for determining whether unlawful occupiers are to be evicted (except in the case of urgent proceedings under section 5). That test is whether the eviction would be ‘just and equitable’. (Sections 4(6), 4(7), 6(1)).

By setting the requirement of justice and equity as the threshold for eviction, PIE seeks to do no more than to pursue that to which the law should in any event always aspire.

In deciding whether eviction would be just and equitable, the court is required to consider “*all the relevant circumstances*”. These include, but are not limited to, the factors specified in these sections. The weight to be afforded to those circumstances; the determination of such further circumstances as might be relevant and the weight to be afforded to them as also the balance ultimately struck, are matters left entirely to the judgment and discretion of the court.’

The balance that has to be struck is one between the proprietary rights of the owner and the basic human rights of the occupier. The Act creates a legal mechanism whereby the human rights of unlawful occupiers are afforded some protection in the context of the exercise by property owners of their proprietary rights. It does not provide for the negation of either class or category of rights and leaves it to the courts to endeavour to address the tension between them justly and equitably. The nature of

⁵ It also seems to me that the remarks made by Olivier JA at paragraphs [86] and [87] of his minority judgment in *Brisley* in respect of the effect of s 26(3) of the Constitution undoubtedly apply in respect in the context of subsections 4(6) and 4(7) of PIE, subject of course to the wording of the provisions, including the distinction between unlawful occupiers with less than six month’s occupancy and those with more and the exception in respect of sales in execution in mortgage cases.

the exercise means that the result will often be one where both sides will feel that their rights have been compromised to some extent.

22] Depending on the circumstances, a judicial determination of what is 'just and equitable' for the purposes of s 4(6) and (7) of PIE can and should also take into account considerations beyond those immediate to the protagonists in the litigation. The decision in *Ndlovu* that PIE has a wider application than just to the occupation of property by 'squatters' or 'informal settlers', a phenomenon generally associated with the process of rapid urbanisation, which has, and will for some time yet, continue to be one of the most significant manifestations of social change in South Africa, does not mean, in my view, that the practical effect of PIE will be the same for a landless migrant to the city who unlawfully occupies vacant land as it will be for a tenant who holds over, or a mortgagor who refuses to vacate when the property is sold after there has been a default on loan repayments⁶. Courts will need to be sensitive to the social and economic repercussions of the exercise of the important responsibility given to them by the Act to regulate property rights. In other words, the determination of what is just and equitable in the circumstances will often entail the court in contextualising the immediate circumstances of the case in the national social and economic macrocosm. In a case like the present, this means that cognisance must be taken of the need for institutional lenders to be

⁶ A municipality seeking to evict land invaders from vacant land owned by it could well find that its ownership rights are treated with less deference than those of a private landowner because of the duty on government, effectively through local government, to provide access to housing and to have in place effective programmes to discharge that duty. Cf. *The City of Cape Town v Rudolph and Others*, supra; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) and A.J. van der Walt, 'Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law' (2002) SAJHR 372, at 397

reasonably assured that their security is effective. The consequences of not

doing so would impact negatively on the provision of housing finance and would retard rather than encourage the achievement of access to adequate housing for all in terms of s 26 of the Constitution.

23]The nature of the discretionary power invested in the courts by s 4 of PIE is, however, of the wide type described in, amongst others, *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 360D-362G and the cases cited there; and *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (A) at 402B-C. Accordingly, a judge or magistrate determining eviction proceedings instituted in terms of the provisions does not have as free a hand to act as he or she might do were the nature of the judicial discretion of the strict or narrow character which applies in matters like sentencing in criminal cases or the determination of general damages in compensation cases. See *Ndlovu* at paragraph [18].

24]It was argued by the applicant's counsel that the bank's claim fell to be determined within the effect of the exception provided in terms of s 4 (7) of PIE where 'land is sold in a sale of execution pursuant to a mortgage'.

25]The majority in *Ndlovu* were of the view that in the case of an eviction pursuant to a sale in execution pursuant to a mortgage when the unlawful occupation had subsisted for more than six months, the

court would not have to have regard to the rights and needs of the elderly, children, disabled persons and households headed by women. The result of this construction, when contrasted with the plain meaning of s 4(6), was found to give rise to an ‘inexplicable anomaly’. See paragraph [10] of the judgment.

26]Whether or not the observations concerning the apparently anomalous incidences of ss 4(6) and 4(7) in the context of the reasoning at paragraphs [7]-[11] of the judgment in *Ndlovu* were *obiter* and, if so, whether the anomalous result identified there could be avoided if the exception in respect of the mortgage-related sales in execution in s 4(7) were limited in application to the import of the words between the first and the second ‘including’ in the phrase:

‘including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.’

are questions which, because of the view I take of the facts in this case, it is unnecessary to decide.

27]As pointed out earlier, the sale of the property in this matter occurred in terms of s 83(8) of the Insolvency Act. Although the sale occurred pursuant to the provisions of a mortgage contract, it was not, in my view, a ‘sale in execution’ either in the ordinary sense of the

expression, which denotes a realisation of property in execution of a judgment, or within the meaning of ‘sale *of* execution’ in s 4(7) of the Act. As the property was sold by the mortgagee privately, exercising the rights reserved to it in terms of the Insolvency Act, the full range of relevant circumstances, including the ‘rights and needs’ of the unlawful occupier’s household fell to be considered in determining whether it would be just and equitable to grant an eviction.

28]The expression ‘rights and needs’ seems to me to be intended to be of wide import. It is not amenable to precise definition and lends itself to significant flexibility. It cannot mean the evictees’ ‘right’ to occupy the property. The notion that the intended evictees are ‘unlawful occupiers’ is inconsistent with the existence of any such right. The unlawful occupiers’ ‘rights’ for the purposes that would generally be relevant would include the right to human dignity, the right not to be treated in a cruel, inhumane or degrading way, the constitutional rights of children and the availability of alternative accommodation within the context of the State’s obligation to provide access to it. The ‘needs’ would be the considerations which would have to be satisfied to give substance to the rights.

29]The enquiry, at least insofar as it takes into consideration the effect of an eviction on the person sought to be evicted, will be influenced particularly by the consideration of the effect on that person’s basic

rights, including that person's constitutional socio-economic rights.

30]Any court applying ss 4(6) or 4(7) of PIE is confronted by the question of just how to go about determining what is just and equitable in a context where while it is clear that the landowner's common law rights have been displaced by the legislation, the Act fails to describe the extent of the displacement. The inherent uncertainty has resulted in a tendency by courts to take the common law rights of an owner as the point of departure. This has given rise to criticism that the courts have often failed to be as sensitively attuned as the spirit of the Constitution enjoins to the far-reaching reforming effects on the approach to ownership rights in s 26(3) of the Constitution read with legislation such as PIE and Extension of Security of Tenure Act, No. 62 of 1997⁷. Some judgments have been criticised as evincing too much of a 'business as usual' approach, according inadequate recognition to the extent to which the common law has been amended by the statute.

31]The basis for the criticism that the tendency has been to take the owner's rights as the point of departure arises in the main, I think, because there is often no or inadequate evidence before the courts in these matters concerning matters affecting the justness and equity of the evictions insofar as the intended evictee is concerned. That the owner's right should be given effect to if there is no or insufficient evidence in

⁷ For a thought provoking overview, see A.J. van der Walt, 'Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law (2002) SAJHR 372 and the other literature there referred to

support of the existence and substance of any relevant competing right is only logical. The central issue in opposed eviction proceedings under PIE is after all whether and to what extent the exercise of the owner's right should be suspended or delayed. PIE does not in any way, nor could it constitutionally, negate the owner's right. The criticism is also to some extent coloured by what I consider to be a misdirected perception of the

object of the legislation. The insinuation that PIE is redistributive in nature characterises some of the academic criticism levied at judgments in which PIE has been implemented⁸. The suggestion is premised on a reading of the statute which its wording and constitutional context do not support. However, the proper implementation of the Act has not been assisted by the poor draftsmanship that went into its making⁹.

32]The legislation is plainly regulatory¹⁰ in effect. It does not afford a mechanism to divest an owner of his or her property. It does, however, afford a basis upon which the judiciary can and must regulate the exercise of the relevant proprietary right to possession by the owner of his or her property against an unlawful occupier, to whom the property has become home, in a manner as far as practically achievable consistently with the Bill of Rights and the founding principles of the Constitution.

33]The use, in s 4(7), of the expression ‘including’ with reference to various stipulated circumstances relevant in the context of the particular case points to factors to be weighed in favour of the intended evictee, but in no manner excludes reference to the at least equally relevant

⁸ The ‘burgeoning literature’ in which the jurisprudential philosophy which supports this view was alluded to in a different context by Davis J in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2002 (6) SA 573 (C) at 594J-595B.

⁹ In *Ndlovu*, supra, at para [100], the Act is described by Nienaber JA as ‘a textual hash’.

¹⁰ Cf. *The City of Cape Town v Rudolph and Others*, supra, at p.42: ‘What PIE does is to *regulate* the exercise of property rights. It is similar for example to rent control legislation and laws of a similar kind, which limit a landowner’s exercise of his or her ownership rights, and which may compel him or her to tolerate occupation of the land by a person whom he or she wishes to evict. Analogous too, are building regulations which restrict or limit the development of immovable property...’

factor of the owner's right to its property and indeed any other circumstances pertinent to the owner's need to obtain possession of its own property. Any opinion as to what is just and equitable in the given circumstances must in a balanced even-handed way take into account the rights and needs of both sides. The owner or 'person in charge of land' (as defined in s 1 of PIE) is therefore entitled to equal consideration. The object is that any eviction from residential property must occur in a fair manner appropriately regulated according to the circumstances¹¹.

34]Striking a balance when determining what is just and equitable in terms of ss 4(6) or (7) of PIE cannot be done without due recognition of the owner's common law and constitutional rights as well. The constitutional rights attendant on property ownership are enshrined in s 25 of the Constitution, but, depending on the particular case, other basic rights of an owner might also be relevant¹².

35]Any contention that PIE has a redistributive goal or emphasis puts little or nothing into the owner's side of the scales and stacks the weights heavily in favour of unlawful occupiers giving an unbalanced result at odds with the very notion of the exercise of the judicial

11 See the preamble to PIE, which includes the following statement: 'AND WHEREAS it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances.'

12 For example, the owner might need possession of the property to provide adequate housing for himself or his dependants, or to provide an income to provide for his livelihood and the maintenance of his dependants.

discretion required by the statute's substantive provisions. The argument of the bank's counsel on the other hand put virtually everything on the bank's side of the scale and nothing of substance on that of the occupier.

36]I suppose that the misdirected extremes in the dichotomous conceptual approaches to the proper construction of the statute just discussed go to illustrate the tensions inevitably involved in dealing with the conflicting needs and interests which the legislation seeks to address.

37]In order to be able to undertake the exercise of determining what might be just and equitable in a given case, the court requires evidence of the relevant circumstances. In *Ndlovu*, the Supreme Court of Appeal held that the evidential onus of demonstrating the existence of circumstances meriting the limitation of the owner's right to possession was on the unlawful occupier¹³. In the

¹³ See *Ndlovu*, supra, at para [19].

absence of such evidence the owner is entitled in principle to an order for eviction. The Appeal Court found it unnecessary to determine where the ‘ultimate onus’ of proof lay.

38]Having regard to what is entailed in any determination of what is just and equitable, as discussed above, I consider that it is inappropriate to fix an ultimate onus of proof on either side. The court’s decision falls to be made on the basis of all the relevant facts and considerations available to it.

39]As previously indicated, I consider that the courts will often have to contextualise the evidence with reference to their own perception of the wider social and economic landscape. I find it impossible to reconcile the requirements of ss 4(6)-(8) of PIE with the notion of a measure of proof in any empirical sense; rather they enjoin a decision to be arrived at by the application of principled¹⁴, intuitive justice. The duty imposed on the court by the provisions implies that making a decision from the perspective of characterising the proceedings as purely adversarial in the ordinary sense would be inappropriate. The concept of an ultimate onus implies that proof of particular facts will have the corollary of identifiable and predictable legal consequences; cf. *During N.O. v Boesak and Another* 1990 (3) SA 661 (A) at 672H-I and *Woerman and Schutte NNO v Masondo and Others* 2002 (1) SA 811 (SCA) at para

¹⁴ Cf. *S v Zuma and Others* 1995 (2) SA 642 (CC) at para [17]; *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) at para [3].

[17]. That is why the incidence of onus in the true sense is a matter of substantive law. The incidence of the onus is obviously pertinent when the existence of a legal right is in contention. The operation of s 4 of PIE, however, contemplates that the protagonists both have established rights which conflict with each other in a context where the operation of law provides no solution. That is the reason why the legislature has had to allow for the courts to afford an equitable remedy to address the conflict. This is the quintessence of the substantive reforming effect of the statute.

40]The procedural burdens placed on a property owner seeking an eviction order in terms of PIE include the need to serve notice of the proceedings on the relevant municipality. The contextual link between PIE and s 26 of the Constitution is the apparent basis for this procedural provision. Municipalities are the organs of government which, with financial and other support from the national and provincial spheres of government, fulfil the primary role of discharging the constitutional duty on the State in terms of s 26(2) of the Constitution to achieve the progressive realisation of the right to access to adequate housing. Cf. *Ridgway v Janse van Rensburg* 2002 (4) SA 186 (C) at 191C-I15. But I think the object of the notice to be given to the municipality goes wider than that. Municipalities are also the manifestation of the State

15 In *Ridgway*, it was held that the provision for service of a notice in terms of s 4(2) of PIE on the municipality is only directory in cases where an eviction in terms of s 4(7) of PIE is applied for pursuant to a sale in execution by a mortgagee. The correctness of this aspect of the judgment must, with respect, be doubted in the context of the decision of the judgement in *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA) at paragraphs [11]-[20].

governmentally responsible for a number of other functions pertaining to socio-economic constitutional rights; cf. s 25(5)-(8) (identification and provision of land for settlement and the taking of measures to achieve land, water and related reform to redress the results of past racial discrimination) and s 27 and s 28 of the Constitution (access to basic healthcare, food, water and social services for adults and children).

41]In this matter service of a notice in terms of s 4(2) of PIE was duly served on the municipality. The municipality, however, submitted no report or comment to the court. I understand that this is the norm. In my view the failure by municipalities to discharge the role implicitly envisaged for them by the statute; that is to report to the court in respect of any of the factors affecting land and

accommodation availability and the basic health and amenities consequences of an eviction on the occupiers, especially the most vulnerable such as children, the disabled and the elderly, not only renders the service of the notice a superfluous and unnecessarily costly exercise for the applicants, but, more importantly, it frustrates an important object of the legislation. It will often hamper the court's ability to make decisions which are truly just and equitable.

42]The provision of a report to the court is a function regularly discharged by a variety of state departments in the context of

proceedings in terms of various statutes. One thinks of the reports routinely filed for the assistance and guidance of the courts by officials such as the Registrar of Deeds, the Master and the Registrar of Companies. In my view, if PIE is to be properly implemented and administered, reports by municipalities in the context of eviction proceedings instituted in terms of the statute should be the norm and not the exception.

43]In the present matter I gave consideration to directing that the municipality furnish a report. I decided that on the peculiar facts of the case the further delay and added costs in which such a course would result was not justified.

44]On the facts, which were common cause, I concluded that the respondents do not qualify for any special consideration in justice and equity entitling them and their dependants to remain in occupation of the property against the owner's right to possession.

45]In arriving at that conclusion the following factors weighed with me.

46]The respondents' occupation of the property was a consequence of a mortgage loan contract with the applicant, which had afforded them the financial means to acquire possession of the property. Interference with the effectiveness of the bank's security in cases like this could have far

reaching adverse consequences in the housing market inimical to the realisation of the object of the progressive provision of access to housing by the broader community.

47]The first respondent is a relatively sophisticated and economically active member of the community who was able to provide independently for the needs of his family and dependants, within the limits of his income. He is a small-scale entrepreneur who has established a successful business. The first respondent had in fact offered to pay rent to the applicant. With adequate notice to make arrangements to move to alternative accommodation, there is no reason to believe he will not be able to continue to provide adequately for his and his dependants' basic needs.

48]The respondents had been aware for over a year of the bank's intention to evict them and accordingly they had already had a considerable period, during which they have occupied the property without any recompense to the owner, to prepare to vacate the property. Accordingly, in terms of ss 4 (8) and (9) of the Act, I considered that a period of approximately 6 weeks' notice to vacate the property before an eviction order could be executed was just and equitable in the circumstances.

49]I should mention that the first respondent applied orally at the hearing for a postponement in order to obtain legal representation. The

respondents had applied for legal aid, but their application had been declined. The respondents wanted time to raise finance to pay for privately funded legal representation. The first respondent was quite articulate and was able to address the court intelligently and cogently on the relevant facts and considerations. I was unpersuaded that sufficient reason for a postponement had been shown.

50]For the reasons given, I made the following orders:

1. The respondents' application for a postponement of the application is refused.
2. Subject to the provisions of paragraph 3 hereof, an order is granted for the eviction of first and second respondents and all persons occupying under them from erf 3523, Westfleur, also known as 3 Wielewaal Crescent, Robinvale, Atlantis.
3. No warrant for the enforcement of the order granted in terms of paragraph 2 hereof shall issue before 1 October 2003.
4. There shall be no order as to costs.

A.G. BINNS-WARD