REPORTABLE

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

Case No: 901/2005

In the matter between:

LATIEFA DAVIDS	First Applicant
SULEIMAN ABRAHAMS	Second Applicant
NAZEEM ALLIE	Third Applicant
MG RYLOON	Fourth Applicant

and

MARIUS VAN STRAATEN	First Respondent
LIANI MAASDORP	Second Respondent
NAZEEMA AKAR	Third Respondent

JUDGMENT DELIVERED ON 17 MARCH 2005

H.J. ERASMUS, J:

Introduction

This case arises from an eviction order granted on 29th November 2004 in the Cape Town magistrate's court at the instance of the respondents, as owners of dwelling premises situate at Leeuwen Mansions, Leeuwen Street, Cape Town, against the applicants who are in occupation of the premises. The respondents aver that the applicants were in occupation of the property by virtue of verbal periodic lease agreements with the previous owners of the property and that they (the respondents) have cancelled the lease agreements but notwithstanding cancellation, the applicants remain in unlawful occupation of the premises. It is, therefore, a case of holding over.

On 1st February 2005 the respondents caused the applicants to be evicted from the premises. On 2nd February 2005 the applicants obtained upon urgent application to this Court, an order restoring possession of the premises to them. A rule was issued calling upon the respondents to show cause on the return day why the eviction order granted on 29th November 2004 should not be reviewed and set aside. The return day of the rule was extended to 18th February 2005 when the matter was argued before me.

In *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) it was held by Harms JA (Mpati JA and Mthiyane JA concurring, Olivier JA and Nienaber JA dissenting) that the protection of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (hereafter "PIE") extends to cases of holding over of dwellings. In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) the

Constitutional Court said (at par [32] footnote 31) that for purposes of the case before it,

> [i]t is not necessary to go into the question which divided the SCA in *Ndlovu* and *Bekker* ….., namely, whether the operation of PIE is restricted to poor, homeless persons who out of necessity arising from past laws have occupied the land of others without consent.

This Court is bound by the decision of the SCA in *Ndlovu v Ngcobo; Bekker and Another v Jika, supra,* and must deal with the case before it on the basis that PIE is applicable.

The matter came before me on application by Notice of Motion. Some of the facts alleged in the founding affidavits by the occupiers were disputed by the respondents, the landowners. Accordingly, I must accept those facts asserted by the applicants that remain undenied by the respondents, together with the facts alleged by the respondents (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A); the principle enunciated in this case was applied by the Constitutional Court in an eviction matter in *Port Elizabeth Municipality v Various Occupiers, supra,* at par [48] footnote 44).

The parties

Latiefa Davids, the first applicant, is a widow, seventy-seven years of age. She occupies flat 3 in Leeuwen Mansions. She is unemployed.

Suleiman Abrahams, the second applicant, is forty-seven years old and occupies flat 8 in Leeuwen Mansions with his wife and four minor

children, aged twenty-one, fifteen, eleven and six. The second applicant is an administrative clerk at Alexander Forbes and his wife is a cashier at Atlas Foods.

Nazeem Allie, the third applicant, is forty years old, and occupies flat 9 in Leeuwen Mansions with his wife and two minor children, thirteen and seven years old. He is self-employed as an electrician.

MG Ryloon, the fourth applicant, is fifty-two years old and occupies flat 1 in Leeuwen Mansions with his wife and two children, Layla Ryloon who is twenty years old and unemployed but having a seven month old baby, and Riaaz Ryloon, twenty-three years of age who is employed at Metrorail. The fourth applicant is a painter/contractor at Nautilus Marine, and his wife is a teller in a bank

Marius van Straaten, the first respondent, is the registered owner of flats 3 and 8 in Leeuwen Mansions.

Liani Maasdorp, the second respondent, is the registered owner of flat 1 in Leeuwen Mansions. The second respondent has in the meantime married the first respondent and she is now Liani van Straaten.

Nazeemna Akar, the third respondent, is the registered owner of flat 9 in Leeuwen Mansions.

The background

The erstwhile owners of Leeuwen Mansions were Mr Abubakar Abrahams and his wife Mrs Jureida Abrahams. During 2002 they decided

to sell the flats in terms of a sectional title scheme to be registered. On 6 April 2002 their attorneys addressed letters to the occupiers of the flats in the building in terms of the provisions of section 10 of the Sectional Titles Act 95 of 1986. The letters are in identical terms except for the description of the particular flat and the amounts involved. The letter to the first respondent is cited by way of example:

OFFER FOR SALE: "VOETSTOOTS"

> We wish to advise that our client intends selling their Leeuwen Mansions Flat in terms of the Sectional Title Scheme to be registered.
>
> In terms of Section 10 of the Sectional Title Act, our client is offering you an opportunity to purchase your one bedroomed flat at R145 000-00. You have NINETY (90) days in which to accept or refuse the offer, whereafter it will be offered to third parties for sale. If you elect to accept the offer, a Deed of Sale will be entered into for that unit and once the purchase price is paid, it will be transferred to you as a separate section.

We wish to advise further that one garage parking for four cars is being sold at R35 000-00 and R5 000-00 is charged per parking bay.

The applicants did not accept the offer. Two of the other tenants, Mr Riedewaan Matthews and Ms Riza Dollie accepted the offer and purchased their flats.

The flats occupied by the applicants were then offered for sale to outside parties and the respondents purchased the flats. At the time of the transfer of the flats to the respondents, there were no registered long leases in respect any of the individual flats. In the answering affidavit deposed to

by the third respondent, it is stated that when they entered into the agreements of sale, the respondents were advised by Mr and Mrs Abrahams that the applicants were on a month-to-month lease. The correctness of this averment is confirmed in supporting affidavits deposed to by the other respondents and by Mr and Mrs Abrahams.

The notices to vacate

The purchasers of the flats then invoked section 28(1)(d)(i) of the Rent Control Act 80 of 1976 (hereafter "the Rent Control Act"), as amended, read with the provisions of section 19(1)(a)(ii) of the Rental Housing Act 50 of 1999 (hereafter "the Rental Housing Act") to give the applicants notice to vacate the premises. The two statutory provisions provide as follows:

The Rental Housing Act repeals (in section 18 thereof) the Rent Control Act and provides in section 19 –

1) Despite section 18 –
   (a) a tenant of controlled premises as defined in section 1 of the Rent Control Act, 1976 (Act No. 80 of 1976), may not be evicted or caused to vacate the premises –
   (i) …..
   (ii) except under the circumstances and in the manner contemplated in section 28 of that Act ….

   …..

for a period of three years commencing on the date of commencement of this Act.

2) During the period of three years referred to in subsection (1) the Minister must –
   (a) monitor and asses the impact of the application of that subsection on poor and vulnerable tenants; and
   (b) take such action as he or she deems necessary to alleviate hardship suffered by such tenants

(3) For purposes of subsection (2) the Minister may define criteria based on age, income or any other form or degree of vulnerability that apply to such tenant or group of tenants and amend or augment the policy framework on rental

housing, referred to in section 2(3), by introducing a special national programme to cater for the needs of affected tenants that comply with the criteria defined in terms of this subsection.

(The date of commencement of the Act was 1 August 2000)

The relevant portions of section 28 of the Rent Control Act are as follows:

Notwithstanding the fact that a lease for any controlled premises has expired … in consequence of notice lawfully given by the lessor concerned … a court shall not issue an order for … the ejectment of a lessee from such premises, if such lessee continues to pay … the rental agreed upon with the lessor or prescribed or determined under this Act in respect of such premises, and complies with the other conditions of such lease, unless –

……..

d) if such premises are a dwelling, garage or parking space –

(i) if such lessor reasonably requires the entire premises for his personal occupation or use or that of his parent or child, and such lessee has been given 3 months notice in writing to vacate such premises, and the said period of 3 months has expired ….

On 26 March 2003, the first and second respondent addressed letters in identical terms (but for the description of the individual flats) to the first, second and fourth applicants. The letter to the first respondent is cited by way of example:

RE: OCCUPATION OF FLAT NR 3 IN LEEUWEN MANSIONS, LEEUWEN ROAD, BO-KAAP

Your current occupation of the abovementioned premises has reference.

> In terms of section 28(1)(d)(i) of the Rent Control Act, Act 80 of 1976, as amended, read with the provisions of Section 19(1)(a)(ii) of the Rental Housing Act, Act 50 of 1999, you are hereby given notice that the lessor requires the entire premises for personal occupation or use.

In terms of the aforesaid provisions, you are afforded a period of three months, i.e. until 30 June 2003, to vacate, failing which action may as required be taken.

Furthermore, kindly take note that we shall serve a copy of this letter with the Rent Control Board at Cape Town.

On the same date (26 March 2003) attorneys acting on behalf of the third respondent addressed a letter in somewhat different terms to the third applicant, as follows:

Re:- NOTICE TO VACATE

We address this letter to you at the instance of our client Miss Nazeema Akar.

> We are instructed to notify you that our client intends moving into the abovementioned flat and consequently, that she does not intend to extend your oral lease.

We are instructed to request that you kindly vacate the flat on or before Monday, 30 June 2003.

The applicants did not vacate the premises on 30 June 2003. On 12 September 2003, attorneys acting on behalf of the first and second respondents addressed letters in identical terms (but for the description of the individual flats) to the first, second and fourth applicants. The letter to the first respondent is cited by way of example:

YOUR OCCUPATION OF NO. 3 LEEUWEN MANSIONS

We refer to the above and advise that we act on behalf of Marius van Straaten, the owner of the premises in which you are currently residing.

Our client has instructed that notwithstanding his previous notice to you in which you were afforded a period of three months to vacate the premises by no later than 30 June 2003, you have to date failed to do so.

We accordingly on behalf of our client confirm:

1. Cancellation of the lease agreement;
2. That you are in unlawful occupation of the property; and
3. That you will continue to be liable for the payment of the monthly rental to our client as damages for holding over, until such time as you have vacated the premises and/or have been evicted therefrom.

Your continued unlawful occupation of the property has further resulted in our client suffering additional monetary damages being the rental he is currently having to pay in the amount of R3 630-00 per month in addition to his bond repayments in respect of the property you continue to occupy.

Should you continue to remain in occupation of the premises, our client shall have no option but to institute eviction proceedings against you without further notice to you and the costs thereof will be for your account. Our client further reserves his right to recover from you the additional monetary damages being sustained by him.

We have further been instructed to advise that the building which you are currently in unlawful occupation of, is unsafe for habitation in that it requires major renovations and structural re-engineering. Our client will not be liable for any damages which may be suffered by you whilst you remain in unlawful occupation.

On 19 August 2003, the third respondent addressed a letter to the third applicant in the following terms:

Re: NOTICE TO VACATE – FLAT NO 9 LEEUWEN MANSIONS

This is to notify you to kindly vacate the premises that you are currently occupying on or before Tuesday, 30 September 2003.

The applicants did not respond to the notices and remained in occupation. The respondents thereupon instituted action in the Cape Town magistrates' court for the eviction of the applicants.

The eviction proceedings

The Particulars of Claim in the summonses issued are, but for amounts claimed, in identical terms. Relevant paragraphs of the amended Particulars of Claim in the case against the first applicant are cited by way of example. After alleging that notwithstanding cancellation by the plaintiff of the lease agreement between the parties, the defendant remains in unlawful occupation of the property, it is further alleged:

> (9). As a result of the Defendant failing vacate the property, Plaintiff has and continues to experience severe financial hardship. In addition to the Plaintiff's monthly bond repayments in the amount of R2 651.00 and monthly sectional title levies in the amount of R412.00 in respect of the property, Plaintiff has paid and is currently paying rental as follows:
>
> i) For the period 1 July 2003 to 30 July 2003 – R1 500.00 per month;
> ii) For the period 1 Augusat 2003 to 30 October 2003 – R1 900.00 per month;
> iii) For the period 1 November 2003 to 30 April 2004 – R1 300.00 per month;
> iv) Since 1 may 2004 – R1 425.00 per month.

10) Defendant is presently paying an amount of R667.65 per month which payment Plaintiff is accepting as damages for holding over.

11) Plaintiff requires the property for his own use.

12) The relevant circumstances of the defendant which are known to the Plaintiff are as follows:

12.1 Defendant is an elderly female;

12.2 Defendant resides in the property with her granddaughter and her granddaughter's husband.

12.3 There are no disabled or sickly people residing in the property.

The plaintiffs accordingly pray for an eviction order, payment of various amounts of money and costs of suit.

The applicants, as defendants, filed pleas in identical terms. The pleas are considered below.

A pre-trial conference was held on 1st July 2004. The applicants thereafter failed to file any discovery affidavit when called upon to do so and did not file any expert notices and summaries.

The matters in respect of all four applicants were consolidated and enrolled for hearing on 25, 26 and 30 August and 1 September 2004. Notices in compliance with section 4(2) and (5) of PIE were sent by the clerk of the court to the applicants (defendants) and to the City of Cape Town, being the municipality having jurisdiction. The hearing was not completed on those days and was postponed to 30 September and 1 October 2004 for continued hearing.

On 29 September 2004 the applicants' attorney advised the respondents' attorney via telefax that they had been instructed to suggest that—

> the proceedings scheduled for tomorrow and Friday be postponed to a later date so that the parties can meet to discuss settlement.

The respondents' attorney on the same day made it clear that the respondents were not prepared to agree to a postponement and that they intended proceeding with the hearing on the following day. Later that same afternoon the applicants' attorney advised that counsel had taken ill and that the matter would have to be postponed. On 30 September 2004 the matter was duly postponed and the applicants were ordered to pay the wasted costs for that day on the scale as between attorney and client.

The matter was then set down for further hearing on 29 and 30 November and 6 and 7 December 2004. The applicants did not attend at court on the 29th November 2004 and judgment by default was granted against them. The circumstances giving rise to judgment by default being granted against the applicants are considered below.

On 28th January 2005 the magistrate dismissed and application for the rescission of the default judgments on the ground that the defendants (applicants in these proceedings) were in wilful default.

On 1st February 2005 the respondents executed the judgment of 29th November 2004 and caused the applicants to be evicted.

On 2nd February 2005 the applicants filed a notice of appeal in which they noted an appeal "against the whole of the judgment of Magistrate

Maku handed down on Friday the 28th January 2005". The effect of the notice of appeal was, in the absence of a directive in terms of section 78 of the Magistrates' Courts Act 32 of 1944, that execution of the judgment was automatically suspended pending the decision on appeal (*South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544H – 545A; see further *Jones & Buckle The Civil Practice of the Magistrates' Courts in SA* 9th ed vol I 329).

It will be observed that no appeal was noted against the judgment handed down on the 29th November 2004. That judgment was, therefore, not affected by the notice of appeal against the magistrate's judgment handed down on the 28th January 2005 and execution of that judgment was not suspended.

The urgent application

On 2nd February 2005 the applicants obtained by way of urgent application to the High Court an order that:

> 2. A rule nisi be issued calling upon respondents to show cause, if any, on 14 February 2005 at 10h00 as to why a final order should not be granted in the following terms:
>
> 2.1 That the eviction order granted on 29 November 2004 in the Cape Town Magistrates' Court should be reviewed and set aside;
>
> 2.2 That Applicant's peaceful and undisturbed possession of the leased

premises be restored with immediate effect, being 2 February 2005, pending the outcome of the appeal against the order of the Cape Town Magistrates' Court on 29 January 2005 refusing to rescind the judgment and order of 29 November 2004.

2.3 That the respondents are ordered and compelled to grant Applicants access to the leased premises by handing the keys of the properties to the Applicants.

2.4 That the respondents are hereby directed to pay the costs occasioned by this application in the event of them opposing it.

3. That pending the determination of the rule nisi issued in accordance with paragraph 2 hereof, the provisions of paragraph 2.2 and 2.3 hereof shall operate as an interim interdict with immediate effect.

On 2nd February 2005 the respondents were in terms of the order evicted from the premises and the applicants restored to occupation.

The return day of the rule was extended to the 18th February 2005. At the hearing, application was made to amend prayer 2.1 of the rule *nisi* by substituting the following:

That the eviction order granted on 29 November 2004, in the Cape Town Magistrates' Court should not be stayed pending an application to review and set aside the decision of the Cape Town Magistrates' Court granted on 29 November 2004;

alternatively

> That this Honourable Court exercising its original jurisdiction in terms of s 24 of the Supreme Court Act 59 of 1959 as amended, and in application of s 38 of Act 108 of 1996 (the Constitution) should not review and set aside the eviction order granted on 29 November 2004 in the Cape Town Magistrates' Court.

The respondents objected to the grant of the amendment on the ground that the application for amendment was sprung upon them without prior notice at the hearing of the matter.

The first part of the proposed amendment seems to make more sense than the original order, especially in view of the fact that the eviction order granted on 29th November 2004 was not affected by the notice of appeal of 2nd February 2005 and remains fully effective.

The second, alternative, paragraph of the proposed amendment will be considered below.

The requisites of an interdict

The applicants seek a final interdict and confirmation of the rule issued on 2nd February 2005. The requisites of a final interdict are:

a) a clear right;
b) an injury actually committed or reasonably apprehended, and
c) the absence of any other ordinary remedy available to the applicant.

(*Setlogelo v Setlogelo* 1914 AD 221 at 227; the test has often been applied and re-stated; as in, for example, *Sanachem (Pty) Ltd v Farmers Agri-Care (Pty) Ltd and Others* 1995 (2) SA 781 (A) at 789B—C).

In an affidavit supplementary to her founding affidavit, the first applicant says that the (identical) pleas filed on behalf of the applicants in the eviction proceedings show that they "had good prospects of success". In the replying affidavit it is reiterated that, but for the default judgment which was "irregularly" granted on 29th November 2004, the defences raised in the pleas "could well have been vindicated and upheld". A copy of the plea filed on behalf of the fourth applicant is attached to the supplementary founding affidavit.

It is accordingly necessary to consider, on the basis of the evidence placed before me, the circumstances giving rise to the grant of judgment by default against the applicants on 29th November 2004, and the defences raised by the applicants in the eviction proceedings. It is also necessary to consider the constitutional rights of the applicants as tenants and the respondents as landowners.

The default judgment

After the postponement of the matter on 30th September 2004, the respondents' attorney attempted to obtain suitable dates for the continuation of the hearing. On 20th October 2004 she was informed that

the applicants' attorneys had consulted with their counsel and client and "advise that this matter can be set down anytime next year". The respondents' attorney nevertheless enrolled the matter for further hearing on 29 and 30 November and 6 and 7 December 2004. A notice of set down was sent to the applicants' attorneys – in the replying affidavit it is admitted that the applicants had been advised of the new trial dates.

The applicants say that the respondents' attorney was aware of the fact that the new dates did not suit them. The plaintiff in an action is *dominus litis* who determines the date of hearing in consultation with the clerk of the court; in selecting the trial date he or she need not consult the defendant (see *Jones & Buckle The Civil Practice of the Magistrates' Courts in SA* 9th ed vol II at 22-1; *Neuman (Pvt) Ltd v Marks* 1960 (2) SA 170 (SR) at 172E; *Boshoff v Botha (1)* 1972 (4) SA 716 (NC); *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality (2)* 1971 (4) SA 532 (C) at 535E—H).

Despite the fact that they were aware that the matter had been set down for further hearing on the 29th November 2004, neither the applicants nor their legal representatives attended at court. No argument was, therefore, addressed to the magistrate to the effect that the matter had been enrolled unilaterally by the respondents' attorney. In *Neuman (Pvt) Ltd v Marks, supra,* in a matter similar to this one, Murray CJ remarked (at 173) that he finds it "difficult to understand why, even if Neuman could not himself have been present at the trial, his attorney did not appear and make a further attempt to secure a postponement." By not being present

or represented at the hearing on 29th November 2004 the applicants undertook the risk of default.

A party who absents him or herself from a trial after he or she had been notified of the date of the trial is in wilful default (*Neuman (Pvt) Ltd v Marks, supra,* at 173A—D; and see *Jones & Buckle The Civil Practice of the Magistrates' Courts in SA* 9th ed vol II at 49-9/10). In my view, the applicants were in wilful default on 29th November 2004.

The defences raised

The substance of the defences raised in the eviction matters is contained in paragraphs 3 and 5 of the (identical) pleas filed by the applicants. In paragraph 3 of the plea it is admitted that the defendant and his family were in occupation of the property on the date as alleged, and it is then stated –

> 3.2 Such right of occupation arose and continues in terms of a binding lease concluded with a Mr Abubakr Abrahams, not with Plaintiff.

Paragraph 5 of the plea reads as follows:

> 5.1 Save for admitting that Defendant has not vacated the property and for denying being obliged to do so, each and every further allegation of fact and conclusion of law herein contained is specifically denied, as if herein set out and traversed.
>
> 5.2 Without derogating from any pleaded denials, Defendant admits and pleads that:

5.2.1 Defendant and his family occupied the property in or about March;

5.2.2 Such occupation right arose and continues, in terms of a lease for an indefinite period;

5.2.3 The lease provisions are unwritten and are partly oral, tacit and implied;

5.2.4 The lease was concluded with a Mr. Abubakar Abrahams, not with Plaintiff, and has not been breached nor cancelled;

5.2.5 The material provisions of the lease provide *inter alia* that:

5.2.5.1 For as long as the rental set by the Rent Board is paid, Defendant and his family, can remain in occupation of the property, indefinitely;

5.2.5.2 The lease and legal relationship between Defendant and the landlord, is interpreted and governed in terms of Islamic law;

5.2.5.3 In the event of the landlord contemplating sale of the property, the parties would first mutually negotiate in good faith, to reach an appropriate selling price, that reflected due consideration of the value of any repairs, maintenance and/or improvements effected by Defendant, as occupier of the property, and also the parties respective means and circumstances.

5.2.5.4 For as long as defendant paid the rental, the lease could not be unilaterally terminated by the landlord.

Five defences are raised in the plea: (i) the applicants continue to occupy the premises in terms of a lease concluded with Mr Abubakr Abrahams; (ii) the lease is for an indefinite period; (iii) the lease is governed by Islamic law; (iv) in the event of the landlord contemplating sale of the property, the parties would negotiate in good faith to reach an appropriate selling price; and (v) for as long as the defendant paid the rental, the lease could not be unilaterally terminated by the landlord. Each of these defences is considered briefly below.

i) *The applicants continue to occupy the premises in terms of a lease concluded with Mr Abubakr Abrahams not with the plaintiff.* There is no dispute that originally the applicants entered into an agreement of lease with Mr Abubakr Abrahams. The situation that arose when the property was sold, is stated as follows by Corbett CJ in *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A) at 939A —C:

> Accordingly, I hold that in terms of our law the alienation of leased property consisting of land or buildings in pursuance of a contract of sale does not bring the lease to an end. The purchaser (new owner) is substituted *ex lege* for the original lessor and the latter falls out of the picture. On being so substituted, the new owner acquires by operation of law all the rights of the original lessor under the lease. At the same time the new owner is obliged to recognize the lessee and to permit him to continue to occupy the leased premises in terms of the lease, provided that he (the lessee) continues to pay the rent and otherwise observe his obligations under the lease. The lessee, in turn, is also bound by the lease and provided that the new owner recognizes his rights, does not have

> any option or right of election, to resile from the contract.

As has been pointed out above, in the answering affidavit deposed to by the third respondent, it is stated that when the respondents entered into the agreements of sale, the respondents were advised by Mr and Mrs Abrahams that the applicants were on a month-to-month lease. The correctness of this averment is confirmed in supporting affidavits deposed to by the other respondents and by Mr and Mrs Abrahams. The mutual obligations that came into being between the applicants and the respondents after the sale of the flats are accordingly those that arise from a periodic lease.

ii) *The lease is for an indefinite period.* A lease for an indefinite period is not known in our law. In *Wille's Principles of SA Law* 8th ed by Hutchinson *et al* (1991) at 545 fn 11 it is pointed out –

> The lease must be for a period of limited duration, since it is an essential feature of the contract that the lessor parts with the use and enjoyment of the thing merely *temporarily*.

Cooper *Landlord and Tenant* 2nd ed (1993) at 65 says that as temporary use and enjoyment of another's property is the essence of a lease, the better view is that "a lease in perpetuity is an *emphyteusis* or *erfpacht*" (see also De Wet and Van Wyk *Die SA Kontraktereg en Handelsreg* 5e uitg, (1992) 356; *LAWSA* (first reissue) vol XIV par 159).

iii) *The lease is governed by Islamic law.* The applicants say that the parties are all Muslims and that the legal relationship between them is governed by Islamic law. However, the original lessor, Mr Abrahams, states in a confirmatory affidavit to the answering affidavit that the lease was a month-to-month periodic lease.

(iv) *It was agreed that the parties would negotiate in good faith to reach an appropriate selling price in the event of the landlord contemplating sale of the property.* In our law, an agreement to negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree (*Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at 431G—H; such a contract may be valid an enforceable if it contains a "dead-lock breaking mechanism" – *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) at pars [11] to[16]).

In any event, the applicants were notified that the landlord contemplated the sale of the property and, as is apparent from the affidavits, there were negotiations, albeit unsuccessful, in regard to the sale of the properties.

As has been pointed out above, the applicants on 29th September 2004 requested the postponement of the hearing scheduled for the next day to enable the parties to negotiate a settlement. In the answering affidavit deposed to by the third respondent it is stated that –

> … to date no proposals have been received from Applicants and Respondents remain unaware of how Applicants wish these matters to be resolved.

(v) *As long as the rental was paid the lease could not be unilaterally terminated by the landlord.* This is correct, subject to the provisions of the Rent Control Act and the Rental Housing Act which contemplate the unilateral termination of a lease in certain circumstances.

The defences that the applicants raise in their pleas are without substance and in my view there is no prospect that at a hearing in the magistrate's court they "could well have been vindicated and upheld".

Constitutional rights

The Constitution of the Republic of South Africa Act 108 of 1996 (hereafter "the Constitution) seeks to protect the rights of landowners and the right to housing.

Section 25(1) of the Constitution provides –

> No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702) at par [50] Ackermann J pointed out:

The purpose of s 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions.

Section 26 of the Constitution provides:

(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.

In *Port Elizabeth Municipality v Various Occupiers, supra,* Sachs J, in considering the constitutional relationship between section 25, which deals with property rights, and section 26, which concerns housing rights, states at par [19]:

> The Constitution recognises that land rights and the right of access to housing and of not being arbitrarily evicted, are closely intertwined. The stronger the right to land, the greater the prospect of a secure home.

The need to balance the interests of landowners and occupiers of land is reiterated in the Preamble of both the Rental Housing Act and that of PIE.

In the Preamble of the Rental Housing Act it is, *inter alia*, provided –

> AND WHEREAS there is a need to balance the rights of tenants and landlords and to create mechanisms to protect both tenants and landlords against unfair practices and exploitation.

In the Preamble of PIE it is, *inter alia*, provided –

> 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.

In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE) at 1080I – 1081A Horn AJ described the purpose of PIE as follows:

> However, what that Act does not do is to abolish the common-law right of an owner to the exclusive enjoyment of his property and the owner's inherent right to the legal protection of his property. The Act sets out to control in orderly fashion those situations where it had become necessary to evict persons who had occupied land belonging to another unlawfully (*reference omitted*). The procedures prescribed by the Act which have to precede removals have made inroads into the rights of property owners to protect their property against unlawful occupation. The Act could very well give rise to serious abuse by homeless persons who deliberately invade an owner's land under the guise of protection afforded by the Act.

In *Ndlovu v Ngcobo; Bekker and Another v Jika, supra,* at par [17] Harms JA says:

> The effect of PIE is not to expropriate the landowner and PIE cannot be used to expropriate someone indirectly and the landowner retains the protection of s 25 of the Bill of Rights. What PIE does is to delay or suspend the exercise of the landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions. Simply put, that is what the procedural safeguards provided for in s 4 envisage.

The applicants sought an eviction order under the provisions of section 19(1)(a)(ii) of the Rental Housing Act and of section 4(6) of PIE. The latter section applies to "proceedings by an owner or person in charge of land for the eviction of an unlawful occupier"; section 6 of PIE applies to eviction proceedings at the instance of an organ of state. In *Port Elizabeth Municipality v Various Occupiers, supra,* Sachs J points out (at par [24] of the judgment):

> This case deals with proceedings brought under s 6 by the municipality and does not require us to consider whether it would have taken a different form if it had been brought directly by owners themselves under s 4. Despite their differences, both sections emphasise the central role courts have to ensure equity after considering all relevant circumstances.

Section 4(6) of PIE provides as follows:

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

For purposes of the subsection, the period of the occupation is calculated from the date when the occupation becomes unlawful (*Ndlovu v Ngcobo; Bekker and Another v Jika, supra,* at par [17]). The applicants brought their actions for eviction within the six month period.

In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others, supra,* at 1081E—F Horn AJ points out that in balancing the opposing interests to bring out a decision that is "just and equitable", within the context of PIE (the phrase is used in both section 4(6) and 6(1)) –

> [t]he use of the term just and equitable relates to both interests, that is what is just and equitable not only to the persons who had occupied the land illegally, but to the landowner as well. The term also implies that a court, when having to decide a matter of this nature, would be obliged to break away from a purely legalistic approach and have regard to extraneous factors such as

> morality, fairness, social values and implications and any other circumstances which would necessitate bringing out an equitable principled judgment.

These sentiments were endorsed by the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers, supra,* in par [33].

The applicants complain that the magistrate granted default judgment against them without having regard to "all the relevant circumstances" as is required by section 26(3) of the Constitution and section 4(6) of PIE. The court needs to be apprised of the circumstances before it can have regard to them. It is incumbent on the interested parties to make all relevant information available (*Port Elizabeth Municipality v Various Occupiers, supra,* at par [32]). The applicants would seem to rely on the (untenable) proposition that a party who wilfully absents him- or herself from proceedings, thereby depriving him- or herself of the opportunity of placing relevant information before the court, can nevertheless subsequently object that the court had acted upon incomplete information.

In my view the magistrate had before him all the relevant circumstances to make a proper finding. He had before him the fact that the applicants are the owners of the premises, that the leases had been terminated in compliance with the provisions of the Rental Housing Act and of PIE and that the tenants were holding over. He furthermore had before him information as to the personal circumstances of the applicants.

In the case of an application under section 4(6) of PIE, the question of the availability of other land for the relocation of the unlawful occupier does not arise (as it does in the case of an application under section 4(7) of PIE) (see (*Ndlovu v Ngcobo; Bekker and Another v Jika, supra,* at par

[17]).

In essence, what one has in this case are landowners who purchased residential properties which were at the time leased to other parties. The landowners in full compliance with all applicable statutory provisions, terminated the leases. When the lessees refused to vacate the premises upon the termination of the leases, the landowners sought their eviction in accordance with the law. The rights which they assert are their rights as landowners which find protection in sections 25 and 26 of the Constitution.

The second, third and fourth applicants are not poor, or destitute or vulnerable people – I deal separately below with the position of the first applicant. The second, third and fourth applicants are in the prime of life. Both the second applicant and his wife are in regular employment. The third applicant is an electrician who is self-employed. In the household of the fourth applicant there are four adults, three of whom are in regular employment.

At present each of the respondents has to make monthly repayments on mortgage bonds in respect of the sectional title units (flats) they had purchased (R2 651.00 in respect of flat 3; R2 247.00 in respect of flat 8; R1 832.87 in respect of flat 9, and R2 709.84 in respect of flat one). They are liable for the levies of R412.00 per month payable in respect of each of the units. In addition, they are obliged to incur the cost of rented accommodation for themselves elsewhere. The rental income they derive from the flats as as follows: R667.65 in respect of flat 3; R836.90 in

respect of flat 8; R852.98 in respect of flat 9, and R998.92 in respect of flat one As a result, the respondents have all incurred substantial debts. They say that they are in "dire financial straits" and though they do not spell it out, the spectre of sequestration must loom in the background. Moreover, it is obvious that the commercial value of the premises in the hands of the respondents has been severely eroded.

The respondents have, in fact, been indirectly expropriated of their land by the conduct of the applicants. This matter is an example of the serious abuse to which PIE may give rise to which Horn AJ adverts in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others, supra,* at 1081A, namely the deliberate occupation of an owner's land under the guise of protection afforded by PIE.

Upon consideration of all the relevant circumstances, I am firmly of the opinion that it is just and equitable that the parasitic occupation by the applicants of the respondents' property must be terminated and that the applicants be evicted from the premises.

The first applicant

The first applicant is a widow, seventy-seven years of age. She is umemployed. She occupies flat 3 in Leeuwen Mansions. The first respondent is the registered owner of the flats 3 and 8 in Leeuwen Mansions.

At the hearing, Ms Ipser, who appeared on behalf of the respondents, informed me that the first respondent purchased both flats with the intention of making structural alterations which would convert the two

flats into a single, larger dwelling for his own occupation. The first respondent is prepared permit the first applicant to remain in occupation of flat 3, and to forego the envisaged structural alterations while she is in occupation.

Upon a conspectus of "all the relevant circumstances", it is a concession fairly made.

Inherent review jurisdiction

As was noted above, the applicants at the hearing of the matter applied for an amendment to prayer 2.1 of the rule *nisi* by substituting, as an alternative, a prayer that this Court exercises its original jurisdiction in terms of section 24 of the Supreme Court Act 59 of 1959 and, in application of section 38 of the Constitution, review and set aside the eviction order granted on 29th November 2004.

In argument, it was urged upon me that I was at large to take a robust approach, particularly (and I quote from the written heads of argument) –

> … if the narrative is such that the issues which ought to have been fully canvassed in the record of the proceedings in the inferior court are more or less agreed upon by the parties and form part of the proceedings before it.

The applicants rely on *Magano and Another v District Magistrate, Johannesburg and Others* 1994 (4) SA 172 (W) at 175E—F (the decision was approved and followed in *Gerber v Voorsitter: Komitee oor*

Amnestie van die Kommissie vir Waarheid en Versoening 1998 (2) SA 559 (T)). I have no doubt, as was held in those cases, that this Court has jurisdiction beyond the confines of the grounds of review set out in section 24 of the Supreme Court Act 59 of 1959, to review a decision of an inferior court which is alleged to be an infringement of a fundamental right entrenched in the Constitution. It is, as is pointed out in *Erasmus. Superior Court Practice* at A1-69, a review of the third category identified by Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111.

However, that does not mean that this Court can embark upon a review of the decision of the inferior court without giving other interested parties, including the magistrate, an opportunity to be heard. To do so would fly in the face of the fundamental right of a party, entrenched in section 34 of the Constitution, "to have any dispute that can be resolved by application of law decided in a fair public hearing before a court". It is of the essence of a fair hearing that a judicial officer should hear all parties before he or she gives a judgment; the principle of *audi alteram partem* has always been a fundamental feature of our civil procedure (see De Vos "Civil Procedural Law and the Constitution of 1996: an Appraisal of Procedural Guarantees in Civil Proceedings" 1997 *TSAR* 444 at 456). In both *Magano and Another v District Magistrate, Johannesburg and Others, supra,* and in *Gerber v Voorsitter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening, supra,* the Court exercised the review jurisdiction after hearing all the parties: in *Magano and Another v District Magistrate, Johannesburg and Others, supra,* a rule *nisi* had been issued, and in *Gerber v Voorsitter: Komitee oor Amnestie van die*

Kommissie vir Waarheid en Versoening, supra, the matter came before the Court by way of the procedure prescribed in Rule of Court 53.

In view of the foregoing, I decline the invitation to embark upon a review of the magistrate's judgment in the eviction proceedings handed down on 29th November 2004.

The joinder of the Minister

The applicants say that in terms of section 19 of the Rental Housing Act there was an obligation upon the Minister of Housing to assess the impact of removing the protection of the Rental Control Act. The text of the section is cited above. Section 19(2)(a) provides that during a period of three years from the date of commencement of the Rental Housing Act, the Minister must monitor and assess the impact of the repeal of the Rent Control Act on "poor and vulnerable tenants". The date of commencement of the Rental Housing Act was 1 August 2000.

The applicants aver that the Minister has not complied with the obligation and that for a proper adjudication of this matter the Minister must be joined in the proceedings. They say that the procedure followed in reaching the decision to evict them –

> …. did not give us the opportunity to place the defence before the Court. We were not given the opportunity to formulate our defence and present it before the Court.

The Minister has no "direct and substantial interest" in the *lis* between the parties in the sense that his rights may be affected by the judgment of the Court (on a "direct and substantial interest" as a requisite for joinder, see *Herbstein and Van Winsen. The Civil Practice of the Supreme Court of SA* 4th ed by Van Winsen *et al* (1997) 172-177). In argument it was suggested that the relief to be claimed against the Minister "may" be in the form of a declarator that the Minister's action constitutes a "failure" to take a decision pursuant to "sections of PAJA", a mandamus ordering the Minister to comply with section 19(2) of the Rental Housing Act within a particular timeframe, and an interim interdict that pending compliance with the mandatory aspect of the relief, the protection of the Rent Control Act remains in place and, unless in accordance with the Rent Control Act, no evictions may take place.

The applicants had ample opportunity to formulate their defence and place it before the Court: their pleas were filed on 4th December 2003.

From the evidence before me it is, moreover, apparent that the applicants are not "poor and vulnerable tenants".

Costs

Ms Ipser submitted that costs should be awarded on the scale as between attorney and client on the ground that the applicants deliberately sought to mislead the court by not disclosing material facts in their *ex parte* application which was brought as a matter of urgency. However, in my

view, the failure to disclose all relevant facts should perhaps rather be ascribed to the pressure of urgency.

What I find more disturbing is the general attitude the applicants adopted throughout the course of the proceedings. For example, after the pre-trial conference in June 2004, they failed to make discovery or to file expert summaries. On 29th September 2004, the day before the hearing of the eviction matter was to be resumed, they requested a postponement so as to enable the parties to enter into negotiations. When the matter was postponed, they took no steps to further the negotiations they had proposed. On 29th November 2004 they were in willful default. In the proceedings before this Court, they say that they need to join the Minister, a step which they could, and should, have taken at the time when they filed their pleas in December 2003. At different times, various attorneys acted for the applicants. Proper notices of withdrawal were not filed and the respondents' attorney had reason to complain that she was not always sure who was acting for the applicants and where he or she was to be found.

A punitive order as to costs on the attorney and client scale is justified.

Orders

In view of the foregoing, the following orders are made:

(1) The application is dismissed and the rule is discharged.

(2) The second, third and fourth applicants are ordered to restore

to the respondents on or before 30th March 2005 possession of the premises they occupy, namely flats eight, nine and one in Leeuwen Mansions.

(3) The first respondent is ordered to allow the first applicant to remain in occupation of flat three in Leeuwen Mansions.

(4) The second, third and fourth applicants are ordered, jointly and severally, to pay the first, second and third respondents' costs of the application, taxed as between attorney and client.

HJ ERASMUS, J