CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 53/03

PORT ELIZABETH MUNICIPALITY Applicant

versus

VARIOUS OCCUPIERS Respondents

Heard on : 4 March 2004

Decided on : 1 October 2004

JUDGMENT

SACHS J:

[1] The applicant in this matter is the Port Elizabeth Municipality (the Municipality). The respondents are some 68 people, including 23 children, who occupy twenty nine shacks they have erected on privately owned land (the property) within the Municipality. Responding to a petition signed by 1600 people in the neighbourhood, including the owners of the property, the Municipality sought an eviction order against the occupiers in the South Eastern Cape Local Division of the High Court (High Court).

[2] At the time that the proceedings were instituted the occupiers had on their version been living for periods ranging from two to eight years on the property. Most had come there after being evicted from other land. The sites they occupied were on undeveloped land in an area known as Lorraine within the jurisdiction of the Municipality. The property is zoned for residential purposes and the dwellings were erected without the consent of the Municipality.[1] The occupiers indicated they were willing to leave the property if they were given reasonable notice and provided with suitable alternative land on to which they could move. They were told they could move to a place referred to as Walmer Township (Walmer). They rejected this proposal saying that Walmer was crime-ridden and unsavoury, as well as over-crowded, and that in any event they feared they would have no security of occupation there and find themselves liable to yet further eviction. It was common cause that the occupiers had not applied to the Municipality for housing.

[3] The Municipality submitted that it was aware of its obligation to provide housing and had for that reason embarked on a comprehensive housing development programme. It contended that if alternative land was made available to the occupiers, they would effectively be 'queue-jumping'; by occupying private land and, when asked to vacate it, demanding that they be provided with alternative accommodation, they would be disrupting the housing programme and forcing the Municipality to grant them preferential treatment.

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[1] In terms of section 4 of the National Building Regulations and Building Standards Act 103 of 1977, as amended.

[4] The High Court held that the occupiers were unlawfully occupying the property and that it was in the public interest that their unlawful occupation be terminated. It said that in taking all the relevant statutory considerations into account it could not come to the conclusion that the relief sought should not be granted. The Court accordingly ordered the occupiers to vacate the land and authorised the Sheriff to demolish the structures if necessary, with the assistance of the police if required. It also ordered the occupiers to pay the costs of the proceedings.

[5] The occupiers took the matter on appeal to the Supreme Court of Appeal (SCA). The SCA held that the occupiers were not seeking preferential treatment in the sense that they were asking for housing to be made available to them in preference to people in the housing queue. They were merely requesting that land be identified where they could put up their shacks and where they would have some measure of security of tenure. The SCA held further that the important consideration in the present case was the availability of suitable alternative land. This was so because of the length of time that the occupiers had occupied the land, and, more importantly, because the eviction order was not sought by the owners of the property but by an organ of state on the owners' behalf. The SCA held that given that on the papers it was unclear whether Walmer was land owned by the Municipality or privately owned, the High Court should not have granted the order sought without assurance that the occupiers would have some measure of security of tenure at Walmer. It accordingly upheld the appeal and set aside the eviction order.

[6] The Municipality now applies to this Court for leave to appeal against the decision of the SCA and to have the eviction order restored. It has indicated that it is particularly concerned to get a ruling from this Court that when it seeks eviction of unlawful occupiers it is not constitutionally bound to provide alternative accommodation or land.

[7] In opposing the application the occupiers contended that in essence it was based on a challenge to findings of fact made by the SCA and did not raise any constitutional matters. This argument must be rejected. The whole case turns on the interpretation to be given to various provisions in the Constitution, as well as to the statute adopted to give effect to a provision of the Constitution.

I The constitutional and statutory context

The Prevention of Illegal Squatting Act 52 of 1951

[8] In the pre-democratic era the response of the law to a situation like the present would have been simple and drastic.[2] In terms of the Prevention of Illegal Squatting Act 52 of 1951 (PISA), the only question for decision would have been whether the occupation of the land was unlawful. Once it was determined that the occupiers had no permission to be on the land, they not only faced summary eviction, they were liable for criminal prosecution. Expulsion from land of people referred to as squatters was accordingly accomplished through the criminal and not the civil courts, and as a

[2] See O'Regan "No More Forced Removals? An Historical Analysis of The Prevention of Illegal Squatting Act" (1989) 5 *SA Journal on Human Rights* 361.

matter of public rather than of private law. The process was deliberately made as swift as possible: conviction followed by eviction. Thus, even if they had been born on the land and spent their whole lives there, persons from whom permission to remain on land had been withdrawn by new owners were treated as criminals and subjected to summary eviction.[3]

[9] PISA was an integral part of a cluster of statutes that gave a legal/administrative imprimatur to the usurpation and forced removal of black people from land and compelled them to live in racially designated locations. For all black people, and for Africans in particular, dispossession was nine-tenths of the law.[4] Residential segregation was the cornerstone of the apartheid policy. This policy was aimed at creating separate "countries" for Africans within South Africa. Africans were precluded from owning and occupying land outside the areas reserved for them by these statutes. The Native Urban Areas Consolidation Act, 25 of 1945, was premised on the notion of Africans living in rural reserves and coming to the towns only as migrant workers on temporary sojourn. Through a combination of spatial apartheid, permit systems and the creation of criminal offences the Act strictly controlled the limited rights that Africans had to reside in urban areas. People living outside of what

[3] See *R v Zulu* 1959 (1) SA 263 (A).

[4] The Natives Land Act 27 of 1913 and the Native Trust and Land Act 18 of 1936 together set apart only 13% of South Africa's land for occupation by the African majority. The other races were to occupy the remaining 87% of the land. See *DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) at para 41. See also the judgment of Madala J at paras 75-9. In terms of the Group Areas Act 36 of 1966, persons classified as Coloured and Indian were compelled to live in very small portions of the land from which Africans were excluded.

were defined as native locations were regarded as squatters and, under PISA, were expelled from the land on which they lived.

[10] Differentiation on the basis of race was accordingly not only a source of grave assaults on the dignity of black people. It resulted in the creation of large, well-established and affluent white urban areas co-existing side by side with crammed pockets of impoverished and insecure black ones.[5] The principles of ownership in the Roman-Dutch law then gave legitimation in an apparently neutral and impartial way to the consequences of manifestly racist and partial laws and policies. In this setting of state-induced inequality the nominally race-free PISA targeted black shack-dwellers with dramatically harsh effect. As Van der Walt has pointed out:

> "The 'normality' assumption that the owner was entitled to possession unless the occupier could raise and prove a valid defence, usually based on agreement with the owner, formed part of Roman-Dutch law and was deemed unexceptional in early South African law, and it still forms the point of departure in private law. However, it had disastrous results for non-owners under . . . apartheid land law: the strong position of ownership and the (legislatively intensified) weak position of black non-ownership rights of occupation made it easier for the architects of apartheid to effect the evictions and removals required to establish the separation of land holdings along race lines."[6]

[5] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC).

[6] Van der Walt "Exclusivity of ownership, security of tenure, and eviction orders: a model to evaluate South African land-reform legislation" 2002 *TSAR* 254 at 258, quoted with approval by Olivier JA in *Ndlovu v Ngcobo; Bekker and Another v Jikka* 2003 (1) SA 113 (SCA) at para 65; 2002 (4) All SA 384 (SCA) at para 69.

PISA accordingly gave the universal social phenomenon of urbanisation[7] an intensely racialised South African character. Everywhere the landless poor flocked to urban areas in search of a better life. This population shift was both a consequence of and a threat to the policy of racial segregation. PISA was to prevent and control what was referred to as squatting on public or private land by criminalising it and providing for a simplified eviction process.[8] The power to enforce politically motivated, legislatively sanctioned and state-sponsored eviction and forced removals became a cornerstone of apartheid land law.[9] This marked a major shift, both quantitatively and qualitatively (politically). Evictions could be sought by local government and achieved by use of criminal rather than civil law.[10] It was against this background and

[7] *Ndlovu and Bekker* above n 6 at para 12. According to one specialist on the subject, Mark Girnson:

> "As much as one tenth of the global population is housed in urban squatting communities. Almost all major cities in Asia, Africa and South America have vast squatter settlements on the outskirts . . . . Migrants flood to the cities from the countryside in search of work and initially sleep outside or find somewhere with relatives or friends. The only way that they can get reasonably permanent roofs over their heads is by building shacks for themselves on unused land at the edge of the city. To achieve this they usually work in groups and take possession of land by building shacks overnight; sometimes there are small firms which specialise in this clandestine operation . . . .
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> [L]iving conditions are often appalling, and the installation of services is a turning point in the battle for a reasonable place to live. The squatters then continue gradually to improve their houses and slowly the settlements become an established part of the city. . . This process . . . also occurs on the peripheries of Southern European cities like Athens, Madrid, Lisbon and Naples and in bidonvilles outside Paris." (This information is taken from a book "*SQUATTING the real story*" published in the UK in 1980, which is made available as a resource online at http://www.squat.freeserve.co.uk/story/ch20.htm)

In South Africa this process of movement to urban areas took place in the context of colonial domination, segregation, apartheid and the migrant labour system, and consequently took on an enduring racist character. According to figures in the 1997 *South African Yearbook* it was estimated that at that time more than 8 million South Africans, that is, a fifth of the total population, lived in informal settlements on land which they neither owned nor had permission to occupy. See Horn AJ in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2000 (2) SA 1074 (SECLD) at 1079.

[8] *Ndlovu and Bekker* above n 6 at para 12.

[9] Van der Walt above n 6 at 260.

[10] Id

to deal with these injustices that section 26(3) of the Constitution was adopted and new statutory arrangements made.

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)

[11] The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was adopted with the manifest objective of overcoming the above abuses and ensuring that evictions in future took place in a manner consistent with the values of the new constitutional dispensation. Its provisions have to be interpreted against this background.

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

access to new housing development programmes, such homeless people had to be treated with dignity and respect.

[13] Thus, the former depersonalised processes that took no account of the life circumstances of those being expelled were replaced by humanised procedures that focused on fairness to all. People once regarded as anonymous squatters now became entitled to dignified and individualised treatment with special consideration for the most vulnerable. At the same time the second part of the title established that unlawful occupation was also to be prevented. The courts now had a new role to play, namely, to hold the balance between illegal eviction and unlawful occupation. Rescuing the courts from their invidious role as instruments directed by statute to effect callous removals, the new law guided them as to how they should fulfil their new complex and constitutionally ordained function: when evictions were being sought, the courts were to ensure that justice and equity prevailed in relation to all concerned.

The broad constitutional matrix for the interpretation of PIE

[14] In this context PIE cannot simply be looked at as a legislative mechanism designed to restore common law property rights by freeing them of racist and authoritarian provisions, though that is one of its aspects. Nor is it just a means of promoting judicial philanthropy in favour of the poor, though compassion is built into its very structure. PIE has to be understood, and its governing concepts of justice and

equity have to be applied, within a defined and carefully calibrated constitutional matrix.

[15] As with all determination about the reach of constitutionally protected rights, the starting and ending point of the analysis must be to affirm the values of human dignity, equality and freedom.[11] One of the provisions of the Bill of Rights that has to be interpreted with these values in mind, is section 25, which reads:

> "Property
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> (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."[12]

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[11] Section 7(1) and (2) of the Bill of Rights state that:

> (1) This Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
> (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights"

Similarly, section 39 states that when interpreting the Bill of Rights a court must promote the values of an open and democratic society based on human dignity, equality and freedom.

[12] The full text of section 25 reads as follows

> "Property
> (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
> (2) Property may be expropriated only in terms of law of general application-
> (a) for a public purpose or in the public interest; and
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
> (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including
> (a) the current use of the property;
> (b) the history of the acquisition and use of the property;
> (c) the market value of the property;
> (d)the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property and
> (e) the purpose of the expropriation.
> (4) For the purposes of this section
> (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
> (b) property is not limited to land,
> (5) The state must take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

The blatant disregard manifested by racist statutes for property rights in the past makes it all the more important that property rights be fully respected in the new dispensation, both by the state and by private persons. Yet such rights have to be understood in the context of the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past.

[16] As Ackermann J pointed out in *First National Bank*,[13] subsections (4) to (9) of section 25 underlined the need for and aimed at redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa. The details of these provisions had to be borne in mind whenever section 25 was being construed, because they emphasised that under the Constitution the protection of property as an individual right was not absolute but subject to societal considerations. His judgment went on to state:

> "The preamble to the Constitution indicates that one of the purposes of its adoption was to establish a society based, not only on 'democratic values' and 'fundamental human rights' but also on 'social justice'. Moreover the Bill of Rights places positive

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(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6)."

[13] First National Bank of SA Limited t/a Westbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Westbank v Minister of Finance 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

obligations on the State in regard to various social and economic rights. Van der Walt (1997) aptly explains the tensions that exist within section 25:

> '[T]he meaning of section 25 has to be determined, in each specific case, within an interpretative framework that takes due cognisance of the inevitable tensions which characterize the operation of the property clause. This tension between individual rights and social responsibilities has to be the guiding principle in terms of which the section is analysed, interpreted and applied in every individual case.'

The purpose of section 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 . . . . When considering the purpose and content of the property clause it is necessary, as Van der Walt (1997) puts it –

> '. . . to move away from a static, typically private-law conceptualist view of the constitution as a guarantee of the status quo to a dynamic, typically public-law view of the constitution as an instrument for social change and transformation under the auspices [and I would add 'and control'] of entrenched constitutional values.'

That property should also serve the public good is an idea by no means foreign to pre-constitutional property concepts."[14]

[17] The transformatory public-law view of the Constitution referred to by Van der Walt is further underlined by section 26, which reads:

> "Housing
> (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.

[14] Id at paras 50-52. Footnotes omitted.

> (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."

Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat. As the United Nations Housing Rights Programme report points out:

> "To live in a place, and to have established one's own personal habitat with peace, security and dignity, should be considered neither a luxury, a privilege nor purely the good fortune of those who can afford a decent home. Rather, the requisite imperative of housing for personal security, privacy, health, safety, protection from the elements and many other attributes of a shared humanity, has led the international community to recognize adequate housing as a basic and fundamental human right."[15]

[18] It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies

[15] United Nations Housing Rights Programme, Report No 1, 'Housing Rights Legislation: Review of International and National Legal Instruments" (2002) at 1. The UN-Habitat report concludes its Introduction by stating:

> "Housing rights rest upon the firm foundations of international human rights law, as well as the subsequent interpretative development of the standards, principles and norms embodied in that law. Indeed, the concept of housing rights has expanded beyond traditional, and often rudimentary, perceptions of those rights. The diversity in texts regarding housing rights may pose numerous ramifications for the international and national legal regimes. Yet, one clear priority remains: the imperative of consolidating promotional activities through an expanded focus on the global protection of housing rights."

rather than mitigates their marginalisation. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence. Hence the need for special judicial control of a process that is both socially stressful and potentially conflictual.

[19] Much of this case accordingly turns on establishing an appropriate constitutional relationship between section 25, dealing with property rights, and section 26, concerned with housing rights. 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. Thus, the need to strengthen the precarious position of people living in informal settlements is recognised by section 25 in a number of ways. Land reform is facilitated,[16] and the state is required to foster conditions enabling citizens to gain access to land on an equitable basis;[17] persons or communities with legally insecure tenure because of discriminatory laws are entitled to secure tenure or other redress;[18] and persons dispossessed of property by racially discriminatory laws are entitled to restitution or other redress.[19] Furthermore, sections 25 and 26 create a broad overlap

[16] Section 25(4)(a).

[17] Section 25(5).

[18] Section 25(6).

[19] Section 25(7).

between land rights and socio-economic rights, emphasising the duty on the state to seek to satisfy both, as this Court said in *Grootboom.*[20]

[20] There are three salient features of the way the Constitution approaches the interrelationship between land hunger, homelessness and respect for property rights. In the first place, the rights of the dispossessed in relation to land are not generally delineated in unqualified terms as rights intended to be immediately self-enforcing. For the main part they presuppose the adoption of legislative and other measures to strengthen existing rights of tenure, open up access to land and progressively provide adequate housing. Thus, the Constitution is strongly supportive of orderly land reform, but does not purport to effect transfer of title by constitutional fiat.[21] Nor does it sanction arbitrary seizure of land, whether by the state or by landless people.[22] The rights involved in section 26(3) are defensive rather than affirmative. The land-owner

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[20] Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 74.

[21] As Van der Walt correctly points out it does not change the institution of private property. Nor does it create what has been referred to as a 'servitude of trespass' (See *Betta Eindomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (WLD) at para 8.2). See Van der Walt "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A critical evaluation of Recent Case Law" (2002) 18 *SA Journal on Human Rights* 372 at 397 *ff*.

[22] As Yacoob J pointed out in *Grootboom*:

> "Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of the State structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable. Reasonableness must be determined on the facts of each case." Above note 20 at para 92.

The term land invasion, however, must be used with caution. It can be stretched to cover widely dissimilar cases, like the present where a relatively small number of people have erected shacks and lived on undeveloped land for relatively long periods of time, or the situation in *Grootboom* where although a thousand desperate people occupied a hillside due to be developed for low-cost housing, no intent to jump the queue was shown and a remedy was not refused, or the circumstances revealed in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* (above n 7) at 1085, where the trial court held that eviction subject to conditions should be ordered because there had been a deliberate and premeditated act culminating in the unlawful invasion and occupation of a large tract of land.

cannot simply say: this is my land, I can do with it what I want, and then send in the bulldozers or sledgehammers.

[21] A second major feature of this cluster of constitutional provisions is that through section 26(3) they expressly acknowledge that eviction of people living in informal settlements may take place, even if it results in loss of a home.

[22] A third aspect of section 26(3) is the emphasis it places on the need to seek concrete and case-specific solutions to the difficult problems that arise. Absent the historical background outlined above, the statement in the Constitution that the courts must do what courts are normally expected to do, namely, take all relevant factors into account, would appear otiose (superfluous), even odd. Its use in section 26(3), however, serves a clear constitutional purpose. It is there precisely to underline how non-prescriptive the provision is intended to be. The way in which the courts are to manage the process has accordingly been left as wide open as constitutional language could achieve, by design and not by accident, by deliberate purpose and not by omission.

[23] In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in

dire need of accommodation.[23] The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.

II The structure of PIE

[24] PIE provides some legislative texture to guide the courts in determining the approach to eviction now required by section 26 (3) of the Constitution. Its preamble makes clear that it was enacted to do so.[24] Its central operative provisions are section

[23] Horn AJ in *Port Elizabeth Municipality* above n 7 at 1081. The judge was quoted with approval by Olivier JA in *Ndlovu and Bekker* above n 6. See also Van Der Walt above n 21 at 378.

[24] Echoing the provisions of sections 25(1) and 26(3) of the Constitution, its preamble declares:

> "WHEREAS no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property;
> AND WHEREAS no one may be evicted from their home, or have their home demolished without an order of court made after considering all relevant circumstances;
> AND WHEREAS it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances;
> AND WHEREAS special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and that it should be recognised that the needs of those groups should be considered;

The definition section (section 1) states that 'building or structure' includes any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter. An 'unlawful occupier' means a person who occupies land without the express or tacit consent of the owner or person in charge. Magistrate's courts are included in the definition of courts to whom powers under PIE are entrusted (sections 1 and 9). It is made a criminal offence to evict an unlawful occupier except on the authority of an order of a competent court (section 8(1)). Section 3 prohibits receipt of payment for organising unlawful occupation of land. Section 5 makes special provision for emergency evictions. Extensive provision is made in section 7 for the appointment of mediators. The Minister designated by the State President is given power to make regulations where they are required or where it is necessary or desirable to achieve the objectives of the Act (section 12).

4, which deals with evictions sought by owners or persons in charge of property,[25] and section 6, which is concerned with eviction proceedings brought by organs of state.

[25] Section 4 reads:

"Eviction of unlawful occupiers—

(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

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

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

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

(5) The notice of proceedings contemplated in subsection (2) must—

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

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

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

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

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

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

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

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

(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).

(9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.

(10) The court which orders the eviction of any person in terms of this section may make an order for the demolition and removal of the buildings or structures that were occupied by such person on the land in question.

(11) A court may, at the request of the sheriff, authorise any person to assist the sheriff to carry out an order for eviction, demolition or removal subject to conditions determined by the court: Provided that the sheriff must at all times be present during such eviction, demolition or removal.

There is considerable difference in detail between the two provisions. They emphasise that a distinction has to be made on the basis of whether the application for eviction is brought by the owner of property or by the Municipality. This case deals with proceedings brought under section 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 section 4. Despite their differences both sections emphasise the central role courts have to ensure equity after considering all relevant circumstances.

[25] Section 6, the governing provision in the present matter, reads:

> "6. Eviction at instance of organ of state.—
>
> (1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—
>
> (a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or
>
> (b) it is in the public interest to grant such an order.
>
> (2) For the purposes of this section, "public interest" includes the interest of the health and safety of those occupying the land and the public in general.
>
> (3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—

> (12) Any order for the eviction of an unlawful occupier or for the demolition or removal of buildings or structures in terms of this section is subject to the conditions deemed reasonable by the court, and the court may, on good cause shown, vary any condition for an eviction order."

(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;
(b) the period the unlawful occupier and his or her family have resided on the land in question; and
(c) the availability to the unlawful occupier of suitable alternative accommodation or land."

Simply put, the ordinary prerequisites for the Municipality to be in a position to apply for an eviction order are that the occupation is unlawful and the structures are either unauthorised, or unhealthy or unsafe.[26] Contrary to the pre-constitutional position, however, the mere establishment of these facts does not require the court to make an eviction order. In terms of section 6, they merely trigger the court's discretion. If they are proved, the court then may (not must) grant an eviction order if it is just and equitable to do so. In making its decision it must take account of all relevant circumstances, including the manner in which occupation was effected, its duration and the availability of suitable alternative accommodation or land.

'The circumstances of the occupation of the land'

[26] A distinction could be drawn between occupation with the consent of the landowner but involving structures that do not meet with by-law requirements, a health hazard, and occupation in the face of landowner opposition. Different considerations could arise depending on whether the land occupied is public or privately owned. In the case of public land, the state generally has further land to

[26] It is not necessary for the purposes of this judgment to decide whether the manner in which the SCA in this matter discusses the disjunctive 'or' between section 4(1) (a) and (b) is fully accurate. See para 9 in that judgment.

meet its obligations in terms of section 26 of the Constitution, while in the case of privately owned land there is normally no alternative land available unless the state takes steps to acquire some. On the other hand, private land may be derelict, with the owners having little practical interest in its utilisation, while public land may have been set aside for important public purposes, including the provision of housing. The motivation for settling on the land could be of importance. The degree of emergency or desperation of people who have sought a spot on which to erect their shelters, would always have to be considered. Furthermore, persons occupying land with at least a plausible belief that they have permission to be there can be looked at with far greater sympathy than those who deliberately invade land with a view to disrupting the organised housing programme and placing themselves at the front of the queue. The public interest requires that the legislative framework and general principles which govern the process of housing development should not be undermined and frustrated by the unlawful and arbitrary actions of a relatively small group of people.[27] Thus the well-structured housing policies of a municipality could not be allowed to be endangered by the unlawful intrusion of people at the expense of those inhabitants who may have had equal claims to be housed on the land earmarked for development by the applicant. Municipalities represent all the people in their area and should not seek to curry favour with or bend to the demands of individuals or communities, whether rich or poor. They have to organise and administer their affairs in accordance with the broader interests of all the inhabitants.

[27] Horn AJ in *Port Elizabeth Municipality* above n 7 at 1084.

'The period the unlawful occupier and his or her family have been on the land'

[27] Section 6 does not make the explicit distinction that section 4 does between occupation for less than six months and occupation for longer. Clearly, however, eviction proceedings speedily undertaken would be more readily sustained than those instituted after a long period of occupation without objection. PIE does not envisage any set formula connecting time to stability, such as that which would be necessary for prescription or a statute of limitations. Its concern is with time as an element of fairness. Justice and equity require showing special concern when settled communities or individuals are faced with being uprooted. The longer the unlawful occupiers have been on the land, the more established they are on their sites and in the neighbourhood, the more well settled their homes and the more integrated they are in terms of employment, schooling and enjoyment of social amenities, the greater their claim to the protection of the courts. A court will accordingly be far more cautious in evicting well-settled families with strong local ties, than persons who have recently moved on to land and erected their shelters there. And should it decide that eviction is called for in the former case, it will be specially astute to ensure that equitable arrangements are made to diminish its negative impact.

'The availability of suitable alternative accommodation or land'

[28] Section 6(3) states that the availability of a suitable alternative place to go to is something to which regard must be had, not an inflexible requirement. There is therefore no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land

is made available. In general terms, however, a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.[28]

[29] The availability of suitable alternative accommodation will vary from municipality to municipality and be affected by the number of people facing eviction in each case. The problem will always be to find something suitable for the unlawful occupiers without prejudicing the claims of lawful occupiers and those in line for formal housing. In this respect it is important that the actual situation of the persons concerned be taken account of. It is not enough to have a programme that works in theory. The Constitution requires that everyone must be treated with care and concern; if the measures though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.[29] In a society founded on human dignity, equality and freedom it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if by

[28] While the provisions of PIE give temporary continuity to transit camps established under section 11(4) of PISA. PIE makes no substitute infrastructural provision for transitional support for evicted persons. This gap in the law creates problems for municipalities seeking to ensure that evictions are carried out in a just and equitable manner. Though in the age of forced removals transit camps had a dolorous history, the role of places for temporary settlement could be quite different today. They could serve to cushion removals and place the persons concerned in a position to re-establish themselves pending access to secure housing. See, Pienaar and Muller "The impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on homelessness and unlawful occupation within the present statutory framework" (1999) 10 *Stellenbosch Law Review* 370 at 393.

[29] *Grootboom* above n 20 at para 44. The issue in *Grootboom* was whether or not the housing programme was reasonable. In the present matter the focus is whether an eviction order would be just and equitable. Yet though the text and context in each case is different what they have in common is the need to focus on the question of human dignity and to ensure that the programmes at issue are sufficiently flexible to respond to those in desperate need and to cater appropriately for immediate and short-term requirements (at para 52). In the words of Yacoob J: "The Constitution will be worth infinitely less than its paper if the reasonableness of State action is determined without regard to the fundamental constitutional value of human dignity . . . . In short, I emphasise that human beings are required to be treated as human beings."(At para 83).

a reasonable application of judicial and administrative statecraft such human distress could be avoided. Thus it would not be enough for the municipality merely to show that it has in place a programme that is designed to house the maximum number of homeless people over the shortest period of time in the most cost effective way. The existence of such a programme would go a long way towards establishing a context that would ensure that a proposed eviction would be just and equitable. It falls short, however, from being determinative of whether and under what conditions an actual eviction order should be made in a particular case.

'Considering all the relevant circumstances'

[30] There is nothing in section 6 to suggest that the three specifically identified circumstances are intended to be the only ones to which the court may refer in deciding what is just and equitable. They are peremptory but not exhaustive. It is clear both from the open-ended way in which they are framed and from the width of decision-making involved in the concept of what is just and equitable, that the court has a very wide mandate and must give due consideration to all circumstances that might be relevant. Thus the particular vulnerability of occupiers referred to in section 4 (the elderly, children, disabled persons and households headed by women) could constitute a relevant circumstance under section 6. Similarly, justice and equity would take account of the extent to which serious negotiations had taken place with equality of voice for all concerned. What is just and equitable could be affected by the reasonableness of offers made in connection with suitable alternative accommodation

or land, the time scales proposed relative to the degree of disruption involved, and the willingness of the occupiers to respond to reasonable alternatives put before them.

[31] The combination of circumstances may be extremely intricate, requiring a nuanced appreciation of the specific situation in each case. Thus, though there might be a sad uniformity in the conditions of homelessness and desperation which lead to unlawful occupations, on the one hand, and the frustration of landowners at being blocked by intruders from enjoyment of their property, on the other, the actual details of the relationships involved are capable of infinite variation.[30] It is not easy to classify the multitude of places and relationships involved. This is precisely why, even though unlawfulness is established, the eviction process is not automatic and why the courts are called upon to exercise a broad judicial discretion on a case by case basis. Each case accordingly has to be decided not on generalities but in the light of its own particular circumstances. Every situation has its own history, its own dynamics, its own intractable elements that have to be lived with (at least for the time being), and its own creative possibilities that have to be explored as far as reasonably possible. The proper application of PIE will therefore depend on the facts of each case, and each case may present different facts that call for the adoption of different approaches.

'Must have regard to'

[30] The reported cases indicate that homeless people tend to erect their shelters on relatively deserted land, rather than on open spaces like golf courses, public commons or private gardens. They seek to tuck themselves away in places from which they are unlikely to be evicted, rather than to choose spots which would inevitably and immediately provoke confrontation.

[32] The obligation on the court is to 'have regard to' the circumstances, that is, to give them due weight in making its judgment as to what is just and equitable. The court cannot fulfil its responsibilities in this respect if it does not have the requisite information at its disposal. It needs to be fully apprised of the circumstances before it can have regard to them. It follows that although it is incumbent on the interested parties to make all relevant information available, technical questions relating to onus of proof should not play an unduly significant role in its enquiry. The court is not resolving a civil dispute as to who has rights under land law; the existence of unlawfulness is the foundation for the enquiry, not its subject matter. What the court is called upon to do is to decide whether, bearing in mind the values of the Constitution, in upholding and enforcing land rights it is appropriate to issue an order which has the effect of depriving people of their homes.[31] Of equal concern, it is determining the conditions under which, if it is just and equitable to grant such an order, the eviction should take place.[32] Both the language of the section and the purpose of the statute require the court to ensure that it is fully informed before undertaking the onerous and delicate task entrusted to it. In securing the necessary information, the court would therefore be entitled to go beyond the facts established in the papers before it. Indeed when the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain, the court might be obliged to procure ways of establishing the true state of affairs, so as to enable it properly to 'have regard' to relevant circumstances.

[31] For the purposes of this case it is not necessary to go into the question which divided the SCA in *Ndlovu and Bekker* above n 6, 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.

[32] Section 6(6) read with sections 4(8), (9) and (12).

'Just and equitable'

[33] In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others*,[33] a case with some similarities to the present, section 6 was helpfully analysed by Horn AJ. He pointed out that in matters brought under PIE one is dealing with two diametrically opposed fundamental interests. On the one hand there is the traditional real right inherent in ownership reserving exclusive use and protection of property by the landowner. On the other hand there is the genuine despair of people in dire need of adequate accommodation. It was with this regard that the legislature had by virtue of its provisions of PIE set about implementing a procedure which envisaged the orderly and controlled removal of informal settlements. It is the duty of the court in applying the requirements of the Act to balance these opposing interests and bring out a decision that is just and equitable. He went on to say that the use of the term 'just and equitable' relates to both interests, that is what is just and equitable not only to the persons who occupied the land illegally but to the landowner as well. He held that the term also implies that a court, when deciding on 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 circumstances which would necessitate bringing out an equitably principled judgment.

[34] Finally Horn AJ went on to emphasise that each case would have to be decided on its own facts. Hopefully once the housing shortage had been overcome incidents of unlawful invasion of property by desperate communities in search of

[33] Port Elizabeth Municipality above n 7.

accommodation would disappear. In the interim the courts would do the best they could and apply criteria that were just and equitable and acceptable to all concerned. What remained essential, he concluded, was that removals be done in a fair and orderly manner and preferably with a specific plan of resettlement in mind.

[35] The approach by Horn AJ has been described both judicially and academically as sensitive and balanced.[34] I agree with that description. The phrase 'just and equitable' makes it plain that the criteria to be applied are not purely of the technical kind that flow ordinarily from the provisions of land law. The emphasis on justice and equity underlines the central philosophical and strategic objective of PIE. Rather than envisage the foundational values of the rule of law and the achievement of equality as being distinct from and in tension with each other, PIE treats these values as interactive, complementary and mutually reinforcing. The necessary reconciliation can only be attempted by a close analysis of the actual specifics of each case.

[36] The court is thus called upon to go beyond its normal functions, and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and

[34] Olivier J in *Ndlovu and Bekker* above n 6 at para 56.

the orders it might make.[35] The Constitution and PIE require that in addition to considering the lawfulness of the occupation the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result.

[37] Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order.[36] It combines individual rights with a communitarian philosophy.

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[35] A perusal of the orders made in the many cases brought under PIE in the different divisions of the High Court indicates a great variety of responses. Innovative orders have been made both in the High Court as a court of first instance, and the SCA as a court of appeal.

Thus, Browde AJ in *Transnet t/a Spoornet v Informal Settlers of Good Hope and Others* 2001 (4) All SA 516 (WLD) concludes his judgment as follows at 524:

> "It is clear to me that what is required is further investigation into the matter since an order for eviction would merely exacerbate an already tragic situation. I therefore make the following order namely:
>
> 1. The application is postponed *sine die*.
> 2. The applicant is ordered to conduct a survey to enable it (and the court when the matter is reinstated) to assess the needs and the rights of the persons presently illegally occupying the Rail Reserve and the prospect, if any, of relocating the communities to a safer and healthier site.
> 3. Respondents ie the two respondent communities, represented by the Legal Resources Centre and the third respondent are ordered to take all reasonable steps to assist the applicant in carrying out the survey referred to in paragraph 1 hereof.
> 4. The costs of the application thus far incurred are reserved for decision by the court which hears the application if and when it is reinstated."

[36] As Mokgoro J has explained:

It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

[38] The inherited injustices at the macro level will inevitably make it difficult for the courts to ensure immediate present-day equity at the micro level. The judiciary cannot of itself correct all the systemic unfairness to be found in our society. Yet it can at least soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails. As the authors of the minority judgment in the second abortion case in the German Federal Constitutional Court pointed out, there are some problems based on contradictory values that are so intrinsic to the way our society functions that neither legislation nor the courts can 'solve' them with 'correct' answers.[37] When dealing with the dilemmas

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> "Generally, *ubuntu* translates as 'humaneness'. In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises a respect for human dignity, marking a shift from confrontation to conciliation. In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our *rainbow* heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of 'humanity' and 'menswaardigheid', are also highly priced. It is values like these that [s 39(1)(a)] requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality." [Footnotes omitted.] See *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR (CC) at para 308.

[37] The eloquent opening words by the Vice President of the German Federal Constitutional Court and the presiding judge in its second senate, Judge Mahrenholz, and his colleague, Judge Sommer in the second abortion case heard by that Court in 1993, illustrate certain inherent limitations of the law; some legal dilemmas cannot be resolved, they can only be managed more or less well.

> "Legal regulation of the termination of pregnancy strikes to the innermost core of human life and touches fundamental questions of human existence. It is characteristic of the human condition that sexuality and the desire to bear children do not coincide. Women have to bear the consequence of this divergence. At all times and in all cultures, including those with different moral and religious value systems, they have sought and found ways out of the crisis

posed by PIE, the courts must accordingly do as well as they can with the evidential and procedural resources at their disposal.

III Mediation

[39] In seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.

> of unwanted pregnancies. They have not let themselves be deterred by the heaviest and most cruel punishments, or even by the risk to their own lives, from terminating the unborn life when they did not want a child. In accordance with their changed station in society, women today resolve this fundamental conflict primarily in terms of whether, in their own estimation, they are able to fulfil the responsibilities of motherhood.
>
> Any regulation of the termination of pregnancy raises questions about the sphere of inviolable autonomy of the individual on the one hand, and the right of the state to regulate on the other; here *the legislature finds itself at the limit of its capacity to regulate in any way an aspect of human life. It can introduce a better or worse regulation, but it cannot 'solve' the problem; in this sphere the state can no longer be confident that it can lay down the 'correct' legislation*." [My emphasis]

See; "Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftssabbruch vom 28 Mai 1993" reported in full in a special issue of *Juristenzeitung* (*JZ.*) of 7 June 1993 at 43. Translated and quoted by Van Zyl Smit in "Reconciling the irreconcilable? Recent developments in the German law on abortion" *Medical Law Review* (1994) 3 at 302. Here the problem is not one of competing values but of competing interests with deep historical roots.

[40] Compulsory mediation[38] is an increasingly common feature of modern systems. It should be noted, however, that the compulsion lies in participating in the process, not in reaching a settlement. In South Africa, mediation or conciliation are compulsory in many cases before labour disputes are brought before a court.[39] Mediation in family matters, too, though not compulsory, is increasingly common in many jurisdictions.[40]

[41] Thus, those seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity. At the same time those who find themselves compelled by poverty and landlessness to live in shacks on the land of others, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral agency. The tenacity and ingenuity they show in making homes out of discarded material, in finding work and sending their children to school, are a tribute to their capacity for survival and adaptation. Justice and equity oblige them to rely on this same resourcefulness in seeking a solution to their plight

[38] Mediation, as a process, is notoriously difficult to define. See the general discussion in Boulle and Rycroft *Mediation Principles, Process, Practice* (Butterworths, Durban 1997) at 3-7. Nupen offers the following crisp definition: "Mediation is a process in which parties in conflict voluntarily enlist the services of an acceptable third party to assist them in reaching agreement on issues that divide them." Nupen "Mediation" in Pretorius (ed) *Dispute Resolution* (Juta, Cape Town 1993) at 39.

[39] See the Labour Relations Act 66 of 1995 and the discussion in Boulle and Rycroft , above n 38, chapter 8.

[40] For a helpful synoptic account of such developments see Van Zyl *Divorce mediation and the best interests of the child* (HSRC, Pretoria 1997) at 142-153.

and to explore all reasonable possibilities of securing suitable alternative accommodation or land.

[42] Not only can mediation reduce the expenses of litigation, it can help avoid the exacerbation of tensions that forensic combat produces. By bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give-and-take, mediators can find ways round sticking-points in a manner that the adversarial judicial process might not be able to do. Money that otherwise might be spent on unpleasant and polarising litigation can better be used to facilitate an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we all live in a shared society.

[43] In South African conditions, where communities have long been divided and placed in hostile camps, mediation has a particularly significant role to play. The process enables parties to relate to each other in pragmatic and sensible ways, building up prospects of respectful good neighbourliness for the future. Nowhere is this more required than in relation to the intensely emotional and historically charged problems with which PIE deals. Given the special nature of the competing interests involved in eviction proceedings launched under section 6 of PIE, absent special circumstances it would not ordinarily be just and equitable to order eviction if proper discussions, and where appropriate, mediation, have not been attempted.

[44] In the light of the above considerations, parties to this appeal were given an opportunity to address argument on the legality and propriety of this Court itself ordering mediation. The Chief Justice issued further directions on this topic.[41] Neither party, however, indicated unqualified support for mediation. The Municipality's response was that while section 7 of PIE[42] placed no obligation on a municipality to appoint a mediator, there was sufficient indication in PIE and the

[41] The parties were asked to answer the following questions:

> "(i) Is it competent for a court seized at first instance of an application under the Prevention of Illegal Eviction and Unlawful Occupation Act 19 of 1998, where the parties to the matter have not availed themselves of the procedures laid down in section 7 of the Act:
> (a) to order that mediation or a similar form of alternative dispute resolution be followed; and
> (b) to decide the case only if the alternative dispute resolution process does not resolve the dispute between the parties within a specified time.
> (ii) If so, is it competent for a court to make such an order on appeal where such an order has not been made by the court of first instance?
> (iii) If so, would it be competent and appropriate in the circumstances of this case for this Court to make such an order?"

[42] Section 7 reads as follows:

"Mediation

(1) If the municipality in whose area of jurisdiction the land in question is situated is not the owner of the land the municipality may, on the conditions that it may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the municipality may determine.

(2) If the municipality in whose area of jurisdiction the land in question is situated is the owner of the land in question, the member of the Executive Council designated by the Premier of the province concerned, or his or her nominee, may, on the conditions that he or she may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the said member of the Executive Council may determine.

(3) Any party may request the municipality to appoint one or more persons in terms of subsections (1) and (2), for the purposes of those subsections.

(4) A person appointed in terms of subsection (1) or (2) who is not in full-time service of the State may be paid the remuneration and allowances that may be determined by the body or official who appointed that person for services performed by him or her.

(5) All discussions, disclosures and submissions which take place or are made during the mediation process shall be privileged, unless the parties agree to the contrary."

Constitution for a court to make such an order as a precursor to granting an eviction order. It accordingly favoured an eviction order, to be suspended while mediation was being tried. The occupiers' answer, on the other hand, was that none of the express powers given to the court by PIE conferred authority on the court to order parties to subject themselves to mediation as a precursor to the granting of an eviction order. They contended that if the Municipality had truly wished to go to mediation, it could have done so prior to launching its application; having failed in the SCA, it should not be entitled to a second bite of the cherry, and should stand or fall by its evidence in the application for eviction. Should the application for leave to appeal be refused, however, the occupiers undertook then to participate in any process of mediation suggested by the Municipality, provided that a mediator be appointed by a Member of the Executive of the Eastern Cape provincial government.

[45] In my view, section 7 of PIE is intended to be facilitative rather than exhaustive. It does not purport, either expressly or by necessary implication, to limit the very wide power entrusted to the court to ensure that the outcome of eviction proceedings will be just and equitable. As has been pointed out, section 26(3) of the Constitution and PIE between them give the courts the widest possible discretion in eviction proceedings, taking account of all relevant circumstances. One of the relevant circumstances in deciding whether an eviction order would be just and equitable would be whether mediation has been tried.[43] In appropriate circumstances the courts should themselves order that mediation be tried.

[43] Even in pre-constitutional times some judges recognised the need to take account of the drastic effects of eviction. As Goldstone J pointed out in *S v Govender* 1986 (3) SA 969 (T) at 971, the power to make an

[46] It appears that from the beginning the parties have been at loggerheads with each other. The Municipality's position has been that it would consider negotiating with the occupiers only once an eviction order had been granted. The occupiers for their part have acknowledged that they will have to move, but have not accepted the proposal that they move to Walmer, where they claim that conditions are bad and they might be subjected to further eviction. There are only nine households and three single persons to be dealt with. Each family situation has its own particularities, and the possibilities of individualised responses rather than a blanket solution could not be ruled out. The endless war of attrition between the parties has been to no-one's advantage. The Municipality could have explored the potential of the landowners to have made a contribution towards a solution.

[47] The question arises whether it is permissible or appropriate for this Court to order mediation when its use or non-use has not been considered either by the court of first instance or by the SCA. By the time an appeal is heard some of the advantages of mediation are lost. There is no saving on forensic expense, no avoidance of the law's delay, and no minimisation of litigious rancour. Further, the chances of successful mediation are usually at their highest when the outcome of litigation is at its most uncertain. In the present matter neither party supports it unconditionally at this stage. Not without hesitation, I have come to the conclusion that too much water has flowed

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ejectment order under section 46(2)(b) of the Group Areas Act 36 of 1966 was a wide one and one which might, and in most cases would, seriously affect the lives of the person or persons concerned. Such an order should not therefore be made without the fullest enquiry. Many considerations might be relevant to the exercise of the court's discretion, for example the nature of the area concerned; the attitude of the neighbours; the policy and views of the Department of Community Development or any other interested Department of State; the attitude of the landlord; the prospects of the permit being issued for continued lawful occupation of the premises; the personal hardship which such an order may cause and the availability of alternative accommodation.

under the bridge to make it appropriate that mediation be attempted now. The fact that mediation has not been tried will, however, be an important factor in determining whether it is just and equitable for an eviction order to be made. With this consideration in mind, I turn to consider the Municipality's appeal against the decision of the SCA.

IV Should the decision of the SCA be overturned?

[48] It is necessary now to consider whether the application for leave to appeal should be granted. In considering this question it is important to identify the relevant facts of this case to which the legal principles identified above must be applied. The Municipality launched motion proceedings to seek the eviction of the occupiers. Many of the facts it alleged in its founding affidavits were disputed by the occupiers in response. Accordingly we must accept those facts asserted by the applicant that remain undenied by the respondent, together with the facts as alleged by the respondents.[44]

[49] The occupiers have built shacks on privately owned land in the suburb of Lorraine, in Port Elizabeth. It is clear that the shacks were erected without the necessary approval from the Municipality. Accordingly, the requirement of section 6(1)(a) of the Act is met.[45] The occupiers assert that eight of the respondent families

[44] See Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).

[45] Section 6(1)(a) provides that:

"Eviction at instance of organ of state.—

have resided on the land for eight years[46] (as at August 2000 when the answering affidavits were signed), three of them for four years[47] and only one family for two years.[48] They aver that most of them moved to the land in Lorraine after having been evicted from land in Glenroy, Port Elizabeth. They also state that they are willing to move again but want to do so only if they are provided with a piece of land upon which to live "without fear of further eviction" until they are provided with housing in terms of the Municipality's housing scheme. In this short tale, the hard realities of urbanisation and homelessness in South Africa are captured.

[50] The occupiers claim that when they moved onto the land they were given permission to do so by a woman whom they assumed to be the owner. The Municipality, in reply, filed affidavits on behalf of all the owners of the erven concerned indicating that the current occupiers do not have permission to reside on the land. These specific and emphatic denials must be accepted to establish that the occupiers, even if they were once given permission to occupy the land by an owner,

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

(a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained."

Given the conclusion that we will reach, it is not necessary to decide whether the requirements stipulated in section 6(1)(a) and (b) are disjunctive or conjunctive. See the discussion in the SCA judgment at para 9.

[46] 1st, 2nd, 5th, 7th, 8th, 9th, 10th and 11th respondents.

[47] 3rd, 6th and 12th respondents.

[48] 4th respondent.

no longer have permission to do so. However, the owners do not assert that they require the land for their own personal use at this stage.

[51] It is clear from the Municipality's affidavits that the land is vacant land, upon which some trees and bushes are growing, but that it is not being used by the owners at present for any productive purpose. The Municipality wishes the occupiers to move because firstly, it has received a petition signed by 1600 members of the public requesting the Municipality to move the occupiers, and secondly because it asserts that the conditions in which the occupiers are occupying the land constitute a health risk because of the absence of toilet facilities. The Municipality indicates that it has no obligation to house these particular families. It states that it has established a "four peg housing programme" to provide site and service facilities to the homeless in its area and that the applicants can apply to be part of that programme, though it admits it will take some time for them to be provided with appropriate site and service facilities.

[52] The occupiers deny that their occupation of the land creates a health risk. They state that they use pit latrines which are hygienic. They also state that they obtain water on a daily basis from a gentleman at the nearby Riding Club, though this allegation, in turn is denied by the Municipality. The occupiers also admit that they are willing to register for the four peg housing scheme but are concerned about where they should live in the meanwhile.

[53] In determining whether the Municipality is entitled to obtain the eviction of the occupiers, the three criteria mentioned in section 6 of the Act must be considered: the circumstances under which the unlawful occupier occupied the land and erected the structures; the period the occupier has resided on the land, and the availability of suitable alternative land. It is clear from what has been said above that the occupiers moved onto the land with what they considered to be the permission of the owner and that they have been there for a long period of time. Eight children are attending local schools in the area and several of the adults have work nearby.

[54] The Municipality, in its founding affidavit, pointed to two possible sites as suitable alternative land: the first was Walmer, which the occupiers reject as being overcrowded and unsafe; the second is Greenbushes, which the occupiers reject as being too far away for them to go to their work and for their children to school in the Lorraine area. It is quite clear that the Municipality has not entered into any discussions with the respondents, who are a relatively small group of people (only 68), to identify their particular circumstances or needs. The occupiers do mention two areas, Seaview and Fairview, as potentially suitable alternative land, but the Municipality does not address these suggestions in their reply. Indeed in their reply the Municipality states bluntly:

> "... [the] Applicant is under no duty to make suitable alternative land available for this particular group of people over and above its existing Housing Programme as set out in Applicant's Founding Affidavit and I repeat Applicant's invitation to Respondents to register under the Applicant's Housing Programme in order to be eligible for benefits under the scheme."

The Municipality also states:

> "It is respectfully submitted on behalf of the Applicant that what the Respondents have sought to do is unilaterally occupy private land and then, when requested to vacate, the Respondents have alleged that they have nowhere else to go and the Applicant must solve their problem by providing alternative land."

[55] These paragraphs capture the nub of the Municipality's case. It asserts that having established a four peg housing programme, it need do no more to accommodate individually homeless families such as the occupiers than offer them registration in that housing programme which, it admits, may not provide housing for the occupiers for some years. It is not accurate, however, on the facts before us to define the occupiers as "queue jumpers". They are a community who are homeless, who have been evicted once, and who found land to occupy with what they considered to be the permission of the owner where they have been residing for eight years. This is a considerable period of time. The Municipality now seeks to evict them without any discussion with them, or consideration of their request that they be provided with security of tenure on a suitable piece of land pending their accommodation in the housing programme.

[56] In considering whether it is "just and equitable" to make an eviction order in terms of section 6 of the Act, the responsibilities that municipalities, unlike owners, bear in terms of section 26 of the Constitution are relevant. As *Grootboom* indicates,[49] municipalities have a major function to perform with regard to the fulfilment of the

[49] See above n 20 at para 58.

rights of all to have access to adequate housing. Municipalities, therefore, have a duty systematically to improve access to housing for all within their area. They must do so on the understanding that there are complex socio-economic problems that lie at the heart of the unlawful occupation of land in the urban areas of our country. They must attend to their duties with insight and a sense of humanity. Their duties extend beyond the development of housing schemes, to treating those within their jurisdiction with respect. Where the need to evict people arises, some attempts to resolve the problem before seeking a court order will ordinarily be required.

[57] From the papers it appears that the Municipality in this matter took no action against the occupiers for years and then acted precipitately to secure an eviction. The Municipality took only cursory steps to ascertain the circumstances of the occupiers, and to establish whether they had made any effort to apply for housing. It took no steps to seek to address the problems of the occupiers at all before launching eviction proceedings, despite the fact that the land was not needed by the owners or the Municipality, and despite the fact that the occupiers are a small group of people who have resided on the land for a considerable time.

[58] Much of the argument in this Court turned on whether or not the Municipality had established on the papers that Walmer was an area under its control, so that the suggestion it made that the occupiers could relocate to Walmer established the availability of suitable alternative land within the definition of section 6(3)(c) of the Act. It is not appropriate to determine the question of eviction on the precise legal

status of Walmer. The real question in this case is whether the Municipality has considered seriously or at all the request of these occupiers that they be provided with suitable alternative land upon which they can live "without fear of eviction" until provided with housing by the Municipality. The thrust of the SCA judgment makes this clear. The lack of information concerning the status of Walmer highlighted the failure of the Municipality to show that it had responded reasonably to the dire situation of the occupiers. The availability of suitable alternative accommodation is a consideration in determining whether it is just and equitable to evict the occupiers, it is not determinative of that question.

[59] To sum up: in the light of the lengthy period during which the occupiers have lived on the land in question, the fact that there is no evidence that either the Municipality or the owners of the land need to evict the occupiers in order to put the land to some other productive use, the absence of any significant attempts by the Municipality to listen to and consider the problems of this particular group of occupiers, and the fact that this is a relatively small group of people who appear to be genuinely homeless and in need, I am not persuaded that it is just and equitable to order the eviction of the occupiers.

[60] In the circumstances, the application for leave to appeal fails and the Municipality is ordered to pay the costs of the respondents, including the costs of two counsel.

[61] It remains only to be said that this decision in no way precludes further efforts to find a solution to a situation that is manifestly unsatisfactory to all concerned. In cases like the present it is particularly important that the Municipality not appear to be aligned with one side or the other. It must show that it is equally accountable to the occupiers and to the landowners. Its function is to hold the ring and to use what resources it has in an even-handed way to find the best possible solutions. If it cannot itself directly secure a settlement it should promote a solution through the appointment of a skilled negotiator acceptable to all sides, with the understanding that the mediation proceedings would be privileged from disclosure. On the basis of this judgment a court involved in future litigation involving occupiers should be reluctant to accept that it would be just and equitable to order their eviction if it is not satisfied that all reasonable steps had been taken to get an agreed, mediated solution.

The Order:

The application for leave to appeal is dismissed with costs, including the costs of two counsel.

Chaskalson CJ, Langa DCJ, Madala J, Mokgoro J, Moseneke J, Ngcobo J; O'Regan J, Skweyiya J, Van der Westhuizen J and Yacoob J, concur in the judgment of Sachs J.

For the applicant:	A Beyleveld and RB Laher instructed by McWilliams & Elliot Inc.
For the respondents:	PWA Scott and WF Jurgens instructed by Port Elizabeth Justice Centre.