IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

REPORTABLE

CASE NO: 7396/08

In the matter between:

MEC FOR THE DEPARTMENT OF HEALTH-KWAZULU-NATAL	**APPLICANT**

Vs

E. M SHAW	**1ST RESPONDENT**
N. MALUNGA	**2ND RESPONDENT**
N.MOODLEY	**3RD RESPONDENT**
T.A MKHIZE	**4TH RESPONDENT**
M.F MASUKU	**5TH RESPONDENT**
S.G MBUYISA	**6TH RESPONDENT**
N.E MAGAQA	**7TH RESPONDENT**
G. M ZONDI	**8TH RESPONDENT**
Z.B MCHUNU	**9TH RESPONDENT**
F.I ZUMA	**10TH RESPONDENT**
S. NDLOVU	**11TH RESPONDENT**
S.G NDLOVU	**12TH RESPONDENT**
T.N MTHABELA	**13TH RESPONDENT**
D.S MGOBHOZI	**14TH RESPONDENT**
K.M HLENGWA	**15TH RESPONDENT**
J.J NDAWONDE	**16TH RESPONDENT**
D.C DEYZEL	**17TH RESPONDENT**
M.S MKHIZE	**18TH RESPONDENT**
M.Z MLMABO	**19TH RESPONDENT**
P.F MAZIBUKO	**20TH RESPONDENT**
T.S ZONDI	**21TH RESPONDENT**
P.A NGCOBO	**22ST RESPONDENT**
L.J NGCOBO	**23ND RESPONDENT**
K.Y BIYASE	**24RD RESPONDENT**

JUDGMENT

MADONDO J

INTRODUCTION

[1] This is an application in which the applicant seeks an order in terms of section 4(1) and (6) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1988 (PIE Act) in the following terms:

(a) That the respondents and all those who illegally occupy flat numbers 28, 126, 129, 131, 132, 33, 128, 130, room numbers 104, 105, 107, 202, 203, 14, 13, 12, 11, 9, 102, the Old Nurses Home and the Matrons Flat Residence all of which situate at the Town Hill Hospital , Hyslop Road, Pietermaritzburg, KwaZulu-Natal, be and are hereby directed to vacate the aforesaid immovable property with all their movable properties;

(b) That in the event of the respondents and all those who unlawfully occupy the immovable property referred to in paragraph (a) above through or via the respondents, failing to comply with the order sought in paragraph (a) above, the Sheriff be directed and hereby authorized to take all the necessary and reasonable steps to evict the respondents and all other persons illegally occupying the immovable property referred to in paragraph (a) above;

(c) That the Sheriff be authorized to enlist the assistance of the South African Police Service in order to give effect to the orders referred to in paragraph (a) and (b) above;

(d) That the respondents be and are hereby directed to pay costs on an attorney and client scale in the event of them opposing the relief sought in this application.

[2] The applicant is the Member of the Executive Council responsible for Health in KwaZulu- Natal Province, cited herein in his official capacity as the Nominal head of the Department of Health in KwaZulu-Natal Province.

[3] The first respondent is E.M Shaw, a major female Staff Nurse in the employ of the applicant and, residing at flat 28, Female Nursing Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg.

[4] The second respondent is N. Malunga, a major male Nursing Assistant in the employ of the applicant, and residing at Flat 126, Male Nursing Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, kwaZulu-Natal.

[5] The third respondent is N. Moodley, a major female Nurse in the employ of the applicant and, residing at Flat 129, Female Nursing Residence, Town Hill Hospital premises, Hyslop Road, Pietermaritzburg, KwaZulu Natal.

[6] The fourth respondent is T.A Mkhize a major female Assistant Nursing Manager in the employ of the applicant, and, residing at Flat 131, Female Nursing Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu Natal.

[7] The fifth respondent is M.F Masuku a major female Pharmacy Assistant in the employ of the applicant and, residing at flat 132, Female Nursing Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu Natal.

[8] The sixth respondent is S. G Mbuyisa, a major male Nursing Assistant in the employ of the applicant and, residing at room 104, Female Nursing Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu Natal.

[9] The seventh respondent is N.E Magaqa, a major male Nursing Assistant in the employ of the applicant and, residing at room 105, Male Nursing Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu- Natal.

[10] The eighth respondent is G. M Zondi, a major male Nursing Assistant in the employ of the applicant and, residing at Room 107, Male Nursing Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu- Natal.

[11] The ninth respondent is Z.B Mchunu, a major female Nursing assistant in the employ of the applicant and, residing at Flat 33, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu- Natal.

[12] The tenth respondent is F.I Zuma, a major female Staff Nurse in the employ of the applicant and, residing at Room 128, Female Nursing Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu-Natal.

[13] The eleventh respondent is S. Ndlovu, a major female Nursing Assistant in the employ of the applicant and, residing at Flat 130, Male Nursing Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu- Natal.

[14] The twelfth respondent is S. G Ndlovu a major male Nursing Assistant in the employ of the applicant and, residing at room 202, Female Nursing Residence Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu-Natal.

[15] The thirteenth respondent is T.N Mthabela, a major male Staff Nurse in the employ of the applicant and, residing at Room 203, Female Nursing Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu-Natal.

[16] The fourteenth respondent is D. Q Mgobozi, a major male Professional Nurse in the employ of the applicant and, residing at Room 14, Male Nursing Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu- Natal.

[17] The fifteenth respondent is K.M Hlengwa, a major male Professional Nurse in the employ of the applicant and, residing at Room 13, Male Nursing Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu- Natal.

[18] The sixteenth respondent is J.J Ndawonde, a major male Staff Nurse in the employ of the applicant and, residing at Room 12, Male Nursing Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu- Natal.

[19] The seventeenth respondent is D. Deyzel, a major male Nursing Assistant in the employ of the applicant and, residing at Room 11, Male Nursing Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu- Natal.

[20] The eighteenth respondent is S. Mkhize, a major male Nursing Assistant in the employ of the applicant and, residing at Room 9, Male Nursing Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu- Natal.

[21] The nineteenth respondent is M.Z Mlambo, a major male Nursing Assistant in the employ of the applicant and, residing at Room 102, Male Nursing Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu- Natal.

[22] The twentieth respondent is P.F Mazibuko, a major male Artisan Painter in the employ of the applicant and, residing at Old Nurses Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu- Natal.

[23] The twenty first respondent is T.Z Zondi, a major male Artisan in the employ of the applicant and, residing at Old Nurses Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu- Natal.

[24] The twenty second respondent is P.A Ngcobo, a major male Artisan in the employ of the applicant and, residing at Old Nurses Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu- Natal.

[25] The twenty third respondent is L.J Ngcobo, a major male Artisan in the employ of the applicant and, residing at Old Nurses Residence, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu- Natal.

[26] The twenty fourth respondent is K.Y Biyase, a major female Nursing Assistant in the employ of the applicant and, residing at Matrons Flat, Town Hill Hospital grounds, Hyslop Road, Pietermaritzburg, KwaZulu- Natal.

[27] However, on the date of the hearing of the application, 29 September 2009, the applicant indicated that it was abandoning its application for eviction orders against the fourth, eighth, eleventh, twelfth and the nineteenth respondents for various reasons. The fourth and eighth respondent had vacated

their residences at Nurses' Home Town Hill Hospital, the eleventh and twelfth respondents died after the institution of these proceedings and the nineteenth respondent had left the employ of the applicant and vacated the Town Hill Hospital premises.

POINTS IN LIMINE

[28] The respondents have raised two points in limine. The first point is that the termination of the lease agreements entered into between the parties is the matter which falls to be determined exclusively by the Labour Court in terms of section 157(1) of the Labour Relations Act, 66 of 1995 (LRA). The second is that the applicant failed to comply with the provisions of section 4(2) of PIE Act in that it failed to follow the proper procedure, in this regard, as laid down in Ubunye Co-operative Housing (Association Incorporated Under Section 21) v Mbele and others NPD Case NO: 3754/2005.

JURISDICTION

[29] The respondents contend that since the real nature of this matter is an employment – related dispute, which is properly the subject for dispute resolution under the auspices of either the Public Service Coordinating Bargaining Council (PSCBC) or the Public Health and Welfare Sectional Bargaining Council (PHWSBC), the dispute resolution procedure provided for by the LRA must be followed. According to the respondents the issue involved in this matter has arisen in the overall sphere of employment relations and it concerns the interpretation and/or application of employee Housing Policy. It has been argued

on behalf of the respondents that the remedies provided by the LRA must be exhausted before the issue can be raised in the High Court. In support of the said argument I have been referred to the case of CHIRWA V TRANSNET LTD and others 2008(4) SA 367 (CC) 389 D-E.

[30] The respondents allege that the applicant has failed to take proper steps to deal with this matter through mechanisms provided by the framework created by the LRA.

[31] On the contrary, the applicant avers that the respondents were the occupiers of the official accommodation in terms of the lease agreements, entered into between the parties. The applicant therefore contends that by signing the lease agreements the respondents had agreed that their occupation would be subject to the terms and conditions contained in such agreements.

[32] However, it is common cause between the parties that the document which sets out the housing policy has been prepared in terms of the PSCBC Resolution 3 of 1999. This is a collective agreement dealing with the Remunerative Allowances and Benefits for the employees including employee housing. The parties to this collective agreement are various Trade Unions including National Education Health and Allied Workers Union (NEHAWU) and the Department of Public Service and Administration, representing the government.

[33] The parties to the present dispute are the Department of Health, KwaZulu-Natal Province and NEHAWU, representing the respondents. The respondents aver that in the event of a dispute arising between the parties relating to a matter that is the subject of a collective agreement, it is open to any of the disputants to refer the dispute to the Bargaining Council for resolution. However, it is not in dispute that, the matter was on 22 February 2008 referred to the Bargaining Council in terms of the dispute resolution procedures of the Council for resolution and that it was resolved that this matter was a mere landlord and tenant issue.

[34] In casu, the Court is called upon to determine the lawfulness of the occupation of the Town Hill Hospital premises by the respondents. It is common cause that the respondents acquired the right to official accommodation on the aforesaid premises through the conclusion of the lease agreements with the applicant. However, at a later stage the applicant terminated such lease agreements. According to the applicant the respondents are holding over after its lawful termination of the said leases. In the premises, the applicant contends that the respondents' action is not a matter that is required to be adjudicated by the Labour Court as contemplated by section 157(1) of the LRA, and that, therefore, the jurisdiction of the High Court is not ousted.

[35] Section 157(1) of the LRA provides that subject to the Constitution and the Labour Appeal Court's jurisdiction, and except where the LRA itself provides otherwise "the Labour Court has exclusive jurisdiction in respect of all matters

that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labout Court".

[36] In Fredericks and others v MEC For Education and Training, Eastern Cape and others 2002(2) SA 693(CC) 713F **O' Regan J** had the following to say:-

> "As there is no general jurisdiction afforded to the Labour Court in employment matter, the jurisdiction of the High Court is not ousted by section 157(1) simply because a dispute is one that falls within the overall sphere of employment relations. The High Court jurisdiction will only be ousted in respect of matters that are to be determined by the Labour Court in terms of the Act."

[37] In Fedlife Assurance Ltd v Wolfaardt 2002(1) SA 49 (SCA) at 61E-H, it was held that whether a particular dispute falls within the terms of section 191 of LRA depends upon what is in dispute. The fact that an unlawful dismissal might also be unfair was held to be irrelevant to that inquiry. It was stated that a dispute falls within the terms of the section only if the "fairness" of the dismissal is the subject of the employee's complaint. Where it is not, and the subject in dispute is the unlawfulness of the dismissal, the fact that it might also be, and probably is, unfair is quite coincidental for that is not what the employee's complaint about. In this case the Court was asked to determine the lawfulness of the dismissal of an employee. The Court concluded by holding that the dispute about unlawfulness of an employee's conduct as opposed to unfairness was not a matter required to be adjudicated by the Labour Court as contemplated by section 157 (1).

[38] In Media 24 Ltd and Another v Grobler 2005 (6) SA 328 (SCA) 353 A-B, the Court held that a dispute about unlawfulness of an employer's conduct as opposed to its unfairness was not a matter required to be adjudicated by the Labour Court as contemplated by section 157(1). In this case an employee had instituted a delictual claim against her employer arising out of the negligent failure of the employer to prevent the employee from being sexually harassed in the work place. The Court concluded that the High Court's jurisdiction was not excluded.

[39] In Boxer Superstores Mthatha and Another 2007 (5) SA 450 (SCA), the applicant had claimed that her dismissal was unlawful and she formulated her claim carefully to exclude any recourse to fairness, relying solely on contractual unlawfulness. The Court held that what matters most in this regard was the subject in dispute. The High Court was held to have jurisdiction to entertain an application relating to such employee's dismissal.

[40] A survey of the authorities dealing with the scope of the jurisdiction of the High Court to determine certain complaints arising out of an employment relationship, has shown that the guiding principle, in this regard, is the subject of the applicant's complaint. In Boxer Superstores, supra, it was held that what matters most, is not the form of the employee's complaint but the substance of the complaint.

[41] In Chirwa v Transnet and Others 2008 (4) SA 367 (CC) 396F-397A, NGCOBO J, as he then was, criticized the approach adopted in other decided cases where the subject of the applicant's complaint was held to be a decisive factor as it leaves it to the employee to decide in which Court the dispute is to be heard. He held that if the substance and the nature of the dispute is one that falls under the LRA, the Labour Court has exclusive jurisdiction under section 157(1). See also Mgijima v Eastern Cape Appropriate Technology Unit and Another 2000(2) SA 291 (Tk) 309C-E and Mcosini v Mancontywa and Another (1998) 19ILJ 1413 (Tk) at 1413 C-E, also quoted with approval in Chirwa case.

[42] In casu, it is not the respondents who have instituted the proceedings against the applicant for an alleged unfair termination of their leases or unfair allocation of the accommodation, but it has been the applicant against them. After the ruling by the Bargaining Council that the issue between the parties was a matter purely between the landlord and the tenant, the respondents did not make any attempt, at all, to pursue the matter further in the dispute resolution mechanisms provided for by the LRA, through to the Labour Court. This detracts from the truthfulness of the respondents' statement that the termination of their leases by the applicant is being challenged on the basis of unfairness and irrationality of the applicant's conduct in terminating such leases. The applicant seeks an eviction order against the respondents on the basis that their continued occupation of the premises in question, is unlawful.

[43] It is common cause between the parties that the Housing Policy was prepared in terms of the provisions of PSBC Resolution 3 of 1999. In terms of section 24 of LRA the disputes about interpretation of collective agreements are to be referred to the commission for Conciliation, Mediation and Arbitration (CCMA) or council whatever the case may be, for conciliation and arbitration though to the Labour Court. In the present case, the agreement relating to Housing Policy (referred to above) provides for a procedure to resolve any dispute about its interpretation and applications. Clause 8 of the PSBC Resolution provides:-

> "If there is a dispute about the interpretation of the agreement or this resolution any party may refer the matter to council for resolution in terms of the dispute resolution procedure of the council."

Be that as may, it is also common cause that the dispute relating to the applicant's termination of the lease agreements entered into between the parties, was in February 2008 referred to the Bargaining Council for resolution and that it was resolved that it was purely a matter between the landlord and tenant.

[44] It is common cause that the right to official accommodation as an employment benefit had resulted from a collective agreement. However, upon the conclusion of the lease agreements, in terms of which the applicant became a lessor and the respondents lessees, the right to accommodation as an employment benefit ceased to exist and its place was taken by the common law right to the official accommodation, arising from the aforesaid contracts of lease, save that of the 20th respondent.

[45] The respondents aver that when they signed the lease agreements, they were not aware that they were thereby entering into lease agreements with the applicant. The general principle of interpretation of contracts, in this regard, is that a person who signs a document thereby signifies his or her assent to the contents of the document. See R H Christie, the Law of Contract 4th Edition P199 and Burger v Central SAR 1903 TS 571 at 578. In the present case, the documents are headed in capital letters “Agreement of Tenancy” and more so, the respondents are learned people, who in the circumstances of this case could not have misunderstood the aforesaid documents. In the premises, the averment by the respondents that at the time they signed the documents in question, they were not aware that they were then concluding lease agreements with the applicant cannot, therefore, hold water. As a result, the factual dispute whether the respondents were at the time of signing the documents aware that they were thereby entering into the lease agreements with the applicant is resolved in favour of the applicant.

[46] It goes without saying that by concluding lease agreements the parties intended that the tenancy between them be governed by the terms and conditions contained in such agreements. It, therefore, follows that in the event of a dispute arising between the parties on the terms and conditions embodied in the lease agreements, the common law must apply. When terminating the contracts of lease the applicant was acting in its capacity as the lessor, but not as the employer. Accordingly, it stands to reason that the respondents cannot be allowed to revert to the collective agreement or to the dispute resolution

mechanisms as provided for by the LRA in an effort to resolve the dispute, simply because the matter had originally arisen from the overall sphere of employment relations.

[47] In Chirwa, supra at 389 D-E the learned Judge of the Constitutional Court, **Skweyiya J**, had the following to say in this regard:-

> "… even if Ms Chirwa, or a similarly situated employee, sought to challenge the dismissal by relying on a constitutional issue other than one implemented through PAJA (as has been done here by relying on s195 of the Constitution), for example discrimination, it is necessary that all remedies under the LRA are exhausted before raising such an issue in a different forum. This is required so that the LRA and its structures, which were crafted to provide a comprehensive framework for labour dispute resolution, are not undermined. "

[48] In the Chirwa case, the applicant had initiated proceedings in the CCMA on the grounds that her dismissal was unfair. When conciliation failed to resolve the dispute, she did not proceed with the CCMA process. Instead, she instituted proceedings in the High Court alleging that in dismissing her, her employer had failed to comply with the mandatory provisions of LRA and that its conduct was therefore in breach of her constitutional right to just administrative action as given effect to by PAJA.

[49] In the present case, the proceedings were initially, instituted in the Bargaining Council and it ruled that this matter was purely a landlord and tenant issue. However, it was then still open to the respondents to pursue the issue further through to the Labour Court, if they had felt aggrieved by the outcome. The reference of the matter to the Bargaining Council occurred notwithstanding

the fact that the right to accommodation at the Town Hill Hospital premises was then regulated and governed by the terms and conditions of the lease agreements, which were purely common law contracts. Unlike in Chirwa case, it cannot be said of the applicant that it has failed to complete the process initiated in the Bargaining Council. Nor do the lease agreements contain an arbitration clause providing that in the event of a dispute arising between the parties in respect of any of the terms or conditions of the lease agreement, the dispute would be referred to arbitration and that the decision of the arbitration would be final and binding on the parties.

[50] The respondents challenge the lawfulness of the applicant's conduct at the time when it terminated their leases. The substance and the nature of the dispute between the parties therefore hinges upon the lawfulness of the respondents' continued occupation of the premises in question *vis-à-vis* the lawfulness of the applicant's conduct when it terminated the respondents' leases. The unlawfulness of the conduct of the employer, as opposed to its fairness, has also been held to grant this Court jurisdiction in cases related to the dismissal of an employee even under circumstances violating the provisions of section 191 of the LRA. See Fedlife case, supra, at 61 G-H. Similarly, in my view, this Court has jurisdiction to entertain an application for the eviction of the respondents from the property in question.

SECTION 4(2) NOTICE

[51] I now turn to consider whether there has been compliance with the procedure laid down for an eviction application under PIE Act. Section 4(2) Notice is objected on the grounds that it did not comply with the provisions of the section since it was served on the respondents and the Msunduzi municipality, as the municipality having jurisdiction, after the date of hearing of the proceedings. Secondly, the subsequent service of the aforesaid notice was not properly directed and authorized by this Court. The respondents, therefore, contend that the approved procedure laid down by the Full Bench of this Division in Ubunye case, supra, was not followed. Section 4(2) of PIE Act provides:-

> "At least 14 days before the hearing of the proceedings contemplated in sub-section (1), the Court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction."

[52] In Ubunye case, the Court held that "a notice of these proceedings" must be served on the unlawful occupier and the municipality. That must take place 14 days before the hearing of those proceedings. The Court also held that an order of Court is required directing that such service take place.

[53] In Cape Killarney Property Investments (Pty) Ltd v Mahamba 201 (4) SA 1222(SCA) at 1227 F-H, it was held that the phrase "the Court must serve written and effective notice of the proceedings" in section 4(2) intended to mean that the contents and the manner of service of the notice must be authorized and directed by an order of the Court concerned. Further, that in High Court proceedings section 4(2) notice can be directed and authorized by the Court only after all the

papers on both sides have been served (at 1228 B-D). In the said case the requirements of section 4(2) were held to be peremptory.

[54] In Unlawful Occupiers, School Site v City of Johannesburg 2005(4) 199 (SCA) 209 G-H, **Brand JA** said:

> "… it was held in Cape Killarney Property (at 1227 E-F) that the requirements of section 4(2) must be regarded as peremptory. Nevertheless, it is clear from the authorities that even where the formalities required by the statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved. (see eg. Nkinsimane and others v Santam Insurance Co. Ltd 1978(2) SA 430(A) at 433 H-434B; Weenen Transitional Local Council v Van Dyle 2002(4)SA 653 (SCA) in para 13)."

It appears from Unlawful Occupiers, School Site case that though the requirements of section 4(2) are peremptory, a deviation therefrom will not necessarily be fatal. The material question remains whether, despite its defects, the section 4(2) notice had in all the circumstances achieved the Legislature's goal.

[55] On proper construction of section 4(4) of PIE Act, the purpose of serving the section 4(2) notice upon the unlawful occupier 14 days before the hearing of the application proceedings is to apprise such occupier of the intended proceedings for an eviction order against her or him, the grounds for such application and to afford her or him adequate opportunity to elect whether or not to defend the intended application. In, my view, what matters most in determining whether there has been due compliance with the provisions of section 4(2) is whether the intended results have been achieved, but not what sequence the

application has followed. If the answer to the question is in the affirmative, whether or not the sequence set out in the Act has been followed, is immaterial.

[56] The question whether the section 4(2) notice had despite its deficiencies achieved its purpose, cannot be considered in the abstract and the answer thereto will depend on what the respondents had already known when the notice was ultimately served upon them. The question whether section 4(2) requirements have been met is, therefore, not a question of law but of fact.

[57] In casu, the applicant set down an application for an order authorizing and directing the issue of the notice in terms of section 4(2) of PIE Act. The Second Order Prayed in the same application would be sought on the later date in the event of the respondent not opposing the application. The matter served before this Court on 24 June 2008 for the First Order Prayed. However, the application papers were served on the respondents prior to the hearing of the application for a First Order. On 24 June the respondents were then represented by Advocate Blomkamp who indicated that the application for the First Order was opposed on the ground that this Court lacked jurisdiction to entertain the application.

[58] On 22 August 2008 the respondents filed their answering affidavit. In paragraph 70 of their answering affidavit the respondents waived the benefit of having a section 4(2) notice served upon them, stating that they were then legally represented in the matter and that they were then au fait with all the aspects enumerated in section 4(5) (a-d) of PIE Act, and of which the notice would have

informed them. However, the respondents consented to the notice being served on the Msunduzi Municipality on an *ex parte* basis at some date, 14 days prior to the hearing of the Second Order Prayed. Thereafter, the applicant filed its replying affidavit on 12 March 2009. Subsequently, the matter was set down and it served before **Mnguni J** on 25 May 2009. After considering all the relevant facts **Mnguni J** granted an application for the First Order Prayed, authorizing and directing the service of section 4(2) notice on the respondents. The matter was then set down for hearing on 26 June 2009 on the opposed roll. However, in their Heads of Argument the respondents alleged that they had made a mistake by waiving the benefit of having section 4(2) notice served upon them. They then contended that since section 4(2) notice had not been served upon them 14 days prior to the date of hearing the, Second Order Prayed in which the eviction of the respondents was sought, could not, therefore, be granted.

[59] The order issued by **Mnguni J** on 25 May 2009 authorized the Registrar of this Court "to issue notices in respect of the respondents annexed to the Notice of Motion - marked "A" on a date 14 days prior to the hearing of the Eviction application to be instituted by the applicant". It was also directed in the order that the notice should be served on the respondents personally. Leave was also granted to serve the notice on Msunduzi Municipality. Subsequently, the notice was served upon the respondents and the Municipality on 7 July 2009.

[60] The respondents contend that the applicant should have re-launched the application on an *ex parte* basis for the order authorizing and directing the service of section 4(2) notice 14 days prior to a specific date of hearing. Since the notice did not have a specific date of hearing and was not served 14 days prior to such date, the respondents contend, the order as well as its subsequent service on the respondents was fatally defective.

[61] On 13 August 2009 the notice of proceedings in terms of section 4(2), (5) and (6) of PIE Act was issued, setting out all the grounds of the intended eviction of the respondents from the property in question and notifying the respondents that they were entitled to appear before this Court on 21 September 2009 to defend the application. It is common cause that when the section 4(2) notice was served upon the respondents, the respondents were then legally represented and that they already knew what case they had to meet. They also knew what was expected of them. In fact the service of the section 4(2) notice upon them was purely academic.

[62] With regard to the order issued by my brother, **Mnguni J**, on 25 May 2009, the respondents had committed an error by waiving the benefit of having a section 4(2) notice served upon them. Had it been served upon them soon after it was authorized, there would be no need to serve it again. It was the conduct of the respondents which resulted in such an anomalous situation. In the premises, the respondents as the wrongdoers cannot be allowed to benefit out of their own wrongdoing or mistake. The fact that the date of the hearing was not specified in

the notice, was not, in my view, critical to the extent that the failure to give it at the time when the notice was served upon the respondents, could render the order and its service defective. The order intended merely to inform the respondents that the notice would be served upon them 14 days prior to the hearing of the eviction application to be instituted by the applicant. After the specific date of hearing was set, the notice was once again served upon the respondents with such date of hearing. The alleged defect was, in my view, cured when the notice was again served upon the respondents 14 days prior to the date of hearing.

[63] Technically, the latter service only served to complete the process prescribed by the relevant provisions of the PIE Act. The respondents did not suffer any prejudice and the objective of the legislation, as outlined above, was achieved. In the premises, it must, in my view, be held that despite the stated defect in the earlier service of the notice and the order issued by **Mnguni J** on 25 May 2009, authorising and directing the service of a section 4(2) notice upon the respondents, there has been substantial compliance with the requirements of the provisions of section 4(2) and (5) of the PIE Act.

FACTUAL BACKGROUND

[64] The facts of this matter are largely common cause. All the remaining respondents currently occupy flats, rooms and other dwellings situate at Town Hill Hospital premises, Hyslop Road, Pietermaritzburg, KwaZulu-Natal, through the lease agreements entered into between the parties with the exception of the

20th respondent. Prior to July 2004 the allocation of accommodation was made on an ad hoc basis. During July 2004, the Department of Health (the Department) and NEHAWU as the representative of the respondents adopted a Housing Policy in order to regulate the allocation of accommodation to all the employees of the Department.

[65] Subsequently, the Departmental Housing Committee, which is, amongst other things, responsible for the implementation of the lease agreements between the parties, was established.

[66] All the respondents with the exception of the 20th respondent entered into lease agreements with the applicant. According to the applicant such agreements were valid for a period of two (2) years, commencing on the 1st of July 2005 and ending on the 30th of June 2007. After the expiry of the lease period, the applicant alleges that no other lease agreements were entered into. According to applicant the respondents have, therefore, been in unlawful occupation of the property since 30 June 2007. The respondents deny that their leases were valid for two (2) years, and they aver that their lease agreements were of indefinite period terminable on the employer determining that the respondents were no longer requiring the accommodation for the purposes of carrying out of their duties, and that in which event the applicant was obliged to give them three months' notice to vacate the premises.

[67] On 16 April 2007, Makhubu, in his capacity as the chairman of the Housing Committee, issued notices to all the residents. In such notices, the residents were advised that their lease agreements would expire on 30th June 2007 and that they should apply for the renewal of their leases. The 1st to the 8th respondents applied for the renewal of their lease agreements, but their applications were turned down on the grounds that they did not meet the criteria set out in paragraph 6.1 of the Housing Policy.

[68] However, the 9th to 24th respondents did not apply for the renewal of their lease agreements. In consequence thereof, according to the applicant these respondents are not entitled to occupy the premises, they presently occupy. The applicant avers that since none of the respondents has a valid lease agreement with it, they are in unlawful occupation of the premises.

[69] Subsequent to the meeting of Integrated and Labour Committee and the stake holders held on 23rd January 2008, the Task Team, formed at such meetings, recommended that all the people who did not meet the set criteria and those who did not renew their leases should vacate the premises in question by the 1st of February 2008.

[70] On 6th February 2008, Circular Number 2 of 2008 was distributed to the 9th to 24th respondents requesting them to vacate the property by 10th February 2008. However the said respondents ignored such notice. The second notice was served upon them by the Sheriff of this Court. Notwithstanding such notice,

according to applicant the respondents continued to occupy the property without its express or tacit consent. The applicant, therefore, contends that the respondents' continued occupation of the premises in question is unlawful. Further, that, accordingly, the respondents' conduct falls squarely within the ambit of the provisions of section 4 and 6 of the PIE Act.

ISSUE

[71] The issue raised in this matter is whether the respondents' occupation of the Town Hill Hospital premises is lawful;

LAWFULNESS OF THE OCCUPATION OF THE PREMISES IN QUESTION

It is common cause that the respondents with the exception of the 20th respondent received the use and enjoyment of the immovable property in question though lease agreements entered into between the parties in return for the payment of rent. See Genac & Properties JHB (Pty) Ltd v NBC Administrators CC 1992(1)SA 566(A) 576D-E. According to the applicant such leases were terminated after the 1st to 8th respondents had failed to have their leases renewed on the ground that they did not meet the set criteria, and after the 9th to 24th respondents had failed to apply for the renewal of their lease agreements. The applicant's case is that the respondents have remained in unlawful occupation of the premises in question despite the fact that it had lawfully cancelled their leases. According to the applicant the respondents have been in unlawful occupation of the property since 30 June 2007. The

respondents aver that the applicant was not entitled to cancel their leases and that they therefore remain of full force and effect.

[72] If both parties agree that there is a lease, the onus is on the plaintiff to justify the termination of the lease. The applicant avers that the lease agreements entered into between the parties were valid for two (2) years, commencing on the 1st of July 2005 and terminating on the 30th of June 2007. On the contrary, the respondents aver that the terms of the lease dealing with the "period of lease" was framed in such a way as to suggest that the leases would be of indefinite duration and that they would only terminate when the applicant determined that the respondents were no longer requiring the accommodation in question for the purposes of carrying out their duties and, that in which event the applicant was obliged to give the respondents' three months' notice to vacate the premises.

[73] For the sake of clarity, I have found it appropriate to quote the clause relating to the "period of lease" in the lease agreements in full:

> "Notwithstanding the date of signature hereof, the lease shall be from the date of allocation of the premises to the lessee, terminating either upon the employer determining that it is no longer required for the employee/ lessee to occupy the premises to carry out her / his work or upon written notice given by the Lessee of her / his intention to vacate the premises. The commencement dated shall be:- _____
>
> This agreement may be terminated by the Lessor by giving three (3) months notice in writing of such termination or by the Lessee by giving one (1) months notice in writing of such termination."

The parties stipulated in the lease agreement not only the grounds for the termination of such agreement, but also what notice each party should give in the event of it wishing to terminate the lease contract. The clause of the lease agreement relating to the period of lease, is crafted in such a way that it can only reasonably be construed that the lease was for an indefinite period and that it was only terminable at the instance of the lessor if the lessor determined that the lessee was no longer requiring the accommodation for the purposes of carrying out his/ her duties. Within the four corners of the agreements nothing shows that the lease agreement was valid for two (2) years, ie. Commencing on the 1st of July 2005 and terminating on 30 June 2007, as the applicant alleges.

[74] The applicant admits that the lease agreements do not provide for a two year period, and alleges that at the meeting held between the Town Hill Hospital Management and the employees' representatives during September 2005, it was agreed that all individual employees would orally enter into lease agreements which would be valid from 1st July 2005 to 30th June 2007. Had the alleged oral agreement been intended to form part of the lease agreement, in my view, it would have been reduced to writing and incorporated in to the lease agreements as addenda to such agreements. The allegation regarding the oral agreement offends against the parol – evidence rule which prevents a party from presenting extrinsic evidence to contradict, add to, detract from, modify or redefine the terms of a written contract. See Lowrey v Steedman 1914 AD 532; Marquard & Co v Biccard 1921 AD 366; Union Government v Vianini Ferro – Concrete Pipes (Pty)

Ltd 1941 AD 43; Venter v Birchholtz 1972 (1) SA 276(A) and Johnston v Leal 1980(3) SA 927(A).

[75] Now, it seems to be common cause that there is nothing within the four corners of the lease agreements which can upon proper construction be said to be meaning that the leases were valid for a period of two (2) years or for any other specific period. However, the applicant in its attempt to explain such conspicuous absence of the clause relating to the duration of the lease in the agreements, in its supplementary affidavit, avers that although the leases did not expressly state that they were valid for a period of two years, by entering into lease agreements with the applicant the respondents were, in turn, subscribing to the provisions of paragraph 6.1 of the Housing Policy No1/2001.

[76] The aforesaid Housing Policy provides:

> "6.1 An annual review of tenancy will be carried out. Tenants occupying official accommodation will need to make application in writing and giving reason as to why they wish to remain in official accommodation for a further year. The Housing Committee will consider all such applications, and all tenants need to understand that continued occupation may not be automatically granted."

The contention by the applicant that the terms limiting the duration of lease be implied cannot hold water since within the four corners of the lease agreements there is nothing to suggest that an agreement had been reached between the

parties that paragraph 6.1 of the Housing Policy would be applicable to the lease agreements, entered into between the parties.

[77] The respondents contend, correctly so, that it would be an absurdity for any person to sign a lease in September 2005, giving him or her the right to occupy premises for a period of two years commencing on a date more than two year period prior to the date of signature. This, is evidenced by the commencement dates in various lease agreements, entered into between the parties, which differ so markedly from one another. For instance, in respect of the first respondent's lease agreement, Annexure "ZGM6.1" the commencement date is 1997 – 03 -01; the commencement date of the lease agreement in respect of the second respondent, "Annexure ZGM6.2" is 01/02/05; in respect of the 3rd respondent "Annexure ZGM6.3", is April 1996; and in respect of the 4th respondent, "Annexure ZGM6.4", is 2002.03.01. The list is not exhaustive. Annexures "ZGM6.6" and "ZGM6.7" for instance, do not have commencement dates. In the premises, it cannot be said from which dates the period of two (2) years in respect of the 6th and 7th respondents was calculated.

[78] The applicant, further, alleges that all the respondents were fully aware in September 2005 that their leases would expire on the 30th of June 2007. However, it is common cause that the 20th respondent did not enter into a lease agreement with the applicant at all. It therefore, follows that his right to accommodation in question, is still governed by the collective agreement and/or Housing Policy.

TERMINATION OF RESPONDENTS' LEASES

[79] In casu, it is common cause that the applicant as the lessor terminated the lease agreements between the parties. It is evident from the lease agreements that the parties did not only stipulate the ground for the termination of the lease by the lessor, but also the notice period the lessor should give the lessee, when terminating the contract of lease. For the respondents to be said to be in unlawful occupation of the immovable property in question, the termination of their leases must have been lawful. The reason for termination of the lease by the lessor is clearly stipulated in the lease agreement as the determination by the employer that the respondents are no longer requiring the accommodation for the purposes of carrying out their duties.

[80] The reason for terminating the leases of the respondents is clearly stated in the document entitled "Re: Lease Renewal Application" issued by the Chair person of the Housing Committee to the residents on 18 December 2007, as the "failure to submit the lease renewal application".

[81] Failure to renew a lease agreement was in terms of the lease agreements entered into between the parties not a ground for terminating the leases. However, in Matador Buildings (Pty) Ltd v Harman 1971(2) SA 21 (C) 28A, it was held that a party who repudiates a contract giving a wrong reason for his repudiation is not bound by the reason he gives and, if in fact there exists a

justifiable reason for repudiation, he is entitled to take advantage of it, notwithstanding the wrong reason he may have given.

[82] It appears from Circular No.2, "Annexure ZGM10," dated 6 February 2008 that, the material portion of the notice given to all the tenants in this regard was in the following terms:

> "The housing task team recommended that those from around **PIETERMARITZBURG** and those who did not apply should vacate the **ROOMS/FLATS/HOUSES.**
> It is required that these residents should vacate by the 10th February 2008".

This had been preceded by Circular No, 5 of 2007, "ZGM7" dated 16 April 2007 and addressed to all tenants, in which the tenants were reminded that in terms of the Housing Policy the lease agreements they had signed would expire on 30 June 2007. The tenants were then requested to apply for the renewal of their leases.

[83] The final notice, "Annexure ZGM11", requesting the tenants to vacate the premises within fourteen days of the date of the notice was issued, on 9 April 2008. To the said notice, copies of the Circular No.5 of 2007 and Circular No.2 of 2008 were attached.

What is noticeable is that none of the documents referred to above, was specially addressed to any of the respondents in this case. Further, the grounds for terminating the leases have been that some of the tenants resided in

Pietermaritzburg and that they had failed to renew their leases, after their expiry on 30 June 2007.

[84] The aforesaid notices were manifestly invalid in that “residing locally” and the “failure to renew their leases” were not in terms of their lease agreements valid grounds for the termination of their leases. The form in which the said notices were couched could not on itself justify an order for ejectment. The notices in fact, fell short of justifying the reason and the statement of fact contained therein. See also R vs Naidoo 1959 (4) SA 233 (N) 234A-B. The applicant was in terms of the lease agreements only required to determine whether the respondents were no longer requiring the accommodation for the purpose of carrying out their duties, notify them of the termination of their leases and to give them three (3) months’ notice to vacate the premises in question. A pre-termination consultation period was not provided for in the lease agreements. See Harlequin Duck Properties 294 v Fieldgate t/a Second Hand Pose 2006(3) SA 456(C) 466G-H.

[85] There is nothing to show that the leases were periodical contracts which should be renewed at certain intervals. For the lease to be terminable on the grounds of the failure to renew it, there must be a clause in the contract to the effect that in the event of the lessee failing to renew the lease, the contract of lease would lapse. In the present case, there is no such clause contained in the lease agreements entered into by parties. It, therefore, follows that the

respondents' failure to renew their leases, was not a justifiable reason for the termination of the leases.

NOTICE TO VACATE THE PROPERTY

[86] After sufficient and reasonable notice has been given to the lessee, a lessor is entitled to cancel the lease and, thereafter, to apply for his ejectment. See Goldberg vs Buytendag Boerdery Beleggings 1980 (4) SA 776 (A).

In casu, in terms of the lease agreement the employer/lessor has a prerogative to determine that the employee is no longer requiring the official accommodation for the purposes of carrying out his or her work, and in which event the employer is required to give the employee/lessee his/her family at least three (3) months' notice to vacate the official accommodation.

[87] The applicant in its supplementary affidavit alleges that the respondents were given the required three (3) months' notice to vacate the premises, and it points at "Annexure ZGM11" as the notice given to the respondents to vacate the premises on 16 April 2007. However, there is nothing to that effect contained in the said Annexure. In such notice, the tenants were only reminded that their leases agreements would expire on 30 June 2007 and that they should apply for their renewal of the same.

[88] The notice giving the residents one month notice to vacate the Hospital premises on the ground that they did not submit their lease renewal applications,

was dated 18 November 2007. Circular no 2, “Annexure ZGM10”, was issued on 6 February 2008 and it was therein stated that those who were residing in and around Pietermaritzburg and those who had failed to renew their leases were requested to vacate the premises by 10 February 2008. This means that they were only given three (3) days’ notice to vacate. The document headed “Final Notice to Vacate”, Annexure “ZGM11” was issued on 9 April 2008, and in such document the residents were given fourteen days to vacate the premises. In the premises, the allegation by the applicant that the respondents were given three (3) months’ to vacate the premises, is not borne out by any evidence. Nor were the respondents formally notified of the termination of their leases save those who had lodged applications for the renewal of their leases, and their applications were turned down. Even those, were given one month notice to vacate the premises. This, is evidenced by the letter dated 18 December 2007, referred to above.

[89] This, brings me to the conclusion that at no stage were the respondents given three (3) months’ notice to vacate the premises as the applicant claims in its papers. In the premises, the applicant has failed to comply with clause 2 of the lease agreement, in that it failed to give the respondent three months’ notice to vacate the premises in question.

[90] In the circumstances, I come to the conclusion that the applicant has failed to discharge the onus of proving that it was entitled to terminate the respondents’ leases, that it notified the respondents of such termination and gave them

sufficient and reasonable notice to vacate the premises in question. For PIE Act to come into operation the applicant must prove that the respondents remained in occupation of the premises in question after their contractual right to such premises has lawfully been terminated.

[91] However, it is common cause between the parties that the 20th respondent did not sign any lease agreement with the applicant at all. The 20th respondent is still in the employ of the applicant and having his employment right to the official accommodation, upon satisfaction of the set down criteria. Since the 20th respondent has received the use and enjoyment of the property as an employment benefit, his matter should have been dealt with in terms of Housing Policy No.1/2001, adopted by the parties in order to regulate the allocation of the accommodation to applicant employees. When the matter was referred to a dispute mechanism provided by the collective agreement, governing the employment benefit to housing, it was not disclosed to the Bargaining Council, that there was no lease agreement existing between the applicant and the 20th respondent. In consequence thereof, a blanket resolution was taken that this was purely a matter between the landlord and the tenant. Accordingly, the matter relating to the 20th respondent was not properly ventilated and dealt with accordingly.

[92] The applicant terminated the leases of other respondents in this case on the basis that they failed to renew their contracts of lease and that those who did apply for a renewal, had failed to meet the set criteria. The 20th respondent had

never been part to any lease agreement with the applicant. Nor had he applied for a lease agreement, let alone renewed it. He therefore still enjoys his employment benefit to accommodation and such right can only be terminated if he resigns or is discharged from his employment. The collective agreement relating to the housing of employees gives a directive as to how disputes relating to the allocation of the official accommodation are dealt with. No evidence has been adduced that such proceedings have been followed in respect of the 20th respondent alone. This, brings me to the inevitable conclusion that the applicant's conduct in terminating the 20th respondents' benefit to the official accommodation without following the appropriate procedure, was also unlawful.

CONCLUSION

[93] In casu the applicant seeks an eviction order against the respondents, with the exception of 4th, 8th, 11th, 12th and the 19th respondents in terms of the PIE Act on the basis that they are in unlawful occupation of the Town Hill Hospital premises.

A person is an unlawful occupier whether he originally took occupation of the land unlawfully or whether he refuses to vacate on the termination of his lawful occupancy. See Ndlovu vs Ngcobo, Bekker and Another vs Fika 2003(1) SA 113 (SCA). In the present matter, I am not satisfied that the termination of all the respondents' rights to official accommodation was lawful, just and equitable. Accordingly, the applicant has failed to make a case for the granting of the eviction order sought in terms of PIE Act.

ORDER

[94] The applicant's application for the eviction order against the respondents is dismissed with costs.

Date reserved on:	21/09/2009
Date delivered on:	14/12/2009
Counsel for applicant:	Adv Hemraj SC / Adv Nankan
Instructed by:	State Attorney (KwaZulu-Natal) c/o Cajee Setsubi Chetty REF: Mr Essa/24/002603/08/E/B26
Counsel for respondents:	Adv. P Hunt
Instructed by:	Ngcobo Poyo & Diedricks Inc.