THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: A369/12

In the matter between:

BREEDE VALLEI MUNISIPALITEIT **Appellant**

and

DIE INWONERS VAN ERF 18184,

DIKKOPSTRAAT 3, AVIAN PARK WORCESTER **1st Respondent**

AND 18 OTHERS **2-19 Respondents**

JUDGEMENT: 13 DECEMBER 2012

BOZALEK, J:

[1] The appellant in this matter, the Breede Valley Municipality, appeals against the order of the magistrate, Worcester, made on 9 May 2012, refusing its application for a *mandament van spolie* which it sought against the respondents in its capacity as owner of erven 18184, 18208 - 18214, 18173 - 18182 and 18195, Worcester. For the sake of convenience I shall refer to these erven as *"the property".*

[2] There are nineteen respondents none of whom are identified in the papers save for the fourth respondent, Ms Varity Valley, who filed the only opposing affidavit. The balance of the respondents are cited as the occupants of the various erven and are described simply as the unlawful occupiers of such erven. All the respondents, however, oppose the appeal.

THE BACKGROUND

[3] The property in question is part of a much larger housing project entitled Housing Project 439 encompassing some 435 residential units in Avian Park which were developed and built by the appellant in co-operation with the provincial and national government for allocation to persons who qualify for a housing subsidy. Four hundred and sixteen of these houses have already been allocated to residents of Worcester and registered in their names. The remaining nineteen houses had, prior to these proceedings, not been allocated since the process of identifying the persons who qualified therefor and obtaining the final approval of the provincial government had yet to be finalised. All the houses had, however, been completed and were ready for occupation.

[4] On 4 January 2012 Mr W Visagie ("*Visagie*a senior official in the appellant's housing department, visited the project and discovered that two of the nineteen houses had been occupied by what he described as *"unlawful occupiers"* whom, he assumed, had moved in the previous night. His attempts to negotiate with these *"unlawful occupiers"* were unsuccessful and he was forced to leave the area as tempers flared amongst them and other members of the public.

[5] The following day Visagie returned to Avian Park to find that the remainder of the nineteen houses had similarly been occupied overnight. Neither he nor his officials were able to identify the occupants. Nor was Visagie able to shed light on how the occupants gained access to the houses inasmuch as there was no visible damage to the doors or windows and they had been guarded by security guards. In his affidavit Visagie went on to describe how, on 12 January 2012, the *"unlawful occupiers"* gathered at the appellant's offices and in an unruly fashion indicated that they refused to vacate the houses in question.

[6] On this evidence, coupled with the averment that it had been in peaceful and undisturbed possession of the nineteen houses and that the respondents had taken the law into their own hands by occupying same, the appellant approached the magistrate's court for relief on an *ex parte* basis on 13 January 2012. It succeeded in obtaining a spoliation order against the respondents requiring them to restore possession of the property to the appellant. The order authorised the Deputy Sheriff to evict the respondents by 4 April 2012 should they not have vacated the property prior thereto and was couched in the form of a *rule nisi* returnable on 4 April 2012.

[7] Before the rule could be made final, however, the respondents gave notice of intention to oppose and, through the fourth respondent, filed an opposing affidavit. Fourth respondent confirmed that she had occupied one of the nineteen houses since 3 January 2012 but claimed lawful occupation thereof on the basis that Visagie had given her the necessary permission to occupy the dwelling. She claimed to have been on the appellant's housing list since 1992 and to have applied for the right to occupy one of the houses. She also set out her own personal housing history to the effect that she had lived in a house in Avian Park until it had to be sold in execution and she had been evicted on 4 December 2011. She then moved into another dwelling in the same suburb but it had been hopelessly overcrowded, eleven persons having to live in three rooms. Because of financial difficulties her attempts to find alternative accommodation had come to nothing. In her on-going dealings with Visagie he had indicated that he would allocate a house to her and eventually, on 3 January 2012, she confronted him in this regard. His response was to state that he was tired of searching for the persons who was supposed to occupy the empty houses and to give her and the other respondents permission to occupy the remaining houses. When she went to the premises the security guard opened the house for her and she therefore regarded herself and the other occupants as lawfully occupying the property. Needless to say much of the fourth respondent's version was disputed by

the appellant, most notably that Visagie gave her, or anyone else for that matter, permission to occupy the houses.

[8] Fourth respondent raised a point in *limine* in her opposing affidavit, namely, that inasmuch as the appellant's case was that she and her fellow respondents were unlawful occupiers of the property, they were entitled to the limited protection afforded by the Prevention of Illegal Eviction from an Unlawful Occupation Land Act, 19 of 1998 *"PIE".* It was upon this point that the magistrate heard argument on 11 April 2012 and held in favour of the respondents. His reasoning was brief, namely, that s 4(1) of PIE stipulated that its provisions applied to proceedings for the eviction of an unlawful occupier by an owner or person in charge of land to the exclusion of any other law or the common law. Given that it was common cause that the application had not been brought in terms of s 4, it had to fail.

GROUNDS OF APPEAL

[9] The grounds of appeal relied upon by the appellant were that the magistrate erred in finding that the *mandament van spolie* remedy was not available to it, in finding that PIE was applicable, in not finding that the houses occupied by the respondents were not their homes and, finally, in finding that the relief sought by the appellant constituted an eviction as defined by PIE.

THE APPELLANT'S AND RESPONDENTS' CASES

[10] On appeal Mr Kirk-Cohen, who appeared together with Mr Wilkin for the appellant, contended that the respondents had failed to put up any evidence or even allege that the houses which they occupied were their homes with the result that they had failed to show that they were entitled to the protection afforded by PIE and therefore that no order for their eviction could issue in these proceedings. The appellant's argument is underpinned

by a reliance on two cases, namely *Ndlovu v Ngcobo; Becker and Another v Jika* 2003 (1) SA 113 (SCA), where the reach of s 4 of PIE was first considered, and *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA), where it was held that PIE applies only to the evictions of persons from their homes.

[11] On behalf of the respondents Mr Joubert contended that the magistrate had correctly found that PIE applied and, furthermore, that the respondents had provided sufficient evidence to the effect that the property constituted their homes. He argued that it was not required of occupiers to persuade the court that the property occupied by them constituted their "*homes",* in the narrow sense contended for by the appellant, relying on the authority of *Barnett.* Mr Joubert made the additional submission that, using a purposive approach to constitutional interpretation, the word *"home"* in s 23 of the Constitution, which embodies the fundamental right not to be evicted from one's home or have one's home demolished, must be given a wider meaning than that contended for by the appellant.

DISCUSSION

[12] The precise ambit of PIE, which has given rise to much debate and judicial writing, was first authoritatively pronounced upon by the Supreme Court of Appeal in *Ndiovu.* The main issue there was whether the procedural and substantive protections against eviction from land created by PIE in favour of *"unlawful occupiers"* covered only those persons who had unlawfully taken possession of land i.e. squatters, as commonly understood in the South African context, or also persons who at one stage had enjoyed lawful possession but whose possession has subsequently become unlawful. A majority of the Court held that the ordinary definition of the term *"unlawful occupiers*" meant, within the context of PIE, that it applied to all *"unlawful occupiers"* irrespective of whether their

possession at an earlier stage had been lawful. The minority would have held that in enacting PIE the legislature had in mind squatters properly so-called, and had never intended to legislate for the case of the ex-tenant, the ex-owner or the exmortgagor i.e. cases of holding over. It was held further that buildings or structures that do not perform the function of a dwelling or shelter for humans do not fall under PIE and that unlawful possession by juristic persons of dwellings is similarly excluded.

[13] In *Barnett Vr\e* Court was required to decide whether the owners of certain holiday cottages built on sites in a remote, pristine coastal conservation area on the strength of various permits and agreements, were entitled to the protections of PIE in proceedings which in effect sought their eviction from such cottages. The Court held that PIE applied only to the eviction of persons from their homes and that the dwellings in question were not the homes of their putative owners who habitually resided elsewhere. In reaching this conclusion Brand JA, speaking for the Court, stated as follows:

> *"Thus the pivotal question is whether PIE does in fact apply. It is to that question I now turn. I believe it can be accepted with confidence that PIE only applies to the eviction of persons from their homes. Though this is not expressly stated by the operative provisions of PIE, it is borne out, firstly, by the use of terminology such as 'relocation' and [1]reside[1] (in ss 4(7) and 4(9)) and, secondly, by the wording of the preamble, which, in turn establishes a directly link with s 26(3) of the Constitution (see eg Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA) ([2002]) 4 All SA 384) in para [3]. The constitutional guarantee provided by s 26(3) is that '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'*

[14] Brand JA then turned to the principal question before the Court, namely whether the holiday cottages in question could be said to be the homes of the appellants, in the context of PIE. In answering this in the negative the learned judge stated as follows:

> *"Though the concept 'home' is not easy to define and although I agree with the defendants' arguments that one can conceivably have more than one home, the term does, in my view, require an element of regular occupation with some degree of permanence. "*

[15] Relying on this broad definition, Mr Kirk-Cohen submitted that the respondents had presented no evidence either that the houses occupied were their homes or that they had consent to occupy the premises and accordingly they had not brought themselves within that class of persons entitled to the substantive and procedural protections offered by PIE.

[16] In considering this question it is necessary to have regard to the averments in the papers dealing with issue. Firstly, I consider it material that in the appellant's founding papers the respondents are described simply as the *"unlawful occupiers*" of the various erven. Nowhere does the appellant state in terms that the premises which the respondents occupy were not or could not be regarded by them as their *"homes"* or that they had homes or accommodation elsewhere. It is noteworthy, furthermore, that the appellant's response to the respondents' point *in limine* was merely to state that this was a matter which would be dealt with in argument. Thus even then it did not aver that the houses were not or could not be the homes of the fourth or the other respondents, in which event the respondents could at least have sought an opportunity to supplement their opposing affidavit on this question. Instead issue was taken with the fourth respondent's claim that she had received permission from Visagie to occupy the house.

[17] Only the fourth respondent filed an opposing affidavit and in it she made no express averment that the premises which she occupied was her *"home".* It is, however, implicit in the affidavit as a whole, particularly having regard to the accommodation and housing history which the fourth respondent set out that, upon occupying the premises in question

she abandoned any other accommodation she may have had. In this regard it must be taken into account that fourth respondent's case was that she regarded herself as the lawful occupier of the house. To this must be added her averments that she secured access to the house and a right to occupy it with the explicit approval of Visagie and the security guard in charge of the property and that she had, in the meantime, effected improvements to the house. Finally, the fourth respondent asserted that on 13 March 2012 she had to deal with various persons who attempted to move into her dwelling and who allegedly were sent by Visagie. It would appear that the fourth respondent resisted this challenge and went to the appellant to lodge a protest.

[18] As regards the balance of the respondents there is limited information. None filed their own opposing affidavit and the reference to them in the fourth respondent's affidavit is limited to her statement that all the other respondents are known to her and that *"their circumstances are simiiar to hers".* She goes on to say, however, that Visagie gave her and the other respondents permission to occupy the empty houses in the project and that the security guard who gave her access to her house did so as well for the other respondents. On these grounds she disputed that any of the occupants of the nineteen houses were unlawful occupiers. Again, in the appellant's replying affidavit Visagie did not engage with the fourth respondent's assertion that the remainder of the respondents' circumstances were the same as hers nor was any attempt made on his part to identify such persons or to make out a case that they had other accommodation or housing which could legitimately be described as their homes.

[19] Faced with this relative paucity of information, save perhaps in the case of the fourth respondent, the question is whether the magistrate erred in finding that the *mandament van spolie* was not available to the appellant because the respondents had failed to establish that the disputed premises were their homes. It is of some importance that the

principal authority upon which the appellant relies, *Barnett,* was decided in a completely different context to that which presents itself in the present matter. In *Barnett* the Court was required to determine whether holiday cottages built by wealthy persons on the basis of dubious permits and having their primary residence elsewhere, constituted an additional home in respect of which they could raise the protections of PIE. These circumstances were clearly material to the factual question with which the Court was presented. I accept without reservation the Court's reasoning in *Barnett,* namely, that for a place of occupation to constitute a home requires the element of regular occupation coupled with some degree of permanence. As Brand JA pointed out, however, the concept *"home"* is not easy to define. It follows, of course, that whether a specific dwelling constitutes a home must be considered in its particular context. That context in the present matter, insofar as it can be determined on the papers, is that of people whose pre-existing accommodation is completely unsatisfactory, be it by reason of overcrowding or its precariousness. It requires little imagination to accept that persons in these circumstances who, in the belief that they have some claim thereto, occupy empty houses built by a local authority for persons such as themselves (but as yet officially unallocated) will, without the elapse of much time in occupation, consider such property to be their *"home".*

[20] As far as the element of regular occupation is concerned, there is nothing in the papers to suggest that since the respondents first occupied the premises they have not continued to reside therein. In regard to the degree of permanence of such occupation, this can only be measured in relation to the ten day period between initial occupation and the challenge to their right of occupation when the appellant launched the application on or about 13 January 2012. I can see no reason why, in this context, even such a short period would not constitute the requisite degree of permanence. It would be a remarkable

proposition if it were to be contended, for example, that squatters who overnight make their home on unoccupied land by erecting a make-shift shelter and who have no other fixed abode could not claim the protection of PIE if the authorities were to immediately demolish such dwellings without a court order. This was the case throughout much of the 1970's and the 1980's when so-called squatters migrated to Cape Town in large numbers and on a daily basis had their flimsy shelters demolished as described above. It was against, and in the light of, this historical background, replicated throughout the country over decades, that s 26(3) of the Bill of Rights and PIE were enacted. In other words, where a person's housing circumstances are dire, much less may be required for such a person to establish a *"home"* by way of regular occupation and a degree of permanence.

[21] This phenomenon is illustrated by *Rudolph v The City of Cape Town* 2004(5) SA 39 C where Selikowitz, J dealt with an extended challenge by the local authority to the scope of PIE together with an attack on its constitutionality, at least insofar as it could be seen as sanctioning *"land-grabbing".* The land in question was a park, a public open space in a built up urban area registered in the local authority's name which had been occupied, over a matter of days, by a large number of persons who erected informal structures thereon. The Court had no difficulty in finding that the structures erected by the respondents were their homes notwithstanding their makeshift nature and the fact that they were newly erected.

> *"There can be no doubt that the shelters erected by respondents are their homes. Indeed, their only homes. They reside with their families in these shelters and have nowhere else to live. They have entered into agreements with their neighbours who reside in houses adjoining the park to afiow them to use their potable water and toilet*
>
> *facilities..... Respondents can, on the evidence, justifiably claim that they have*
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> *established their homes in the park and that they had already done so when the application was*

instituted", (para [59] C- E)

[22] After a full review of the authorities Selikowitz, J concluded:

> *"In my view both the plain language and the purpose of PIE are irreconcilable with the notion that PIE is not applicable to the circumstances of this case. Whether you characterise respondents as 'squatters' or, indeed, as Mr le Roux would have it, as 'land-grabbers' they fall four square with the terms of the definition of 'unlawful occupier' and I find no warrant for depriving them of the protection for which the Legislature enacted PIE." (at para [59]* G - *H)*

[23] I find myself in respectful agreement with the finding of Selikowitz, J that to hold that the common law remedies, including the *mandament van spolie,* which are available in our law for the eviction of unlawful occupiers, exist alongside the remedy provided for in PIE would fundamentally undermine the overall purpose of the legislation. In specifically rejecting the proposition that the *mandament van spolie* was available to the applicant because it did not seek the eviction of the respondents but only the re-establishment of the status ante quo prior to a determination as to whether to evict the respondents, Selikowitz, J stated as follows:

> *"To permit an applicant to use the mandament to evict the person who has established a home on the land and who would otherwise qualify as 'unlawful occupier' would, as in the case of the other common iaw remedies, overlook the wording and purpose of PIE and would permit the statute to be undermined by a simple device."*

[24] It was submitted on behalf of the respondents that inasmuch as PIE must be interpreted as providing its protection only to those facing eviction from their homes, the concept of *"home"* must be generously interpreted to give effect to the purpose of the legislature and the constitutional right which PIE protects. That right is provided by

section 26(3) of the Bill of Rights which holds that:

> *"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. "*

[25] Such an approach would appear to be borne out by the wide terms of PIE. Although its preamble provides that *"no one may be evicted from their home, or have their home demolished without an order of court after considering all the relevant circumstances"* both the express purposes of the Act and its operative provisions are framed much more widely. The former is described as making provision for *"the prohibition of unlawful eviction; to provide for procedures for the eviction of unlawful occupiers; and to repeal the Prevention of Illegal Squatting Act; 1950(1), and other obsolete laws. "*

[26] The preamble to PIE states that it is "*desirable that the law should regulate the eviction of unlawful occupiers from land and in a fair manner, while recognising the right of landowners to apply to a court for an eviction order in appropriate circumstances;*[7]*'.* The definitions are illuminating in their breadth: "*building or structure"* includes any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter. *"Evict"* means to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and *"eviction"* has a corresponding meaning. Finally, "*unlawful occupier*is widely defined as *"a person who occupies land without the express or tacit consent of the owner or a person in charge or without any other right in law to occupy such land*... "

[27] PIE's operative provision dealing with evictions, s 4 commences: *"(n)otwithstanding anything to the contrary contained 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*It stipulates a prescribed notice period to unlawful occupiers, what information must be conveyed to such person in such notice and it invests the court with a wide power in equity to grant an eviction order after considering all relevant circumstances and whether a valid defence has been raised by the unlawful occupier.

[28] Mr Kirk-Cohen referred to decisions which dealt with what was described therein as *"land-grabs"* and sought to demonstrate the deleterious consequences of construing the *"simple identification by a person of certain premises as his or her home"* as placing such person within that class of person which enjoys the substantive and procedural protections afforded by PIE. It is not particularly helpful, however, in determining whether the protections afforded by PIE are applicable in a given set of circumstances, to refer to land-grabs or land invasions. These terms are inherently subjective and, as was pointed out in *Rudolph*, whether a certain class of persons are characterised as squatters or land-grabbers, all other things being equal, they nonetheless fall within the terms of the definition of unlawful occupier. Nor should sight be lost of the fact that qualifying for the protections afforded by PIE affords no substantive right of occupation to any party but merely, as it were, prescribes the rules and procedures by which a Court must determine whether any party has a valid defence to the claim for eviction and if not, the terms upon which any eviction must be carried out.

[29] It is, furthermore, entirely appropriate that the present matter should be determined in terms of the provisions of PIE. The appellant is a local authority and the premises in respect of which it seek eviction orders are previously unoccupied housing built for the very class of persons from whom the respondents appear to emanate i.e. local residents whose existing accommodation and housing is clearly far from adequate. As was pointed out by Meer J in *Arendse v Arendse* [2012] All SA 305 (WCC), a substantial body of

jurisprudence has built up holding that the provisions of PIE and s 26 (3) of the Constitution require courts to seek concrete and case specific solutions to the difficult problems that arise in eviction proceedings.

[30] That the respondents may have jumped the gun in occupying the houses and sought to gain an advantage to which they are not entitled are matters which fall to be addressed through the procedures established by PIE. I am mindful of the interests of those persons to whom the property may in the meantime have been lawfully allocated and the effect that a delayed hearing may have on them. If, however, the present proceedings had initially been launched under PIE, if necessary under the provisions applicable to urgent matters, I have little doubt that they would have long since been concluded. To permit the appellant, in circumstances such as these to rely on the *mandament van spolie* would, in my view, undermine the very purpose of PIE which is to permit no eviction order against unlawful occupiers unless and until the procedure envisaged by PIE have been complied with.

[31] Taking all these factors into account I consider that, in determining in any given case whether a place, dwelling or structure constitutes a *"home"* within the meaning of PIE, context is all important and, furthermore, in so doing the concept must be generously interpreted so as not to stultify the purpose of PIE

[32] In the present matter, the facts as presented by the respondents indicating that the premises which they occupy are their homes are somewhat scanty and certainly open to challenge. In my view, however, they are sufficient to meet the threshold necessary to defeat the relief sought by way of the *mandament van spolie* application, particularly bearing in mind the appellant's initial references to the respondents as *"unlawful occupiers"* and the absence of any indication that it would contend that the respondents

could not claim the protection of PIE since the occupied premises were not their homes. In any event, respondents raised a defence to the spoliation application, namely, that they occupied the houses with the permission of Visagie and thus there was no wrongful deprivation of possession. Although unlikely this is not a defence which in my view can simply be dismissed on the papers. I must emphasize that this judgment should not be understood as suggesting that the *mandament van spolie* remedy is effectively excluded in all circumstances where land or buildings are occupied by alleged spoliators. Each case must be determined on its own facts and circumstances. Furthermore, given the decreased room for the application of common law remedies for eviction, it is desirable that any challenge to the applicability of PIE be clearly signalled at an early stage.

[33] In the result I am satisfied that the magistrate did not err in finding that the appellant had in effect misconceived its remedy and could only seek what in effect amounted to an eviction order against the respondents upon prior compliance with the provisions of PIE.

[34] For these reasons the appeal is dismissed with costs.

BOZALEK, J

I agree

MANTAME, AJ