D9 Eviction under PIE

RS 24, 2024, D9-1

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE'), which came into operation on 5 June 1998, provides for procedures for the eviction of unlawful occupiers of land. [1] In *Ndlovu v Ngcobo; Bekker and Bosch v Jika* [2] the Supreme Court of Appeal, in a majority judgment, [3] held that PIE disposed of certain common-law rights relating to eviction. The majority judgment can be summarized as follows:

(a) PIE has its roots, *inter alia*, in s 26(3) of the Constitution of the Republic of South Africa, 1996. [4]

RS 24, 2024, D9-2

(b) The definition of an unlawful occupier in s 1 of PIE relates to a person who *occupies* land without the express or tacit consent [5] of the owner or person in charge of such land. [6]

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all unlawful occupiers, irrespective of whether their occupation of such land was previously lawful. [7]

(c) PIE does not protect buildings and structures that do not perform the function of a form of dwelling or shelter for humans (e g commercial properties) or that are occupied by juristic persons. [8] PIE does not apply to student accommodation which is not a home but a residence, of limited duration; for a specific purpose; is time-bound by the academic year; and is subject to rotation. [9]

(d) The effect of PIE is not to expropriate private property. [10] What PIE does is to delay or suspend the exercise of a landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions. [11]

(e) PIE invests in the courts the right and duty to make the order which, in the circumstances of the case, would be just and equitable, and it prescribes some circumstances that have to be taken into account in determining the terms of the eviction. [12] In other words, the court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated, has to exercise a discretion as to what is just and equitable. [13] The discretion is one in the wide, and not the narrow, sense. [14] Consequently, the court does not have a free hand to do whatever it wishes. [15]

(f) Provided the procedural requirements laid down in PIE have been met, a landowner is entitled to approach the court on the basis of ownership and the occupier's unlawful occupation. In this regard the occupier bears an evidential onus ('weerleggingslas'). [16]

RS 24, 2024, D9-4

A draft Bill to amend certain definitions and to qualify the application of PIE was published under GN 2276 of 27 August 2003.

In s 1 of PIE the word 'court' is defined as 'any division of the High Court or the magistrate's court in whose area of jurisdiction the land in question is situated'. [17]

Section 4(1) of PIE provides that, notwithstanding anything to the contrary contained in any law or the common law, the provisions of that section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier. [18] The word 'proceedings' may, of course, bear different meanings in different statutory provisions. It is submitted that in the context of PIE it includes action as well as application proceedings. [19]

RS 24, 2024, D9-5

If the defendant is an unlawful occupier of land, as defined in PIE, written and effective notice of the proceedings must be served on both the unlawful occupier and the municipality having jurisdiction at least fourteen days before the hearing of proceedings for the eviction of the defendant. [20] The purpose of this requirement is to provide protection to occupants by

RS 24, 2024, D9-6

[This page contains footnotes only in print]

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alerting them to the threat to their occupation and the basis thereof; alerting them to the provisions of and the protections and defences afforded them by PIE; advising [21] them of their rights to legal representation; and informing them of the date and place of the hearing [22] and 'to afford the respondents in an application under PIE an additional opportunity, apart from the opportunity they have already had under the Rules of Court, to put all the circumstances

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they allege to be relevant before the court'. [23] In addition, the period of notice provided for permits the municipality and the occupants concerned to investigate the availability of alternative accommodation or land and to explore the possibility of mediation in terms of s 7 of PIE. [24]

RS 23, 2024, D9-8

The notice requirement applies even to proceedings leading to the grant of a rule *nisi* against occupants. [25]

Where a written notice of proceedings for eviction had been given in the English language to occupants, the overwhelming majority of whom were Xhosa-speaking and many illiterate, it was held that the notice had not been effective; it should have been accompanied by a translation in the home language of the majority of the respondents and, given that a substantial proportion of the occupants were illiterate, the contents of the notice ought to have been broadcast, in Xhosa, throughout the community at times when most occupants were likely to be present. [26]

The procedure provided for in s 6 of PIE enables an organ of state to apply for an eviction order under certain circumstances. [27] The jurisdictional facts which would enable an organ of state to institute proceedings are set out in s 6(1). [28]

In order to decide whether the order is just and equitable, the court must have regard to the provisions of s 6(3) of PIE. [29] The provisions of s 6(3) are peremptory. [30] Thus, the

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presiding officer in legal proceedings for eviction by an organ of state must have regard to the factors enumerated in s 6(3) (i e give them due weight in making its judgment) [31] in deciding whether it is just and equitable to grant an order for

eviction. [32] Those are, however, not the only factors to be considered. A court could, for example, take into account the factors mentioned in s 4(6) and s 4(7) of PIE in deciding whether it would be just and equitable to grant an order of eviction in proceedings instituted in terms of s 6(1). [33] A court would be entitled to have regard to all the relevant circumstances, [34] including the public interest. [35] The courts have adopted different approaches on the question of onus. [36]

Having regard to the position set out above, a court will therefore grant an eviction order only where: *(a)* it has all the information about the occupiers to enable it to decide whether the eviction is just and equitable; and *(b)* the court is satisfied that the eviction is just and equitable, having regard to the information in *(a)*. The two requirements are inextricable, interlinked and essential. An eviction order granted in the absence of either one of these two requirements will be arbitrary. [37]

If the defendant has been in occupation of the land for less than six months at the time when proceedings are initiated, the 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. [38] In addition to these requirements the court is required to consider whether land has been made available or can reasonably be made available by a municipality or other organ of state or another landowner for the relocation of the defendant, if the latter

has been in unlawful occupation for longer than six months at the time when proceedings are initiated. [39] The period of occupation is calculated from the date that the occupation

becomes unlawful. [40]

If the availability of alternative land or accommodation is relevant, then it is obligatory for the court to have regard to it regardless of whether s 4(6) or s 4(7) of PIE is applicable. [41]

Both s 4(6) and 4(7) of PIE oblige the court, as a matter of substantive law, to exercise its discretion only in relation to the granting or refusal of an eviction order and not in relation to any procedure either before or after the granting of the eviction order. [42]

Courts have a duty to provide effective relief under PIE and to ensure that the constitutional rights of both the owner of the land and the unlawful occupiers are protected and enforced. [43] If necessary, innovative remedies must be shaped to achieve this goal. [44] A court

faced with a purported agreement to eviction is not absolved of its duties under PIE; the application of PIE is mandatory. [45]

If the requirements of s 4 of PIE are satisfied and no valid defence [46] to an eviction order has been raised, the court 'must', in terms of s 4(8), grant an eviction order. [47] When granting such an order the court must, in terms of s 4(8)*(a)* of PIE, determine a just and equitable date on

which the unlawful occupier or occupiers must vacate the premises. [48] The court is empowered, in terms of s 4(12) of PIE, to attach reasonable conditions to an eviction order. [49] The date that the court determines must be one that is just and equitable to all parties. [50]

The relationship between ss 4(7) and 4(8) of PIE has been summarized as follows in *City of Johannesburg v Changing Tides 74 (Pty) Ltd*: [51]

> 'A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve the gradual realisation of the right of access to housing in terms of s 26(1) of the Constitution, is faced with two separate enquiries. First it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under s 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under s 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant that order. Before doing so, however, it must consider what justice and equity demand in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of those two discrete enquiries is a single order. Accordingly it cannot be granted until both enquiries have been undertaken and the

> conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity.' [52]

PIE also provides for urgent proceedings *pendente lite* for the eviction of an unlawful occupier. [53] However, even where relief is sought on the basis of urgency, written and effective notice must be given to the respondents. [54]

It is not required of the representative of a group of respondents in an eviction application to obtain and deliver confirmatory affidavits in support of the answering affidavit from every member of the group. [55]

PIE includes no automatic review procedure and confers no jurisdiction on the Land Court. A review in respect of a magistrate's decision under PIE will only lie to a division of the High Court having jurisdiction over that magisterial district. Such a review would be a review in terms of rule 53. [56]

The SAPS is entitled to assist in evicting unlawful occupiers in terms of an eviction order granted under PIE. [57]

Various regulations issued from time to time during the Covid-19 pandemic in terms of s 27(2) of the Disaster Management Act 57 of 2002 [58] temporarily prohibited evictions under PIE. [59]

In *South African Human Rights Commission v Cape Town City* [60] the City of Cape Town, in the course of the national state of disaster proclaimed in March 2020 in the wake of the Covid-19 pandemic, had come to evict individuals from informal dwellings on city, nature conservation and private land, and had then demolished the structures concerned. The applicants

applied urgently to interdict such action and for further relief. The following order, in essential part, was granted by Meer J and Allie J: [61]

(i) The City, its land-invasion unit, and any private contractors the City employed were interdicted from evicting persons from and demolishing informal dwellings whether occupied or unoccupied, throughout the Metropole, while the state of disaster endured, except in terms of an order of court. [62]

(ii) Where the City, the land-invasion unit or contractors conducted evictions and demolitions of occupied or unoccupied informal dwellings under order of court, such demolitions and evictions were to be performed in a manner respectful of the dignity of the evictees, without excessive force, and without destroying or confiscating materials of the evictees.

(iii) Any police present at such demolitions and evictions were to ensure they were conducted lawfully, and that evictees' dignity was protected.

1 PIE has to be interpreted, and its governing concepts of justice and equity have to be applied, within a defined and carefully calibrated constitutional matrix. The starting and ending point of the analysis of PIE must be to affirm the values of human dignity, equality and freedom (*Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 225A–229G). See also *Machele v Mailula* 2010 (2) SA 257 (CC) at 262A–B.

2 2003 (1) SA 113 (SCA). See further 2003 (March) *De Rebus* 14–17, 18–20 and 22–24; 2003 (July) *De Rebus* 44; 2004 (July) *De Rebus* 57–60 and 2016 (October) *De Rebus* 24–26.

3 Harms JA, Mpati JA and Mthiyane JA. Olivier JA and Nienaber JA dissented.

4 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 227B–229D; and see the judgments of Ngcobo J (Moseneke DCJ and Sachs J concurring) and Sachs J (Moseneke DCJ and Mokgoro J concurring) in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) at 527E–528G and 559G–562H respectively. Section 26(3) of the Constitution provides 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'. It provides, further, that no legislation may permit arbitrary evictions. See also *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) at 1229E; *Wormald NO v Kambule* 2006 (3) SA 562 (SCA) at 568F; *Ekurhuleni Metropolitan Municipality v Various Occupiers, Eden Park Extension 5* 2014 (3) SA 23 (SCA) at 29I. 'Eviction' includes the attenuating, or obliterating, of the incidents of occupation (*Motswagae v Rustenburg Local Municipality* 2013 (2) SA 613 (CC) at 617B–D). In *ABSA Bank Ltd v Murray* 2004 (2) SA 15 (C) it was held (at 22I–23A) that the substantive effect of PIE, read with s 26(3) of the Constitution, is twofold: it imposes a duty on the courts to investigate and address considerations of justice and equity in the determination of eviction applications and provides them with a discretionary power to impinge on an owner's common-law right to obtain possession of his property. In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 229E–G the Constitutional Court stated the following with reference to, *inter alia*, s 26(3):
'In sum, the Constitution imposes new obligations on the courts concerning the 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. 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.'
See also *Grobler v Phillips* 2023 (1) SA 321 (CC) at paragraphs [36]–[48].
In *Machele v Mailula* 2010 (2) SA 257 (CC) at 262C–D the Constitutional Court stated:
'The application of PIE is not discretionary. Courts must consider PIE in eviction cases. PIE was enaced by Parliament to ensure fairness in the legitimacy of eviction proceedings and to set out factors to be taken into account by a court when considering the grant of an eviction order. Given that evictions naturally entail conflicting constitutional rights, these factors are of great assistance to courts in reaching constitutionally appropriate decisions.
That the High Court authorized the eviction without having regard to the provisions of PIE is inexcusable. PIE is of great importance, given that there are still millions of people in our country without shelter or adequate housing and who are vulnerable to arbitrary evictions.'
The High Court referred to in the last paragraph of the judgment in the *Machele* case quoted above (i e Willis J) commented as follows in *Emfuleni Local Municipality v Builders Advancement Services CC* 2010 (4) SA 133 (GSJ) at 139D:
'Quite how the Constitutional Court could have come to this conclusion is one of the great unfathomable mysteries of my life!'
In *Wormald NO v Kambule* 2006 (3) SA 562 (SCA) it was pointed out (at 569F–G) that the effect of PIE is not to expropriate the landowner and that PIE cannot be used to expropriate someone indirectly. The landowner retains the protection against arbitrary deprivation of property under s 25 of the Constitution.
In *Mayekiso v Patel* 2019 (2) SA 522 (WCC) Gamble J, writing for the majority, emphasized the competing constitutionally entrenched rights at play under PIE, namely s 26(3), which provides that people may not be evicted from their homes without an order of court granted after consideration of all the relevant circumstances, and s 25(1), which protects the rights of owners of private property against arbitrary expropriation (at paragraphs [58] and [59]), referred to in *Rantsoareng N.O. v Titus* (unreported, FB case no 3943/2022 dated 11 November 2022) at paragraph [13]. See also *GA-Segonyana Local Municipality v All Unidentified and Unknown Persons Occupying or Intending to Unlawfully Occupy ERF [. . .] Kuruman* (unreported, NCK case no 1773/2021 dated 16 September 2022) at paragraph [18].
The common objectives of PIE and ESTA (Extension of Security of Tenure Act 62 of 1997) are to give effect to the values enshrined in ss 26 and 27 of the Constitution and to regulate the conditions and circumstances under which occupiers of land may be evicted (*Randfontein Municipality v Grobler* [2010] 2 All SA 40 (SCA) at paragraph [4]; *Frannero Property Investments 202 (Pty) Ltd v Selapa* 2022 (5) SA 361 (SCA) at paragraph [21]).
A person, who is not an 'occupier' as defined in ESTA, and who occupies any land without the consent of the owner and remains there unlawfully falls to be evicted in proceedings instituted in terms of the PIE (*Droomer NO v Snyders* (unreported, WCC case no A336/2019 dated 4 August 2020 — a decision of the full court) at paragraph [21]; *Pirija N.O v Roos* (unreported, NWM case no M420/2020 dated 31 January 2024) at paragraph [31]; *Janawi (Pty) Ltd v All Unlawful Occupiers of Portion 114 of the Farm Stilfontein* (unreported, NWM case no UM07/2023 dated 28 March 2024) at paragraph [37]; *Van Rensburg v Mutongi* (unreported, GJ case no 004659/2022 dated 15 July 2024) at paragraphs [4]–[24]; *Redefine Properties Ltd v Chauke* (unreported, GJ case no 2023/094317 dated 13 August 2024) at paragraphs 42–66).

5 As to tacit consent, see the five judgments by the different members of the Constitutional Court in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC). The *mandament van spolie* cannot be used to circumvent the protection given to occupiers of homes by PIE (*City of Cape Town v Rudolph* 2004 (5) SA 39 (C) at 61E). Although PIE might prevent the use of the *mandament van spolie* to evict a person from his home, such prevention cannot occur if PIE is not applicable due to the fact that the person sought to be evicted has for a considerable period of time not occupied the dwelling on a regular basis or with any degree of permanence and where it could, accordingly, be said that the dwelling is not such person's fixed residence or seat of domestic life (*Afzal v Kalim* 2013 (6) SA 176 (ECP) at 181F–182E and 183C–184G). In *Communicare v Apolisi* 2023 (6) SA 250 (WCC) it was held (at paragraphs [33]–[41]) that PIE should be used instead of the *mandament van spolie* in eviction proceedings.
An owner of the bare *dominium* in property who occupies property without the consent of the holder of a limited real right of *habitatio* in respect of that property, is an 'unlawful occupier' against whom it is competent for the *habitatio* holder — as the 'person in charge' of such property, without whose consent the property is being occupied — to bring eviction proceedings as contemplated in PIE (*Hendricks v Hendricks* 2016 (1) SA 511 (SCA) at 514F–515C and 516D–G). See also *October and Another NO v Hendricks* 2016 (2) SA 600 (WCC), where it was decided (at 603A–D) that, in the context of a usufruct, the usufructuary would, for purposes of PIE, be the person in charge of the property concerned, and the holder of bare ownership who occupies the property without the consent of the usufructuary, could be an unlawful occupier.
The definition extends to illegal foreigners occupying a factory building on industrial property as living quarters (*Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew* 2017 (1) SA 403 (GJ)).

6 The jurisdictional requirement to trigger an eviction under PIE is that the person sought to be evicted must be an unlawful occupier within the meaning of the definition at the time when the eviction proceedings are launched (*Davidan v Polovin NO* [2021] 4 All SA 37 (SCA) at paragraph [11]; and see *Hohl N.O. v Dalcos* (unreported, GJ case no 38224/2020 dated 11 February 2022) at paragraph [19]; *Shezi v L.V.L* (unreported, GJ case no 4209/2022 dated 24 April 2023) at paragraph [10]; *Nkonyane v Nkonyane* (unreported, GJ case no 2020/43035 dated 28 April 2023) at paragraphs [8]–[13]; *Blue Dot Properties 391 (Pty) Ltd v H.G* (unreported, WCC case no 1926/2023 dated 1 November 2023) at paragraphs 13–19).

7 *Davidan v Polovin NO* [2021] 4 All SA 37 (SCA) at paragraph [12]. The protection under PIE does not, however, cover affluent property owners who deliberately place themselves in unlawful occupation of their own property (*Andries van der Schyff en Seuns (Pty) Ltd t/a Complete Construction v Webstrade Inv No 45 (Pty) Ltd* 2006 (5) SA 327 (C) at 330G–H).

8 See also *Shoprite Checkers Ltd v Jardim* 2004 (1) SA 502 (O) at 506E–507E; *Dries v Venter NO* 2005 (6) SA 67 (T) at 69I–71C; *Kanescho Realtors (Pty) Ltd v Maphumulo* 2006 (5) SA 92 (D) at 94F.

9 *Stay At South Point Properties (Pty) Ltd v Mqulwana* 2024 (2) SA 640 (SCA) at paragraphs [6]–[18].

10 PIE was enacted to prevent the arbitrary deprivation of property and is not designed to allow for the expropriation of land from a private landowner from whose property the eviction is being sought (*Grobler v Phillips* 2023 (1) SA 321 (CC) at paragraph [2]; *Hohenfelde Dohne Merinos (Pty) Ltd v Louw* (unreported, WCC case no 5852/2022 dated 30 October 2023) at paragraph 35).

11 This approach was endorsed in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) at 118E–H. See also *Wormald NO v Kambule* 2006 (3) SA 562 (SCA) at 569G; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at 307C–D; *Rantsoareng N.O. v Titus* (unreported, FB case no 3943/2022 dated 11 November 2022) at paragraph [11].

12 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 231B and 232B–D.

13 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 232B–D; *Jackpersad NO v Mitha* 2008 (4) SA 522 (D) at 529B. See also *Wormald NO v Kambule* 2006 (3) SA 562 (SCA) at 569J–570G.

14 Cf *Media Workers Association of South Africa v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 800B–J; *Knox D'Arcy Ltd v Jamieson* 1996 (4) SA 348 (A) at 360G–362G; and see *Wormald NO v Kambule* 2006 (3) SA 562 (SCA) at 570G–J.

15 The majority of the court held (at paragraph 18) that a court of appeal is not hamstrung by the traditional grounds of whether the court *a quo* exercised its discretion capriciously or upon a wrong principle or that it did bring an unbiased judgment to bear on the question or that it acted without substantial reasons.

16 Whether the ultimate onus will be on the landowner or on the occupier was not decided by the Supreme Court of Appeal. In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) it was held (at 235F–G) that, although it is incumbent on the parties to make all relevant information available to the court, technical questions relating to onus of proof should not play an unduly significant role in its enquiry. See further the cases referred to in the text below where the different approaches adopted by the courts on the question of onus are referred to.

17 In *Miya v Matleko-Seifert* 2023 (1) SA 208 (GJ) (a decision of the full bench) it was held (at paragraphs [54]–[69]) that in terms of PIE a magistrate's court has jurisdiction to grant an eviction order even though the right of occupation which is in dispute between the parties exceeds the amount determined by the Minister from time to time in the *Gazette* in clear value to the occupier as contemplated by s 29(1)*(b)* of the Magistrates' Courts Act 32 of 1944.

18 It is competent for an organ of state to proceed for eviction under either s 4 or s 6 of PIE (*City of Cape Town v Unlawful Occupiers, Erf 1800, Capricorn (Vrygrond Development)* 2003 (6) SA 140 (C) at 149D–F). When seeking an eviction order in respect of land owned by it, an organ of state could, however, proceed only in terms of s 4 of PIE (*Mangaung Local Municipality v Mashale* 2006 (1) SA 269 (O) at 274F–J). When seeking an eviction order in terms of s 6 of PIE an organ of state is required to follow the procedures set out in s 4, with the necessary changes (*Baartman v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA) at 563H–I).
It is also competent for a parastatal body (such as Transnet SOC Ltd) to proceed for eviction under s 4 of PIE in respect of land of which it is the registered owner (*Transnet Ltd v Nyawuza* 2006 (5) SA 100 (D) at 103G–H).
The definition of 'owner' in PIE, read together with the definition of 'owner' in respect of immovable property in the Deeds Registries Act 47 of 1937, includes the executor of the deceased estate of any owner of immovable property who has died, provided such executor is acting within the authority provided to her by law. Consequently, such an executor is compelled to act in her representative capacity, and not her personal capacity, in proceedings for eviction on behalf of the deceased estate under PIE (*Adoro v Monchusi* (unreported, FB case no A19/2021 dated 23 August 2021)).
In *SOHCO Property Investments NPC v Stemmett* (unreported, WCC case no 12553/2020 dated 16 May 2023) the applicant's primary purpose was the development of quality affordable residential property (for rental) for lower income households. Steenberg Project in the Western Cape was one such development. The applicant was accredited as a social housing institution pursuant to the provisions of the Social Housing Act 16 of 2008. It had concluded a lease agreement with the City of Cape Town (the registered owner of the land upon which the project was built), at a time when the land was undeveloped. Funding for the construction of the immovable properties on the land was provided from National Government, with a provincial top-up, as well as significant loan funding sourced and utilized by the applicant itself. The court held that the applicant was therefore entitled to launch the application for eviction of the unlawful occupiers by reason of it having been the person in charge of the Steenberg Project, as envisaged in s 1 of PIE. In addition it was held that, by reason of the lease agreement concluded between the applicant and the City, the applicant was the person who at all relevant times had the necessary legal authority to give permission to persons to enter upon or reside upon the land in question (at paragraph 25).
In *Adams v Manuel* (unreported, WCC case no 9401/2021 dated 3 February 2022) the applicant was found not to be an owner or person in charge of land within the meaning of s 4(1). So too in *Plaatjies v Meintjies* (unreported, WCC case no A81/2022 dated 19 September 2022 — a decision of the full bench).
For a case dealing with a 'person in charge' of the land in question, see *Hohenfelde Dohne Merinos (Pty) Ltd v Louw* (unreported, WCC case no 5852/2022 dated 30 October 2023) at paragraphs 20–22.

19 It has been held that the word 'proceedings' has a wider meaning than the word 'action' in s 29(1)*(b)* of the Magistrates' Courts Act 32 of 1944 (*Nduna v ABSA Bank Ltd* 2004 (4) SA 453 (C) at 457D–458E; *D Esterhuizen v JJ Esterhuizen* (unreported, WLD case no A3044/06 dated 26 March 2007 — a decision of the majority of the full court). See also July 2003 *De Rebus* 44; *Miya v Matleko-Seifert* 2023 (1) SA 208 (GJ) at paragraphs [65]–[66] (a decision of the full bench). But see *DNN Technologies (Pty) Ltd v Mdwara* (unreported, GJ case no 2023/134462 dated 27 June 2024) where Fisher J held (at paragraphs [41]–[42]) that an application in terms of PIE 'must' be instituted by way of application in terms of rule 6 and that an action, followed by an application for summary judgment, is not permitted.
It is submitted that, in the event of a material dispute of fact arising in proceedings brought by way of application, the court may apply rule 6(5)*(g)*.

20 Section 4(2) of PIE. In *Okkupeerders van die Plaas Rietfontein v Mooikloof Estates (Edms) Bpk* (unreported, TPD case no 5496/99 dated 5 June 1999) it was held that the phrase 'the court must serve written and effective notice of the proceedings' in s 4(2) merely meant that the summons or application had to be served upon 14 days' notice to the unlawful occupier and municipality having jurisdiction. In *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) it was, however, held (at 1227F–H) that these words were intended to mean that the contents and the manner of service of the notice in terms of s 4(2) must be authorized and directed by an order of the court concerned. It was held, further (at 1227H–J), that in addition to the notice in terms of s 4(2), a notice in terms of s 4(3) must be served in accordance with the rules of the court in question. It was held (at 1228B–D) that in High Court proceedings the s 4(2) notice can be directed and authorized by the court only after all the papers on both sides have been served. The approach in *Cape Killarney* was followed and applied in *PZL Properties (Pty) Limited v Unlawful Occupiers of Erf […] Judith's Paarl Township* (unreported, GJ case no 053569/2022 dated 30 January 2023) at paragraphs 21–25; and see *Kgwete v Makonko* (unreported, GJ case no 2022/010418 dated 8 August 2023) at paragraph [13]. In *Thiam v Magee Investments CC t/a Magee Property Investment* (unreported, CPD case no A516 (2007)), followed in *Theart v Minnaar NO* 2009 (3) SA 503 (C) at 505E–F, the full court expressed the view that the *dictum* in the *Cape Killarney* case should not be regarded as imposing a requirement of substantive law in all eviction proceedings, nor should it be applied to such proceedings other than those initiated by way of notice of motion in the High Court. In *Ansie Senekal v Winskor 174 (Pty) Ltd* (unreported, CPD case no A722/2007 dated 23 July 2008), referred to in the *Theart* case at 508F–J, it was pointed out that there is nothing in PIE that prohibits a notice of motion from containing the 'notice of the proceedings' and directions for its service in combination with the application for ejectment of the unlawful occupier. In the *Theart* case it was pointed out (at 505H–I) that the authorization of the s 4(2) notice by the court may be effected *ex parte*. See also *Theart v Minnaar NO; Senekal v Winskor 174 (Pty) Ltd* 2010 (3) SA 327 (SCA) in which the appeals in the *Theart* and *Senekal* cases were dismissed.
In *Meme-Akpta v Unlawful Occupiers at 44 Nugget Street* 2023 (3) SA 649 (GJ) the court, with reference to s 4(2) and the Johannesburg *Practice Manual* (as to which see Volume 3), distilled the following peremptory procedural prescripts (footnotes omitted):
'[13] From these provisions the following peremptory procedural rules can be distilled:

- The main application for eviction must be drawn in accordance with the rules of court.
- This means that the notice of motion must contain a stated date on which it will be heard.
- Service of the main application must be effected in accordance with one of the appropriate methods prescribed by rule 4, but if these rules for service are inadequate (which is generally the case in mass evictions) the court must direct that service of all process, including the main application and the notice in terms of s 4(2), be effected in a manner which is likely to come to the attention of the occupants of the property.
- The application for substituted service is, as is the usual case with such applications, brought ex parte and is a separate application from both the main application and the application in terms of s 4(2).
- The s 4(2) application is a separate application from both the main application and any application for substituted service, and it is brought ex parte. It provides for a second notification of the date of the hearing of the main application.
- The s 4(2) application is brought after service of the main application has been effected in terms of the rules or the order for substituted service.

- The facts of each matter will determine the mode of service of the application, the likelihood of notice coming to the occupants being the decisive factor. Examples of such modes of service are the sliding of the application under the door of each unit in a block or the posting of the application at strategic places on an open expanse where dwellings have been erected, or even appropriate daily addresses over a loud-hailer for a period of days, as to the date of hearing of the application and where copies may be accessed. There is a specimen order in the Practice Manual which may provide some guidance.
- Legal practitioners who are seeking to serve process in circumstances of mass eviction or other circumstances where notification of all the occupants could prove challenging, must be astute to these challenges and be creative in fashioning suggested methods which are tailored to the particular facts. In all such instances the process should properly begin with an ex parte application for substituted service.
- If the method of service adopted under the rules is unlikely to come to the attention of the occupants, for example, service on a person who happens to be found by the sheriff on a property where a mass eviction is to be undertaken, the risk is run that the court will not be satisfied with such service when the application for the s 4(2) approval is sought. This is likely to have the effect that the s 4(2) application will not be granted and the process will have to be started afresh.
- A proper application for eviction duly issued and delivered and the sheriff's return evidencing effective service must be before the court when it considers an application for authorisation under s 4(2).
- The hearing date which the s 4(2) notice contains must necessarily coincide with the hearing date on the notice of motion in the main application, and the periods adopted in the drawing of the process must accommodate this necessity.
- Whilst the s 4(2) procedure is such that it allows for the providing of further service mechanisms, the need for which has come to light during or since the service of the main application, such procedure is not intended to be a cure for deficient service of the main application in the first instance. A court called upon to authorise a notice under s 4(2) will want to be satisfied that all reasonable steps have been taken to obtain proper service of the main application, and mere lip service to rule 4 will not be tolerated.
- Service of the main application may result in a notice of intention to oppose being filed before the authorisation of the notice under s 4(2), in which event the s 4(2) process may be a formality, but is still necessary. The s 4(2) notice may, in such instance, be delivered to the address provided in the notice of intention to oppose.
- In the latter event, care must be taken to determine that the notice of intention to oppose is the result of all occupants having received notice.'

The fact that the notice served on the respondent is in some respect deficient of s 4(2) will not necessarily be fatal if the notice achieved the purpose contemplated by these statutory provisions. Whether that purpose had been achieved cannot be considered in the abstract, but will depend on the facts of each case (*Theart v Minnaar NO; Senekal v Winskor 174 (Pty) Ltd* 2010 (3) SA 327 (SCA) at 334B–F). See also *Coleman v Unlawful Occupiers* (unreported, KZD case no D5527/2020B dated 14 March 2023) at paragraphs [32]–[46].

In *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) the appellants sought to rely on a patently defective s 4(2) notice to argue that the eviction order granted against them in the court of first instance was invalid. It was held (at paragraph [23]) that although the s 4(2) notice did not comply procedurally with the letter of s 4(2), there had been substantial compliance with the provision and its object had been achieved. The Supreme Court of Appeal emphasized that the proper enquiry in determining whether the defective process should vitiate the eviction order was to examine whether the object of s 4(2) of PIE had nevertheless been achieved. The court stated (*per* Brand JA):

'[24] The question whether in a particular case a deficient s 4(2) notice achieved its purpose, cannot be considered in the abstract. The answer must depend on what the respondents already knew. The appellant's contention to the contrary cannot be sustained. It would lead to results which are untenable. Take the example of a s 4(2) notice which failed to comply with s 4(5)*(d)* in that it did not inform the respondents that they were entitled to defend a case or of their right to legal aid. What would be the position if all this were clearly spelt out in the application papers? Or if on the day of the hearing the respondents appeared with their legal aid attorney? Could it be suggested that in these circumstances the s 4(2) should still be regarded as fatally defective? I think not. In this case, both the municipality's cause of action and the facts upon which it relied appeared from the founding papers. The appellants accepted that this is so. If not, it would constitute a separate defence. When the respondents received the s 4(2) notice they therefore already knew what case they had to meet. In these circumstances it must, in my view, be held that, despite its stated defects, the s 4(2) notice served upon the respondents had substantially complied with the requirements of s 4(5).'

See also *De Wet N.O. v Geffen* (unreported, GJ case no 6504/2019 dated 27 September 2022) at paragraphs [8]–[9]; *Vacation Import (Pty) Ltd v Bumina; Vacation Import (Pty) Ltd v Ngaleka* (unreported, WCC case nos 3852/2022 and 3855/2022 dated 3 March 2023) at paragraphs [6]–[7].

Bruce Andre Barkhuizen 'Section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act — why calendar days and not court days' 2022 (November) *De Rebus* 5 correctly contends that on the basis of s 4 of the Interpretation Act 33 of 1957, the period of 14 days provided for in s 4(2) should be calculated as follows:

(a) exclusive of the first day;
(b) inclusive of the last day;
(c) inclusive of the days between the first day and the last day unless the last day falls on an officially declared public holiday or Sunday, in which case the last day shall be that day after the said officially declared public holiday or Sunday.

21 The provisions of s 4(1)–(5) are peremptory *(Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) at 1228H); and see *Ndlovu v Ngcobo; Bekker and Bosch v Jika* 2003 (1) SA 113 (SCA) at 123F and 124D–E; *Moela v Shoniwe* 2005 (4) SA 357 (SCA) at 362C; *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at 209G; *Van Niekerk v Favel* 2006 (4) SA 548 (W); *Kanescho Realtors (Pty) Ltd v Maphumulo* 2006 (5) SA 92 (D) at 95A; *Ploughman NO v Pauw* 2006 (6) SA 334 (C) at 342H–I. See further 2003 *De Rebus* 18–20. Though the requirements of s 4(2) are peremptory, a deviation therefrom will not necessarily be fatal: the material question remains whether, despite its defects, the s 4(2) notice had, in all the circumstances, achieved the legislature's goal (*Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at 209G–H and 210A; *Moela v Shoniwe* 2005 (4) SA 357 (SCA) at 362G; *Ploughman NO v Pauw* 2006 (6) SA 334 (C) at 342I–343H; *Theart v Minnaar NO* 2009 (3) SA 503 (C) at 509A–G). Section 4(5) provides that the notice must contain certain prescribed information. The object of paragraphs *(a)* and *(c)* of s 4(5) is 'to inform the respondents of the basis upon which the eviction order is sought so as to enable them to meet that case' (*Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at 210A; *Ploughman NO v Pauw* 2006 (6) SA 334 (C) at 342H; *De Wet N.O. v Geffen* (unreported, GJ case no 6504/2019 dated 27 September 2022) at paragraph [23]).

A municipality need not be joined in all cases. The need for joinder arises only if the municipality has a direct and substantial interest in the proceedings by reason of, for example, its duty to report to the court or to appoint a mediator (*Drakenstein Municipality v Hendricks* 2010 (3) SA 248 (WCC) at 259H–260F; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at 316F–317H; and see *Premier, Eastern Cape v Mtshelakana* 2011 (5) SA 640 (ECM) at 645G–I and 646A–C). A court should be alive to the risk of homelessness and the issue of joining a municipality to discharge any duties it may have (*Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) at 366B–C). If there is a risk that homelessness may result, the availability of alternative accommodation becomes a relevant factor that must be taken into account, and the municipality concerned should be joined (*Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) at 364B–G; *Madulammoho Housing Association NPC v Nephawe; Final Housing Solutions (Pty) Ltd v Lukhanya* (unreported, GJ case nos 22/023954 and 21/40262 dated 10 January 2023) at paragraphs 12–19).

22 *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2000 (2) SA 67 (C) at 74D–E; confirmed on appeal in 2001 (4) SA 1222 (SCA).

23 *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at 209I–J; *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) at 1229E–F; *Moela v Shoniwe* 2005 (4) SA 357 (SCA) at 362F; *Ploughman NO v Pauw* 2006 (6) SA 334 (C) at 342F–G.

24 *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2000 (2) SA 67 (C) at 74F, confirmed on appeal in 2001 (4) SA 1222 (SCA). There is no general duty on a municipality to report in all cases. Each case will have to be approached in view of its own facts (see *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at 317D–H; *Vincemus Investments (Pty) Ltd t/a Ponte City v Sindi* (unreported, GJ case no 26720/2019 dated 13 September 2021) at paragraph [22]). In case of doubt a municipality would probably be well advised to file a report (*Drakenstein Municipality v Hendricks* 2010 (3) SA 248 (WCC) at 260G–262E); but see *Cashbuild (South Africa) (Pty) Ltd v Scott* 2007 (1) SA 332 (T) at 338E–H and 339E–340I; *Oelofsen NO v Gwebu* 2010 (5) SA 241 (GNP) at 251B–C and 251I–252B. Reports by municipalities are, however, the norm and not the exception; it has been held that failure of municipalities to report to the court would hamper the court's ability to make decisions that are truly just and equitable (*ABSA Bank Ltd v Murray* 2004 (2) SA 15 (C) at 30B–G; *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 (1) SA 470 (W) at 480H–481D; and see *Cashbuild (South Africa) (Pty) Ltd v Scott* 2007 (1) SA 332 (T) at 338E–H and 339E–340I); *Arendse v Communicare NPC* (unreported, WCC case no A76/2023 dated 25 March 2024) at paragraphs [38]–[47] (a case where a report was warranted but not obtained). The report of the municipality should set out its current housing policy and, in addition, deal directly with the facts of the particular case (*City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at 318E). In the latter case it was held (at 318E–319B) that if eviction is sought by a private landowner and the municipality had been joined, the report must specify:

'*(a)* The information available to the local authority in regard to the building or property in respect of which an eviction order is sought, for example, whether it is known to be a "bad building", or is derelict, or has been the subject of inspection by municipal officials and, if so, the result of their inspections. (It appears from some of the reported cases, like the present one, that the local authority has known of the condition of the building and precipitated the application for eviction by demanding that owners evict people or upgrade buildings for residential purposes.) The municipality should indicate whether the continued occupation of the building gives rise to health or safety

concerns and express an opinion on whether it is desirable in the interests of the health and safety of the occupiers that they should be living in such circumstances;

(b) such information as the municipality has in regard to the occupiers of the building or property, their approximate number and personal circumstances (even if described in general terms, as, for example, by saying that the majority appear to be unemployed or make a living in informal trades), whether there are children, elderly or disabled people living there, and whether there appear to be households headed by women;

(c) whether in the considered view of the local authority an eviction order is likely to result in all or any of the occupiers becoming homeless;

(d) if so, what steps the local authority proposes to put in place to address and alleviate such homelessness by way of the provision of alternative land or emergency accommodation;

(e) the implications for the owners of delay in evicting the occupiers;

(f) details of all engagement it has had with the occupiers in regard to their continued occupation of or removal from the property or building;

(g) whether it believes there is scope for a mediated process, whether under s 7 of PIE or otherwise, to secure the departure of the occupiers from the building and their relocation elsewhere and, if so, on what terms and, if not, why not.'

Where, in response to the report, the applicant for eviction (i e the private landowner) indicates that it intends to seek an order that imposes duties upon the municipality, the municipality must be furnished with the proposed order in sufficient time to enable it to consider its terms, suggest amendments and if no agreement is reached, to appear and make appropriate submissions to the court on the terms of the order (*City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at 319F).

A municipality has a discretion in terms of s 7(1) of PIE to appoint a mediator (*Drakenstein Municipality v Hendricks* 2010 (3) SA 248 (WCC) at 263A–B; *Oelofsen NO v Gwebu* 2010 (5) SA 241 (GNP) at 248E and 249H *per* Poswa J, re-examining and not following his own decision to the contrary in *Cashbuild (South Africa) (Pty) Ltd v Scott* 2007 (1) SA 332 (T)).

The provision of emergency accommodation by the government forms part of the right of access to adequate housing entrenched in s 26 of the Constitution. In *Cape Town City v Commando* 2023 (4) SA 465 (SCA) at paragraphs [7] and [72] the Supreme Court of Appeal set aside the High Court's order that the City of Cape Town had to provide emergency accommodation at a specific location and substituted it with an order that the City had to provide the occupiers and their dependants with temporary emergency accommodation in a location as near as possible to where they resided at the time, and from which they had been evicted (at paragraphs [72] and [76]).

In *Mtshali v Masawi* 2017 (4) SA 632 (GJ) it was held (at 658A, 658E, 658G–659C and 661G) that it is lawful for a municipality to charge for temporary emergency accommodation.

25 *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2000 (2) SA 67 (C) at 74F–H, confirmed on appeal in 2001 (4) SA 1222 (SCA).

26 *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2000 (2) SA 67 (C) at 75C–H, confirmed on appeal in 2001 (4) SA 1222 (SCA). See also *Mangaung Local Municipality v Mashale* 2006 (1) SA 269 (O) at 272E–G.

27 *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001 (4) SA 759 (E) at 767J–768B; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 231A–232B; and see *City of Cape Town v Unlawful Occupiers, Erf 1800, Capricorn (Vrygrond Development)* 2003 (6) SA 140 (C) at 149D–F; *Baartman v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA). In *Johannesburg City v K2016498847 (Pty) Ltd* 2022 (3) SA 497 (GJ) the Johannesburg Metropolitan Municipality ('the City') sought an order for an interdict restraining the respondent company from using a certain property as an 'accommodation establishment' (i e letting it out to multiple households), such use being contrary to the way the property was zoned under the applicable Land Use Scheme, i e 'Residential 1', and to forthwith use the property in a zone-compliant manner. The City sought further relief: that, should the respondent not comply, the sheriff be authorized to take all necessary steps to give effect to the interdict, including taking into possession 'all that [was] found at the property' and to keep such items that the company was using to conduct an accommodation establishment, pending payment of the City's 'reasonable fees and disbursements' incurred in the execution of the order. The High Court observed (without deciding the issue) that s 6 of PIE empowers a municipality to seek the eviction of people who are living in structures erected without its consent, or where it is otherwise in the public interest to evict a person or persons, but that s 6 makes it clear that a municipality may only evict 'unlawful occupiers' in these circumstances. On the face of it, then, s 6 of PIE does not apply where a municipality seeks to enforce its Land Use Scheme against individuals who are living on property in breach of that Scheme but with the permission of the owner or the person in charge (at paragraphs [27]–[33]).

28 *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001 (4) SA 759 (E) at 768B–C; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 232B; *Baartman v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA) at 564G–H; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) at 488I–491B.

29 *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001 (4) SA 759 (E) at 768D–E; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 235F–236B; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) at 491C–492G, 508D–G and 550G–I; *Resnick v Government of the Republic of South Africa* 2014 (2) SA 337 (WCC) at 343E–344E; *Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew* 2017 (1) SA 403 (GJ) at 408G–H.

30 *Pedro v Greater George Transitional Council* 2001 (2) SA 131 (C) at 135A; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 234F; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) at 491F, 508G and 550G–I.

31 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 235F; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) at 491F, 508G and 550G–I.

32 *Pedro v Greater George Transitional Council* 2001 (2) SA 131 (C) at 136I–137B; *Baartman v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 232E–236B; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) at 492G, 508D–G and 550G–I.

33 *Baartman v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA) at 564E–F; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 234G; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at 304D; *Vincemus Investments (Pty) Ltd t/a Ponte City v Sindi* (unreported, GJ case no 26720/2019 dated 13 September 2021) at paragraph [10]. A determination of what is 'just and equitable' for purposes of subsecs 4(6) and (7) ought, depending on the circumstances, to take account of considerations beyond those immediate to the protagonists of the litigation (*ABSA Bank Ltd v Murray* 2004 (2) SA 15 (C) at 26H–I and 25C–E).

In *JB Marks Local Municipality v Illegal Trespassers Erf 2148, Promosa, Potchefstroom* (unreported, NWM case no M353/2021 dated 18 January 2023) it was held that due to a lack of meaningful engagement and because the respondents would be rendered homeless if an eviction order was granted, the court could not grant such an order (at paragraphs [28]–[62]).

34 *Baartman v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA) at 564F–G; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 232C–D and 234F–G; *Jackpersad NO v Mitha* 2008 (4) SA 522 (D) at 531B–C; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) at 491C–492G, 508D–512C, 550G–553C and 577G–581C; *Ekurhuleni Metropolitan Municipality v Various Occupiers, Eden Park Extension 5* 2014 (3) SA 23 (SCA) at 30G–33G; *Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew* 2017 (1) SA 403 (GJ) at 408H–409B and 409D–G; *Miya v Matleko-Seifert* 2023 (1) SA 208 (GJ) (a decision of the full bench) at paragraphs [38]–[46]. To qualify as relevant the circumstances must be legally relevant (*Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 21B; *Wormald NO v Kambule* 2006 (3) SA 562 (SCA) at 568G). The court must exercise a judicial discretion which obliges the court to strike a balance between the proprietary rights of the owner and the basic human rights of the occupier (*ABSA Bank Ltd v Murray* 2004 (2) SA 15 (C) at 21C–G; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 224H, 229F–G and 236E; *Jackpersad NO v Mitha* 2008 (4) SA 522 (D) at 529D–E; *Grobler v Phillips* 2023 (1) SA 321 (CC) at paragraphs [36]–[48]). In order to ensure that it is adequately informed in regard to the relevant factors that must be taken into account in making a decision, a court could take a proactive approach and make use, where appropriate, of court-ordered mediation or engagement, or structured interdicts. Such more active role in managing the litigation does not, however, permit the court to enter the arena or take over the running of litigation (*City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at 312D–313D). See also *Arendse v Arendse* 2013 (3) SA 347 (WCC) at 355G–359G and the authorities there referred to; *SOHCO Property Investments NPC v Stemmett* (unreported, WCC case no 12553/2020 dated 16 May 2023) at paragraphs 113–136.

35 *Baartman v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA) at 564G–H; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) at 508D–E.

36 The different approaches can be summarized as follows:

(a) The evidential burden is on the unlawful occupier to demonstrate the existence of circumstances meriting the limitation of the owner's right to possession. It is, however, inappropriate to fix an ultimate burden of proof on either side (*ABSA Bank Ltd v Murray* 2004 (2) SA 15 (C) at 28H–29C; *Ndlovu v Ngcobo; Bekker and Bosch v Jika* 2003 (1) SA 113 (SCA) at 124E–F; *FHP Management (Pty) Ltd v Theron NO* 2004 (3) SA 392 (C) at 405A–B; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 235F–H; *Jackpersad NO v Mitha* 2008 (4) SA 522 (D) at 528H–529A and 531D–F; *Sishen Iron Ore Company (Pty) Limited v Khosa* (unreported, NCK case no 142/2021 dated 29

October 2021) at paragraph [18]). The owner need, therefore, place no more before the court by way of evidence in the application for eviction than that he is the owner and that the respondent is in unlawful occupation of the property (*Ndlovu v Ngcobo; Bekker and Bosch v Jika* 2003 (1) SA 113 (SCA) at 124E–F; *FHP Management (Pty) Ltd v Theron NO* 2004 (3) SA 392 (C) at 404J–405A; *Jackpersad NO v Mitha* 2008 (4) SA 522 (D) at 528H–J; *Shezi v L.V.L* (unreported, GJ case no 4209/2022 dated 24 April 2023) at paragraphs [19]–[21]).

(b) In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) it was, however, held (at 232C–D) that the mere establishment of these facts does not require the court to make an eviction order. In terms of s 6, they merely trigger the court's discretion. If they are proved, the court then may (not must) grant an eviction order. In making its decision the court must take into account and give due weight to all the relevant circumstances. It was, therefore, decided (at 235F–G) that it is incumbent on the parties to make all relevant information available to the court.

(c) In *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) the Supreme Court of Appeal, in holding that the onus of proof cannot be disregarded (at 314A), stated (at 314B–C) that 'it is for the applicant to secure that the information placed before the court is sufficient, if unchallenged, to satisfy it that it would be just and equitable to grant an eviction order'. It was held (at 314C–D) that, whilst in some cases it might suffice for an applicant to state that it is the owner and the respondent is in occupation, in others it might not. The position was summarized as follows (at 316B–E):

'In my view, therefore, there are no good reasons for saying that an applicant for an eviction order under s 4(7) of PIE does not bear the onus of satisfying the court that it is just and equitable to make such an order. Cases where that onus affects the outcome are likely to be few and far between because the court will ordinarily be able to make the value judgment involved on the material before it. However, the fact that an applicant bears the onus of satisfying the court on this question means that it has a duty to place evidence before the court in its founding affidavits that will be sufficient to discharge that onus in the light of the court's obligation to have regard to all relevant factors. The City's contention, that the common-law position continues to prevail and that it is for the occupiers to place the relevant facts before the court, is incorrect. Once that is recognised it should mean that applicants go to greater lengths to place evidence of relevant facts before the court from the outset, and this will expedite the process of disposing of these applications, particularly in cases that are unopposed, as the need for the court to direct that further information be obtained will diminish.'

See also *Ekurhuleni Metropolitan Municipality v Various Occupiers, Eden Park Extension 5* 2014 (3) SA 23 (SCA) at 44A–D; *Madulammoho Housing Association NPC v Nephawe; Final Housing Solutions (Pty) Ltd v Lukhanya* (unreported, GJ case nos 22/023954 and 21/40262 dated 10 January 2023) at paragraphs 9–11; *JB Marks Local Municipality v Illegal Trespassers Erf 2148, Promosa, Potchefstroom* (unreported, NWM case no M353/2021 dated 18 January 2023) at paragraph [27].

In *Trollip v Davis* (unreported, GJ case no A3022/2019 dated 4 March 2021) it was found on appeal (at paragraphs [17]–[36]) that the respondent (the applicant in the eviction proceedings) had the onus to allege and prove essential or material facts to obtain an eviction order and failed to discharge it by not addressing material facts for a finding that the eviction order would meet justice and equity.

37 *Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) at 361F–H; and see *Bock NO v Erasmus* (unreported, WCC case no 3257/2021 dated 27 August 2021) at paragraphs [39]–[46]. In *Grobler v Phillips* 2023 (1) SA 321 (CC) the magistrate who had granted the eviction order did not consider whether it was just and equitable to grant the order (at paragraph [29]). The Constitutional Court, in the light of the facts of the case, held that the fact that the magistrate's court 'skipped this step' was not of such a nature that the eviction order had to be set aside (at paragraph [29]).

38 Section 4(6) of PIE; and see in regard to this requirement, which is also a requirement under s 4(7) of PIE, *Modderklip Boerdery (Pty) Ltd v Modder Estate Squatters* 2001 (4) SA 385 (W); *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001 (4) SA 759 (E) at 767H–I; *Ndlovu v Ngcobo; Bekker and Bosch v Jika* 2003 (1) SA 113 (SCA) at 123F–124A; *ABSA Bank Ltd v Murray* 2004 (2) SA 15 (C) at 26D–F; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 234G; *Davids v Van Straaten* 2005 (4) SA 468 (C) at 484D–485F.

In *Occupiers of Mooiplaats v Golden Thread Ltd* 2012 (2) SA 337 (CC) the Constitutional Court set aside the High Court's finding under s 4(6) that it was just and equitable to evict the occupiers. It did so on the ground that since the High Court had not investigated whether the municipality (who was present at the High Court hearing but only on a watching brief) could provide alternative land or housing, the High Court had failed to comply with its duties under s 4(6). The Constitutional Court held that the High Court ought to have ordered the municipality to file a report on, *inter alia*, the housing situation of the applicants and the steps it could take to provide alternative land or housing. See also *Super Four Developers CC v Mallick* (unreported, EP case no 1570/2020 dated 4 October 2021) at paragraphs [30]–[31].

In *Luanga v Perthpark Properties Ltd* 2019 (3) SA 214 (WCC) the court stressed (at 224H–225A) that where eviction proceedings were opposed and the respondent legally represented, the legal practitioner representing the respondent, as an officer of the court, was under a positive duty to furnish the court with all relevant information in his possession in order for the court to properly interrogate the justice and equity of ordering an eviction under s 4(6) and (7). This approach was affirmed by the full court in *Kidrogen RF (Pty) Ltd v Nordien* (unreported, WCC case no A159/2022 dated 30 January 2023) at paragraph [35].

In *Winprop (Pty) (Ltd) v Bahlekazi* (unreported, GJ case no 28781/2021 dated 13 December 2022) the court found it just and equitable to grant an eviction order under circumstances where the respondents embarked upon a rent boycott, did not allege that eviction would render them homeless and made out no case that they or their dependants were women, children, elderly or disabled persons whose rights to shelter would be violated if evicted (at paragraphs 57–63).

39 Section 4(7) of PIE; and see *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001 (4) SA 759 (E) at 767F–G and 770H–I; *Ndlovu v Ngcobo; Bekker and Bosch v Jika* 2003 (1) SA 113 (SCA) at 123F–124A; *Baartman v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA) at 567A–C; *Agrico Masjinerie (Edms) Bpk v Swiers* 2007 (5) SA 305 (SCA) at 320E–H; *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 (1) SA 470 (W) at 480H–483I; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) at 492H–494H, 510E–512A and 551E–553B; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at 304D–E; *Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew* 2017 (1) SA 403 (GJ) at 408E–G; *Luanga v Perthpark Properties Ltd* 2019 (3) SA 214 (WCC) at 224H–225A; *Michael v Trustees of the Govender Trust* (unreported, KZP case no AR571/20 dated 27 November 2020) at paragraphs [6]–[8]; *Ekurhuleni Metropolitan Municipality v Nkosi and 91 Others* (unreported, GJ case no 2020/1348 dated 7 November 2022) at paragraph [30]; *Grobler v Phillips* 2023 (1) SA 321 (CC) at paragraph [33] (and see LR Ngwenyama 'Alternative accommodation of an unlawful occupier's choosing: Some reflections on *Grobler v Phillips* [2022] ZACC 32' (2023) 44.3 *Obiter* 646); *De Beer NO v De Lange* (unreported, WCC case no 4457/2022 dated 24 February 2023) at paragraphs [33]–[35]; *Vacation Import (Pty) Ltd v Bumina; Vacation Import (Pty) Ltd v Ngaleka* (unreported, WCC case nos 3852/2022 and 3855/2022 dated 3 March 2023) at paragraphs [31]–[37] (a case where the municipality failed to file a report as previously directed by the court, resulting in a further order directing it to investigate the apparent rights and needs of the unlawful occupiers of the properties in issue with special reference to those of any of the occupiers who were elderly, children, disabled persons, or women heading households and to report thereon to the court before a date set out in the order); *Coleman v Unlawful Occupiers* (unreported, KZD case no D5527/2020B dated 14 March 2023) at paragraphs [32]–[46] (a case where the papers were served on the municipality which took a supine approach, giving rise to an order that the eviction order had to be served on the municipality as well as the MEC for Cooperative Governance and Traditional Affairs: KwaZulu-Natal and the Premier of KwaZulu-Natal to ensure that the municipality carried out its constitutional responsibility to find alternative accommodation for the occupiers).

A sale by public auction in terms of s 83(8) of the Insolvency Act 24 of 1936 does not constitute a 'sale of execution' as contemplated in s 4(7) of PIE (*ABSA Bank Ltd v Murray* 2004 (2) SA 15 (C) at 26D–F). In *Ives v Rajah* 2012 (2) SA 167 (WCC) it was held (at 172C–E) that the repetition of the word 'including' and the placing of a comma before each of them in s 4(7) leads to the conclusion that on the natural and grammatical meaning of that section, the 'except' clause applies only to the first 'including' phrase. In other words, where there is a sale of mortgaged property in execution, the question of alternative land is excluded as a relevant consideration, but the rights of the elderly, etc must still be taken into account. It was held, further (at 173H–J, 174A–C and 174C–D) that:

(i) where the eviction of a disabled person is under consideration, a relevant factor must inevitably be whether the person will on eviction have somewhere else suitable to go;

(ii) nevertheless, the evicting court must respect the policy of the lawmaker that execution sales of mortgaged property are intended to result in the buyer obtaining vacant occupation and, accordingly, the question of alternative accommodation should not necessarily receive the same weight in such a case as it might if the disabled person were in occupation of property which had not been sold in execution and would not have to be dealt with in the context of a statutory provision which expressly requires the court to consider whether the local authority could provide accommodation;

(iii) the developing jurisprudence of the courts in relation to the investigation of alternative accommodation, and the reporting by and engagement with local authorities, cannot without further ado be transposed to cases where the question arises not in relation to the first 'including' phrase but only as an aspect of the consideration of the rights of disabled persons.

See also *CJW Belegings [sic] (Pty) Ltd v Arendse* (unreported, WCC case nos 1755/2021 and 11835/22 dated 1 December 2022) at paragraphs [27]–[31].

40 *Ndlovu v Ngcobo; Bekker and Bosch v Jika* 2003 (1) SA 113 (SCA) at 123F–124A; and see *Winprop (Pty) (Ltd) v Bahlekazi* (unreported, GJ case no 28781/2021 dated 13 December 2022) at paragraph 55.

41 *Arendse v Arendse* 2013 (3) SA 347 (WCC) at 355E–F; *SOHCO Property Investments NPC v Stemmett* (unreported, WCC case no 12553/2020 dated 16 May 2023) at paragraphs 137–162.

42 *Transnet Ltd v Nyawuza* 2006 (5) SA 100 (D) at 105C–G; and see *Gefen v De Wet NO* 2022 (3) SA 465 (GJ) (a decision of the full court) at paragraphs [13]–[32].

43 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA) at 61B–I; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 224H, 229F–G and 236E. In *Mayekiso v Patel* 2019 (2) SA 522 (WCC) Gamble J, writing for the majority, emphasized the competing constitutionally entrenched rights at play under PIE, namely s 26(3), which provides that people may not be evicted from their homes without an order of court granted after consideration of all the relevant circumstances, and s 25(1), which protects the rights of owners of private property against arbitrary expropriation (at paragraphs [58] and [59]), referred to in *Rantsoareng N.O. v Titus* (unreported, FB case no 3943/2022 dated 11 November 2022) at paragraph [13]. See also *GA-Segonyana Local Municipality v All Unidentified and Unknown Persons Occupying or Intending to Unlawfully Occupy ERF [. . .] Kuruman* (unreported, NCK case no 1773/2021 dated 16 September 2022) at paragraph [18]. If there is a threat of lawlessness should an applicant evict illegal occupiers from its land, the State has a duty to uphold the rule of law. If the municipality concerned has a lack of funds to protect the rights of the applicant and the illegal occupiers, the provincial government and the Government, as higher echelons of the State, have a direct and substantial interest in the final outcome of the case and could be joined as respondents (*Chieftain Real Estate Incorporated in Ireland v Tshwane Metropolitan Municipality* 2008 (5) SA 387 (T) at 392J–393B); but see *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 (4) SA 337 (SCA) at 359C.

Consent in eviction proceedings is a valid defence (*Davidan v Polovin NO* [2021] 4 All SA 37 (SCA) at paragraph [12]). It has been held by the Constitutional Court that the duties of a court when dealing with proceedings for eviction from residences generally, and when faced with actual or purported consent to eviction, arose from the protection of the rights of residents and were therefore inextricably intertwined with the issue of informed consent and waiver. The court must as a first step be satisfied that the parties freely, voluntarily and with full knowledge of their rights agreed to the eviction. A consent to an eviction order would entail the waiver of, at a minimum, the following: the constitutional and statutory rights to eviction only after a court has considered all the relevant circumstances (s 26(3) of the Constitution of the Republic of South Africa, 1996); to the joinder of the local authority and production by it of a report on the need and availability of alternative accommodation; to a just and equitable order in terms of s 4(6)–(7) and s 6(1) of PIE; and to temporary alternative accommodation in the event that eviction would result in homelessness. If these rights were capable of waiver, such waiver would need to be free, voluntary and informed. If the factual consent was not informed it would be legally invalid, and so not binding on them (*Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) at 356D–E, 357F–358F, 359A–C and 366A–C).

44 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA) at 61H. See, further, *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 236C–242F; *Transnet Ltd v Nyawuza* 2006 (5) SA 100 (D) at 105G–107D.

45 *Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) at 362G–364A.

46 This refers to a defence that would entitle the occupier to remain in occupation as against the owner of the property, such as the existence of a valid lease (*City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at 304H).

In *Magic Vending (Pty) Ltd v Tambwe* 2021 (2) SA 512 (WCC) the applicant, in an application for eviction under PIE, invoked a forfeiture clause for the summary cancellation of a lease due to non-payment of rental by the first respondent. The latter raised, amongst other things, the defence that the forfeiture clause constituted an 'unfair, unreasonable or unjust term' as contemplated in s 48 of the Consumer Protection Act 68 of 2008. The court, in rejecting the defence, held that the contextual indications of what the legislature contemplated by a term that might be 'unfair', suggested that it would be one that was exploitative of the consumer. The provisions of the Consumer Protection Act 68 of 2008 should not be construed so as to purport to invest in the courts a power to refuse to enforce contractual terms on the basis that their enforcement would, in the judge's subjective view, be unfair, unreasonable or unduly harsh; they should rather be construed as, in certain respects, codifying the established principle that courts will refuse to enforce contractual provisions that are so unfair, unreasonable or unjust that it would be contrary to public policy to give effect to them (at paragraph [7]). The court held, further, that forfeiture clauses were common features of lease agreements and that there was nothing lacking in good faith about their incorporation. Had it been the legislative intention to override the rich body of jurisprudence that has held them to be enforceable according to their tenor and that the courts have no equitable jurisdiction to relieve a debtor from the effect of them, the statute would have provided as much unequivocally (at paragraph [8]).

In *Nelson v Samuels* [2021] 3 All SA 190 (WCC) the court rejected a defence based on some form of entitlement to the property concerned under Islamic law and held that the opposition by the respondents to the eviction application was brazen, uncompromising and demonstrative of an attitude tantamount to expropriation (at paragraph 36).

In *Gefen v De Wet* NO 2022 (3) SA 465 (GJ) the respondents raised a defence to an eviction application in their answering affidavit but subsequently failed to comply with a compelling order to file heads and a practice note in the application. The court *a quo* accordingly granted an order striking out the respondents' defence and granted an eviction order. In an appeal lodged by the respondents against the order, the full court, in setting aside the order, held that:

(i) before granting the striking-out of the defence application, the court *a quo* should not only have considered whether a proper explanation had been furnished for non-compliance with the compelling order to file heads and a practice note but in addition should have broadly considered the veracity of all possible defences which would have informed the court about the possibility of a successful defence against an eviction, and whether these defences had been raised in a bona fide manner (at paragraph [26]);

(ii) a striking-out of a defence was a drastic remedy and, accordingly, the court should be apprised of sufficient facts on the basis of which it could exercise its discretion in favour of such an order (at paragraph [27]);

(iii) in an eviction application, having regard to the provisions of s 4(7), the enquiry extended even wider. A court granting an eviction application had to consider whether it would be just and equitable to evict an occupier from his residence despite a finding that the occupier was unlawfully occupying the land or premises in question. The court had to act proactively to obtain as much information as possible. More so as the prejudice a party might suffer if the order was made or not had to be considered. A judicial discretion could only be exercised if it was a properly informed decision. To be in that position it would not be helpful to strike a defence and the facts supporting the defence which were contained in an answering affidavit (at paragraph [30]);

(iv) there was no indication that the court *a quo* had considered the impact which s 4(7) could have had on the order to strike the defence or to evict the respondents. The court *a quo* had not considered the veracity of the defence raised by the respondents, which should have included an enquiry whether it would have been just and equitable to evict them. Consequently, the court *a quo* had not exercised its discretion judicially in granting the application to strike out the defence, as well as to grant the eviction order (at paragraph [32]).

47 See, for example, *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at 304; *Miya v Matleko-Seifert* 2023 (1) SA 208 (GJ) (a decision of the full bench) at paragraph [36]; *Jacobs N.O. v Nakedi* (unreported, FB case no 4648/2023 dated 30 January 2024) at paragraph [30].

48 *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at 304E; *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers Newtown Urban Village* 2013 (1) SA 583 (GSJ) at 592E–F and 595D–F; *Vincemus Investments (Pty) Ltd t/a Ponte City v Sindi* (unreported, GJ case no 26720/2019 dated 13 September 2021) at paragraph [10]; *Super Four Developers CC v Mallick* (unreported, EP case no 1570/2020 dated 4 October 2021) at paragraph [25]; *GA-Segonyana Local Municipality v All Unidentified and Unknown Persons Occupying or Intending to Unlawfully Occupy ERF [. . .] Kuruman* (unreported, NCK case no 1773/2021 dated 16 September 2022) at paragraphs [29]–[30]; *Goodfind Properties (Pty) Ltd v Adriaanse and Similar Cases* (unreported, WCC case no 6635/2022 dated 28 November 2022) at paragraph [23]; *Blue Dot Properties 391 (Pty) Ltd v H.G* (unreported, WCC case no 1926/2023 dated 1 November 2023) at paragraphs 23–28; *Jacobs N.O. v Nakedi* (unreported, FB case no 4648/2023 dated 30 January 2024) at paragraph [31].

49 *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at 304D–E; *Vincemus Investments (Pty) Ltd t/a Ponte City v Sindi* (unreported, GJ case no 26720/2019 dated 13 September 2021) at paragraph [22]; *Super Four Developers CC v Mallick* (unreported, EP case no 1570/2020 dated 4 October 2021) at paragraphs [25]–[26]; *City of Cape Town v Various Occupiers* [2024] 3 All SA 428 (WCC) at paragraph [265]; *Okoye v Lockyer* (unreported, GJ case no 2022/43051 dated 9 July 2024) at paragraph [26]; *De Kock v Du Plessis* (unreported, SCA case no 284/2023 dated 24 July 2024) at paragraph [53].

50 *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at 305B; *Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew* 2017 (1) SA 403 (GJ) at 428D–431H. See also *Jacobs v Communicare NPC* 2017 (4) SA 412 (WCC) at 420H–421E; *Super Four Developers CC v Mallick* (unreported, EP case no 1570/2020 dated 4 October 2021) at paragraph [25]; *CJW Belegings [sic] (Pty) Ltd v Arendse* (unreported, WCC case nos 1755/2021 and 11835/22 dated 1 December 2022) at paragraph [31]; *De Beer NO v De Lange* (unreported, WCC case no 4457/2022 dated 24 February 2023) at paragraph [37]. See also *Cape Town City v Commando* 2023 (4) SA 465 (SCA) at paragraph [74].

51 2012 (6) SA 294 (SCA) at 311F–312C; *Super Four Developers CC v Mallick* (unreported, EP case no 1570/2020 dated 4 October 2021) at paragraph [25]; *Gefen v De Wet NO* 2022 (3) SA 465 (GJ) at paragraphs [30] and [32]; *Meme-Akpta v Unlawful Occupiers at 44 Nugget Street* 2023 (3) SA 649 (GJ) at paragraph [39]; *Plaatjies v Meintjies* (unreported, WCC case no A81/2022 dated 19 September 2022 — a decision of the full bench) at paragraphs 34–49; *De Wet N.O. v Geffen* (unreported, GJ case no 6504/2019 dated 27 September 2022) at paragraphs [16]–[17]; *Rantsoareng N.O. v Titus* (unreported, FB case no 3943/2022 dated 11 November 2022) at paragraph [12]; *Madulammoho Housing Association NPC v Nephawe; Final Housing Solutions (Pty) Ltd v Lukhanya* (unreported, GJ case nos 22/023954 and 21/40262 dated 10 January 2023) at paragraphs 9–18; *Hohenfelde Dohne Merinos (Pty) Ltd v Louw* (unreported, WCC case no 5852/2022 dated 30 October 2023) at paragraphs 36–40; *Smith v Khumalo and All the Unlawful Occupiers of the Property* (unreported, GJ case no 47400/21 dated 10 May 2024) at paragraphs [26]–[33].

52 In *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village* 2013 (1) SA 583 (GSJ) the court held (at 597F–G, 600C–601A and 615D–E) that the discretion in respect of what is just and equitable 'entailed a latitude of individual judicial freedom' and that the decision maker was required in its exercise not to be influenced by a wrong principle or a misdirection on the facts, and not to

reach a decision that a court properly directing itself to the law and the facts would not reasonably reach. See also *SOHCO Property Investments NPC v Stemmett* (unreported, WCC case no 12553/2020 dated 16 May 2023) at paragraphs 137–163 (where the court gave reasons for its order concerning temporary emergency accommodation).

53 Section 5 of PIE; and see *Shanike Investments No 85 (Pty) Ltd v Ndima* 2015 (2) SA 610 (GJ) at 615E–J; *Telkom SA (Soc) Ltd v Moeletsi* (unreported, GJ case no 40530/2023 dated 30 May 2023) at paragraphs [7]–[15]; *White Wall Trading (CC) v Biyela* (unreported, GJ case no 090403/2023 dated 26 January 2024) at paragraphs [9]–[19]. In *Communicare v Apolisi* 2023 (6) SA 250 (WCC) the court found the omission in s 5 of PIE to provide, or at least to consider, alternative accommodation in urgent eviction proceedings regrettable (at paragraphs [37]–[41]). An order against the City of Cape Town to prevent the occupiers from being rendered homeless was crafted in the following terms:

'[50.1] The application for eviction of the respondents is granted, to be effected on Friday 17 September 2021.

[50.2] The City of Cape Town is ordered to undertake a full investigation and compile a report listing the addresses where the respondents were resident prior to their occupation of the units at 28 Ysterplaat Street, Brooklyn; Erf 125948, commonly known as 27 De Mist Street, Brooklyn; and Unit 2, 47 Justin Street, Dennehuis Complex, Brooklyn, on/before Friday 3 September 2021. Where an address is not within the Western Cape Province, an alternative address within the Western Cape Province should be provided by the respondents to the City of Cape Town.

[50.3] The City of Cape Town is to facilitate the respondents' move from the units they are currently occupying to the addresses within the Western Cape Province listed in the report in [50.2] above on or before 17 September 2021.

[50.4] Should the respondents not co-operate with the investigation in [50.2] and/or fail to vacate the units by 17 September 2021, the orders in [50.2] and [50.3] above will lapse, placing no further obligation on the applicant, or the City of Cape Town, and the sheriff is authorised to effect their removal.'

54 Section 5(2) of PIE; and see *White Wall Trading (CC) v Biyela* (unreported, GJ case no 090403/2023 dated 26 January 2024) at paragraph [21].

55 *City of Cape Town v Unlawful Occupiers, Erf 1800, Capricorn (Vrygrond Development)* 2003 (6) SA 140 (C) at 149H–I.

56 *Esterhuyze v Khamadi* 2001 (1) SA 1024 (LCC) at 1028A–C; *Davids v Van Straaten* 2005 (4) SA 468 (C) at 485I–486H. See further the notes to rule 53 in Part D1 above.

57 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA) at 48F–H.

58 GN R480 in *GG* 43258 of 29 April 2020.

59 See regulation 19 of the regulations issued on 29 April 2019 (GN 480 in *GG* 43258), regulation 36(1) of the regulations issued on 28 May 2020 (GN 608 in *GG* 43364) and regulation 53(1) of the regulations issued on 17 August 2020 (GN 891 in *GG* 43620).

60 2021 (2) SA 565 (WCC).

61 At paragraph [80].

62 It was accepted that occupied structures were protected by PIE, and evictions therefrom could only occur by virtue of court order (at paragraph [39]). As to unoccupied structures, the City asserted that neither PIE nor the Constitution of the Republic of South Africa, 1996, required eviction or demolition to be in terms of a court order (at paragraph [40]). The court, however, concluded that judicial supervision was justified (at paragraphs [54]–[55]). This in a context where City officials decided whether structures were unoccupied and where such decisions were sometimes arbitrary, with officials making the decisions in their own cause, without public hearing, and unguided by rules, legislation or policy, and where PIE, properly interpreted, required supervision in cases of doubt (at paragraphs [46.4], [47], [50] and [52]).