THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number : 304/06

In the matter between :

DAVID SINCLAIR BARNETT	**FIRST APPELLANT**
PATRICIA STEPHANIE CANHAM NO	**SECOND APPELLANT**
STEPHEN HUGH CHURCH	**THIRD APPELLANT**
PETER CLOWES	**FOURTH APPELLANT**
JAMES KEVIN DOVETON	**FIFTH APPELLANT**
PETER GOSS	**SIXTH APPELLANT**
HILTON LLEWELLYN LANE	**SEVENTH APPELLANT**
ASHTON HENRY MARTIN	**EIGHTH APPELLANT**
RICHARD JEREMY REEN	**NINTH APPELLANT**
JACOB JOHN ROTHMAN	**TENTH APPELLANT**
WILLIAM TURTON	**ELEVENTH APPELLANT**
EDWARD LAWRENCE BARRY	**TWELFTH APPELLANT**
MICHAEL BERESFORD	**THIRTEENTH APPELLANT**
BRUCE DORNLEO	**FOURTEENTH APPELLANT**
R JOHN PICKERING	**FIFTEENTH APPELLANT**
NEVILLE DANSON TAYLOR	**SIXTEENTH APPELLANT**
and	
THE MINISTER OF LAND AFFAIRS	**FIRST RESPONDENT**
THE MINISTER OF WATER AFFAIRS AND FORESTRY	**SECOND RESPONDENT**
THE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM	**THIRD RESPONDENT**
THE MEMBER OF THE EXECUTIVE COUNCIL RESPONSIBLE FOR ECONOMIC AFFAIRS, ENVIRONMENT AND TOURISM, EASTERN CAPE PROVINCE	**FOURTH RESPONDENT**

CORAM : **HOWIE P, BRAND, JAFTA, MAYA *et* COMBRINCK JJA**
HEARD : **20 AUGUST 2007**
DELIVERED : **6 SEPTEMBER 2007**

Summary: Application for eviction from cottages built in coastal conservation area – based on both Decree 9 of 1992 (Transkei) and wrongful possession in common law – plea of prescription dismissed on principle of continuous wrong – PIE found not applicable because cottages held not to be 'homes'- other defences dismissed on the facts.

Neutral citation: This judgment may be referred to as *Barnett v Minister of Land Affairs* [2007] SCA 95 (RSA)

JUDGMENT

BRAND JA/

BRAND JA:

[1] The first three respondents are Cabinet Ministers representing three different State Departments in the National Government. The fourth respondent is the Member of the Executive Council for Economic Affairs, Environment and Tourism in the Province of the Eastern Cape. The sixteen appellants are the occupiers of sites and cottages on the Transkei Wild Coast in an area 13 kilometres north of Port St Johns and situated in the magisterial district of Lusikisiki. I shall herein refer to the respondents collectively as 'the Government' and to the appellants as they were cited in the court *a quo*, ie 'the defendants'.

[2] On the basis that the sites occupied by the defendants form part of State land, the Government sought and obtained an eviction order against the defendants (by Miller J) in the Mthatha High Court. The order also directed the defendants to demolish and remove all structures built on the sites within four months from date of the order, failing which the Government was authorised to have the structures demolished and removed at the defendants' expense. The appeal against that judgment is with the leave of the court *a quo.*

[3] The sites are situated in an area which, until 27 April 1994, formed part of the erstwhile Republic of Transkei. Since then, it falls under the jurisdiction of the Provincial Government of the Eastern Cape. The cottages and other structures were erected by the defendants from about mid 1994. The Government relied on two causes of action, in the alternative. Its first cause of action was based on the provisions of a decree promulgated by the President of the Transkei on 24 July 1992 described as Decree No 9 (Environmental Conservation) of 1992 which came into operation on 1 January 1993 ('the Decree'). For its alternative cause of action the Government relied on the common law ground that the defendants were in unlawful possession – or occupation – of State land.

[4] I shall soon return to the provisions of the Decree in more detail. Broadly stated, however, its import was to proclaim all State land situated on the landward side of the entire Transkeian coast within a strip of one kilometre above the high water mark, a coastal conservation area. Inside the conservation area, the Decree prohibited any development by anybody (including departments of

State) save under authority of a permit issued by the Department of Agriculture and Forestry. Relying on the provisions of the Decree as its main cause of action, the Government contended that because the defendants had no permit to construct the cottages and other structures on the sites occupied by them, their activities constituted unauthorised development within the coastal conservation area, the consequences of which they were bound to remove.

[5] The defences raised by the defendants to these causes of action were numerous and, at least some of them, rather difficult to understand. They led to a trial lasting for many days and a record covering nearly four thousand pages. In the course of time, some of these defences have wisely been jettisoned. Those persisted in will best be understood against the background facts that follow. The defendants are mostly well-to-do farmers and businessmen. They all reside in the province of KwaZulu-Natal. Nonetheless, most of them had some association with the Transkei Wild Coast which they visited regularly on vacation for a number of years. Their settlement in the area started about one month after the area again became part of South African soil, in April 1994. Their reason, so they said, was because prior to that they were not allowed to occupy land which formed part of the former Republic of Transkei. The timing of their settlement in this exquisitely beautiful, virtually pristine part of nature, happened to coincide, however, with a transition from one government to the other, when administrative control in the area seems to have been, to say the least, in a state of flux.

[6] The procedure adopted by the defendants to obtain their occupancy was essentially the same. This is hardly surprising. Those who came later simply followed the precedent established by the success of the earlier ones. Broadly stated, it happened like this: They first spoke to the local headman, Induna Torch Hola, who is since deceased, and informed him of their wish to obtain a site on the coast which they identified to him. The headman then took them to the chief of the local tribe, Chief Mchilizwa Hanxa, who is also since deceased. Their approach to the chief was mostly accompanied by a bottle of Commando brandy, which appears to have been the strong drink of the chief's choice. Once they obtained the chief's approval, he arranged for them to attend a meeting of the Emtweni tribal authority, exercising jurisdiction in the area.

[7] Accompanied by the chief, they then attended a meeting of the tribal authority. After the meeting had approved their request, they paid a ‘customary fee’ of R200 to the tribal authority for which they were issued with a receipt. They also received a rather curious document signed by the secretary of the tribal authority and described as a ‘fishing site licence application’. According to the heading of the document itself, it was to be submitted to the magistrate at Lusikisiki. In substance the document conveyed to the magistrate a recommendation by the tribal authority that the applicant cited be granted a licence to conduct some fishing business on the proposed site. Why I referred to the document as curious, is, of course, because it made no mention of the defendants’ request for permission to occupy or to build a cottage on the site. while, on the other hand, it referred to an application for a business licence which the defendants never wanted.

[8] Armed with the receipt and the fishing site license application, the defendants then made their way to the magistrate’s court building in Lusikisiki. However, they did not go to the magistrate, as instructed by the contents of the application form, but to an official in the Department of Agriculture, Mr Dumisane Ntete, who happened to have his office in the same building. Arrangements were then made with Ntete to meet at the chosen site together with Chief Hanxa and members of the local community. It appears that Ntete always had a measuring tape with him when he attended these meetings. Yet the measuring tape was never used. The sites were not actually measured, but rather vaguely identified by Ntete with reference to certain landmarks and physical features. Nor were the sites ever surveyed or their exact dimensions recorded or mapped.

[9] The chief then asked the members of the local community present, who on occasion numbered up to one hundred people, whether they had any objection to the site being allocated to the defendant concerned. No objections were ever raised. After that, the chief granted his permission for structures to be built on the site, which signalled the end of the formalities. Festivities then started where beer, brandy and food, supplied by the defendants in ample quantities, were enjoyed by all. The only thing that happened thereafter was that some of the defendants – though not all of them – annually paid the sum of R20 by way of a local tax and a general levy to the Receiver of Revenue in Lusikisiki, whose

office also happened to be in the same building as the Magistrate's Court. Receipts were issued for these payments and a record kept by means of a so-called cardex filing system, identifying each defendant with reference to his own tax number.

[10] Two of the defendants testified that on an occasion when they went to pay their annual taxes at the Magistrate's Court building they happened to meet one of the magistrates. They then used the opportunity to ask him whether there was anything more they had to do in order to secure occupation of their sites. His response was something to the effect that they had done all they were required to do and that 'nobody could take their piece of heaven away from them'.

[11] In response to the defendants' declarations of trust in the validity of the permission they received from the chief, the tribal authority and – on two occasions from the magistrate, by conduct, as it were – the Government relied on the evidence of Mr James Feely. Feely was employed between 1989 and 2000 by the departments – first of the former Transkei Government and then of the Eastern Cape Provincial Government – that took administrative responsibility for the area. According to his testimony – undisputed in this regard – the allocation of residential sites and sites for recreation as well as land destined for agricultural use in the area, was governed at the time by the provisions of Proclamation No 26 of 1936 read with the Transkei Agricultural Development Act 10 of 1966 (Transkei).

[12] According to these statutory enactments, residential sites could only be allocated in areas earmarked for residential purposes. Because the sites occupied by the defendants did not form part of any residential area, no one was authorised to permit the occupation or the erection of buildings on these sites. Moreover, s 4 of the 1936 Proclamation provided that, within residential areas, permission to reside could only be granted by the magistrate of the district and only to a 'person domiciled in the district, who has been duly authorised thereto by the Tribal Authority'. It follows that neither the chief nor the tribal authority could allocate residential sites. They could only make recommendations to the magistrate and, in any event, only in respect of persons domiciled in the district. In terms of s 5, occupation for recreational purposes could only take place with

the permission of the Minister of the Interior and subject to such conditions and to the payment of such rental or other charges as he of she might approve. In sum, Feely's evidence was that the permission relied upon by the defendants, was plainly devoid of any validity.

[13] Feely also laid the factual foundation for the Government's main cause of action which relied on s 39 of the Decree. The relevant part of the section provides:

'39(1) There is hereby established on the landward side of the entire length of the seashore, excluding any national park, national wildlife reserve, municipal land, seaside resort, site occupied in terms of Proclamation No 174 of 1921 or Proclamation No 26 of 1936, privately owned land and lease hold land, a coastal conservation area 1 000 metres wide measured –

(a) in relation to the sea, as distinct from a tidal river and tidal lagoon, from the high-water mark;

(b) . . .

(2) Notwithstanding anything in any other law or in any condition of title contained, no person (including any department of State) shall within the coastal conservation area, save under the authority of a permit issued by the Department [of Agriculture and Forestry] in accordance with the plan for the control of coastal development approved by the resolution of the Military Council –

(a) clear any land or remove any sand, soil, stone or vegetation;

(b) . . .

(c) erect any building.

. . .'

And then follows a list of other prohibited activities, such as the construction of roads, etc*,* which were admittedly carried out by the defendants, both on their individual sites and in the area generally.

[14] It is not in dispute that, despite the cessation of the Republic of Transkei as an independent country, the Decree remained in force by virtue of s 229 of the Interim Constitution, Act 200 of 1993, in the area where it previously found application. Likewise undisputed, is the fact that, pursuant to the provisions of s 235(8) of the Interim Constitution, the administration of s 39 of the Decree had been assigned to Feely's employer of late, to wit, the Department of Economic Affairs, Environment and Tourism of the Eastern Cape Province. Feely was convinced that the sites occupied by the defendants form part of the coastal conservation area. They were clearly situated within a zone one kilometre from the sea and, so he testified, not inside any of the areas pertinently excluded by

s 39(1) such as national parks, seaside resorts, etc. Yet, he said, not one of the defendants – or, for that matter, anybody else – applied for a permit from any of the successive authorities that he worked for, to carry out the activities enumerated in s 39(2) that they had performed.

[15] Feely conceded in cross-examination that no overall plan for coastal development was ever approved by resolution of the Military Council as envisaged by s 39(2). The development plan in existence at the time, he explained, was the Transkei Coastal Development Control Plan of 1979. According to this plan, the defendants' sites were outside any of the prescribed nodes destined for development, Though a new development plan was in the process of preparation for approval, that plan had never been finalised before the demise of the Military Council. Feely's department thus continued to work on the 1979 plan. If someone had applied for a permit under s 39(2) – which no-one did – Feely's assumption was that his department would have made use of the 1979 plan.

[16] The Government also relied on the expert evidence of Mr Warrick Pierce, who carried out an investigation into the environmental impact of the defendants' activities in the area. In response, the defendants tendered the expert evidence of Dr James Granger who was involved in a similar study. This gave rise to a rather lengthy debate between these two experts, the relevance of which, I must confess, I find difficult to understand. What the experts agreed upon was that the impact of some of the defendants' activities was significant and that it will endure for a long time to come. In this regard, they both referred, by way of example, to the harm caused by the gaining of access to cottages by means of four-wheel driven vehicles via the beach and across frontal dunes; the impact on dunes caused by the construction of cottages too close to the high-water mark; the damage caused by the clearing of the coastal forest; and the visual disturbance caused by the erection of structures to an otherwise pristine landscape. What the two experts also seemed to agree on, was that no proper and effective rehabilitation could take place for so long as the defendants' cottages remain. The dispute between them seemed to turn mainly on the extent to which the environmental impact of the defendants' activities can be remedied or ameliorated through rehabilitative measures, once all the structures had been

demolished and removed from the sites. As I have indicated, however, I cannot see how the resolution of this debate, one way or the other, could make any difference to the outcome of this case.

[17] Dr Granger also introduced a further topic which then became a recurring theme in the evidence of the defendants themselves. It related to the benefits received by the local residents from the settlement by the defendants in the area and the concomitant hardship that they would suffer if the defendants were compelled to leave. In the promotion of this theme, the defendants also relied on the results of a social impact study commissioned on their behalf. In sum, the results of this study showed that unemployment is a serious problem in the area; that many of the local inhabitants have no cash income at all and that they represent what was described as the 'poorest of the poor'. According to those responsible for the study, the consensus among members of the local community was that they substantially benefited from the presence of the defendants in the area. Examples of these benefits included the employment of local residents as domestic workers, as security guards and as construction workers on the building sites; assistance rendered by the defendants in the erection of a school and a water tank for the community; and the provision by the defendants of emergency transport and care. In the event the study showed that this resulted in considerable local support for the defendants' continued presence in the area, as was confirmed by those members of the community who were called to testify on behalf of the defendants.

[18] Against this background I can now turn to those defences persisted in by the defendants on appeal. First among these is the special plea of prescription. The starting point of the defendants' argument in support of this plea relied on s 12(3) of the Prescription Act 68 of 1969. In terms of this section, the defendants argued, the prescription period – of three years provided for in s 11(d) – commenced to run, at the latest, when the Government acquired knowledge of the 'identity of the debtor and of the facts from which the debt arose'. The 'debt' under consideration, so the argument went, is the vindicatory relief that the Government sought to enforce. The identities of the defendants and the facts from which the vindicatory claims against them arose, so the argument proceeded, were known to the Government at the latest by early 1996. Thus, the

argument concluded, the claims relied upon by the Government became prescribed long before summons in the matter was issued and served in December 2000.

[19] In my view it is fair to say that the Government was aware of the identities of the defendants and of the facts upon which its claims against them rely, more than three years before the present action was instituted. I am also prepared to accept that the vindicatory relief which the Government seeks to enforce constitutes a 'debt' as contemplated by the Prescription Act. Though the Act does not define the term 'debt', it has been held that, for purposes of the Act, the term has a wide and general meaning and that it includes an obligation to do something or refrain from doing something (see eg *Electricity Supply Commission v Stewarts & Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344F-G and *Desai NO v Desai* 1996 (1) SA 141 (A) at 146H-J). Thus understood, I can see no reason why it would not include a claim for the enforcement of an owner's rights to property (see also eg *Evins v Shield Insurance Co Ltd* 1979 (3) SA 1136 (W) 1141F-G).

[20] In considering the special plea of prescription, the postulation is, of course, that the allegations underpinning the Government's claim had in fact been established. Broadly stated, it must therefore be accepted for the prescription issue that the defendants' occupation of their sites constitutes a contravention of both the Decree and the common law. Departing from this premise, the answer to the prescription defence is, in my view, to be found in the concept which has become well-recognised in the context of prescription, namely that of a continuous wrong. In accordance with this concept, a distinction is drawn between a single, completed wrongful act – with or without continuing injurious effects, such as a blow against the head – on the one hand, and a continuous wrong in the course of being committed, on the other. While the former gives rise to a single debt, the approach with regard to a continuous wrong is essentially that it results in a series of debts arising from moment to moment, as long as the wrongful conduct endures (see eg *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A); *Mbuyisa v Minister of Police, Transkei* 1995 (2) SA 362 (T); *Unilever Bestfoods Robertsons (Pty) Ltd v Soomar* 2007 (2) SA 347 (SCA) para 15).

[21] In *Slomowitz* (at 331F-G) this court accepted the description of a continuous wrong as one which 'is still in the course of being committed and is not wholly past'. In applying this description, the defendants' wrongful conduct relied upon by the Government must, in my view, be classified as a continuous wrong, in contrast with a single wrongful act. For their contention to the contrary, the defendants sought to rely mainly on the decision in *Radebe v Government of the Republic of South Africa* 1995 (3) SA 787 (N) 803D-804G. I believe, however, that *Radebe* is distinguishable on its facts. What *Radebe* claimed was the setting aside of an alleged wrongful expropriation and the consequent transfer of his immovable property to the Government, which was the defendant in that case. What the court held was that a deprivation of ownership based on a single act of expropriation did not constitute a continuous wrong and that, because the single wrongful act that Radebe relied upon had occurred more than three years ago, his claim had become prescribed. Where the present case differs from *Radebe*, as I see it, is that the Government's claim is not for the setting aside of a single act of deprivation of possession which happened wholly in the past, but effectively for an order terminating wrongful conduct which is still in the course of depriving it of the possession of its property. Thus understood, the Government's position is, in my view, no different from that of the plaintiff in *South African Railways & Harbours v Fisher's Estate* 1954 (1) SA 337 (A) which was succinctly described as follows by Centlivres CJ at 342B-D:

'The plaintiff's case is not that the defendant wrongfully entered upon the land but that the defendant was at the time of service of the summons (not at any time prior to that date) in wrongful possession of land of which it is the registered owner. That is all it has to prove in order to succeed in its action. As far as its claim is concerned, what occurred in the past is irrelevant . . ..'

[22] A further argument raised by the defendants for the first time in this court, was that even if their wrongful occupation of the sites must be regarded as a continuous wrong, the same cannot be said of their building activities on the sites. That, they argued, can only be described, with reference to every individual structure, as a single wrongful act committed wholly in the past. In consequence, so their argument went, even though the Government's claim for their eviction from the sites may still be enforceable, its further claim that they be held responsible for the demolition and removal of all structures erected by them, had been extinguished by prescription three years after the Government acquired

notice of these structures. I do not agree with this argument. On the Government's case as pleaded, the continued existence and occupation of the structures by the defendants constituted part and parcel of their wrongful occupation of the sites. To my way of thinking, the result is that the existence and occupation of the structures form part of the continuous wrong perpetrated by the defendants. It follows that, in my view, the special plea of prescription cannot be sustained.

[23] As to the merits, the first defence raised by the defendants went to the Government's *locus standi.* Essentially it was based on the contention that the Government had failed to establish its alleged ownership of the land on which the sites are situated. The appropriate starting point in considering the validity of this contention is, in my view, to be found in the unequivocal testimony of Feely, on behalf of the Government, that the defendants' sites indeed formed part of State land. The defendants relied, however, on a concession by Feely in cross-examination that he never consulted the Deeds Registry. Though this is so, Feely seems to have been justified in his inference, shared by at least some of the defendants, that that remote part of the Transkei Wild Coast has never been held in private ownership. It also appears to have been common cause that the area formed part of unsurveyed land. In the event, the legal principle to be applied is that, since all land originally belongs to the State, land which has never been transferred into private ownership remains State land (see eg *Cape Town Town Council v Colonial Government and Table Bay Harbour Board* (1906) 23 SC 62 at 69; *LAWSA* (1st reissue) Vol 14 para 21). Moreover, Feely also testified, and this was not contested, that the land in the immediate vicinity of the defendants' sites had been administered since time immemorial as State land under the provisions of the 1936 Proclamation. In the circumstances, I find no merit in this defence.

[24] As to the Government's case based on the provisions of the Decree, the defendants raised a twofold defence. Firstly, they maintained that the sites occupied by them were excluded from the coastal conservation area created by s 39(1) because it formed part of municipal land. Their second defence was that s 39(2) of the Decree never took effect because the overall development plan contemplated in this section had never been approved by the Military Council.

[25] The defence that the sites fell within the excluded category of municipal land was in turn based on a twofold hypothesis. Firstly, it assumed that the expression 'municipal land' must, in the context of s 39(1) be understood to refer to land falling under municipal jurisdiction as opposed to land owned by a municipality. The second assumption was that the sites were indeed subject to the jurisdiction of some unknown municipality. The first assumption is, in my view, unfounded. The meaning of the expression contended for by the defendants is clearly not the natural one. When the Decree refers to 'State land" it patently means land owned by the State. That much was conceded by the defendants. Why, it may then, in my view, rightfully be asked, would the meaning of the same expression change without warning when it refers to a municipality instead of the State? What s 39(1) plainly sought to exclude from the ambit of its operation – admittedly in a somewhat circuitous way – was land not owned by the State. In the process it referred, *inter alia*, to 'privately-owned land' and 'municipal land'. In this context the latter expression must, in my view, be understood to mean land owned by a municipality.

[26] The assumption that the sites were indeed subject to the jurisdiction of some or other municipality, is, in my view, equally untenable. It was based on the supposition that when the 1996 Constitution came into operation on 4 February 1997, every nook and cranny of the national territory immediately and automatically became subject to the jurisdiction of a municipality, albeit that the identification of the municipality concerned might not in all instances have been practically possible. As the basis for this rather surprising notion, the defendants relied on s 151(1) of the Constitution 108 of 1996, which provides that:

'The local sphere of Government consists of municipalities, which must be established for the whole of the territory of the Republic.'

[27] I do not believe, however, that the section is capable of supporting the notion contended for by the defendants. In fact, if that was the meaning of the section, it would make a nonsense, for example, of the contemplation in s 155 of the Constitution, that the establishment of municipalities and their boundaries would take place in terms of national and provincial legislation to be promulgated at some future date (see eg, Local Government: Municipal Demarcation Act 27 of 1998). Absent any direct evidence that the remote part of the Transkei Wild Coast where the sites are situated became subject to the jurisdiction of some

municipality, that inference cannot, in my view, be justified. I therefore conclude that there is no merit in the defence that the sites occupied by the defendants were excluded from the coastal conservation area and thus from the ambit of the provisions of the Decree.

[28] The further defence, that the Decree did not come into operation, because the Military Council never adopted an overall development plan, is, in my view, equally devoid of substance. The mere fact that, in the absence of an overall plan, no permit authorising development could be issued under s 39(2), does not mean that the prohibition pronounced by s 39(2) could simply be ignored. The main operative part of the section was the prohibition. A permit would constitute an exception. Quite clearly the operative part could function without any exception. That distinguishes the present case from the facts of *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 1999 (4) SA 788 (T) – on which the defendants sought to rely – where the operation of the whole Act depended on subordinate legislation not yet in existence. It may be that the applicant for a permit would have to seek a *mandamus* against the Military Council – or its successor – compelling the approval of an overall plan. Or, maybe such an applicant could take the department on review for refusing the permit on the basis of the 1979 plan, as Feely suggested. But, since no single defendant applied for such permit, these are not issues we have to decide.

[29] As to the Government's alternative claim based on wrongful possession of State land, the first defence raised by the defendants was one of consent. The onus to prove the validity of that consent, in my view, rested on the defendants. It follows from the statement by this court in *Dreyer and another NNO v AXZS Industries* 2006 (5) SA 548 (SCA) para 4, that:

'A party who institutes the *rei vindicatio* is required to allege and prove ownership of the thing. Since one of the incidents of ownership is the right to possession of the thing, a plaintiff who establishes ownership is not required to prove that the defendants' possession is unlawful. In that event, the onus to establish any right to retain possession will rest on the defendant, as long as the plaintiff does not go beyond alleging ownership.'

[30] I do not think it unfair to say that the defendants did not even come close to discharging this onus. On the contrary, even if the Government were to bear

the onus, it had, in my view succeeded in establishing the absence of any valid consent. The defendants did not deny that the right to occupy uninhabited land in the area was governed by ss 4 and 5 of Proclamation 26 of 1936. Even a perfunctory reading of these sections reveal that the consent of the tribal authority and the chief, relied upon by the defendants was plainly of no validity. As to the tacit consent of the magistrate in which some of the defendants placed their trust, it is equally clear that, in terms of s 4, the magistrate could only grant permission to reside to persons domiciled in the district of his jurisdiction and then only in an area reserved for residential purposes. Because the defendants clearly failed to meet these two requirements, any consent by the magistrate, be it tacit, express or otherwise, would be equally invalid. The proposition put forward for the first time in this court, that when the magistrate granted his tacit consent, he must be taken to have acted on behalf of the Minister of the Interior under s 5, was clearly no more than an afterthought. The suggestion was never pleaded by the defendants nor put to any of the Government witnesses in cross-examination and, in any event, appears to be devoid of any factual basis. Whatever the magistrate intended to do, it is clear that he never purported to grant the formal – and conditional – permission contemplated by s 5, on behalf of the Minister.

[31] At the stage of argument in the trial court, the defendants raised the further defence that they were protected in their occupation by s 2(1) of the Interim Protection of Informal Rights Act 31 of 1996. In this regard they contended that their right to occupy the sites constituted an ‘informal right to land’ as defined in paras a(i) and (a)(ii) of s 1 of the Act. In terms of these paragraphs, the ‘informal right to land’ protected by s 2(1) includes ‘(a) the occupation of land in terms of (i) any tribal, customary or indigenous law or practice of a tribe; and (ii) the custom, usage or administrative practice in a particular area or community.’

[32] The short answer to this defence is, in my view, that, on the evidence presented, the ‘rights’ relied upon by the defendants – whatever they were – had never before been granted to non-residents in the area until the defendants came on the scene. It follows, in my view, that the defendants did not even come close

to establishing the ‘custom’ or ‘practice’ on which they sought to rely. In the result I am of the view that this defence cannot succeed.

[33] What remains to be considered is the defendants’ contention that the Government’s claim for their ejectment, both in terms of the Decree and under the common law, was constrained by the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, that has long since become better known in legal vernacular as ‘PIE’. Departing from this premise, the defendants’ argument was that the Government had to satisfy the provisions of s 4(7) of PIE. In terms of this section an eviction order may only be granted if the court ‘is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances . . ..’

[34] Thus based on the presumed application of PIE, the defendants developed an argument which eventually constituted the cornerstone of their case, namely, that the Government had failed to establish that, in all the circumstances, it would be just and equitable to evict them from their sites. In fact, it was the argument, so it seems, which prompted the greater part of the evidence presented by and on behalf of the defendants at the trial.

[35] Adverting to this evidence, the defendants advanced considerations such as the following in support of their plea that it would be unfair and unjust to evict them from their sites:

(a) Their historical connections with and affinity for the Transkei Wild Coast, coupled with the fact that they were for a long time precluded from any title to the land, which they visited from childhood, because of the racial policies of the pre-constitutional South Africa.

(b) They took occupation openly and without stealth or force, of vacant State land held in trust for local tribes who consented to and endorsed the defendants’ occupation.

(c) It was held out to them by various officials and entities involved in the administration of the area, that they could occupy the sites and build their cottages.

(d) The consideration that the impact of their occupation on the environment was not as far reaching as suggested by the Government.

(e) Their eviction would result in their losing the money, time and labour invested in buildings on the sites – which varied from R30 000 to R300 000.

(f) The benefits attained by the local inhabitants through the defendants' occupation and the concomitant hardship the inhabitants will suffer if the defendants are ordered to leave.

(g) The consideration that the state of apartheid will effectively be reintroduced if all white residents are evicted from the area.

[36] Apart from disputing the veracity of some and the weight to be attributed to the other considerations advanced by the defendants, the Government's contention was that, the balancing act of deciding what is just and fair requires that regard should also be had to countervailing factors such as the following:

(a) The defendants are all literate and sophisticated people. The documents that were issued to them purported to be applications for licences to conduct a fishing business on the sites and not the permission to build holiday cottages which they sought. Though these applications were addressed to the magistrate, they went to the agricultural officer. The dimensions of the sites were determined in the most cavalier fashion. Despite these glaring incongruities and despite the inherent unlikelihood that one could acquire the right to perpetual occupation of a site on the coast for a sum as paltry as R200, the defendants chose to make no enquiries about the applicable legislation. The inference to be drawn from this, the Government contended, is that the defendants deliberately closed their eyes; that they simply did not want to know what the true position was.

(b) The defendants built their cottages, in direct contravention of the law, in an ecologically sensitive area. By all accounts the impact of their activities on this virtually pristine environment was significant and will endure for a long time to come.

(c) The defendants did not build in an area reserved for residential purposes, where the local residents lived, but instead created a white enclave.

(d) The benefits derived from their occupation by the local community, the Government contended, are overstated by the defendants; are in any event limited to a few of these residents; and are only enjoyed during the relatively short periods when the defendants are there on vacation.

[37] On balance, I tend to agree with the Government's argument that considerations of fairness and equity do not favour the defendants' continued stay. But, as I have said, this whole debate had been introduced by the defendants on the basis of the expressly stated hypothesis that the provisions of PIE has a bearing on the case. 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 'reside' (in ss 4(7) and 4(9)) and, secondly, by the wording of the preamble, which, in turn establishes a direct link with s 26(3) of the Constitution (see eg *Ndlovu v Ngcobo* 2003 (1) SA 113 (SCA) 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 the court made after considering all the relevant circumstances'.

[38] This leads to the next question: can the cottages on the sites that were put up by the defendants for holiday purposes be said to be their homes, in the context of PIE? I think not. Though the concept 'home' is not easy to define and although I agree with the defendants' argument that one can conceivably have more than one home, the term does, in my view, require an element of regular occupation coupled with some degree of permanence. This is in accordance, I think, with the dictionary meanings of: 'the dwelling in which one habitually lives; the fixed residence of a family or household; and the seat of domestic life and interests' (see eg The Oxford English Dictionary 2ed Vol VII). It is also borne out, in my view, by the following statement in *Beck v Scholz* [1953] 1 QB 570 (CA) 575-6:

'The word 'home' itself is not easy of exact definition, but the question posed, and to be answered by ordinary common sense standards, is whether the particular premises are in the personal occupation of the tenant as the tenant's home, or, if the tenant has more than one home, as one of his homes. Occupation merely as a convenience for . . . occasional visits . . . would not, I think, according to the common sense of the matter, be occupation as a "home".'

[39] Moreover, within the context of s 26(3) of the Constitution – and thus within the context of PIE – I believe that my understanding of what is meant by a 'home' is supported by Sachs J, speaking for the Constitutional Court, in *Port*

Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) para 17, where he said:

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

[40] These sentiments cannot, in my view, apply to holiday cottages erected for holiday purposes and visited occasionally over weekends and during vacations, albeit on a regular basis, by persons who have their habitual dwellings elsewhere. Thus I conclude that for purposes of PIE, the cottages concerned cannot be said to be the defendants' 'homes'. Their 'homes' are in KwaZulu-Natal. Consequently I hold the view that PIE finds no application. This finding renders it unnecessary and indeed inappropriate to resolve the debate as to what outcome would be dictated by justice and equity. Finally, the defendants sought an extension of the four month period which the court *a quo* afforded them to demolish and remove their structures from the sites. Again, however, this relief was sought on the basis of PIE – this time under the provisions of s 4(8) of the Act. Because of my view that PIE does not apply, I do not believe we can accede to this request.

[41] For these reasons, the appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

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F D J BRAND
JUDGE OF APPEAL

Concur:

HOWIE P
JAFTA JA
MAYA JA
COMBRINCK JA