THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 167/2020

In the matter between:

PETRA DAVIDAN **APPELLANT**

and

DAVID NEVILLE POLOVIN N O **FIRST RESPONDENT**

ALAIN RENÉ JEAN PROUST N O **SECOND RESPONDENT**

JONATHAN PAIZEE N O **THIRD RESPONDENT**

Neutral citation: *Davidan v Polovin N O and Others* (167/2020) [2021] ZASCA 109 (5 August 2021)

Coram: DAMBUZA, MOCUMIE and DLODLO JJA and CARELSE and KGOELE AJJA

Heard: 18 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court

of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 10h00 on 5 August 2021.

Summary: Application for eviction under PIE – unlawful occupation – Consent to occupy – under an oral lease – termination – was consent lawfully terminated.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Hack AJ sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside, and substituted with the following:

'The application is dismissed with costs.'

JUDGMENT

Carelse AJ (Mocumie JA and Kgoele AJA concurring):

[1] The respondents are the trustees of the Botany Bay Trust (the Trust) that owns a house in Bantry Bay, Cape Town (the property). The appellant, Ms Petra Davidan, Ms Elizabeth Gunta, the housekeeper, and Ms Helene Schonees, the appellant's 83-year-old mother, occupy the property. On 13 September 2019, the Western Cape Division of the High Court (Hack AJ) granted an order in terms of s 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), evicting the appellant (respondent in the court *a quo)* and all those who occupied through or under her, from the property.

[2] On 10 December 2019, the high court dismissed an application for leave to appeal. On 6 February 2020, this Court granted leave to appeal limited to the following issues:

'(a) Whether any right that the appellant may have had to occupy the property had been lawfully terminated?

(b) Whether Mrs Gunta and Mrs Schonees had a direct and substantial interest in the relief sought in the court a quo and were therefore necessary parties who ought to have been cited as co-respondents?'

[3] A chronology of the relevant facts is set out below. The appellant, a real estate agent and the late Mr Mercure Paizee (Mr Paizee) met on 15 March 2002, after he had separated from his ex-wife. Mr Paizee was

residing at the property at the time. Ms Gunta moved into the property during May 2002. Soon thereafter, the appellant and the deceased started co-habiting at the property. The property was the matrimonial property of the deceased and his ex-wife. In 2004 the deceased and his ex-wife divorced.

[4] The property was registered in the name of Mr Paizee's ex-wife. Following an acrimonious divorce, and in terms of the settlement agreement, the property was acquired by and registered in Mr Paizee's name. Compelled by dire financial distress, Mr Paizee agreed after discussions between him and Mr Gamsu that a 'capital realization trust' be created to undertake a development on the property. The development of the property did not materialise. Instead, the Trust was created on 31 March 2004. Mr Paizee transferred the property to the Trust. Mr Paizee had a 50% beneficial interest in the Trust, which was subsequently reduced to 40%. In 2004 a mortgage bond was registered over the property in favour of Absa bank for the standard period of 20 years.

[5] Sometime in 2011, the appellant took out a Discovery Life Policy over the life of Mr Paizee. The purpose of the policy was to ensure that in the event of the deceased's death, their joint obligations to the Trust in respect of the mortgaged bond and municipal charges would be covered. The policy recorded that in the event of either one of them dying, the funds from the policy was to be utilised in full for the purpose of running the property and in particular, settling all outstanding municipal charges since the bond would be settled in full. This was not disputed. In terms of the policy, the benefit amount was reflected as R3 571 428.57 and the total cover was for R5 000 000.00. According to the Trust, the amount

outstanding on the bond as at the 11 May 2018 was R2 160 226.15. The appellant submits that R 1 411 202.42 would be left and that this would be enough to settle any outstanding municipal charges. This allegation is met with the following response by the trust:

'[T]he first respondent has not been able to provide any proof that she arranged for the Discovery Life Policy or that she was the one that paid the monthly premiums.'

[6] It is not disputed that on 12 July 2004, the appellant and the trustees of the Trust entered into a one-year lease agreement for the property, which would be subject to one months' notice on either side. The rental payable by the appellant was R20 000 per month. After the expiry of this lease, the appellant alleged that she and the deceased entered into an oral agreement with the Trust, represented by one of the trustees, Mr Gamsu. The terms of the oral agreement were to the effect that the appellant and Mr Paizee would be entitled to occupy the property and in return they would pay the bond instalments and the municipal rates for the duration of the bond.

[7] On 9 March 2017, after the removal of Mr Gamsu and Mr Paizee as trustees, Mr Polovin and Mr Proust were appointed as the new trustees of the Trust. In 2017, tensions developed between Mr Paizee and the appellant. On 12 September 2017, the appellant found Mr Paizee in his study with a fatal gunshot wound.

[8] After the death of Mr Paizee, the appellant was requested to enter into a formal lease agreement with the Trust. On 23 February 2018, the trustees wrote to the appellant requesting payment of R40 000.00 per month towards the bond repayments, in return for a monthly tenancy. The

trustees informed the appellant in their letter that if she refused, she would be required to vacate the property by no later than 30 April 2018.

[9] On 24 April 2018, the trustees sent a further letter demanding that the appellant vacate the property by no later than 30 April 2018. On 13 August 2018, the trustees sent a final (third) letter to the appellant informing her that should she not conclude a lease agreement with the Trust for the property within 14 days, the Trust would commence with eviction proceedings. The appellant refused to vacate the property and remains in occupation of the property. As a result of this refusal, the respondents successfully launched an application in the high court for the eviction of the appellant and all those who occupy through her.

[10] There was contestation as to whether the right that the appellant may have had to occupy the property was lawfully terminated by the Trust. The high court found that:

'It was only M Paizee who had the "right" to reside on the property granted to him by the Trust. She therefore obtained her occupancy at M Paizee's behest as his guest or invitee.'[1]

Simply put, the high court found that the appellant did not have any consent whatsoever to reside on the property and, as a result, she was an unlawful occupier. The allegation by the Trust was that the appellant's consent to reside on the farm was dependent upon Mr Paizee's continued right to

[1] Compare *Klaase and Another v van der Merwe N.O.and Others* para [66]: 'The Land Claims Court's Findings that Mrs Klaase occupied the premises "under her husband" subordinates her rights to those of Mr Klaase. The phrase is demeaning and is not what is contemplated by section 10(3) of ESTA. It demeans Mrs Klaase's rights to equality and human dignity to describe her occupation in those terms. She is an occupier entitled to the protection of ESTA. Although Klaase was decided under ESTA, similar conclusion could be reached under PIE.'

occupy the property. Nowhere is it alleged that it was a term of occupation that if Mr Paizee died the appellant's right to occupy would terminate.

[11] 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 PIE at the time when the eviction proceedings were launched. Section 1 of PIE defines an unlawful occupier as 'a person who occupies land without the express or tacit consent of the owner or person in charge or without any other right in law to occupy such land.' Consent is defined as 'the express or tacit consent, whether in writing or otherwise, of the owner or person in charge to the occupation by the occupier of the land in question.'

[12] The starting point is to establish whether the appellant is an unlawful occupier under PIE. The key question is whether the appellant enjoyed a right of occupation? PIE applies not only to occupants who occupied land without the initial consent of the owner or person in charge, it also applies to occupants who had consent to occupy but such consent was subsequently terminated. In both instances the occupants would be unlawful occupiers within the meaning of PIE. Consent in eviction applications is a valid defence.

[13] The first enquiry is whether the appellant had the necessary express or tacit consent to reside on the property owned by the Trust. In other words, was the oral agreement established? Whether or not someone has the necessary consent to reside is a factual question.

[14] The Trust's cause of action set out in the founding affidavit is that the appellant is an unlawful occupier of the property as defined in section 1(xi) of PIE, in that she is a 'person who occupies land without the express or tacit consent of the owner . . . Or without any other right in law to occupy such land. . . .'

[15] What is decisive in this appeal is the appellant's evidence that on 12 July 2004, she and the Trust entered into a one-year lease of the property. After the expiry of this lease, she and the deceased entered into an oral agreement with the Trust, represented by Mr Gamsu, then a trustee of the Trust. In terms of this agreement, they would continue to occupy the property, but *in lieu* of rent they would jointly and severally pay the monthly bond instalment on the property plus the rates and taxes levied by the municipality. This oral agreement is corroborated by the erstwhile trustee, Mr Gamsu. In an affidavit opposing an application for his removal, he stated:

'The applicant [i.e. Paizee] and Petra Davidan (the applicant's partner) originally occupied the Trust's property in terms of a written lease agreement, which was concluded with Davidan. A copy of that lease agreement is annexed hereto marked "BG6".

It was subsequently orally agreed between the Trust, applicant and Davidan, that, *in lieu of the rental amount, they would jointly and severally make payment of the monthly bond instalments and the rates and municipal charges for services consumed, as charged from time to time by the municipality.* This obligation was recorded in clause 10.5 of the acknowledgment of debt that was ultimately signed between all the parties.' (My emphasis.)

[16] The appellant's version is met with a bare denial by the Trust, followed by a response that the written agreement, which had expired,

cannot be varied by the oral agreement. Once again there is no denial that an oral agreement followed after the expiry of the written agreement. It is not disputed that although the appellant and Mr Paizee's obligations to the Trust were joint and several, she assumed the responsibility of paying the bond instalments and municipal charges because he was unable to pay due to his dire financial circumstances. The Trust did not deal with this allegation in reply. The appellant contended that an acknowledgment of debt provided further corroboration of the oral agreement. On 24 August 2010, the appellant and Mr Paizee signed an acknowledgment of debt in favour of Atlantic Nominees (Pty) Ltd (Atlantic Nominees) for monies allegedly loaned to the Trust. Pertinently clause 10.5 and 10.5.1 provide:

'Davidan and Paizee undertake to continue to pay all bond payments due to ABSA and all rates and taxes due to the City of Cape Town on a monthly basis henceforth.

Paizee and /or Davidan shall continue to pay all the rental payments in terms *of the lease between Botany Bay Trust and Paizee*, which shall be utilized to pay the monthly bond payments to ABSA referred to above.' (My emphasis.)

[17] In its heads of argument, the Trust submits that para 10.5.1 of the acknowledgment of debt supports its case that it was Mr Paizee and not the appellant that had a lease agreement with the Trust. The acknowledgment of debt is in favour of Atlantic Nominees, not in favour of the Trust. According to paragraphs 10.5 and 10.5.1 of the acknowledgment of debt, it seems to go no further than to record that the rental due under the oral (lease) agreement would be used to pay the monthly bond instalments of the Trust. It is not a written recordal of the terms of the oral lease or who the tenant(s) are. The reference to 'the lease between Botany Bay Trust and Paizee' is in my view nothing more than an incomplete description of the lease, intended for identification purposes only. The fact that the appellant assumed an obligation in terms of 10.5.1, together with Mr Paizee, to make

rental payments by way of the payment of the bond instalments, indicates that the appellant was a co-tenant. The acknowledgment of debt was not in respect of the bond payments but in respect of an alleged loan that was made to the Trust by Atlantic Nominees. In any event, Mr Gamsu's evidence that the appellant and Mr Paizee had an oral agreement with the Trust to pay the monthly bond and the municipal charges, has not been challenged. To date the Trust has not attached any lease agreement that it allegedly had with the deceased.

[18] Pertinently in reply, the Trust denies that the appellant made any bond payments or municipal payments and alleged that if she has done so, she has not attached any proof of such payments. Likewise, if the Trust has made such payments, as it says, it too has not attached any proof thereof. In any event, the appellant has attached a letter dated the 15 May 2018 to her affidavit, which was addressed to the members of the Trust informing them that the mortgage bond over the property has been settled in full.

[19] Mr Polovin, the deponent to the Trust's affidavit, was not a trustee when this oral agreement was concluded and would have had no personal knowledge thereof**.**

[20] The method for resolving disputes of fact in motion proceedings has been laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620.[2] The Trust's reply to the appellant's version, that she had an

[2]See also *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) where this Court, at para 26, held that '[m]otion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well

oral agreement with the Trust, is met with a bare denial. In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) Heher JA held at para 13:

'. . . if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.'

This does not create a dispute of fact and for the purposes of this appeal the appellant's version must be accepted. Since the appellant was the respondent in the motion proceedings her version is the one that prevails.

In light of the above, I do not think that the appellant's version is far-fetched or clearly untenable. If the appellant was not a tenant under an oral lease, why did the Trust wait five months before asking her to sign a lease or vacate the property?

[21] If the appellant had no right to occupy the property, then axiomatically there would be no need to terminate that right.[3] The

established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them on the papers.' See also *Media 24 v Oxford University Press*; [2016] ZASCA 119; [2016] 4 All SA 311 (SCA); 2017 (2) SA 1 (SCA), and *Malan and Another v Law Society Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA); [2009] 1 All SA 133 (SCA).

[3] In *Residence of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16; 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC), The Constitutional Court also grappled with the question of whether or not the applicants were unlawful occupiers for purposes of the PIE Act and, if so, whether their occupation was lawfully terminated. Pertinently, the Court considered whether the occupants had consent to occupy the land owned by the City of Cape Town? The Court agreed that at the time that the eviction proceedings were launched, the applicants were unlawful occupiers. Yacoob J, Langa CJ and Van der Westhuizen J held: 'I conclude therefore that the occupants enjoyed no right of occupation. It was therefore not necessary for the City to terminate their right'. Whereas, Moseneke DCJ,

judgment of the high court does not deal with the question of termination and neither was it pleaded. The question of consent, whether it be express or tacit, is integrally linked to whether any right that the appellant might have had was lawfully terminated.

[22] Having established that the appellant had the necessary consent, the next question to be determined is whether the appellant's right to occupy was lawfully terminated. It is significant that the high court, in its judgment, recognised that 'the initial founding affidavit was very brief. After a lengthy answering affidavit was filed raising many issues the applicants filed a lengthy replying affidavit. This elicited this application for leave to file an additional affidavit'. The high court further stated: 'I am mindful of the prescripts of uniform rule 6 which intended to ensure that an applicant makes out its case in its founding affidavit. . . .' The question then is whether the Trust, as applicants, made out its case in its answering affidavit? Nowhere in the founding affidavit does the respondent aver that such consent was terminated.[4]

[23] The entitlement of the appellant to reside on the property stems from an oral agreement. Once that agreement is terminated her contractual right to reside also terminates. The appellant goes on to state that she has fulfilled all her obligations in terms of the oral agreement. The Trust would have been obliged to comply with the terms of the agreement before it could terminate the appellant's right of residence. There is no suggestion that this oral agreement was terminated, nor was it pleaded. An owner must

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Ngcobo J, O'Regan J and Sachs J found that the applicants did have consent however, it was conditional and subsequently revoked.

[4] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636B.

legally terminate a lease agreement or, as in this case, the oral agreement between the parties. The underlying basis for the termination must be legal, for example the expiration of the lease or a material breach of the terms of the agreement.

[24] In *Wormald N O and Others v Kambule* [2005] ZASCA 84; [2005] 4 All SA 629 (SCA); 2006 (3) SA 562 (SCA), Maya AJA held at para 11 that '[a]n owner is in law entitled to possession of his or her property and to an ejectment order against a person who unlawfully occupies the property except if that right is limited by the Constitution, another statute, a contract, or any legal basis'. Once the Trust, as owner of the property, has lawfully cancelled the oral agreement the appellant will have no contractual right to occupy the property.

[25] Presumably the reason the high court did not deal with the question of termination of the right to occupy, even though it was argued, was because it found that the appellant never had the necessary consent to occupy the property. The Trust nevertheless in argument relied on the letter of the 23 February 2018, and subsequent letters, to contend that if the appellant did have consent to reside, her right to occupy was lawfully terminated. The letter of 23 February 2018 merely calls upon the appellant to vacate the property if she does not accept the offer of a monthly tenancy. There is no notice of termination of an existing (oral) lease in the letter.

[26] In *Snyders and Others v De Jager and Others* [2016] ZACC 55; 2017 (5) BCLR 614 (CC); 2017 (3) SA 545 (CC), the Constitutional Court held at paras 71 and 72:

'The second difficulty is that no part of the letter said that Mr Snyders' right of residence was being terminated. The part on which Ms de Jager relies simply said that Mr Snyders was required to vacate the house. The basis for the requirement that Mr Snyders should vacate the house must have been that his right of residence had automatically terminated when his contract of employment was terminated. That was not necessarily the position. The right of residence needed to be terminated on its own in addition to the termination of the contract of employment. Until Mr Snyders' right of residence had been terminated, he could not be required to vacate the house. In this case Ms de Jager has failed to show that Mr Snyders' right of residence had been terminated. Therefore, Ms de Jager had no right to require Mr Snyders to vacate the house or to seek an eviction order against Mr Snyders . . .

In any event, even if it were to be accepted that Ms de Jager terminated Mr Snyders' right of residence, she has failed to show, as is required by section 8(1) of ESTA, that there was a lawful ground for that termination and that, in addition, the termination was just and equitable. At best for Ms de Jager, she purported to show no more than that there was a lawful ground for the termination of the right of residence.'

[27] The Trust submits that *Snyders* dealt with ESTA and not PIE matters. I disagree. Paragraph 71 in *Snyders* dealt with the common law right of an occupier to occupy, and paragraph 72 specifically dealt with s 8(1) of ESTA.

[28] The appellant is not an unlawful occupier in terms of PIE. No case has been made out against the appellant, her mother or Ms Gunta therefore, the eviction sought against them must fail. It is accordingly unnecessary to consider the second ground on which leave was granted.

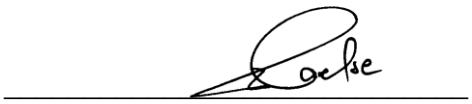
[29] For the above reasons the appeal must succeed.

[30] The following order is made:

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside, and substituted with the following:

'The application is dismissed with costs.'



Z CARELSE
ACTING JUDGE OF APPEAL

Dambuza JA (Dlodlo JA concurring):

[31] I have read the judgment of my colleague Carelse JA in the main judgment. Regrettably, I am unable to agree with the reasoning and the order granted therein. My view is that the appellant did not have consent to occupy the property. Instead she was in occupation, as the high court found, at Mr Paizee's behest and as his guest. I am also of the view that the non-joinder of Ms Gunta and Ms Schoonees, in the application for eviction, was not fatal to that application.

[32] In seeking the appellant's eviction from the Trust property, the trustees alleged that she was in occupation of the property unlawfully and had been invited, repeatedly, to negotiate a lease agreement for the property or vacate it. The appellant pleaded three bases for her alleged right to occupy the property. The first was a common law right. She did not, however, explain the exact basis of that common law right. It was common cause that Mr Paizee and the appellant were never married. When the appellant came to join Mr Paizee on the property Mrs Paizee was the owner thereof. And then ownership was transferred to the Trust.

[33] The second basis for the appellant's occupation of the Trust property was an alleged oral lease agreement. The appellant contended that there was a partnership agreement between herself and Mr Paizee to acquire the property for development. Towards this end, in July 2004 a 12 months' written lease was concluded between the Trust and the appellant. When that lease expired an oral lease agreement was concluded between her and Mr Paizee as lessees, and the Trust, the appellant contended. The identity of the trustee(s) with whom the oral agreement was not divulged. In terms the oral lease the appellant and Mr Paizee, in lieu of the rental amount,

would jointly and severally make payment of the monthly bond instalments payable to Absa Bank in respect of the property. They would also pay the rates and Municipal charges for services consumed as charged from time to time by the municipality.

[34] As set out in the main judgment, in support of her contention the appellant relied on an acknowledgement of debt which she and Mr Paizee executed in favour of Atlantic Nominees, in relation to a loan that they had obtained in the previous years. However, the acknowledgement of debt belies the allegation of an oral agreement concluded with the appellant. Instead the contents thereof support the trustee's contention that the lease agreement was between the Mr Paizee and the Trust (or the trustees).

[35] The background to the acknowledgment of debt is this: the loan of R2 million was obtained from the Hatobeda Trust to enable Mr Paizee to meet his obligation to acquire the property from his wife in whose name it was registered prior to the divorce. Ownership of the property was then registered in the name of the (Botany Bay) Trust, with Mr Paizee holding 40% beneficial interest therein. The 60% beneficial interest was held in the Trust for the benefit of such persons as the trustees would nominate.

[36] Subsequent thereto, all right, title and interest in relation to the loan advanced by the Hatobeda Trust to the Botany Bay Trust was ceded to the Atlantic Nominees. Hence the acknowledgement of debt in favour of the Atlantic Nominees. By the time of execution of the acknowledgment of debt the amount outstanding on the loan had increased to R5 million which the appellant and Mr Paizee undertook to repay in two instalments of R2 500 000.00 each. They also provided further security to cover the outstanding amount. It is in this context that the lease for occupation of the

Trust property was referred to in the acknowledgement of debt. Importantly, therein the lease was recorded as having been concluded 'between the Botany Bay Trust and [Mr] Paizee'. As recorded in the acknowledgement of debt the appellant's involvement only went as far as the undertaking to pay, as a co-debtor together with Mr Paizee, the principal debt and mortgage bond instalments together with the municipal rates and other charges.

[37] More specifically, Clause 10.5 of the acknowledgement of debt dated 24 August 2010 provided that:

'10.5 Davidan and Paizee undertake to continue to pay all bond payments to Absa and all rates and taxes due to the City of Cape Town on a monthly basis henceforth.

10.5.1 Paizee and/or Davidan shall continue *to pay all the rental payments in terms of lease between Botany Trust and Paizee*, which shall be used to pay the monthly bond payments to Absa referred to above.' (My emphasis.)

[38] The fact that Mr Gamsu may have said, in separate proceedings, that the appellant was also a lessee, is irrelevant. Those were mere allegations and not proved facts or findings of a court. As the appellant herself alluded, in those proceedings Mr Paizee disputed the allegation that the appellant was a lessee. The contents of the acknowledgement of debt provide objective evidence in relation to the identity of the lessee of the Trust property during the relevant period. Mr Gamsu tendered no evidence in these proceedings. Consequently, the alleged oral lease agreement advanced as the second basis for the right of occupation or the alleged consent was disproved.

[39] The third basis for the right of occupation was a reliance on the expansive meaning of tacit consent as applied in the ESTA cases and by the minority in *Residents of Joe Slovo*.[5] The appellant contended that the trustees had tacitly consented to her occupation of the property because they never objected thereto. As I will show below, this contention is untenable. Apart from the alleged acquiescence on the part of the Trust, the appellant referred to no other conduct that could be reasonably interpreted as demonstrating consensus to a lease contract between her and the trustees. There was also no evidence as to identity of the trustee(s) who acquiesced to her occupation or whether all of the trustees acquiesced.

[40] Under the PIE Act an "unlawful occupier" is defined as:

'[A] person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996).'

[41] In *Residents of Joe Slovo Community* the Constitutional Court had to determine whether members of the appellant community were unlawful occupiers under the PIE Act. The Court affirmed the traditional interpretation of 'tacit consent'. Yacoob J, writing for the majority, held that tacit consent was a species of actual consent and that in terms thereof bilateral conduct was required from the relevant parties. The Court held that there was no basis for a broad meaning for the expression, and that: 'If

[5] See para 21 of main judgment. *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (CCT 22/08) [2009] ZACC 16; 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC) (10 June 2009).

the purpose of the lawmaker was to confer a right of occupation consequent upon ostensible consent it would have certainly said so'.

[42] The submission on behalf of the *Joe Slovo* community, that a broad meaning should be given to 'tacit consent', namely, that the term included acquiescence by the owner or person in charge of the property to occupation, was firmly rejected by the Court. Instead the Court held that any impression created by the municipality that it had consented to occupation of its property by the appellants was no bar to it denying the absence of consent. The minority judgment penned by Moseneke J would have upheld a broader meaning of tacit consent. But it does not appear that even Moseneke J envisaged as wide a meaning as advocated by the appellant in this case. At para 144 the Learned Judge held:

'The consent required is of an owner or the person in charge. It may be express or tacit and it may be in writing or otherwise. The definition is cast in wide terms. It envisages explicit consent but it also contemplates consent that may be tacit or, put otherwise, that may be unsaid *but capable of being reasonably inferred from the conduct of the owner in relation to the occupier*.' (emphasis supplied)

As stated earlier, the appellant pleaded no conduct from which consent to occupation could reasonably be inferred.

[43] The broad definition of 'tacit consent' has been applied by the Constitutional Court in the determination of lawfulness or otherwise of occupation of land or termination of residence under the Extension of Security of Tenure Act 62 of 1997(ESTA).[6] ESTA is intended to provide measures to facilitate long-term security of land tenure for the benefit of land occupiers in mainly rural areas and on farms. Contrary to the PIE Act

[6] See for example *Klaase and another v Van der Merwe NO and others (Women on Farms Project as amicus curiae)* 2016 (9) BCLR 1187 (CC).

ESTA becomes applicable on the basis that consent was granted for occupation of land. ESTA then regulates termination of consent previously granted or deemed to have been granted to occupiers of or residents on land.[7]

[44] Section 3 (4) of ESTA regulates the presumption of consent to reside on land where a person has 'continuously and openly resided on [the] land' for a period of one year. Section 3 (5) is a deeming provision, applicable where a person has resided on land with the knowledge of the owner or the person in charge once residence thereon exceeds a period of three years.

[45] Again, contrary to the PIE Act in ESTA the legislature expressly provided for implied consent based unilateral conduct or acquiescence. Therefore, the broad interpretation of tacit consent in the ESTA cases accords with the words used in that Act and the specific objectives and purpose thereof. It is in this context that tacit consent has been given a broad interpretation in the ESTA cases.

[46] The objective or purpose of the PIE Act was explained by Yacoob J in *Residents of Joe Slovo* as follows:

'It is evident that the purpose of the PIE Act and its Preamble say nothing at all about the broadening of the definition of "consent" or the narrowing of the definition of "unlawful occupiers". These parts of the Act do not evince the purpose of ensuring that occupiers who would have been regarded as unlawful in the past should be regarded, in terms of the PIE Act, as having a right of occupation. The objective in relation to unlawful occupiers is not to define them differently from the way in which they were defined before but "to provide for procedures" for their eviction. The way in which the purpose is expressed begins to herald the notion that what the PIE Act purports to

[7] Section 3 (2) and (4).

achieve is fair procedures to be followed when unlawful occupiers are evicted. The idea is that an unlawful occupier, despite the absence of tacit consent of the owner, is a human being and must be treated as a human being. A person in occupation of property without the tacit or express consent of the owner must be treated fairly.

. . .

There is nothing new about the definition of "unlawful occupier. It is the traditional definition. Anyone who occupies without consent of the owner or without any right other than to occupy is, and has always been, an unlawful occupier. Anyone with a right to occupy is and had always been a lawful occupier. There is nothing earthshaking about the inclusion of the phrase "tacit consent"'. [8]

[47] In *Residents of Joe Slovo Community* the Constitutional Court held that the occupation of members of the community was unlawful, even when the municipality had provided certain services to them and had reached certain agreements with them regarding occupancy of a proposed development on the land they were occupying. The reason was that those services had not been extended voluntarily by the municipality to the community. It had done so only out of a sense of duty, for 'humanitarian purposes.'

[48] Similarly in this case there is no evidence that the trustees gave actual consent to the appellant's occupation. Even if one or more of the trustees acquiesced to her presence thereon (which the trustees deny) and acknowledged her financial contribution to payments due in respect of the Trust property, that cannot be interpreted as tacit consent to her occupation. The anomaly of the appellant's case is that whereas Mr Paizee had always accepted the obligation to pay for his occupation of the property, she insists on free occupation thereof. Be that as it may, on a conspectus of all the

[8] At para 65 and para 67.

evidence the appellant had no consent or any other right to occupy the trust property.

[49] The trustees therefore had no obligation to terminate any right of occupation in relation to the appellant. However, they still had a responsibility to act fairly in evicting her from the house. They had to treat her and those occupying through her with dignity. In my view they did.

[50] Approximately four months after Mr Paizee's death, on 23 February 2018, the trustees addressed the letter in which they demanded that the appellant pay R40 000 per month towards repayment of the bond over the property, the rates and utilities. The tone of the letter was conciliatory. It read:

'You are undoubtedly aware that the trust has significant monthly expenses to meet connected to the property at 56 De Wet Road. They include bond repayments and municipal accounts. If these debts are not serviced, the property is put at risk and so is the Trust and its beneficiaries.

You are presumably aware too that the trust has no other source of income with which to service the debts and the only prospect of earning any is to recover a rental from letting the property. You are in occupation of the property however, and have resisted all polite hints and requests to contribute to the monthly expenses or to vacate the property in order to make way for a paying tenant. The unfortunate result is that your occupation is a problem rather than a solution but you do have the power and the choice to change that by deciding to pay.

We now request you to make a monthly contribution of R40 000 in return for which we will offer you monthly tenancy on such further terms as may be negotiated and agreed upon in due course. If you decline this request, then we have no alternative but to give you notice to vacate the property by no later than 30 April 2018.'

It is evident from the reference to 'resist[ing] all polite hints and requests to contribute . . .' that this was not the first invitation extended to the appellant to legitimize her occupation of the property.

[51] The trustees therefore made the appellant an offer similar, in terms, to Mr Paizee's tenancy of the property. They gave her two months to vacate the property if she was not prepared to accept the offer. When she rejected it, the trustees, in a letter dated 24 April 2018, advised her that it was most unfortunate that she had refused their offer. They advised her that in the interests of protecting the beneficiaries they were compelled to insist that she vacate the property by 30 April 2018. She still did not accept the offer.

[52] In yet another letter dated 13 August 2018 the trustees invited the appellant again to negotiate a lease. They gave her a further notice that should she not accede to the final invitation to enter into negotiations to secure a lease within 14 days or agree to voluntarily vacate the property within a fair and reasonable period, eviction proceedings would be instituted against her.

[53] The letters clearly alerted the appellant that she had no right of occupation of the property. It is difficult to understand the appellant's rejection of the invitation to live on the property on the same conditions as Mr Paizee had done. It appears that her view was that she had right to occupy the property free of any obligation because of the financial assistance she had given to Mr Paizee, including her contributions to the bond repayments, the municipal charges and premiums to the Discovery Life insurance policy. In terms of the insurance policy contract, a copy of which forms part of the record, the insurance was taken in 2011 by the Trust as the owner on the life of Mr Paizee, with a 'natural person as beneficiary'. Contrary to this objective evidence the appellant insisted that she took the insurance policy with the aim that the proceeds thereof would be utilized to settle the balance of the bond account. There is no evidence

however that she contested the payment of the proceeds thereof to Mr Paizee's son as the beneficiary.

[54] The appellant's reliance on settlement of the Trust property bond account from proceeds of the insurance policy is misplaced. It was common cause that after receiving the proceeds of the insurance policy (sometime during the early part of 2018, it would appear) the beneficiary, Mr Jonathan Paizee advanced a loan to the Trust for settlement of the outstanding balance on the bond and municipal accounts. As the trustees stated in their correspondence to the appellant, they still had a legal obligation to manage the affairs of the Trust responsibly, in the interests of the Trust beneficiaries. The appellant's rejection of their offer left them no choice but to evict her from the property. Any financial contributions she made in relation to the Trust property or to the insurance premiums did not entitle her to a right to live in the house.

[55] With regard to the non-joinder the appellant's mother and Ms Gunta, it is significant, as a starting point, that the defence is not raised by the alleged interested parties. In the founding papers the trustees alleged only that the appellant's parents might be residing with her as their property had been rented out. They previously lived on their own in the Waterkant suburb of Cape Town and came to live with the appellant after Mr Paizee's death. The appellant's father had since died. Given that the appellant's mother occupied the property through an unlawful occupier she too were in unlawful occupation. The appellant accepted that the trustees were entitled to evict the appellant and those who occupied the property through her. In the circumstances the notice by the trustees to those occupying the property through the appellant was reasonable. Counsel for the trustees

confirmed that there was no intention to evict Ms Gunta who has lived on the property with the Paizee family for decades.

[56] In *Residents of Joe Slovo Community* the Constitutional Court highlighted that the fairness required in the eviction of unlawful occupiers is not the only factor stipulated in the Act. The Act also recognizes the right of the landowners to apply to a court for an eviction order 'in appropriate circumstances'. In my view an eviction order was just and equitable in this case. The appellant was not destitute. The Mongoose Rock Trust of which she was a beneficiary, was a registered owner of three sectional title property units. The home of the appellant's parent was occupied on lease. I find no reason why the appellant and her mother would not be able to secure alternative accommodation.

[57] For these reasons I would have dismissed the appeal with costs.

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N DAMBUZA

JUDGE OF APPEAL

Appearances

For appellant:	L Wilkin SC
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	Symington & De Kok, Bloemfontein
For respondent:	A du Toit SC
Instructed by:	BBP LAW INC, Cape Town
	McIntyre van der Post, Bloemfontein