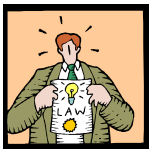
E-MANTSHI

A KZNJETCOM Newsletter

May 2009: Issue 40

Welcome to the fortieth issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments and suggestions – these can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. The South African Law Reform Commission has approved the publication of a discussion paper on adult prostitution for public comment. The primary aim of the Discussion Paper is to consider the need for law reform in relation to adult prostitution and to identify alternative policy and legislative responses that might regulate, prevent, deter or reduce prostitution. A secondary aim is to review the fragmented legislative framework which currently regulates adult prostitution and enhance alignment with international human rights obligations for the country. Under South African legislation voluntary selling and buying of adult sex as well as all related acts are currently all criminal offences.

The Discussion Paper has three parts. Firstly, the Commission discusses the social and legal context of prostitution. Here it discusses a range of legal, social and economic factors that are relevant to the question of whether to reform the law relating to adult prostitution. Secondly, the Commission engages in an extensive comparative analysis to look at how other countries have addressed prostitution in their laws. Thirdly, the Commission makes general proposals in preparation for reforming the law on prostitution and proposes **four alternative legal models** that might be employed in South Africa.

To give effect to the general proposals the Commission proposes that the legislature:

- Repeals the Sexual Offences Act.
- Repeals sections 11 of the Sexual Offences Amendment Act.
- Enacts a new Adult Prostitution Reform Act which may include or exclude provisions of the Sexual Offences and Sexual Offences Amendment Acts.
- If required in the new legislation, develops new terms and definitions for

archaic terms.

The proposed four law reform options are:

- Total criminalisation of adult prostitution (status quo);
- Partial criminalisation of some forms of adult prostitution and prostitution related acts;
- Non-criminalisation of adult prostitution;
- Regulation of adult prostitution and prostitution related acts.

All of the proposed options presuppose the criminalisation of under-aged and coerced prostitution and trafficking of people for the purpose of prostitution. The criminalisation of coerced adult prostitution must be included in the option which is ultimately recommended in the report.

The closing date for comment on this discussion paper is **30 June 2009**. Comments and submissions are invited and can be addressed to:

E-mail: dclark@justice.gov.za
Internet: http://salawreform.justice.gov.za

2. The Protection from Harassment Bill has been published for general comment. The Bill emanated from an investigation by the South African Law Reform Commission (SALRC) into stalking behaviour. The SALRC report on the matter contains legislative proposals (Project 130). According to the SALRC, the existing civil law framework, namely an interdict, and criminal law framework, namely the punishing of stalking conduct as a crime or the prohibition thereof by means of a binding over of a person to keep the peace in terms of section 384 of the Criminal Procedure Act, 1995 (Act No. 56 of 1955), may not provide adequate recourse to victims of stalking who are not in a domestic relationship. The SALRC is therefore of the opinion that legislation should be enacted to specifically cater for a civil remedy against stalking. The Bill proposed by the SALRC primarily aims to address this type of behaviour by means of an order of court, in terms of which the harasser is prohibited from continuing with the harassing conduct, a contravention of which is punishable as a crime.

The Bill proposed by the SALRC has been adapted to bring it in line with prevailing drafting norms and standards. Besides these technical amendments, a number of substantive changes are proposed. They are dealt with below:

(i) Clause 1(2) makes it clear that although a complainant can seek relief for harassment or stalking in terms of the Domestic Violence Act, 1998, nothing prevents such a person from applying for protection from harassment in terms of this Bill.

(ii) Clauses 3(3)(a) and (4) and 6(5) require a court, when issuing a protection order, to identify a person who is to serve the order on the respondent and to direct that person to act accordingly. Non-compliance can result in the person being convicted of contempt of court, as provided for in clause 15(2). The reason for this approach is to address the very real challenge

which is experienced in the application of the Domestic Violence Act, 1998, where protection orders issued under that Act very often do not reach the respondents, thereby contributing largely to that Act being rendered almost ineffective at times.

(iii) Clause 4 inserts provisions which will create a mechanism in terms of which witnesses can be subpoenaed to attend court proceedings. Since there is also no such provision in the Domestic Violence Act, 1998, the Schedule to the Bill proposes a similar insertion in that Act.

(iv) Clause 5 inserts provisions which give the court a discretion to hold proceedings in camera should this be necessary. The Domestic Violence Act, 1998, requires all proceedings in terms of the Act to be held in camera because it deals with parties who are in domestic relationships. As already indicated, the Bill is intended primarily to deal with parties who are not necessarily in domestic relationships and the universally accepted principle of open court proceedings should apply, unless the court directs otherwise in the interest of the administration of justice.

(v) The SALRC Bill contains a provision in terms of which the court is given the power to order that a respondent be assessed and, if necessary, be subjected to psychiatric or psychological treatment or rehabilitation as the court deems fit, at State expense. This provision has been deleted because of the financial implications it has for the State. Neither the Domestic Violence Act, 1998, nor the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, contains such a provision.

(vi) Clause 7(2) allows a court, in addition to the conditions that it can impose under clause 7(2)(a) and (b), to direct that a stalking matter be investigated by the South African Police Service with the view to the possible institution of a criminal prosecution.

(vii) Amendments are proposed to section 384 of the Criminal Procedure Act, 1955 (the predecessor of the current Criminal Procedure Act, 1977). Only a few provisions of this 1955 Act are still in force, among others, section 384 which deals with binding over of persons to keep the peace. There were comments during the investigation of the SALRC on stalking regarding this provision, among others, that it might be expedient to enhance its efficacy by means of a few minor amendments. The intention is to elicit comments on the amendments proposed by the Department to this provision which are contained in the Schedule to the Bill.
Comments on the bill can be forwarded to srobbertse@justice.gov.za before 15 June 2009. The Bill can be accessed on the Department of Justice website.

3. *The Companies Act*, Act 71 of 2008 has been published in Government Gazette No. 32121 dated 9 April 2009. The Act cannot come into operation before 9 April 2010 and then only on a date to be fixed by the President by proclamation in the Gazette. Section 217 read with section 216 gives magistrates' courts the jurisdiction to impose a penalty of up to 10 years imprisonment or a fine for contravention of sections 213(1) or 214(1) of the Act.

4. The *National Land Transport Act,* Act 5 of 2009 has been published in

Government Gazette No. 32110 dated 8 April 2009. The Act will only come into operation on a date to be determined by the President by proclamation in the Gazette. It will then repeal the National Land Transport Transition Act, Act 22 of 2000 amongst other an interesting aspect of the Act is that although a fine of R100 000 or 2 years imprisonment may be imposed for certain offences the magistrates' courts have not been given increased jurisdiction to impose a fine above R60 000 (which is the present limit of the magistrates' courts jurisdiction.

5. The *Child Justice Act*, Act 75 of 2008 has been published in Government Gazette No. 32225 dated 11 May 2009. The Act will take effect on 1 April 2010 or any earlier date fixed by the President by proclamation in the Gazette.

6. The provisions of section 2 and 3 of the *Criminal Procedure Amendment Act*, 2008 (Act 65 of 2008) has come into operation on 6 May 2009. According to the proclamation in Government Gazette No. 32205 dated 6 May 2009 regulations have also been promulgated in the same Gazette to deal with applications for the expungement of criminal records.

7. The *Magistrates' Courts Rules* have been amended in a notice published in Government Gazette No. 32208 dated 8 May 2009. The amendments came into effect on 15 June 2009 and affect the tariffs in Table A of Annexure 2 to the Rules. It also amends Rule 67 of the Rules which deals with criminal appeals.

Recent Court Cases

1. S v MATSABU 2009 (1) SACR 513 (SCA)

A trial-within-a-trial is usually appropriate to decide admissibility under section 252A of Act 51 of 1977, however section 252A (7) does recognize cases where not following this procedure would not prejudice an accused's rights.

The appellant, a traffic policeman, was convicted of contravening s 1(1) (b) of the Corruption Act 94 of 1992, in that he had accepted R300 as a bribe from a police officer as an inducement not to issue a traffic summons to her. A sentence of two years' imprisonment in terms of s 276(1) (i) of the Criminal Procedure Act 51 of 1977 (the Act) was imposed. It was common cause that the appellant had been caught in a trap set in terms of s 252A (1) of the Act. On appeal, two issues were raised. Firstly, it was contended that the fact that the magistrate had refused to hold a trial-within-a-trial concerning the admissibility of the trap evidence had rendered the trial unfair. Secondly, it was argued that the conduct of the trap had gone beyond the provision of an opportunity to commit the offence of corruption.

Held, that the courts had long accepted that it was both desirable and necessary to try issues of the voluntariness of extra curial statements or conduct of accused persons separately from the merits of the case. There was no material distinction between the accepted categories of cases where the separation of admissibility and merits was insisted upon, and s 252A of the Act. Accordingly, the holding of a trial-within-a-trial would usually be appropriate to decide admissibility under s 252A. However, s 252A (7) recognised that there might be cases where the interests of the accused would not be prejudiced by either the making of a ruling without hearing evidence, or delaying a ruling until the conclusion of the case. In the present instance the appellant's legal representative, called upon to furnish the grounds upon which he would challenge the admissibility of the trap evidence, referred only to the narrow factual question covered by s 252A (2)(a). So limited an issue did not, *prima facie*, bear on the voluntariness of the appellant's commission of the offence. It was an issue which, if left over for determination at the end of the case, was most unlikely to result in unfairness to the accused. Accordingly, the magistrate's refusal to hold a compartmentalised hearing was not a misdirection. (Paragraphs [8] and [9] at 519*b*-520*e*.)

Held, further, that a trap might usefully be employed to set up a situation of which a corruptly inclined official might take advantage. The provision of an attractive opportunity was the essence of a successful trap, which the legislature had recognised in s 252A. It drew the line, though, at conduct which literally or figuratively laid bait for an unsuspecting official by encouraging the commission of a crime. However, the complainant's behaviour *in casu* had been essentially neutral. She had not tempted, enticed or suggested any unlawful line of conduct. And while there was no suspicion that the appellant had committed any similar offences, this did not mean that he had been unfairly treated. The trap had not been directed at him personally, but at whoever had happened to be operating the speed trap at that particular time. (Paragraphs [16] and [17] at 522*a*-*e*.)
Appeal dismissed.

2. S v MAVININI 2009(1) SACR 523 SCA

A judicial officer must not only take moral responsibility on the evidence for convicting an accused but must also vouch for the integrity of the system producing the conviction.

"[26] It is sometimes said that proof beyond reasonable doubt requires the decision-maker to have 'moral certainty' of the guilt of the accused. Though the notion of 'moral certainty' has been criticised as importing potential confusion in jury trials, it may be helpful in providing a contrast with mathematical or logical or 'complete' certainty. It comes down to this: even if there is some measure of doubt, the decision-maker must be prepared not only to take moral responsibility on the evidence and inferences for convicting the accused, but to vouch that the integrity of the system that has produced the conviction – in our case, the rules of evidence interpreted within the precepts of the Bill of Rights – remains intact. Differently put, subjective moral satisfaction of guilt is not enough: it must be subjective satisfaction attained through proper application of the rules of the system."

3. S v MBOKHANI 2009(1) SACR 533 TPD

Trials in which children testify as victims or eyewitnesses should be given priority at all times.

"[53] The lofty ideals that South Africa has subscribed to by adopting the *Convention on the Rights of the Child* come to naught if the functionaries in the criminal justice system allow a child victim to be treated and to be neglected in the way this child was abused and abandoned. Z's reality is the very opposite of the enjoyment of the rights Sachs J set as the foundational standard that should apply to children generally.

[54] If a child victim of a sexual assault is to testify in the alleged rapist's subsequent trial, her or his interests can only be accorded their rightful paramountcy if all parties involved co-operate to ensure that the trial is finalised as soon as humanly possible. Children's memories are notoriously compromised by the passage of time; victims in the complainant's position may be exposed to undue influences and threats and the trauma of repeated postponements may compromise the child's subsequent testimony to the extent that the rapist must go free because the evidence provided by the child is no longer of the standard that would justify a conviction. Trials in which children are to testify either as victims or as eyewitnesses must be given priority in all courts and at all times – not to do so is an infringement of the Constitution's 28(2): 'A child's best interests are of paramount importance in every matter concerning the child.'

[55] Children who are as obviously at risk as the complainant should be provided with the care and protection of appropriate social services. Enquiries ought to have been conducted immediately the rape was discovered whether the child was in need of care: *S v Mojaki* 2006 (2) SACR 590 (T)."

4. S v ROZANI; ROZANI v DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE AND OTHERS 2009(1) SACR 540 CPD

The overriding duty of a prosecutor is not to "win" convictions but to see that justice is done.

The applicant was charged with two counts of raping his minor stepdaughter and with one count of attempting to do so, and was convicted on all three counts. He pleaded guilty to all the counts, and was convicted on the basis of a written explanation of plea; whereafter an effective sentence of eight years' imprisonment was imposed. It subsequently transpired that a report compiled by a district surgeon – the 'J88' form – disclosed that he had observed no injuries of any kind on the complainant and, specifically, that he had found her hymen to be 'intact' and 'virginal'. In his opinion there was 'no sign of vaginal penetration'. The J88 form and its contents were never brought to the attention of the magistrate. In the founding affidavit of his review application the applicant stated that he had never penetrated the complainant; that he had never instructed his attorney that he had done so; and

that his attorney had never asked him whether he had. Rather, he had mistakenly believed that certain incidents which had taken place between himself and the complainant amounted to sexual intercourse, leading him to admit to the same. Among the questions to be determined in review proceedings was whether or not the failure of the prosecutor and the defence attorney to disclose the existence and content of the J88 form to the magistrate constituted a gross irregularity.

Held, that, had the content of the J88 form been disclosed to the magistrate by either the prosecutor or the defence attorney, the magistrate would no doubt have posed questions to the applicant as to whether or not his admission of 'sexual intercourse' included an admission of penetration. Such questioning would probably have revealed to the magistrate that the applicant did not admit one of the elements of the two charges of rape. She would then have been obliged under s 113(1) of the Criminal Procedure Act 51 of 1977 to record a plea of not guilty and to require the prosecutor to proceed with the prosecution. (At 547*g*-548*e*.)

Held, further, that the prosecutor's conduct was reprehensible and irregular. She had, in effect, deliberately withheld from the magistrate vital expert information pointing to the possible absence of one of the essential elements of the two rape charges. In so doing she had taken improper advantage of the applicant's questionable admission of sexual intercourse. Worse than this, she had insulated the magistrate from the doubt attaching to the admission, thereby precluding an alteration by the magistrate of the plea to one of not guilty. In South Africa the prosecution had never been expected to 'win at all costs' against the defence. The overriding duty of the prosecuting authority was not to 'win' convictions, but to see to it that criminal justice was done. A prosecutor was expected at all times to act in a manner which was responsible and fair to the accused, and to be candid and open with the court; all relevant and admissible material at the prosecutor's disposal was to be placed before the court. *In casu* the prosecutor had failed to do this, resulting in an irregularity that was extremely serious and which could justifiably be categorized as gross. (At 549*f*-550*d*.)

From The Legal Journals

1. **Mayer, P**

"Legal Truth: The conflict between real justice and legal justice"

2008(1) Pretoria Student Law Review

2. **K.K. Sithebe**

"May the accused (Minister of Safety and Security) please rise before the court: Police liability versus partial immunity"

2008(1) Pretoria Student Law Review

3. **Van Dijkhorst, K**

"The Law, The Lawyer and Society.

Law Faculty University of Pretoria address

4. **Mostert, D**

"Suretyship Agreement must comply with the NCA"

De Rebus June 2009

5. **Stadler, S**

"Consumers and ss 129 and 86 (10) of the National Credit Act"

De Rebus June 2009

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

SECTION FOUR OF THE PREVENTION OF ILLEGAL EVICTION ACT: EVICTIONS FROM PRIVATE LAND AND THE PARTICIPATION OF THE STATE

Introduction

In *Blue Moonlight Properties v The Occupiers of Saratoga Avenue* 2009 (3) BCLR 329 (W), the South Gauteng High Court recently identified and set out certain new procedural requirements which must be fulfilled before an eviction order may be granted in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act).

This judgment is interesting, not only because it introduces new procedural requirements which must be fulfilled before an eviction order may be granted in terms of section 4 of the PIE Act, but also because in doing so it has given practical effect to some of the key principles the Constitutional Court has laid down with respect to section 26 of the Constitution.

Before turning to consider the judgment in *Blue Moonlight Properties*, however, it will be helpful to briefly set out the relevant provisions of the PIE Act as well as the relevant principles the Constitutional Court has laid down with respect to section 26 of the Constitution.

2. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act

The PIE Act came into operation on 5 June 1998. As its preamble states, PIE's purpose is to give effect to the constitutional right to have access to adequate housing by, *inter alia*, regulating the eviction of "unlawful occupiers".

An unlawful occupier is defined in section 1 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 of 1997; and a person whose informal right in land is protected by the Interim Protection of Informal Land Rights Act 31 of 1996".

In *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA), a majority of the Supreme Court of Appeal held that the definition of an unlawful occupier encompasses not only those persons who took occupation without consent, for example so-called "squatters"; but also those persons who initially took occupation with consent, but whose consent had been lawfully withdrawn at the time the eviction proceedings were launched, for example lessees or mortgagors who are holding over.

When it comes to granting an eviction order, PIE draws a distinction between eviction proceedings instituted by a landowner and eviction proceedings instituted by the state. Eviction proceedings instituted by a landowner are governed by the provisions of section 4, while those instituted by the state are governed by the provisions of section 6. PIE also makes provision for urgent evictions. These are dealt with in section 5.

Section 4 contains both procedural and substantive requirements that must be met before an eviction order may be granted. The procedural requirements are set out in subsections 4(2), (3), (4) and (5), and the substantive requirements in subsections 4(6) and 4(7).

Insofar as the procedural requirements are concerned, section 4 begins by providing that an unlawful occupier must be notified of the eviction twice, first in terms of section 4(3) and second in terms of section 4(2).

Section 4(3) provides that the notice must be served in accordance with the ordinary rules of the court in question. In *Nduna v ABSA Bank Ltd* 2004 (4) SA 453 (C), the Cape High Court held that PIE has endowed magistrates' courts with the jurisdiction to hear eviction proceedings either by way of action or by way of application. The section 4(2) notice may be served on the unlawful occupiers, therefore, either by way of summons or by way of notice of application.

Section 4(2), however, has introduced a new form of notice. This section provides that at least 14 days before the eviction proceedings are heard, the "court must serve written and effective notice of the proceedings on both the unlawful occupier and the municipality having jurisdiction".

In *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA), the Supreme Court of Appeal explained that section 4(2) does not mean that the court itself must serve written and effective notice on the unlawful occupier. Instead, it means that the content and the manner of service of this notice must be authorised and directed by an order of court.

This order of court, the Supreme Court of Appeal explained further, may be obtained by way of an *ex parte* application. This *ex parte* application, however, can only be brought after all of the papers have been served in terms of section 4(3). It must also be served on the unlawful occupier and the municipality having jurisdiction at least 14 days before the eviction proceeding is heard.

Insofar as the content of the section 4(2) notice is concerned, section 4(5) provides that the notice must:

(a) state that the proceedings are being instituted for an eviction order;
(b) indicate the date and time at which the court will hear the matter;
(c) set out the grounds for the proposed eviction; and
(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.

Lastly, the section 4(2) notice must also be written and effective. In *Moela v Shoniwa* 2005 (4) SA 357 (SCA), the Supreme Court of Appeal held that the service of the notice on the municipality was not effective. This is because the municipal official who received the notice and initialled the return of service did not indicate clearly who he was, what his affiliation with the municipality was and whether the documents were processed any further. In fact, it was not clear from the evidence whether the municipality had any knowledge of the proceedings at all.

Insofar as the substantive requirements are concerned, section 4 distinguishes between unlawful occupiers who have occupied the land for less then six months (s 4(6)) and unlawful occupiers who have occupied the land for more than six months (s 4(7)). The period of occupation is calculated from the date the occupation became unlawful.

If the unlawful occupier has occupied the land for less than six months, section 4(6) provides that a court may grant an eviction order if it is of the opinion that it is just

and equitable to do so and after considering all the relevant circumstances. The relevant circumstances that must be taken into account include the rights and needs of the elderly, children, disabled person and households headed by women.

If the unlawful occupier has occupied the land for more than six months, section 4(7) provides that a court may grant an eviction order if it is of the opinion that it is just and equitable to do so and after considering all the relevant circumstances. The relevant circumstances that must be taken into account include, in addition to those listed above, whether alternative land has been made available or can reasonably be made available by a municipality, organ of state or landowner for the relocation of the unlawful occupier and his or her dependants. The circumstances expressly listed in section 4(7) do not apply, however, when the land is sold in a sale of execution pursuant to a mortgage.

3. The Constitutional Right to Housing

3.1 Section 26

The right to housing is guaranteed in section 26 of the Constitution. It provides as follows:

(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
(3) 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. No legislation may permit arbitrary evictions.

This section has been considered by the Constitutional Court on a number of occasions. Amongst its most significant judgments in this respect are *Government of the RSA v Grootboom* 2000 (11) BCLR 1169 (CC), *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC); and *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 (8) BCLR 786 (CC).

3.2 *Government of the RSA v Grootboom*

In *Grootboom*, the respondents consisted of a large group of people who had been evicted from their informal shacks. After being evicted they moved onto a municipal sports field and built makeshift structures. While they were living on the sports field they applied for an order declaring that the national housing policy infringed their constitutional right of access to adequate housing.

The Constitutional Court found that the national housing policy did infringe the respondent's constitutional right of access to adequate housing because it made no provision for accommodating people who had no access to land, no roof over their heads and who were living in an intolerable crisis situation.

In arriving at this decision, the Constitutional Court explained that the right of access

to housing does not impose an obligation on the state to provide a person with a house on demand. Instead, it imposes an obligation on the state to take reasonable steps to provide a person with access to adequate housing over time.

This meant, the Constitutional Court explained further, that the government could not adopt a housing policy which excluded a significant sector of society and, in particular, that the government could not adopt a housing policy which excluded people who had no access to land, no roof over their heads and who were in living in an intolerable crisis situation.

Having set out these principles, the Constitutional Court then turned to apply them to the facts. In this respect, the Court found that the government's housing policy was unreasonable because it did not provide emergency or temporary shelter for people, like the respondents, who had been evicted and had nowhere else to go. In other words, it did exclude a significant sector of society.

Following this judgment, the government adopted a new programme aimed at providing emergency or temporary shelter to those people who found themselves in a crisis situation. This emergency housing programme provides that an emergency includes those situations where a person has, owing to circumstances beyond his or her control, been evicted from land or a building and has nowhere else to go.

3.3.*Port Elizabeth Municipality v Various Occupiers*

In *Port Elizabeth Municipality*, the respondents consisted of a relatively small group of people (68 people, including 23 children) who had unlawfully occupied privately owned land in Port Elizabeth for a number of years. After being handed a petition signed by the landowners, the Port Elizabeth Municipality applied for an order evicting the unlawful occupiers from the land in terms of section 6 of the PIE Act. The Constitutional Court, however, dismissed the application and refused to grant the eviction order.

In arriving at this decision, the Court explained that it could only grant an eviction order in terms of section 6 of the PIE Act if it was "just and equitable" to do so. When it came to deciding whether it was just and equitable to grant an eviction order, the Court explained further, it had to take into account a number of factors. One of these factors is whether there was "alternative accommodation" available for the unlawful occupiers.

This factor, the Constitutional Court went on to explain, does not mean that unlawful occupiers can never be evicted unless alternative accommodation is available. What it does mean, the Court then explained, is that a "court should be reluctant to grant an eviction order against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme".

Having set out these principles, the Constitutional Court then turned to apply them to the facts. In this respect the Court pointed out that the respondents had been

occupying the land in question for a relatively long period of time and that the land was not needed by either the landowners or the municipality for any productive purpose. In addition, the respondents were a relatively small group of people who appeared to be genuinely homeless and in need. Given these facts, the Constitutional Court held, it would not be just and equitable to evict the unlawful occupiers.

3.4 *President of the RSA v Modderklip Boerdery (Pty) Ltd*

The respondent in this case was the owner of a farm. Over a period of time approximately 40 000 people unlawfully moved onto its farm and established an informal township. During this period the respondent applied for and was granted an eviction order. The state, however, refused to execute the eviction order. The respondent then applied for an order compelling the state to execute the eviction order. The Constitutional Court, however, dismissed the application and refused to grant an order compelling the state to execute the eviction order.

In arriving at this decision, the Constitutional Court began by explaining that the state's failure to execute the eviction order did infringe the principle of the rule of law and that its failure to execute the eviction order was, therefore, unconstitutional. In addition, the Court explained further, it was unreasonable for a private landowner to be forced to bear the burden which should be borne by the state of providing accommodation to those in desperate need.

Apart from infringing the rule of law, however, the Constitutional Court went on to explain, the state had also infringed the unlawful occupier's right of access to adequate housing. This is because the unlawful occupiers were living in an intolerable crisis situation and the state had taken no steps to provide them with emergency accommodation. In addition, the Court explained further, the lack of alternative accommodation meant that it would not be fair and equitable to grant an eviction order in terms of section 4 of the PIE Act.

Given these conflicting considerations, the Constitutional Court then held, the only appropriate relief was to allow the unlawful occupiers to remain on the respondent's farm until alternative land was made available and to instruct the state to pay constitutional damages to the respondent for the violation of its constitutional rights.

3.5 Comment

Two important points can be drawn from these cases:

The first point is that the constitutional right to property (section 25) and the constitutional right to housing (section 26) give rise to at least two conflicting entitlements. These are a landowner's right to the exclusive and undisturbed possession of his or her property, and a "relatively settled unlawful occupier's" right not to be evicted unless alternative accommodation is available.

Second, that the state is under a constitutional obligation to resolve this conflict. The

state may resolve this conflict either by carrying out its constitutional obligation to provide alternative accommodation, or, if this is not immediately possible, by paying compensation to the affected landowner until such time as it is able to provide alternative accommodation.

These two points clearly illustrate the fact that the state has an indispensable role to play, not only in those cases where the *state* itself is seeking to evict "relatively settled unlawful occupiers", but also those cases in which a *private landowner* is seeking to evict "relatively settled unlawful occupiers".

The notion that the state is required to participate in at least certain private eviction proceedings is a relatively new idea in South Africa and will undoubtedly give rise to some difficult questions. As was pointed out in the introduction to this article, some of these have recently been considered by the South Gauteng High Court.

4. *Blue Moonlight Properties v The Occupiers of Saratoga Avenue*

In this case the respondents consisted of a relatively small group of people (62 adults and 9 children) who had unlawfully occupied a derelict factory and garage in Johannesburg. After the applicant bought the factory and garage it sought an order in terms of section 4 of the PIE Act evicting the unlawful occupiers from the land.

It was common cause that the majority of the unlawful occupiers had no formal employment; that they had very little in the way of income; and that if they were evicted there was no lawful alternative accommodation available to them. It was also common cause that they had occupied the factory for a number of years and could therefore be described as "relatively settled".

In response to the eviction application, the unlawful occupiers applied for an order joining the Johannesburg Metropolitan Municipality as an interested party. This order was granted at a prior hearing (in an earlier separate judgment the South Gauteng High Court held that municipalities must be joined in any eviction proceeding that may result in homelessness (see *Sailing Queen Investments v The Occupants of La Colleen Court* 2008 (6) BCLR 666 (W)).

After the order joining the Municipality had been granted, the respondents applied for another order declaring that the Municipality was obliged to provide them with alternative accommodation and that the Municipality was obliged to provide the Court with a report setting out the steps it would take to provide the unlawful occupiers with alternative accommodation if they were evicted.

The two issues which the Court had to decide in the case at hand, therefore, were:

(a) whether the Municipality was obliged to provide alternative accommodation not only to those unlawful occupiers who are evicted from public land, but also to those unlawful occupiers who are evicted from private land; and

(b) whether the Municipality was obliged to provide the Court with a report setting

> out the steps it would take to provide the unlawful occupiers with accommodation if they are evicted and, if so, what sort of information should be included in such a report.

Insofar as the first issue was concerned, the Court found that in light of the principles laid down by the Constitutional Court in the *Grootboom*, *Port Elizabeth Municipality* and *Modderklip* cases there is no doubt that the Municipality was obliged to provide alternative accommodation to unlawful occupiers who are evicted from public land as well as unlawful occupiers who are evicted from private land.

Insofar as the second issue was concerned, the Court began by explaining that the PIE Act implicitly imposes an obligation on municipalities to provide the court with a report indicating whether alternative accommodation was available and what the consequences of an eviction would be on the unlawful occupiers and, in particular, what the consequences of an eviction would be on vulnerable groups like women and children.

Without a report from the Municipality, the Court explained further, it would usually not be able to take into account all of the "relevant circumstances" and, consequently, it would not be in a position to determine whether an eviction would be just and equitable. It follows, therefore, the Court held, that the report "must not only be comprehensive but must also be meaningful and specific to assist the court to come to a just decision in a particular case".

Having set out these principles, the Court then turned to apply them to the facts of the case. In this respect the Court pointed out that the report submitted by the Municipality had not been prepared specifically for the case at hand. Instead, it was simply a general report setting out, in general terms, the Municipality's housing plans.

This sort of a report, the Court went on to find, is not good enough. This is because it does not help a Court faced with a particular set of facts determine whether it would be just and equitable to grant an eviction order. The report submitted by the Municipality must, therefore, the Court concluded, contain relevant information relating to the specific unlawful occupiers in question.

The Court then ordered the municipality to submit a new report within four weeks setting out "what steps it has taken and in future can take to provide emergency shelter or other housing for the [unlawful occupiers] in the event of their eviction as prayed".

5. Comment

As was pointed out in the introduction, the Court in *Blue Moonlight Properties* has identified and set out a new procedural requirement which must be fulfilled before an eviction order may be granted in terms of section 4 of the PIE Act.

This new procedural requirement applies in those cases where the unlawful

occupiers are “relatively settled” and have no access to lawful alternative accommodation. It requires the relevant Municipality to submit a report to the Court which contains relevant information relating to the specific unlawful occupiers in the case at hand.

While this procedural requirement will undoubtedly give practical effect to the principles laid down by the Constitutional Court in the *Grootboom*, *Port Elizabeth Municipality* and *Modderklip* cases, it also imposes a new and onerous burden on local government. The extent to which municipalities will be able to fulfil this new requirement in an efficient and effective manner, therefore, is open to some doubt.

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If you have a contribution which may be of interest to other Magistrates could you forward it via email to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or by fax to 031 3681366 for inclusion in future newsletters.

Matters of Interest to Magistrates

Too much in this title

I react to the invitation by the Editor to respond to his editorial and letters in 2009 (Jan/Feb) *DR* 4 calling for views on a proposal that attorneys should have a title.

The answer to the question is in my view: Nothing. But, if the reader is upholding the view by the proponents of the idea, I suggest that perhaps too much is in a title. To be able to use the title ‘Adv’ one must

- be 21 years or older;
- be a South Africa citizen or have permanent residence;
- have an LLB degree; and
- be a fit and proper person.

Now why would any attorney be envious of a title that comes with those requirements?

What I admire about advocates at the Bar is their knowledge of the law, analytical thinking, proficiency with the written and spoken word and ability to charge fees. But these attributes do not come with the title.

I must admit to not having been in a High Court for a number of years, but when I was there last, advocates were addressed as 'Mr' by the judges – quite like in some professions where a general practitioner would have the title 'Dr' but, when he qualifies as a specialist, he drops the 'Dr' and becomes 'Mr'.

Perhaps my judgment on the issue is a bit clouded by earlier experience when I used to frequent the passages or a certain government department and noticed on door after door that that office was occupied by 'Adv' so or 'Adv' so. What was even more illuminating was the insistence of some of those 'advocates' to be addressed as 'advocate' when I knew that that particular 'advocate' had at most one day in court – on admission.

Let us not try and catch up with advocates. It is not necessary. Each profession has its unique attributes and requirements. I would like to stay, Mr Botha.

Arno Botha,
attorney, Bellville

(The above letter appeared in the De Rebus of May 2009)

A Last Thought

"*The provisions of s 165(2) of the Constitution compel the conclusion that the fundamental principle of judicial independence cannot simply be equated with a principle of immunity of judicial officers from criminal prosecutions for all acts and/or omissions in the exercise of their judicial functions, irrespective of the circumstances of the individual case. It goes almost without saying that the criminal prosecution of judicial officers for such acts and/or omissions will – and must – remain an extraordinary and exceptional step. Any decision by the office of the DPP to prosecute a judicial officer must be taken with the utmost caution, due regard being had to the fundamental principle of judicial independence, but also to the related principle that judicial officers are subject to the Constitution and the law and thus cannot be completely immune from criminal prosecution, in appropriate cases, for their acts and/or omissions in the exercise of their judicial functions*"

Par 56 – *Minister of Justice and Constitutional Development and others v S M Moleko* [2008] ZASCA 43.
