

Can estoppel be raised against an eviction in terms of PIE?

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Abstract

Estoppel is a well-known defence against (or limitation on) the *rei vindicatio*. This would be the case for example where the owner by some representation creates the impression that a third party is the owner of a thing and that the third party has the capacity to alienate the property. The *bona fide* third party can, when the owner then institutes the *rei vindicatio* to recover his property, raise estoppel and preclude the real owner from claiming his property.

Before 2002, if one wanted to evict an unlawful occupier from certain residential premises, one would institute the *rei vindicatio*. In *Ndlovu v Ngcobo; Bekker v Jika* [2002] 4 All SA 384 (SCA) the court, however, ruled that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) must be used in *all* instances of evicting people from urban residential premises. The question is: does estoppel serve as a defence/limit in the application of PIE? Surprisingly few cases deal with this issue. The court in *Joe Slovo* made a few remarks about the possibility of using estoppel as a defence against the *rei vindicatio* by looking at the interpretation of 'tacit consent' required by PIE. This article will interpret provisions of PIE and look at case law that deals with the use of estoppel in lease cases. It will conclude by remarking on the feasibility of using estoppel as a defence in PIE eviction cases.

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1 Introduction

Property owners are generally entitled to exercise and retain control over their property. In attempting to do this, there are several remedies at an owner's disposal should her entitlements be infringed. The *rei vindicatio* is one such remedy.¹ This entitles an owner to vindicate her property, in particular movables and non-residential immovable property, from anyone that is in unlawful control of her property. All the owner needs to aver is that she is the owner, and that the defendant is in control of the property, and that the property exists and is identifiable.² The defendant can then raise various defences to ward off this claim,³ of which estoppel is one such defence.⁴

Estoppel precludes the owner from relying on her ownership, if the owner created a misrepresentation that another person relied on, thinking the presentation is the truth, and acted on the misrepresentation to the other person's detriment. This representation can be made in words or by conduct, including silence and inaction.⁵

The remedy of the *rei vindicatio* was traditionally used to evict tenants.⁶ With the advent of constitutionalism this changed dramatically.⁷ Section 26 of the

¹*Ubi rem meam invenio, ibi vindico*, or 'where I find my property, there I can vindicate it from'.

²*Graham v Ridley* 1931 TPD 476 at 479 and *Chetty v Naidoo* 1974 3 SA 13 (A) 20A – E.

³The various defences against the *rei vindicatio* are as follows: the defendant has acquired the property by prescription; a third party is the owner of the property; the property was alienated or destroyed; or the defendant has a superior contractual right to possession. Van der Merwe and Du Plessis *Introduction to the law of South Africa* (2004) 218. Echoed in Du Bois *et al Wille's Principles of South African law* (2011) 539 and Badenhorst *et al Silberberg and Schoeman's The law of property* 5th ed (2006) 242.

⁴*Mann v Sydney Hunt Motors (Pty) Ltd* 1958 2 SA 103 (GW), where it was said that '[i]n our law estoppel remains a weapon of defence' (107). Also see *Union Government v National Bank of South Africa Ltd* 1921 AD 121 128; *Pandor's Trustee v Beatley and Co* 1935 TPD 358; *Biloden Properties (Pty) Ltd v Wilson* 1946 NPD 736 at 749-750. Millner 'Fraudulent non-disclosure' (1957) SALJ 177 questions why estoppel cannot also be used to enforce a contract. Van der Walt 'Die beskerming van die bona fide-besitsverkryger: 'n vergelyking tussen die Suid-Afrikaanse en Nederlandsereg' in Gauntlett (ed) *Noster* (1979) 86 does not agree: '[e]stoppel is gerig op die voorkoming van nadeel aan die opwerper; die leerstuk het dus slegs werking in dié mate waarin die opwerper benadeelsou word. 'n Opwerper kan nie op grond van estoppel 'n voordeel, wat hy andersins nie sou gehad het, behou nie'. See *Arthur v Central News Agency Ltd* 1925 TPD 588 about the nature of the 'remedy of estoppel' as 'a matter of evidence' (595). This was rejected in *Colee Investments (Pty) Ltd v Papageorge* 1985 3 SA 305 (W) at 56.

⁵*Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* 1981 3 SA 275 (A) 291.

⁶*Chetty v Naidoo* (n 3). In pre-constitutional eviction law, this enabled a landlord to easily evict tenants without considering if it was just and equitable to do so. With landownership mostly in the hands of the state and of white people, this enabled the apartheid government to enforce its segregation policies. See Van der Walt 'Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land-reform legislation' 2002 *TSAR* 254.

⁷See in general Van der Walt *Property in the margins* (2009) for a thorough theoretical explanation of this shift.

Constitution of the Republic of South Africa, 1996 (the Constitution) provides that '[e]veryone has the right to have access to adequate housing' and that '[n]o one may be evicted from their home [...] without an order of court made after considering all the relevant circumstances'.⁸ The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)⁹ was promulgated to give effect to this section.¹⁰ Evicting tenants from residential property¹¹ therefore requires an owner to use the procedures prescribed by PIE. An application in terms of PIE will fail when one of three things happens. Firstly, one of the technical requirements in section 4¹² is not met.¹³ Secondly, the evictee can raise a valid defence. In this sense some of the technical requirements can become a defence, such as that the occupier is not unlawful. Lastly, the court may refuse an eviction order because it is not 'just and equitable'.¹⁴

The question that this article seeks to address is whether *estoppel* can be raised against an eviction in terms of PIE, where an occupier can negate the unlawfulness of his occupation.¹⁵ Intuitively the answer seems to be 'no', based

⁸For the purposes of s 26(3), the nature of a home is not defined in or qualified in the Constitution. In order for a property to be a 'home' there must be an intention to occupy it for residential purposes permanently or for a considerable period of time. In *Fischer v Persons whose identities are to the applicants unknown and who have attempted or are threatening to unlawfully occupy Erf 150 (Remaining extent) Philippi In re: Ramahlele v Fisher* 2014 3 SA 291 (WCC); 2014 7 BCLR 838 (WCC); [2014] 3 All SA 365 (WCC) the court stated that 'home' should be afforded a wide meaning. Also see Du Plessis 'Ways of living in a transformative democracy' in *De Ville Meaning and memory: Essays in honour of Lourens du Plessis* (2015, forthcoming) for an analysis of how the courts interpret the concept of 'home'. Since the meaning of 'home' is not the focus of the paper, suffice it to accept for purposes of this paper that 'home' has a very wide meaning, where the focus is on the intention of the parties occupying the structure rather than the type of structure itself.

⁹19 of 1998.

¹⁰The court in *Jafftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) developed the meaning of the negative obligation by finding that instances (in this case selling a house in execution for the payment of a debt) where the right of access to adequate housing might be deprived must be considered in a court of law. This was confirmed in *Gundwana v Steko Development* 2011 3 SA 608 (CC).

¹¹If the eviction is from any other property than a person's home, the common law still applies. See *Pareto Ltd v Mythos Leather Manufacturing (Pty) Ltd* 2000 3 SA 999 (W) para 5.

¹²Section 4 is applicable to private landowners who want to evict people. This is the focus of the article, and will therefore be examined closely. Section 5 is applicable to urgent evictions, and focuses on the real or imminent danger that might result if the person is not evicted, the likely hardship for the owner if the person is not evicted or where there is no other remedy but eviction. Section 6 provides for an organ of state to evict people, and is applicable where the consent of the organ of state is required for the erection of a building or structure on the land where the occupiers unlawfully occupy such land, or where it is in the public interest to do so. For more detailed descriptions, see Pienaar *Land reform* (2014) 720-734.

¹³*Mokwena v Boschplaats Boerdery (Pty) Limited* (39828/2008) [2009] ZAGPPHC 125.

¹⁴Pienaar *Land reform* (2014) 727.

¹⁵Of course, should this be possible, it will not change the legal position from unlawful to lawful. It will merely prevent another party from relying on the truth.

on section 4(1) of PIE, which states that '[n]otwithstanding anything to the contrary contained in any law or *the common law*, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier' [own emphasis].¹⁶ But on closer scrutiny of section 4 it becomes clear that it deals with the duties of owners during eviction only; with the procedure that they must follow; and thus with the remedies available to an owner. The effect of section 4 is that an owner can no longer rely on his common law remedies, like the *rei vindicatio*,¹⁷ to evict a person from a residential property.¹⁸ PIE is silent about *defences*. In terms of the rule of interpretation, *expression unius est exclusio alterius*, the express mention of one (remedy), excludes the other (defences).¹⁹ Literature is also silent on the matter. Having looked for case law on the issue, it seems as if *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*²⁰ was the only case where the court considered the issue pertinently, but only *obiter*.

This article seeks to answer the question of whether estoppel can be used to stop an eviction in terms of PIE by briefly discussing the relevant provisions of PIE, then discussing the requirements of estoppel. The discussion will then move to give some actual examples of where it might apply, after which the *Joe Slovo*²¹ case will be discussed as an example of how the courts dealt with the possibility of such a defence. Some remarks linked to the possibility or feasibility of estoppel as a defence to PIE precede the conclusion.

¹⁶Section 4 of PIE deals with the eviction of unlawful occupiers and is quoted in full below:

- (1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.?
- (2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.
- (3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.
- (4) Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.

¹⁷See for instance *City of Cape Town v Rudolph* 2003 11 BCLR 1236 (C), where the court tried to institute the *mandament van spolie* to retain possession of land that illegal occupiers occupied. *MC Denneboom Service Station CC v Phayane* Case no CCT 71/14 of 3 Oct 2014 (CC) recently confirmed that PIE is applicable only to residential property and natural persons.

¹⁸See *Ndlovu v Ngcobo, Bekker v Jika* 2003 1 SA 113 (SCA), where the court made it clear that PIE is applicable in *all* eviction proceedings. There were attempts to change this interpretation to exclude cases where occupation was once lawful, but at the date of writing the position remains that PIE is applicable to all unlawful occupiers, whether lawful initially or not.

¹⁹Du Plessis *Re-Interpretation of Statutes* (2002) 234-236.

²⁰2010 3 SA 454 (CC).

²¹*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* para 16.

2 PIE and evictions

Private law guards the ownership of land fairly jealously.²² As party of an owner's right to undisturbed and exclusive possession of her property, eviction is usually seen as the owner exercising her right over her property.²³ Such a right of the owner can traditionally be countered by a right of occupation only, where such a right is derived from legislation or a right granted by the owner.²⁴ The Constitution further limits ownership in the residential lease context where courts are required 'to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved relevant in each particular case'.²⁵ To this effect, it was famously noted that:

PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.²⁶

Sachs J defined PIE as 'a unique piece of legislation with procedures that are specifically designed to prevent unjust removals'.²⁷ Section 4(1) of PIE also explicitly excludes the use of the common law to evict tenants.²⁸ The enactment of PIE further limits the right of ownership, since the owner's vindicatory powers are restricted. An owner's right to assert her vindicatory powers when it comes to

²²While I am aware that much has been written about the so-called 'doctrinal distortion' (see Visser 'The "absoluteness" of ownership: the South African common law in perspective' (1985) *Acta Juridica* 39, which proclaims that property rights are absolute), authoritative property law books in South Africa still list 'absoluteness' as one of the basic principles of property law.

²³Van der Walt (n 8) 53.

²⁴Van der Walt *Property in the margins* (2009) 54. See *Chetty v Naidoo* (n 3), where this was confirmed. Also see Van der Walt 'Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land-reform legislation' (2002) *TSAR* 254 at 257-258 on a discussion of how this is accepted as the normal state of affairs, with everything else being exceptional.

²⁵See *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23.

²⁶*Id* para 37.

²⁷*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (n 15) para 395.

²⁸PIE provides procedural protection for unlawful occupiers, in that the owner of the land must follow certain procedures before the unlawful occupiers can be evicted. Section 4 is applicable to private landowners and section 6 is applicable when an organ of state lodges the eviction.

evicting unlawful occupiers will furthermore be interpreted within 'a defined and carefully calibrated constitutional matrix'.²⁹

PIE is applicable when evicting an 'unlawful occupier',³⁰ regardless of whether occupation was unlawful from the beginning or whether it was initially lawful but then became unlawful (so-called 'holding over' cases).³¹ The requirement that the occupation had to be 'unlawful' is what this paper focuses on: if a defendant can prove that a misrepresentation was created that he has consent to live on the property, this might (if he meets all the requirements of estoppel) mean that the owner cannot prove the unlawfulness of his occupation, and can therefore not invoke PIE to evict the person.

It is therefore clear that PIE replaced a landlord's common law *remedies* as far as residential properties are concerned. The Act, however, seems silent on the common law *defences*. On the basic rules of interpretation,³² the fact that the Act is silent on the common law *defences* means that they are excluded from the ambit. If this is true, then the question is: can one use *estoppel* to halt an eviction in terms of PIE.

3 Estoppel

Estoppel was adopted from English law.³³ It provides that, where a person (the

²⁹*Port Elizabeth Municipality v Various Occupiers* (n 24).

³⁰An 'unlawful occupier' is defined in s 1 of PIE 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'. The people that are excluded in terms of the Extension of Security of Tenure Act (ESTA) are mostly people living on farms. Initially, there was some confusion about to whom this Act applies. Initially the courts found, based on a historical interpretation of the Act, that it applies to 'classic squatting' cases only. See *ABSA v Amod* [1999] 2 All SA 423 (W); *Ross v South Peninsula Municipality* 2000 1 SA 589 (C); *Betta Eiendomme v Ekple-Epoh* 2000 4 SA 408 (W); *Ellis v Viljoen* 2001 5 BCLR 487 (C). This would be an instance where the occupants *never* had consent to occupy the land. The *rei vindicatio* was therefore used in cases where the occupiers had had consent to occupy the land, but whose occupation had become unlawful. For an excellent discussion of the term 'unlawful occupier', see Pienaar "'Unlawful occupier" in perspective: History, legislation and case law' in Mostert and De Waal *Essays in honour of CG van der Merwe* (2011) 309-330.

³¹*Ndlovu v Ngcobo; Bekkar v Jika* 2003 1 SA 113 (SCA).

³²See for instance the *Ex contrariis* rule of inclusive interpretation, that states that if a provision expressly caters for something, it is inferred that if it does not include something, that thing is not covered in the act. See Du Plessis *Re-interpretation of statutes* (n 18) 238.

³³*Bauman v Thomas* 1920 AD 428 at 434. In terms of English law, (propriety) estoppel is when 'a legal owner of land has so conducted himself, either by encouragement or representations, that the claimant believes that he has or will acquire some right or interest in the land and has so acted to his detriment on that basis, it would be unconscionable for the legal owner to assert his strict legal rights' – see Pawlowski *The doctrine of proprietary estoppel* (1996) 1. The three essential elements

representor) by his words or conduct made a representation to another person (the representee), and this second person believed the truth of the representation and acted on this representation and by acting on it suffered prejudice that he would not have suffered had he known of the truth of the representation made to him, the presentor may be estopped or precluded from relying on this truth.³⁴

The traditional idea of estoppel is that the (mis)representation will be treated as the truth between the parties. This is a fiction of sorts, where the representor's misrepresentation is upheld as the truth.³⁵ In the context of landlord-tenant law, estoppel will be relevant in the cases where a tenant claims that there was permission or consent to occupy the rented premise. In most instances, there will be a lease agreement that was detracted from by some form of conduct of the

that need to be proven are an assurance, reliance and detriment or change of position (*id* 3).

³⁴Sonnekus *The law of estoppel in South Africa* (2000) 1. Five elements crystallised from this, namely i) legally relevant representation; ii) blame; iii) causation; iv) detriment, and v) maintainability. Van der Merwe and Van Huyssteen 'A perspective on the elements of estoppel by representation' (1988) *TSAR* 568 569 make the point that estoppel is to effect fairness. According to them, '[t]he general consideration underlying this measure is whether harm which would be suffered by one party if the substantive rules of law were to be applied strictly according to the facts as they exist, should rather be shifted on to another party. The answer to this question as it arises in a particular set of circumstances appears when the so-called elements of estoppel are applied to those circumstances'.

For Lubbe 'Estoppel, vertrouensbeskerming en die struktuur van die Suid-Afrikaanse privaatreë' (1991) *TSAR* 1 at 14-15 the most obvious characteristic of estoppel is to serve as a correction of the different institutions of private law, which can be traced back to the ideal of individual autonomy. For instance, where estoppel is used in a vindication claim, it is a limitation on the absoluteness of ownership vindication. Ownership is not absolute. It corrects the idea that an owner has a vindication claim denied only if he claims it. In essence the corrective working of estoppel then attaches certain (legal) consequences to the reliance that the estoppel-denier created by his conduct to the estoppel-claimant. Rabie regards the aim of estoppel as preventing loss and 'preventing the prejudice which the representee is likely to suffer if the representor is not prevented from denying the truth of his representation'. This is because the defence is based on equity (*The law of estoppel in South Africa* (1992) 2).

³⁵It still does not give legal certainty as to what the estoppel-claimant is gaining from estopping the estoppel-denier. A possible interpretation is that, if estoppel is raised in a vindication claim, the estoppel-claimant is regarded as the owner of the property. See for instance Van Heerden 'Estoppel: 'n wyse van eiendomsverkryging?' (1970) *THRHR* 19; Lou 'Estoppel en die *rei vindicatio*' (1975) *THRHR* 218; Van der Merwe and Van Huyssteen 'A perspective on the elements of estoppel by representation' (1988) *TSAR* 568; Visser 'Estoppel en die verkryging van eiendomsreg in roerende eiendom' (1994) *THRHR* 633. Another interpretation is that only the harm that was suffered should be repaired. Lubbe (1991) *TSAR* 1 at 18-19; Van der Merwe and Van Huyssteen (n 33) 571. Rabie (n 26) 9 foresees the possibility that estoppel could be used in an indirect way to secure the enforcement of a claim, mostly in instances where an agent makes a (mis)representation. In *Bildon Properties (Pty) Ltd v Wilson* 1946 NPD 736 749-750 the respondent claimed that a written lease was renewed for a period of five years, and estopped the lessors from relying on the truth, since the conduct of the lessors indicated that it had been renewed. The court made it clear that a litigant cannot claim a declaration of rights on an estoppel, nor can it create a title.

representor (the landlord) that the landlord might deny and the representee (lessor) might rely upon. For example, if the initial agreement between the landlord and the tenant was that rent should be paid on the 1st day of every month and the tenant pays on the 7th of every month without objection from the landlord, it might be possible to infer after a while that the landlord accepts this position. Should the landlord then wish to enforce his right to payment on the first of every month, the tenant might be able to estop the landlord from relying on such rights, because the impression was created that it is acceptable to pay on another date.

Estoppel at the conclusion of a contract raises some interesting questions. Contracts are formed by consensus; in other words, when both parties are *ad idem* or have the intention to conclude a contract. With estoppel, the court might find that the parties were not *ad idem*, but will nonetheless find that the landlord cannot rely on the lack of consensus because of certain actions. The question then arises whether or not a person can be held to have been *ad idem* about concluding a contract although the person did not have the actual intention to do so? This situation seems uncertain. In *Van Rhyn Wine and Spirit Co v Chandos Bar*³⁶ the court imported English law principles and found³⁷ that:

[i]f, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.³⁸

Before the Constitution there were cases where estoppel was raised successfully at ejection in terms of the *rei vindicatio*. In the *locus classicus* for estoppel and ejection from leased property, *Garlick Ltd v Phillips*,³⁹ Garlick was

³⁶1928 TPD 417.

³⁷The court *in casu* then applied the 'reliance theory' where, if objectively it seems that a party led another party to reasonably believe that they had concluded a contract, then the intention would be imputed. This is also referred to as the doctrine of quasi-mutual consent, as embodied in *Smith v Hughes* (1871) LR 6 QB 597 at 607. Also see *Pieters and Co v Salomon* 1911 AD 121 at 137. For the difficulties with this doctrine, see *Van Rhyn Wine and Spirit Co v Chandos Bar* 1928 TPD 417. When the court had an opportunity to settle the question in *Saambou-Nasionale Bouvereniging v Friedman* 1979 SA 978 (A) it merely stated that it is not necessary in such a case to decide whether liability arises due to estoppel or due to the reliance theory. The problem with equating the reliance theory with estoppel, however, is that if it is found that based on the reliance theory a contract came into being, then such a contract will actually exist, while with estoppel the claimant will merely be estopped from relying on the misrepresentation, with no actual contract coming into being. This might not make a big difference *inter partes*, but the position of a third party might differ, whether it is reliance theory or estoppel; Rabie (n 33) 11-12.

³⁸From *Smith v Hughes* (n 27).

³⁹1949 1 SA 121 (A).

estopped from evicting Phillips on the basis of the late payment of rent since Garlick accepted such late payment over months without complaining. The court found that:

[s]o long as its attitude remained one of indifference towards late payments of rent, there was of course no necessity to speak, but when appellant's state of mind changed from one of indifference to one of a desire or intention to take advantage of late payment of rent in order to obtain ejectment, then I think a duty arose to make that changed attitude known to respondent.⁴⁰

The question can of course also arise whether accepting late payments on a monthly basis is not an implied variation to the contract.⁴¹ It is important to remember that not every prior indulgence or variation to the contract will be enough to allow for a defence of estoppel.⁴² In *Edward L Bateman Ltd v Combined Metal v Wire Works (Pty) Ltd*⁴³ the court formulated the principle as follows:

When a creditor has acquiesced, expressly or by implication and without complaint, in a sufficiently long series of defective performances by his debtor, he will not be permitted, unless there was prior warning that strict performance was thenceforth required, to make use of a further and similar defective performance in order to bring a forfeiture or acceleration provision into operation.

⁴⁰ *Garlick Ltd v Phillips* 1949 1 SA 121 (A) 132. For more on a duty to speak, see *Padaychee v Union National South British Insurance Co* 1983 3 SA 246 (D) 257; *Pillay v Pillay* 1951 1 SA 133 (E) 139; *Universal Stores Ltd v OK Bazaars (1929) Ltd* 1973 4 SA 747 (A) 761; and *Big Dutchman (South Africa) v Barclays National Bank* 1979 3 SA 267 (W) 267-277.

⁴¹ See *Myerson v Osmond Ltd* 1950 1 SA 714 (A) 724; and *Ndogeni v Administration Board, Western Cape* 1984 1 SA 768 (C) 774. *Adriatic Insurance Co v O'Mant* 1964 3 SA 292 (SCA) 297 classified this as quasi-estoppel. *Hoole v McQuade* 1944 CPD 442 held that if a party does not cancel a contract and thereby leads another party into believing that the contract will not be enforced in the future, such a party is precluded from reliance on the strict terms of the contract. See also *Roman Catholic Bishop of Natal v Sewduth* 1938 NPD 110; *Independent Picture Palaces (Pty) Ltd v Independent Film Distributors (Pty) Ltd* 1936 NPD 456 470-474; *Sadar Investments (Pty) Ltd v Caldeira* 1971 1 SA 193 (O). Of course, when the lessor gives notice that the contract will henceforth be strictly enforced the basis for the misrepresentation falls away. The courts seem more hesitant to accept that it is estoppel in similar circumstances than where an agent made the representation – see *Martin v De Kock* 1948 2 SA 729 (A) 735; *Jaffer v Falante* 1959 4 SA 360 (C) 364. In *Sayed v Ally* 1941 CPD 374 the court found that the simple fact that a party accepted two late payments does not mean that the party cannot foreclose. In *United Provident Assurance Co v Young* 1928 CPD 295 298, Watermeyer J allowed for estoppel where a mortgagee allowed late payments for 14 years.

⁴² *Edward L Bateman Ltd v Combined Metal v Wire Works (Pty) Ltd* 1975 3 SA 497 (W), where the court made it clear that it will depend on the course of conduct, the length of which depends on the circumstances of each case.

⁴³ 1975 3 SA 497 (W) (498).

Based on this overview of cases where estoppel was raised in defence to eviction prior to the Constitution, can one argue that estoppel can still be used as a defence for an eviction in terms of PIE? What are the possible scenarios where this might be argued?

4 Practical examples of the possible application

What sparked my interest in this question is the recurring eviction from family homes happening especially in Soweto and Alexandra, Johannesburg. Attorneys at the University of Johannesburg Legal Aid Clinic sketched a specific, common and re-occurring picture to me.

During apartheid black families living in 'black spots' in 'white areas' could acquire rights in property in terms of permits.⁴⁴ These were use rights of a personal nature, and only the holders themselves and their dependants were allowed to reside on the property. With the promulgation of the Upgrading of Land Tenure Rights Act,⁴⁵ these permits were upgraded to ownership.

These permits listed the members of the household on the permit, with the person in charge listed at the top. When these permits were converted, the local municipality was supposed to consult with every person listed on the permit or to ascertain that there was a family agreement that ensured that the people listed on the permit had a *habitatio*. This seldom happened. Some people did not upgrade their rights in the terms of the Act, but simply continued to sell the permits (and therefore presumably the rights in the home) to other people.

Parallel to this is often a factual situation that does not accord with the legal situation. A family home, in terms of customary law, is hardly ever regarded as anybody's individual property. Instead, the family head often exercises control over the property that is held by the family in communal ownership.⁴⁶ The focus remains on the family, and access and use of the property depends on this family bond. In terms of this, the family house will not go to an individual upon the death of the registered owner, nor can it be simply transferred to an individual. It will instead remain in the family, with somebody else taking over as the family head.

⁴⁴The permits were issued in terms of the infamous Government Notice R 1036 of 1968, part of the Regulations on the Control and Supervision of Black Urban Areas and Related Matters of 1968, issued in terms of the Black (Urban Areas) Consolidation Act 25 of 1945. The permits took different forms. Site permits allowed the holder to build on a vacant, undeveloped plot. Residential permits enabled the holder to rent a house from the local authority for rent and the payment of levies. Certificates of occupation gave the holder a personal right to a house that the local authority 'sold' to the holder. These certificates did not confer ownership, but allowed the holder in certain circumstances to sell it to another person. Lodger's permits allowed for the renting of a house, and hostel permits enabled a single person to rent single quarters from the local municipality. For a summary of the permits in urban areas, see Pienaar *Land reform* (n 13) 148-150.

⁴⁵122 of 1991.

⁴⁶Bennett *Customary law in South Africa* (2004) 256.

In the one specific case, X, the permit holder, asked A to move in with his aunt B, a single ailing woman who needed someone to take care of her. He made it clear that A had permission to stay on the property. A took care of aunt B up to her death and throughout this time X assured A that she had a right to remain on the property. A in the meantime raised her own children and grandchildren in the family property. At some stage X 'sold' the permit to Y, another family member. Still during this time, A had clear permission to stay on the property and regarded it as family property to which she had a right. It seems from the facts that Y never objected to A's living in the house. He subsequently applied for an eviction order to evict A from the family house in order to rent it out for extra income. Regarding herself as the rightful holder, A claimed that she had a right to stay on the property and was therefore not an 'unlawful occupier' as required by PIE. To A's mind, she had and always had had permission to stay in the house, as it was 'family property'.

Of course it is possible to rely on the substantive protection of PIE by arguing that evicting A will not be just and equitable in such circumstances. But it should also be possible that A should be able to raise the defence of estoppel, should she be able to prove that Y created a misrepresentation that the property is family property, which misrepresentation A relied on to her detriment, and thereby precluded Y from relying on the truth (and evicting A). This should be possible especially in the light of the different understanding of rights in property in the customary law context, which is adapted in an urban setting. When the right to occupy derives from a family relationship there should be a more onerous duty on the owner to make the legal position clear.

In the state of New York there is a prohibition on the eviction of family members as mere occupiers, the so-called 'family exception'.⁴⁷ It requires procedures different from the ordinary eviction procedures. This is based on the premise that the permission to occupy the dwelling stems not from the consent of the family member but from the family relationship itself.⁴⁸ Should one rather leave the common law defence of estoppel alone and instead develop such an exception? Or does the substantive protection in PIE ensure that such evictions will probably not be 'just and equitable', and would this be enough protection? Recently the High Court was faced with another interesting question.⁴⁹ During apartheid it was not possible for people of certain race groups to buy property in an area reserved for another group. What often happened was that people

⁴⁷See *Rosenstiel v Rosenstiel* (20 AD 2d 71 [1963]).

⁴⁸*Kakwani v Kakwani* 2013 NY Slip Op 23200 [40 Misc 3d 627]. Note that this exception is not premised in misrepresentation as is estoppel. It is premised on the idea that due to a special relationship with the owner or the right holder of the property, a family member cannot be evicted by using the normal procedures.

⁴⁹*Balduzzi v Rajah* [2008] 4 All SA 183 (W).

entered into private agreements, resulting in the registered owner being a 'front' for another person. This is what happened in *Balduzzi v Rajah*.⁵⁰ In this case Balduzzi and Rajah entered into an agreement. Under the agreement Rajah 'purchased' the property from Balduzzi by paying the mortgage instalments; paying the rates and taxes on the property; and maintaining the property as an owner would. Balduzzi, however, would remain the registered owner on paper.⁵¹ Upon Rajah's death the mortgage was paid off and Rajah bequeathed the home to his wife in his will. She continued to live on the property peacefully, as if she were the owner, until Balduzzi, the *registered* owner, applied for an eviction order. Balduzzi relied on his ownership (and the lack of a formal, written agreement between him and Rajah for the purchase of the property as required by the Alienation of Land Rights Act⁵²), while the wife denied that she was an unlawful occupier of the property. The then Witwatersrand Local Division of the High Court found that Balduzzi consented to Rajah's conducting himself as the owner. In this sense there was an agreement to stay on the property, and Rajah's doing so was not unlawful. There was no further indication that permission had been withdrawn.⁵³ Based on that, the court did not order the eviction.

If one looks at the requirement of estoppel and applies it to this case, can it be that B would have been precluded from relying on his ownership, because he had previously (through his conduct) created the impression that R was either the owner or at the very least had permission to reside on the property, and by doing so R's widow acted to her detriment? Of course R himself would have difficulty in arguing that he relied on a misrepresentation, as he must have been aware of the true state of affairs. But R's widow, who 'inherited' the property from her husband, might have succeeded if she could have proved the requirements of estoppel.⁵⁴ On a narrow interpretation of estoppel one can possibly argue that since we have a registration system that bears the name of the legal owner it is

⁵⁰[2008] 4 All SA 183 (W).

⁵¹Another interesting twist: the Abolition of Racially-Based Land Measures Act 108 of 1991 repealed racially-based laws such as the Group Areas Act 36 of 1966 that prohibited R from acquiring property. It further provided in s 48(3) that property so acquired could be transferred to the nominee owner (such as R) and registered in the person's name.

⁵²68 of 1981

⁵³Balduzzi tried to evict Rajah again six years later. This time, R relied on the Abolition of Racially Based Land Measures Act 108 of 1991 to claim that she was entitled to the right of ownership. Much of the case turned on the question whether the right created in s 48(3) is a real or personal right, since a real right cannot prescribe, while a personal right can. The court found that the right in s 48(3) is a personal right that prescribes, and that Rajah could therefore not insist on registration.

⁵⁴Note that a successful reliance on estoppel will not make the widow the owner. She will, however, not be able to contest unlawfulness on the basis that she is the owner either, since B is the formal owner of the property, and the time lapsed for R and the widow to, in terms of legislation specifically so enacted, to become the owner.

impossible to create a misrepresentation. A wider interpretation of estoppel might consider the special circumstances in *Balduzzi* and allow for a defence of estoppel, especially if it is interpreted in the light of section 26.⁵⁵

5 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*

In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*⁵⁶ the Constitutional Court heard an application concerning the eviction of 20 000 people from Joe Slovo settlement near Cape Town.⁵⁷ Government agencies responsible for housing brought an eviction application to the High Court⁵⁸ on the basis that they required the land for developing affordable housing for poor people. The High Court granted the eviction order.

The residents' argument before the Constitutional Court was that they were in lawful occupation of the property, and that the decision to evict them was not made fairly and properly.⁵⁹ The government agency, on the other hand, asserted that they were unlawful occupants and that their eviction was just and equitable.

For the applicants to be 'unlawful occupiers', they would have to have been on the land without the consent of the owners. Although all the judges eventually agreed that they *were* unlawful occupiers for the purposes of PIE, they differed on whether the occupiers had *always* been unlawful⁶⁰ or had become unlawful. In the middle of this dispute is the question of *consent*. Did the City of Cape Town consent to the occupation? A discussion of the court's dissection of the consent requirement will help answer the question of whether or not it is really possible to use estoppel as a limitation to the application of PIE.

⁵⁵The usefulness of such a defense is discussed in para 6.

⁵⁶*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (n 15).

⁵⁷*Id* para 8.

⁵⁸*Thubelisha Homes v Various Occupants* Case No 13189/07.

⁵⁹In the alternative they stated that, should the Court find that their eviction was unlawful, the eviction order should not be granted since the law that prevents the eviction of unlawful occupants needed to be complied with. The particular contention was that their relocation, 15km away, was not just and equitable. Five judgments were prepared by Moseneke DCJ, Ngcobo J, O'Regan J, Sachs J and Yacoob J. It is a challenge to see where they concur for the same and for different reasons. Suffice it to say that they all concurred with the order, albeit for different reasons. The Court found that the applicants were indeed 'unlawful occupiers' for purposes of PIE (para 4). The Court ruled that the eviction was just and equitable based on the reasonable measure to give effect to the right to housing. Even without meaningful engagement it would remain reasonable if alternative accommodation was provided for the occupiers and given their expectation that 70% of the new houses would be allocated to them (para 5).

⁶⁰Yacoob J ruled that they did not have consent at all, while the other judges concluded that they did have consent, but that the consent had been conditional and that the condition had expired.

A few facts need to be highlighted in order to shed more light on the issue. The owner of the property in *Joe Slovo* was the City of Cape Town. The eviction order was asked for by Thubelisha Homes, which was responsible for developing the housing in the Joe Slovo settlement.⁶¹ The settlement started in the early 1990s, when the occupiers settled on unoccupied land. The occupants had to clear away vegetation to enable them to put up structures. During the early days, and still under apartheid, the occupants were forcefully removed from time to time, but they kept on returning to the site.⁶² With democracy also came greater tolerance of the occupiers, and from December 1994 the residents were gradually supplied with water, container toilets and rudimentary cleaning facilities. A fire caused considerable damage in the early 2000s, after which the city started providing tap water, toilets, refuse removal, roads, drainage and electricity, and gave each house a number.⁶³ It was fairly clear that the city had not *expressly* acknowledged that the people had a right to occupy the land, but many applicants said that they had occupied the land with permission given to them by a committee of the residents.⁶⁴

The city tried to persuade the residents to move from the land and make way for development in 2004.⁶⁵ The N2 Gateway project was eventually launched, and the extensive media and other coverage meant that the community was aware of the development. Representatives and leaders of the community initially supported the project.⁶⁶ Despite their knowledge of the forthcoming development, the community did not move. In 2006 and 2007 there was greater pressure to move the people in order to enable Thubelisha Homes to develop new homes. For various reasons the community grew dissatisfied with the project.⁶⁷ It was then that the City of Cape Town stepped in to evict the occupiers in terms of PIE. To do so the city had to prove that they were 'unlawful occupiers' in terms of PIE. Each occupier therefore had to be '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' (own italics). The applicants contended that the city, as the owner of the property, consented to their living on the land and could therefore not evict them in terms of PIE. The court *a quo* rejected this.⁶⁸

⁶¹*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (n 15) para 11.

⁶²*Id* para 20.

⁶³*Id* para 21.

⁶⁴*Id* para 23.

⁶⁵*Id* para 26.

⁶⁶*Id* para 28.

⁶⁷*Id* para 31. This is because, *inter alia*, they were promised houses in the development at a relatively low rental price, which price was raised considerably later. They were also promised 70% of the houses in the development. This did not realise in phase 1 and 2, and the residents feared the same for phase 3.

⁶⁸*Id* para 37.

Yacoob J found that in this instance there was no consent, tacit or otherwise, for their occupation of the land. In finding so, Yacoob J as an aside stated that '[t]acit or implied consent must not be confused by imputing concepts of estoppel into the concept of tacit consent required by the legislation'.⁶⁹ This is because tacit consent is actual consent, as opposed to ostensible consent that is required for a successful reliance on estoppel. On a narrow interpretation of the Act Yacoob J found that there was no consent. For him the ordinary meaning of consent is 'consent to occupy that entails the creation of a right to occupy on the part of the occupier', and that PIE does not speak of a 'kind of nebulous consent or consent [...] in the air'.⁷⁰ The consent in PIE is therefore consent 'or some other right to occupy'.⁷¹ When interpreting PIE, Yacoob J concluded that the consent the Act refers to is 'consent to occupy or permission that creates a defensible right of occupation'.⁷² Based on the Oxford Dictionary meaning of the word, he concluded that the consent required in terms of PIE is a 'voluntary agreement' of the owner or the person in charge. This means that if an (unlawful) occupier stays on an owner's land without the agreement of an owner, even if an owner felt duty bound to tolerate the occupier, such an occupier would not be occupying the land based on a 'voluntary agreement' and would therefore be doing so without consent.⁷³ Pushing the common law notion of agreement further, Yacoob J required this agreement to be *bilateral*, and concluded that the consent in PIE could therefore not be a unilateral act. Occupiers had therefore to *ask* permission to stay on the land, or be *granted* permission from the owner of the land, and if no such permission was given, the 'consent' requirement of PIE would not be fulfilled.⁷⁴

⁶⁹*Id* para 50.

⁷⁰*Id* para 51.

⁷¹*Ibid*.

⁷²*Ibid*. Yacoob J's comments are only *obiter*, since 'the applicants have not begun to make out any case on [the basis of estoppel]' (para 50).

⁷³*Id* para 55. The problem is that tacit consent is inferred from certain facts, and will be deemed as consent only where 'the most probable conclusion from all the proved facts and circumstances is that a contract came into existence'. *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vornor Investments (Pty) Ltd* 1984 3 SA 155 (A) 165B-C as quoted in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (n 15) para 58.

⁷⁴*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (n 15) para 55. Yacoob J here supported his argument by relying on the Land Claims Court interpretation of consent in the Extension of Security of Tenure Act 62 of 1997 in *Landbounavorsingsraad v Klaasen* 2005 3 SA 410 (LCC). Yacoob J opposed a broad interpretation of 'consent' motivated by a desire to increase the protection of vulnerable people, because if the parliament had wanted a broader definition it would have given one (para 62). Yacoob J did consider this in the light of the Constitution, and pinned down the aim of PIE as being to prevent unlawful occupiers from being evicted without a court order where all the relevant circumstances are taken into account. The main purpose of PIE was to ensure the fair treatment of unlawful occupiers, and not to quibble about whether someone is a lawful or unlawful occupier (para 63). I find this argument problematic: how can one assure the

This enabled Yacoob J to come to the conclusion that since the City had not passed a resolution to authorise an authority to give consent to the occupiers to occupy the land, one could not talk of actual consent, and could therefore not talk of tacit or express consent.⁷⁵ The fact that the City had merely fulfilled its constitutional duties and its duties in terms of the Local Government: Municipal Systems Act⁷⁶ to provide the minimum level of services could not mean that the city had consented to the occupation,⁷⁷ and did not grant them an enforceable right of occupation. Since the city was compelled to perform its constitutional duties (of providing basic services), it allowed the occupiers there only on compulsion, which compulsion could not mean that the city entered into a 'voluntary agreement' as required by consent. Yacoob J found that on the facts, the occupiers 'ought to have known, in all the circumstances, that no right to occupation had been conceded'.

Moseneke DCJ⁷⁸ approached the question of consent by looking at the transformative purpose of the Constitution.⁷⁹ In terms of this transformative purpose, section 26(1) of the Constitution expressly states that everyone has the right of access to adequate housing, and that the state must take reasonable measures within its available resources to provide everyone with access to adequate housing. Section 26(3) on the other hand provides a shield against eviction that is not in terms of the law. This requires judicial intervention in evictions, in that a court can grant an eviction only after considering all the relevant circumstances. PIE's aim, then, is to prevent illegal evictions.⁸⁰ In this framework Moseneke DCJ held that the definition of 'consent' is cast in wide terms, where tacit consent is consent 'unsaid but capable of being reasonably

fair treatment of unlawful occupiers if one cannot be certain if somebody is an unlawful occupier or not? It is in this context of procedural protection for unlawful occupiers at eviction that Yacoob J interprets PIE. Since the context and the preamble are silent on the definition of 'consent', he feels restrained to broaden the meaning. PIE does not aim to redefine unlawful occupiers, he argues; it aims instead at granting procedural protection. The absence of consent does not allow the owner to treat the occupier unfairly (para 65). The possible unfairness of a literal interpretation of the 'consent' requirement is countered by the substantive and procedural protection of unlawful occupiers in terms of PIE. The balancing of rights in this case will tip the scale unfairly in favour of the unlawful occupier (para 68). Yacoob J (para 70) made the comment that PIE does not distinguish between a private or a public entity as an owner of land. This also means that consent is defined in the same way for both. This is not entirely true. What about Modderklip, where the court stated that a private owner cannot bear the brunt of homelessness? There is a differentiation. The state has a duty to supply housing, and the state might therefore have a more onerous duty to bear with the occupiers.

⁷⁵*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (n 15) para 73.

⁷⁶32 of 2000.

⁷⁷*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (n 15) para 76.

⁷⁸With Sachs J concurring.

⁷⁹*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (n 15) para 141.

⁸⁰*Id* para 142.

inferred from the conduct of the owner in relation to the occupier'.⁸¹ This directs him away from Yacoob J's distinction between ostensible and actual consent, and the reliance 'on concepts of estoppel and ostensible consent in the law of contract in order to narrow down the proper reach and protection afforded by the word 'consent' in the sphere of public law'.⁸² In accordance with the section 39(2) instructions of the Constitution, Moseneke DCJ felt obliged to find an outcome that was just, instead of 'a mechanistic application of legal rules of private law in a terrain which is clearly intended to give fulsome protection derived from the Bill of Rights'.⁸³ Likewise, the term 'consent' had to be interpreted in line with the history of apartheid South Africa.⁸⁴ PIE in this sense tried to prevent the scenario where people will be forced off land because they did not have formal or written proof of the right to be on the land, or where they stayed on the land without the initial consent of the owner. This means that a right of occupation might not always be evident from express agreements of public entities, but with the owner's tacit consent.⁸⁵

Moseneke DCJ further found that where public land is occupied, more stringent considerations may apply given the obligations in terms of section 26(2)

⁸¹*Id* para 144. He then interprets 'unlawful occupier' and 'consent' purposively. This means they must be understood against the background of PIE as an Act that tries to give effect to the constitutional imperative that no one may be evicted from their homes without a court order. This means that '[w]e are obliged to attribute to the word 'consent' a meaning which provides the widest possible protection to an evictee against arbitrary or unfair eviction' (para 145). This will provide an interpretation that, in context, is protective of homeless people or the vulnerable against arbitrary evictions.

⁸²Para 146.

⁸³*Ibid.*

⁸⁴Also emphasising the history of South Africa and the current housing policies, Ngcobo J (Moseneke DCJ and Sachs J concurring) interpreted the City's reluctance to move the occupiers within its constitutional obligation to provide access to adequate housing. The City allowed the residents on the land only because it was fulfilling this constitutional duty (para 209). This, Ngcobo J argues, 'does not purport to confer consent by constitutional fiat' (para 212). He based this on the dicta in *Port Elizabeth Municipality* (n 24) where the court said that title cannot be transferred by constitutional fiat. At the same time, however, he is reluctant to find that the residents occupied the land unlawfully during the period that the government tolerated them (para 213). Note also that, in para 215, Ngcobo J raised the issue that a private landowner might be treated differently. The difficulty in answering the 'consent' question, for Ngcobo J, is the fact that the occupiers will be evicted to make way for a housing project, a project that is part of the state's duty to provide people with access to adequate housing (para 216). In this context, Ngcobo J finds it unnecessary 'to first "brand" residents as "unlawful occupiers" before they may be relocated' (para 218). Instead, he focuses on the question whether it is just and equitable to evict the people to implement the government's plan to provide the residents with adequate housing (para 218). However, in the confines of PIE the residents must still be 'unlawful occupiers', and without going into a discussion about it, Ngcobo J finds that even if they had consent, they knew that they had to vacate the property and were therefore 'unlawful occupiers' at the time the application was lodged (para 222).

⁸⁵*Id* para 147.

of the Constitution. This means that where consent might be dubious, the state cannot simply rely on the formalistic interpretation of consent to treat the occupiers as unlawful. The length of time that the occupiers have spent on state land will also put a greater obligation on the state to evict occupiers only once a lawful process in line with constitutional protections has been followed.⁸⁶

O'Regan J⁸⁷ on the other hand held that the provision of services by a municipality to people in informal settlements should not be regarded as constituting tacit consent,⁸⁸ since local government has a statutory and constitutional obligation to provide such basic services to people living in their municipalities. The provision of services in itself would therefore not warrant an inference that there is tacit consent.⁸⁹ Based on the specific facts of *Joe Slovo*, however, she did not have trouble in finding that the occupiers did in fact have consent.⁹⁰

⁸⁶ *Id* para 148. Based on this, Moseneke DCJ found that it is reasonable to conclude that the occupiers did occupy the land with consent (para 150). The factors that he looked at were the fact that the occupiers had been on the land for a relatively long period; the City had taken various steps to acknowledge and accept the occupation of the residents; the City had not told the residents during their occupation that they were not permitted to stay on the land or that they should leave. He concluded that: 'it is fair to state that the provision of basic services is legitimate evidence of the City's state of mind that the residents are a reality and will have to be accepted and provided for in a humane manner for a considerable period of time until access to adequate housing is realised. The provision of basic services must, taken together with several other facts I have referred to earlier, lead to the irresistible inference that the City had tacitly given its permission for the occupation.' The fact that they had consent to stay on the land, however, does not preclude the City from withdrawing the consent. This is indeed what happened, since there had been extensive negotiations with the residents regarding the N2 Gateway project, and the consent had also been (implicitly) withdrawn. The City was therefore allowed to rely on PIE to evict the occupiers (para 160).

⁸⁷ She concurred with the judgment of Yacoob J.

⁸⁸ As in *Rademeyer v Western Districts Council* 1998 3 SA 1011 (SECLD); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (n 15) para 276.

⁸⁹ Indeed, to find that it does might make local governments reluctant to provide these services to residents. *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (n 15) para 276.

⁹⁰ *Id* para 280. This consent was not unlimited. It was qualified to the extent that they could stay on the land until the land was needed for the development of houses. O'Regan considered the *precarium* argument and the fact that reasonable notice needed to be given to the occupiers should it be found that they were occupying the land based on *precarium*. O'Regan accepted that reasonable notice had been given, and argued that if good cause was a requirement for the termination, then the development of low-cost housing would be a good cause (paras 282-286). O'Regan also questioned the use of the common-law principle. As a principle, *precarium* would allow an owner to evict somebody simply by establishing his or her ownership. In strict application of this principle, there might be cases where the owner would be able to evict occupiers immediately. The 'reasonable notice' requirement was therefore an equitable requirement that had been inserted by Roman Dutch commentators, according to O'Regan (para 287) relying on Voet *Commentary on the Pandects* 8.4.18 and *Gemeenskapontwikkelingsraad v Williams* 1977 3 SA 955 (WLD) 965E-969A. PIE brought in its own equitable requirements. It 'reorders the ordinary

Sachs J⁹¹ tried to reach an outcome in keeping with the objectives of the Constitution and legislation, in an aim 'to minimise as far as is possible any resultant injustice or disadvantage to either party'.⁹² Keeping in line with his reasoning in *PE Municipality*, Sachs saw the role of the judiciary as 'accept[ing] the intellectually more modest role of managing tensions between competing legitimate claims, in as balanced, fair and principled a manner as possible'.⁹³ With regard to the interpretation of the 'unlawful occupier' requirement, Sachs J found that the question *in casu* should rather be found in the context of the specific relationship between occupants and the City, established in terms of the Housing Act and the Constitution, and not within the framework of the common law rights of landowners.⁹⁴ Against the backdrop of the Constitution and legislation promulgated in terms of the Constitution, Sachs J found that the occupiers had tacit consent to occupy the land,⁹⁵ but that this consent was conditional.⁹⁶

Joe Slovo therefore left the question of whether estoppel can be used as a defence largely unanswered, since all the judges ruled that at the time of eviction, the occupiers were indeed unlawful.

6 Conclusion

In the preface to his book on estoppel, Sonnekus quotes Cheshire and Fifoot,⁹⁷ saying that '[f]ew doctrines are at once so potentially fruitful and so practically unsatisfying. [Estoppel] is more often cited than applied, and more often applied than understood'. He continues later in the same vein, warning that estoppel

common-law rules relating to eviction' (para 288). She continued to say that 'PIE strikes a balance between landowners, government agencies and homeless people and ensures that the interests of homeless people are seriously considered by any court asked to make an eviction order' (para 291). Her conclusion was that the occupiers *had* consent, but that such consent was not indefinite, which consent was indeed terminated by the City, a fact of which the occupiers became aware during consultations with them (para 290). O'Regan found that PIE's speaking of 'unlawful occupiers' was unfortunate, due to the historical context. For her, '[t]o speak of people residing on state land, who have no other homes and nowhere else to go, as 'unlawful occupiers' jars with the aspirations of our new constitutional framework' (para 291).

⁹¹Moseneke DCJ and Mokgoro J concurring.

⁹²*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (n 15) para 332.

⁹³*Id* para 333.

⁹⁴107 of 1997. The common law is not at the core of this relationship. In this case, where a public entity is involved, the establishment of the relationship is from public responsibilities which involve numerous reciprocal rights and duties (para 343). Thus, on a transformative interpretation of the 'unlawful occupier' requirement, s 26 will not regard the City as just another landowner but as a landowner of special type that is obliged to use its land for the purposes designated by the Constitution and legislation promulgated in terms of the Constitution (para 344).

⁹⁵*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (n 15) para 358.

⁹⁶*Id* para 360.

⁹⁷Sonnekus (n 25) v.

should not be a 'Mädchen für Alles',⁹⁸ and that there is no 'excuse for an undisciplined application of the doctrine of estoppel'.⁹⁹ He continues by warning against the use of the doctrine as a broad principle without taking care of the particular requirements and distinctions that have evolved over decades.

The fact that PIE expressly excludes the use of common law *remedies*¹⁰⁰ for evicting urban tenants does not *per se* mean that the *defences* available to eviction are also excluded.¹⁰¹ PIE provides for specific procedural protection mechanisms in that an owner that wants to evict a tenant must follow the procedures set out in PIE. It also provides for substantive protection,¹⁰² in that the court can give an order for eviction only if it is 'just and equitable' to do so, taking into account the circumstances of the evictee.

A brief discussion on estoppel has shown that courts previously held a landlord by his misrepresentation, although the lines were somewhat conflated on whether the courts' decisions were based on the 'reliance theory' in contract or the doctrine of estoppel. In today's world of cautious landlords and careful lawyers the prevalence of written contracts with non-variation clauses might move formalistic lawyers to plead that estoppel can be pleaded only in *exceptional* circumstances where true misrepresentation has been proven. If the contract stipulates payment on the first of every month, the tenant cannot be misled when the landlord after 13 late payments now all of a sudden wishes to enforce his rights on the second of the month.

Such a formalistic argument might, however, not be constitutional. The common law application of estoppel might therefore have to be developed in line with the Constitution.¹⁰³ Section 26(3) of the Constitution prohibits arbitrary evictions. A landlord that does not enforce his contractual right for timeous payments for a certain period of time might well be estopped from enforcing the right at a later stage, as such eviction might be arbitrary. Even without the Constitution, there is enough case law to support the proposition that in such a case the landlord will be precluded from relying on the terms of the contract. This

⁹⁸The phrase translates directly as 'a girl for everything', meaning something along the lines of 'a jack of all trades'.

⁹⁹Sonnekus (n 25) 26.

¹⁰⁰I am aware that there are people who are of the opinion that PIE overrides the common law altogether since s 4(1) refers to the common law's not being applicable 'to [the] proceedings by an owner or person in charge of the land for the *eviction* of an unlawful occupier' [own emphasis].

¹⁰¹The only reference to defences is found in s 8(1), where it states that if no valid defence has been raised, the eviction order must be granted. See also *Mokwena v Boschplaats Boerdery (Pty) Limited* (39828/2008) [2009] ZAGPPHC 125.

¹⁰²While substantive protection for evictees is important, that is not the focus of this particular article and therefore will not be dealt with further.

¹⁰³See s 39(2), which states that '[w]hen [...] developing the common law [...] every court [...] must promote the spirit, purport and objects of the Bill of Rights'.

does not mean that estoppel is a 'Mädchen für Alles'; rather, this is an approach that the Constitution encourages.

Similarly, a registered owner who has for years through an informal agreement recognised another person as the owner of a property should not be allowed to rely on his registered right of ownership to evict people who relied on this misrepresentation. Neither should a person who lives in a house that was presented to her as a family house, in which she acquired rights of occupation in terms of a customary law understanding of occupancy rights, be evicted because an individual suddenly claims individual ownership of the property. It seems to go against everything that section 26 of the Constitution tries to prevent, and it certainly does not 'infuse the elements of grace and compassion into the formal structures of the law',¹⁰⁴ as PIE requires.

Does the *Joe Slovo* case help? In as far as the consent requirement is discussed in some detail, it does. On Yacoob J's interpretation of the 'consent' requirement, the defence of estoppel will be relevant only if the consent is 'ostensible'. Note that the judge did not reject the defence outright, as one would expect if section 4(1) of PIE indeed also overrode the common law defences. Yacoob J is silent, however, on how one would find that the consent was tacit as opposed to ostensible. The same facts might be able to prove both; and on the facts of *Joe Slovo*, the city's continuous denial of consent, while acting as if it did consent, might well indicate that the consent was more ostensible than tacit. The brief discussion of this in the judgment, therefore, does not help to answer the question whether estoppel can be used as a defence, and instead leaves us with a further question: should the consent required for estoppel, when it is the state as agent that must achieve the realisation of the relevant right to housing, be the same as the private law consent? There are very compelling constitutional reasons why the state may be subject to a different scrutiny, but that is beyond the scope of this article.

Moseneke DCJ's purposive approach is perhaps the most useful in answering the question. If PIE's aim is to prevent arbitrary evictions, then a wide interpretation of consent is warranted. This means that consent 'capable of being reasonably inferred from the conduct of the owner in relation to the occupier'¹⁰⁵ will suffice for the purposes of PIE. In his interpretation, consent must provide the widest possible protection for the evictee. It would therefore be possible to argue that a misrepresentation that induced a tenant to believe that there was consent, when, in fact, there was no consent, might be upheld in instances where holding otherwise would lead to an arbitrary eviction. This would fit in with Sach J's view of judges as 'accep[ting] the intellectually more modest role of managing tensions

¹⁰⁴*Port Elizabeth Municipality v Various Occupiers* (n 24) para 37.

¹⁰⁵(N 15) para 144.

between competing legitimate claims, in as balanced, fair and principled a manner as possible'.¹⁰⁶

While it is possible to make out a good case that there is nothing preventing a tenant from raising estoppel as a defence to PIE, the ultimate question to answer will then be, what will such a tenant gain? If the landlord is, in terms of the contract, entitled to cancel the contract with a month's notice, it might well mean that estoppel will only serve as a delaying tactic. In the case of an ostensible fixed-term contract, it might be a fair amount of time. In *Joe Slovo's* case, it might be a longer while, since the state can evict only if alternative housing is provided. In the customary law example, it might offer relief of longer duration.

The relevance of estoppel as a defence to PIE in practice will largely depend on whether it provides substantial relief or not. While it might be more advantageous for an evictee to rely on other defences, there might be circumstances where estoppel might be the only defence available to a person. In this sense, estoppel is an extra tool in the toolbox of remedies available to someone facing eviction. The fact that the courts seem rather to solve such questions within the consideration of whether the eviction is 'just and equitable' is possibly an indication that the courts feel more comfortable solving cases that seem blatantly unfair under that banner rather than to develop the common law of estoppel. The application of estoppel, however, is possible.

¹⁰⁶*Id* para 333.