THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 429/10

THE MINISTER OF SAFETY AND SECURITY Appellant

and

DEVARAJH MOODLEY Respondent

Neutral citation: *Minister of Safety & Security v Moodley* (429/10) [2011] ZASCA 93 (31 May 2011)

CORAM: Navsa, Cloete, Cachalia, Bosielo and Majiedt JJA

HEARD: 16 May 2011

DELIVERED: 31 May 2011

SUMMARY: Fair procedure prescripts of s 3 of The Promotion of Administrative Justice Act 3 of 2000 not complied with in terminating occupancy of official police quarters – high court erred in determining the matter on the basis that the notice provisions of the Prevention of Illegal Evictions and Occupation from Land Act 19 of 1998 (PIE) were not complied with without determining whether occupation unlawful – doubt expressed about the applicability of PIE to housing accommodation in official police quarters – in determining whether notice provisions of PIE complied with court below elevating form above substance.

ORDER

On appeal from: KwaZulu-Natal High Court (Durban) (Sishi J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

NAVSA JA (Cloete, Cachalia, Bosielo and Majiedt JJA concurring)

[1] The State is the owner of Aurora Flats (the complex) situated at 133 Graypark Road, Brighton Beach, Durban, KwaZulu-Natal. Flats in the complex are made available by the South African Police Service (SAPS) to its members who qualify for housing in accordance with the official housing policy and guidelines. The question in this appeal is whether the appellant, the Minister of Safety and Security (the Minister), lawfully terminated the respondent's occupancy of flat 19[1] (designated as married quarters) at the complex, rendering him liable to eviction. The respondent, Mr Devarajh Moodley (Moodley), is a member of SAPS who holds the rank of Inspector. The history of Moodley's occupancy, the applicable statutory regime and the events leading up to the present appeal are set out hereafter.

[2] During 1995 Moodley applied for and was granted permission for the first time to occupy flat 19 at the complex. The Police Act 7 of 1958 authorised the making of regulations dealing with, inter alia, the provision and occupation of official quarters by members of SAPS, whether such quarters are owned or rented by the State or placed at its disposal. On 14 February 1964 regulations were published dealing with the occupation of such quarters by members of SAPS.[2] The relevant sections are set out hereunder:

'78(1) A member shall be obliged and may, subject to directions issued by the Commissioner, be ordered to occupy quarters in possession of, or hired by, or otherwise placed at the disposal of the State, irrespective of whether such quarters is a fixed or movable

1 Flat 19 was formerly flat 36. A renumbering exercise caused the change.
2 Regulations for the South African Police GN R 203, GG 299, 14 February 1964.

structure or a tent, and if the exigencies of the Force so require, a member may be ordered to remain in such quarters and be available at any or during a specified time; provided that the provisions of this sub-regulation shall not entitle a member to claim the allocation of such quarters; and provided further that, should the number of applications for the allocation of quarters exceed the number of available quarters, such quarters shall be allocated either in accordance with directions issued by the Commissioner or by the Commissioner in his discretion.

. . .

(4) The Commissioner may at any time give a member notice to vacate quarters allocated to him, and if given such notice, such member shall vacate the quarters on the date determined by the Commissioner; provided that if such a member resigns or is discharged or dismissed for any reason, the quarters shall be vacated not later than the date of his discharge referred to in sub-regulation (4) of regulation 15; and provided further that if such a member dies, the Commissioner may, in his discretion, grant permission to his household to remain in occupation of such quarters for a short, reasonable period.'

[3] Although the Police Act 7 of 1958 was repealed and substituted by the South African Police Service Act 68 of 1995 (the SAPS Act), the regulations were preserved by virtue of s 72(4)(a) of the latter Act. Policy directives for occupation of police quarters were issued by the National Commissioner of Police (the Commissioner) and amended from time to time.

[4] It appears that at the time Moodley first took occupation of flat 19, the stipulated occupation time cycle was three years. Moodley successfully reapplied on two further occasions after 1995 to have his occupation extended. One such application was made in October 2000 and approved in February 2001. The final paragraph of the letter notifying Moodley that his occupation had been extended until 30 June 2002 reads as follows:

'You are hereby requested to make the necessary arrangements before the expiry date.'

[5] Moodley, however, continued to remain in occupation of the flat at the complex for a further period of more than two years and paid his occupancy rate, without demur by the Minister. The problem culminating in this appeal arose in February 2005, after new policy guidelines were finalised. The policy was published on 11 March 2005. It is necessary to have regard to its material provisions. The preamble reads as follows:

'1. PREAMBLE

1.1 The South African Police Service (SAPS) is a large and growing organization, with limited housing facilities.

1.2 SAPS will endeavour to allocate these limited facilities to its employees *on a temporary basis* in the interest of the Service. In doing so, SAPS will take due consideration of the principles of accountability, transparency and equity.

1.3 The employees have the ultimate responsibility to provide housing either for themselves and/or their dependents.' (My emphasis.)

The purpose of the policy is defined as follows:

'2. PURPOSE

2.1 The purpose of this Housing Policy is to facilitate the provision of official housing to employees in order to enhance the delivery of services to communities in terms of SAPS' strategic objectives.

2.2 This policy regulates the equitable and effective allocation of official housing to all qualifying employees.

2.3 The policy defines the criteria and circumstances under which the official housing can be provided to employees of the SAPS.'

[6] Under the heading 'Guiding Principles' it is recorded that the allocation of housing, which is limited, will be based on certain fundamental principles. Amongst these are the promotion and enhancement of efficient, effective and responsive service delivery by SAPS. It is stated that housing will be allocated in a fair, unbiased and non-discriminatory basis. Clause 3.1.5 of the policy reads as follows:

'3.1.5 in allocating official housing, priority should, as far as possible be given to employees at lower levels.'

[7] Clause 9 of the policy sets out the criteria for allocation of housing. Importantly, consistent with the regulations referred to above, two years is the specified time for which housing is to be allocated. Understandably, a fundamental requirement is that an applicant must be an employee of SAPS. Allocation of housing is stated to be subject to availability and funding. The housing policy provides for the withdrawal of housing to employees whose services are terminated as a result of resignation, dismissal or retirement.

[8] Under the heading 'Transitional Measures' the following appears:

'13.1 The current occupants of official housing must apply to the relevant housing

committee referred to in Paragraph 6 for continued occupancy of such houses within 3 months of the date of implementation of this policy.

13.2 In the event an occupant who applied in terms of 13.1 above, does not qualify for official housing, he or she may continue occupying the official house for a period not exceeding twelve months from the date of implementation.

13.3 The committee shall consider such applications according to the principles and criteria contained in this policy.

13.4 The transitional measures will come into effect from the date of implementation of this policy and shall lapse after a period of twelve months.

13.5 This policy replaces all existing policies regarding the allocation of housing to employees in the Service.'

[9] During March or April 2005, after the new housing policy came into being, Moodley, together with other residents at the complex, attended a meeting convened by Superintendent De Villiers, the station Commander at Brighton Beach. The Superintendent informed those present that there was a new housing policy in place and that all occupants of the complex were required to make applications anew for housing, failing which they would be required to vacate the flats they occupied. According to Moodley, they were assured that the new applications would merely constitute a 'process'. This was the first Moodley had heard of the new housing policy. He requested a copy of the policy and was told that it would be supplied later. He only received a copy in 2007.

[10] As instructed, Moodley completed the official application forms and submitted it to the relevant committee. On 6 February 2006 he was advised that his application was unsuccessful and that he had to vacate his quarters at the complex by 7 May 2006. After being so informed, Moodley made representations to remain in occupation of the flat. He was granted an extension to remain in the flat until 31 December 2006.

[11] The letter dated 6 February 2006, informing Moodley that his application was unsuccessful and which purported to terminate his occupancy, reads as follows:

'SOUTH AFRICAN POLICE SERVICE: RE-APPLICATION FOR OFFICIAL MARRIED QUARTERS: RE-ALLOCATION 2005: DURBAN SOUTH AREA

1. Your application refers.

2. You are hereby informed that all the applications were presented before the National Housing Committee, by the Office of the Province Commissioner: Kwa-Zulu Natal, the consensus was reached that all the members who have resided in official married quarters for (5) years and more should be given (3) months notice to vacate the official married quarter.

3. Unfortunately your application was unsuccessful, therefore you are hereby given (3) months notice as from the 7th of February 2006 to the 7th of May 2006 to vacate the official married quarter that you are currently occupying.

4. The keys should be handed over to the Logistical Oficer at your station, and should you have any enquiries, you can contact Snr Supt Mkhize or Supt Ndlovu at the above contact details.'

[12] According to Moodley he subsequently made representations to remain in his quarters, which were construed by SAPS as representations for an extension of time within which to vacate. In his representations Moodley set out his personal particulars, including those that related to and impinged on his family.

[13] At this stage it is necessary to have regard to proceedings before the Rental Housing Tribunal and other litigation skirmishes between the parties. During 2006 and 2007 another occupant of official quarters engaged SAPS before the Rental Housing Tribunal. There is some dispute about the nature and timing of Moodley's complaints before the housing tribunal against SAPS in relation to his occupancy of quarters at the complex. For present purposes it is not necessary to deal with those disputes. In 2007 Moodley obtained an interim interdict in the Durban High Court against SAPS, prohibiting renovations at the complex pending the outcome of proceedings before the Rental Housing Tribunal. During March 2007 Moodley instituted further proceedings in the high court, seeking an order declaring the Provincial Commissioner to be in contempt of the earlier interim interdict. Before all this litigation was finalised the parties entered into a settlement agreement, the material part of which reads as follows:

'Upon completion of the renovations to Aurora Flats, the Applicant [Moodley] would be entitled to move back to Flat 36, Aurora Flats, being the flat occupied by him prior to commencement

of renovations, save that the agreement relating to the Applicant moving back to the said flat is without prejudice to any action for ejectment against the Applicant which may be contemplated.'

[14] Moodley and his family were accommodated at an alternate venue during the renovation period. SAPS subsequently adopted a position in terms of which it did not recognise that Moodley was entitled to return to the complex, as a result of which he instituted proceedings in the high court to be reinstated in occupation. In response the Minister instituted a counter-application seeking an order declaring that Moodley's occupation was lawfully terminated and claiming his eviction. Pending the finalisation of the counter-application, in terms of an agreement that was made an order of court, Moodley moved back into his quarters at the complex. The litigation in the court below proceeded on the basis that only the counter-application was to be adjudicated by the Durban High Court.

[15] In his opposition to the counter-application Moodley took a point *in limine*, namely, that the Minister had not complied with applicable provisions of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE). Furthermore, in his affidavit opposing the counter-application, Moodley, whilst acknowledging that the Commissioner of SAPS has a discretion to order a member of SAPS to vacate a flat at the complex, contended that this discretion must be exercised with due regard to the principles of natural justice and the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). He contended that he ought to have been given adequate prior notice of the nature and purpose of the administrative action in terms of which his occupancy was purportedly terminated.

[16] In his opposing affidavit Moodley emphasised that he had not been provided with an opportunity to make representations in relation to the administrative action that led to the termination of his occupancy. Moodley

submitted that his representations to remain in occupancy were misconstrued as representations for an extension of time within which to vacate the quarters. Moodley was aggrieved that the new housing policy had been rigidly applied without due regard to his circumstances as set out in the representations made by him. He complained that insofar as he had made representations to remain in occupation, after the new policy had been presented as a *fait accompli,* he was not informed about the outcome of his representations. It is clear from the replying affidavit on behalf of the Minister that Moodley's representations were considered only in relation to the time within which Moodley was required to vacate his quarters at the complex, after his occupancy had purportedly been terminated, and not in relation to his continued occupation in light of the new policy.

[17] The housing committee charged with the administration of the housing policy decided to grant Moodley an extension of time to vacate until 31 December 2006. The SAPS Area Commissioner wrote a letter to a number of occupants of official quarters, including Moodley, informing them that the extension until 31 December 2006 was a 'last and final notice'. It is common cause that the extension was 'uniform for all affected members'. The complaints to the Rental Housing Tribunal and the litigation referred to above followed.

[18] The counter-application was heard and decided by the Durban High Court (Sishi J). It is that decision which is the subject of the present appeal. It is before us with the leave of the court below. It appears that in argument in the court below Moodley's erstwhile counsel was content to rely principally on the point *in limine* in relation to the alleged failure by SAPS to comply with the peremptory notice provisions of PIE. He also made submissions based on the provisions of the Extension of Security of Tenure Act 62 of 1997, which were

rightly rejected by the court below and not persisted in before us. Moodley's present counsel readily conceded that Moodley's principal reliance on PIE in the court below was misplaced. The correctness of this concession will soon become apparent.

[19] In considering the point *in limine*, Sishi J recorded that the Minister had adopted the position that PIE did not apply to Moodley's occupancy of the quarters at the complex. Sishi J had regard to the submission on behalf of the Minister that the occupation of police quarters fell into a special category, freeing it from the application of PIE. It had been contended on behalf of the Minister that the regulatory statutory framework applying to members of SAPS made it clear that the housing provided was inextricably linked to employment with SAPS and was of temporary duration. The learned judge rejected these submissions and concluded as follows:

'Section 2 of the *PIE* deals with the Application of the Act. It provides that this Act applies in respect of all land throughout the Republic. Land is defined as including a portion of land. Furthermore, "*building or structure, in terms of the Act, includes any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling, or shelter, even section 6 of the PIE, deals with eviction at the instance of an organ of state. Section 6(1) provides that an organ of state may institute proceedings for an eviction of an unlawful occupier from land which falls within its area of jurisdiction* . . ." '

[20] Without any consideration of the facts impacting on the legality of Moodley's continued occupation of the flat, the court below said the following:

'The Respondent in the counter-application fits perfectly within the definition of "unlawful occupier" in terms of the Act [and] the premises in question [falls] with[in] the definition of building or structure as defined in the Act.'

Sishi J held that PIE was applicable.

[21] The learned judge went on to consider whether the Minister had complied with the notice provisions of PIE, contained in s 4.[3] The learned

3 The relevant parts of s 4 read as follows:
'(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.

judge stated that the purpose of s 4 of PIE is clear, namely, to inform defendants or respondents of their rights and to enable them to contest their intended eviction.

[22] In the present case, after Moodley had raised the provisions of PIE as a defence, the Minister proceeded to serve the counter-application on the eThekwini Municipality and once more on Moodley's attorney, after it had applied separately to the high court for authorisation to do so.

[23] In considering whether the Minister had complied with the provisions of PIE, Sishi J had regard to a decision of the full court (Levinsohn J) in *Ubunye Co-operative Housing (Association incorporated under Section 21) v Joyce N Mbele & others* (54/05/01) [2005] ZAKZHC 13 (22 September 2005) where the following was said:

'Section 4(1) speaks of "proceedings . . . for the eviction of an unlawful occupier". It is at once clear from section 4(2) that what has to happen before the hearing of the proceedings is that "a notice of these proceedings" must be served on the unlawful occupier, and the Municipality. That must take place fourteen days before the hearing of those proceedings. Section 4(2) lays down that the notice of proceedings must state the matters which are set forth in sections 4(5)(a), (b), (c) and (d) respectively. These subsections provide that the respondent is told in the notice that proceedings for eviction are being sought, the date and time when the court will hear the proceedings, the grounds for the proposed eviction, that the Respondent is entitled to appear in court to defend the case and if necessary he or she has the right to apply for legal aid. These requirements are peremptory.'

[24] Sishi J went on to hold that it was clear that the Minister had failed to comply with the peremptory provisions of PIE. He said the following in this regard:

'In the present case, the Court is faced with the position where there is no mention made in the counter-application of the fact that this is a *PIE* application. There is no mention made in the founding papers that this is a *PIE* application. Then a subsequent application is made on

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. . .
(5) The notice of proceedings contemplated in subsection (2) must—
(a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;
(b) indicate on what date and at what time the court will hear the proceedings;
(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.'

an ex-parte basis for authority to serve the notice in terms of *PIE*. The notice which was served was also grossly deficient. The first obvious point about this notice is that the Applicant did not allege that this is a *PIE* application to begin with. Mr Collingwood submitted that in such circumstances it is difficult to conceive how this can be a *PIE* notice when the Applicant is not proceeding in terms of *PIE*. The provisions of section 4(5) makes it clear that the certain requirements in terms of the Act must be complied with and that the notice of those proceedings must state that the proceedings are being instituted in terms of section 4(1) of the *PIE*. It has been pointed out earlier on in this judgment that the notice falls short in that regard.'

These are aspects which I will address briefly later in this judgment.

[25] The court below reasoned that since the Minister had disavowed the application of PIE it was difficult to see how the application that was brought for Moodley's eviction could be construed as being within the purview of that legislation. Consequently, the Minister's application for Moodley's eviction was dismissed with costs.

[26] The fundamental flaw in the approach of counsel and Sishi J in the proceedings in the court below was to disregard the primary question of the lawfulness of the termination of Moodley's occupancy. It was the anterior question that ought to have been asked and answered. I have serious reservations about whether PIE applies to the occupation of official police quarters, an aspect that is dealt with later in this judgment at paras 42 to 45. However, even assuming PIE to be applicable, counsel and the court below failed to consider that the very basis for an application for eviction in terms of PIE is unlawful occupation. It is a jurisdictional fact necessary for the act to apply. In *Ndlovu v Ngcobo, Bekker & another v Jika* 2003 (1) SA 113 (SCA)

this court said the following at para 1:

'The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (herein called "PIE") gives "unlawful occupiers" some procedural and substantive protection against eviction from land. The question that arises is whether "unlawful occupiers" are only those who unlawfully took possession of land (commonly referred to as squatters) or whether it includes persons who once had lawful possession but whose possession subsequently became unlawful. In the *Ndlovu* appeal the tenant's lease was terminated lawfully but he

refused to vacate the property. In the *Bekker* appeal a mortgage bond had been called up; the property was sold in execution and transferred to the appellants; and the erstwhile owner refused to vacate. In neither case did the applicants for eviction comply with the procedural requirements of PIE and the single issue on appeal is whether they were obliged to do so.'

[27] In *Ndlovu* this court held that PIE applied where a lease was terminated and when a mortgagor defaulted, and where either continued in occupation, notwithstanding a demand to vacate.

[28] It is therefore clear that before the protective provisions of PIE can be held to apply and long before the court goes over to considering whether an eviction in terms of s 4(8)[4] should follow, the unlawfulness of the continuing occupation has to be established.

[29] The heads of argument in this court on behalf of both parties were initially restricted to the question whether PIE applied to the circumstances of this case. At our request, through the office of the Registrar, counsel, upon short notice, addressed the question whether Moodley had a valid defence in terms of PAJA. We are grateful to counsel for their prompt response. I now turn to deal with the PAJA defence raised on behalf of Moodley in the court below.

[30] It was not contested before us that the purported termination of Moodley's occupation of the flat at the complex was 'administrative action' as defined in s 1 of PAJA.[5] The constitutional right to procedurally fair

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4 Section 4(1) provides that the provisions of s 4 apply to proceedings by an owner or person in charge of land for the eviction of 'an unlawful occupier'. The notice provisions provided for in subsecs 4(2) to 4(5) are required to be served on the 'unlawful occupier'. Section 4(8) provides:
'If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine—
(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph *(a)*.'

5 The relevant part of s 1 reads as follows:
'In this Act, unless the context indicates otherwise—
'administrative action' means any decision taken, or any failure to take a decision, by—
(a) an organ of state, when—
(i) exercising a power in terms of the Constitution or a provincial constitution; or

administrative action embraces the well-established common-law concept of 'natural justice'. Even during the days preceding our interim and present Constitution our law was that when a statute empowered a public official or body to give a decision prejudicially affecting an individual in his/her liberty or property or existing rights, the individual had a right to be heard before the decision was taken, or in limited instances thereafter. This found expression in the maxim *audi alteram partem*. In adjudicating whether administrative action was just, which is synonymous with the principle of administrative legality,[6] our courts have steadily moved from a formalistic and narrow approach to the rules of natural justice towards a broad and flexible duty to act fairly in all cases. This court played a significant role in the dynamic evolution of the law in this regard.[7]

[31] Professor Hoexter at p 327[8] puts it thus:

'Procedural fairness has, in fact, become one of the most interesting and vibrant areas of South African administrative law. This development has followed a similar trend in the United Kingdom, but in South Africa it has gained momentum particularly from the creation of constitutional rights to administrative justice and (more recently) the provisions of the PAJA.'

[32] Sections 3(1) and 3(2) of PAJA provide:

'(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) *(a)* A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)─

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.'

(ii) exercising a public power or performing a public function in terms of any legislation; or

. . .

which adversely affects the rights of any person and which has a direct, external legal effect. . .'

6 See Y Burns 'Administrative Law' 1 *Lawsa* (2 ed) para 74.

7 See *Administrator Transvaal & others v Traub & others* 1989 (4) SA 731 (A). See Hoexter *Administrative Law in South Africa* (2007) at p 327.

8 *Op cit* p 327.

[33] Section 3(4)(a) states that if it is reasonable and justifiable in the circumstances an administrator may depart from any of the requirements referred to in s 3(2). There was no substantive engagement by the Minister in his replying affidavit with Moodley's assertions about the failure by SAPS to comply with the provisions of PAJA. Nor was there an attempt made by the Minister at any stage to justify a departure from the requirements of s 3(2) of PAJA.

[34] In dealing with the minimum requirements of s 3(2), Hoexter rightly states that notice of impending administrative action to an affected party is essential in South African law. Turning to the adequacy of the required notice the learned author suggests that it implies sufficient information to enable a person to exercise his or her rights.[9] She states the following:

'As far as information about the proposed action is concerned, it seems clear that its nature and purpose must be described with sufficient particularity, or the right to make representations will be illusory rather than real.'[10]

[35] Moodley was not told that a prior five year occupation period would be viewed by the housing committee as an absolute disqualification. Thus, he was not afforded an opportunity to make any representations in relation thereto. The parties were also at cross-purposes in relation to the object of the representations made by Moodley: He thought he was making representations in relation to continued occupation whilst the committee apparently considered the representations in relation to an extension of time within which to vacate the premises.

[36] Usually the opportunity to make representations should be offered before any decision is taken. There is good reason for this. If an opportunity is only offered subsequently, the affected person would probably have to do much more to dislodge a decision already taken.[11] In the present case, no case was presented for not providing an opportunity before the decision was taken. In any event, the representations in relation to the administrative

9 In this regard she refers to Jonathan Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) paras 3.12 and 3.13.
10 Hoexter p 333.
11 See *Traub* at 750C-D.

decision in question went altogether unheeded.

[37] Furthermore, as stated above, the National Housing Committee adopted an inflexible attitude in relation to persons who had occupied official quarters at the complex for more than five years. The policy itself did not dictate such inflexibility. In respect of the period itself affected parties might have had something to say. The inflexibility of the Committee effectively precluded a proper consideration of Moodley's circumstances. The decision as a result of the Committee's absolute inflexibility is also arguably, on the face of it, irrational and can on that basis alone be impugned.[12] This does not mean that the lengthy period of Moodley's prior occupation is not a relevant factor to be taken into account in finally deciding whether his occupancy should be terminated. It obviously is.

[38] It was not submitted on behalf of the Minister, nor could it be, that SAPS was at large to terminate occupation of official quarters without following due process. Whilst on the face of it Moodley appears to have been afforded a considerable time in official quarters ─ more than a decade ─ he is entitled to be dealt with as required by law. It does not mean, and this was accepted by his counsel, that SAPS is unable to terminate his tenancy after following legal prescripts and in a manner that is administratively fair and just.

[39] There is no merit to the submission on behalf of counsel for the Minister that Moodley was precluded from relying on the provisions of PAJA because he had not earlier instituted an application to review the decision of the housing committee or any other entity falling under the authority of SAPS. The submission does not take into account that Moodley was a respondent opposing an application for eviction. There had been a number of other legal skirmishes and delays in finalising the dispute between the parties. On the common cause facts it was clearly established that his occupancy had not been lawfully terminated. I have difficulty in understanding what more he

12 See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (338/10) [2011] ZASCA 47 (30 March 2011)* and *Pharmaceutical Manufacturers Association of SA & another: In Re Ex Parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) para 85.

could have done or indeed why he should do anything further.

[40] In light of the common cause facts in the present case, the question of onus does not arise. Neither a statutory body nor a private landlord nor an owner could succeed in litigation in which it sought to evict a person unless that individual's occupation was unlawful. Once it is established that the termination of Moodley's occupancy was unlawful that is the end of the matter. One need not determine finally whether PIE applies to situations where police personnel continue in occupation of official quarters after a valid termination by SAPS.

[41] To sum up: in the present case SAPS did not follow the most fundamental requirements for a fair procedure before or after taking a decision to terminate Moodley's tenancy. It adopted an inflexible attitude and effectively precluded a proper consideration of Moodley's circumstances and all other relevant factors before taking a decision to terminate his occupancy of the flat. The purported termination of Moodley's occupation was thus unlawful and the Minister's application for eviction could not succeed.

[42] Notwithstanding the conclusions in the preceding paragraphs, I nevertheless deem it desirable to deal briefly with the nature of occupancy of police quarters and the applicable statutory regime. I also intend to comment briefly on part of the reasoning of the court below in relation to the application of the notice provisions of PIE. This is necessary because counsel for both parties informed us that the decision of the court below might lead to uncertainty and confusion about the application of s 4 of PIE.

[43] First, the nature of occupancy of police quarters and the application thereto of PIE. Moodley's counsel was constrained to concede that the regulations bearing on official police quarters and the concomitant policy were in themselves eminently reasonable. Occupational transition from more experienced and higher ranking and higher earning police personnel ─ in a filter-down rotational movement ─ towards lower ranking police who earned lower salaries and who might be struggling financially and might themselves

be in dire need of housing, seems sensible and practical. Police quarters and army barracks can by their very nature not be allocated in perpetuity. Operational and strategic exigencies militate against that notion.

[44] Since *Ndlovu* this court has seen fit progressively to limit the application of PIE, a statute that was initially interpreted as being of application to all housing, without exception. In subsequent judgments this court was at pains to point out that PIE was intended to protect unlawful occupiers who were poor and vulnerable and observed that persons who were not intended to be beneficiaries were seeking to bring themselves within its ambit.[13] For present purposes an extensive examination of those decisions is not necessary. It suffices to state that it is now established that there are exceptions to the application of PIE.

[45] For the reasons stated in the preceding paragraphs and because there is a separate statutory regime dealing with housing for members of SAPS, which is an essential part of the country's security component, I have grave doubts whether PIE applies to the provision of official quarters by SAPS. As stated earlier it is not necessary to decide that question finally.

[46] I now turn to deal with the reasoning of the court below in relation to the notice provisions of s 4 of PIE. It is undoubtedly so that the application by the Minister was for Moodley's eviction from the complex. No-one could have been under any illusion of its purpose. Moodley was at all material times legally represented. He was aware of the provisions of PIE and this was emphatically demonstrated by the point he took *in limine*, referred to above. The relevant municipality was served with the notice of motion and its annexures. The object of PIE was clearly achieved.

[47] In *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 22 this court said the following:

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13 *Webtrade INV No 45 (Pty) Ltd and Other v Andries Van Der Schyff en Seun (Pty) Ltd t/a Complete Construction* (589/06) [2007] ZASCA 104 (17 September 2007) para 18 and *Barnett & others v Minister of Land Affairs* 2007 (6) SA 313 (SCA). See also *Wormald NO & others v Kambule* 2006 (3) SA 562 (SCA) para 20.

'[I]t is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision has been achieved (see eg *Nkisimane and Others v Santam Insuarnce Co Ltd* 1978 (2) SA 430 (A) at 433H-434B; *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) in para 13).'

See also *Moela v Shoniwe* 2005 (4) SA 357 (SCA) para 8 and more recently *Norgold Investments (Pty) Ltd v The Minister of Minerals and Energy of the Republic of South Africa & others* (278/10) [2011] ZASCA 49 (30 March 2011) paras 43 and 44.

[48] To hold as the court below did that PIE had not been complied with because the statutory notice had been given by the Minister only after the point *in limine* had been raised and because the notice of motion had made no reference to provisions of PIE, is to elevate form above substance.

[49] In addition, the court below erred in holding it against the Minister that he had contended that PIE did not apply whilst at the same time seeking to persuade the court that he had complied with the notice provisions of s 4. A litigant is within his rights to challenge the applicability of PIE whilst at the same time, out of caution, complying with its notice provisions. There is nothing inconsistent or objectionable in a litigant advancing a point of law and in the alternative, relying on a fact.

[50] Even though the reasons underpinning the Minister's failure in the court below are fallacious, for all the reasons stated above, the appeal must fail. The order made by the court below remains unaltered. Counsel for the parties reached agreement on the procedure to be followed in a proper consideration of Moodley's continued occupancy, in the event that the appeal was unsuccessful, and were content for us to record the arrangement in this judgment. That agreement was:

'1. The respondent is to make representations with regard to the correctness or otherwise of the decision taken on 6 February 2006 that because the respondent had already been in occupation for five years he could not qualify for the allocation of housing.

2. The said representations are to be made within 30 days of the date of the order.

3. The Provincial Commissioner is to consider the said representations and make a decision thereon within 30 days and is to give written reasons for the decision within 30 days thereafter.
4. The respondent is thereafter entitled to pursue any internal remedy or take any steps under PAJA that he may be entitled to.'

[51] For the reasons set out above, the appeal is dismissed with costs.

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M S NAVSA
JUDGE OF APPEAL

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