Five Shaky Pillars – A Criticism of the Reasoning on Which the *Stay at South Point Properties v Mqulwana (SCA)* Decision Rests

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Abstract

In July 2023 in the case of *Stay at South Point Properties (Pty) Ltd v Mqulwana* the Supreme Court of Appeal (the SCA) found that student accommodation does not constitute a "home" in terms of section 26(3) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*). Section 26(3) of the *Constitution* provides that "[n]o one may be evicted from their home … without an order of court made after considering all the relevant circumstances." The students' "residence" was not their "home". This meant that they could not rely on the protection provided by section 26(3) of the *Constitution* or the legislation giving effect to this right, the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (hereafter *PIE*). This note identifies five shaky pillars that the decision rests on and argues that these pillars may be too weak to uphold the judgment. Importantly, the note does not aim to determine whether a residence should in fact be considered a home. Rather the note intends to highlight the problems with the reasoning of the court in coming to its conclusion.

Keywords

Eviction; home; student accommodation.

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1 Introduction

In July 2023 in the case of *Stay at South Point Properties (Pty) Ltd v Mqulwana*[1] the Supreme Court of Appeal (the SCA) found that student accommodation does not constitute a "home" in terms of section 26(3) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*).[2] Section 26(3) of the *Constitution* provides that "[n]o one may be evicted from their home … without an order of court made after considering all the relevant circumstances." The students' "residence" was not their "home". This meant that they could not rely on the protection provided by section 26(3) of the *Constitution* or the legislation giving effect to this right, the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (hereafter *PIE*).[3]

This note identifies five shaky pillars that the decision rests on and argues that these pillars may be too weak to uphold the judgment. Importantly, the note does not aim to determine whether a residence should in fact be considered a home. Rather the note intends to highlight the problems with the reasoning of the court in coming to its conclusion.

The note first discusses the facts and the decision of the case. Then it identifies and critically analyses the five shaky pillars of the case. Based on this discussion, the note subsequently explores four broader questions raised by the case. Finally, the note concludes.

2 Facts

The matter involved an eviction application of university students from student accommodation known as "New Market Junction".[4] The appellant is the owner of the residence and leased the building to Cape Peninsula

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1 *Stay at South Point Properties (Pty) Ltd v Mqulwana (UCT Intervening as Amicus Curiae)* (1335/2021) [2023] ZASCA 108 (3 July 2023) (hereafter *Stay at South Point*).

2 *Stay at South Point* para 17.

3 *Stay at South Point* para 18. Since the court had interpreted the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (*PIE*) to apply only to homes due to its giving effect to s 26(3) of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*). See *Ndlovu v Ngcobo, Bekker v Jika* 2002 4 All SA 384 (SCA) para 20.

4 *Stay at South Point* para 2.

University of Technology (CPUT) to be used for student accommodation.[5] The respondents were ninety-nine students who were allocated accommodation in the residence for the 2020 academic year.[6] Of the ninety-nine students, twenty-one were also allowed to reside in the accommodation for the 2021 academic year.[7] All of the respondents were required to vacate the residence by end of November 2020.[8] This included those with permission to reside there in 2021, since maintenance and decontamination were to be done during the university break.[9] That students must vacate their residences during term breaks is a normal procedure for most university residences.

All of the respondents, including those with permission to return, refused to vacate the building at the end of November 2020.[10] In response, on 12 January 2021 the appellant tried to use private security to forcibly remove the respondents.[11] When this failed the appellants approached the High Court for an eviction of the respondents in terms of the *rei vindicatio.*[12] The respondents opposed the eviction on the basis that they are protected under section 26(3) of the *Constitution* and any eviction application must therefore be done in terms of *PIE*.[13] The appellant argued that *PIE* did not apply, since the residence was not their home.[14] In addition, the respondents would not be homeless once evicted.[15] The High Court ruled in favour of the respondents and dismissed the eviction application. It is against this order that the appeal was made to the SCA.[16]

By the time the matter came before the SCA two years later, the case had become moot.[17] This is because the respondents had all vacated the building.[18] Nevertheless, the court decided that the matter should proceed due to the "wider and far-reaching implications of the eviction of students

5 *Stay at South Point* paras 2-3.
6 *Stay at South Point* para 3.
7 *Stay at South Point* para 3.
8 *Stay at South Point* para 3.
9 *Stay at South Point* para 3.
10 *Stay at South Point* para 3.
11 *Stay at South Point* para 3. No comment is made about this act, which is clearly unlawful. Whether or not *PIE* applied, the appellants could not take the law into their own hands to retrieve their possession.
12 *Stay at South Point* para 3. The *rei vindicatio* is a remedy for the owner to regain possession of his/her property. It has three requirements: (1) The person instituting the action must prove his/her ownership of the property. (2) The property must exist and be identifiable. (3) The defendant must have physical control of the property. See Van der Walt and Pienaar *Introduction to the Law of Property* 164.
13 *Stay at South Point* para 4.
14 *Stay at South Point* para 4.
15 *Stay at South Point* para 4.
16 *Stay at South Point* para 1.
17 *Stay at South Point* para 5.
18 *Stay at South Point* para 5.

from student accommodation" and the fact that "the rights and duties of students provided with accommodation by CPUT is an issue of recurring controversy".[19]

3 Finding of the SCA

The substantive part of the SCA judgment is only four pages long. It starts with an explanation that *PIE* and the protections against eviction it provides are applicable only to evictions from "homes". This is due to the fact that *PIE* was enacted to give effect to section 26(3) of the *Constitution*, a right that is explicitly limited to the protection of the home-interest.[20] The court then continued to ask: "What then is a home?"[21] However, instead of thoroughly exploring this question, it simply stated:[22]

> This Court in *Barnett* held that the sensible and ordinary meaning of home is a place with 'regular occupation coupled with some degree of permanence'.

The SCA then gave three main reasons for finding that student accommodation cannot be a home.[23] First, students residing in residences have homes that they came from and can return to.[24] The court found that "unless otherwise demonstrated" the student accommodation did not "replace or displace" their homes of origin and the students "have homes other than the residence".[25] The court concluded from this that:

> There is then no basis to seek the protection of PIE. Eviction does not render the students homeless.[26]

Secondly, the court found that the nature and purpose of student accommodation is "temporary" and "transitory" and that students are aware of this.[27] Thirdly, the court highlighted the importance of student accommodation to the right to education and found that:[28]

> Equity requires that those who have had the benefit of accommodation should yield to those who have not.

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19 *Stay at South Point* para 5. A court would generally hear a moot matter only if a decision would be in the public interest. See Loots "Standing, Ripeness and Mootness" 7-20 – 7-22.

20 *Stay at South Point* paras 6-9. For the finding that *PIE* applies only to evictions from homes, see *Ndlovu v Ngcobo, Bekker v Jika* 2002 4 All SA 384 (SCA) para 20.

21 *Stay at South Point* para 10.

22 *Stay at South Point* para 10, quoting from *Barnett v Minister of Land Affairs* 2007 6 SA 313 (SCA) (hereafter *Barnett*) para 38. This case involved an eviction matter in which the evictees argued that *PIE* should apply to their holiday houses, since these constituted second homes.

23 *Stay at South Point* para 12.

24 *Stay at South Point* para 12.

25 *Stay at South Point* para 12.

26 *Stay at South Point* para 12.

27 *Stay at South Point* para 13.

28 *Stay at South Point* paras 14-16.

This last factor could not have any application on the twenty-one students who had permission to reoccupy the following year.

For these reasons the court found that the residence was not the respondents' home.[29] It summarised: "It is a residence, of limited duration, for a specific purpose, that is time-bound by the academic year, and that is, for important reasons, subject to rotation."[30] It then made a declaratory order that *PIE* did not apply and that the appellants were entitled to an eviction of the respondents in terms of the *rei vindicatio.*[31]

4 Evaluation of the court's reasoning: five shaky pillars

Several issues emerge from the reasoning that this decision is based on. First, there is the blanket factual assumption that students in student accommodation all have primary residences elsewhere and will not be homeless if evicted. Second is the fact that the court and the appellant seem to believe *PIE* is applicable only to evictions that will cause homelessness. Third is the notion that the residence is not their home because they have homes of origin. Fourth is the notion that the residence is not their home because of the nature and purpose of the accommodation. Fifth is the notion that the residence is not their home due to equity considerations.

This section critically analyses these five shaky pillars of the decision. In doing so it aims to point out the cracks in the pillars that have the potential of causing the judgment to collapse.

4.1 Blanket factual assumption of alternative accommodation

The first pillar, identified above, is that the court assumed that all students have accommodation elsewhere and will therefore not be homeless if evicted. Such an assumption might make sense theoretically, especially when one considers the fact that the court is making the point in conjunction with the point that the purpose of the accommodation is not for the residence to be a permanent home. However, this assumption is not in line with the reality faced by many South African students and contradicts the students' submission in the High Court that an eviction would leave them homeless.[32] One can think of many instances where students would be unable to return to their homes of origin. This includes where their parents have moved into retirement homes, where the students came from children's homes or foster care, where their family have become homeless due, for example, to eviction or where they might feel unsafe returning to their parental home.

29 *Stay at South Point* para 17.
30 *Stay at South Point* para 17.
31 *Stay at South Point* paras 18-20.
32 Snyman 2022 https://www.derebus.org.za/cput-students-gets-a-piece-of-the-pie/.

Moreover, their parents might not want them to move back.[33] Hence, this blanket assumption is faulty.

Perhaps it is more worrying that the court made a blanket assumption regarding the housing situation of ninety-nine students. This contradicts its earlier jurisprudence in *City of Johannesburg v Changing Tides 74 (Pty) Ltd*[34] in which it stressed the importance of considering the actual individual circumstances of unlawful occupiers and not making blanket assumptions regarding whether they faced homelessness once evicted.[35]

Unlike in *Stay at South Point*, the North Gauteng High Court in *Tshwane University Technology v All Members of the Central Student Representative Council of the Applicant*[36] found that some students would face homelessness if evicted from student accommodation.[37] This case also involved an application for the eviction of students from student residences. As with *Stay at South Point*, the court had to decide whether *PIE* should apply. The court did not make blanket assumptions but found that many students did not have alternative accommodation because they were "unable to afford to return home".[38]

4.2 Applicability of PIE to evictions that will not lead to homelessness

The second shaky pillar in *Stay at South Point* is the court's statement that:[39]

> There is then no basis to seek the protection of PIE. Eviction does not render the students homeless.

This suggests that the respondents should *seek* the protection of *PIE*. However, that is not how *PIE* operates. *PIE* is an eviction mechanism. It provides the procedure for evicting unlawful occupiers from their homes.[40] The person applying for the eviction cannot decide not to follow *PIE*

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33 In such situations the court would have to determine whether people can be considered to have alternative accommodation with their families where their families are not prepared to take them in. This is explored elsewhere and it is concluded that this might be the case in some instances. See Fick 2015 *Stell LR* 678-690.

34 *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA).

35 See *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA) para 10.

36 *Tshwane University Technology v All Members of the Central Student Representative Council of the Applicant* (67856/14) [2016] ZAGPPHC 881 (22 September 2016).

37 *Tshwane University Technology v All Members of the Central Student Representative Council of the Applicant* (67856/14) [2016] ZAGPPHC 881 (22 September 2016) para 2.

38 *Tshwane University Technology v All Members of the Central Student Representative Council of the Applicant* (67856/14) [2016] ZAGPPHC 881 (22 September 2016) para 2.

39 *Stay at South Point* para 12.

40 See the long title of *PIE*.

because the person is of the opinion that the occupiers will not be left homeless. This is up to the court. Similarly, the occupiers would not need to raise *PIE* as a defence. When applicants are allowed to choose which protections respondents are entitled to, they will always opt for the least protection.

Moreover, the court seems to suggest that *PIE* applies only if the eviction would cause homelessness. This has similarly been alluded to by some academics.[41] The basis for this suggestion is *Lester v Ndlambe Municipality.*[42] In this matter the court found that:[43]

> The protection afforded in s 26(3) must therefore always, without exception, be read against the backdrop of the right to have access to adequate housing, enshrined in s 26(1). Thus where a person, facing a demolition order, does not adduce any evidence that he or she would not, in the event of his or her dwelling being demolished by order of a court, be able to afford alternative housing, s 26(1) is of no avail to him or her.

However, it must be kept in mind that *Lester* was not an eviction matter. It was an application for an order authorising the demolition of the appellant's home.[44] Had the appellant refused to vacate the property after the order was granted, the state would have had to obtain an eviction order in terms of *PIE.*

Moreover, the court in *Stay at South Point Properties*, while referring to *Lester*, seems to use the matter only as support for the finding that *PIE* applies only to homes and not to find that *PIE* applies only when there is a risk of homelessness:[45]

> Although the substantive provisions of PIE reference the occupation of land, it is plain that PIE gives effect to the constitutional protections against the peril of homelessness. *It follows that, if the occupation of land does not constitute the home of an occupier, PIE does not find application*. Further support for this proposition is found in *Lester v Ndlambe Municipality and Another*. There, this Court stated that s 26(3) needs to be read against the backdrop of s 26(1), that is, the right of access to adequate housing. It has been found that where one cannot demonstrate that one would be without alternative accommodation, and thus be rendered homeless, the protection of s 26(3) does not find application.

Still, this last statement seems to confuse the matter. That *PIE* applies only in matters where evictions cause homelessness cannot be correct. As

41 Cramer and Mostert 2015 *Stell LR* 591; Viljoen 2020 *Stell LR* 203.

42 *Lester v Ndlambe Municipality* (514/12) [2013] ZASCA 95 (22 August 2013) (hereafter *Lester*).

43 *Lester* para 17.

44 The demolition order did not include an order to vacate the building and neither does s 21 of the *National Building Regulations and Building Standards Act* 103 of 1977 authorising the order. See the high court order, *Ndlambe Municipality v Lester* (92/2011) [2012] ZAECGHC 33 (3 May 2012) para 122.

45 *Stay at South Point* para 9, emphasis added.

stated above, while *PIE* gives effect to section 26(1) and (3) of the *Constitution*, it also simply provides the procedure for evictions from homes. This is clear from the act's long title. It is the only mechanism available for private persons to evict unlawful occupiers living on their urban properties.[46] The availability of alternative accommodation is not a threshold for the applicability of *PIE* but a consideration that the court must take into account when applying *PIE*. This is clear from the fact that it is a factor listed in *PIE* for courts to take into account when determining whether or not to grant an eviction order.[47] Such a factor would have been redundant had *PIE* applied only in matters where alternative accommodation was not available.[48] Moreover, several cases at the Constitutional Court level have involved discussions about whether homelessness is involved only at the stage of whether an eviction order would be just and equitable. By this time, *PIE* was already deemed to apply.[49] Should *PIE* be applicable only if an occupier faces homelessness, this would create a strange situation in large-scale evictions where the owner needs to use one mechanism to evict those facing homelessness and another to evict those that do not.

Moreover, the court is enjoined to consider all relevant circumstances before granting an eviction. This suggests that homelessness is not the only factor that may bar an eviction. An eviction (or an immediate eviction) might not be just and equitable, despite the availability of alternative accommodation. Factors such as the location of the alternative accommodation may also play a role. This was confirmed by the court in *Grobler v Msimanga*,[50] when it said:[51]

> It will also not be just and equitable that families, and especially school children, are uprooted and removed to a different area which would cause huge disruption to schools and persons travelling to and from their employment.

In fact, *PIE* emphasises the importance of considering *all* relevant circumstances, including "the rights and needs of the elderly, children,

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46 Section 4(1) of *PIE* reads: "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." More specific acts apply in some cases, primarily with regard to agricultural land, including *Land Reform (Labour Tenants) Act* 3 of 1996 and *Extension of Security of Tenure Act* 62 of 1997.

47 Section 6(3)(c) of *PIE*.

48 Which would be against the presumption against tautology.

49 See for example, *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 59; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 46; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) paras 16, 39, 40; *Occupiers of Erven 87 and 88 Berea v De Wet* 2017 5 SA 346 (CC) para 61.

50 *Grobler v Msimanga* 2008 3 All SA 549 (W).

51 *Grobler v Msimanga* 2008 3 All SA 549 (W) para 241.

disabled persons and households headed by women".[52] For this reason, *PIE* should apply to all evictions from homes, and homelessness should be only one of the factors considered in determining whether the eviction would be just and equitable.

This is in line with *Barnett*, where the SCA supported the notion that a person can have more than one home, thereby insinuating that *PIE* would apply to an eviction even where there is no risk of homelessness.[53] Commenting on this case, Van der Walt[54] argues that *PIE* should also apply to evictions of occupiers for whom one feels "little sympathy" (such as those who have second homes), as this "better suits the spirit of the post-apartheid eviction law under s 26(3)", which requires *all* evictions from homes to be decided by a court, which is enjoined to consider all relevant circumstances.

4.3 Applicability of PIE to second homes

The third shaky pillar to consider is the fact that the court seems to find that *PIE* cannot be applicable because the respondents have homes elsewhere. However, the same court had previously found that having a home elsewhere does not prevent a finding that the place someone is being evicted from is his/her home. The SCA found in *Barnett* that:[55]

> I agree with the defendants' argument that one can conceivably have more than one home.

Hence, a finding that the respondents' homes of origins still constitute their homes does not negate a finding that the student residence is their home.

Moreover, applying *Barnett* to student accommodation, the court in *Tshwane University Technology v All Members of the Central Student Representative Council of the Applicant*[56] found that:

> There can be little doubt that a student residence is not like holiday cottages and satisfy the requirement of a 'home' as so defined. It is the place where they stay for the majority of the year; although they may not regard it from the point of view of their domicile as their permanent home, it is their home for the majority of the year.

In fact many university students leave their parental homes for university never to return, except for social visits. In such a situation their homes of origin might constitute alternative accommodation but cease to be their homes. This would have the effect that the student accommodation

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52 Sections 4(6) and 4(7) of *PIE*.

53 *Barnett* para 38.

54 Van der Walt 2007 *JQR* 2.3. One could also say the spirit of transformative constitutionalism.

55 *Barnett* para 38.

56 *Tshwane University Technology v All Members of the Central Student Representative Council of the Applicant* (67856/14) [2016] ZAGPPHC 881 (22 September 2016) para 65.

becomes their only home during their university years. The same applies to students who grew up in children's homes or foster care or do not feel safe to go back to their parental homes.

Moreover, the fact that someone has two homes does not mean that an eviction would not cause any hardship. A person's second home might be in another country or may be extremely inadequate, especially when it comes to tertiary studies. This would make it difficult for the person to return to and may affect some of the person's rights negatively.

4.4 Effect of the nature and purpose of the accommodation on whether a place is a home

The fourth shaky pillar of the decision is the assumption that the nature and purpose of a place is determinative of whether it can be someone's home. That this is not the case is clear from early eviction matters in which *PIE* applied to evictions from places that were not intended to be anyone's home. This includes *City of Cape Town v Rudolph*[57] in which the land that the people were being evicted from was a public children's playground. The court found:[58]

> There can be no doubt that the shelters erected by Respondents are their homes.

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*,[59] the court did not doubt that the "old and dilapidated commercial premises with office space, a factory building and garages"[60] that the people were occupying were their homes.

The problem is that some recent court jurisprudence seems to suggest just this – that the nature of the property can exclude it from being classified as a home. This is suggested by the findings of the High Court regarding Airbnb accommodation (short-term home rental). The court, in *Yussuf vs Ye Khan Investments CC*,[61] found that:[62]

> I am unpersuaded that a guest house qualifies for protection in terms of the Pie Act because occupants in a guest house are occupying the premises for a fixed period of time with the express consent of the owner or the person in charge of the premises. This is a commercial property, like a hotel, which provides for short term occupation of persons who are visitors and not to

57 *City of Cape Town v Rudolph* (8970/01) [2003] ZAWCHC 29 (7 July 2003).
58 *City of Cape Town v Rudolph* (8970/01) [2003] ZAWCHC 29 (7 July 2003) para 22.
59 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC)
60 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 1.
61 *Yussuf v Ye Khan Investments CC* (1355/2011) [2011] ZAWCHC 416 (1 November 2011) (hereafter *Yussuf*).
62 *Yussuf* para 5.

> persons who are long term occupiers of land or property because they have nowhere else to live.

In fact, the wording in *Stay at South Point Properties* is very close to the wording used in *Yussuf*:

> the provision of student accommodation is for a finite period of time and it has a limited and defined purpose, that is, to accommodate students for the duration of the academic year and thereby assist them to study at the university. The arrangement is by its nature temporary and for a purpose that is transitory.

The court in *Yussuf* seemed to rely heavily on *Shoprite Checkers (Pty) Ltd v Jardim*,[63] finding that:[64]

> Respondents have referred me to a decision in the matter of *Shoprite Checkers (Pty) Ltd v Jardim*, 2004 (1) SALR p.502 where the Court held that the provisions of the Pie Act are not applicable to ejectment of persons occupying non-residential properties.

However, this reliance is misplaced. The issue in *Shoprite Checkers* was completely different. It was not whether *PIE* applied where non-residential properties were being *used as homes*, but whether *PIE* applied to evictions from non-residential properties of *non-residential occupiers*. The court indicated that the property was not being used as a home and this point seemed to be significant to its findings:[65]

> Die ruimte wat die onderwerp vorm van die huurkontrak, word nie vir behuisingdoeleindes verhuur of benut nie.

Hence, in *Shoprite Checkers* the finding was that *PIE* applies only to homes, not that commercial property cannot be a home.[66] *Yussuf*'s misplaced finding should therefore not be used as precedent or support for the finding that the purpose of the property can bar it from being classified as a home.

It is not the nature of the property but the use thereof that should determine whether it is a home. Commenting on *Yussuf*, Van der Merwe and Pienaar[67] write:

> It is submitted that the name of or label attached to the particular premises should not be the distinguishing factor, but that the actual use to which the property is being put should be scrutinized instead.

They also point out that just a few weeks after *Yussuf* was decided by the High Court, the Supreme Court of Appeal, in *City of Tshwane Metropolitan*

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63 *Shoprite Checkers (Pty) Ltd v Jardim* 2004 1 SA 14 (O) (hereafter *Shoprite Checkers*) 502.
64 *Yussuf* para 3.
65 *Shoprite Checkers* para 13.
66 See *Shoprite Checkers* para 13.
67 Van der Merwe and Pienaar 2014 *ASSL* 947.

Municipality v Mamelodi Hostel Residents Association[68] found that *PIE* should have been used in an eviction from a hostel. This overturns the blanket finding in *Yussuf* that *PIE* would not apply to guesthouses or hostels. Van der Merwe and Pienaar[69] conclude:

> Excluding or including certain properties per se, on its usual definition, would not suffice.

In the same vein, Cramer and Mostert,[70] writing on determining whether a place is a home for eviction purposes, argue:

> In South Africa, with its broad socio-economic spectrum, a circumstantial understanding of the concept, rather than a hard-and-fast definition, is prudent. Standards as to what constitutes a home should vary depending on the circumstances.

That said, the nature and purpose of the property is not irrelevant to the determination of whether a place is a home. It might help to determine this question. Places that are ordinarily not occupied as homes may be less likely to be someone's home. Within that category a distinction can also be made between places that were never intended to accommodate persons (such as office buildings) and those specifically intended to be used as temporary accommodation. The nature of these places weighs on the side of them not being considered homes.[71] Furthermore, the fact that the occupiers consented to staying for only a short period may be a relevant circumstance to be considered weighing in favour of the landowner.[72] However, this should just be one factor in determining whether a place is a home and not an aspect that should bar the finding that a place is someone's home. The facts could still prove that such places were used as homes, despite their nature, such as the accommodation of office buildings by indigent persons.[73]

Another point to consider is that it is unlikely that the short-term, student-accommodation nature of a private rental apartment would exclude it from the protection of *PIE*. This further brings into question this line of reasoning of the court.

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68 *City of Tshwane Metropolitan Municipality v Mamelodi Hostel Residents Association (*025/2011) [2011] ZASCA 227 (30 November 2011).

69 Van der Merwe and Pienaar 2014 *ASSL* 948.

70 Cramer and Mostert 2015 *Stell LR* 595.

71 Like in *Stay at South Point* and *Yussuf.*

72 When considering the relevant circumstances and determining whether an eviction would be just and equitable, courts must balance the rights and interests of the unlawful occupiers and the owner. See for example *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 74; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 23, 37. Also see Chenwi 2015 *J L & Social Pol'y* 80; Boggenpoel and Mahomedy 2023 *PELJ* 7-8; Wilson 2009 *SALJ* 278.

73 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 1.

4.5 Effect of equity on whether a place is a home

The fifth shaky pillar of the case is the notion that equity can be used to determine whether a place is a home. The court discussed the student housing scarcity in higher education and found that:[74]

> Equity requires that those who have had the benefit of accommodation should yield to those who have not. And nothing about the position of the respondents suggests that this equitable principle should not continue to apply. It is also for this reason, as the amicus reminded us, that student accommodation forms part of the larger policy framework of higher education.

Equity plays an important role in eviction matters. However, the court relied on equity considerations at the incorrect stage of the inquiry. *PIE* provides that: a "court may grant an order for eviction if it is of the opinion that it is just and *equitable* to do so, after considering all the relevant circumstances."[75] Equity is the standard used to determine whether an eviction should be granted. Equity considerations cannot determine whether a place is a home. This is a factual determination.

The "equity" considerations that the court took into account had nothing to do with the factual question of whether a residence is a home. Instead, the court seemed to be of the opinion that equity considerations require that it not be considered a home. This type of reasoning muddles the two enquiries - whether the place is a home and whether an eviction would be just and equitable - and should be avoided. As is further discussed below,[76] considering equity considerations in interpreting the threshold requirement of "home" also unduly limits the protection offered by the right in section 26(3) of the *Constitution.*

Moreover, its statement that "nothing about the position of the respondents suggests that this equitable principle should not continue to apply" suggests that it was in fact balancing the interests of the parties, something that should occur when applying *PIE*.

5 Broader questions raised by the case

This section considers the broader questions raised by the *Stay at South Point* case. Four questions are considered. One, whether faulty reasoning by a court is problematic if the outcome is correct. Two, whether the court is suggesting that some types of properties should be excluded from the

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74 *Stay at South Point* para 16.

75 Sections 4(6) and (7) of *PIE.* Emphasis added. S 6(1) provides the same with slightly different wording. The measure of "just and equitable" gives effect to s 172(1)(b), which reads: "When deciding a constitutional matter within its power, a court…may make any order that is just and equitable."

76 See section 5.3.

protection of *PIE.* Three, whether the court's interpretation of "home" is too narrow. Four, whether courts should decide moot matters.

5.1 Is faulty reasoning problematic if the outcome is correct?

It was argued above that equity considerations should not play a role in determining whether a place is a person's "home" and, hence, whether *PIE* should apply. Instead, equity considerations should be taken into account in the application of *PIE* when a court is determining whether an eviction would be just and equitable. The equity considerations regarding the nature and purpose of student housing in higher education highlighted by the court suggest that an eviction would be just and equitable. This implies that despite its shaky legal reasoning the outcome of the decision would have been the same had the court found that the residence was the students' home and applied *PIE.*

One might wonder whether it matters that the court made mistakes in its judgment if it would have led to the same outcome – an eviction. It does matter. It matters because if this case is used as precedent in future cases the outcome might not be the same had *PIE* applied. In applying equity considerations to the threshold requirement, the court creates precedent for barring all student accommodation from the application of *PIE.* This is undesirable, as it prevents the courts from considering the relevant circumstances of each case individually, which would better suit "the spirit of the post-Apartheid eviction law".[77]

5.2 Is the court suggesting that some types of properties should be excluded from PIE?

A further question arising from the case is whether the court is suggesting that evictions from certain places would always be just and equitable and should therefore not have to go through the entire tedious *PIE* process. This is reminiscent of the application of the housing right in *European Convention on Human Rights,* where the idea is that the proportionality of evictions need not be determined on a case-by-case basis but rather that the legislature had already performed the balancing act and found that the eviction would be proportional.[78] The proportionality of an eviction is therefore assumed and need only be determined by a court if the person being evicted specifically raises it as a defence.[79] Respondents would have to show exceptional circumstances for the court to rule in their favour.[80] Is this the

77 Van der Walt 2007 *JQR* 2.3. Here Van der Walt is suggesting that the court in *Barnett* should rather allow the application of *PIE*, even where the place is not a primary home.

78 Fick and Vols 2016 *EJCL* 47-48.

79 Fick and Vols 2016 *EJCL* 47-48.

80 Fick and Vols 2016 *EJCL* 47-48.

direction that the courts are moving in – that evictions from certain properties would always be just and equitable? If this is the case, then the court must clearly state this instead of hiding inside the "home" requirement. Only then could one properly engage with such a development.[81]

Maybe the answer does not lie in barring the use of *PIE* for certain types of properties where the delay in eviction would cause great hardship and/or where the type of property suggests that it is unlikely that the property is a person's home. In such circumstances, perhaps the solution should rather be that section 5 of *PIE* applies to these properties. This section sets out the "urgent proceedings for eviction".[82]

I say section 5 "should" apply because it is unclear from section 5 if it would apply to all such urgent matters. Section 5(1) reads:

> Notwithstanding the provisions of section 4, the owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order, and the court may grant such an order if it is satisfied that—
>
> (a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land;
>
> (b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and
>
> (c) there is no other effective remedy available.

It is uncertain whether financial hardship or the hardship of new students requiring accommodation would qualify as "substantial injury or damage to any person or property". If not, it is suggested that this section be amended to include such.

5.3 Is the interpretation of "home" too narrow?

Section 26(3) of the *Constitution* provides that no one may be evicted from their "home" unless a court has ordered the eviction after considering all the relevant circumstances. That the place must be the person's home is therefore a threshold requirement for the protection of the right. The Constitutional Court, in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)*,[83] found that, when determining the scope of the protection of a right, the right should be interpreted widely. This is

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81 Transposing a European concept such as that into South African law might not be ideal, due to the inequality prevalent in South Africa.

82 Title of the section.

83 *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC).

because the limitation of the rights in the *Constitution* takes place at another stage, not at the threshold level.[84] This wide interpretation of rights is in line with the general approach of the Constitutional Court to rights interpretation.[85] The court, in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division),* did not consider moral values when it included abhorrent behaviour such as the creation and distribution of child pornography as protected under the right to freedom of expression.[86]

This is different from the court's interpretive approach in *Stay at South Point*. Instead of adopting a wide interpretation, the court excluded several categories of occupiers including persons who do not face homelessness, persons with second homes, persons occupying properties with a certain nature and purpose, and persons occupying properties who should not do so for equity reasons. Perhaps in *Stay at South Point* the court has interpreted the threshold requirement of "home" too narrowly, thereby unnecessarily limiting the protection of the right.[87]

The court's narrow interpretation seems to be out of step with the initial case law limiting *PIE* to eviction from homes. In *Ndlovu v Ngcobo, Bekker and Another v Jika*[88] the purpose of limiting the application of *PIE* to evictions from homes was to bar its application to commercially used property and not to create a more nuanced requirement. The concept of "home" was simply described as "buildings or structures that … perform the function of a form of dwelling or shelter for humans."[89] This interpretation of "home", without the added nuances, would have classified the student residence as the students' home.

Interestingly, even this interpretation has been criticised as "narrow" in that it excludes the occupation of rudimentary structures or the occupation of land without (permanent) structures from the protection of *PIE*.[90] It resulted

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84 *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC) para 48.

85 See *S v Zuma* 1995 2 SA 642 (CC) para 15; *S v Makwanyane* 1995 3 SA 391 (CC) para 9.

86 *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC) para 50.

87 Boggenpoel and Mahomedy have similarly argued that "one should be careful not to interpret the term 'home' too narrowly." Boggenpoel and Mahomedy 2023 *PELJ* 21.

88 *Ndlovu v Ngcobo, Bekker v Jika* 2002 4 All SA 384 (SCA).

89 *Ndlovu v Ngcobo, Bekker v Jika* 2002 4 All SA 384 (SCA) para 20.

90 Boggenpoel and Mahomedy 2023 *PELJ* 21-23. This excludes persons like the applicants in *Ngomane v City of Johannesburg Metropolitan Municipality* 2020 1 SA 52 (SCA), whose "pile of loose wooden pallets, cardboard boxes and plastic sheets" were confiscated. The applicants used these to create shelter for themselves each night and dismantled them every morning. The court found that "not even the most generous interpretation of the words 'building or structure' … can lead to the conclusion that the material confiscated falls within their meaning. There were simply no buildings or structures." This prevented an interpretation that the place where

in a call for a more nuanced approach in such cases, that advocates for seeing a home as "more than a physical structure that provides shelter from the elements."[91] This call should not be used to narrow the interpretation of "home" by excluding from protection "buildings or structures that … perform the function of a form of dwelling or shelter for humans". Rather, it is meant to widen the interpretation of the term to ensure more, not less, protection.

Such an approach would be in line with Van der Walt's[92] reasoning referred to above (commenting on *Barnett*):

> Would it not perhaps be better to accept that PIE also applies to the unlawful occupation of holiday homes or second homes that are occupied only intermittently, and then decide the matter on the equity of allowing the eviction in view of all the circumstances? I prefer the latter approach and I think it better suits the spirit of the post-apartheid eviction law under s 26(3), even (or perhaps particularly) when it applies to occupiers with whom one feels little sympathy, such as in this case.

5.4 Should courts decide moot matters?

A further question raised by *Stay at South Point* is whether courts should moot matters at all. *Stay at South Point* was a moot matter.[93] This is because all the respondents had vacated the building by the time the matter came before the SCA.[94] Nevertheless, the court decided that the matter should proceed due to the "wider and far-reaching implications of the eviction of students from student accommodation" and the fact that "the rights and duties of students provided with accommodation by CPUT is an issue of recurring controversy."[95] A court would generally hear a moot matter only if a decision would be in the public interest.[96]

Despite finding that the matter was of such importance that it should be heard regardless of its mootness, the court made a very brief analysis lacking in depth. This is both surprising and unfortunate. It is surprising that the court would hear a matter that it did not have to, if it was not going to commit to an in-depth analysis. It is also unfortunate, because it is very unlikely that a moot matter will be appealed against. Perhaps courts should decide moot matters only if they are willing to commit to providing a

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they slept could be considered their home for the protection of *PIE*. See paras 7, 16-17 of the case.

91 Boggenpoel and Mahomedy 2023 *PELJ* 22; interpreting Fox O'Mahony *Conceptualising Home* 4 with reference to *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 17. See also, Fox O'Mahoney 2013 *IJLBE* 161-163.

92 Van der Walt 2007 *JQR* 2.3.

93 *Stay at South Point* para 5.

94 *Stay at South Point* para 5.

95 *Stay at South Point* para 5.

96 See Loots "Standing, Ripeness and Mootness" 7-20 – 7-22.

comprehensive decision, taking full cognisance of the fact that an appeal is unlikely and precedent is being created.

6 Conclusion

This note set out to identify five cracks in the pillars upon which the *Stay at South Point* judgment rested. First, it criticised the blanket factual assumption that students in student accommodation all have primary residences elsewhere and will not be homeless if evicted. Second, it argued that the court's seeming understanding that *PIE* is applicable only to evictions that will cause homelessness is erroneous. Third, it criticised the notion that the residence is not the students' home because they have homes of origin. Fourth it found fault with the notion that the residence is not their home because of the nature and purpose of the accommodation. Fifth it argued that the equity considerations in determining whether the residence is a home were misplaced.

Apart from these points, the note discussed some broader questions raised by the case. Some recommendations arose from this discussion, that it should be accepted that it is insufficient for a case to have the correct outcome, when the outcome arises from flawed reasoning. Moreover, there is a clear need for expedience in the eviction process, especially if a delay would cause great hardship. Another issue highlighted was the idea that courts should avoid interpreting the term "home" too narrowly, thereby limiting the protection of the right. Finally, the idea was highlighted that courts should refrain from deciding moot matters if they are not prepared to commit to in-depth analyses.

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List of Abbreviations

ASSL	Annual Survey of South African Law
CPUT	Cape Peninsula University of Technology
EJCL	European Journal of Comparative Law and Governance
IJLBE	International Journal of Law and the Built Environment
J L & Social Pol'y	Journal of Law and Social Policy
JQR	Juta's Quarterly Review
PELJ	Potchefstroom Electronic Law Journal
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review