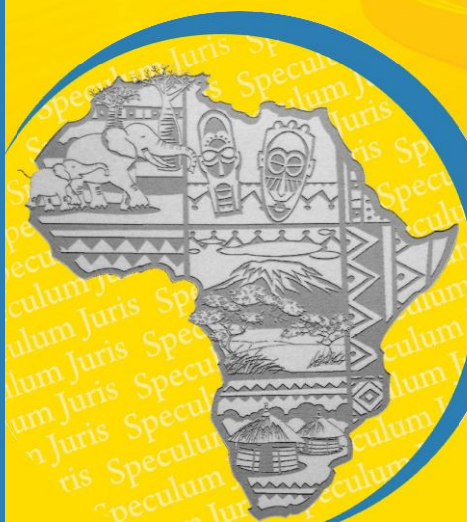




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Was a Limited Interpretation of “Home” by the Supreme Court of Appeal Justifiable? A Consideration of the Judgment in *Stay At South Point Properties (Pty) Ltd v Mqulwana*

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Abstract

There has been a recurring controversy over whether student accommodation could be described as “home”. Recently, the Supreme Court of Appeal, in Stay At South Point Properties (Pty) Ltd v Mqulwana (Mqulwana) held that student accommodation is not a home. This triggered the application of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. The purpose of this case note is to consider whether (1) the decision is correct and (2) a limited interpretation

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of home is justifiable, taking into account the right to further education. It is argued that the judgment is correct within the very narrow factual context in which it was decided and as such, a limited interpretation of home is justifiable to serve the right to further education.

Keywords: eviction; higher education institutions; home; PIE; student accommodation

1 INTRODUCTION**

The rights and duties of students provided with student accommodation by higher education institutions have been recurrently controversial.¹ At issue is whether student accommodation can be regarded as a “home” worthy of protection under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). Interestingly, the Supreme Court of Appeal (SCA) in *Mqulwana*¹ had to decide whether the provision of student accommodation by the Cape Peninsula University of Technology (CPUT) to its students constituted a home for the purposes of section 26(3) of the Constitution of the Republic of South Africa, 1996 (Constitution) to trigger the application of the PIE.² The court found that student accommodation is not a home and therefore the PIE is not applicable to the eviction of students from such accommodation. It then becomes important to consider whether (1) this decision is correct and (2) a limited interpretation of home is justifiable under the circumstances.

This case note consists of five parts: Part one introduces the case note before Part two contextualises the concept of home. This is followed by Part three to provide an overview of the facts, issue and decision of the court. Thereafter, Part four critically analyses the judgment before part six concludes the case note.

2 CONTEXTUALISATION OF A “HOME”

The Constitution provides that “no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances. No legislation may permit arbitrary evictions.”³ The Constitution does not define what constitutes a “home”. Currie and De Waal point out that for a place to be a home, there must be “an intention to occupy a dwelling for residential purposes permanently or for a considerable period of time.”⁴ Similarly, in *Makama v Administrator, Transvaal*,⁵ the court held that “though the concept ‘home’ is of wide and varied nature when applied to persons, it does connote a shelter against the elements providing some of the comforts of life with some degree of permanence.”⁶

1 *Stay At South Point Properties (Pty) Ltd v Mqulwana* (UCT intervening as *amicus curiae*) (1335/2021) [2023] ZASCA 108 (3 July 2023).

2 *Ibid* para 11.

3 Section 26(3) of the Constitution. Section 1 of the PIE defines “evict” to mean an act that deprives “a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and “eviction” has a corresponding meaning”.

4 Currie and De Waal *The Bill of Rights Handbook* 6ed (2013) 587. For academic literature that engaged with the meaning of home, see generally Fox *Conceptualising Home: Theories, Laws and Policies* (2007) 155, 157, 168 and 175; Du Plessis “Ways of Living in a Transformative Democracy” in De Ville (ed) *Memory and Meaning: Lourens du Plessis and the Haunting of Justice* (2015) 69–76; Cramer and Mostert “‘Home’ and Unlawful Occupation: The Horns of Local Government Dilemma” 2015 *Stell LR* 583–611; Robbertze and Muller “Conceptualising the Home in Law and Gender” 2020 *De Jure LJ* 332–352; Boggenpoel and Mahomed “Evictions During the COVID-19 Pandemic and Beyond [Discussion of *South African Human Rights Commission v City of Cape Town* 2021 2 SA 565 (WCC)] 2021 *Stell LR* 482–495; Muller and Viljoen *Housing in Property* (2021) 426–429. The authors show that when defining a home, the circumstances of each case should be considered. This is because what constitutes a home may be fundamentally different for different people and this nuance and complexity should not be explicitly ignored and intentionally disregarded.

5 *Makama v Administrator, Transvaal* 1992 2 SA 278 (T).

6 *Ibid* 285.

Accordingly, a home within the context of section 26(3) of the Constitution and the PIE is “the dwelling in which one habitually lives; the fixed residence of a family or household; and the seat of domestic life and interests.”⁷

However, the PIE, as legislation that was enacted to give effect to section 26(3) of the Constitution, only mentions home in its preamble and uses words such as “relocation” and “reside” in sections 4(7) and 4(9).⁸ It becomes important to consider whether such terminologies point towards what may be a home. Relocation involves the movement of occupiers from one piece of land to another.⁹ Reside generally means to live in a place permanently.¹⁰ However, permanence is not the core element of reside in this specific context, though it will always depend on the unique factual setting in each case.¹¹

Certain examples which the courts have regarded as a home exist, for example, rental housing (such as houses and apartments), housing units for farm workers and traditional dwellings (such as a hut or a mud house).¹² A shack or informal dwelling may also be regarded as a home.¹³ Shelters for overnight accommodation and lodgings would fall within the definition of a habitable dwelling or home.¹⁴ Cottages used for holiday purposes and visited occasionally over weekends and during vacations, though on a regular basis, by individuals who have their own habitual dwellings elsewhere, cannot be a home.¹⁵ Similarly, the occasional use of a studio within the property belonging to persons who have their regular and permanent place of residence somewhere else does not constitute a home.¹⁶ Property or buildings used for commercial purposes (such as shops, offices) can also not be regarded as a home.¹⁷

- 7 *Barnett v Minister of Land Affairs* 2007 6 SA 313 (SCA) para 38. See also Pienaar *Land Reform* (2014) 702.
- 8 *Ibid* para 37. Section 4(7) of the PIE provides that “[i]f an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, 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, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the *relocation* of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women” (own emphasis added). Section 4(9) of the PIE states that “[i]n determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have *resided* on the land in question” (own emphasis supplied).
- 9 See, for example, *Grobler v Phillips* 2023 1 SA 321 (CC), where the landowner moved the unlawful occupiers to a different piece of land that he owned.
- 10 *Barrie NO v Ferris* 1987 2 SA 709 (C) 714; *Kiepersol Poultry Farm (Pty) Ltd v Phasiya* 2010 3 SA 152 (SCA) paras 8–9; *Mkwanazi v Bivane Bosbou (Pty) Ltd; Msimango v De Villiers; Ngema v Van der Walt; Mdletshe v Nxumalo* (LCC4/97, LCC9/97, LCC9/97, LCC10/97) [1998] ZALCC 13 (23 October 1998) para 8; Pienaar (2014) 395.
- 11 In *National Union of Mineworkers v Murray & Roberts Cementations (Pty) Ltd* (LCC193/09) [2009] ZALCC 13 (9 November 2009) paras 11 and 15–18, the court acknowledged that “reside” does essentially mean a permanent home. However, that is not the case in every context. In this regard, the court found “reside” to include temporary residence of mineworkers in hostels.
- 12 Currie *et al. The Bill of Rights* (2013) 587; Viljoen *The Law of Landlord and Tenant* (2016) 91–92; Fox O’Mahony *Conceptualising Home: Theories, Laws and Policies* (2007) 25–27.
- 13 Currie *et al. The Bill of Rights* (2013) 587, citing *Despatch Municipality v Sunridge Estate and Development Corporation (Pty) Ltd* 1997 4 SA 596 (SE) 602; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 17.
- 14 Mohamed “Sectional Title Tenancy and the Effect of the PIE Act” (SSRN, 1 September 2011) <<https://ssrn.com/abstract=2544024>> (accessed 21-10-2023).
- 15 *Barnett* paras 38–40; *Beck v Scholz* [1953] 1 QB 570 (CA) 575–576.
- 16 *Blue Dot Properties 391 (Pty) Ltd v HG* (1926/2023) [2023] ZAWCHC 269 (1 November 2023) para 19.
- 17 Currie *et al. The Bill of Rights* 587; *Ross v South Peninsula Municipality* 2000 1 SA 589 (C) 596.

A traffic island forming part of a public road designed for the purpose of facilitating traffic cannot be a home.¹⁸

3 FACTUAL BACKGROUND, ISSUE AND DECISION IN *MQULWANA*

3.1 Facts

The appellant (Stay at South Point Properties (Pty) Ltd) was the owner and the manager of student accommodation for students enrolled at the CPUT.¹⁹ The appellant leased the premises to the CPUT for purposes of providing student accommodation.²⁰ The seventy-ninth to ninetieth respondents were granted permission to remain in the student accommodation for the 2021 academic year.²¹ However, they were required to vacate the student accommodation at the end of the 2020 academic year and stay in alternative accommodation, which the appellant had made available to them.²²

The alternative accommodation was provided to the respondents so that the appellant could carry out planned maintenance and decontamination in the student accommodation.²³ The respondents refused to vacate after the CPUT, in terms of its evacuation procedures, gave them notice to vacate the student accommodation within seventy-two hours of their last examination of the 2020 academic year.²⁴ The appellant approached the High Court on 15 January 2021 for an order to evict the respondents from the student accommodation. The appellant relied on the *rei vindicatio* to do so.²⁵ The High Court dismissed the appellant’s application to evict the respondents, which led to this appeal.²⁶

3.2 Issue

The issue on appeal was whether, given what the SCA in *Barnett v Minister of Land Affairs*²⁷ has held a home to be for the purposes of section 26(3) of the Constitution and the PIE, the provision of student accommodation by the CPUT to its students constituted a home, to trigger the application of the PIE.²⁸

The respondents contended that it was not appropriate for the appellant to rely on the *rei vindicatio* to evict them since the PIE applied to the proceedings. To the extent that the appellant failed to bring the eviction proceedings in terms of the PIE, the application was fatally defective.²⁹

18 *Ngomane v City of Johannesburg Metropolitan Municipality* 2020 1 SA 52 (SCA) para 9. For a critical discussion of this case, see Boggenpoel “Revisiting the Tswelopele Remedy: A Critical Analysis of *Ngomane v City of Johannesburg Metropolitan Municipality*” 2020 *SALJ* 424–438.

19 *Mqulwana* para 2. Section 1 of the PIE defines an “owner” as the “registered owner of land, including an organ of state”. The same section defines a “person in charge” as the “person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question.”

20 *Mqulwana* para 3.

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

25 *Ibid.* For the meaning of this remedy and what it entails, see generally Boggenpoel *Property Remedies* (2017) 41–85; Muller *et al. The Law of Property Silberberg and Schoeman’s* 6ed (2019) 269–273.

26 *Mqulwana* para 1.

27 *Barnett v Minister of Land Affairs* 2007 6 SA 313 (SCA).

28 *Mqulwana* para 11.

29 *Ibid* para 4.

The appellant contended that the student accommodation did not constitute the respondents' home, and if evicted, they would not be rendered homeless, because they had homes to go to at the end of their academic year.³⁰ As such, the PIE could not apply in the respondents' situation. Alternatively, the appellant contended that should the PIE be applicable, then the eviction order should nevertheless be granted in terms of section 5 of the PIE.³¹

The University of Cape Town (UCT) entered as *amicus curiae*. It submitted that the provision of student accommodation must be viewed within the context of the Higher Education Act 101 of 1997.³² In this regard, the UCT provides student accommodation both on and off campus to various students who were registered at the university.³³ Furthermore, the UCT submitted that student accommodation was primarily a support mechanism assisting the right to access to higher education, and higher education institutions like itself, regulated access to student accommodation in terms of its institutional rules.³⁴

3.3 Judgment

The SCA held that the PIE was promulgated to give effect to section 26(3) of the Constitution, which provides that "no one may be evicted from their home without an order of court made after considering all the relevant circumstances."³⁵ Although the substantive provisions of the PIE reference the occupation of land, the SCA found that it was evident that the PIE gave effect to the constitutional protections against the peril of homelessness.³⁶ According to the court, if the occupation of land did not constitute the home of an occupier, the PIE would not find application.³⁷

Regarding whether the provision of student accommodation by the CPUT to its students constituted a home, to trigger the PIE applicable, the court held that the nature of the student accommodation made available to the respondents indicated that the accommodation was not a home.³⁸ The court reasoned that student accommodation at a higher education institution was a residence of limited duration, for a specific purpose, and time-bound by the academic year.³⁹ The court found that the PIE was not applicable, and the appeal was accordingly upheld.⁴⁰

30 *Ibid.*

31 *Ibid.* Section 5 of the PIE provides for urgent evictions of an unlawful occupier pending the outcome of proceedings for a final order. The court may grant such an order if it is satisfied that "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."

32 *Mqulwana* para 14.

33 *Ibid.*

34 *Ibid Mqulwana* para 14.

35 *Ibid* para 6.

36 *Ibid* para 9.

37 *Ibid*, citing *Lester v Ndlambe Municipality* 2015 6 SA 283 (SCA) para 17.

38 *Ibid* para 17.

39 *Ibid.*

40 *Ibid* para 18. Boggenpoel "Limiting the Use of PIE in our Constitutional Democracy: One Step Forward, Two Steps Back?" 2024 *SAPL* 1–18, argues that limiting the use of the PIE and bringing back the *rei vindicatio* in the context of eviction from student accommodation, should be approached with caution because it could open the door for arbitrary evictions. However, this case dealt with a very narrow factual context that could not support reliance on the PIE.

4 THE CONSIDERATION OF THE *MQULWANA* JUDGMENT

4.1 Was the SCA Decision Correct?

In light of the above narrow factual context, the SCA in *Mqulwana* observed that a home under section 26(3) of the Constitution requires regular occupation and a degree of permanence.⁴¹ Student accommodation is therefore not a home as contemplated in section 26(3) of the Constitution and the PIE, because the required element of permanence is lacking, which is a material factor for a dwelling to be a home.⁴²

In that narrow factual context, the decision of the SCA may be justified/upheld by the following reasons. Student accommodation cannot be a home because it is allocated at the discretion of the higher education institutions.⁴³ In terms of their institutional rules, higher education institutions have the power to decide who should stay at student accommodation and for how long. Therefore, a contractual relationship ensued, under which the students were well aware of when it started and ended. Further, also in terms of their institutional rules, these institutions generally reserve the right to choose where to place a student or to withdraw the allocation of accommodation if the student no longer meets the minimum admission requirements.⁴⁴

Student accommodation is a key element of the academic year for which the student is registered, and as such, cannot be called home,⁴⁵ as the student is generally provided with accommodation upon registration for an academic programme for a specific period, at an academic institution.⁴⁶ Therefore, registration is a prerequisite for the provision of student accommodation.⁴⁷

Student accommodation is not a home because, it serves an academic purpose and not a residential one.⁴⁸ Thus, when students are requested to vacate the accommodation, they cannot equate student accommodation with rental housing by holding over the accommodation.⁴⁹ Likewise, students in private accommodation, despite signing lease agreements, cannot hold over the accommodation when requested to vacate because their leases are not for residential purposes.⁵⁰

The *Mqulwana* judgment is a reminder of a narrow context within which the constitutional right to a home may be understood under section 26(3) of the Constitution and the PIE. In that narrow factual context, *Mqulwana* provided a distinction between a home and student accommodation. This distinction paved the way for the CPUT to evict students who refuse to vacate student accommodation at the end of the academic year to serve the right to further education. The decision is crucial because it provides certainty (and much-needed clarity) that student accommodation is not a home under section 26(3) of the Constitution and the PIE.

41 *Mqulwana* para 10, citing *Barnett* para 38.

42 *Mqulwana* para 13; *Makama* 285; *Currie et al. The Bill of Rights* (2013) 587; *Robbertze and Muller* 2020 *De Jure LJ* 333 and 336.

43 *Mqulwana* paras 14–15.

44 *Ibid* para 14.

45 *Ibid Mqulwana* paras 13 and 17.

46 *Ibid* para 14.

47 *Ibid*.

48 *Ibid* para 13.

49 *Glover Kerr's Law of Sale and Lease* (2014) 480.

50 *Mqulwana* para 15; *Glover Kerr's Law* (2014) 480.

4 2 Was a Limited Interpretation of Home by the SCA in *Mqulwana* Justifiable?

Students have the right to access to adequate housing on the one hand⁵¹ and the right to further education, on the other.⁵² However, the rights to housing and further education are not absolute and in certain circumstances they can be limited.⁵³ Section 36 of the Constitution contains the limitation clause, which provides for the limitation of rights in certain instances.⁵⁴ Section 36 of the Constitution seeks to answer the question of whether the limitation is justifiable.⁵⁵ The SCA held that student accommodation is not a home. The court reasoned that the nature of student accommodation at a higher education institution indicated that it was a residence of limited duration, for a specific purpose, and time-bound by the academic year.⁵⁶ It becomes important to determine whether the limited interpretation of “home” by the SCA in *Mqulwana* was justifiable.

In practice, when there is a clash between rights, the most important limitation inquiry is the balancing and proportionality test. To determine whether the limited interpretation of home was justifiable in *Mqulwana*, the former students’ right to housing must be weighed against the importance of current and future students’ right to further education.⁵⁷ In light of the reasons mentioned in the previous section and the context in which student accommodation is provided by higher education institutions, the balancing exercise between the students’ right to housing and the students’ right to further education reveals that further education is the most important right under the circumstances.⁵⁸ As such, a limited interpretation of home was therefore justifiable in this narrow factual context of *Mqulwana*. This is because the student accommodation was provided to enable further education and not for the purpose of providing a home; again, the students were aware of this as they entered into a lease agreement with the appellant. This lease agreement permitted the appellant to choose to whom accommodation should be allocated and when to withdraw it in line with prioritising higher education.

5 CONCLUSION

The purpose of this case note was to consider whether the decision of the SCA in *Mqulwana* was correct and the limited interpretation of home adopted by the court was justifiable under the circumstances in which higher education institutions operate. An argument was made that the judgment is correct because of its narrow factual context, and reasons were identified that could uphold the SCA’s decision. First, the accommodation is granted at the discretion of the higher education institution guided by its internal rules.

51 Section 26 of the Constitution, which states that: “(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

52 Section 29(1)(b) of the Constitution, which provides that “[e]veryone has the right – to further education, which the state, through reasonable measures, must make progressively available and accessible.”

53 De Vos *et al.* *South African Constitutional Law in Context* 2 edn (2021) 430; Currie *et al.* *The Bill of Rights* (2013) 150.

54 *Ibid* 430.

55 *Ibid* 431.

56 *Mqulwana* para 17.

57 *S v Makwanyane* 1995 3 SA 391 (CC) 104; *Ex Parte Minister of Safety and Security: In Re S v Walters* 2002 4 SA 613 (CC) 26–27; Currie *et al.* *The Bill of Rights* (2013) 163–164.

58 *Mqulwana* paras 12 and 16.

Second, that accommodation is closely related to the academic term that the student has registered for and third, the accommodation is meant for academic and not residential purposes. It was further argued that a limited interpretation of “home” is justifiable because students occupy the accommodation as an accompanying right to further education. If students were to occupy such accommodation for as long as they wanted, this would have severe implications for current and future students’ access to further education. Based on the nature and purpose of student accommodation, it is recommended that it should not be classified as “home”. Whichever justification is relied on, assessing whether it is reasonable to consider student accommodation as a home must be guided by its nature and the purpose for which it is granted, while also taking into account the short supply of student accommodation.