

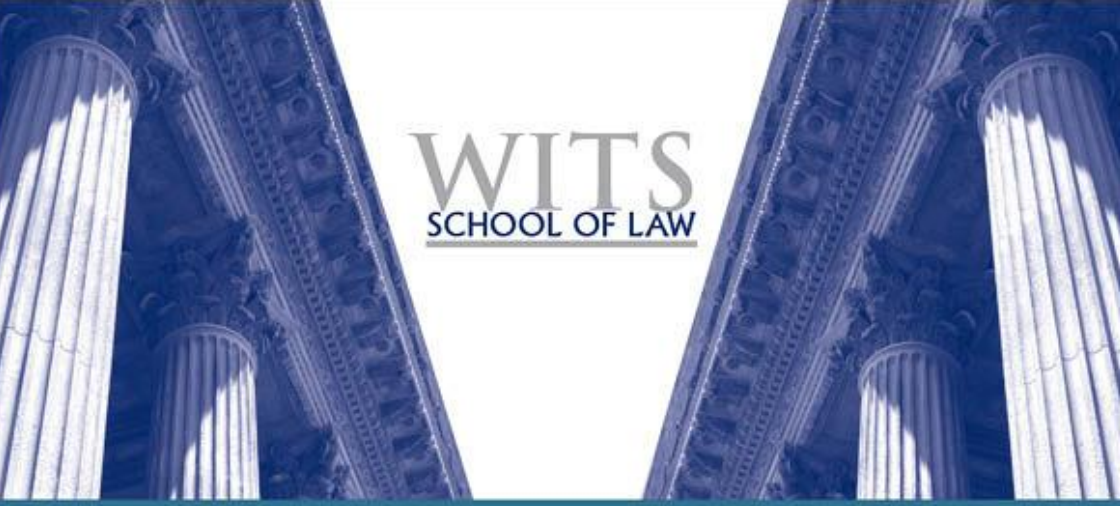
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Do blacks have a Right to Family Life? an examination of the concept "Ordinary Residence" in Section 10(1)(c) of the Blacks (Urban Areas) Consolidation Act 25 of 1945, as amended

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AN EXAMINATION OF THE CONCEPT "ORDINARY RESIDENCE" IN SECTION 10(1)(C) OF THE BLACKS (URBAN AREAS) CONSOLIDATION ACT 25 OF 1945, AS AMENDED

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MARION L DIXON

Freedom of movement for Blacks in South Africa is severely curtailed by legislation which provides the "circumstances under which a Black may enter, remain in and be repatriated from a prescribed area."[1] Prescribed areas, chiefly urban areas, become prescribed by declaration of the Minister of Co-operation and Development in the Government Gazette,[2] and once "prescribed" they become forbidden territory, except for the purposes of short visits, for Blacks who do not qualify to remain there.[3] One common effect of this restriction is that certain members of a family may be prevented by law from living with other members of the same family; in particular, that a wife may be prevented from living with her husband or a child with its parent. An incidental consequence of this legislation therefore is frequently to deprive Blacks of family life as well. Although in other contexts our courts have held that it is against

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public policy and contra bonos mores to break up a marriage or family[4], in the realm of influx control legislation this principle appears to have been overlooked and the legislation has been interpreted in a manner which has had the effect of denying many Blacks the right to live together as a family.

The Blacks (Urban Areas) Consolidation Act 25 of 1945, as amended, is the principal measure providing for influx control and section 10(1) is probably the most important single provision in the Act, establishing as it does the right of certain Blacks to remain for more than 72 hours in an urban or prescribed area. Interpretation of the section is crucial therefore in determining which Blacks may enter, live and work in any prescribed area.

Paragraph (c) of section 10(1) deals with the right (to remain in a prescribed area) of the wife or child of a Black qualifying in terms of paragraphs (a) or (b) of the subsection. Such wife's or child's right hinges to a great extent on the judicial interpretation given to the words "ordinary residence" contained in paragraph (c) of the subsection. In 1963 the Appellate Division handed down a judgment containing an interpretation of these words[5] which has since been unquestioningly adhered to by our courts and which has had particularly far-reaching implications for the family life of urban Blacks.

A fresh examination by our courts of the meaning of the term "ordinary residence" in the context of section 10(1)(c) would seem to be long overdue; for the 1963 interpretation, if it ever was correct (and this is doubtful), cannot stand up today in the light of subsequent developments. Section 10(1) reads as follows:

> "No Black shall remain for more than seventy-two hours in a prescribed area unless he produces proof in the manner prescribed that -
>
> (a) he has, since birth, resided continuously in such area; or
>
> (b) he has worked continuously in such area for one employer for a period of not less than ten years or has lawfully resided continuously in such area for a period of not less than fifteen years, and has thereafter continued to reside in such area and is not employed outside such area and has not during either period or thereafter been sentenced to a fine exceeding five hundred rand or to imprisonment for a period exceeding six months; or
>
> (c) such Black is the wife, the unmarried daughter or the son under the age of eighteen years of any Black mentioned in paragraph (a) or (b) of this subsection and after lawful entry into such prescribed area, ordinarily resides with that Black in such area; or
>
> (d) in the case of any other Black, permission so to remain has been granted by an officer appointed to manage a labour bureau in terms of the provisions of paragraph (a) of subsection 6 of section 22 of the Black Labour Act 1964 (Act No 67 of 1964), due regard being had to the availability of accommodation in a Black residential area:
>
> Provided that whenever any Black who is under this subsection qualified to remain within such area for a period in excess of seventy-two hours, becomes

> disqualified so to remain and cannot within that area or any other such area or outside such area but outside a scheduled Black area or released area as defined in the Development Trust and Land Act 1936 (Act No 18 of 1936), obtain employment and accommodation for himself, his wife and children, if any, the Minister shall, if satisfied that such Black cannot so obtain employment and such accommodation, provide that Black with a residential site within any such scheduled Black area or such released area[6]."

THE NATURE OF THE RIGHT UNDER SECTION 10(1)

The argument has been raised that the "right" under section 10(1) to be in a prescribed area is merely a right not to be proceeded against for remaining in the area for longer than 72 hours, and not a positive right to be in the prescribed area. This was the view expressed obiter by the court in the most recent decision on section 10(1)(c)[7]. In coming to that conclusion the court relied on R v Tshawe[8], a judgment which antedates the present, amended form of section 10(1). In my opinion this view is incorrect. Such an interpretation of section 10(1) might have been possible in 1956 when it was first handed down by the court in Tshawe's case[9] and when the first amendment of section 10[10] was still in operation, but the amended wording of the section[11] renders this interpretation altogether unsatisfactory. The last part of the existing subsection reads:

> "Provided that, whenever any Black who is under this subsection qualified to remain within such area for a period in excess of seventy-two hours, becomes disqualified so to remain...."

The words underlined state expressly that under section 10(1) certain Blacks become qualified to remain in a prescribed area for more than 72 hours. It is submitted therefore that a positive right to remain in a particular prescribed area for more than 72 hours is indeed created. This view would appear to be confirmed by the words of Muller JA in Mabasa v West Rand BAAB[12], where he says:

> "It seems to me that, in enacting section 10(1) of the Act, the legislature had in mind two broad classes of persons who would be entitled to remain in the prescribed area for more than 72 hours. In the first class would fall those persons who qualify on certain prescribed grounds such as birth and continuous residence in the area (para (a)), employment in the area for a lengthy period or residence in the area for a lengthy period (para (b)) and also the wife and unmarried children of a Bantu qualified under paras (a) or (b) who ordinarily reside with that Bantu in the area (para (c)). In the other, the second class, would fall Bantu who do not qualify under paras (a), (b) or (c) but who have obtained permission under para (d). Those in the first-mentioned class qualify by reason of the existence

of one or other factual situation, without the necessity of obtaining permission, and those in the second class qualify only if and when permission has been granted."

THE REQUIREMENTS OF SECTION 10(1)(C)

Section 10(1)(c), it will be seen, provides that the wife, unmarried daughter or son under 18 of a Black (who himself qualifies to be in a prescribed area under paragraph (a) or (b) of the subsection) may qualify to remain more than 72 hours in such prescribed area on fulfilling three requirements, namely:

1. he or she must be the wife[13], unmarried daughter or son under 18 of such Black; and
2. he or she must have entered the prescribed area lawfully; and
3. he or she must ordinarily reside with such Black in such prescribed area.

Our courts have repeatedly held[14] that the term "ordinarily resides" in this context must be construed as "lawfully ordinarily resides" with the result that where a woman resides with her husband in contravention of the local housing regulations (i.e. without permission in terms of a Site, Residential or Lodger's Permit) she has been held to be not ordinarily resident with her husband and therefore not qualified to remain in the prescribed area. Similarly, where an unmarried daughter or son under 18 resides with a

parent qualified under section 10(1)(a) or (b), but the child is not authorised so to reside by the local housing officer, the child will be held to be not ordinarily resident with such parent and will therefore not qualify to remain in the same prescribed area as the parent (unless of course the child qualifies in his or her own right under section 10(1)(a) or (b)).

Such an interpretation of the words "ordinarily resides" offends against the well-established rules of interpretation of statutes in several respects. In brief, the objections I would raise to the above construction are:

1. It inserts a word into the enactment that was not intended by the legislature.

2. It is inconsistent with the obviously intended meaning of the expression "ordinary residence" or "ordinarily resides" elsewhere in Act 25 of 1945.

3. It departs from the ordinary and literal meaning of the provision.

4. If this construction be accepted, then section 10(1)(c) has been rendered nugatory by the regulations promulgated in terms of section 38 of the Act in Government Notice 1036 dated 14 June 1968.

1. Insertion of a word

It is a legal truism that in interpreting a statute a court's overriding aim is to arrive at the intention of the legislature, and that the court will do so from a study of the enactment in question[15]. It is well established, too, that Iudicis est ius dicere sed non dare and, therefore, if the law as it stands appears unjust or unreasonable, "the proper course is for the legislature to remedy the evil by amending the statute, and not for the court to commit the greater evil by seeking to repeal the clear letter of the Act."[16] Thus where the law speaks in clear, unequivocal terms, the court cannot be concerned with the propriety of the legislation nor with the policy of the legislature.

A departure from a strictly literal interpretation of the wording of an enactment is, of course, justified where the actual words are ambiguous or produce a meaningless result. But only if the literal meaning of the words obviously defeats the legislative intent would a court be entitled to make such a departure[17]. Only in exceptional circumstances, where the legislative intent can be arrived at in no other way, may the clear language of an enactment be modified and words inserted, altered or deleted in interpretation - and then the court must be forced to the conclusion that the words are nonsense or opposed to the clear meaning of the section.[18]

The words of a statute, however, are not the sole source of the legislative intent, and the abovementioned rules of construction operate in all cases of doubtful significance against the background of certain presumptions - presumptions of reasonableness, justice and convenience.[19] Thus where a court is in doubt as to the meaning of a particular provision in an enactment, it will favour the interpretation that is most reasonable or most just or most convenient. It is important to emphasize that these presumptions come into play only in cases of doubt, however, and if the wording of an enactment is clear there is no place for the presumption.

This last principle is acknowledged by Botha JA in the crucial S v Mapheele judgment[20] where he relies on a presumption to the effect that "any reference in any law to any action or conduct is presumed, unless the contrary intention appears from the statute itself, to be a reference to a lawful or valid action or conduct." And it is on the basis of this presumption that the learned judge holds that "ordinary residence" in the context of section 10(1)(c) means "lawful ordinary residence."

There are two possible objections to the learned judge's reasoning applied in the above instance: the first objection relates to the question of the correctness of the presumption; the second objection is that the presumption ought not to have operated in this case, where there can be no doubt about the intention of the legislature, as read from other parts of the enactment in question.

In relation to the question of the correctness of the presumption, one needs to look at the authority advanced for its existence. Botha JA cites four cases in which the presumption was applied. The first of these, Union Government v Schierhout,[21] concerns the removal from office of a public servant, and Innes CJ, relying on no authority whatever, says merely "In my opinion the expression 'is removed from public service' means is rightly or duly removed, and cannot be taken to cover cases where the removal has been wrongful."[22] In the second case, Olivier v Botha,[23] De Villiers J (sitting alone) stated that "one of the recognized canons of construction of statutes is that any action or conduct referred to therein must be presumed, unless the contrary is expressly stated to be the case or unless by necessary implication from the statute as a whole the contrary appears to be the case, to refer to legal action or conduct."[24] De Villiers J referred to L C Steyn[25] where the learned author cites Christinaeus as the source of the rule.[26] In the third case relied on by Botha JA as authority for this presumption, Ndhlovu v Mathega,[27] the court (in a judgment delivered by Botha JA himself when he was Acting Judge of Appeal) merely made reference to counsel's argument based on the case of Olivier v Botha (supra) and held that the presumption could not operate in the instant case. At page 624 A-B the learned judge stated:

> "Dit is 'n fundamentele beginsel by wetsuitleg dat 'n Hof van die letterlike betekenis van duidelike en ondubbelsinnige woorde kan afwyk slegs indien 'n

> letterlike toepassing van die woorde aanleiding gee tot 'n gevolg wat onbestaanbaar is met die duidelike bedoeling van die wetgewer soos blyk uit die samehang van die betrokke wetsvoorskrif of sulke ander oorwegings as wat die Hof in aanmerking kan neem."

The fourth case, De Kock v Helderberg Ko-op Wijnmarkerij Bpk,[28] in relying on this presumption, cites as authority for the existence of the presumption Christinaeus[29] and Ndhlovu v Mathega (supra).

It will be seen from the above examination of the authorities that the presumption which Botha JA in Mapheele's case calls "a recognised canon of construction" had not, in 1963, a significant history behind it: it had apparently been applied only three times by our courts, and one of those applications of the so-called rule was later held to have been wrong.[30] It would seem therefore that, far from being a fundamental "recognised canon of construction", the guideline relied on by Botha JA in Mapheele's case is at most a weak presumption which, like all presumptions, "must give way where other considerations, such as those of language, context and circumstance, indicate a contrary intention on the part of the legislature."[31]

The second objection to the court's reliance in Mapheele's case on this presumption is that the presumption ought not to have been applied to the interpretation of the term "ordinary residence" in section 10(1)(c), seeing that it is clear from a

consideration of other parts of the enactment in question that the legislature intended only de facto residence, and not necessarily lawful residence, to give rise to the rights embodied in this section. Botha JA himself makes reference (at 655F) to "some indication of an intention on the part of the legislature not to restrict residence together for the purpose of section 10(1)(c) to lawful residence" in the fact that the legislature did not expressly restrict residence with another for the purpose of section 10(1)(c) to lawful residence, as it restricted continuous residence for the purpose of section 10(1)(b). But the learned judge held nevertheless that there were other considerations indicative of an intention to exclude, for the purposes of section 10(1)(c), residence which was "unlawful and terminable at any moment."

The "other considerations" which are held by the learned judge to indicate an intention to restrict ordinary residence to lawful ordinary residence are:

(a) the precariousness of such residence, with is terminable at any moment; and

(b) the fact that the uncontrolled entry into locations of wives and families of Blacks referred to in paragraphs (a) and (b) of section 10(1) could lead to serious problems of overcrowding and occupation of unsuitable accommodation, which therefore made it unthinkable that the legislature could have intended that the unauthorized residence of his wife and family with a Black referred to in paragraphs (a) and (b) should be sufficient to exempt such

wife and family from the general prohibition contained in section 10(1).

Consideration (a) is an unsatisfactory argument, for even lawful occupation of premises may be highly precarious, being terminable at the instance of the landlord for various lawful reasons.[32] Consideration (b) is also problematical in that Botha JA here looks to the possible consequences of a literal interpretation in order to infer that the legislature did not intend a literal interpretation. He declares that a presumption must in this case take precedence over those considerations of "language, context and circumstance" to which, it has been held, the presumption must ordinarily give way.[33] In other words, he holds that the possible undesirable result of a particular interpretation must militate against such an interpretation, even where there is a clear indication elsewhere in the enactment that the particular interpretation is intended !

Such reasoning cannot stand up to scrutiny: it permits a presumption to override a rule of construction and thereby allows the failure to obtain permission to reside in a particular house, for whatever reason, to defeat the clearly expressed intention of the legislature of allowing a Black who has usefully or satisfactorily been absorbed into the economic life of the urban community in question to have his wife and family with him in the area concerned.[34] This, surely, is putting the cart before the horse.[35]

In short, if presumptions are to operate in the construction of the term "ordinary residence", it must be because the term "ordinary residence" is ambiguous or produces a meaningless (not merely an undesirable) result if interpreted literally. If the expression indeed were ambiguous, the court's first duty would be to apply the various internal and external aids to construction (for example, the use of the term "residence" or "ordinary residence" elsewhere in the enactment) in order to arrive at an acceptable definition. Only where these aids still left the court in the dark would it be appropriate to invoke the various presumptions. And in that case there can be no selective use of presumptions - the court must consider and apply any relevant presumption, including that which holds that in interpreting an ambiguous penal provision the construction must be preferred which is least onerous on the accused. This last would seem to be a particularly pertinent presumption in the interpretation of section 10(1), contravention of which constitutes a punishable offence in terms of section 10(4). There is certainly no dearth of authority for the existence of such a presumption in our law.[36] Nor indeed for the existence of a related presumption, which is to the effect that in cases of doubt the construction most favourable to the subject should be adopted.[37]

From the above it may be seen that in interpreting the expression "ordinary residence" to mean "lawful ordinary residence" the courts are inserting into the enactment the word

"lawful". It is my contention, on the basis of the arguments offered above, as well as those to follow, that such an insertion is quite unwarranted.

2. The term "ordinary residence" elsewhere in Act 25 of 1945

Yet another presumption which may operate in cases of doubt, according to Steyn,[38] is that which holds that the same words and expressions in the same enactment are intended to have an equivalent meaning. It would seem, however, that there is also a "rule of construction" (which is peremptory in cases of doubt) holding that in difficulties of interpretation regard should be had to other uses of the same, or like, words in the same enactment.[39] Consistency of meaning is presumed. By way of corollary it is presumed that a deliberate change of expression is *prima facie* intended to connote a change of intention.[40]

In the crucial *Mapheele* judgment, the court, having encountered difficulty with the expression "*ordinary residence*", makes a half-hearted bow in the direction of the abovementioned rule or guide to construction. Botha JA refers to the fact that in section 10(1)(b) the legislature has restricted continuous residence to lawful continuous residence, whereas in section 10(1)(c) no such express restriction is imposed. But the learned judge accords little weight to what would seem to be a very significant alteration and nevertheless holds that "*ordinary residence*" should be read as "*lawful ordinary*

residence."

It is interesting to observe that in an earlier judgment of the Natal Bench[41] it was held, in relation to section 10(1)(b), that the second requirement (namely of continued residence in the prescribed area in which the appellant had already completed more than fifteen years' continuous lawful residence) was satisifed " by the fact of his continued residence, irrespective of whether it was lawful or not."[42] Mr Justice Caney went on to say, about section 10(1)(b):

> "The legislature has not required the attribute of lawfulness in relation to the continued residence; this is completely divorced from the fifteen years' continuous residence. Had the legislature's intention been that the residence was to be lawful for its continued duration, it could easily have said so."[43]

Unfortunately Mr Justice Bótha makes no reference to this decision in Mapheele.

If one considers carefully the various references in Act 25 of 1945 to "residence" and "ordinary residence", the overwhelming conclusion must be arrived at that the terms refer to a de facto residence and not to residence with the permission of the local authorities. The following list, although it does not claim to be exhaustive, covers most of the references to "ordinary residence" and, where relevant,

"residence". (The underlinings are mine.)

(a) Section 5 bis.[44] Temporary residence of coloured persons in locations or Black villages -

(1) Notwithstanding anything to the contrary in this Act contained, but subject to the provision of subsections (2) (3) (4) and (5) -

(a) any coloured persons who were ordinarily resident in a location recognised by law as a place for the residence of Blacks in any urban area at the commencement of the Blacks (Urban Areas) Act 1923 (Act No 21 of 1923), and their descendants, may reside in such location or, in the event of its removal or abolition, in any location or Black village established in such area in place thereof, and, as long as they continue so to reside, may hire lots or premises for their own occupation therein;

(b) where in any urban area there were at the commencement of the Blacks (Urban Areas) Act 1923, coloured persons ordinarily resident in a location recognised by law as a place for the residence of Blacks, the urban local authority concerned may permit coloured persons to reside, subject to such conditions as may be prescribed, in any location or Black village established in such area and to hire lots or premises for their own occupation therein.

It is difficult to see how the coloured persons "ordinarily resident" above could be said to be "lawfully ordinarily resident" if they were resident in locations recognized by law as places for the residence of Blacks. Clearly a de facto ordinary residence by coloured persons is envisaged by the legislature, which then grants urban local authorities the right to permit continued residence. "Ordinary residence" here is antecedent to "lawful residence".

(b) Section 5 bis.(5) Any coloured person who resides or continues to reside in any location or Black village after the provisions of subsection (1) have ceased to operate in respect of such location or Black village in relation to such coloured person [45] shall be guilty of an offence.

The legislature clearly contemplates here that "residence" can in fact take place in contravention of the law.

(c) Section 9. Segregation of Blacks in urban areas.

(2) A Black falling within one of the following classes who is not prohibited in terms of the Group Areas Act 1957 (Act 77 of 1957), or any other law, from residing on land or premises in the urban area in which he is ordinarily resident or employed, shall be exempt from the operation of subsection (1) but may be required by an authorised officer to produce proof that he falls within one of the classes hereby exempted, and if upon demand he fails to produce such proof to the officer, he shall prima facie be presumed not to be so exempted:

(a) Any Black who, being....the registered owner of immovable property within the urban area valued for rating purposes at one hundred and fifty rand or more, has been registered as prescribed, so long as he continues to be the registered owner of and to be ordinarily resident on such property;

(b) Any Black who, having acquired immovable property as described in paragraph (a) by devolution or succession on death from a registered Black owner, whether under a will or on intestacy, has been registered as prescribed, so long as he continues to be the registered owner of and to be ordinarily resident on such property;

(c) .....

(d) Any person being the wife, minor child or bona fide dependant of any Black exempted under paragraph (a),(b) or (c) of this subsection, so long as that person continues ordinarily to reside

> with such Black, or any widow of such Black or minor child of such Black residing with the widow ;[46]

In sub-paragraphs (a) and (b) the legislature provided certain exemptions (from residing in a location or from being removed out of an urban area into a scheduled area) for Blacks based on their registered ownership of, and ordinary residence upon, fixed property in the urban area in question. It seems clear that the term "ordinary residence" here was intended to denote a factual situation, the legality of the residence being accounted for by the requirement of registered ownership of the property at which such ordinary residence took place. Paragraph (d) unfortunately does not assist us, since it resembles very closely section 10(1)(c) of the Act and therefore the meaning of the expression "ordinarily to reside" in paragraph (d) is equally subject to debate.

Probably the most compelling argument of all for interpreting the words "ordinary residence" to mean factual and not lawful residence is contained in the wording of the amended first part of section 9(2). Here the legislature cannot possibly contemplate anything other than de facto residence for the term "ordinarily resident": since the provision refers to a Black who is "ordinarily resident" not in contravention of the Group Areas Act (77 of 1957) or any

other law, it is obvious that the legislature had in view the possibility that a Black might well be "ordinarily resident" in contravention of the Group Areas Act or any other law !

(d) On various other occasions throughout the Act the legislature has chosen to use terms like "lawfully residing",[47] "entitled to reside",[48] "lawfully domiciled"[49] and "whose sojourn there is unlawful"[50] rather than the simple term "resides" or "resident" or "residing". Surely this is a clear indication that when the legislature intends the insertion of the word "lawful", it inserts it ? To conclude otherwise is to impute to the legislature a singular muddle-headedness.

3. The ordinary and literal meaning of "ordinary residence"

What then is the plain meaning of "ordinary residence" ? It has been held frequently that the terms "resident" and "ordinarily resident" are not technical expressions which always bear the same meaning, and that they must therefore be interpreted in the context in which they are used.[51] Nevertheless, some guidance as to the meaning of the terms may be sought from dictionaries, including presumably legal dictionaries - although the popular sense of a word or expression will prima facie be presumed in construing that word or expression.[52]

The word "resides", as stated by the Shorter Oxford English

Dictionary, means, inter alia, "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place", and this definition is relied on by the court in Mapheele's case, along with the statement by Bayley J in R v North Curry 4 B & C 959 to the effect that the "word ('resides'), where there is nothing to show that it is used in a more extensive sense, denotes the place where an individual eats, drinks and sleeps, or where his family or his servants eat, drink and sleep."[53] On the basis of these two definitions Botha JA concludes in Mapheele's case that the expression "ordinarily resides" cannot have any meaning except with reference to a place, and he concludes further that in section 10(1)(c) the words "ordinarily resides" must refer to residence at a particular place in the prescribed area.

With regard to the meaning of "ordinarily", which is not discussed by Mr Justice Botha, the Shorter Oxford English Dictionary definition is "usually" or "commonly" or "as a rule".[54] Thus in the popular sense "ordinarily resides" could reasonably be held to mean "usually lives or dwells". Such a definition would be consistent with the many judicial interpretations which have held that a man may be "resident" in one place although he is "ordinarily resident" somewhere else.[55] Physical presence is thus not a conclusive test for determining whether an individual is "ordinarily resident" in a place. What facts would be

sufficient to constitute "ordinary residence" however might very well vary from case to case. It is submitted that, in view of the obligations of consortium omnis vitae (including the duty of cohabitation) flowing invariably from marriage,[56] it is only reasonable to hold that, in the absence of evidence to the contrary, a married woman is "ordinarily resident" with her husband wherever her husband is resident. And this should be so even if the couple have been married but a matter of hours, for on marriage the woman abandons her old life and takes on a new legal status.[57] To require a woman to prove that she "ordinarily resides" with her husband seems incongruous in a legal system which until recently provided that failure or refusal to join her husband in the place he had chosen as the matrimonial home was a ground for divorce.[58] Similarly, it seems contradictory to require a dependant or minor child to prove that he or she is "ordinarily resident" with the father or mother who is in law obliged to give the child shelter[59] and whose domicile determines the child's domicile.[60]

In short, I suggest that the spirit of our common law demands that we presume that a man's dependents are "ordinarily resident" with him in the place he has chosen as his place of abode, and only if on evidence it can be shown that a wife or minor child does not "usually live" with such man are we entitled to deduce that the wife or child does not "ordinarily reside" with that man in the area where he resides.

The fact that a man may himself for the time being have no fixed address in a particular prescribed area or no fixed address at which he can accommodate his family cannot, in my view, detract from the fact that his family are "ordinarily resident" with him if one presumes that they usually live with him. From this it follows that, if a man is himself qualified to be in a prescribed area under paragraph (a) or (b) of section 10(1) of Act 25 of 1945, his wife and unmarried daughters and sons under eighteen referred to in paragraph (c) must be presumed to be "ordinarily resident" with him in the prescribed area, even if the family have for the time being been denied permission by the local authorities to live together in any one house.

4. The nullifying effect upon section 10(1)(c) of regulations promulgated in terms of section 38(8)

Section 38(8)[61] reads as follows:

(a) Notwithstanding anything to the contrary in this section contained, the Minister may make regulations as to all or any of the matters referred to in subsection (3) (other than paragraph (c) thereof) and subsection (4) and publish such regulations in the Gazette for the guidance of urban local authorites.

(b) When the Minister considers it advisable to do so, he may, after reference to the urban local authority concerned and to the Administrator, by notice in the Gazette declare that any or all of the regulations referred to in paragraph (a) and any subsequent amendments thereof shall apply in the area specified in such notice and thereupon such regulations shall apply in such area to the exclusion of any other regulations relating to the same matters and applicable in such area.

(c) Any regulations applied in an area under paragraph (b) shall be deemed to have been made by the urban local authority under the corresponding provisions of subsection (3) or (4).

The matters referred to in subsection (3) and (4) of section 38 (i e the matters concerning which the Minister may make regulations) include "the terms and conditions of residence in locations, Black villages and Black hostels."[62]

Under the powers vested in him by section 38(8)(a), on 14 June 1968 by Government Notice R1036,[63] the Minister, through his Deputy, made certain regulations for the guidance of urban local authorities and application thereafter in terms of section 38(8)(b) of the Act.

Curiously, the subsection which grants the Minister power to make these regulations does not expressly state that the regulations should not be inconsistent with the Act, as do those subsections which grant similar powers to an urban local authority and to the Minister himself in respect of other matters.[64] One may, however, infer that these particular regulations emanating from the Minister should likewise not be inconsistent with the Act from the fact that section 38(8)(c) provides that regulations made by the Minister "shall be deemed to have been made by the urban local authority under the corresponding provisions of sub-section (3) or (4)."

In any case, should the Minister purport to make any regulation inconsistent with the Act, the ordinary rules of construction of legislation must apply, namely:

i) that instruments and by-laws made under statutory powers must not, on pain of invalidity, be repugnant to that statute;[65]

ii) that the court will presume that the legislature did not intend a nugatory or useless provision and will, in cases of doubt, choose that meaning which renders the provision most effective;[66]

iii) that the court will presume that the legislature did not intend an unfair, unjust and unreasonable result, and therefore will not uphold subordinate legislation (in this case, regulations) having an unfair, unjust and unreasonable result unless, from a study of the enabling statute, it is clear that the legislature intended to confer the power to make such subordinate legislation.[67]

It has been authoritatively held by our courts that the purpose of section 10(1)(c) -

> "is clearly that a native who has usefully or satisfactorily been absorbed into the economic life of the urban community in question .... should be allowed to have his wife and family with him in the urban area concerned."[68]

It has also been held that persons who are entitled to remain in a prescribed area by reason of qualification

under section 10(1)(a),(b) or (c) qualify so to remain by reason of certain facts, without the necessity of obtaining permission.[69] If these are indeed the underlying purposes for the enactment of section 10(1)(c) (and it is submitted that they are), then it is necessary to consider whether the requirements of the housing regulations contained in Government Notice 1036 are compatible with, or serve, these purposes.

The said housing regulations lay down inter alia the requirements and procedures for the granting of Site Permits, Residential Permits and Lodger's Permits. Site Permits may apparently be issued only to male persons,[70] while Residential Permits may in certain circumstances be granted to an adult female with dependants to support.[71] A Lodger's Permit may be granted to either male or female.[72]

Each variety of permit has its own set of regulations or requirements. Both the Site Permit and the Residential Permit may apparently include permission for the permit holder's dependants to reside with him (or her, in the case of a female Residential Permit holder),[73] and it has been held by the Appellate Division[74] that permission for a wife to reside with a male holder of a Residential Permit cannot be refused on the ground that such wife does not already qualify in terms of section 10(1) to be in the relevant prescribed area. As far as the Site Permit is concerned,

there is a curiously vague requirement that the superintendent, before granting a Site Permit, should be satisfied that the applicant's dependants "may reside in the prescribed area."[75] The exact meaning of this requirement is uncertain. The word "may" would seem to connote permission, and if the provision is interpreted to mean that the applicant's dependants must have permission to be, or must qualify to be, in the prescribed area before the superintendent is able to authorize their residence on a particular site, then clearly a vicious circle is created for those persons seeking to establish that they qualify to remain in the prescribed area in terms of section 10(1)(c). Before they can lawfully ordinarily reside with the husband or parent on whom they depend, they must obtain permission to reside in a particular Black location, which permission is refused unless they already qualify to be in the prescribed area 1

The wives (and possibly also the unmarried daughters and sons under eighteen) of male holders of a Lodger's Permit are caught in the same vicious circle. Regulation 20(1) provides:

> "No person other than any holder of a site or residential permit or any grantee, or the dependants of such holder or grantee, or any holder of an accommodation permit [76] shall reside in the Black residential area unless he has first obtained a permit, hereinafter referred to as a lodger's permit."

No provision is made for the holder of a Lodger's Permit to obtain permission for his family to reside with him. Must

one necessarily conclude from this that the dependants of a lawful lodger must themselves obtain permission to lodge there if they are to reside lawfully in the same house with him ? It would seem so, if the most recent decision of the Cape Provincial Division of the Supreme Court[77] is correct, although another earlier decision of the same court[78] held that, until a local authority expressly decides not to allow a person to live somewhere, it must be inferred that probably the person is living there with the consent of the municipality or local authority and, therefore, lawfully.

It is possible, from a reading of regulation 20(5), to deduce that the Minister intended that a lawful lodger's minor children should not be required to obtain their own Lodger's Permit and that his wife should only in certain unspecified circumstances be required to obtain a Lodger's Permit herself; but unfortunately the regulations do not say this. Regulation 20(5) reads:

> "Every lodger's permit shall show -
>
> (a) the name and identity number of the holder thereof;
>
> (b) the names, identity numbers and ages of any male dependants under the age of 18 years and any unmarried female dependants under the age of 21 years of such holder;
>
> (c) the name of the holder of the site or residential permit or the grantee authorised to accommodate the holder of such lodger's permit and his dependants mentioned therein; and
>
> (d) the number of the site or dwelling where the holder of such lodger's permit and his

> dependants mentioned therein are accommodated: Provided that where a wife residing with her husband is required to obtain a lodger's permit, the names of the dependants referred to in paragraph (b) shall be shown in the husband's lodger's permit only."

In practice it seems that the local authorities (in the Cape Peninsula at least) interpret the above regulation to mean that the children referred to in sub-paragraph (b) need not obtain Lodger's Permits in their own names and may be included on a parent's permit. Wives are, however, required to obtain permits in their own names.

Before the superintendent may issue a Lodger's Permit to any applicant, he must be satisfied that the applicant is, inter alia, "bona fide employed or is carrying on some lawful trade within the prescribed area"[79] - unless the applicant is by reason of old age, infirmity or similar disability unable to comply with this requirement, in which case the superintendent may in his discretion waive compliance therewith.[80] If one examines the above requirement carefully, one cannot fail to see that where the applicant for a Lodger's Permit is the wife of a man qualified under section 10(1)(a) or (b) to be in the prescribed area and such wife wishes to obtain a Lodger's Permit in order to establish "ordinary residence" for the purpose of herself qualifying under section 10(1)(c) to be in the prescribed area with her husband, a hopelessly circular situation is created. For unless she is already "bone fide employed" or "carrying on some lawful trade within the prescribed area", such wife cannot qualify for a Lodger's

Permit. Yet how is she to become bona fide employed or lawfully engaged in trade in the prescribed area ? In order to do so she must obviously first be possessed of a qualification under section 10(1)(a) or (b) or (c) or (d) to be in the prescribed area[81] (unless of course she can be bona fide employed without being lawfully employed, a point not altogether clear).

It is obvious that a legal stalemate of the above kind could not have been intended by the legislature when it enacted section 10(1)(c); for as it stands the provision is rendered meaningless and absurd, or at the very least unreasonable, by regulation 20(2)(b) (and possibly also by regulation 6(2)(c)). The remedies open to our courts are:

(i) to declare the offending portions of the housing regulations invalid; or

(ii) to re-interpret section 10(1)(c) in order to give effect to the acknowledged intention of the legislature. This would require that the courts interpret the term "ordinary residence" to mean no more than de facto ordinary residence.

CONCLUSION

The contradictory nature of the relationship between the concept of "ordinary residence" as lawful ordinary residence and the requirements of lawful residence is illustrated by the following example.

Suppose A is a thirty-five year old Black man born in Cape Town who has resided there all his life and who therefore qualifies under section 10(1)(a) to remain in the area to live and work. Suppose A meets B, a young Black woman in Cape Town on a lawful visit to her aunt, and suppose that they decide to marry. As an adult single male A has until now been obliged to live in single quarters in a Black location. Before he marries B he applies for a Site Permit or Residential Permit. Because of the housing shortage referred to by the learned judge in Komani's case (at 511H), such a permit is refused. A cannot have B living with him in single quarters without their both running the risk of contravening the housing regulations and thereby committing an offence. He therefore applies for a Lodger's Permit to reside with a relative, where he hopes his future wife may obtain permission to lodge with him. A is granted a Lodger's Permit, and he and B are married from the house of her aunt. B is still, on the records of the local authorities, a "visitor" to the area. She now applies for a permit to lodge in the same house as her husband. This permit is refused because there is, according to the regulations, no room for an additional lodger in the house where her husband lodges. B therefore continues to lodge officially with her aunt, while she in fact lives with her husband in the room he lawfully occupies at his relative's house. After a time B's permission to visit the prescribed area expires. She goes to the local authorities and points out that she is now married to a "qualified" man and submits

that under section 10(1)(c) of Act 25 of 1945 she is qualified to remain in the prescribed area. She and her husband wish to be placed on the waiting-list for suitable accommodation in which they may lawfully live together. She is informed that, on the contrary, she does not qualify to be in the area under section 10(1)(c) because she is not "ordinarily resident" with her husband (her de facto presence with him in his relative's house being in contravention of the housing regulations), and she is ordered to leave the prescribed area, her visitor's permit having expired. She may in future be re-admitted to the area, she is told, if and when suitable accommodation becomes available in which she and her husband may live together.

By this means a husband and wife may be indefinitely prevented, not merely from living in the same house, but even from residing in the same prescribed area because there is no one house in the area in which they may live together at that time. Can this possibly be read as the intention of the legislature which purportedly also intended to allow the Black man qualifying under section 10(1)(a) or (b) to have his wife and family with him in the prescribed area where he lives and works ?[82]

It is therefore submitted that our courts, in choosing to interpret the words "ordinarily resides" in section 10(1)(c) as "lawfully ordinarily resides", have made a substantial inroad, not intended by the legislature, on the

rights of certain Black families to live together in urban areas.[83] For where the legislature clearly intended to allow a Black person qualifying under section 10(1)(a) or (b) to have his wife and family living with him in the prescribed area (if not necessarily in the same house), the courts are, by requiring that such wife and family first obtain permission to reside in the same house as their husband or parent, frustrating the legislative intent. The courts have, perhaps unwittingly, made law by holding that where there is a shortage of housing, as a result of which a wife and family are unable to obtain permission to reside in the same house with a qualified Black male (husband/father), the wife and family may not even reside in the same urban area as he does, unless they too qualify to do so in their own right by reason of birth and continuous residence thereafter or a lengthy period of continuous employment/lawful residence.[84]

It is suggested that the courts have thus unjustifiably inserted the word "lawful" into the term "ordinary residence". Such an insertion is unjustified because:

1. the ordinary and literal meaning of "ordinary residence" is clear and does not produce a meaningless result;

2. the other uses in the same statute of the term "ordinary residence" and "residence" make it clear that the term is not intended to connote more than

de facto residence;

3. the presumption that conduct referred to in an enactment is intended to be lawful conduct operates only in cases of uncertainty after the general rules of construction have been exhausted, and such uncertainty cannot reasonably exist in section 10(1)(c);

4. the requirement that the ordinary residence be lawful creates a vicious circle for the persons intended to benefit by the provision in section 10(1)(c).

For all of the above reasons it is imperative that our courts should take the earliest opportunity of adopting a less restrictive interpretation of "ordinary residence" and of restoring to the wives and families of Blacks qualifying to be in a prescribed area under section 10(1)(a) or (b) of Act 25 of 1945 their right to be in the same prescribed area as the head of their household, provided of course that they meet the other requirements of section 10(1)(c).

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FOOTNOTES

1. Paragraph 3.195 of the Riekert Commission Report RP 32/1979 (Report of the Commission of Inquiry into Legislation Affecting the Utilization of Manpower).

2. See section 9 bis (1) of the Blacks (Urban Areas) Consolidation Act 25 of 1945, as amended.

3. Section 10(1) of Act 25 of 1945, as amended.

4. See Levy NO v Schwartz NO 1948 (4) SA 930 (WLD) at 933 where Price J stated (with regard to certain provisions in a will aimed at causing the dissolution of the beneficiary's marriage): "To break up marriages is to begin to break up the State, and is to deprive the children of such broken marriages of the comfort and sense of security and happiness that they can derive from a united home alone, where they live in the shadow of the affection and protection of their parents. The laws of all civilized countries are unanimous in declaring that conduct calculated to break up a marriage is contra bonos mores."

   See also Viljoen v Viljoen 1968 (3) SA 581 (AD) at 590B-C where Wessels JA held (in regard to an action for divorce): "Waar partye in die huwelik tree, beoog hulle dat die samelewing tussen hulle van blywende aard sal wees, en die beloftes, wat teenoor mekaar gedoen word, beklemtoon dit. Waar die gesineenheid later ook kinders insluit ontstaan daar 'n addisionele, indien nie die belangrikste, oorweging waarom die samelewing nie beëindig behoort te word nie. Gesien die belangrikheid van die gesinseenheid in volksverband, word die openbare belang ook daarby betrek. Die huweliksbond, wat aanvanklik uit ooreenkoms ontstaan, kan nie regtens deur ooreenkoms ontbind word nie, maar slegs om redes wat deur die reg erken word as gronde vir ontbinding."

5. S v Mapheele 1963 (2) SA 651 (AD).

6. Substituted by section 47(a) of Act No 42 of 1964 and amended by section 6 of Act 16 of 1979. The original section 10 merely gave the Governor-General the right to declare by proclamation in the Gazette that after a specified date no native might enter a defined urban area for the purposes of seeking or taking up employment or for purposes of residence otherwise than in accordance with conditions to be prescribed by the Governor-General. It also provided that the Governor-General was obliged to make such a proclamation if so requested by a valid resolution of any urban local authority. In 1952 (Act 54 of 1952, section 27) a new section 10 was inserted which formed the basis of the existing provisions. The exemption contained in section 10(1)(c) at that time did not require lawful entry to precede ordinary residence however. The paragraph read -

> "(unless).... such native is the wife, unmarried daughter or son under the age at which he would become liable for payment of general tax under the Natives Taxation and Development Act 1925 (Act No 41 of 1925), of any native mentioned in paragraph (a) or (b) of this subsection and ordinarily resides with that native."

This form of section 10(1)(c) remained unchanged until 1964, when Act 42 of 1964, section 47(a) added the words "after lawful entry into such prescribed area" before the words "ordinarily resides". The 1964 amendment also inserted the words "in such area" at the end of section 10(1)(c). In the 1979 amendment, the phrase "of eighteen" was substituted for the words "at which he would become liable for payment of general tax under the Bantu Taxation and Development Act 1925 (Act No 41 of 1925)".

7. Komani NO v Bantu Affairs Administration Board, Peninsula Area 1979 (1) SA 508 (C) at 511 G.

8. 1956 (4) SA 818 (A).

9. Supra, at 822A.

10. Inserted by section 27 of Act 54 of 1952.

11. Inserted by section 30(a) of Act No 36 of 1957 and amended by section 47 of Act No 42 of 1964 and further amended by section 6 of Act 16 of 1979.

12. 1976 (4) SA 1002 (AD) at 1009 F-H.

13. It is not settled whether the term "wife" used here includes a partner to a customary union. Davis and Durandt in their Manual of Bantu Law (1971) at p 39 submit that it should, "having regard to the fact that the paragraph is penal and that it should be given an extended meaning." There is no uniform rule in South African law about the recognition to be accorded to customary unions. (See Kahn in Appendix to The South African Law of Husband and Wife 4th edition by H R Hahlo 604-611).

14. See, for instance, S v Mapheele (supra) at 656 D; S v Madevu 1966 (3) SA 222 (CPD) at 224 C; Matlhoko v Chief Bantu Affairs Commissioner, Western Area 1976 (4) SA 210 (NCD) at 216A; Komani NO v Bantu Affairs Administration Board, Peninsula Area (supra) at 511A.

15. Farrar's Estate v Commissioner for Inland Revenue 1926 TPD 501 at 508.

16. Harris v Law Society of the Cape of Good Hope 1917 CPD 449 at 451.

17. Dadoo, Ltd and others v Krugersdorp Municipal Council 1920 AD 530 at 543; Venter v Rex 1907 TS 910 (at 914, per Innes CJ).

18. Smith v Klip River Licensing Board 1912 NLR 276 at 279 where Laurence AJP said: "Where there is ambiguity in the words the court ought to give them a reasonable construction, and to assume that the legislature intended what was reasonable rather than unreasonable; but that is a different thing from going further, and, where there is no ambiguity in the words, supplying words which the legislature may have intended to insert, but which as a matter of fact it did not insert."
R v Kirk 1914 CPD 564 at 567, where Kotze J said: "The court must interpret and give effect to what the legislature actually said, and not to what it may have intended to say but did not say. We cannot insert words not used by the legislature to meet what we conceive was its real intention."

19. For a comprehensive list of the presumptions operative in South African law, see L C Steyn Die Uitleg van Wette 4th ed (1974) 73-133.

20. Supra at 655 D-E.

21. 1925 AD 322.

22. At 339.

23. 1960 (1) SA 678 (O).

24. At 685 E.

25. Uitleg van Wette 2nd ed 113.

26. The quotation is from Paulus Christinaeus, In legis Municipales eiusdem civitatis act provinciae Commentaria ac notae, Praeludiae, Paragraph 48, and reads: "Statutum loquens de aliquo actu vel instrumento vel alia dispositione intellegi debet de valida, non invalida."

27. 1960 (2) SA 618 (AD).

28. 1962 (2) SA 419 (AD).

29. See footnote 26.

30. In Olivier v Botha (supra) De Villiers J had held that the expression "being conveyed for reward" in section 11(1)(iv) of the Motor Vehicle Insurance Act 29 of 1942 meant "being legally conveyed for reward." In Ndhlovu v Mathega (supra) it was held that the words "carried for reward" in section 11(1)(iv) of Act 29 of 1942 must be literally construed and applied and that the intended carriage for reward was not restricted to carriage for reward which was not punishable under section 9 of Act 39 of 1930.

31. Per Corbett AJ in Abbott v Commissioner for Inland Revenue 1963 (4) SA 552 (C) at 556 F.

32. Cf S v Mjakuca 1967 (3) SA 352 (C) at 355 G-H, where Tebbutt AJ, although accepting the interpretation of "ordinary residence" to mean lawful residence, holds that precariousness alone cannot render ordinary residence unlawful; and further that, until a local authority expressly decides not to allow a person to live somewhere, it must be inferred that probably the person is living there with the consent of the municipality or local authority, and, therefore, lawfully (at 356 C).

33. See Abbott v Commissioner for Inland Revenue (supra) at 556 F.

34. S v Mapheele (supra) at 656 A.

35. The same reasoning is reflected in the Komani case (supra) at 511 H where Mr Justice Schock states:

> "I agree that section 10(1)(c) indicates that it is in fact the policy of the legislature that a Bantu person qualified under section 10(1)(a) and (b) should be allowed to have his wife and family

with him. It however by no means follows from this that the legislature contemplated that the wife of such qualified Bantu person could reside in the prescribed area with him even where there is no suitable accommodation for her, for example where the husband is living in accommodation suitable for only a single male person and where there is no suitable accommodation in the prescribed are for the couple to live together."

As in Mapheele's case, the court is here hypothesizing about the intention of the legislature.

36. See Steyn, Uitleg van Wette, 4th ed (1974) 117-8 where he cites, in particular, Kotze JP in Moss v Sissons and McKenzie 1907 EDC at 167 to the effect that: "The observation of Paulus, In poenalibus causis benignius interpretandum est (Dig 50, 17 lex 155) is a just and sound one, for it imports that where the language is obscure or ambiguous the court should give the benefit of the doubt in favour of the defendant or of the accused."

37. Cf Principal Immigration Officer v Bhula 1931 AD 323 at 336 where Wessels JA states: "Where, however, two meanings may be given to a section, and one meaning leads to harshness and injustice, whilst the other does not, the court will hold that the legislature rather intended the milder than the harsher meaning." See also Steyn op cit at 120-121.

38. Steyn op cit 132.

39. Steyn op cit 160 and the cases cited there. See,in particular, Sinovich v Hercules Municipal Council 1946 AD 783 at 804 where Scheiner JA states: "In order to ascertain the intention of the Provincial Council it is permissible, and indeed necessary, to examine those other subsections of section 80 that also use the words 'prohibit' or 'prevent'." See also Minister of the Interior v Machadodorp Investments 1957 (2) SA 395 (AD) at 404 D where Steyn JA stated:

> "Where the legislature uses the same word, in this case the word 'race', in the same enactment, it may reasonably be supposed that out of a proper concern for the intelligibility of its language, it would intend the word to be understood, where no clear indication to the contrary is given, in the same sense throughout the enactment."

40. Port Elizabeth Municipal Council v PE Electric Tramway Co 1947 (2) SA 1269 (A) at 1279, as cited in Steyn op cit 161.

41. R v Nene 1960 (1) SA 263 (NPD).

42. Ibid at 268 C.

43. Ibid at 268 D.

44. Inserted by section 26 of Act 36 of 1957.

45. That is, after 31/12/62, broadly speaking, as provided in subsection (3) of section 5 bis.

46. Since subsection (2) of section 9 was amended by section 6(c) of Act 76 of 1963, it could not be expected that the current version of section 9(2) would have influenced the court's interpretation of "ordinary residence" in Mapheele's case. However, one must note here that sub-paragraphs (a), (b) and (d) of subsection (2) were little changed by the 1963 amendment and the term "ordinarily resident" appeared in the equivalent, almost identical, sub-paragraphs. It is only the first part of subsection (2) which was significantly altered by the 1963 amendment.

47. Section 9(3) bis (e). This section was inserted by section 4(b) of Act 16 of 1955.

48. Section 18(1).

49. Section 28(2)(a)(i) and (ii); section 28(2)(b).

50. Section 38(3)(i). This paragraph was amended by section 6 of Act 45 of 1947.

51. See, for instance, Ex parte Minister of Native Affairs 1941 AD 53 at 58; Biro v Minister of the Interior 1957 (1) SA 234 (TPD) at 239 H; H v Commissioner of Taxes 1960 (2) SA 695 (SR) at 696 G.

52. Craies on Statute Law 7th ed by SGG Edgar (1971) 162.

53. S v Mapheele (supra) at 654-655 A.

54. This definition is cited also in Claassen's Dictionary of Legal Words and Phrases 95.

55. See Biro v Minister of the Interior 1957 (1) SA 234 (TPD) at 240 E-G (re the South African Citizenship Act 44 of 1949); Cohen v CIR 1946 AD 174 at 184 (re the Income Tax Act 31 of 1941); Ex Parte Platt 1949 (4) SA 309 (N) at 311 (re the Liquor Act 30 of 1928); Philips v Commissioner of Child Welfare Bellville 1956 (2) SA 330 (C) at 334 (re the Children's Act 31 of 1937).

56. See HR Hahlo The South African Law of Husband and Wife 4th ed (1975) 109-110.

57. That this is so is evident from the fact that as long as the marriage subsists the wife shares her husband's legal domicile, even if she in fact lives apart from him (cf Hahlo op cit 107).

58. Ibid 392. The new Divorce Act (70 of 1979) changes the position slightly. Irretrievable breakdown of the marriage is now the chief ground of divorce, proof of such breakdown being afforded (in terms of s 4(2)(a)) by evidence that the parties have not lived together as husband and wife for a continuous period of at least one year prior to the date of institution of the divorce action.

59. See E Spiro Law of Parent and Child 3rd ed (1971) 82 and the authorities cited there. Note also the obligation (under section 10(1) and (2) of the Children's Act 33 of 1960), referred to at page 331, upon a parent to notify a Commissioner of Child Welfare where such parent delivers his infant child up to another person for the purpose of being mainained apart from his parents for a period of more than 30 days.

60. Ibid 124.

61. As substituted by section 9 of Act 76 of 1963.

62. See section 38(3)(a).

63. Published in Government Gazette No 2096 of 14 June 1968.

64. Section 38(1) and 38(3).

65. Maxwell on Interpretation of Statutes 11th ed by R Wilson and B Galpin (1962) 290. See also page 292: "where Parliament has delegated its legislative function to a Minister of the Crown without retaining any specific control over the exercise of that function by the Minister.... the court has the right and duty to decide whether the Minister has acted within the limits of his delegated power."

66. Steyn op cit 124 et seq.

67. See Minister of Posts and Telegraphs v Rasool 1934 AD 167 at 173 where Stratford ACJ said: "I agree.... that an enabling Act must not be construed to confer the power to do unreasonable things unless such latter power is specifically given." See also Sinovich v Hercules Municipal Council 1946 AD 783 at 802 (per Schreiner JA): "They (i e by-laws) are invalid if they are unreasonable, in the specialized sense, and they can only be upheld, despite their unreasonableness, if the enabling provision in effect says that they shall nevertheless be good." See further R v Seedat 1957 (1) SA 27 (NPD) at 33-34.

68. S v Mapheele (supra) at 656A: Komani NO v BAAB, Peninsula Area (supra) at 511 H.

69. Mabasa v West Rand Bantu Affairs Administration Board (supra) at 1009 F-H.

70. Regulation 6(1).

71. Regulation 7(4).

72. The argument was raised by counsel for the plaintiff in Komani NO v Bantu Affairs Administration Board, Peninsula Area (supra) that regulation 20, governing the granting of Lodger's Permits, applies only to Black males. The court rejected this view.

73. See regulation 6(2) and 7(2).

74. See Mabasa v West Rand Bantu Affairs Administration Board (supra) at 1011 A-B.

75. Regulation 6(2)(c).

76. Relating to permission to be temporarily accommodated under regulation 19(2).

77. Komani v BAAB, Peninsula Area (supra) at 511 B-E and 512 A-B.

78. S v Mjakuca (supra) at 356 C.

79. Regulation 20(2)(b).

80. Regulation 20(2).

81. This is especially so in view of the fact that regulation 27(e)(v) of the Black Labour Regulations provides that a municipal or district labour officer may refuse to sanction the employment of any Black "if the Black concerned is a female who is in terms of section 10 of the Urban Areas Act not authorised to be in the said area concerned." (Black

Labour Regulations made in terms of R1892 of 3 December 1965, as amended by GN 674/1968 and GNR 23/1969.)

82. It is of more than passing interest to note that, in moving an amendment to the Native Laws Amendment Bill of 1952 (which ultimately became Act 54 of 1952) whereby paragraph (c) was inserted into section 10(1), the Minister of Native Affairs explained the purpose behind this provision as follows:

> "The important amendment is the new (c) which I propose should be inserted here. Hon members will remember that during the second-reading debate the question repeatedly arose: What would happen to the wife or the children of a native who was allowed to keep on working ? Is it not possible that they may be unjustly treated by refusing them a permit to remain in the city ? The fact of the matter is, of course, that our standpoint has always been quite clear, namely that the law would be administered by officials of the local authorites. We take it for granted that it will be administered in a reasonable manner.... Because it is so obvious that no injustice will be done to the wife and children by the municipal authorities in the administration of residential permits, we did not consider it necessary to guarantee anything like that in the Bill. During the second-reading debate in this House, however, it once more became very clear that hon members on the other side have no confidence in the good administration of the situation by the local authorities. Because they obviously lack that confidence in those authorities which we have, I then decided that it would be better to introduce this amendment. In this amendment I therefore move that in the case of a husband who has received permission to remain in the city, such permission will also include his wife if she is with him. In addition, the female children who are unmarried and who live in the same house will retain that right of residence together with the father. Also the male

children up to the age of 18 (although they have to register at the age of 15) up to the age when they have to pay taxes, namely 18 years, will also have the right of residence together with the family. All this comes as a result of the permission granted to the father. This will therefore keep the essential components of the family which hon members say they do not want to tear apart, which we agree should not be torn apart and which we also thought would never be torn apart owing to sympathetic administration of the law by the municipal authorites. It will be noticed that we very definitely say 'who reside with that person.' It stands to reason that if the family is torn asunder, the wife or the child will then have to receive permission to remain in the city on their own merits. If, for instance, a child has already left the home and is doing other work, he or she is independent and must have his or her own permission. If the husband and wife are divorced, if they are separated, then the wife's right of residence is not dependent on the unity of the family but on the question whether she herself is employed in that area or not. She therefore remains in the city because she herself has permission to stay there and the position remains like that as long as she is employed. The point which has apparently worried hon members was, however, merely this, that when a wife and children lived with the husband as a family unit in the city there could be the danger that the family might be torn apart by arbitrary action. That is hereby avoided." (House of Assembly Debates, vol 77, cols 1275-7 (18 February 1952).

83. See further, DM Davis "Influx Control - All Quiet on the Legal Front" (1979) 42 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 316.

84. The wording of section 10(1)(d) specifically requires that permission to be in the prescribed area granted by a labour officer in terms of this paragraph shall be subject to the availability of accommodation in the said prescribed area. The mention of this consideration in section 10(1)(d), and its omission in paragraphs (a),(b) and (c) of section 10(1), would seem to be a further indication that the legislature did not intend to make the availability of suitable housing a pre-requisite for the establishment of rights under paragraphs (a),(b) and (c).