

**EVICCTIONS; TOWARDS A TRANSFORMATIVE  
INTERPRETATION OF THE CONSTITUTIONAL  
REQUIREMENT OF CONSIDERING ‘ALL RELEVANT  
CIRCUMSTANCES’**

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## **KEY WORDS**

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Extension of Security of Tenure Act

Land reform

Tenure reform

Access to land and housing

Relevant circumstances

Suitable alternative accommodation

Transformation

Social reform



## DECLARATION

I declare that *Evictions; Towards a transformative interpretation of the constitutional requirement of considering 'all relevant circumstances'* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete reference.

Full name: Seehaam Samaai

Signed: \_\_\_\_\_

September 2006



## DEDICATION

### **This work is dedicated to**

My parents, Allie & Ruwayda, my mom-in-law, Yasmina, my aunts, Latiefa & Faiza  
for your unconditional support and love and keeping up the fort

My beautiful daughters, Hala and Rabia, for being my 'dose' of happiness everyday

My siblings, Toufiek & Rashaad, their wives Sadie & Fadwa for all your encouraging  
words

My Yan – Munier – for your continuous belief in my abilities and encouragement,  
and for just being you.



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## TABLE OF CONTENTS

	<b>PAGE</b>
Title page	i
Keywords	ii
Declaration	iii
Dedication	iv
Acknowledgement	v
Table of Contents	vi
List of Abbreviations	ix

### CHAPTER ONE: INTRODUCTION

1.1	Eviction: Historical and social context	1
1.2	Problem Statement: Constitutional response to eviction	2
1.3	Overview of the Chapters	6

### CHAPTER TWO: DEFINING THE TRANSFORMATIVE VISION OF THE CONSTITUTION IN THE CONTEXT OF SECTION 26(3)

2.1	Introduction	8
2.2	Transformation through land reform legislation	8
2.3	Transformation through judicial interventions	9
2.4	International law as a source of interpretation	10
2.5	Conclusion	12

### CHAPTER THREE: LEGAL FRAMEWORK

3.1	Introduction	14
3.2	Pre-constitutional position	15
3.3	Post-Apartheid position: Interpreting relevant circumstances	

within the context of section 26(3)	17
3.4 Introduction to the Land tenure reform legislation	
3.4.1 Introduction	19
3.4.2 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)	
3.4.2.1 Purpose and applicability of PIE	20
3.4.2.2 Relevant circumstances to be considered before an eviction	21
3.4.3 Extension of Security of Tenure Act (ESTA)	
3.4.3.1 Purpose and applicability of ESTA	23
3.4.3.2 Relevant circumstances to be considered before an eviction	24
3.5 Relevance of compliance with the procedural and substantive provisions of PIE and ESTA	28
3.6 Conclusion	30

## **CHAPTER FOUR: JUDICIAL INTERPRETATION OF RELEVANT CIRCUMSTANCES**

4.1 Introduction	32
4.2 Section 26(3) of the Constitution	
4.2.1 Defining ‘relevant circumstances within section 26(3) circumstances within common law eviction matters	33
4.2.2 Narrowing the meaning of ‘relevant circumstances’	35
4.2.3 Closing the transformative potential of ‘relevant circumstances’	37
4.2.4 A paradigm shift	38
4.2.5 Diverging approaches; nuisance as a relevant circumstance to evict.	41
4.3 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)	
4.3.1 Introduction	43
4.3.2 Balancing the rights of occupiers and owners	44
4.3.3 Considering factors extraneous to the substantive	47

	provisions of PIE	
4.3.4	The consideration of suitable alternative accommodation as a relevant circumstance	48
4.3.5	Judicial interpretation of the provisions of PIE	51
4.4	Extension of Security of Tenure Act (ESTA)	
4.4.1	Introduction	51
4.4.2	The disproportionate impact of evictions on farm workers	52
4.4.3	Historical vulnerabilities of women, children and the elderly as relevant circumstances.	52
4.4.4	The court's approach to factors surrounding the employment relationship during an eviction	56
4.4.5	Confining relevant circumstances to the provisions ESTA	58
4.4.6	Coming through the backdoor: consideration of factors extraneous to ESTA via the section 9(3) report.	58
4.4.7	The consideration of suitable alternative accommodation as a relevant circumstance.	60
4.4.8	Excluding occupiers from the provisions of ESTA	62
4.4.9	Judicial interpretation of the provisions of ESTA	62
4.5	A comparative analysis of the judicial interpretation of 'relevant circumstances'	63

## **CHAPTER FIVE: CONCLUSION**

5.1	Introduction	64
5.2	An analysis of the constitutional and legislative provisions defining 'relevant circumstances'	65
5.3	An analysis of the court's approach to interpreting 'relevant circumstances'	
5.3.1	Section 26(3) of the Constitution	66
5.3.2	PIE	67
5.3.3	ESTA	68
5.4	Proposed amendments to PIE	68



5.5	New developments and proposed amendments to ESTA	71
5.6	Comments and conclusion	74
6.	<b>BIBLIOGRAPHY</b>	75

## **LIST OF ABBREVIATIONS**

CC	Constitutional Court
DLA	Department of Land Affairs
ESTA	Extension of Security of Tenure Act 62 of 1997
ICESCR	International Covenant on Economic, Social and Cultural Rights
LCC	Land Claims Court
LTA	Land Reform (Labour Tenants) Act 3 of 1996
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 18 of 1998
PISA	Prevention of Illegal Squatting Act 52 of 1951
SCA	Supreme Court of Appeal
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights



# CHAPTER ONE

## INTRODUCTION

*'Every situation has its own history, its own dynamics, its own intractable elements that have to be lived with (at least for the time being), and its own creative possibilities that have to be explored as far as reasonably possible.'*<sup>1</sup>

### 1.1 Evictions: Historical and social context

Many academics have argued that the South African Constitution has an 'overwhelming transformative intent'.<sup>2</sup> This visionary intent has also been embraced by our Constitutional Court and has been described as a 'long-term project of constitutional enactment, interpretation and enforcement, committed to transforming South Africa's political and social institutions and power relationships in a democratic, participatory and egalitarian direction.'<sup>3</sup>

The transformative vision of the Constitution aims to prohibit the socially unjust practices of the past, address the inequalities in our society and specify new governing norms as a guide to future conduct. It also underpins the interpretation of the rights enshrined in the Bill of Rights.<sup>4</sup>

Forced evictions as an unjust practice, played a huge role in the apartheid government's racially based land dispossession, as it was systematically used by the government to forward its agenda of separate development.<sup>5</sup> Evictions have been defined as the 'permanent or temporary removal against their will, of individuals,

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<sup>1</sup> *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) at para 31.

<sup>2</sup> Roux 'Continuity and change in a transforming legal order: The impact of Section 26(3) of the Constitution on the South African Law' (2004) 121 *SALJ* 467. Also see De Vos 'Grootboom, the right to access to housing and substantive equality as contextual fairness' (2001) 17 *SALJ* 260. Liebenberg 'Needs, rights and transformation: Adjudicating social rights in South Africa' (2005b) 6 *ESR Review* 3.

<sup>3</sup> De Vos 2001, 261. This definition was shaped by Karl Klare in his article 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146 at 150, which has now become an influential feature in South African legal discourse. Also see Van der Walt 'Transformative Constitutionalism and the development of South African property law; Part 1' (2005b) 4 *TSAR* 656.

<sup>4</sup> Roux 2004, 467.

<sup>5</sup> The apartheid government established strategies and land laws to weaken black land rights, which facilitated forced removals (evictions). Van der Walt (2005a) *Constitutional Property Law*, 285.

families and/or communities from their home or land which they occupy without the provision of, and or access to appropriate forms of legal or other protection.’<sup>6</sup>

Forced evictions and removals uprooted millions of black South Africans from their land and homes, which had the effect of weakening black land users rights and interests in land. It resulted in homelessness, poverty traps, the formation of informal settlements and insecure tenure holding of land. The legal situation for persons facing the prospect of eviction was aggravated by the strong common law property rights afforded to landowners versus the weak tenure rights of occupiers, which made evictions much easier.<sup>7</sup>

In the new constitutional dispensation the apartheid land legacy had to be addressed so as to re-establish a system of non-discrimination and equitable access to land and housing.<sup>8</sup> Land reform had to become, one of the prominent features of South Africa’s transformation process to effectively address the unequal land access patterns and insecure tenure land holdings, as evictions continued to be a reality in post-apartheid South Africa.<sup>9</sup> It thus became important to prevent apartheid-style evictions and forced removals, to allow access to housing and land on an equitable basis to the poor and marginalized and to simultaneously protect the existing property rights of land owners.

Constitutional and legislative enactments were employed to give effect to latter so as to avoid the repetition of past injustices.<sup>10</sup>

## **1.2 Problem statement: Constitutional response to evictions**

Section 26(3) of the South African Constitution<sup>11</sup> was enacted specifically to address the issue of evictions and it prohibits evictions without a court order. It further

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<sup>6</sup> United Nations Committee on Economic Social and Cultural Rights General Comment 7 (1997) ‘The Right to Adequate Housing (Art 11.1 of the Covenant) Forced Evictions’ contained in document E/1998/22, annex IV, para 10 (Hereinafter UNCESCR General Comment 7).

<sup>7</sup> Liebenberg 2005b, 1.

<sup>8</sup> Van der Walt 2005a, 308.

<sup>9</sup> Van der Walt 2005a, 285. Land reform is characterised by three main areas namely restitution, tenure reform and redistribution. See Carey Miller (2000) *Land Title in South Africa*.

<sup>10</sup> Van der Walt 2005a, 310.

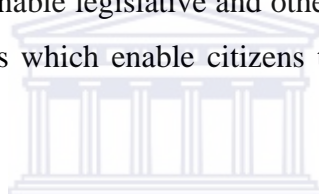
<sup>11</sup> Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter Constitution).

requires the courts to consider all relevant circumstances before issuing an eviction order and it has its roots within the housing provision of the Constitution which stipulates the following:

## Section 26

- (1) 'Everyone has the right to 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; and
- (3) That no one may be evicted from their home, or have their home demolished, without a court order made after considering all relevant circumstances. No legislation may permit arbitrary evictions

The Constitution also protects existing property rights against unconstitutional interference and it provides the basis for land reform in South Africa as it provides that 'the state must take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to access land on an equitable basis.'<sup>12</sup>



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<sup>12</sup> Section 25.(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application for a public purpose or in the public interest; and subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including the current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation.

(4) For the purposes of this section the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6).

The Constitution thus has the role of extending the rights of housing and land to all and to protect the existing rights and privileges in property. In relation to access to housing and land to the poor and marginalized, these rights will inevitably conflict with each other. This conflict will have to be managed by both the legislature and the courts in a manner which aims to promote the constitutional vision of a just and equitable society where ‘everyone enjoys the full and equal enjoyment of all rights and freedoms’.<sup>13</sup>

The provisions of section 26(3) and section 25 have been embroidered on various pieces of land tenure reform legislation. Prime examples of such legislation include the Prevention of Illegal Eviction from and Unlawful Occupation of land Act 19 of 1998 (PIE) and the Extension of Security of Tenure Act 62 of 1997 (ESTA), which attempts to provide greater security of tenure to vulnerable occupiers and outline the circumstances within which eviction may occur.<sup>14</sup> These circumstances have been specified in legislation to mitigate the harshness of an eviction and to ensure that the existing property interests are protected from unlawful intrusion.

The effect of these provisions and its enabling legislation is that the common law vindication rights of owners have been given constitutional protections in terms of section 25 and it has been qualified by considerations of principles of fairness and equity as well as the socio-political and economic circumstances of the persons involved in evictions by section 26(3).<sup>15</sup>

It is the legislature’s task to give effect to these rights within legislation in a balanced and equitable manner which ensures that the interests of both the occupier and the landowner are protected. However, and notwithstanding the legislature’s intention to ‘sweep clean’ the wrongs of the past, it is impossible to foresee in advance and regulate all the applicable legal rules of a particular matter and to predict an equitable legal outcome.<sup>16</sup>

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<sup>13</sup> Section 9(2) of the Constitution

<sup>14</sup> Van der Walt ‘Exclusivity of ownership, security of tenure and eviction orders’ (2002a) 18 *SALJ* 373.

<sup>15</sup> Van der Walt 2005a, 419.

<sup>16</sup> Roux 2004, 1.

It will be argued that common law eviction law has been qualified by section 26(3) and its enabling legislation through the consideration of all relevant circumstances as it pertains to the rights of persons facing eviction situations. It will further be argued that these circumstances should have the potential to develop the common law property rights and the tenure rights of occupiers in accordance with the transformative vision of our Constitution. It should be able to bring about an equitable balance between two competing rights, namely the traditionally strong property rights of owners and the weak tenure rights of the historically marginalised.

However and notwithstanding all the wonderful intentions of the legislature, the interpretation of the eviction laws applicable to a legal matter and the balancing of the two competing concerns are mainly left to the judiciary.<sup>17</sup> The courts have been ambivalent in its interpretation of the circumstances considered before an eviction is granted. Different approaches have surfaced in case law ranging from a narrow traditional approach to a broad transformative approach, which has the effect of either weakening or strengthening existing tenure rights of occupiers. For example the courts have either broadly taken into account the historical, social and economic circumstances of an occupier by taking a context driven and purposive approach so as to mitigate the harshness of an eviction or the courts have taken a conservative interpretation of the legislation by not allowing circumstances beyond that which have been allowed by the legislation or it took an approach which weighed heavily in favour of existing property rights and the common law which is based on the premise that the landowner is entitled to exclusive use of his or her property “free of all encumbrances”.

In response to the conflicting and inconsistent interpretations given by the various courts, proposals are being made to amend the tenure legislation, which has the potential of affecting the relevant circumstances to be considered before an eviction is granted. These amendments also reflect the tensions between section 26 and the property rights of owners provided for in section 25(1).

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<sup>17</sup> Roux 2004, 2.

Circumstances have been identified in international law, which aims to ensure that the rights of occupiers are protected, that vulnerable persons are not further discriminated against, that the eviction is reasonable under the circumstances and that it happens in an appropriate manner. Recognising these circumstances may assist our courts in identifying relevant circumstances when considering an application for eviction.

This research paper thus aims to explore the relevant circumstances that the legislature has specified must be considered before an eviction application is granted and the meaning that the courts have given these circumstances in both section 26(3) and enabling legislation. Finally, it will explore, whether a transformative interpretation has been given to the meaning of ‘all relevant circumstances’ within the legislation, its proposed amendments, and by the courts.

### 1.3 Overview of the Chapters

Chapter 2 defines the transformative vision of the Constitution in the context of section 26(3) and how this impacts on the interpretation of ‘relevant circumstances’.

Chapter 3 commences by examining the pre-constitutional position which governed eviction proceedings. It firstly analyses the common law legal rules relating to evictions and thereafter the legislative interventions, which impacted on the court’s discretion to consider circumstances which limit the property rights of owners in eviction matters. It further attempts to define relevant circumstances within the context of section 26(3) and the possible impact ‘relevant circumstances’ could have on the common law right to vindicate property. It proceeds by defining what the legislature has defined as relevant circumstances within two specific pieces of land tenure reform legislation, notably the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 18 of 1998 (PIE) and the Extension of Security of Tenure Act 62 of 1997(ESTA) are analysed to highlight the socio-economic factors and circumstances, which the court has to take into account before an eviction application will be considered.

Chapter 4 explores what courts have considered relevant before the granting of an eviction order. This brings to the fore the tensions between ownership rights and

rights of occupiers as the courts struggle with legal certainty and transformation. The chapter proceeds to examine specific eviction cases, which have had a transforming impact on housing and tenure rights and furthermore considers the importance of ‘suitable alternative accommodation’ and ‘access to alternative land’ as relevant circumstances to be considered before the courts grant an eviction order. It further analyses how the courts have interpreted and balanced these concerns in eviction matters.

In conclusion, Chapter 5 analyses the judicial interpretation of, and, the effect of the new legislative developments on the transformative interpretation of relevant circumstances in evictions matters.





## CHAPTER TWO

### DEFINING THE TRANSFORMATIVE VISION OF THE CONSTITUTION IN THE CONTEXT OF SECTION 26(3)

#### 2.1 Introduction

The South African Constitution has been hailed as a transformative document and it recognises in the Preamble that we should ‘recognise the injustices of the past and aim to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights’.<sup>18</sup> A commitment to social justice and an egalitarian state are thus central features of the transformative goals of the Constitution.<sup>19</sup> The Constitution is clearly not a static document frozen in time, with its primary concern the retention of State power.<sup>20</sup> De Vos observes that it is a document that requires continued reinvention to make sense of the changing world and the country we live in, with the primary goal of producing a society, which is based on principles of justice and equity.<sup>21</sup> It is therefore important that the provisions of the Bill of Rights be interpreted within its historical, social and economic context, which is a view that has been adopted by the Constitutional Court.<sup>22</sup>

#### 2.2 Transformation through land tenure reform

There are various ways in which the parliament as well as judicial processes can interpret social rights to facilitate transformation.<sup>23</sup> However, ‘social rights will not fulfill their transformative potential unless they start influencing the development of the common law.’<sup>24</sup>

In respect of evictions, it is important to improve the security of tenure of those individuals whose land rights were weakened by the apartheid land laws, through the

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<sup>18</sup>See further Liebenberg ‘Towards a right to alternative accommodation? South Africa’s constitutional jurisprudences on evictions’ (2005a) *Housing and ESCR Rights Law*, 1. Also see De Vos 2001, 260.

<sup>19</sup>Liebenberg 2005a, 1; Also see De Vos 2001, 260.

<sup>20</sup>De Vos 2001, 260.

<sup>21</sup>De Vos 2001, 260.

<sup>22</sup>De Vos 2001, 262.

<sup>23</sup>See Liebenberg 2005b, 6-7.

<sup>24</sup>Liebenberg 2005b, 7.

process of land tenure reform.<sup>25</sup> Land reform would therefore have to feature in any legitimate and sustainable transformation process in South Africa due to the deeply entrenched unequal distribution of land and insecure tenure holdings of a vast majority of black South Africans.<sup>26</sup> Land tenure reform is the reform of the ‘legal basis of landholding, usually directed towards social change.’<sup>27</sup> It aims to dismantle the legacy of apartheid land law and establish a new post-apartheid land law based on non-discrimination and equal access to housing and land. It further aims to protect or strengthen existing rights of vulnerable occupiers or establish new rights by way of legislation so as to avoid inequitable evictions through limiting the vested rights of property owners and the harsh consequences of eviction.<sup>28</sup> Legislation can place limits on evictions through the specification of factors and circumstances to be considered before an eviction may be granted so as to avoid vulnerable occupiers from being left destitute and homeless after an eviction.

### **2.3 Transformation through judicial interventions**

The courts can assist in ‘deconstructing the hierarchical and absolute (common law) notions of property rights’<sup>29</sup> through the consideration of relevant circumstances, which qualifies the property rights of owners to evict. The courts can play a significant role in facilitating transformation by taking into account circumstances, which minimises the harsh consequences of eviction on vulnerable and marginalised persons and communities. A context-driven approach places evictions within a historical, social and economic context to avoid the consequences of occupiers being left destitute and homeless after the eviction. This approach allows the court to consider the impact of the past on the current reality of the occupier and formulate a just and equitable outcome, which facilitates transformation.

International law can assist the courts in defining circumstances, which limit the possibility of an eviction impacting on the human rights of occupier as particularly infringements of the right to dignity, life, health, education and children rights.

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<sup>25</sup> Van der Walt 2005a, 416. Tenure reform is one of the three pillars of the South African land reform process. It deals with the strengthening of weak and vulnerable rights and interests in land.

<sup>26</sup> Van Der Walt 2005a, 285.

<sup>27</sup> Carey-Miller and Pope (2000) *Land Title in South Africa*, 456.

<sup>28</sup> Van der Walt 2005a, 310.

<sup>29</sup> Van der Walt 2005a, 310.

## 2.4 International law as a source of interpretation

Section 39(1) of the Constitution requires the courts to interpret the provisions of the Bill of Rights in such a manner that it ‘promote[s] the values that underlie an open and democratic society. Section 39(1) also refers to the use of public international law and foreign law by our courts, and the role that such law should play as interpretive tools.’<sup>30</sup>

Rights, protecting peoples’ homes and ensuring access to housing by the state, are found in a number of international human rights instruments.<sup>31</sup> The International Covenant on Economic, Social and Cultural Rights (the ICESCR) is seen as one of the most important international instruments relating to socio-economic rights.<sup>32</sup> The ICESCR can thus be viewed as a valuable source of guidance for South African courts when interpreting section 26(3).

South Africa has not ratified the ICESCR; however, it may still have interpretive value to the rights enshrined in the Constitution as the courts may use binding as well as non-binding law as tools of interpretation.<sup>33</sup>

There are various substantive rights recognised within the ICESCR. Of significance to this paper, is the right to adequate housing which encompasses the right to have security of tenure and which guarantees legal protection against eviction in that a

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<sup>30</sup> Zimmerman ‘Property on the line: Is an expropriation-centred land reform constitutionally permissible’ (2004) 144 *SALJ* 397.

<sup>31</sup> Davis D et al (1997) *Fundamental Rights in the Constitution* 344. The treaties include: the Universal Declaration of Human Rights (1948) (article 25), the European Convention on Human Rights and Fundamental Freedoms (1950) (article 8.1); the International Convention Relating to the Status of Refugees (1951) (Article 21); EHT European Social Charter (1961) (Articles 16 & 19.4); The International Covenant on Economic, Social & Cultural Rights (1966) (Article 11); The International Convention on the Elimination of All Forms of Racial Discrimination (1966) (Article 5(e)(iii)); The International Convention on the Elimination of All forms of Discrimination Against Women (1979) (Article 14(2)(h)).

<sup>32</sup> De Waal, Currie and Erasmus (2001) *The Bill of Rights Handbook* (4ed) 436. State parties who have ratified the ICESCR are under an obligation to ensure that the provisions in the ICESCR are respected and implemented.

<sup>33</sup> In *S v Makwanyane* 1995 (3) SA 391 (CC), Chaskalson P said that ‘public international law would include binding and non binding law...International agreements and laws accordingly provide a framework within which the [Bill of Rights] can be evaluated and understood.’ ... it can be a guide to interpretation, however, the weight of it may vary.’

person cannot be evicted without a court order.<sup>34</sup> In essence the right not be forcibly evicted is based on Article 11.1, read with other relevant provisions of the ICESCR.

The United Nations Committee on Economic, Social and Cultural Rights (UNCESCR), the body monitoring the ICESCR, defines the right not to be forcibly evicted in General Comment 7 (UNCESCR General Comment 7).<sup>35</sup>

The UNCESCR General Comment 7 confirms that a person should not be evicted without appropriate legal recourse and without the consideration of all relevant circumstances.<sup>36</sup> It further stipulates that persons should be protected from unfair evictions by law and where evictions are unavoidable; there should be appropriate suitable solutions to mitigate the harshness of the eviction.<sup>37</sup> One of the most critical issues for the Committee has therefore been to determine the circumstances under which evictions are permissible and defining the protections required.<sup>38</sup> The Committee encourages state parties to introduce protective measures through the enactment of legislation against arbitrary evictions. Legislation must also specify the circumstances in which evictions may occur.<sup>39</sup>

Special measures should also be introduced to ensure that where evictions do occur that the rights of women, children, and the elderly and other vulnerable individuals are not disproportionately affected by the eviction or discriminated against.<sup>40</sup> The Committee has also introduced procedural protections in relation to evictions, which can be considered as factors or circumstances, which are to be considered before an application for an eviction is instituted.<sup>41</sup>

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<sup>34</sup> Article 11.1 of the ICESCR read with para 1 of the UNCESCR General Comment 7.

<sup>35</sup> One of the functions of the UNCESCR is to publish interpretations of the content of the provisions of the ICESCR in the form of General Comments. General Comments are not legally binding on State Parties but they serve to offer guidance and promote implementation of the Articles within the ICESCR. In relation to the right to adequate housing and in particular evictions, General Comment 7 has been formulated to give content to the right not to be forcibly evicted in Article 11.1.

<sup>36</sup> At para 2.

<sup>37</sup> See UNCESCR General Comment 7, para 2.

<sup>38</sup> Also see UNCESCR General Comment 7, para 2.

<sup>39</sup> UNCESCR General Comment 7, para 3.

<sup>40</sup> UNCESCR General Comment 7, para 9.

<sup>41</sup> See UNCESCR General Comment 7, para 15. The Committee considers the following as procedural protections:

- a) an opportunity for genuine consultation with those affected;
- b) adequate and reasonable notices for all affected prior to the eviction;
- c) information on the proposed eviction;

One of the most important considerations to be taken into account is that an eviction should not result in individuals being rendered homeless or vulnerable to further human rights violations and the State must therefore introduce appropriate measures to ensure that there is adequate alternative accommodation or access to land.<sup>42</sup>

Legislation and case law should give effect to the provisions of the ICESCR when defining the circumstances which a court should consider before granting an eviction.

## 2.5 Conclusion

The land reform programme in South Africa as well as the ICESCR highlight the importance of legislation defining circumstances, which mitigate the harshness of eviction on the poor and marginalised.

It is thus important that the legislature defines circumstances, which limits the effect of the strong common law property rights on the historically-weak tenure rights of vulnerable occupiers. In defining these circumstances and to facilitate transformation, legislation should attempt to redress the injustices of the past. This can only be achieved if the legislation forces the courts to take into account the years of dispossession which deprived millions of their human rights, the social and economic conditions of poverty, unemployment and violence prevalent in the country and any other circumstances, which may impact on both the occupier and owner's constitutional rights.<sup>43</sup>

The courts should adopt a purposive and context driven approach to interpreting section 26(3) and the land tenure reform legislations so as to avoid persons being left homeless and destitute after being evicted.<sup>44</sup> The adoption of this approach require the courts to consider the foundational values of the constitution, comparative

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- d) the presence of government officials when an eviction occurs;
  - e) that the evicted persons be properly identified;
  - f) evictions not to happen in bad weather or at night;
  - g) provision of legal remedies;
  - h) provision of legal aid.

<sup>42</sup> UNESCR General Comment 7 at para 16.

<sup>43</sup> De Vos 2001, 263.

<sup>44</sup> Zimmerman 2004, 389.

(international) law and the unique history and circumstances of South Africa, which includes the country's commitment to land reform and its international obligations.<sup>45</sup> Therefore to facilitate social justice within eviction matters, it is important that the courts take into account the interests and needs of the poor and marginalised and that ownership no longer be viewed as an absolute right unaffected by the social realities that affects the poor.

The legislature and the courts must attempt to redress the imbalances of our past by placing qualifications and limitations on the property rights of owners through the consideration of all relevant circumstances. It is further important that the inequitable land redistribution be addressed within eviction matters through the consideration of factors, which addresses the housing needs of vulnerable occupiers. This is important to ensure that evictions do not result in 'individuals being rendered homeless or vulnerable to the violations of other human rights'.<sup>46</sup> One of the factors, which is a highly relevant factor in avoiding destitution and homelessness is the right to access housing and/land after being evicted. Where those affected by eviction cannot access housing and/or land or provide for themselves with their own resources, the courts should assess whether the State has taken all appropriate measures to the maximum of its available resources, to ensure that adequate alternative housing, settlement or land, are made available to the occupier.<sup>47</sup>

Legislation must also address the disproportionate effects of evictions on the poor, marginalised, women, children, the elderly and the disabled through the introduction of special measures to protect these persons. The courts on the other hand should avoid discrimination within eviction matters and address these imbalances caused by the past.

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<sup>45</sup> Zimmerman 2004, 389.

<sup>46</sup> UNESCR General Comment 7 (1997) at para 4.

<sup>47</sup> UNESCR General Comment 7 (1997) at para 17.

## CHAPTER 3

### LEGAL FRAMEWORK

#### 3.1 Introduction

Tenure reform in South Africa aims to strengthen and secure weak and vulnerable land rights of persons and it aims to remove the threats of unlawful and arbitrary loss of land through the provision of constitutional protection in both section 25 and 26 of the Constitution,<sup>48</sup> In respect of evictions, Section 26(3) specifically prohibits evictions without a court order and after the consideration of all relevant circumstances.

This constitutional provision have been embroidered on a range of land reform laws which lays down requirements and factors to be considered before an eviction is granted.<sup>49</sup>

This study will ,however, only focus on two principal land reform statutes namely PIE and ESTA which sets out strict requirements for evictions.

These Acts have been enacted to define circumstances, which need to be taken into account before an eviction is granted and it protects the interests of both occupier and property owner through the balancing and consideration of circumstances which aim to protect occupiers from inequitable evictions and property owners from unlawful invasions on their property.

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<sup>48</sup> Tenure reform is one of the three pillars of land reform in South Africa post 1994. The other two are restitution and redistribution. See Van der Walt 2005a, 416 and 417.

<sup>49</sup> Van der Walt 2005a, 417. For further reading on land reform legislation see Van der Walt 'Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land reform legislation' (2002b) 2 *TSAR* 265. The important legislation includes: The Rental Housing Act 51 of 1999, which protects the occupation rights of occupiers of rural and urban residential property; Land Reform (Labour Tenants) Act 3 of 1997 protects lawful occupiers of agricultural (rural) land; The Interim Protection of Informal Land Rights Act 31 of 1996 protects lawful occupiers of rural and urban land in terms of informal land rights for an interim period until more specific laws are promulgated and the Restitution of Land Rights Act 22 of 1994 protects lawful and unlawful occupiers of urban and rural land who have instituted a restitution claim. Also see Badenhorst (2005) *Silbeberg and Schoeman's: The Law of Property* 4ed, 489-510.

Where the occupation is occupied with the consent of the owner on agricultural land or land which has been designated for agricultural purposes or it is situated outside of formally declared township, the ESTA applies and it prescribes the relevant circumstances to be considered before an eviction is granted.<sup>50</sup>

In cases of unlawful occupation on urban land and in some instances even rural land where ESTA does not apply, the PIE is applicable. PIE sets out various circumstances to be considered if the occupier resides on the property for less than six months. It also prescribes circumstances to be considered if the unlawful occupation exceeds six months and it regulates the evictions from state land which has been unlawfully occupied.

Both Acts criminalises unlawful evictions,<sup>51</sup> it prevents default evictions and it provides the courts with discretion to decline an eviction if the prescribe circumstances have not been met and also on the grounds of justice and equity.<sup>52</sup>

However, to fully understand the impact of these provisions on the common law right and to assess whether these provisions achieves the transformative visions of the constitution it is important to firstly reflect on the pre-constitutional eviction laws.

### **3.2 Pre-constitutional position**

Before the advent of the 1996 South African Constitution, eviction laws were regulated in terms of the common law and various pieces of apartheid land legislation.<sup>53</sup>

The common law rules regulating eviction are set out in *Graham v Ridley*<sup>54</sup> and *Chetty v Naidoo*.<sup>55</sup> In terms of the South African common law, when an owner of

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<sup>50</sup> Section 2 of ESTA.

<sup>51</sup> Sections 8(1)-(3) of PIE and Sections 23(1)-(3) of ESTA.

<sup>52</sup> Currie and De Waal 2005, 590.

<sup>53</sup> One of the mechanisms used to segregate races were evictions and forced removals through legislation like the Group Areas Act 36 of 1966, the Prevention of Illegal Squatting Act 52 of 1951 and various other pieces of land laws. See Badenhorst 2005, 482.

<sup>54</sup> 1931 TPD 476 at 479. Also see Roux 2004, 471.

<sup>55</sup> 1974 (3) SA 13(A) at paras 20A-E. Also see Roux 2004, 271.



property seeks an eviction order, all he or she has to allege is that he or she is the owner of the property and that the defendant is in possession of the property.<sup>56</sup> The onus is then on the defendant to prove lawful possession through a lease agreement or any other right in law.<sup>57</sup> However, if the owner alleges and proves the termination of the possessory right of the defendant, the defendant will have no further recourse even if the eviction leaves him or her destitute and homeless as these circumstances have no legal effect on the owner's property rights. This was based on the liberal view that property rights should be entrenched and protected at all costs against unlawful intrusions even if it infringed other person's rights.<sup>58</sup>

Eviction was a very strong remedy at common law provided to owners to avoid the unlawful intrusion of their property rights. However, and notwithstanding these strong rights, owners were not allowed to evict a person without following the legal process. Occupiers could, in terms of the common law, approach the courts for a spoliation order in the event that they were unlawfully disposed from their land or home in terms of the common law.<sup>59</sup> Although the common law did not place much legitimacy on the historical and social contexts of eviction, the courts did have a discretion to consider circumstances which could be considered relevant in an eviction matter.<sup>60</sup> In *S v Govender*,<sup>61</sup> the Supreme Court stated that before an eviction order is granted in terms of section 46(2) of the Group Areas Act, the court should take into account a range of factors, which included, *inter alia*, the attitude of the neighbors, the governments policy and the interests of landlords, the personal hardships that the eviction may cause and the availability of alternative accommodation.<sup>62</sup>

However, the common law rules of eviction were limited by the Prevention of Illegal Squatting Act 52 of 1951 (PISA), which extended the already strong property rights

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<sup>56</sup> At 479. However, should the owner allege in its papers that the defendant had a right to possession, said right had to be terminated before instituting eviction proceedings. Also see *Chetty v Naidoo* 1974 (3) SA 13 (A); Keightley 'When a home becomes a castle: A constitutional defense against common law eviction proceedings: *Ross v South Peninsula Municipality*' (2000) 117 SALJ 27.

<sup>57</sup> *Chetty* at 21H. Also see Keightley R 'The impact of the Extension of Security of Tenure Act on an owner's right to vindicate immovable property' (1999) 15 SAJHR 286.

<sup>58</sup> Van der Walt 2005a, 410.

<sup>59</sup> Roux 2004, 471.

<sup>60</sup> *S v Govender* 1986 (3) SA 969 (T) at 971.

<sup>61</sup> This case concerned an eviction under the Groups Area Act 36 of 1966, which criminalised occupation of land in contravention of the Act. See Roux 2004, 472.

<sup>62</sup> *Govender* at 971. See Roux 2004, 472.

to evict.<sup>63</sup> PISA amended the application of the mandament van spolie through the authorisation of evictions without a court order.<sup>64</sup> After the *Govender* judgment, PISA was amended to make the application of *Govender* to its provisions impossible.<sup>65</sup> This had the consequence that evictions in terms of PISA did not take into account the socio-economic and personal circumstances of occupiers.

Any resistance by the courts to mitigate the harshness of evictions on vulnerable occupiers and to limit the state's powers to evict, resulted in further amendments of legislation and limitation on the court's powers.<sup>66</sup>

These draconian land laws made it easy for the apartheid government to effect evictions and forced removals required for racial segregation and the establishment of an unjust and inequitable land use system.<sup>67</sup> It further strengthened the already strong eviction rights of owners, and it shifted the status of evictions from action emanating from the common law power to sue for eviction to action based on a 'public law power' which manipulated social relationships through the unequal distribution of land and land segregation policies.<sup>68</sup>

### **3.3 Post – Apartheid position: Interpreting relevant circumstances within the context of Section 26(3)**

Apartheid land laws used evictions as a mechanism to uproot millions of black South Africans, which left them homeless, socially and economically marginalised and vulnerable. Section 26(3) was enacted with the aim of reversing these processes through the enactment of land-reform legislation and programmes.

Section 26(3) means that arbitrary evictions and the demolishing of homes cannot take place without a court order and after all relevant circumstances have been taken

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<sup>63</sup> Van der Walt 2005a, 413.

<sup>64</sup> Section 3B(1)(a). This new provision was inserted by the amendment of the PISA statute in 1976. See Roux 2004, 471.

<sup>65</sup> Roux 2004, 472.

<sup>66</sup> Van der Walt 2005a, 415.

<sup>67</sup> Van der Walt 2005a, 413.

<sup>68</sup> Van der Walt 2005a, 415.

into account. PISA and other apartheid land laws, which allowed evictions without court orders, were thus in conflict with the rights enshrined in section 26(3).<sup>69</sup>

However, does section 26(3) impact on the common law property right to evict?

Section 26(3) aims to prohibit the repetition of past unlawful, forced and arbitrary evictions and to accordingly transform the South African legal order.<sup>70</sup> However, section 26(3) does not just prohibit past practices it also specifies new governing norms, which guides future conduct within eviction matters and also ‘contemplates a future in which eviction orders will be sought and granted’.<sup>71</sup> This ‘future’ can either be regulated through legislation that specifies factors that need to be considered before an eviction is granted or through the courts, which could have the effect of limiting the owner’s right to evict.

However, these circumstances and factors may have no impact on the common law, if ‘relevant circumstances’ were to be given the same meaning as circumstances at common law by the courts.<sup>72</sup> The possibility thus exist that the words have no real meaning as the courts must always consider ‘all relevant circumstances’ before making their decisions, ‘as this is in the nature of the judicial process’.<sup>73</sup> This could also mean that it ‘does not alter the common law other than to mandate the passing of legislation, which may have this effect.’<sup>74</sup> It is therefore important to identify these circumstances in the land-reform legislation to assess its impact on the common law and to consider if it brings about social justice and transformation.

‘Relevant circumstances’ within section 26(3) could be interpreted more broadly than the above, if the courts identify circumstances and give meaning to its provisions, which encompass the transformative vision of the Constitution. Section 26(3) has the potential to provide the courts with a discretion to refuse, suspend or stay an eviction

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<sup>69</sup> Currie and De Waal 2005, 588.

<sup>70</sup> Roux 2004, 473.

<sup>71</sup> Roux 2004, 467.

<sup>72</sup> Roux 2004, 473.

<sup>73</sup> Budlender ‘Justiciability of the right to housing – The South African experience’ in Scott Leckie (ed) *National Perspectives on Housing Rights* (2003) 207 at 211-212.

<sup>74</sup> Roux 204, 474.

order, even if an eviction order would have been granted at common law, after the consideration of all relevant circumstances.<sup>75</sup>

### **3.4 Introduction to the Land tenure reform legislation**

#### **3.4.1 Introduction**

The State has given effect to section 26(3) by enacting enabling legislation, which provides protection to people who are vulnerable to eviction and who live in insecure tenure arrangements.<sup>76</sup>

There are a number of land-reform laws, which regulate the occupational rights and/or eviction proceedings of different types of occupiers.<sup>77</sup> For our purpose, this paper will concentrate on PIE and ESTA, which regulate evictions of occupiers living on agricultural land. Both laws prescribe fair eviction procedures, criteria for eviction and the circumstances to be considered before eviction orders are granted.

Both PIE and ESTA set out procedural requirements before an eviction may occur which regulates, *inter alia*, the notice periods, how the occupational rights should be terminated and legal representation of parties.<sup>78</sup> In addition to these procedural requirements, there are additional substantive factors that the courts have to consider before the granting of an eviction order, which will be explored in greater detail below.

A commonality in both Acts is that they call for special protection and considerations for the rights of the elderly, children, disabled persons and particularly households headed by women as these vulnerable groups suffer disproportionately from eviction practices. The recognition of these special circumstances by the legislature is in accordance with the provisions of the ICESCR.<sup>79</sup> A further common feature of both

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<sup>75</sup> Budlender 2003, 211.

<sup>76</sup> Budlender 2003, 209.

<sup>77</sup> See footnote 46 above.

<sup>78</sup> The procedural requirements of PIE are stipulated in section 4(1) – (5), 4(8) - (11), 15(2) and (3). In terms of ESTA, the procedural requirements are stipulated in section 9 and 15(2).

<sup>79</sup> UNESCR General Comment 7.

Acts is the emphasis on justice, fairness and equity, which play an important role in determining the relevant circumstances to be considered within eviction matters.<sup>80</sup>

### **3.4.2 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)**

#### **3.4.2.1 Purpose and the applicability PIE**

In view of the historical background set out in Chapter 1 above, the impact of the pre-constitutional eviction laws on the existing rights of vulnerable and marginalised persons facing eviction, and the constitutional requirements set out in section 26(3), it was necessary for an Act to be promulgated to regulate the unlawful occupation of land. PIE was enacted with the aim to prohibit illegal evictions and to provide for procedures for the eviction of unlawful occupiers so as to avoid vulnerable persons being left destitute after an eviction<sup>81</sup> In addition to protecting the rights of occupiers, PIE also protects the interests of landowners.<sup>82</sup>

PIE repealed PISA and other previous legislation dealing with unlawful occupation.<sup>83</sup> Initially there was uncertainty around whether PIE applied to all instances of illegal occupation, which included tenant and landlord situations. The initial case law<sup>84</sup> indicated that PIE is only applicable where vacant land has been unlawfully occupied. However, the latest judicial authority indicates that PIE applies to all unlawful occupation, for example where the property is used as a home and where the occupier has no prior consent.<sup>85</sup>

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<sup>80</sup> This is evidenced in sections 4, 5 and 6 of PIE and sections 10(1), 10(3), 11(1), 11(2), 11(3), 12(1), 12(2) and 13(2) of ESTA. Also see Keightley 1999, 279.

<sup>81</sup> Pienaar and Muller 'The impact of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 Of 1998 on homelessness and unlawful occupation within the present statutory framework' (1999) 3 *Stell LR* 379. Also see Badenhorst (2003) *Silberberg & Schoeman's The Law of Property* 527.

<sup>82</sup> Pienaar and Muller 1999, 379. Also see Badenhorst 2003, 527.

<sup>83</sup> Pienaar and Muller 1999, 382.

<sup>84</sup> See *Absa Bank v Amod* (1999) 2 All SA 423 (W); *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C), *Betta Eiendomme v Ekple-Epoh* 2000(4) SA 468(W), *Ellis v Viljoen* 2001 (5) BCLR 487 ( C) and *Brizley v Drotsky* 2001 4 All 573 (SE). The courts followed the view that the PIE does not apply to persons who initially occupied premises with consent but whose occupation became subsequently unlawful.

<sup>85</sup> *Ndlovu v Ngcobo and Bekker v Jiga* 2002 (4) All SA 384 (SCA). Also see Badenhorst 2005, 528.

### 3.4.2.2 Relevant circumstances to be considered before an eviction

PIE distinguishes between the eviction of unlawful occupiers at the instant of a private individual<sup>86</sup> and the State.<sup>87</sup> It also provides for urgent eviction proceedings under certain circumstances.<sup>88</sup>

In eviction proceedings at the instant of private individuals, PIE specifies different circumstances to be considered where the unlawful occupiers have resided on the property for less than six months<sup>89</sup> and where unlawful occupiers have resided on the property for more than six months.<sup>90</sup>

If the unlawful occupier has resided on the premises for less than six months, the court may grant the eviction order if it is of the opinion that it is just and equitable to do so after the consideration of all relevant circumstances, which includes the rights and the needs of the elderly, children, disabled persons and households headed by women.<sup>91</sup>

If an unlawful occupier has resided on the land or premises in question for more than six months, the 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 relevant circumstances, including the rights and the needs of the elderly, children, disabled persons and households headed by women.<sup>92</sup> In addition to these factors, the court has to consider whether land has been made available or can reasonably be made available for relocation of the occupier by the municipality, another organ of state, or a landowner.<sup>93</sup> However, the latter requirement is waived in instances where the land has been sold in a sale of execution pursuant to a mortgage.<sup>94</sup>

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<sup>86</sup> Section 4.

<sup>87</sup> Section 6.

<sup>88</sup> Section 5.

<sup>89</sup> Section 4 (6).

<sup>90</sup> Section 4 (7).

<sup>91</sup> Section 4 (6). See Van der Walt 2002b, 286.

<sup>92</sup> Section 4 (7). See Van der Walt 2002b, 286.

<sup>93</sup> Section 4 (7).

<sup>94</sup> Section 4 (7). See Van der Walt 2002b, 286.

If the eviction of an unlawful occupier is instituted at the instance of the State, the court must consider if it is just and equitable to grant the eviction order after considering if the occupier obtained consent to erect structures or a building on the land or if the eviction is in the public interest.<sup>95</sup> In deciding whether it is ‘just and equitable’ the courts must have regard to the circumstances surrounding the occupation,<sup>96</sup> the period of occupation<sup>97</sup> and the availability of alternative accommodation.<sup>98</sup>

If an owner makes application for an urgent eviction, the court before granting the urgent eviction application, has to consider whether there is real and imminent danger to the owner’s life and property if the unlawful occupier is not evicted, whether the hardship of the owner exceeds that of the occupier, and whether there is no other effective remedy.<sup>99</sup>

Separate provisions are applicable to evictions at the instance of an organ of state which may institute eviction proceedings with regard to land situated in its jurisdiction except where the unlawful occupier is a mortgagor and the land is sold in a sale of execution.<sup>100</sup> The court is required to grant an eviction order if it is just and equitable to do so after the consideration of all relevant circumstances.

Factors that the court should take into account include whether the occupant is in occupation of the land and has erected structures without consent and whether it is in the public interest to grant the order.<sup>101</sup> The term ‘public interest’ has also been defined in PIE and includes circumstances, which relate to the interest and safety of those occupying the land and the general public.<sup>102</sup> The court must also consider the

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<sup>95</sup> Section 6 (1)(a) and (b).

<sup>96</sup> Section 6 (3)(a).

<sup>97</sup> Section 6 (3)(b).

<sup>98</sup> Section 6 (3)(c).

<sup>99</sup> The case of *Groengras Eiendom v Elandsfontein Unlawful Occupants* 2002 (1) SA 125 (T) provides a range of factors that the court should consider in an urgent application for eviction. Also see Badenhorst 2005, 530.

<sup>100</sup> Section 6.

<sup>101</sup> Section 6 (3)(a) and (b). Badenhorst 2005, 530.

<sup>102</sup> Section 6 (2).

availability of suitable alternative accommodation, regardless of the period of occupation of the unlawful occupier.<sup>103</sup>

Within urgent eviction proceedings, different factors to the above are considered by the courts before the eviction is granted.<sup>104</sup> The court should satisfy itself that there will be substantial injury or damage to the property or any person if the occupier is not evicted, and that there is no other effective remedy.<sup>105</sup> The court is also required to weigh up the hardships of the owner and that of the occupier before an eviction is granted and such order may only be granted if the owner's hardship exceeds that of the occupier.<sup>106</sup>

A range of factors have thus been identified before an eviction may be granted in terms of PIE. The Act prescribes that the court has to grant an eviction order if it is satisfied that all the requirements of the Act have been met and that a valid defense has not been raised by the occupier.<sup>107</sup> However, the court order has to contain details regarding a 'just and equitable date' relating to when the eviction should occur.<sup>108</sup> When determining this date, the court must have regard to all relevant factors including the period of occupation.<sup>109</sup>

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### **3.4.3 Extension of Security of Tenure Act 62 of 1997 (ESTA)**

#### **3.4.3.1 Purpose and application of ESTA**

ESTA recognises that many South Africans living on farms do not have secure tenure due to the discriminatory apartheid land laws. It further acknowledges that the insecure tenure arrangements make many occupiers vulnerable to unfair evictions, which 'leads to great hardship, conflict and social instability'.<sup>110</sup>

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<sup>103</sup> Section 6 (3)(c).

<sup>104</sup> Section 5.

<sup>105</sup> Section 5 (1)(a) and (c).

<sup>106</sup> Section 5 (1)(b).

<sup>107</sup> Badenhorst 200, 532.

<sup>108</sup> Section 4(8)(a) and (b). 'Public interest' has been defined in section 6(2), which includes the interest of the health and safety of the occupiers and the public.

<sup>109</sup> Section 4 (9).

<sup>110</sup> See the Preamble to ESTA.



ESTA provides security of tenure only to lawful occupiers who either have the consent of the landowner to occupy land or have another right in law to occupy<sup>111</sup> rural land, which has not been established, approved, proclaimed or recognised by law as a township.<sup>112</sup>

ESTA aims to protect certain vulnerable occupiers through the facilitation of long term security of tenure and it prescribes the conditions and circumstances under which an occupier's right to occupation may be terminated.<sup>113</sup> It specifically seeks to regulate the eviction of vulnerable occupiers from land in a fair manner, whilst recognising the property rights of landowners to apply to court for an eviction order under appropriate circumstances<sup>114</sup>

### **3.4.3.2 Relevant circumstances to be considered before an eviction**

The eviction procedures in terms of ESTA consists of two stages, namely the termination of the existing right to reside on the premises<sup>115</sup> and the actual eviction process, which requires the owner to approach the court for an eviction order.<sup>116</sup> Both stages require specific circumstances to be taken into account, before the court may consider an eviction application.

An eviction application may only be instituted in a court of law, after the occupier's existing rights to occupy the land has lawfully been terminated in accordance with ESTA.<sup>117</sup> Section 8(1) provides for the termination of the right to residence on lawful, just and equitable grounds, after having regard to all the relevant factors.<sup>118</sup> The section lists a number of factors that the court has to take into account,<sup>119</sup> in particular, the court must consider whether the termination was fair in all the

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<sup>111</sup> Van der Walt 2002b, 275.

<sup>112</sup> Section 2.

<sup>113</sup> See the Preamble to ESTA.

<sup>114</sup> See the Preamble to ESTA. Also see Keightley 1999, 279; Badenhorst 2005, 500.

<sup>115</sup> The termination procedures are dealt with under section 8 of ESTA.

<sup>116</sup> The eviction procedures are dealt with in sections 10 and 11 of ESTA.

<sup>117</sup> Roux 'Chapter 7: The Extension of Security of Tenure Act' in Budlender, Latsky and Roux (1998) *Juta's New Land Law* 7A-17.

<sup>118</sup> Roux 1998, 7A-19.

<sup>119</sup> Circumstances are listed in section 8 (1)(a) –(c).

circumstances.<sup>120</sup> Special circumstances apply to occupiers who have an existing employment agreement,<sup>121</sup> long term-protected occupiers<sup>122</sup> and their spouses and dependants.<sup>123</sup> Once the right to residence has been lawfully terminated, the landowner may apply for an eviction order. However, valid termination does not guarantee an eviction, as the Act prescribes additional requirements before an eviction order is granted.<sup>124</sup>

ESTA specifies four requirements before an eviction order is to be granted.<sup>125</sup> However, this paper will only explore the prerequisite which requires that the substantive conditions in sections 10 and 11 have been complied with.<sup>126</sup> These sections prescribe the circumstances to be considered before an eviction application is granted and they distinguish between occupiers who lawfully occupied the land before 4 February 1994<sup>127</sup> (effective date occupier) and occupiers who lawfully occupied the land after 4 February 1994<sup>128</sup> (post-effective date occupier).

Effective date occupiers are further categorised into four distinct categories 'in order to do justice to particular circumstances'.<sup>129</sup> Where the effective date occupier has done something seriously wrong by breaching section 6(3)<sup>130</sup> of ESTA or the residence agreement, the court has to consider the nature of the breach, whether the owner has complied with the provisions of the agreement, and finally if the occupier failed to remedy the breach after being requested to do so after one month's notice.<sup>131</sup> After the court has satisfied itself with these factors, the court may grant an eviction, without considering any other factors.

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<sup>120</sup> Roux 1998, 7A-19.

<sup>121</sup> Section 8 (2) and (3).

<sup>122</sup> Section 8 (4).

<sup>123</sup> Section 8(5). Also see Van der Walt 2002b, 276 -277; Roux 1998, 7A 19 -25.

<sup>124</sup> Keightley 1999, 282.

<sup>125</sup> Van der Walt 2002b, 277. The requirements are highlighted in section 9(1)(a)–(d).

<sup>126</sup> Section 9(1)(c).

<sup>127</sup> Regulated in terms of section 10. See Van der Walt 2002b, 278.

<sup>128</sup> Regulated in terms of section 11. See Van der Walt 2002b, 278.

<sup>129</sup> Roux 1998, 7A-31.

<sup>130</sup> Section 6(3) requires that an occupier not harm any other occupier on the land, threaten or intimidate others residing on the land, cause material damage to any property of the owner or erects illegal dwellings on the land.

<sup>131</sup> Section 10(1)(a) and (b).

If the effective date occupier causes the irretrievable breakdown of the owner-occupier relationship<sup>132</sup> or voluntarily resigns from the employment where his or her right to residence arose solely from the employment relationship,<sup>133</sup> the court may grant the eviction if the relationship cannot be restored<sup>134</sup> and the circumstances' surrounding the resignation do not amount to constructive dismissal.<sup>135</sup> Additional factors need not to be considered by the courts if the owner has complied with the applicable substantive and procedural requirements of ESTA.<sup>136</sup>

If the effective date occupier does not breach any of the factors as set out above, the court may grant an eviction order if it is satisfied with the availability of suitable alternative accommodation to the occupier<sup>137</sup> and nine months have not yet elapsed after the termination of the right to residence.<sup>138</sup>

In respect of the last category of effective date occupiers, the landowner is not required to provide suitable alternative accommodation if nine months have elapsed after the termination of the occupational rights<sup>139</sup> and he or she provided the dwelling occupied by the occupier,<sup>140</sup> and the effective operations of the owner is being seriously prejudiced by the continued occupation of the occupier.<sup>141</sup>

If the above exemption applies to the applicability of available suitable alternative accommodation, the courts are obliged to consider the efforts by the parties in attempting to find suitable alternative accommodation<sup>142</sup> and the comparable hardships which the parties will be exposed to if the order is not granted in their favor<sup>143</sup> before granting the eviction order.<sup>144</sup>

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<sup>132</sup> Section 10(1)(c).

<sup>133</sup> Section 10(1)(d).

<sup>134</sup> Section 10(1)(c).

<sup>135</sup> Section 10(1)(d).

<sup>136</sup> Van der Walt 2002b, 279. Also see Roux 1998, 7A-32-33.

<sup>137</sup> Section 10(2).

<sup>138</sup> Section 10(3)(a) read with the other provisions in the section.

<sup>139</sup> Section 10(3)(a).

<sup>140</sup> Section 10(3)(b).

<sup>141</sup> Section 10(3)(c).

<sup>142</sup> Section 10(3)(c)(i).

<sup>143</sup> Section 10(3)(c)(ii).

<sup>144</sup> Van der Walt 2002b, 280, Also see Roux 1998, 33.

In respect of post-effective date occupiers, no distinction is made between occupiers who did something wrong or those who did not.<sup>145</sup> The court may grant an eviction order if it is satisfied that the residential agreement has terminated on a fixed date based on a fair and/or a material and/or an express term of the agreement or if the court considers it 'just and equitable' to evict the occupier after the effluxion of time.<sup>146</sup> The court may further grant an eviction based on any factor if it is of the opinion that it is 'just and equitable' to do so.<sup>147</sup> Section 11 is not as prescriptive as the provisions of section 10; the section obliges the court to have regard to certain factors when considering if it is 'just and equitable' to evict the occupier.<sup>148</sup> These factors relate to the length of time that the occupier has been on the land,<sup>149</sup> the fairness of any agreements between the parties,<sup>150</sup> whether suitable alternative accommodation is available to the occupier,<sup>151</sup> the reason for the eviction and the balance of the interests of the owner,<sup>152</sup> the occupier and the remaining occupiers.<sup>153</sup>

In order for the court to consider whether the factors of section 10 and 11 have been met, the court is required to request a probation officer's report in terms of section 9(3) of ESTA.<sup>154</sup> In addition to the pleadings submitted by the parties, the court is also required to consider the information, circumstances and factors highlighted in the report. The probation officer should submit the report within a reasonable time after being requested to do so by the court<sup>155</sup> and provide information on the availability of suitable alternative accommodation to the occupier<sup>156</sup> and how an eviction will affect the constitutional rights of any person including the rights of the children, if any, to education.<sup>157</sup> It further highlights any undue hardships, which an eviction would

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<sup>145</sup> Van der Walt 2002b, 281.

<sup>146</sup> Section 11(1).

<sup>147</sup> Section 11(2).

<sup>148</sup> Section 11(3).

<sup>149</sup> Section 11(3)(a).

<sup>150</sup> Section 11(3)(b).

<sup>151</sup> Section 11(3)(c).

<sup>152</sup> Section 11(3)(d).

<sup>153</sup> Section 11(3)(e).

<sup>154</sup> Badenhorst 2005, 507. The Minister in terms of section 1 of the Probation Services Act 116 of 1991 appoints the probation officer.

<sup>155</sup> Badenhorst 2005, 507.

<sup>156</sup> Section 9(3)(a).

<sup>157</sup> Section 9(3)(b).

cause to the occupier<sup>158</sup> and any other factor, which is considered relevant to the matter.<sup>159</sup>

The importance of this provision cannot be over-emphasised as it allows the court to consider a range of circumstances, which might not be considered relevant within the substantive provisions of sections 10 and 11 and it may also consider circumstances not provided by the latter provisions in order to avoid the eviction leading to greater hardship.

However, the courts have dispensed with this provision, if the probation officer takes long to compile and place the report before the court, after being requested to do so by the court.<sup>160</sup> The courts have also determined the ‘requesting’ of the report as peremptory and not the actual placing of the relevant circumstances before the court.<sup>161</sup> This, I would argue, defeats the purpose of the provision, which is to place relevant circumstances before the court as required by section 26(3) of the Constitution.

### **3.5 Relevance of compliance with procedural and substantive provisions of PIE and ESTA**

Section 26(3) of the Constitution itself obliges landowners to tolerate the presence of unlawful occupiers on their land by prohibiting evictions ‘without an order of court’ and this necessarily requires landowners to follow proper procedures. The rules of court are designed to ensure that parties to an eviction matter have notice of the dispute, and an adequate opportunity to present their case. Procedure, affords occupiers in an eviction proceeding a better opportunity than they would have had under the common law rules to put before the court all the circumstances that they allege to be relevant.

Although PIE and ESTA are aimed at different types of occupiers, both Acts regulate the eviction of occupiers from land in a fair manner. Essential elements, which

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<sup>158</sup> Section 9(3)(c).

<sup>159</sup> Section 9(3)(d).

<sup>160</sup> *Gili Greenworld Holdings (Pty) Ltd v Shisonge* 19/02 LCC at para 17.

<sup>161</sup> *Thewaterskloof Holdings (Pty) Ltd v Jacobs* 37/2001 LCC.

promote fairness within eviction matters, are the provision of appropriate procedural protection and due process mechanisms to an occupier. If evictions are invoked unfairly it leads to undue hardships and destitution. Compliance with the procedural and substantive provisions of the Acts cannot be over-emphasised as it facilitates fairness within the eviction process, which provides a better opportunity for the parties to place all the relevant circumstances before the court thus ensuring that the eviction processes do not disproportionately affect one of the parties. Factors which promote fairness and due process are, *inter alia*, effective and proper notification before an eviction, the right to legal representation and to be consulted before the eviction, proper identification of the occupiers who are to be evicted and that evictions happen at an appropriate time so as to mitigate the harshness of the eviction.

Procedural requirements, which facilitate fairness within the eviction process, are provided for in PIE<sup>162</sup> and ESTA.<sup>163</sup> Despite clear procedural requirements and a body of case law setting out directive guidelines on the procedures to be followed, many cases have fallen foul of the procedural requirements, which resulted in many matters being set aside by the courts on appeal or review. This is reflected in matters where there has been non-compliance with the effective serving of notices<sup>164</sup> and the procedural and substantive provisions of the legislation,<sup>165</sup> lack of legal representation<sup>166</sup> and lack of *locus standi*.<sup>167</sup> Many other procedural irregularities

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<sup>162</sup> Section 4(2)–(5), which provides how the notice of the eviction proceedings is to be served and the required information to be reflected in these notice, namely right to legal representation, the grounds of the eviction and the date, time and place of the hearing.

<sup>163</sup> Section 9 places limitations on eviction proceedings, section 12 regulates who, when and how the eviction is to be effected and section 13 regulates the circumstances after an eviction so as to ensure that the occupier is properly compensated for any losses after being evicted

<sup>164</sup> In *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) at para 20 confirmed the decision of the court *a quo* with regard to the service of notices. It stipulated that section 4(2) of PIE is peremptory. The court *a quo* stipulated that the notification had to be in a language, which the occupants understand as a large majority of them were illiterate and could only speak Xhosa. The SCA required that the notices had to be read in Xhosa, to ensure due process and fairness within the eviction process. Also see ESTA cases *Green v Gumede* 92R/00 LCC. Service on the municipality and other relevant authorities are also important and the courts have set matters aside due to lack of compliance; See *Gawie Rossow v Goeman* 93R/00 LCC, *McKenzie v Lukas* 11R/04 LCC, *Ridway v Janse Van Resburg* 2002 (4) SA 186 (C); For PIE related matters see *Illegal Occupiers of Various Erven, Phillippi v Monwood Investment Trust Company (Pty) Ltd* 2002 (1) All SA 115 (C); *Transnet t/a Spoornet v Informal Settlers of Goodhope* 2001 (4) All SA 516 (W).

<sup>165</sup> See *Pretorius v Ramoseme* 95R/00 LCC where the Court set aside the matter due to non-compliance with section 12 of ESTA.

<sup>166</sup> *Bower v Nkomuzwayo* 02R/02 LCC the court stipulated that another aspect of concern relates to legal representation for the respondent. It was held in the case of *Nkuzi Development Association v The Government of the Republic of South Africa and Another* 10/01 LCC that persons who have a right to security of tenure and whose security of tenure is threatened or has been infringed, are entitled to legal

have been identified by the courts; however, it is important to note that the courts reluctantly allow evictions to proceed if the circumstances do not reflect procedural compliance with the legislation and/or any other due process laws.

The courts have further indicated that it is disturbing to note that there are still glaring omissions with regard to compliance with service, notice periods, eviction dates and other provisions, despite a plethora of case law.<sup>168</sup> Therefore when determining all relevant circumstances before an eviction, the court must consider factors, which highlight whether the procedural requirements have been met and the possible impact of lack of compliance on the rights of the occupier.

### 3.6 Conclusion

Section 26(3) specifically states that people should be protected from ‘unfair’ evictions which take place without legal recourse to the law.<sup>169</sup> The inclusion of these rights within domestic legislation like PIE and ESTA reflects South Africa’s commitment to enshrine the principles of the ICESCR in its domestic law.

Although PIE and ESTA deal with different types of occupiers, a defining feature of both Acts, is that it forms part of a bundle of legislation directed at achieving land-reform. Within eviction matters, it charts new territory by forcing the courts to consider relevant circumstances which limit the property right of owners to evict and which mitigate the harshness of eviction proceedings by making substantive justice accessible to the previously marginalised within the South African society.

The statutory provisions of both Acts reflect the legislature’s intention to amend the existing common law by providing additional factors to be considered before an eviction is considered. It has been argued that in principle ‘this should result in

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representation or legal aid at state expense in cases where substantial injustice would otherwise result, and if they cannot reasonably afford the costs of such representation from their own.’

<sup>167</sup> *Henri du Plessis Trust v Kammiés* 77R/01 LCC, which dealt with the *locus standi* of a trust. Also see *Remhoogte Boerdery v Mentoer* 73/01 LCC.

<sup>168</sup> *Swartz v Malope* 83R/00 LCC paras 11-12.

<sup>169</sup> Agenda 21: Report of the United Nations Conference on Environment and Development, Rio De Janeiro, 3 -14 June 1992, Vol 1.( A/CONF.151/26/Rev.1(vol), annex II, Agenda 21, chap 7.9(b). See also UNCESCR General Comment 7. The Habitat Agenda: Report of the United Nations Conference on Settlements (Habitat II).

substantive amendment of the common law,<sup>170</sup> however, the courts have given conflicting interpretations to the provisions of both Acts.

It is therefore important to consider what meaning the courts have given these circumstances and whether the courts have gone beyond the circumstances as provided for by legislation to fulfill the transformative vision of the Constitution, in a tangible way.

A more distinct picture will emerge after the courts' approach has been analysed. The next chapter, which deals with the judicial interpretation of 'relevant circumstances', will reflect the extent to which the interpretation of both Acts impinge on the common law property rights of owners to evict.



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<sup>170</sup> Van der Walt 2005a, 419.



## CHAPTER FOUR

### JUDICIAL INTERPRETATION OF RELEVANT CIRCUMSTANCES

#### 4.1 Introduction

Roux highlights that where a 'legal system goes through a period of transformation after the adoption of a constitution, two concerns inevitably compete with each other: the need for legal continuity [in decision making] and the imperative that the old-order rules indeed need to give effect to the new Constitution.'<sup>171</sup> It is clear from the previous chapter that the legislature has attempted to transform the legal rules of eviction through the enactment of land reform legislation like PIE and ESTA, which places limitations on the owner's property right to evict. However, it is not always possible to cater for all types of situations within legislation and the legislature does not stipulate how the laws should be interpreted.<sup>172</sup> The latter interpretations have thus been 'mainly left to the judiciary, whose task is to combine 'the old rules with the new rules so as to achieve the objectives laid down by our constitution and the legislature.'<sup>173</sup>

This task is an onerous one for the judiciary, as the courts are continually faced with choosing between 'legal continuity and the need to do constitutional justice to a particular matter.'<sup>174</sup> The courts can facilitate transformation within eviction matters by calling into question the existing unjust resource allocation of land and housing where occupiers are going to be left homeless and destitute after the eviction. The courts can also affirm the historically weak tenure rights of vulnerable persons and

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<sup>171</sup> Roux 2004, 466.

<sup>172</sup> Roux 2004, 466.

<sup>173</sup> Roux 2004, 466.

<sup>174</sup> Roux 2004, 466.

even recognise rights where no such rights were recognised previously. The courts can contribute to transformation by making judgments which addresses the social injustices of poverty and inequality caused by apartheid. The courts can place limitations on the absolute notion of property rights by taking into account the needs and interests of poor people in respect of the protection of their homes, which could effectively influence the development of the common law.

It cannot be denied that section 26(3) and the legislation like PIE and ESTA pose interpretation problems to the courts, if the courts have to develop the common law in accordance with the transformative vision of the Constitution. Diverging approaches have emerged in case law dealing with these provisions and, in particular, how the courts have interpreted ‘relevant circumstances’ as these circumstances place limitations on the common law rights of owners to evict. The courts’ interpretations of section 26(3) and legislation either reflect a narrow unwillingness to amend the common law rights of owners where the limitations have not been supported by legislation or a slow commitment by the courts to effect the changes brought about by the legislation. In other instances the courts have broadly interpreted the provisions of section 26(3) and the legislation by developing the common law rules of eviction in accordance with the transformative vision of the constitution.

The courts interpretation of ‘relevant circumstances’ in terms of section 26(3), PIE and ESTA will be highlighted in more depth below.

## **4.2 Section 26(3) of the Constitution**

### **4.2.1 Defining ‘relevant circumstances’ within section 26(3)**

Section 26(3) does not specify the circumstances to be considered before an eviction order is granted and, where the eviction is not regulated by legislation, it is important that these circumstances be defined so as to avoid unfair evictions. This issue was briefly addressed in *Ross v South Peninsula Municipality*.<sup>175</sup> This case primarily concerned the impact of section 26(3) on the common law right of eviction and the

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<sup>175</sup> 2000 (1) SA 589 (C).

extent to which it placed an onus on the plaintiff to allege relevant circumstances in addition to those that were relevant at common law.<sup>176</sup>

In this matter the owner, the South Peninsula Municipality (Municipality), issued a summons against the occupier claiming eviction based on the common law rules of eviction. The Municipality alleged that it was the landowner and that the occupier had no right in law to reside on the premises.<sup>177</sup> No other facts were alleged by the Municipality. The occupier took an exception to the respondent's summons, alleging that by virtue of section 26(3) of the Constitution, the Municipality did not place relevant circumstances before the Court, which would have entitled it to evict the occupier from the house. The eviction was set aside as the exception to the summons was upheld. The High Court in this matter did not deem it necessary at the time to define the relevant circumstances within the matter as it was 'beyond the scope of the appeal to consider what circumstances are relevant'.<sup>178</sup> However, it said that some guidance could be obtained from the provisions of section 4(6) and 4(7) of PIE<sup>179</sup> notwithstanding the non-applicability of PIE to this particular eviction matter.<sup>180</sup> PIE provides for specific circumstances to be considered before an eviction is granted and it protects the rights of the elderly, children, disabled persons and households headed by women.<sup>181</sup>

This judgment is important as it affirms that section 26(3) of the Constitution has fundamentally changed the common law of evictions as laid down by *Graham v Ridley*.<sup>182</sup> It is no longer sufficient for an owner of property in an eviction application to simply allege that the occupiers occupy the property unlawfully with no right in law to reside on the property.<sup>183</sup> It is required that 'relevant circumstances' must be alleged in the pleadings before the court before an eviction order can be granted. The exact nature of the circumstances is still unclear, however, guidance can be obtained

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<sup>176</sup> Roux 2004, 475. Also see Keightley 2000, 27.

<sup>177</sup> Ross at 591E.

<sup>178</sup> At 591D.

<sup>179</sup> This was a confirmed position in *Absa Bank* at paras 429e -429i, which was adopted by Josman AJ in the *Ross case*. The court in *Amod* took a narrow approach to the application of PIE and it specifically stated it is difficult to accept that PIE Act applies to landlord and tenant situations.

<sup>180</sup> *Amod* at 599B. Also see Keightley 2000, 29, Pope (2002) 711, Roux 2004, 29.

<sup>181</sup> Liebenberg and Kahanovitz 'Cases' (1999) 2 *ESR Review* 1.

<sup>182</sup> Liebenberg and Kahanovitz 1999, 2.

<sup>183</sup> Liebenberg and Kahanovitz 1999, 2.

from the factors a court has to consider under PIE so as to ensure that it is just and equitable to grant the eviction.

The High Court in *MEC for Business Promotion, Tourism & Property Management, Western Cape v Matthyse*<sup>184</sup> confirmed the view that section 26(3) imposes on the court an obligation to consider all relevant circumstances. The occupiers in this matter placed a range of circumstances before the Court, which included the length of occupation, the number of occupiers and the number of women, children and elderly people in each family.<sup>185</sup> The Court referred to the decision of *Ross* and confirmed that PIE provided some guidance as to the sort of circumstances a court might take into account.<sup>186</sup> However, it expressly added that the factors listed in PIE were ‘not exhaustive’.<sup>187</sup> The Court considered the various factors placed before it. However, the proprietary rights of the owner and the housing rights of the occupiers to alternative accommodation were not decisive factors in the Court’s decision to grant the eviction.<sup>188</sup> The Court was primarily influenced by the proposed housing development on the land, which the occupiers occupied, as it was determined that it was in the greater public interest to grant the eviction.<sup>189</sup>

The Court further held that one of the objectives of section 26(3) of the Constitution was to ‘mitigate the harshness of an eviction from a home’ and this reading of section 26(3) allowed the court to stay or suspend orders if it is fair and reasonable to do so under the circumstances.<sup>190</sup>

#### 4.2.2 Narrowing the meaning of ‘relevant circumstances’

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<sup>184</sup> 2000 (1) All SA 377 (C). Shortly after the *Ross* supra, the applicant in *MEC Business* applied for an eviction order under PIE against a number of families who were occupying housing units of applicant’s land. The families were all ex employees of the Western Cape Provincial Government and the units were part of their employee benefits. The school where they were employed was set to close and the Applicant required the property for a new development. The applicant abandoned their application based on PIE and the respondents relied on section 26(3) of the Constitution. Also see Roux 2004, 477.

<sup>185</sup> At para 25. See Roux 2004, 477.

<sup>186</sup> At para 25. See Roux 2004, 477.

<sup>187</sup> At para 25. See Roux 2004, 477.

<sup>188</sup> Roux 2004, 478.

<sup>189</sup> Roux 2004, 478.

<sup>190</sup> At para 32. See Roux 2004, 478.

Subsequent to the *Ross* judgment, there was a commonly held belief among magistrates that pleadings in eviction proceedings had to allege more than mere unlawful occupation of the premises. This position was criticized by the High Court in *Betta Eiendomme (Pty) Ltd v Ekple–Epoh*.<sup>191</sup> This matter was an undefended eviction action where the owner applied for default judgment against the occupiers. The court *a quo* refused the eviction on the basis that ‘illegal occupation in itself was not sufficient relevant circumstances’ to evict a person from his home.<sup>192</sup> On appeal the High Court in *Betta Eiendomme* restated the common law rules pertaining to eviction and furthermore stated that section 26(3) of the Constitution did not impact on private law rights of owners to evict defaulting tenants. The Court stated that the ‘need to protect’ the landlord’s right to restoration of possession of the property, was a relevant circumstance in the absence of legislative interference barring the Court from doing so.<sup>193</sup> The Court further stated that it was wrong to look at PIE for guidance.<sup>194</sup>

In its *obiter* ruling the Court highlighted that relevance includes ‘the unfairness of loss to the owner so that the impertinence of land grabbing can stand’<sup>195</sup> and ‘the taxes and water and electricity bills left unpaid by the unlawful occupier’.<sup>196</sup> The Court further stated that where the occupier has not put up a defense, the court is not required to search for relevant circumstances as there is no necessity to restrict the rights of the owner against an illegal occupier in order to promote the values that underlie the Constitution or to promote the spirit, purport or objectives of the Bill of Rights.<sup>197</sup>

The same restrictive and conservative approach was followed by the Cape High Court in *Ellis v Viljoen*,<sup>198</sup> where the Court reiterated the view that section 26(3) of the Constitution should be read as ‘endorsing the landowners existing common law right

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<sup>191</sup> 2000 (3) All SA 403 (W); Also see Jahzbay S ‘Recent Constitutional Cases’ (2000) November, *De Rebus* 49.

<sup>192</sup> *Betta Eiendomme* at 405. Also see Jahzbay 2000, 49.

<sup>193</sup> *Betta Eiendomme* at 410-411.

<sup>194</sup> *Betta Eiendomme* at 411.

<sup>195</sup> *Betta Eiendomme* at para 12.1. Also see Roux 2004, 481.

<sup>196</sup> *Betta Eiendomme* at para 12.2. Also see Roux 2004, 481.

<sup>197</sup> Hawthorne ‘The right to access to adequate housing- Curtailment of eviction?’ (2002) 34(3) *De Jure* 585.

<sup>198</sup> 2001 (5) BCLR 487 (C) at paras 497E –H.

to regain possession of their land on proof of ownership and [unlawful] occupation by the occupier'.<sup>199</sup> The Court further implied that the circumstances to be alleged by the occupier should be relevant to the establishment of a valid defense in law.<sup>200</sup>

These decisions were criticised as it brought about a restrictive and conservative reading of section 26(3) of the Constitution.<sup>201</sup>

#### **4.2.3 Closing the transformative potential of relevant circumstances as defined in section 26(3) of the Constitution**

In *Brizley v Drotsky*<sup>202</sup> the Supreme Court of Appeal (SCA) stated that in the absence of any specific legislation that grants the courts discretion to amend the common law and deprive a landowner of his common law right to evict upon consideration of specified circumstances – the only circumstances that are relevant are ownership and occupation.<sup>203</sup> Thus 'relevant circumstances' are to be interpreted as circumstances that are legally relevant in terms of the common law or applicable legislation.

The position in *Brizley* confirms the approach that suggests that section 26(3) does not alter the common law position other than to mandate the passing of legislation that may have this effect.<sup>204</sup> It further highlighted the proposition that section 26(3) does not provide the court with a discretion to refuse to grant an eviction order to an owner in circumstances where the owner would be entitled to such an order in terms of the common law.<sup>205</sup> It thus, on this interpretation, negates the court's discretion to refuse or grant an eviction or to stay the execution upon equitable grounds.<sup>206</sup> The common law rights of landowners to summarily reclaim their property (*rei vindicatio*) would

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<sup>199</sup> Roux 2004, 284. Also see Van der Walt 2002a, 402 -403.

<sup>200</sup> Roux 2004, 284. Also see Van der Walt 2002a, 403.

<sup>201</sup> For further reading see Roux 2004; Van der Walt 2002a and Pope 2002.

<sup>202</sup> 2002 (4) SA 35 (SCA) at 42.

<sup>203</sup> Van der Walt 2005a, 676.

<sup>204</sup> Roux 2004, 474. Also see *Nelson Mandela Metropolitan Municipality v Various Occupiers of Stands in Mnyanda Street* 2001 (4) All SA 485 (LCC). The Land Claims Court found that PIE did not apply to the circumstances of the occupiers and therefore the common law would be applicable. Case law has indicated that section 26(3) has not amended the common law.

<sup>205</sup> *Brizley* at paras 42- 45.

<sup>206</sup> This is one of the plausible interpretations provided for by Roux (2004) and Budlender (2003). The SCA in *Brizley* stated that judges have no discretion to refuse an eviction order once lawful cancellation of the lease agreement had been proved.

thus continue to apply in the same manner as it had been applied for the last century, irrespective of the plight of the homeless, the vulnerable or the destitute.<sup>207</sup>

Interpreting relevant circumstances in this manner, narrows the scope available to courts to interpret relevant circumstances in a broad and transformative way. It effectively denies the consideration of socio-economic, personal and historic factors within eviction matters and furthermore excludes the consideration of factors like the availability of alternative accommodation for vulnerable occupiers, from the courts decision-making process.<sup>208</sup> The effect of *Brizley* is that the socio-economic status of the vulnerable occupiers is not taken into account as it is not legally relevant to the matter.<sup>209</sup>

Roux has described the approach followed in *Brizley* as ‘anti-vagueness’ rather than unconstitutional. He suggests that the SCA wanted to avoid the situation where the ‘Constitution exerts indeterminate influence on the common law’ which could have the impact that every legal rule and principle will have to be restated on a case by case basis.<sup>210</sup> The approach followed by the judges in *Brizley* is an approach that many courts instinctively prefer as it provides legal certainty in its decision making, but has the potential to negate or minimise the transformative potential of the Constitution.<sup>211</sup>

#### 4.2.4 A paradigm shift

It should be noted that all of the above cases, in particular *Brizley*, were based directly on section 26(3) of the Constitution and it were not instituted in terms of PIE. These decisions were taken before *Ndlovu v Ngcobo*<sup>212</sup> set the precedent that PIE applies even in cases where occupation was initially lawful. PIE limits ownership rights as the court may only evict a person under the circumstances provided for by PIE, which includes taking into account the impact of the eviction on the rights of the elderly, children and women-headed households.

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<sup>207</sup> Du Plessis, Olivier, Pienaar “Progress in land reform, illegal occupation of land and judicial interpretation” (2002) 17 *SAPL* 204.

<sup>208</sup> Oliphant 2004, 60.

<sup>209</sup> Oliphant 2004, 67.

<sup>210</sup> Roux 2004, 492.

<sup>211</sup> Van der Walt 2005a, 677.

<sup>212</sup> 2003 (1) SA 113 (SCA).

In the case of *Port Elizabeth Municipality v Various Occupiers*<sup>213</sup> (which primarily dealt with PIE) the Constitutional Court commented on the relationship between section 26(3), the common law, and relevant circumstances. The Court stated that the rights involved in section 26(3) are defensive rather than affirmative and the landowner cannot simply say: ‘this is my land; I can do with it what I want, and then send in the bulldozers or sledgehammers’.<sup>214</sup> Simultaneously, the Court also acknowledged that eviction may take place even if it results in the loss of a home.<sup>215</sup>

The Court emphasised that section 26(3) obliges the court to ‘seek concrete and case-specific solutions to the difficult problems that arise.’<sup>216</sup> It further highlighted that if the historical background of evictions in South Africa is not taken into account in eviction matters, ‘the statement in the Constitution that the courts must do what courts are normally expected to do, namely, take all relevant factors into account, would appear otiose (superfluous), even odd.’<sup>217</sup> The Court indicated that relevant circumstances within section 26(3) ‘serves a clear constitutional purpose and is there precisely to underline how non-prescriptive the provision is intended to be’, in order to cater for a wide range of different socio-economic factors and circumstances.<sup>218</sup>

The Court further stated that the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law.<sup>219</sup> The Court concurred with the views expressed by Van der Walt that the expectations that ordinarily go with land title could clash head-on with the genuine despair of people in dire need of accommodation.<sup>220</sup> The rights of all parties have to be balanced by taking into account all the interests involved and the specific factors of each case.

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<sup>213</sup> 2004 (12) BCLR 1268 (CC).

<sup>214</sup> *Port Elizabeth Municipality v Various Occupiers* at para 21.

<sup>215</sup> *Port Elizabeth Municipality v Various Occupiers* at para 22.

<sup>216</sup> *Port Elizabeth Municipality v Various Occupiers* at para 22.

<sup>217</sup> *Port Elizabeth Municipality v Various Occupiers* at para 22.

<sup>218</sup> *Port Elizabeth Municipality v Various Occupiers* at para 22.

<sup>219</sup> *Port Elizabeth Municipality v Various Occupiers* at para 23.

<sup>220</sup> *Port Elizabeth Municipality v Various Occupiers* at para 23. Also see Van der Walt 2002.a, 374.



In the case of *Japhtha v Schoeman*<sup>221</sup> the Constitutional Court reinforced the constitutional protection of poor people against the loss of their homes without all the relevant circumstances being considered. This case challenged the constitutionality of certain provisions of the Magistrates Court Act,<sup>222</sup> which allowed the sale in execution of immovable property for purposes of debt collection.

The effect of the sale of the property would have resulted in the eviction of people from their homes.<sup>223</sup> Section 26(3) of the Constitution has, however, introduced a prerequisite for the granting of an eviction order in the form of ‘the consideration of all relevant circumstances’ by the courts.<sup>224</sup> This requirement created an important right for defaulting debtors who face eviction and possible homelessness for trifling amounts of debt. The Court, in taking into account all relevant circumstances, and in particular the vulnerable position of debtors, ‘read-in’ provisions to the Magistrates Courts Act to provide guidance relating to how courts should deal with these types of applications. The factors to be considered as relevant in such cases are, the circumstances in which the debt was incurred, attempts made by the debtor to pay off the debt, the financial position of the parties, the amount of the debt, whether the debtor is employed or has a source of income.<sup>225</sup> Further considerations for the courts include the ‘availability of alternatives which may allow for the recovery of debt but do not require the sale in execution of the debtor’s home’<sup>226</sup> and whether it would render the debtor and his/her family homeless.<sup>227</sup> In *Standard Bank of South Africa Limited v Elizabeth Snyders and Others*<sup>228</sup> the Court refused to grant orders for the right to execute against immovable property on the strength of the *Japhtha* judgment, as the plaintiff did not make any reference to section 26(3) in his pleadings before the court. Without the express reference to section 26 in the summons, the defendant is

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<sup>221</sup> 2005 (2) SA 140 (CC). This case dealt with section 66(1)(a) of the Magistrates’ Court Act 32 of 1944, which allows for the attachment and sale in execution of private property, including immovable property, to satisfy a debt. In this case the section was used to satisfy small debts by attaching and selling in execution the debtor’s houses.

<sup>222</sup> Section 66(1)(a) of the Magistrates’ Court Act 32 of 1944.

<sup>223</sup> Liebenberg 2005b, 4.

<sup>224</sup> *Standard Bank of South Africa Limited v Elizabeth Snyders and Others* (C) Case no 10076/04 Unreported judgment as at 21 -7 2005. Also see Loggenrenberg, Dicker & Malan ‘Civil Procedure: Sales in execution of judgment debtors homes: The correct approach in default judgment and summary judgment proceedings’ (2005) November, *De Rebus*, 27

<sup>225</sup> Loggenrenberg 2005, 27.

<sup>226</sup> *Japhtha* at para 59. Liebenberg 2005b, 4.

<sup>227</sup> *Japhtha* at para 56.

<sup>228</sup> Case no 10076/04 (C) Unreported judgment.

not placed on terms in respect of section 26 and its protections. The plaintiff must specifically plead that the facts alleged justify an execution in terms of section 26(3),<sup>229</sup> which clearly is broader than the scope of *Brizley*. Although the judgment does not give a blanket prohibition against execution of immovable property in debt collection-related matters, it simply subjects courts to the requirements of section 26(3), where the court must consider all the relevant circumstances before it may order execution against immovable property.<sup>230</sup> In addition to the factors listed above, the court may also take into account any other factors relevant to the particular facts of the case before it.<sup>231</sup> The failure by the State to take adequate steps is in fact a failure to engage meaningfully with the transformative vision of the Constitution.<sup>232</sup>

The State has traditionally had the authority to evict people from land and property if state security, public health and public interest required it. This power existed in terms of the common law of nuisance and various other pieces of legislation.<sup>233</sup> Case law allowed local authorities to evict persons if their structures did not comply with building regulations or if their occupation was a nuisance to their neighbors.<sup>234</sup>

#### **4.2.5 Diverging approaches; nuisance as a relevant circumstance to evict**

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<sup>229</sup> Loggenrenberg 2005, 28.

<sup>230</sup> Deosaran 'Implications for sales in Execution' (2005) July, *De Rebus*, 1.

<sup>231</sup> Deosaran 2005, 1.

<sup>232</sup> *The City of Johannesburg v Rand Properties (Pty) Ltd, Occupiers of ERF 381 Berea Township and others* Case No 04/10330;04/10331;/ 04/10332; 04/10334; 04/24101;04/13835 (W).

<sup>233</sup> See *Johannesburg Inner City* at para 31.

<sup>234</sup> *Vena v George Municipality* 1987 (4) SA 29 (C). This matter was heard prior to 1994. A more recent case, which illustrates the Court's callousness, is in *Joubert v Van Rensburg* 2001 (1) SA 753 (W). This matter was brought before the Court in terms of nuisance laws and not in terms of PIE or ESTA. The Court granted an application for the eviction of occupiers to abate the nuisance caused by their occupation. This matter involved a situation where a community of landless people moved onto a piece of land provided to them by the municipality. The land was given to a Trust, which was formed on behalf of the respondents in this matter. The Trust had to develop the land on the respondent's behalf. The community moved onto the land and the landowners in the vicinity objected to the settlement and they then approached the Court for an eviction as there was a lack of compliance with planning and development laws. It further alleged that the settlement caused a nuisance. The eviction order was granted as the settlement contravened planning laws. The Court further stated that the demolition of the structures did not constitute an eviction but was merely a request by the community to bring the settlement into the confines of the law. This indirect eviction was based on the common law. However, on appeal the SCA in *Mkangeli and Others v Joubert and Others* 2002 (4) SA 36 (SCA), found that the provisions of ESTA apply. Van der Walt 2002, 379 -381.

In the case of *Johannesburg Inner City*,<sup>235</sup> the Municipality sought an eviction order in terms of the National Building Regulations and Building Standards Act 103 of 1977 (NBRA) against more than 300 respondents occupying 6 buildings within the inner city of Johannesburg. It was brought to prevent dangerous living conditions and to promote public health and safety. The Court highlighted that the contextual approach to eviction has unequivocally been accepted by our Constitutional Court.<sup>236</sup> Therefore the health and safety of citizens must be reconciled with the duty towards the poor and destitute.<sup>237</sup> The Court emphasised the need for concrete, case-specific solutions.<sup>238</sup>

The Court found that the constitutionality of section 12(4)(b) of the NBRA must be read subject to section 26(3) of the Constitution. The Court referred to *Port Elizabeth Municipality v Peoples Dialogue*<sup>239</sup> and highlighted that the Constitution imposes an obligation on courts facing similar matters to balance out and reconcile the opposing claims in a just manner, taking into account of all the interest involved in the specific factors relevant to each particular case.<sup>240</sup> The Court stated that the applicant may not exercise its powers in relation to health and safety in a manner, which would violate the rights of the occupiers in particular, the right to access to housing, and the right not to be arbitrarily evicted.<sup>241</sup> This judgment should be compared with *Joubert v Van Rensburg*<sup>242</sup> where the Court did not display the same type of sensitivity towards the rights of the occupiers.

From the case law discussed above, it is clear that ‘relevant circumstances’ in terms of section 26 has been given a broader meaning than circumstances considered to be legally relevant at common law. The courts have adopted a broad context-driven approach to eviction matters, which allows for a range of circumstances to be considered so as to mitigate the harshness of being evicted from one’s home.

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<sup>235</sup> Case No 04/10330;04/10331;/ 04/10332; 04/10334; 04/24101;04/13835 (W). Compare the findings of this case with *Joubert* supra, where the court did not take into account the rights of the occupiers.

<sup>236</sup> *Johannesburg Inner City* at para 15.

<sup>237</sup> See *Johannesburg Inner City* at paras 59-60. Also see *Port Elizabeth Municipality v Various Occupiers* judgment at paras 36, 55, 56.

<sup>238</sup> The court referred to the *Port Elizabeth Municipality v Various Occupier* at para 23.

<sup>239</sup> *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001 (4) SA 759 (SCA).

<sup>240</sup> *Johannesburg Inner City* at para 38. *Peoples Dialogue* at 22.

<sup>241</sup> *Johannesburg Inner City* at para 59.

<sup>242</sup> 2001 (1) SA 753 (W).

As the courts have adopted a transformative interpretation of section 26(3) it would be instructive to evaluate what interpretation the courts have given to the provisions of PIE and ESTA.

### **4.3 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 18 of 1998 (PIE)**

#### **4.3.1 Introduction**

PIE was adopted with the manifest objective of overcoming the above abuses and ensuring that evictions take place in a manner consistent with the values of the new constitutional dispensation. Its provisions have to be interpreted against this background.<sup>243</sup> By setting the requirement of considerations of justice and equity as the threshold for eviction, PIE seeks to do no more than to pursue that to which the law should, in any event, always aspire. In deciding whether an eviction would be just and equitable, the court is required to consider 'all the relevant circumstances'.<sup>244</sup> These include, but are not limited to, the factors specified in sections 4 and 6 of PIE.<sup>245</sup>

The provisions of PIE do not stipulate how the court should apply the circumstances to a specific eviction matter and what weight to be afforded to it. Therefore, ultimately, the determinations of such further circumstances as might be relevant and the weight to be afforded to specific circumstances are left entirely to the judgment and discretion of the court.<sup>246</sup>

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<sup>243</sup> *Port Elizabeth Municipality v Various Occupier* at para 11.

<sup>244</sup> *City of Cape Town v Rudolph* (2003) All SA 517 (C) at 542.

<sup>245</sup> *Rudolph* at 542. Also see *Groengras Eiendomme v Elandsfontein Unlawful Occupants* 2002 (1) SA 125 (T) at para 32.

<sup>246</sup> *Rudolph* at 542 -543.

Whether or not an eviction will take place in terms of PIE is therefore determined by a court and PIE gives it an equitable discretion to make that decision, after considering all the relevant circumstances.<sup>247</sup>

Fairness, justice, morality and social values underlie the provisions of PIE and the courts are required to make decisions, which are fair and equitable under the circumstances.<sup>248</sup>

### 4.3.2 Balancing the rights of occupiers and owners

Making decisions, which are fair and equitable, includes considering the rights of the owner and not just the unlawful occupier as it is the court's duty to consider and protect the interests of both parties (occupier and landowner).<sup>249</sup> In determining what circumstances are relevant, the court should ensure that the eviction is effected in such a manner that fairness and human dignity prevail, after considering all the relevant circumstances, which includes the rights of owners.<sup>250</sup> However, the balancing of these rights should not disproportionately impact on the rights of the occupier.

In *Groengras Eiendomme*<sup>251</sup>, the factors which the Court took into account before granting the eviction order was the manner of invasion of the property, the short duration of occupation of the property, the probability that the occupiers would return to where they came from, the interests of the surrounding communities and also the negative impact of 'land grabs' which might discourage investor-confidence in the country.<sup>252</sup> On this basis the Court granted the eviction as it was in the public interest that the rule of law was upheld, and a period of 48 hours was given to vacate the property.

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<sup>247</sup> *Rudolph* at 543.

<sup>248</sup> Badenhorst 2005, 530.

<sup>249</sup> *People's Dialogue* at 1081H. Also see *Modderklip Boerdery v Modder East Squatters* 2001 (4) SA 385 (W). Badenhorst 2005, 531.

<sup>250</sup> *Groengras Eiendomme* at para 26.

<sup>251</sup> 2002 (1) SA 125 (T).

<sup>252</sup> Van der Walt 2005, 531.

Some of the sentiments raised by the Court were similar to that of the Court in *Betta Eiendomme*.<sup>253</sup> Roux criticized the sentiments of Flemming DJP in *Betta Eiendomme* where he made *obiter* statements on the possibility of Zimbabwe-style land grabs and land invasions if the rule of law is not adhered to.<sup>254</sup> Roux dismissed these ‘ravings’ as fears and prejudices of that of an average middle class magistrate or judge who would take these ‘possibilities’ to be self-evident without any proof.<sup>255</sup> It is with the same level of disapproval that the writer criticizes *Groengras Eiendomme*.

In the case of *Absa Bank v Murray*,<sup>256</sup> the Court also went to great lengths to balance the rights of the occupier and that of the owner.<sup>257</sup> In determining what is just and equitable within the context of ‘relevant circumstances’, the Court looked beyond the position of the immediate parties and took a holistic view of the socio-economic repercussions entwined in the regulation of propriety rights.<sup>258</sup> In this case the Court considered the need for financial institutions to have effective security and held that the failure by the courts to take note of the particular needs of financial institutions would obstruct the realisation of access to adequate housing for all.<sup>259</sup> However, the Court stated that where there is a lack of evidence supporting the existence and substance of any competing right to that of the owner, it would only be logical that the right of the owner be given effect to.<sup>260</sup> The Court further considered the alleged economic sophistication of the respondent including the respondent’s offer to pay rent to the applicant.<sup>261</sup> Other factors taken into account were the respondent’s articulation, intelligence and manner of representation to the court, which to his

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<sup>253</sup> Although *Betta Eiendomme* was determined in terms of section 26(3) and not PIE the sentiments regarding land grabbing are similar. Flemming DJP’s *obiter* ruling on the meaning of ‘relevant circumstances’ includes the ‘unfairness of causing loss to the owners’ so that the impertinence of land grabbing can stand.’ (at par 12.1) Also see Roux 2004, 481.

<sup>254</sup> Roux 2004, 482.

<sup>255</sup> Roux 2004, 481.

<sup>256</sup> 2004 (2) SA 15 (C) In the present case, a mortgage bond was registered in favor of the applicant against the home of the respondents as security for a loan granted by the applicant. Both respondents were sequestrated. The applicant purchased the property at the ensuing auction and resold it. The respondents remained in the property and the applicant applied for an eviction in terms of section 4(7) and 4(8) of PIE as the respondents had resided in the premises for more than 6 months. The respondents opposed the application as they stated that it would not be just and equitable to evict them, and alleged numerous personal circumstances in their opposing papers.

<sup>257</sup> Oliphant 2004, 66.

<sup>258</sup> *Absa Bank v Murray* at 24-25.

<sup>259</sup> *Absa Bank v Murray* at 25.

<sup>260</sup> *Absa Bank v Murray* at 27.

<sup>261</sup> *Absa Bank v Murray* at 30-3.

detriment, were the factors that denied him a postponement to secure legal representation.<sup>262</sup>

The Court's consideration of occupiers' rights might reflect well in theory, however, the outcome reflects once again the strong private law propriety rights of owners vis-a-vis the weak tenure and housing rights of occupiers. The Court in *Absa v Murray* was clear that PIE was not redistributive in nature and does not provide a mechanism for divesting an owner of his property.<sup>263</sup>

If PIE does not facilitate access to housing or land, as occupiers have no vested rights in the property,<sup>264</sup> the question is then raised as to what the consideration of relevant circumstances means to a vulnerable occupier if her subordinate land rights cannot be transformed to stronger rights, in particular, the right to access alternative accommodation after being evicted.

The Court in *Port Elizabeth Municipality v Various Occupiers*<sup>265</sup> acknowledged the challenging role of trying to balance the rights of owners and the housing rights of occupiers. The role of the judiciary in respect of eviction matters was aptly described as follows:

‘In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. It is to balance out and reconcile the opposed claims

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<sup>262</sup> *Absa Bank v Murray* at 31.

<sup>263</sup> *Absa Bank v Murray* at 32. The court made the submission that this view is a misdirected perception of the object of the legislature.

<sup>264</sup> Oliphant 2004, 68.

<sup>265</sup> 2004 (12) BCLR 1268 (CC) at 1289.

in as just a manner as possible taking into account all the interests involved and the specific factors relevant in each particular case.<sup>266</sup>

In the recent decision of *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd Modderklip; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*<sup>267</sup> the SCA succeeded in balancing the competing rights of landowners and those of occupiers by setting a platform for compelling the State to fulfill its constitutional obligations towards both parties. This matter concerned a private landowner's efforts to execute an eviction order, granted in terms of PIE by the Johannesburg High Court against a community of more than 40000 people.<sup>268</sup> The Sheriff of the court refused to secure the eviction in terms of the court order if the owner did not deposit the requested fee to cover anticipated costs of the eviction. After numerous failed attempts to get assistance from the State, the owner approached the Pretoria High Court to force the State to assist him to vindicate his property rights. The Pretoria High Court found that the State had breached the rights of both the owner and the occupiers by allowing them to continue to reside on the property without access to alternative accommodation.<sup>269</sup> The State appealed this decision and the SCA confirmed the findings of the Pretoria High Court. The State then appealed to the Constitutional Court on the basis that it did not infringe the rights of the owner. Although the unlawful occupiers were already subject to an eviction court order, the Constitutional Court did not consider it necessary to resolve the *Modderklip* case based on either the constitutional property rights of the owner or the competing housing rights of the unlawful occupier.<sup>270</sup> Instead, the Constitutional Court found a dereliction of duty on the part of the State in not assisting the landowner to vindicate his property rights and, in so doing, simultaneously avoiding large scale evictions without alternative accommodation.<sup>271</sup> The Constitutional Court order stipulated that the residents are entitled to occupy the premises until alternative accommodation has

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<sup>266</sup> *Port Elizabeth Municipality v Various Occupiers* at para 23.

<sup>267</sup> *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd Modderklip; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 (8) BCLR 821 (SCA).

<sup>268</sup> *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* 2001 (4) SA 385 (W). Also see Liebenberg 2005b, 4.

<sup>269</sup> *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid Afrika* 2003 (6) BCLR 638 (T).

<sup>270</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) at para 26. Also see Liebenberg 2005b, 4.

<sup>271</sup> *Modderklip* (CC) at paras 43-51. Also see Liebenberg 2005b, 4.



been made available by the State, however, it also required the State to compensate the landowner for the unlawful occupation of his property.<sup>272</sup>

### **4.3.3 Considering factors extraneous to the substantive provisions of PIE**

The Constitutional Court in *Port Elizabeth Municipality v Various Occupiers* reaffirmed the principle established by the SCA in *Baartman and Others v Port Elizabeth Municipality*<sup>273</sup> in respect of the range of circumstances a court can have regard to in respect of eviction applications under PIE. It further noted that the vulnerability of occupiers referred to in section 4 (the elderly, children, disabled persons and households headed by women) could constitute a relevant circumstance under section 6, which regulates eviction at the instance of the State, even if it is not expressly provided for in the provision.<sup>274</sup>

Factors like ‘mediation’ as a mechanism to resolve the dispute between the parties has also been regarded as special circumstances which the court should consider,<sup>275</sup> particularly if it is the State applying for the eviction, as it reflects the State’s commitment to attempt to resolve the issue amicably through discussions.<sup>276</sup>

### **4.3.4 The consideration of suitable alternative accommodation as a relevant circumstance**

In terms of the provisions of PIE, the consideration of alternative accommodation is only relevant where land was occupied for a period longer than six months or if the eviction is instituted at the instance of the State.

The availability of alternative accommodation is not a prerequisite for granting an eviction order and is merely one factor that can be taken into account.<sup>277</sup> This decision was taken by the SCA in *Port Elizabeth Municipality v People’s Dialogue*

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<sup>272</sup> *Modderklip* (CC)\_at para 68. Also see Liebenberg 2005b, 5.

<sup>273</sup> 2004 (1) SA 560 (SCA) at para 8.

<sup>274</sup> *Port Elizabeth Municipality v Various Occupiers* at 39.

<sup>275</sup> *Port Elizabeth Municipality v Various Occupiers* at paras 39, 43 and 47. Also see Liebenberg 2005b, 4.

<sup>276</sup> *Port Elizabeth Municipality v Various Occupiers* at paras 28 - 29.

<sup>277</sup> *Peoples Dialogue* at para 769D.

after the High Court refused to grant an eviction order on the basis of the non-availability of suitable alternative accommodation. The SCA criticised the High Court for interpreting it to be a pre-condition to an eviction, as it would, according to the Court, have far-reaching and chaotic consequences, as it may act as an incentive for people to unlawfully invade land in order to secure alternative accommodation.<sup>278</sup>

The Constitutional Court in *Port Elizabeth Municipality v Various Occupiers* stated that there is no unqualified constitutional duty on local authorities to ensure that under no circumstances are homes destroyed unless alternative accommodation is provided.<sup>279</sup> Alternative accommodation is thus not a factor to be considered in all eviction cases.

A court should, however, be reluctant to grant an eviction order if the occupiers have been settled on the property for many years unless it is satisfied that reasonable alternative accommodation is available even if only as an interim measure.<sup>280</sup> The State's obligation in relation to the right to housing does not mean that it is required to build houses for the entire population, or that housing should be supplied at no cost, or that the right will manifest itself in the same way in all types of circumstances.<sup>281</sup> It does, however, mean that the State undertakes to ensure that everyone has access to affordable and acceptable housing and that the State will take appropriate measures to realise the right to housing and to improve rather than destroy neighborhoods.<sup>282</sup>

The protection against eviction must be viewed in the context of the general right of access to adequate housing.<sup>283</sup> In the groundbreaking case of *Grootboom*<sup>284</sup> the Constitutional Court refused to grant an eviction order as the Court considered the consequences of such a large-scale eviction and the fact that the local authority did not have an emergency housing programme in place for persons, like the respondents, who found themselves in desperate or crisis situations.<sup>285</sup>

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<sup>278</sup> *Peoples Dialogue* at para 769D .

<sup>279</sup> *Port Elizabeth Municipality v Various Occupiers* at para 28. See Pillay 'Property v Housing Rights: Balancing the interest in evictions cases' (2004) 5 *ESR Review* 3.

<sup>280</sup> *Port Elizabeth Municipality v Various Occupiers* at para 28.

<sup>281</sup> *Johannesburg Inner City* at para 50.

<sup>282</sup> *Johannesburg Inner City* at para 50.

<sup>283</sup> See *Grootboom v Government of the Republic of South Africa* 2000 (11) BCLR 1169 (CC).

<sup>284</sup> 2000 (11) BCLR 1169 (CC).

<sup>285</sup> *Grootboom* at paras 66 and 99.

In the case of *City of Cape Town v Rudolph and Others*,<sup>286</sup> the Cape High Court was faced with an application by the City of Cape Town (Municipality) to evict a number of occupiers who illegally erected shacks on municipal land. The occupiers alleged that it was desperate need that motivated their occupation as they could no longer wait for the Municipality to provide them with formal housing.<sup>287</sup> The occupiers lodged a counter application against the eviction application and wherein they alleged that the Municipality's disregard for the order of the Constitutional Court in *Grootboom* was evidenced by its failure to fulfill the constitutional duty of providing access to housing.<sup>288</sup> The Cape High Court dismissed the main eviction application as the circumstances did not warrant the granting of an urgent eviction order in terms of PIE. The Court interdicted the Municipality to comply with its statutory and constitutional obligations towards the occupiers and ordered the Municipality to return to Court within four months to report on the tenure and housing rights of the respondents.<sup>289</sup> The Court also directed the Municipality to place information before the court in respect of the availability of alternative land and the position of the vulnerable members of the community.<sup>290</sup>

In the case of *Baartman v Port Elizabeth Municipality*<sup>291</sup> the SCA found that it was not in the public interest to evict the unlawful occupiers from the property which they occupied, if it would mean that they could possibly be evicted from the alternative land, on the same ground of unlawful occupation. The SCA stated that in the absence of an assurance that the unlawful occupiers would have some measure of security of tenure at the new place; the court *a quo* should not have granted the eviction order.<sup>292</sup>

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<sup>286</sup> 2003 (11) BCLR 1236 (CC).

<sup>287</sup> At 548.

<sup>288</sup> At 548, Also see Liebenberg 2005a, 3.

<sup>289</sup> At 560. Also see *Transnet t/a Spoornet v Informal Settlers of Good Hope, Informal Settlers of Dukatole* 2001 (4) All SA 516 (W). The Court similarly ordered that the Municipality in this case submit a social audit of the occupiers situation to the Court and the Court postponed the application due to the lack of information reflecting the circumstances of the occupiers and, in particular, the availability of alternative land.

<sup>290</sup> *Transnet t/a Spoornet v Informal Settlers of Good Hope, Informal Settlers of Dukatole* 2001 (4) All SA 516 (W).

<sup>291</sup> 2001 (1) SA 557 (SCA).

<sup>292</sup> At para 19.

The SCA further commented on the housing programme of the Municipality, which did not provide interim relief to those in desperate need of housing.<sup>293</sup>

Where there is a clash between property rights and the ‘genuine despair of people in dire need of accommodation’, the courts should not automatically privilege property rights.<sup>294</sup> Although suitable alternative accommodation is not an absolute requirement, it is a weighty consideration, which the courts should not take lightly, when assessing if an eviction is just and equitable in the circumstances.<sup>295</sup>

From the cases reviewed in this section, it is clear that alternative accommodation is not an absolute requirement, however, it is an important factor that the courts are required to consider in determining if the eviction passes constitutional muster. The housing needs of people have become a highly relevant consideration in eviction matters and property rights are not automatically privileged above the housing needs of the poor, any longer.<sup>296</sup>

#### **4.3.5 Judicial interpretation of the provisions of PIE**

The cases have illustrated that the courts have moved beyond the factors contained in sections 4, 5 and 6 of PIE in deciding what is relevant within the context of the Act. The court may consider factors broader than the provisions of PIE when deciding what is just and equitable, as the provisions of the Act are peremptory but not exhaustive.<sup>297</sup>

In determining what is just and equitable, the courts have considered a range of circumstances which may mitigate the consequences of an eviction for both occupier and owner.

#### **4.4 Extension of Security of Tenure Act (ESTA)**

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<sup>293</sup> At para 13.

<sup>294</sup> *Port Elizabeth Municipality v Various Occupiers* at para 23.

<sup>295</sup> *Port Elizabeth Municipality v Various Occupiers* at para 58.

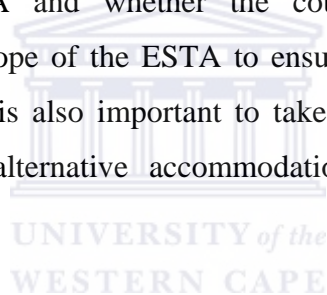
<sup>296</sup> *Liebenberg* 2005a, 5.

<sup>297</sup> *Port Elizabeth Municipality v Various Occupiers* at para 30.

#### 4.4.1 Introduction

Despite the legal requirements setting out the grounds for eviction in terms of sections 10 and 11 of the Act, the courts have to be satisfied that evictions in terms of ESTA are fair and just.<sup>298</sup> ESTA provides extensive factors to be considered before an eviction is granted and these factors are more prescriptive than the provisions of PIE. The Land Claims Court (LCC) has extensively emphasised the importance of compliance with the formal provisions of ESTA, as security of tenure can only be achieved if all the requirements in ESTA have been met.<sup>299</sup> The consequences of this legalistic approach to ESTA can undermine the achievements and objects of ESTA as it is unclear whether this approach supports the ‘reading-in’ of additional factors not supported by the text of ESTA.

This raises the question as to whether ‘relevant circumstances’ is confined to the formal provisions of ESTA and whether the courts are entitled to explore circumstances beyond the scope of the ESTA to ensure justice, equity and fairness within the circumstances. It is also important to take a look at whether the courts consider the provision of alternative accommodation as an important relevant circumstance.



Before commencing with our analysis, it should be noted that the analysis of the cases to be considered will be confined to matters which have been reviewed by the Land Claims Court (LCC) in terms of section 19(5) of the Act.<sup>300</sup>

#### 4.4.2 The disproportionate impact of evictions on farm workers

Farm-worker and farm-dweller evictions have its own unique socio-political dynamics within the broader scope of evictions within South Africa. This minority group constitutes one of the most marginalized groups in South Africa who, for the

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<sup>298</sup> Badenhorst 2005, 505.

<sup>299</sup> *Dlamini v Mthembu* 1999 (3) SA 1010 (LCC) at para 1032I. Also see *Lategan v Koopman* 1998 (3) SA 457 (LCC) at paras 461C-D and *Karabo v Kok* 1998 (4) SA 1014 (LCC) at para 1019B.

<sup>300</sup> Section 19(3) of ESTA stipulates that any order for eviction by a magistrate court shall be suspended subject to the review by the Land Claims Court.

most part, continue to live under appalling conditions.<sup>301</sup> Historically farm-workers due to the patriarchal as well as unequal employment relationships with the farm owners are poor, vulnerable and in many cases are illiterate.<sup>302</sup> As discussed below, women on farms are disproportionately affected by evictions as they are more vulnerable to eviction than men who live on farms.<sup>303</sup> Evictions from farms have devastating social consequences for an already vulnerable group.

#### **4.4.3 Historical vulnerabilities of women, children and the elderly as relevant circumstances**

On many South African farms the primary employment relationship existed between the farm owner and the male ‘head’ of the farm-worker household. This had the discriminatory consequence that the wife as well as the dependants of the head of household, derived their right to reside on the land through him.

From a survey and study conducted by Nkuzi Development Association on the realities of farmdweller evictions in South Africa it reflected that over three quarters of those evicted from farms are women and children.<sup>304</sup> The study attributed this to the judicial interpretation of ESTA and the attitude of landowners who have defined women’s tenure rights as ‘secondary’ if an independent right cannot be established separate from her husband or male partner.

The fact that the wife worked on the farm and had a separate labour contractual relationship with the farmer had no impact on her occupational rights if the occupational rights has not been clearly defined in labour agreement or it has not been obtained by some other right in law and therefore she will remain a ‘secondary’ occupier.<sup>305</sup>

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<sup>301</sup> Wegerif M (2005) *Still Searching for Social Security : The reality of farmdweller evictions in South Africa* 28.

<sup>302</sup> Wegerif 2005, 76.

<sup>303</sup> Wegerif 2005, 76.

<sup>304</sup> Wegerif 2005, 41.

<sup>305</sup> Roux ‘Pro-poor court, Anti poor outcomes’ (2004) 20 *SAJHR* 525.

Under the common law rules of eviction, if the owner instituted eviction proceedings against the male head of the household, the wife and the dependants were cited as ‘all those who derive title under him’.<sup>306</sup> This perpetuated the discrimination against women on farms and represented a situation which had to be addressed by ESTA as well as the courts dealing with farm dweller evictions.

In the case of *Conradie v Hanekom*,<sup>307</sup> the LCC ruled that a woman whose husband has been dismissed could not be evicted from the farm based on this reason as she was an employee on the farm in her own right. Separate grounds for eviction thus had to be established if the farm owner wanted to evict her.<sup>308</sup> The Court also found that she had a right to family life and therefore her husband, although lawfully dismissed, could reside with her.<sup>309</sup> This judgment was ‘hailed as a triumph for court-driven social transformation in South Africa’<sup>310</sup> as it vindicated women from past discriminatory practices on farms.

Unfortunately this victory was short-lived.<sup>311</sup> In *Landbou Navorsingsraad v Klaasen*<sup>312</sup> the LCC restricted the *Conradie* judgment. The LCC stipulated that where the occupier cannot establish an independent right to that of the husband, such occupier’s right is a derivative of the right held by the head of the household. Therefore the act of evicting the male farm worker would allow the farm owner to evict all those holding title under him. *Klaasen* thus restored the common law position on so far as the citation of farm worker’s spouse and dependants are concerned, which had the consequence of making it unnecessary to allege separate substantive grounds for the eviction of the wife of the head of the household, if she derived her occupational right from her husband.<sup>313</sup>

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<sup>306</sup> Roux 2004b, 525.

<sup>307</sup> 1999 (4) SA 491 at para 20.

<sup>308</sup> *Conradie* at para 20.

<sup>309</sup> *Conradie* at para 21. See Roux 2004, 526.

<sup>310</sup> Roux 2004b, 526.

<sup>311</sup> Roux 2004b, 526.

<sup>312</sup> 83R/01 (LCC).

<sup>313</sup> Roux 2004b, 527.

In *Venter v Claasen*<sup>314</sup> and *Dique v Van der Merwe*<sup>315</sup> the LCC confirmed that marriage partners do not have separate occupier status from their spouse. In both matters the wives applied for protection under ESTA. The respondents in *Venter* highlighted, as circumstances to be considered by the court, the vulnerability of women farm-workers as a group that was clearly discriminated against in the past and whose tenure was always weak on farms, as circumstances to be considered by the court.<sup>316</sup> The Court accepted that while it is true that women were discriminated against by legislation in the past, these circumstances had no connection with the Act.<sup>317</sup> On this basis the Court refused to define the respondent as an occupier in terms of the Act and the eviction was granted. The Court also decided that the legislature did not intend that a person could be an occupier by virtue of a marriage relationship as her right to reside on the premises was a derivative of her husband's occupier status.<sup>318</sup>

By not taking into account the historical vulnerabilities and weak tenure relationships related to the position of women on farms, these cases perpetuated the common practice of landowners treating women as secondary occupiers.<sup>319</sup> This has the consequence that 'secondary occupiers' are now being evicted in terms of PIE legislation as they are deemed to be unlawful occupiers if a legal nexus cannot be obtained.<sup>320</sup>

Besides women, the elderly are also disproportionately affected by evictions. ESTA aims to address this situation through section 8(4) of ESTA, which makes provision for long-term occupiers, who cannot generally be summarily evicted from farms. Occupiers should be 60 years of age and should have resided on the farm for more than 10 years in order to qualify as a long-term occupier within the meaning of ESTA.

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<sup>314</sup> 2001 (1) SA 720 (LCC).

<sup>315</sup> 2001 (2) SA 1006 (LCC).

<sup>316</sup> *Venter* at para 728D.

<sup>317</sup> *Venter* at paras 726E -727C. The LCC highlighted that any other form of interpretation would lead to absurdities and consequences which the legislature could not have intended.

<sup>318</sup> *Venter* at paras 726A-726E.

<sup>319</sup> Also see *Landou Navorsingraad v Klaasen* LCC 83R/01, where the court ruled that an eviction order of the primary occupier can be used to evict other occupiers whose rights are derivative of his right to reside on the land.

<sup>320</sup> See *Lusan Premium Wines (EDMS) Bpk v Sally Booyesen and Others* Case No 3220/05 LCC. The respondents all resided on the farm for many years.



This provision provides protection to the elderly who cannot be evicted because of ill health or frailty.

In the case of *Rashava v Van Rensburg*<sup>321</sup> the occupier in this matter argued that she had been employed on the farm for more than 20 years and was 58 years old when her employment was terminated. She argued that she still qualifies in terms of section 8(4) of the Act as a long term occupier if the court followed a purposive and generous construction of that section.<sup>322</sup> The Court in refusing to take these circumstances into account highlighted that the formulation of the Act was clear and that there was therefore no need to resort to a generous, purposive or otherwise interpretation of the provision, where no uncertainty exists.<sup>323</sup> The circumstances surrounding this provision are taken into account at the time when the eviction order was granted and not at the time of the actual eviction (after appeal) notwithstanding the vulnerability of the occupier and other personal circumstances.<sup>324</sup>

#### **4.4.4 The court's approach to factors surrounding the employment relationship during an eviction**

The majority of farm-workers' rights to reside on the premises, as stated above, have been linked to their employment relationship with the farm owner. Over two thirds of evictions from farms have been work-related.<sup>325</sup> Circumstances surrounding the employment termination including the terms of the employment agreement are thus very important factors to be considered by the court. Farm workers employment status is therefore critical to determining their tenure vulnerability.<sup>326</sup>

ESTA provides for fair termination procedures in section 8(3)<sup>327</sup> and the LCC has interpreted this section to mean that all avenues of redress under the Labour Relations

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<sup>321</sup> 2004 (2) SA 421 (SCA).

<sup>322</sup> Du Plessis, Olivier and Pienaar 'Land matters: New developments' (2004) 19 *SAPL* 220.

<sup>323</sup> Du Plessis, Olivier and Pienaar 2004, 220.

<sup>324</sup> *Magodi v Janse van Rensburg* 29R/01 LCC. The appellant was 59 years and 9 months old at the time of the eviction.

<sup>325</sup> Wegerif 2005, 76.

<sup>326</sup> Wegerif 2005, 68.

<sup>327</sup> The section provides that 'any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), shall be dealt with in accordance with the provisions of the Labour

Act<sup>328</sup> (LRA) must first be exhausted before the right to residence can be terminated in terms of section 8(2).<sup>329</sup> Compliance with these formal provisions has been considered relevant in numerous cases decided by the courts.<sup>330</sup>

Farm workers, who are ignorant of their labour rights, seldom seek the protection of the LRA if they have been unfairly dismissed, with the consequence that the matter is not adjudicated by the Commission for Conciliation Mediation and Arbitration (CCMA). However, the fact that a dispute has not been referred to the CCMA or handled in accordance with the LRA does not mean that the dismissal was in reality unfair.

The LCC first took the formalistic view that compliance with the formal provisions of sections 8(2) and (3) of ESTA constituted grounds for granting an eviction application, notwithstanding the possible unfairness of the dismissal and regardless of the long history of occupation on the land, which in some cases predated the employment relationship.<sup>331</sup> The LCC also indicated that the Court should be extremely reluctant to consider factors surrounding the termination of employment agreements.<sup>332</sup>

In *Conradie* the LCC, however, considered whether the termination of the employment relationship was fair in light of the circumstances as the wife had a separate employment with the owner. She could thus not be dismissed on the basis of her husband's dismissal. The Court highlighted that the employment relationship is a highly relevant factor to be considered in an ESTA eviction application. The Court thus found that a provision which allowed both parties to lose their residential rights if any one of their employment contracts was cancelled constituted an unfair

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Relations Act, and the termination shall take into effect when any dispute over the termination has been determined in terms of the Act.'

<sup>328</sup> Act 66 of 1995.

<sup>329</sup> *Karabo* at paras 1022G-H. When a matter has been referred to the CCMA, the date that the CCMA makes its award is the 'effective date for the termination' of the employment. Also see *Remhoogte Farms (Pty) Ltd v Mentoer* 12R/99 LCC.

<sup>330</sup> See *Malan v Gordon and Another* 1999 (3) SA 1033 (LCC) at para 1050G. Also see Roux 1998, 7 A-20.

<sup>331</sup> *Van Rensburg v Magodi and others* 52R/01 LCC. Also see Wegerif M 2005, 36.

<sup>332</sup> *Monyiki v Portion 608 New Belgium* CC 62/98 LCC at para 3.

circumstance.<sup>333</sup> The Court further found that the occupier was an occupier in her own right and that the magistrate has therefore failed to take into account all relevant circumstances by granting the eviction order on the basis of her husband's violent behavior on the farm and his subsequent dismissal.<sup>334</sup>

Similarly in *Mostert v Duiker*,<sup>335</sup> the LCC considered factors surrounding the dismissal as relevant circumstances notwithstanding compliance with the formal provisions of section 8(3) of ESTA. In deciding what is just and equitable, the Court highlighted that it is obliged to consider all relevant circumstances, which include the reasons and fairness of the dismissal, as well as the circumstances surrounding the dismissal.<sup>336</sup>

#### 4.4.5 Confining relevant circumstances to the provisions of the ESTA

Over the years much emphasis has been placed on the existing provisions of ESTA and its interpretation, with not much room left for the consideration of circumstances extraneous to the provisions of the Act.

This is highlighted in *Westminster Produce (Pty) Ltd v Simons and Another*<sup>337</sup> where the Court took a similar view to that of *Brizley*. The Court viewed 'relevant circumstances' as circumstances made relevant by law (either common law or statute law).<sup>338</sup> The Court further stated it is not for the court to determine subjectively what those considerations should be. The Court did not consider the 'hardship and inequity', which the eviction would cause in the particular circumstance of the

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<sup>333</sup> Van der Walt 2002b, 279.

<sup>334</sup> Van der Walt 2002b, 279.

<sup>335</sup> 2003 (1) SA 295 (LCC). The respondent was dismissed by the applicant because his addition to alcohol affected his ability to perform his duties. He was given a letter of dismissal, whilst being intoxicated. The Court took into account the fact that the respondent did not understand the contents of the letter of dismissal as he was intoxicated at the time. The Court found that the respondent did not understand the significance of the proceedings and was not given time to prepare. The eviction was set aside. See Du Plessis, Olivier and Pienaar 'Expropriation, restitution and land redistribution: an answer to land problems in South Africa' (2003) 18 *SAPL* at 242.

<sup>336</sup> This decision was markedly different from the case of *Monyiki* supra, where the Court confirmed that the LCC did not have the jurisdiction to adjudicate on the fairness or otherwise termination of the employment agreements. Also see *Prize Trade 44 (Pty) Ltd v Isaac Tefo Memana* 35/02 (LCC) where Meer J came to a similar conclusion where she stated that it is not for the LCC to consider the fairness of the termination of employment as this falls within the ambit of the LRA.

<sup>337</sup> 2000 JOL 7198 (LCC)

<sup>338</sup> *Westminster* at para 11.

occupier<sup>339</sup> as it was not provided for in section 10(1) of ESTA.<sup>340</sup> The restrictive views of the Court was further demonstrated when it held that it is not necessary to request the report in terms of section 9(3) as the information will be redundant and it cannot possibly affect the rights of the landowner to obtain an eviction order.<sup>341</sup>

#### **4.4.6 Coming through the backdoor: considerations of factors extraneous to ESTA via the section 9(3) report**

In *Valley Packers Cooperative Ltd v Dietloff*<sup>342</sup> and *Glen Elgin Trust v Titus*<sup>343</sup> the Court concluded that the *Westminster* case was wrongly decided and found that the section 9(3) report should be requested in all ESTA eviction applications as the hardship which the occupier and his family would suffer, is one of the most important factors to consider when determining the justice and equity of an eviction application.<sup>344</sup>

The significance of this report is that it places independent information before the court, which relates to the impact of the eviction on the constitutional rights of both occupier and land-owner. The importance of this provision within the framework of section 26(3) is that it provides a mechanism to place relevant circumstances before the presiding officer to enable her to fulfill her constitutional duty in terms of section 26(3).<sup>345</sup> Factors extraneous to ESTA and which need not be considered under the provisions of sections 10, 11 or 15 of the Act, can be brought before the court by the probation officer. The courts have also stated that the report should not just reflect circumstances related to the occupier but should also reflect the position of the landowner. This would include, *inter alia*, circumstances surrounding the usage of the property by the land-owner, rentals, and costs of providing transport for the farm workers.<sup>346</sup>

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<sup>339</sup> This was an eviction under section 10(1) as the occupier voluntarily resigned from the farm.

<sup>340</sup> *Westminster* at paras 13 -15.

<sup>341</sup> *Westminster* at para 16-18.

<sup>342</sup> 84R/00 LCC.

<sup>343</sup> 81R/00 LCC.

<sup>344</sup> *Valley Packers* at para 9.

<sup>345</sup> *Valley Packers* at para 7.

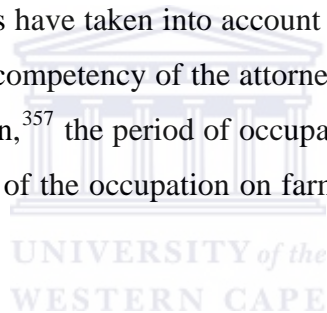
<sup>346</sup> *Terblanche v Flippe*s 36R/01 (LCC). Also see Badenhorst 2005, 508.

In *Glen Elgin*<sup>347</sup> the Court stated that the constitutional rights of occupiers affected by the eviction must be considered, which includes the right to housing,<sup>348</sup> the right of the occupier's children to education<sup>349</sup> and shelter,<sup>350</sup> and the right to life.<sup>351</sup> The Court held that the property rights of owners must also be considered.<sup>352</sup>

Section 9(3) of ESTA has clearly broadened the scope of factors which the court can consider in eviction matters even if the parameters of the formal provisions do not seem to emphasise the importance of these factors. It ensures that the constitutional rights of all parties are considered and not overlooked in eviction matters.<sup>353</sup>

The possible hardship, instability, suffering and destitution in eviction situations are all factors which the court should consider in ensuring that evictions are conducted with compassion. This may necessitate a delay or suspension of an eviction order.<sup>354</sup>

Other factors which the courts have taken into account include, *inter alia*, the literacy levels of the occupier,<sup>355</sup> the competency of the attorney representing the occupier,<sup>356</sup> the lack of legal representation,<sup>357</sup> the period of occupation and default in payment of rental,<sup>358</sup> the negative impact of the occupation on farm operations and the harm and prejudice to the occupier.<sup>359</sup>



#### **4.4.7 The consideration of suitable alternative accommodation as a relevant circumstance**

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<sup>347</sup> At para 6.

<sup>348</sup> Section 26 of the Constitution.

<sup>349</sup> Section 29(1)(a) of the Constitution states: 'Everyone has the right to basic education including adult basic education.'

<sup>350</sup> Section 28(1)(c) of the Constitution states: 'Every child has the right to basic nutrition, shelter, basic health care services, and social services'

<sup>351</sup> In *Glen Elgin* the Court referred to numerous Indian Supreme Court cases, which interpreted the right to life to include not just the right to physical life but also quality of life. The latter incorporates socio-economic rights.

<sup>352</sup> Section 25 of the Constitution deals with the right not to be deprived of property.

<sup>353</sup> *Glen Elgin* at para 9.

<sup>354</sup> *Glen Elgin* at para 9.

<sup>355</sup> See *Mostert* case.

<sup>356</sup> *Visser v Hartzenberg* 27R/03 LCC at para 12.

<sup>357</sup> *Nkuzi Development Association v The Government of the Republic of South Africa and the Legal Aid Board* 10/01 LCC. Also see *Maas Transport BK v Beukes* 38R/02 LCC.

<sup>358</sup> See *Terblanche* case.

<sup>359</sup> *Thewaterskloof v Jacobs* at para 9.

In terms of ESTA, the consideration of suitable alternative accommodation is only a formal requirement in terms of certain provisions of the Act.<sup>360</sup> This had the effect that the courts only considered alternative accommodation in certain defined circumstances.

In the *Westminster Produce* case the Court was of the opinion that it need not consider the availability of alternative accommodation and hardship that the eviction might course in a section 10(1) situation, which stemmed from an alleged fault on the part of the occupier.

In *Valley Packers*, the Court emphasised the importance of considering alternative accommodation and the related hardship which the occupier and his family will suffer, if an eviction is granted. The Court stated that notwithstanding the fact that prior to the inclusion of section 9(3) it appeared as if alternative accommodation was not a requirement of a section 10(1) eviction process, alternative accommodation is an important factor which a court must consider for the purposes of section 26(3) of the Constitution.<sup>361</sup>

A similar position was followed in *Glen Elgin* where the Court agreed that alternative accommodation should be considered in all eviction-related matters.<sup>362</sup> The Court, however, indicated that the right to housing imposes a clear duty on the State to take measures towards the realisation of this right as it would be a ludicrous situation for landowners to take over the State's responsibility to provide housing to the occupier and his family.<sup>363</sup>

In *Glen Elgin* the Court further highlighted that judicial notice may also be taken of the serious housing crisis in the country.<sup>364</sup> The courts have also taken into account the extreme pressure of these evictions on the existing infrastructure of local

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<sup>360</sup> Section 10(3)(a). In cases where occupiers are evicted due to no fault or choice of the occupier, for example retrenchment, nine months occupation is provided in the Act.

<sup>361</sup> *Valley Packers* at para 7.

<sup>362</sup> *Glen Elgin* at para 5.

<sup>363</sup> *Glen Elgin* at paras 7-8.

<sup>364</sup> *Glen Elgin* at para 9.

government as well as including the possible trauma that a removal to an informal settlement would have on a family facing an eviction situation.<sup>365</sup>

The LCC has rejected eviction applications even in circumstances where alternative accommodation was found, on the basis that alternative accommodation was not suitable to the needs of the occupier and his family.<sup>366</sup>

Therefore in considering what constitutes suitable alternative accommodation, the court has to consider whether the alternative accommodation is safe and no less favorable than the previous accommodation.<sup>367</sup> Factors to be taken into account include, *inter alia*, the reasonable needs of the occupier, the joint earnings of the household, the need to live close to economic and employment opportunities including transport facilities as well as the proximity to schools.<sup>368</sup>

However, the LCC has held that the consideration of suitable accommodation is not a factor to be considered where the occupier is re-located on the same farm to different accommodation.<sup>369</sup>

#### **4.4.8 Excluding occupiers from the provisions of ESTA**

In the case of *Pharo's Properties CC and Others v Kuilders & Others*<sup>370</sup> the Land Claims Court confirmed that relocation of an occupier from one dwelling to another on the same land was not an eviction. This had the effect of the occupiers not being afforded the protection of ESTA. In theory, occupiers are entitled to rely on the common law spoliation remedy where such relocation occurs without consent as it can be argued that the owner is still required to effect the relocation by way of the common law action for eviction. However, given the different approaches by our courts to the impact of section 26(3) of the Constitution on of the common law, it is

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<sup>365</sup> *Theewaterskloof Holdings v Jacobs* at para 13.

<sup>366</sup> *Theewaterskloof Holdings Pty Ltd, Glaser Division v Noble* 92R/2001 LCC, where a 'wendy house' was found not to be suitable.

<sup>367</sup> Section 1 of ESTA.

<sup>368</sup> Badenhorst 2005, 506.

<sup>369</sup> *Pretorius v Beginsel* 94R/01 (LCC).

<sup>370</sup> 2001 (2) SA 1180 (LCC). In this case certain occupiers were moved to other accommodation on the same land. The court found that this relocation did not constitute an eviction.

possible that an eviction order might be granted by the court without regard to ‘all relevant circumstances’ as circumstances have not been prescribed by statute.

This approach by the court is clearly contrary to the provisions of section 26(3) which have been enacted to ensure that no one is removed from their home against their will without a court order after considering relevant circumstances. This is one of the issues that the proposed amendments to ESTA aim to address which is discussed further below.

#### **4.4.9 Judicial interpretation of the provisions of ESTA**

From the cases reviewed above, it is noted that the LCC has taken a narrow and restrictive view to the interpretation of ESTA. The LCC has also been reluctant to consider circumstances, which are not specifically provided for in ESTA. This narrow approach to interpreting ESTA could have the effect of limiting the transformative vision of the Constitution.

#### **4.5 A comparative analysis of the judicial interpretation of ‘relevant circumstances’**

Various distinct approaches have emerged in the judicial interpretation of ‘relevant circumstances’ within section 26(3) and the land-reform legislation. With reference to section 26(3) of the Constitution, the courts have been reluctant to read provisions into the section, if the legislature has not expressly provided for it in legislation. The courts confined ‘relevant circumstances’ to factors which are legally relevant at common law, which has had the consequence of excluding factors that relate to the personal and social circumstances of the occupiers. On deciding that PIE applied to all unlawful occupations, including common law evictions, this restrictive approach was negated in that the court highlighted that evictions cannot occur without considering the personal and socio-economic circumstances of the occupiers. It appears that the SCA was prepared to develop the common law of eviction according to the land-reform legislation provided the considerations in terms of which the common law right to eviction should be restricted, are made clear in the relevant



legislation.<sup>371</sup> Where these circumstances are not clearly defined in the provisions of legislation, some courts ‘would prefer to stick to the common law and grant an eviction order’ if the common law or the legislative requirements have been met.<sup>372</sup> This was clearly the approach of the LCC in terms of ESTA.

On the other hand, the courts adopted a significantly different approach to PIE. In deciding what is just and equitable within PIE, the courts have indicated that the provisions of PIE are peremptory but not exhaustive. It has also gone beyond the circumstances of PIE to find case-specific solutions, which take into account factors which aim to avoid homelessness and destitution.

## CHAPTER FIVE CONCLUSION

### 5.1 Introduction

Section 26(3) of the Constitution and the land reform legislation discussed above place restrictions on the common law right to obtain an eviction order. Land reform legislation prescribes circumstances, which have to be considered before an eviction is granted by a court, It further limits the strong common law property rights of owners, by considerations of socio-economic and other circumstances which have previously had no legal relevance at common law.<sup>373</sup>

Section 26(3) and its related land reform legislation, in particular PIE and ESTA, have posed interpretation problems for the courts, as are reflected in case law dealing with these provisions.<sup>374</sup> The case law reflects diverging approaches to how section 26(3) and the land reform legislation impacts on the common law right to evict.<sup>375</sup> Some of the decisions by our courts reflect a narrow and restrictive interpretation to ‘relevant circumstances’ due to the general unwillingness to change the common law propriety

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<sup>371</sup> Van der Walt 2005, 424.

<sup>372</sup> Van der Walt 2005, 424.

<sup>373</sup> Van der Walt 2005b, 675.

<sup>374</sup> Van der Walt 2005b, 675.

<sup>375</sup> Van der Walt 2005b, 675.

rights of owners.<sup>376</sup> The SCA at first confined the ‘relevant circumstances’ in section 26(3) to circumstances, which are legally relevant.

The Constitutional Court in *Ndlovu* overturned the SCA’s approach in *Brizley* by extending PIE to all unlawful evictions. This had the effect of extending the meaning of ‘relevant circumstances’, as defined in PIE, to all types of unlawful eviction cases including matters where the occupier’s consent to reside on the premises was lawfully terminated. The Constitutional Court further broadened the scope of section 26(3) through the adoption of a context driven and purposive interpretation of eviction,<sup>377</sup> which takes into account the historical, social and economic contexts of eviction in order to limit the effects of property rights on the weak tenure rights of vulnerable occupiers, to mitigate the harsh consequences of eviction.

## **5.2 An analysis of the constitutional and legislative provisions defining ‘relevant circumstances’**

Section 26(3) does not of itself prescribe the circumstances to be considered before an eviction order is granted. Content has to be given to the ‘relevant circumstances’ contemplated in section 26(3), in land reform legislation, more notably PIE and ESTA.

Both PIE and ESTA specify the circumstances under which evictions may occur. Furthermore they endeavour to ensure that where evictions do occur, they are done in a humane manner and that no form of discrimination is involved. PIE and ESTA both acknowledge the vulnerabilities of women, children and the elderly and they call for special measures to protect these vulnerable groups. PIE expressly calls for the consideration of these factors within all eviction matters and ESTA gives special protection to the elderly and the disabled within its provisions.

The overall effect of the provisions of PIE and ESTA is that the landowners’ right to evict has been substantially qualified by considerations of circumstances, which recognise the social, economic, historical and present context of evictions in South

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<sup>376</sup> Van der Walt 2005b, 675.

<sup>377</sup> See *Port Elizabeth Municipality v Various Occupiers* supra.

Africa. They further balance the rights of owners and occupiers in a manner, which promotes fairness, justice and equity so as to avoid inequitable outcomes in eviction situations.

Section 26(3) of the Constitution, PIE and ESTA, among other land reform legislation, provide a new legislative framework within which evictions takes place, which aims to break away from the common law view that property rights are sacrosanct and should be protected from unlawful occupation at all cost.<sup>378</sup>

Section 26(3) of the Constitution, PIE and ESTA comply with the provisions of the ICESCR and they provide greater security to vulnerable occupiers by placing limits on the strong property rights of land owners to evict.

In principle, these enactments should have the potential to substantially amend the common law.<sup>379</sup> However, the courts have been ambivalent in their interpretation of the provisions of both PIE and ESTA.

### **5.3 An analysis of the court's approach to interpreting 'relevant circumstances'**

#### **5.3.1 Section 26(3) of the Constitution**

Although the legislation provides for the consideration of various circumstances before a court grants an eviction order, it does not, however, explain how these provisions should apply in a given situation and how they should influence the common law.<sup>380</sup> The interpretation of these provisions has been left to the courts which have not been consistent in defining the circumstances that must be considered before an eviction is granted. This has in some measure contributed to the legal uncertainty around the issue.

The courts' were at first reluctant to give meaning to the 'relevant circumstances' within section 26(3) as it held the view that these circumstances had to be defined by

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<sup>378</sup> Van der Walt 2005a, 427.

<sup>379</sup> Van de Walt 2005a, 419.

<sup>380</sup> Van der Walt 2005a, 420.

legislation. In the absence of such definitions, ‘relevant circumstances’ were restrictively confined to circumstances which were considered to be legally relevant.<sup>381</sup> Section 26(3) did therefore not grant the courts discretion to suspend or deprive landowners of their proprietary rights based on the personal and social circumstances of occupiers, if legislation did not define these circumstances.<sup>382</sup> This resulted in section 26(3) being defined within the parameters of the common law rules of eviction.<sup>383</sup> The *Ndlovu* judgment substantially changed this position as it brought all unlawful evictions under the ambit of PIE, which allowed the court to take into account circumstances previously not taken into account in common law evictions. However, it remained unclear what circumstances should be considered in the absence of legislative definition. Subsequent case law has, however, expressed the view that the purpose of section 26(3) of the Constitution is to seek concrete, case-specific solutions to eviction problems, which take into account the interests of all parties involved in a particular case.<sup>384</sup>

It is the view of the author that the courts have moved away from a restrictive interpretation of relevant circumstances, which was limited to circumstances defined by the common law, to a broad all inclusive and transformative approach, which takes into account the historical, personal and social circumstances within which evictions occur.

### 5.3.2 PIE

The ‘open-ended’ provisions of PIE, have allowed the courts to consider circumstances broader than that which has been provided for in PIE. This has allowed the courts to give a transformative interpretation to the housing and tenure rights of the vulnerable and marginalised. The case law on PIE reflects the courts purposive and context-driven approach to eviction, which attempts to balance the historical, social and economic position of the occupier with the proprietary rights of the landowner. The Constitutional Court in *Port Elizabeth Municipality v Various*

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<sup>381</sup> See *Brizley* at paras 35-46.

<sup>382</sup> Van der Walt 2005a, 422.

<sup>383</sup> Van der Walt 2005a, 423.

<sup>384</sup> *Port Elizabeth Municipality v Various Occupiers* at para 23. Although this case dealt with a section 6 eviction in terms of PIE, the Constitutional Court sets out the various features of section 26(3), which have persuasive value.

*Occupiers* set the benchmark for the future interpretation of relevant circumstances in PIE matters as it stipulated that each case has to be decided in the light of its own particular circumstances.<sup>385</sup>

From the above, it is clear that the Constitutional Court has adopted a transformative approach in PIE evictions which has contributed to defining how PIE eviction matters will be dealt with in the future. The broad and transformative approach by the courts has not been received well by property owners and other key players with vested interests in this matter. Pressure has thus been placed on government to amend PIE to reflect a more narrow interpretation of its provisions. These amendments are discussed below.

### **5.3.3 ESTA**

ESTA provides extensive circumstances to be considered before an eviction is granted. However, the courts' unusually restrictive and narrow approach to the interpretation of those circumstances has had the impact of closing down the transformative potential of this piece of legislation in relation to the broader vision of the Constitution.

The courts seem to have taken a restrictive view of not considering circumstances beyond that which has been defined by the statute. Notwithstanding the fact that ESTA has been one of the most litigated land reform laws, the LCC has preferred to follow the common law approach above that of a substantive transformative approach.<sup>386</sup> The LCC has also dismally failed to address the gender inequities within eviction matters and has been criticised for adopting such a narrow view of ESTA. Due to the continued reluctance of the LCC to consider factors extraneous to the provisions of ESTA, various stakeholders have called for amendments to ESTA so as to provide greater protection to vulnerable occupiers.

## **5.4 Proposed Amendments to PIE**

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<sup>385</sup> At para 30.

<sup>386</sup> Wegeriff 2005, 316.

The broad application of PIE after *Ndlovu* and the numerous procedural and substantive factors to be considered in its application, created huge concerns among property developers, landlords and banks. These concerns have been raised since the very inception of PIE, as landowners viewed the consideration of additional factors in eviction situations as interfering with their common law right to evict unlawful occupiers from their property.<sup>387</sup> Many viewed the extension of PIE to holding-over matters, where the occupier first had consent which was subsequently terminated, as creating a constitutional anomaly and imposing unreasonable restrictions on property rights.<sup>388</sup>

The Department of Housing on 27 August 2003 published a Draft Prevention of Illegal Eviction From And Unlawful Occupation of Land Amendment Bill, 2003 (PIE Bill 2003) for public comment.<sup>389</sup>

After receipt of comment, a further Bill (PIE Bill 2005) was published in the Gazette on 18 March 2005 in a form much changed from 2003 version.<sup>390</sup> The 2005 version was not distributed for public comment but brought before the parliamentary committee on very short notice and the departmental spokesperson said that it was urgent that it be passed.<sup>391</sup> The Bill was briefly discussed by Parliament's Housing Committee and the following week the Bill was withdrawn and the parliamentary committee and public were advised that there would be deliberations between the Department of Housing and the Department of Land Affairs so as to find agreement on what ought to follow.

A further draft Bill has now been published in Government Gazette No 29501 of 22 December 2006 (PIE Bill 2006). The publication of the current Bill was accompanied by proposed amendments to other housing legislation. A commonality in all three Bills is the limitation it places on the applicability of PIE in tenant/landlord situations.

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<sup>387</sup> Christmas 2004, 1.

<sup>388</sup> Hopkins and Hofmeyer 'The constitutional anomaly created by PIE' 2003 (June) *Property Law Digest* 1.

<sup>389</sup> Government Gazette No 25391 published 27 August 2003.

<sup>390</sup> Government Gazette No 27370 published 18 March 2005.

<sup>391</sup> Parliamentary submissions made by the Legal Resources Centre dated 27 February 2007

The Memorandum to the PIE Bill 2006 stipulates at paragraph 2.3 that ‘There has been confusion as to whether or not the Act applies to proceedings for the eviction of erstwhile tenants or mortgagors who refused to vacate land after their leases were cancelled or on foreclosure of their bonds. The Supreme Court of Appeal has held that these categories of persons do indeed fall under the provisions of the Act – [Ndlovu, Ngcobo, Bekker and Another v Jika 2003 (1) SA113 (SCA)]. It is submitted that it is not desirable and that it was not the intention that the Act should apply to tenants and mortgagors who default in terms of their prior agreements with landlords and financial institutions, respectively. The Act should only cover those persons who unlawfully invade land without the prior consent of the landowner or person in charge of land. It has thus been necessary to amend Section 2 of the Act (application section) to state specifically that the Act does not apply to a person who occupied land as a tenant, or in terms of any other agreement or as the owner of land and who continues to occupy despite the fact that the tenancy or agreement has been validly terminated or the person is no longer the owner of the land.’<sup>392</sup>

Whilst relevant circumstances must still be considered by the Courts this amendment takes us back to the common law position where only legally relevant circumstances were considered.

Parliamentary submissions made by the Legal Resources Centre highlights the following consequences: ‘The exclusion of a large grouping of people from the protections provided by PIE (and not providing them with any alternative protection) will create a new vacuum with regard to how the protections should be enforced if the amendments are passed. In many instances judges and magistrates will have to investigate the circumstances of those whose eviction is sought. Precisely what protection they would be entitled to is not clear. The vacuum created by these amendments will create considerable uncertainty (and with the uncertainty, litigation) for several years while the courts determine what procedural and substantive protections are required by Section 26(3) uninformed by PIE.’

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<sup>392</sup> Also see the Memorandum to the 2005 Bill which has an almost similar motivation.

Whether this amendment will thus pass constitutional scrutiny is arguable as the initial ability to ‘pay for tenure, does not necessarily make a person less vulnerable than ‘squatters’ if an eviction renders them homeless.’<sup>393</sup>

The current PIE draws a distinction between persons occupying for less than six months and persons occupying more than six months and different criteria or circumstances are considered before the court grants an eviction order. The PIE Bill 2006 provides for a single set of criteria to be considered in all cases of unlawful eviction.

The single set of criteria stipulates the following criteria to be considered:<sup>394</sup>

- (a) the circumstances under which the unlawful occupier occupied the land;
- (b) the period of occupation;
- (c) the availability to the unlawful occupier of suitable alternative accommodation;
- (d) the rights and the needs of the elderly, children, disabled persons and households headed by women;
- (e) the constitutional rights and duties of all affected persons including the State.

These provisions extend the circumstances to be considered in respect of section 4(6).

## **5.5 New developments and proposed amendments to ESTA**

Various stakeholders have highlighted the fact that ESTA needs to be revised due to the inadequate enforcement and protection of tenure rights.<sup>395</sup> This inadequacy is related to, inter *alia*, the lack of protection given by the LCC to women, the elderly and children. One can also argue that the lack of adequate protection may also be attributed to the LCC’s conservative interpretation of the provisions of ESTA, which includes the LCC’s reluctance to go beyond the circumstances as defined by the Act

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<sup>393</sup> Christmas 2004, 2.

<sup>394</sup> Pie Bill 2006, 10.

<sup>395</sup> Chenwi ‘Seeking security: Towards a new vision for tenure relations in farming areas’ (2005) 6 *ESR Review* 20.



and to give a purposive interpretation to its provisions. The court's narrow application of the provisions of ESTA has 'systematically eroded the rights contained in the tenure legislation that were aimed to protect farm-workers.'<sup>396</sup> In response to the above, various stakeholders have called for the strengthening of the legislation pertaining to evictions by creating more substantive rights for ESTA occupiers.<sup>397</sup>

In response to the concerns raised, the Department of Land Affairs (DLA) has been in the process of consolidating the Extension of Security of Tenure Act and the Labour Tenants Act (ESTA/LTA).<sup>398</sup> The Department of Land Affairs set up an ESTA/LTA consolidation task team consisting of DLA officials in the national and provincial offices involved in the implementation of these two statutes, a representative of the Department's legal services section, and two consultants, to draft the amendments for submission to the Minister of Agriculture and Land Affairs.<sup>399</sup> Although much of the proposals have been of a technical nature some proposed amendments have far reaching consequences.

Among the proposed amendments is the strengthening of the rights of the elderly and certain other occupiers by creating a class of 'non-evictable' occupiers.<sup>400</sup> Currently section 8(4) of ESTA provides special protection to occupiers who reside on the land for more than 10 years and who are over 60 years of age or is an employee who due to ill health, injury or disability and have resided cannot work for the employee any longer. These long-term occupiers right to reside on the land cannot be terminated

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<sup>396</sup> Wegerif 2005, 3.

<sup>397</sup> Chenwi 2005, 20.

<sup>398</sup> 'Draft Submission to the Minister of Agriculture and Land Affairs on possible strategies aimed at conferring independent tenure rights on rural tenants' drafted 15 October 2002 by the ESTA/LTA Consolidation task group (hereinafter the ESTA Draft Submission). The submission was drafted in response to the Minister of Agriculture and Land Affairs directive to ESTA and the LTA be consolidated so as to achieve the goal of independent tenure security. The ESTA draft submission reflects the recommendations and concerns raised at a three-day ESTA Review workshop hosted by the Department of Land Affairs in November 1999. It should be noted that this document has not been publicised for public comment yet. It is discussed in this report to highlight the proposed amendments as a response to the courts narrow approach.

<sup>399</sup> The first meeting if the task team took place on the 28 May 2002 and three possible ways of implementing the Minister's directive were discussed. In light of the discussions, the first draft of the Tenure Security Laws Consolidation and Amendment Bill was presented in three versions. After numerous meetings with various stakeholders, the task team met with the Director-General of the DLA who instructed the task team to make a comprehensive policy submission to the Minister setting out the advantages and disadvantages of the three options, and at the same time to prepare a third draft of the Bill. This Submission, which is the focus of this research paper, was made pursuant to these decisions.

<sup>400</sup> ESTA Draft Submission 2002, 1.

unless the occupier committed a breach in terms of section 10(1)(a)-(c) of ESTA. It was recommended at the Department of Land Affairs ESTA Review Workshop that the definition of ‘occupier’ be amended to create a separate category of long-term occupier whose right cannot be terminated under any circumstance. A comparison was made to section 9(1) of the Labour Tenants Act which provides special protection to labour tenants who have attained the age of 60 years irrespective of the length of time that they have been living on the land belonging to the owner.<sup>401</sup>

A direct response to the *Pharo* case, where the LCC held that the relocation of an occupier from one dwelling to another on the same land was not an ‘eviction’ as defined in ESTA and therefore does not have the protection of the Act, the ESTA/LTA consolidation task team proposed circumstances to be considered which must be taken into account by the court before it relocates occupiers from one dwelling-place to another.<sup>402</sup>

However, the process of consolidating ESTA and the LTA commenced in 2001 and disappointingly has not been finalised to date.<sup>403</sup> Since then, numerous demands have been made to government to finalise the consolidated legislation and to strengthen the tenure rights of vulnerable groups.<sup>404</sup> One of these demands has centered on the strengthening of women’s rights as women have been found to be more vulnerable to evictions and are often discriminated against by the legal system, the courts and farmers.<sup>405</sup> The discrimination is highlighted in the court cases where women have been classed as ‘secondary occupiers’ who derive their rights from their husbands and who are vulnerable to eviction if the primary occupier’s right to reside on the premises has been terminated.<sup>406</sup>

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<sup>401</sup> ESTA Draft Submission 2002, 70. See Explanatory note to the Third draft of the Tenure Security Laws Consolidation and Amendment Bill, 2003

<sup>402</sup> ESTA Draft Submission 2002, 73. See Explanatory note to the Third draft of the Tenure Security Laws Consolidation and Amendment Bill, 2003

<sup>403</sup> Chenwi 2005, 20.

<sup>404</sup> These concerns were raised at the National Land Summit held in 2004 hosted by the Department of Land Affairs and at a conference hosted by Nkuzi Development Association and the Social Surveys Africa in October 2005. See Wegerif 2005.

<sup>405</sup> Wegerif 2005, 187.

<sup>406</sup> See the cases of *Landbounavorsingraad, Dique* and *Venter* supra.

In addition to the above, amendments have also been proposed to de-link labour rights from occupier's tenure rights, as dismissals should not automatically result in the occupier being evicted.<sup>407</sup> This, it is submitted, is a direct response to the court's reluctance to consider issues of fairness surrounding dismissals before an eviction is granted.

These proposals are an attempt to broaden the scope as well as the circumstances under which evictions may occur, so as to provide greater protection to vulnerable occupiers, in view of the court's failure to do so. However, it should be noted that legislative amendments alone will not solve the eviction problem if the LCC does not adopt a purposive interpretation of ESTA.

## **5.6 Comments and conclusion**

Evictions remain a social reality to many vulnerable and marginalised persons. However, restrictions have been placed on the common law property rights of owners by section 26(3) and its related land reform legislation to ensure that vulnerable and marginalised persons and communities are protected from unfair, arbitrary and inequitable eviction processes. These provisions have placed limits on the common law right to evict through the consideration of circumstances, which would not have been traditionally considered at common law.

However, tensions between the common law notions of property rights and the transformative vision of our Constitution and land reform legislation will continue as the courts make decisions and give interpretive value to what is relevant in eviction matters. Courts need to be aware of both situations to effectively balance the rights of both occupiers and landowners in eviction matters.<sup>408</sup>

The transformative interpretation given by the courts in PIE matters should not be thwarted by the proposed amendments to PIE. The legislature cannot provide

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<sup>407</sup> Wegerif 2005, 39.

<sup>408</sup> Liebenberg 2005b, 7.

circumstances and rules for the myriad of different eviction situations within one piece of legislation. Instead, it is the role of the courts to determine what is just and equitable in each eviction matter so as to avoid the application of rigid rules that may create inequitable results. The courts need to make decisions which are just and equitable.

The legislature should also avoid making amendments, which could further limit the potential of transformation, in particular in relation to ESTA. Providing a plethora of different factors to be considered for occupiers does not automatically mean better protection for vulnerable occupiers on the whole. This is clear from the current jurisprudence on ESTA. It is thus important that the courts adopt a purposive and context-driven approach to the provisions of the tenure legislation, so as to forward the constitutional vision of transformation for the South African society.

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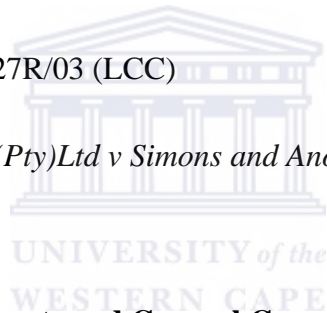


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- 5) Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
- 6) (Draft) Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill Government Gazette No 25391 published 27 August 2003
- 7) Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill Government Gazette No 27370 published 18 March 2005
- 8) Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill Government Gazette No 29501 published 22 December 2006
- 9) Draft Submission to the Minister of Agriculture and Land Affairs on Possible Strategies Aimed at Conferring Independent Tenure Rights on Rural Tenants' drafted 15 October 2002 drafted by the ESTA/LTA Consolidation task team
- 10) Parliamentary Submissions made by the Legal Resources Centre on the Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill, 2006 dated 19 February 2007