The role and functions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) in land reform in South Africa

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THE ROLE AND FUNCTIONS OF THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT (PIE) IN LAND REFORM IN SOUTH AFRICA

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KEY WORDS

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act
Land reform
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Security of tenure
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Social reform
ABSTRACT

THE ROLE AND FUNCTIONS OF THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT (PIE) IN LAND REFORM IN SOUTH AFRICA

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In this minithesis, I set out to determine the degree to which the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) is in line with the objectives of South Africa’s land reform policy with regard to the promotion of access to land and security of tenure, and to determine to which extent the Act has contributed to land reform.

A brief historical overview of South African land law is provided in order to indicate the reasons for enacting PIE. Current land policy is then described to establish the extent to which the Act is in line with the objectives of land reform and its constitutive components. The motivation giving rise to the enactment of PIE is analysed in more detail by setting out the objectives of the Act and the basic procedure prescribed for eviction under the Act. The flaws identified in the Act are analysed with reference to case law. The Act along with the proposed
amendments are then systematically compared to the objectives of the land reform policy.

Conflicting views regarding the place of PIE in the land reform system gave rise to the present investigation. As the Act has its roots in section 26(3) of the Constitution, it has been linked to the right of access to adequate housing, which has led to the interpretation that it was a means of effecting land reform. It is evident from the investigation that the Act was intended too further purposes of land reform. However, the interpretation of the Act by the courts supports the notion of employing the Act as a means of effecting broader social reform.

I argue that the Act makes a limited contribution to effecting the right of access to adequate housing. In terms of ensuring security of tenure, however, the Act plays a pivotal role in the prevention of arbitrary evictions. This minithesis is concluded with a description of the implications of this investigation.

November 2004
DECLARATION

I declare that The role and functions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) in land reform in South Africa 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.

Laetitia Oliphant

November 2004
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Laetitia Oliphant
DEDICATION

This work is dedicated to my mother and father for their enduring love and support

Laetitia
CHAPTER ONE

THE ROLE AND FUNCTIONS OF THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT (PIE) IN LAND REFORM IN SOUTH AFRICA

"The path to poverty is characterised by landlessness. For as long as the poor are hungry, the rich will never know peace. Land acquisition is the only way to riches.” Mr Motsepe Matlala, Deputy President of the National African Farmer’s Union, at an LRAD\textsuperscript{1} farm hand-over.\textsuperscript{2}

1.1 Introduction

Land has been a contentious issue in South Africa for decades. From as early as 1652, with the arrival of Jan van Riebeeck at Table Bay, indigenous people were subject to the dictates of Europeans regarding the occupation of land. The colonisation of the Cape by the Dutch occurred through the appropriation of the land on which the Khoisan lived, through wars and various agreements with the relevant chiefs.\textsuperscript{3} The expansion of the colony and the increased arrival of European settlers brought further forcible dispossession of land. Although this notion would later take on various forms, its aim and consequences remain the same, besieging South Africa with a legacy of conflict surrounding land.

Ongoing wars during the seventeenth century resulted in extended occupation by settlers.\textsuperscript{4} The indigenous population was reduced to mere labourers.\textsuperscript{5} The Khoisan were

\textsuperscript{1} Land Redistribution for Agricultural Development.
\textsuperscript{2} Matlala “ Land central to humanity, dignity and survival” (2002) Land Info. Department of Land Affairs 9(2) 30.
\textsuperscript{3} Ross A Concise History of South Africa (1999) 22.
driven from fertile territory making them unable to sustain cattle or crops, and by 1713, most of the territory was under the control of Europeans. For the remainder of the eighteenth century, white colonists continued to invade the vast expanse of land.

The annexation of the Dutch Cape Colony by the British in 1806 gave rise to the notion that “the two societies should be kept absolutely separate from one another until the Whites were powerful enough to dominate the region.” This notion of separate development riddled almost two centuries, making forced removals and evictions part of the fabric of South African history. Ruthless conquests led to the continued expulsion of the indigenous inhabitants from the land.

The twentieth century saw the start of consolidation of white power and the systematic dispossession of land on the basis of racially discriminatory legislation. The Native Land Act 27 of 1913 propelled territorial segregation by designating specific areas which could be acquired solely by “natives”, and prohibiting them from acquiring the rest in any manner. The Act effectively promoted dependence on white-owned farms, and dictated the living and working conditions. The underlying objective of prevailing land policies was to force blacks into areas that could not sustain them economically, effectively creating a pool of cheap labour subject to exploitation by the white farm owners. Their poverty was perpetuated by the fact that they could not use land as a form of security in order to attain self-sufficiency. Apart from limited access to land, the title to land held by

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blacks was and still is of an inferior nature. According to Bundy, the Native Land Act “laid down the conditions and terms upon which the struggle between landlords and tenants would be waged in the future. The law loaded the dice heavily in favour of landlords and employers.”11

The Group Areas Act12 followed the National Party’s political victory in 1948, to enforce the ideology of separate development. It designated specific areas for occupation by particular racial groups. The Prevention of Illegal Squatting Act,13 which was considered by many as the cruellest creation of the apartheid architects, created various offences related to the occupation and utilization of land.14 It conveyed the power to forcibly remove communities from land which they occupied and to destroy homes.

In terms of this Act, forced removals were authorised regardless of whether the occupant of the relevant premises had the owner(s)’ consent to be there.15 Due to the dictates of the economy, however, blacks could not be kept out of the city, and had to be provided with a minimal form of shelter. In this way, large informal settlements were created.16 These were later declared to be transit areas,17 with the result that those who had been relocated could be removed again as soon as the land was needed for another purpose. Since the Act removed the power of the Court to give recourse in this regard, those affected were left without any remedy.18

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12 41 of 1950 and 36 of 1966.
13 52 of 1951.
16 O’Regan (1990) 176.
17 O’Regan (1990) 177.
18 O’Regan (1990) 162.
All these laws were therefore used to manipulate, disempower, disenfranchise and deprive people of their means of survival. It created class divisions and empowered a specific group.

The transition to a democratic era was underpinned by issues surrounding the struggle for land. Vehement and extensive debates thus surrounded the constitutional protection of property in the negotiations leading up to 1994.\textsuperscript{19} Although property rights are now entrenched in the constitution, the distribution of land remains grossly unequal.

1.2 Problem Statement

Even today, access to and ownership of land is distorted in favour of a minority of South Africans, rendering the majority poor and landless. To correct this distortion, the post-apartheid government has taken up the task of alleviating the difficulties attached to limited access to and inferior rights in land. Due to the historical dispossession of land and the intrusion of the consequences into the lives of many South Africans, a comprehensive land reform policy and various mechanisms were put in place for this purpose. A sound land policy is essential for reconstruction and development to be successful. Progress has however been slow and reform has as yet not been completed.

The subject of this study is the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)\textsuperscript{20} and its role in the government’s land reform programme. South Africa’s history of denial of land rights by dispossession and forced removals made the regulation of evictions imperative. Before this, black people had no recourse

\textsuperscript{19} Carey Miller \textit{Land Title in South Africa} (2000) 282.
\textsuperscript{20} 19 of 1998.
when they were forced off land that they occupied, or even owned, for decades. The purpose of the Act is “to provide for the prohibition of unlawful eviction; to provide for procedures for the eviction of unlawful occupiers; and to repeal the Prevention of Illegal Squatting Act 52 of 1951”.

PIE is not only an attempt to regulate control of land, but also to change deeply ingrained dispossession practices. There are, however, various views regarding the place of this Act in the reform system. By regulating evictions the Act could be regarded as a mere procedural mechanism preventing unlawful evictions. The nature of the Act also makes it a temporary measure of relief for unlawful occupiers who maintain occupation while the provisions of the Act are complied with. Whether this measure of relief also affects security of tenure is, however, unclear. Whether the Act was envisaged as part of the land reform programme or simply to deal with the constitutional provision against illegal evictions is a vexed question. If it was indeed intended to be part of the land reform system, the substance of the Act needs to be clearly defined within the greater scheme of land reform. This is what has given rise to the current enquiry as to whether PIE has been enacted as part of government’s land reform programme.

In order to do justice to the research question posed, i.e. the significance, if any, of PIE in the broader land reform initiative, it is necessary to distinguish between the terms land reform, social reform, security of tenure, access to land, and access to housing. This distinction will enable a judgment as to exactly how PIE fits into the greater scheme of things, when its objectives and goals are compared with those of the various legs of the

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21 See long title.
22 The aim of the study is to determine the degree to which PIE is in line with the objectives of South Africa’s land reform policy with regard to the promotion of access to land and security of tenure and to determine to which extent the Act has contributed to land reform.
reform programme. Social transformation does not only refer to the end result or aim of legislation, such as PIE, but also has an impact on the interpretation of legislation or how this specific kind of legislation has to be approached. It entails not only looking through purely legalistic eyes at these provisions. Social reform encompasses the transformation of the social inequality which exists in South African society due to apartheid policies, and reforming the way in which society is run. It draws attention to the fact that there are various groups in society that require special attention. Land reform is thus a constituent part of the broader purpose of achieving such transformation, as it attempts to reorganize and transform existing agrarian systems with the intention of improving the distribution of agricultural incomes and thus fostering rural development. Among its many forms, land reform may entail provision of secured tenure rights to the individual farmer, transfer of land ownership away from small classes of powerful landowners to tenants who actually till the land, appropriation of land estates for establishing small new settlement farms, or instituting land improvements and irrigation schemes. Section 25(6) of the Constitution provides for the upgrading of insecure tenure. Tenure security refers to the measure of legal protection afforded to the rights of an owner in relation to his property. Arbitrary interference with these rights of property owners is constitutionally prohibited. Land tenure reform aims to strengthen and secure insecure titles which are a direct consequence of the unjust land regime emanating from the apartheid dispensation.

See 24.
Such as women, children, the aged and the previously disadvantaged.

Section 25(6) reads: “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.”

Section 25(1) of the constitution provides that “No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”
As stated by Mostert, the policy underpinning initial tenure reform laws supports the notion that attaining landownership for a broader basis of South Africa’s society is the definitive aspiration of reform. However, later tenure reform laws have deviated from this ambition. For PIE to qualify as tenure reform legislation, an analysis will have to display the presence of core elements of the tenure reform programme, namely providing secure tenure, preventing arbitrary evictions, ending racially defined forms of rights to land, allowing for different forms of tenure in terms of which de facto rights are protected and reforming the legal basis of landholding.

Section 25(5) of the Constitution further provides for land reform by directing government to facilitate access to land for its populace. Section 25(5) does not confer a right to land or the right to have access to land. The state simply has to “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”. The content of section 25(5) therefore does not grant individuals the ability to demand access to land. Access does

33 Section 25(5) reads: “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.”
not automatically entail, although it may incorporate, ownership.\textsuperscript{36} It may denote accessibility of land on joint ownership, rights based in contract or other secure use rights, which would shield occupiers from arbitrary dispossession.\textsuperscript{37} Legislative measures intended to secure rights to land already occupied under insecure forms of tenure can also be used as a means of securing access.\textsuperscript{38} This reasoning denotes a link between access to land and tenure security in that tenure security may be a means of facilitating access to land.

Section 26(1) states that “everyone has the right to have access to adequate housing.” This provision does not convey the right to housing on demand. It would be a practical impossibility for government to fulfil a constitutional mandate of providing housing to its citizens on demand. As with section 25(5), an internal limitation exists in that the realisation of the right is subject to the availability of state resources. The responsibility of the state in relation to both sections 25(5) and 26(1) is to promulgate legislation and to deploy alternative means within its available resources in order to realise its constitutional obligations. The facilitation of access to housing would, however, be meaningless if beneficiaries did not enjoy some form of security in relation to the property being occupied. As the rights in the bill of rights are interrelated and interdependent, it is also apparent that access to housing entails access to land. Land needs to be made accessible in order to make housing development possible. Facilitating the right of access to housing in isolation from the right to land is insufficient and not


practical. The Constitutional Court has also made it clear that realising the right to access to housing would require that other elements which form the basis of other socio-economic rights, such as access to land must be in place as well.\textsuperscript{39} The right of access to adequate housing therefore requires available land.\textsuperscript{40}

Although tenure security, access to land and access to housing emanate from different constitutional provisions, they are interlinked and to an extent may be seen to be mutually dependant.

1.3 Aims and objectives

Since PIE has raised many concerns with regard to the protection it affords to unlawful occupiers,\textsuperscript{41} the aim of this study is to determine the degree to which PIE is in line with the objectives of South Africa’s land reform policy with regard to the promotion of access to land and security of tenure and to what extent the Act has contributed to specific objectives of the land reform policy.

It can be accepted that PIE presents itself as an effective temporary measure of relief for unlawful occupiers, but how this relates to the promotion of access to land and or to security of tenure is not clear. The recent application of the Act as well as its content has been subject to much criticism. There has also been much debate with regard to the categories of persons who should be afforded protection in terms of the Act. The Act has

\textsuperscript{39} Government of the Republic of South Africa and Another v Grootboom and Others 2000 (11) BCLR 1169 (CC) 1189 at para 35.

\textsuperscript{40} Government of the Republic of South Africa and Another v Grootboom and Others 2000 (11) BCLR 1169 (CC) 1189 at para 35.

\textsuperscript{41} In Ndlovu v Ngcobo and Bekker & Bosch v Jika 2003 (1) SA 113 (SCA), the court ruled that tenants who do not pay rent and buyers who default on their bond payments will have the same protection against eviction as squatters.
been scrutinised in many cases. ABSA Bank v Amod,\textsuperscript{42} Ross v South Peninsula Municipality,\textsuperscript{43} Betta Eiendomme (Pty) Ltd v Ekple-Epoh,\textsuperscript{44} Ellis v Viljoen,\textsuperscript{45} Brisley v Drotsky,\textsuperscript{46} Ndlovu v Ngcobo and Bekker & Bosch v Jika\textsuperscript{47} and Baartman and Others v Port Elizabeth Municipality\textsuperscript{48} are amongst the cases which will be discussed in a later chapter.

The views of commentators\textsuperscript{49} are of particular relevance to the discussion, along with the Draft Amendment Bill\textsuperscript{50} which aims to alleviate tension caused by the Act. Eventually it must be determined whether PIE has indeed been enacted as part of the government’s land reform programme. This is important in the light of the various discrepancies surrounding PIE,\textsuperscript{51} and the question of whether the goals envisaged by land policy have been achieved. The answer to this latter question may aid future interpretation of some of the most problematic provisions of PIE.

\textsuperscript{42} 1999 All SA 423 (W).
\textsuperscript{43} 2000 (1) SA 589 (C).
\textsuperscript{44} 2000 (4) SA 468 (W).
\textsuperscript{45} 2001 (4) SA 795 (C).
\textsuperscript{46} 2002 (4) SA 1 (SCA).
\textsuperscript{47} 2003 (1) SA 113 (SCA).
\textsuperscript{48} 2004 (1) SA 557 (SCA).
\textsuperscript{50} GN 2276 GG25391/27-8-2003, Draft Prevention of Illegal Eviction and Unlawful Occupation of Land Amendment Bill.
\textsuperscript{51} See para 3 5.
1.4 Sequence of chapters

Chapter two is dedicated to a description of current land policy, its three components and the objectives that it seeks to achieve. The success of the implementation of these programmes, the realisation of the objectives as well as the constraints hampering their materialisation, is also examined in this chapter. This is done with a view to determine the extent to which PIE is in line with the objectives of land reform in general and its three constitutive components. Chapter three provides an overview of the provisions of PIE. Flaws identified in the Act are also introduced in this chapter. Chapter four contains an analysis of PIE and relevant cases in which the Act was interpreted and applied in order to ascertain the approach which the courts have taken with regard to evictions under the Act. The interpretation of the Act by the courts will elucidate the role and function of PIE and aid in determining whether it can be interpreted in a manner which fashions land reform. In chapter five the proposed amendments to the Act are discussed. This is done in order to determine the effect that these proposed amendments could have with regard to the Act in relation to land reform. In chapter six PIE is assessed against the objectives of land policy. The determination of the measure to which the Act contributes to land reform will be indicative of its nature and whether it was conceived to facilitate this process. Chapter seven concludes the study with a summary of the findings.
CHAPTER TWO

LAND REFORM IN SOUTH AFRICA

2.1 The South African Land Reform Process

In terms of the 1996 South African Constitution, the government is obliged to make land reform a priority as a means of redressing the disparities of the past. The mandate of the Department of Land Affairs (DLA) was “to contribute to the Reconstruction and Development Programme (RDP) by developing a comprehensive and far-reaching land reform programme.”\(^{52}\) This led to the drafting of the Green Paper on Land Policy, which articulated the position with regard to land and policy proposals.\(^{53}\) After extensive scrutiny of the Green Paper and public participation, the White Paper on South African Land Policy was created in 1997 as the policy document that would facilitate the realization of the government’s constitutional mandate towards land reform.\(^{54}\)

Current land policy consists of three programmes: restitution, redistribution and land tenure reform.\(^{55}\) *Land restitution* is directed at compensating those who were deprived of land by racially discriminatory laws or practices after 1913, which can take the form of restoring land or any other appropriate remedy.\(^{56}\) *Land redistribution* is aimed at enabling the poor to generate their own wealth by providing them with land which they can utilise to this end.\(^{57}\) *Land tenure reform* entails strengthening the title to land. To this end the rights that accrue are also strengthened, making the arbitrary evictions


that beset the apartheid dispensation impossible. The basis for these land reform programmes is to remedy the injustices of the past, and to facilitate the realisation of the many other objectives of land policy.\(^58\) Numerous impediments however exist with regard to the implementation of these programmes. Although the goals and programmes envisaged in land policy are noble, these constraints hamper their realisation.

The key problem of the *land restitution* policy is its largely rights-driven process.\(^59\) The *redistribution* process is stifled by its application basis, which required applicants to apply for specific pieces of land, often lacking reference to need, existing infrastructure or provincial or municipal planning.\(^60\) The size of the grant made available in terms of the grant-based approach is also insufficient to generate a livelihood.\(^61\) *Tenure reform* has been severely constrained by the DLA’s lack of resources. Although the White Paper\(^62\) emphasises provision of land rights and opportunities to gain landownership, this effort is limited by the lack of fundamental reform of landownership.\(^63\) Of the obstacles facing land reform, however, the shortage of funds is most threatening.\(^64\) In order to remedy this situation, government will have to increase the budget for land reform substantially or alternatively reconsider the targets of the process.

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In this chapter an outline is provided of the policy contained in the White Paper,\textsuperscript{65} and the legislation that was subsequently enacted. The core characteristics of PIE are also set out here,\textsuperscript{66} as well as problems that have been identified,\textsuperscript{67} in order to further an understanding of the provisions of the Act.

\subsection*{2.2 South African Land Policy}

According to the White Paper,\textsuperscript{68} official land policy seeks to address the injustices of racially based land dispossession of the past; the need for a more equitable distribution of landownership; the need for a type of land reform that will minimise poverty and lead to the creation of jobs which underpin economic growth; security of tenure for all and a system of land management that will make land available for development while supporting sustainable land use patterns, in other words, not causing harm to the environment. To further these objectives and to redress the injustices of apartheid, foster national reconciliation and stability, underpin economic growth and improve household welfare and alleviate poverty, the land reform programme centres on the three mentioned elements: restitution, redistribution and tenure reform.\textsuperscript{69} Each of these elements of the South African land policy are examined more closely below.

\textsuperscript{66} See 2.4.
\textsuperscript{67} See 2.4.3.
2.2.1 Restitution

The objective of the restitution policy was to enable people who had been dispossessed of their land to receive compensation in the form of either the land of which they were dispossessed or alternative land, monetary compensation, a combination of alternative land and a cash settlement or priority access when government makes decisions relating to housing and land development programmes.70 Only those dispossessed of their land through racially based legislation or practices can be beneficiaries under this policy.71 The Restitution of Land Rights Act72 was the first reform law passed by the post-apartheid government. This Act has its basis in section 121(1) of the interim Constitution,73 which required that “an Act of Parliament shall provide for matters relating to the restitution of land rights” and section 25(7) of the 1996 Constitution.

In order for a restitution claim to be considered under the Act, the claimant had to be a person or community dispossessed of property after 19 June 1913 as a result of racially discriminatory laws or practices and must not have received just and equitable compensation.74 All these claims had to be lodged with the Commission before 31 December 1998. Mechanisms through which this policy is still being realised are the Land Claims Court,75 Commission on Restitution of Land Rights76 headed by a Chief Land Claims Commissioner77 and Regional Commissioners.78 Appeals against judgments or orders of the Land Claims Court are considered by the Supreme Court

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75 Section 22(1) of the Restitution of Land Rights Act 22 of 1994.
76 Section 4(1).
77 Section 4(3).
78 Section 4(3).
of Appeal\textsuperscript{79} in the instance where the required leave to appeal is obtained. Where permitted, the Constitutional Court can also be approached directly.\textsuperscript{80}

From 1 May 1995 the initial targets for the restitution process were three years for lodgement of claims; five years for finalization of claims, and ten years for implementation of all Court orders.\textsuperscript{81} The amendment of the Restitution of Land Rights Act, in 1997,\textsuperscript{82} allowed claimants direct access to the Land Claims Court and enhanced the powers of the Minister of Land Affairs to settle claims by negotiation. In 1998 a review of the restitution process accelerated the settlement of claims so that by February 2004, 48 463 claims had been settled.\textsuperscript{83}

One of the aspects which the restitution process seeks to address is that of poverty.\textsuperscript{84}

In this regard, the developmental aspects of the programme are questionable, as major problems of inadequate infrastructural development, poor service provision and unrealistic business planning have become apparent.\textsuperscript{85}

The White Paper provides that restitution is closely linked to the need for the redistribution of land and tenure reform.\textsuperscript{86} The three legs of the land reform policy are thus inextricably linked. This, however, does not necessarily mean that the legs of the programme have an impact on each other all of the time.

PIE does not suggest a restitutinatory intent, as persons who have been displaced as a result of racially based legislation or practices, in respect of the land which they

\textsuperscript{79} Section 37(2).
\textsuperscript{80} Section 37(9).
\textsuperscript{82} Section 38B(1) of Act 22 of 1994 as amended by Act 63 of 1997.
\textsuperscript{83} Umhlamba Welthu. A quarterly bulletin tracking land reform in South Africa. (2004) 1
\textsuperscript{85} Dispossession leading to landlessness has been a major cause of poverty in South Africa.
\textsuperscript{86} Luhill\textsuperscript{9} “Land reform in South Africa: An overview, with particular reference to protected areas” (2002) Programme for Land and Agrarian Studies, University of the Western Cape.
\textless www.sasusj.net/Downloads/Land%20Reform\textgreater 24/08/2004.
currently occupy illegally are currently being protected by the Interim Protection of Informal Land Rights Act.\textsuperscript{87}

2.2.2 Redistribution

To promote the redistribution of land, the following have been enacted: the Provision of Land and Assistance Act,\textsuperscript{88} the Development Facilitation Act\textsuperscript{89} and the Transformation of Certain Rural Areas Act.\textsuperscript{90}

The purpose of the redistribution programme is to provide the poor and disadvantaged with land for residential and productive purposes in order to improve their livelihoods.\textsuperscript{91} Initially, a single land grant to the value of R16 000 per household, the Settlement and Land Acquisition Grant, commonly known as SLAG, was offered by the government to assist in the purchase of land from willing sellers.\textsuperscript{92} Expropriation would only be resorted to where no other remedy was available.\textsuperscript{93} As the public were left to their own devices to express their need with regard to land in order to access these grants, the demand-driven nature of the programme was criticized.\textsuperscript{94} The government also failed to embark upon any active campaigning to ensure that people were aware of the programme.\textsuperscript{95}

The Department of Land Affairs introduced a new redistribution policy entitled “An Integrated Programme of Land Redistribution and Agricultural Development in South

\textsuperscript{87} 31 of 1996.
\textsuperscript{88} 126 of 1993.
\textsuperscript{89} 67 of 1995.
\textsuperscript{90} 94 of 1998.
This policy shifted the focus from alleviating the plight of the rural poor to the promotion of agricultural production and commercial farming by establishing a class of black commercial farmers. In 2000, after much uncertainty as to whether or not the IPLRAD would entirely replace the existing redistribution programme, a revised policy document clarified that the Land Redistribution for Agricultural Development programme (LRAD) was in fact to be regarded as a sub-programme within the larger redistribution programme. This sub-programme was also introduced as a response to the criticism levied against the SLAG policy, and was designed to provide grants to black South Africans to facilitate their access specifically to agricultural land. This sub-programme has two parts, consisting of the transfer of agricultural land to specific individuals or groups on the one hand and commons projects on the other. Beside contributing to the process of the redistribution of 30% of the country’s agricultural land over 15 years, the programme aims to improve the nutrition and income of poor rural farmers, relieve over-crowded former homeland areas and expand opportunities for women and the youth to stay in rural areas.

The value of a grant ranges between R20 000 and R100 000 per individual but depends on the amount that individuals contribute, whether in kind, labour and/or cash. The “own contribution” ranges from R5 000 to R400 000 and may consist of bank loans, either partly or entirely. In the latter instance it is evident that “grants will ... be directed towards the creditworthy, among whom earners of high salaries in

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98 Released in early November 2000 as “final draft document 3”.
urban employment are likely to be prominent. Applicants need to be black South Africans, they must intend using the land for agricultural purposes and they must live on or close to it. Projects that qualify for an LRAD grant include food safety-net projects or subsistence production projects, equity schemes and commercial projects.

The LRAD programme has been criticised for its failure to address the serious shortfalls of the SLAG policy. It perpetuates the “demand-led approach which places excessive responsibility on intended beneficiaries”. This reveals a lack of recognition for the fact that rural communities are often disorganized, under-resourced and under-skilled as a result of apartheid. The programme also continues to rely on “the willing-buyer and willing-seller approach which gives current owners effective control over the pace and nature of land redistribution.” For reasons that are self-evident, this redistribution programme has therefore been criticised for providing more money for subsidizing those who are already well-off rather than for those who are poor.

The redistribution process would be a futile attempt at reform if the recipients in terms of the programme had no security of tenure in relation to the land received. This by implication intractably links redistribution and tenure reform to one another. It is also

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apparent that in order to realise the right of access to housing, land needs to be accessible. The Constitutional Court linked section 26(1) to section 25(5) in *Grootboom*[^108] by providing that “[a]ccess to land for the purpose of housing is ... included in the right of access to adequate housing in section 26.” Although the state’s obligation in terms of section 26(1) may vary depending on the particular circumstances, it is possible that the realization of this right depends largely on access to land.[^109]

Judging by the objectives of the redistribution programme, a preliminary classification of PIE as access legislation would be faulty. Access does not seem, in terms of PIE’s objectives to be its foremost goal. However, access might be the effect of the implementation of the provision of the Act in specific instances. This will be illustrated further in chapter three and four.

### 2.2.3 Tenure reform

The strengthening of insecure land titles is provided for in section 25(6) of the Constitution. This constitutional obligation underpins efforts to redress subservient titles produced during apartheid. Tenure is the English derivative of a Latin term meaning “holding” or “possession”, while land tenure refers to the terms on which land is held.[^110] “It is a legal term and means the *right* to hold land, rather than the *simple fact* of holding or possessing land.”[^111] The third element of land reform, land tenure reform, intends “to end racially defined forms of rights to land and at the same...
time to allow for different forms of tenure within which *de facto* rights would be protected.” As it deals with reforming “the legal basis of landholding”, it is a long-term project, which inevitably has huge budgetary implications requiring a stern commitment from the government. Writers have submitted that the sensitive nature and complexity of tenure issues and the concentration on the other two elements of land reform have led to the neglect of tenure reform.

To facilitate the delivery of security of tenure, a rights-based approach was adopted in the White Paper. The coinciding guiding principles for tenure reform therefore include a move towards rights away from permits; consistency with the Constitution’s commitment to basic human rights and equality; building a unitary non-racial system of land rights for all South Africans; and allowing people to choose the tenure system that is appropriate to their circumstances. The land rights that are strengthened by tenure reform include rights to occupy a homestead. They further comprise rights to deal with property i.e to transact, donate, mortgage, lease, rent and bequeath areas of exclusive use. Others may also be excluded from the above-mentioned rights, at

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community and/or individual levels. Linked to the above, rights to enforce legal and administrative provisions in order to protect the right holders also exist.

In order for land tenure reform to be effective, the process must be based on a comprehensive understanding of the context in which those who are intended to benefit find themselves. As the programme is directed at securing communal land rights primarily in rural areas, existing “functional and relatively democratic” systems of customary land tenure are not to be unduly constricted. The White Paper therefore provides that in areas where customary land tenure is functional, interference “would be unnecessary and even dangerous ... especially while there is no proven better alternative”. The motivation behind the process of tenure reform “is the need to deal with the legacy of discrimination, which has led to a situation of grossly inferior land rights being the lot of the majority of the population in the context of a system providing high standards of tenure for a minority of privileged landowners.”

One of the ways in which security of tenure was envisioned is through protection against eviction. Due to apartheid laws such as the Prevention of Illegal Squatting Act, many people found themselves subject to arbitrary evictions. To strengthen the land rights of those who occupy property belonging to others, legislation was required to provide alternative land in terms of which security of tenure is

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125 52 of 1951.
guaranteed.\textsuperscript{128} But protection for occupants of privately owned land was also identified as a key task for the development of the government’s tenure reform programme.\textsuperscript{129} The White Paper therefore emphasises that “tenure reform requires that legislation be promulgated which protects the rights and interests of both owners and occupants.”\textsuperscript{130} To provide for more secure land rights, the government promulgated the Upgrading of Land Tenure Rights Act,\textsuperscript{131} the Land Reform (Labour Tenants) Act,\textsuperscript{132} the Communal Property Association Act,\textsuperscript{133} the Interim Protection of Informal Land Rights Act,\textsuperscript{134} the Extension of Security of Tenure Act\textsuperscript{135} and the Communal Land Rights Act.\textsuperscript{136} Although some of these Acts are more prone to address evictions than others, Gildenhys nevertheless refers to these Acts as “social legislation”\textsuperscript{137} because it “attempts to address the social problem of homelessness caused by the eviction of people, particularly disadvantaged people, from the land where they lived.”

Achieving tenure security invariably requires the relocation of many people who currently share rights with others as a result of forced removals and overcrowding.

\textsuperscript{131} 112 of 1991.
\textsuperscript{132} 3 of 1996.
\textsuperscript{133} 28 of 1996.
\textsuperscript{134} 31 of 1996.
\textsuperscript{135} 62 of 1997.
\textsuperscript{136} 11 of 2004. The Communal Land Rights Act sets out to give secure tenure to those occupying South Africa’s former homelands. Its overall aim is to enable the registration and transfer of communal land to communities to occur and to be recognised under statutory law. The starting point of the Act, which delineates its primary objective, is provided in sections 4(1) and 4(2). A mechanism, in terms of which the Minister may institute a land rights enquiry, is also created. The creation of Land Administration Committees is provided for by the Act. The responsibilities of this committee include the relocation of new order rights in accordance with law and the registration of communal land and new order rights, establishing and maintaining registers as well as facilitating development processes in the community. In terms of the Act, the Minister may establish one or more Land Rights boards. The key functions of the land rights board are primarily to advise the Minister and the community affected by the Act.

Tenure reform can therefore not be conducted in isolation from land restitution and redistribution. It necessitates in particular the facilitation of access to housing and land. The upgrading of insecure titles would be meaningless without property in terms of which it can be exercised. Similarly, providing access to housing and land would be meaningless without the guarantee of some sort of security in relation to occupation.

2.2.4 PIE’s place in Land Reform Policy: A preliminary Assessment

The Act aims to provide for the prohibition of unlawful eviction, including procedures for the eviction of unlawful occupiers, the repeal of the Prevention of Illegal Squatting Act 52 of 1951 and other obsolete laws, as well as for matters incidental to these issues. It is important to note that the Act does not provide for an outright prohibition on evictions, but focuses on the prevention of unlawful evictions. The objectives of the Act appears in the preamble, which reflects the provisions of section 25(1) of the Constitution—"[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."
The preamble further states that “no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances,” reiterating section 26(3) of the Constitution. The inclusion of the idea that “it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognizing the right of landowners to

139 See long title.
140 The property clause.
apply to a court for an eviction order in appropriate circumstances,”¹⁴¹ is indicative of the intention to balance the interests of both landowners and occupiers. Requiring that “special consideration ... be given to the rights of the elderly, children, disabled persons, and particularly households headed by women, and that it should be recognised that the needs of those groups should be considered,”¹⁴² demonstrates the government’s commitment to give preference to these categories of persons. From the preamble of the Act it is evident that PIE has its roots in certain central principles of our Constitution, particularly in section 26(3). This express link with access to adequate housing may be what has prompted writers and practitioners to interpret the Act as a means of effecting land reform.

One of the primary objectives of PIE is the prevention of illegal evictions.¹⁴³ In this context, the Act contributes to facilitating security of tenure by providing clearly defined procedures which need to be complied with before an eviction may be executed.¹⁴⁴ It is thus evident that the Act is linked to tenure reform in terms of those who are intended to benefit from it. Both the Act and this specific land reform programme are targeted at those who find themselves in precarious positions in relation to property rights.

In the case of the Act, the specific category of persons intended to benefit is however contested. Initially the Act was held to apply only in instances where occupation has been unlawful from the outset.¹⁴⁵ In the controversial case of Ndlovu v Ngcobo and Bekker v Jika¹⁴⁶ the Supreme Court of Appeal nevertheless held that the Act also

¹⁴¹ See preamble.
¹⁴² See preamble.
¹⁴³ See long title.
¹⁴⁴ See sections 4, 5 and 6.
¹⁴⁵ See, for example, ABSA Bank Ltd v Amod [1999] 2 All SA 423 (W); Betta Etendomme (Pty) Ltd v Ekple–Epho 2000 (4) SA 468 (W); Ellis v Viljoon 2001 (4) SA 795 (C); Brisey v Drotsky 2002 (4) SA 1 (SCA).
¹⁴⁶ Ndlovu v Ngcobo and Bekker v Jika 2003 (1) SA 113 (SCA).
applied to instances where occupation was initially lawful. As a result bond defaulters, defaulting tenants and squatters are afforded equal protection under the Act. In my view, these categories of persons are rightfully protected in terms of the Act. It does however not seem fitting to afford bond defaulters as well as defaulting tenants the same protection as squatters. Although these categories of persons are indeed vulnerable members of society, the degree to which this is so in each instance is markedly different. Bond defaulters and defaulting tenants do require protection against illegal evictions due to their possibly vulnerable socio-economic status. It is nevertheless doubtful whether PIE is the appropriate mechanism to use in order to realise such protection. Whether PIE is applicable to all these categories of vulnerable people would in essence depend on the extent to which it can be regarded as legislation which deals with broader issues of social reform. If its enactment was primarily or solely to further the purposes of land reform, application of the Act to defaulting tenants or bond defaulters outside the “squatting” context would be illogical. If, however, PIE was intended to serve a broader purpose than merely alleviating the plight of squatters by raising the stakes of secure tenure, the protection of bond defaulters and tenants under it can no longer be excluded. Hence, it is important to assess the role and function of this Act in the context of land law and land reform. The degree to which the Act contributes to tenure reform will be discussed further in chapter four.

147 Ndlovu v Ngcobo and Bekker v Jika 2003 (1) SA 113 (SCA).
2.3 Conclusion: The Status of Land Reform

Since its commencement, land reform has experienced a number of problems which have hampered the realization of its objectives and left critical areas unaddressed.\textsuperscript{148} In summary, the various programmes have been weighed down by various problems. For one, the restitution process has been painstakingly slow, overly bureaucratic, and inefficient.\textsuperscript{149} Moreover, a mere 2.9% of total agricultural land had been transferred in terms of the redistribution process by 29 February 2004.\textsuperscript{150} Further, the anticipated beneficial impact on participants in the programme has not been realised\textsuperscript{151} and execution and monitoring continues to be weak although significant farm tenure laws have been implemented in terms of the tenure reform programme.\textsuperscript{152} The process has further been marred by an extreme lack of capacity, particularly in terms of quality and quantity of staffing in national and provincial offices of the Department of Land Affairs (DLA) and the Commission on the Restitution of Land Rights, which has regularly led to the Department’s failure to spend its budget.\textsuperscript{153} Confusion relating to the priorities of land reform has also added to the difficulties experienced in the process.\textsuperscript{154} The narrow development framework is an additional stumbling block as it does not provide priorities, nor does it link reform initiatives to other components of

\textsuperscript{148} Lahiff “Land reform in South Africa: An overview, with particular reference to protected areas” (2002) Programme for Land and Agrarian Studies, University of the Western Cape. \\
\texttt{<www.sasusg.net/Downloads/Land\%20Reform> 24/08/2004.} \\
\textsuperscript{149} Lahiff “Land reform in South Africa: An overview, with particular reference to protected areas” (2002) Programme for Land and Agrarian Studies, University of the Western Cape. \\
\texttt{<www.sasusg.net/Downloads/Land\%20Reform> 24/08/2004.} \\
\textsuperscript{151} Lahiff “Land reform in South Africa: An overview, with particular reference to protected areas” (2002) Programme for Land and Agrarian Studies, University of the Western Cape. \\
\texttt{<www.sasusg.net/Downloads/Land\%20Reform> 24/08/2004.} \\
\textsuperscript{152} National Land Committee “Land Reform Policy” (2001) Gender and Land Media Fact Sheets \\\n\texttt{<www.nlc.co.za/mdrfpm.htm> 24/08/2004.} \\
\textsuperscript{153} Lahiff “Land reform in South Africa: An overview, with particular reference to protected areas” (2002) Programme for Land and Agrarian Studies, University of the Western Cape. \\
\texttt{<www.sasusg.net/Downloads/Land\%20Reform> 24/08/2004.} \\
\textsuperscript{154} Lahiff “Land reform in South Africa: An overview, with particular reference to protected areas” (2002) Programme for Land and Agrarian Studies, University of the Western Cape. \\
\texttt{<www.sasusg.net/Downloads/Land\%20Reform> 24/08/2004.}
rural development, such as agricultural support and infra-structural development. Cooperative development frameworks\textsuperscript{155} between relevant governmental departments are essential to facilitate policy integration and prevent inconsistent practices at community level.\textsuperscript{156} "Poorly articulated demand among the poor and landless, and limited capacity among NGOs in the land sector, can also be cited as factors contributing to the lack of progress."	extsuperscript{157}

However, the government's ideological approach to land reform could conceivably be the most prominent restraint of current land policy.\textsuperscript{158} Emphasizing the market as a regulatory mechanism, has constrained the possibilities of land reform.\textsuperscript{159} The market-based approach utilises the forces of the market to redistribute land and is largely based on the willing-buyer-willing-seller principle. This slows the delivery of land as people most in need of land are in most cases unable to pay the market price. Providing for the willing-buyer-willing-seller framework of implementation and "fair and just" compensation for existing landowners has caused land reform to be characterized by speculation, obstruction by existing landowners, and expensive land transfers.\textsuperscript{160} In addition, land reform projects take extended periods of time to negotiate, thereby frustrating communities seeking to buy land. It has been suggested that a more interventionist approach be taken by the state in order to accelerate the

\textsuperscript{155} Joint initiatives undertaken by role-players to facilitate the streamlining of development.
\textsuperscript{157} Lahiff "Land reform in South Africa: An overview, with particular reference to protected areas" (2002) Programme for Land and Agrarian Studies, University of the Western Cape.
\textsuperscript{160} Lahiff "Land reform in South Africa: An overview, with particular reference to protected areas" (2002) Programme for Land and Agrarian Studies, University of the Western Cape.
delivery of land reform.\textsuperscript{161} This demand has led to amendment of the Restitution Act\textsuperscript{162} as well as the promulgation of legislation such as the Communal Land Rights Act\textsuperscript{163} which permits greater intervention. The amendments to the Restitution of Land Rights Act\textsuperscript{164} during 1995\textsuperscript{165} and 1996\textsuperscript{165} centered on the structure, powers and procedures of the Land Claims Court.\textsuperscript{167} In 1997\textsuperscript{168} amendments were promulgated to bring the Act in line with the 1996 Constitution, and to extend the cut-off date for the lodgment of claims.\textsuperscript{169} During 1998\textsuperscript{170} it was amended so as to provide for the secondment of officers to the Commission,\textsuperscript{171} to further regulate mediation and negotiation,\textsuperscript{172} and to extend the cases in respect of which money may be granted for the development of land. The most important amendments to date were those contained in the Land Restitution and Reform Laws Amendment Act 18 of 1999. These amendments have resulted in the speeding up of the restitution process by doing away with the need for a claim to be referred to the court where the interested parties have reached an agreement as to how a claim should be finalized.\textsuperscript{173} The Minister is now authorized under these circumstances to make an award of a right in land, pay compensation and grant financial aid.

\textsuperscript{161} Lahiff “Land reform in South Africa: An overview, with particular reference to protected areas” (2002) Programme for Land and Agrarian Studies, University of the Western Cape. \texttt{<www.sasug.net/Downloads/Land%20Reform> 24/08/2004.}


\textsuperscript{163} 11 of 2004.

\textsuperscript{164} 22 of 1994.

\textsuperscript{165} Restitution of Land Rights Amendment Act 84 of 1995.

\textsuperscript{166} Land Restitution and Reform Laws Amendment Act 78 of 1996.

\textsuperscript{167} Sections 22, 23 and 25.

\textsuperscript{168} Land Restitution and Reform Laws Amendment Act 63 of 1997.

\textsuperscript{169} Section 2.

\textsuperscript{170} Land Affairs General Amendment Act 61 of 1998.

\textsuperscript{171} Section 9.

\textsuperscript{172} Section 13.

\textsuperscript{173} Section 14.
It is suggested that any new policy should display a much more interventionist approach by the state. The excessive conditions of racial segregation and poverty in South Africa, deems it unrealistic to achieve transformation on the basis of incremental reform by way of the free market. An interventionist approach by government will mean that reform will be implemented in an integrated manner and will focus on areas in greatest need. It is in the context of this interventionist approach that PIE is viewed as a mechanism for broader social reform rather than only a temporary measure for continued occupation of another person’s property. Since the aim of this study is to determine whether the Act was ever intended to reflect the objectives of current land reform policy and to what extent it could contribute to the process, a brief introduction to the Act is provided in chapter three to serve as a basis for the evaluation of the Act against the objectives of land policy which is to follow in chapter six.

CHAPTER THREE
THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT\textsuperscript{178}

3.1 Introduction

In this chapter, the motivation giving rise to the enactment of PIE is analysed in more detail. The objectives of the Act are set out, and the basic procedure prescribed for eviction under the Act discussed. The main problems that have been identified already with the operation of the Act are then listed.

3.2 The legislative history of PIE

Prior to the introduction of the new constitutional dispensation, the criminalization of certain forms of land use had been brought about by several statutes, amongst these being the Prevention of Illegal Squatting Act.\textsuperscript{179} This Act provided for ruthless measures to evict squatters from public or private land.\textsuperscript{180} Since the commencement of the Constitution, however, numerous legislative reforms have been introduced in order to ensure constitutional compliance. The Prevention of Illegal Squatting Act,\textsuperscript{181} being part of the objectionable legislation from the past, was thus repealed by PIE which came into effect on 5 June 1998. The Act was promulgated to address the unfair eviction practices

\textsuperscript{178} 19 of 1998.
\textsuperscript{179} 52 of 1951.
\textsuperscript{180} Pienaar "The effect of the Prevention of illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 on Owners and Unlawful Occupiers of Land" (1999) \\
\texttt{<http://butterworths2.uwc.ac.za/nxt/gateway.dll/jc/9e/y5a/c6a/4p2k> 14/07/2004.}
\textsuperscript{181} 52 of 1951.
of the past and introduces considerable changes to the procedures in order to evict unlawful occupiers. PIE provides a framework claiming restoration of rights lost as a result of racial discrimination of the past, and for preventing any further erosion of rights relating to land through arbitrary evictions. The Act regulates unlawful occupation of land and creates a judicial process pursuant to which the rights of individuals and landowners could be mediated.

3.3 Objectives of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act

In addition to repealing the Prevention of Illegal Squatting Act, PIE aims to prohibit unlawful evictions while providing for procedures for the eviction of unlawful occupiers. The main premise of the Act is that "no person may evict an unlawful occupier except on the authority of an order of a competent court". The requirements for the lawful eviction of an occupier are strictly regulated and stipulate that upon institution of eviction proceedings the court must serve written notice upon the unlawful occupier and the municipality having jurisdiction at least 14 days prior to the hearing. This requirement is a novel feature of the Act. It is contended that in terms of this requirement, the court will not take measures regarding the actual serving of the papers but merely authorizes

182 52 of 1951.
183 See long title.
184 Section 8(1).
185 Section 4(2).
service taking place and the manner in which this is to occur.\textsuperscript{186} This is however not evident from a reading of the relevant provisions of the Act. In the event of farmland situated outside specific municipal boundaries, some difficulty may be experienced in determining which municipality has jurisdiction.\textsuperscript{187}

The following key elements are also provided for: (i) the establishment of procedures for the eviction of unlawful occupiers (as defined by the Act),\textsuperscript{188} (ii) the prohibition of receiving or requesting payment for arranging, organizing or permitting a person to occupy land unlawfully,\textsuperscript{189} (iii) the provision of mediation in regard to disputes in terms of the Act;\textsuperscript{190} (iv) and the criminalization of certain activities.\textsuperscript{191} An important departure from the harsh measures of the Prevention of Illegal Squatting Act\textsuperscript{192} is that the unlawful occupation of land is no longer a criminal offence. It is however commented that departing from the process of criminalizing land use by unlawful occupiers has led to the creation of several new criminal offences.

\textsuperscript{188} Section 4.
\textsuperscript{189} Section 3.
\textsuperscript{190} Section 7.
\textsuperscript{191} Section 8.
\textsuperscript{192} 52 of 1951.
3.4 Scope of application of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act

Many laws giving effect to land reform apply either to rural or urban areas. PIE however applies to the eviction of unlawful occupiers from land throughout the Republic. It thus applies to both rural and urban land. The provisions of the Act are further intended to apply to unlawful occupiers. An unlawful occupier is defined by the Act as:

"a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997[ESTA], and excluding a person whose informal right in land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act 31 of 1996."

Although certain categories of persons, such as occupiers as defined under ESTA, are excluded from the definition, it remains very wide, and it is not clear whether all forms of illegal occupation of land is dealt with under the Act. A consequence of this vague drafting of the Act is that it can strongly be argued that it includes a person who occupied property under a lease and failed to vacate the property after the lease has expired as well as bond defaulters.

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194 Section 2.
195 See preamble.
3.5 Basic procedure provided by PIE

A distinction is made between unlawful occupiers who have occupied land for less than six months and those who have done so for more than six months. If occupation has lasted less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so after considering all the relevant circumstances.\textsuperscript{197} This is indeed a pivotal aspect of the Act as it enhances protection afforded to unlawful occupiers as courts are compelled to consider the broad socio-economic context in which each application for an eviction is made. The relevant circumstances to be considered include the rights and needs of the elderly, children, disabled persons and households headed by women.

Where unlawful occupation has lasted longer than six months before the proceedings are initiated, the court may also grant an eviction order if it is just and equitable to do so. In this instance, the relevant circumstances include, in addition to those mentioned previously, the issue of whether alternative land has been made available or can reasonably be made available by a municipality or other organ of state or another landowner for the relocation of the unlawful occupier.\textsuperscript{198} This consideration is of particular value as it could potentially end the cycle of unlawful occupation.

If the requirements of section 4 have been complied with and the unlawful occupier fails to raise a valid defence, the court must grant an eviction order.\textsuperscript{199} A just and equitable date on which the occupier must vacate the land and the date on which the eviction order must be carried out by the sheriff, in the event of the occupier’s failure to vacate the

\textsuperscript{197} Section 4(6) and (7).
\textsuperscript{198} Section 4(7).
\textsuperscript{199} Section 4(8).
premises timeously, must also be determined. In determining such date, the court must have regard to all relevant factors referred to in sections 4(6) and 4(7), including the period the unlawful occupier and his or her family have resided on the relevant land. The court may also make an order for the demolition and removal of buildings or structures that were occupied by the unlawful occupier. No demolition of buildings or structures or removal of building materials by the owner is allowed without a court order.

3.6 Flaws identified in the Act

The importance of PIE is that it attempts to create a balance between the rights of the landowner and the occupier by providing a fair and equitable procedure for the eviction of unlawful occupiers. This attempt is however blemished by the varied interpretations of the Act due to its vague drafting. The purpose for which the Act was enacted ought to have been clearly displayed by the provisions of the Act. However, the ambiguity arising from its provisions has skewed the application of the Act and detracted from its effectivity.

Various aspects of the Act have been criticised. These include the ambiguity relating to the definition of the term “unlawful occupier”; a lack of clarity concerning what constitutes “relevant circumstances” and who bears the onus of presenting it to the

200 Section 4(8).
201 Section 4(9).
202 Section 4(10).
court; the extent to which the availability of suitable alternative accommodation should impact on the decision whether or not to grant an eviction order;\textsuperscript{205} as well as the question as to who should bear the burden of providing alternative accommodation.

These issues are discussed in chapter four, with reference to the judiciary’s interpretation of these aspects of the Act. A further discussion of the various discrepancies related to the Act is undertaken in chapter five in order to assist in the investigation of the degree to which the Act was probably intended to contribute to land reform. The importance of the inquiry as to whether PIE is land reform legislation or not is that it will clarify the circumstances in terms of which the Act is applicable.

For the moment it suffices to note that social circumstances have dictated that the legislature limit an owner’s right to possession in a variety of ways.\textsuperscript{206} The 1996 Constitution provides a link between a past typified by a lack of respect for proprietary rights and a future where these rights are recognised and enforced.\textsuperscript{207} PIE was introduced with a view to effecting such change and has considerably changed the procedures followed in order to evict unlawful occupiers, but not without controversy. In chapter four the court’s interpretation of the Act is considered with a view to ascertaining the extent to which this Act has the potential to contribute towards land reform.

\textsuperscript{205} de Klerk “Eviction under PIE” Property Law Update 2004 (July) DR
\textsuperscript{206} Gildenhuys “Evictions A Quagmire for the Unwary” (1999)
CHAPTER FOUR

THROUGH THE EYES OF THE COURTS:
AN ANALYSIS OF PIE WITH REFERENCE TO CASE LAW

4.1 Introduction

It was mentioned in chapter two that some authors view PIE as part of the South African government’s attempt to stimulate land reform, specifically land tenure reform.\textsuperscript{208} That land tenure reform has not been achieved in any great way is no secret. It is, however, still questionable whether PIE was really intended to contribute to this specific aspect of the land reform programme.

Among the problems that have been mentioned in chapter three with respect to PIE, are the meanings attributed to the requirements of “unlawful occupation” and the existence of “relevant circumstances”, whether alternative accommodation must be provided in the case of eviction and who must do so. In this chapter, these problems are analysed and discussed in terms of cases that have been decided. The relevance of such a discussion is that the problems provide a basis from which to establish the degree to which the Act is understood or could be expected to contribute to land tenure reform and possibly access to land.

4.2 “Unlawful occupier”

As mentioned in chapter three, the scope and application of the Act has produced difficulties of interpretation for our courts, predominantly with regard to the question as to who may benefit from its application.\textsuperscript{209} An “unlawful occupier” according to the Act is “a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997[ESTA], and excluding a person whose informal right in land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act 31 of 1996.”\textsuperscript{210}

Yet the Act does not further explain the action of “occupying”. As “occupy” is not defined in the Act, the form taken by the verb to indicate the specific time referred to, creates ambiguity with regard to the category of persons who should be afforded protection under the Act. The application of the Act in relation to land, structures erected before unlawful occupation and structures erected after such occupation has also raised concern.

4.2.1 How the Courts have interpreted “unlawful occupier”

In \textit{ABSA Bank Ltd v Amod}\textsuperscript{211} the applicant brought an action for the eviction of the respondent from the residential property he occupied, which was owned by the applicant.\textsuperscript{212} The agreement\textsuperscript{213} in terms of which the respondent took occupation of the

\textsuperscript{209} See 3 4.
\textsuperscript{210} See preamble.
\textsuperscript{211} [1999] 2 All SA 423 (W).
\textsuperscript{212} At 425 g.
\textsuperscript{213} An oral lease concluded between the respondent and the applicant.
premises had terminated.\textsuperscript{214} Prior to the hearing the parties reached a settlement, which they requested be made an order of court.\textsuperscript{215} The judge could not make the settlement an order of court, unless the applicant’s alternative defence was considered by the court.\textsuperscript{216} The respondent relied on PIE, stating that the applicant had not complied with any of the provisions of the Act.\textsuperscript{217} It thus had to be determined whether the provisions of the Act were applicable to the proceedings. Counsel for the applicant argued that the Act was intended as a means of providing protection to persons who had established informal settlements on land belonging to others, without the required consent to do so and that it was not intended for the Act to apply to contractual relationships regulating the sale or rental of structures constructed on land by an owner, including residential property.\textsuperscript{218}

In determining the matter, Schwartzman J, considered the following principles which govern the interpretation of statutes:

a) “It is permissible to look at the law at the time of the enactment and the reason for passing the Act.

b) It is permissible to look at the preamble to an Act or other express indications in it to ascertain the object sought to be achieved by the Act.

c) A statute must not be presumed to alter the common law.

d) Once it is clear that that is its object, effect must be given thereto to the extent that the statute clearly alters the common law.

e) A statute must not be interpreted to lead to an absurdity which the legislature did not intend.”\textsuperscript{219}

\textsuperscript{214} At 425 h.
\textsuperscript{215} At 426 b.
\textsuperscript{216} At 426 e.
\textsuperscript{217} At 426 d.
\textsuperscript{218} At 428 c.
\textsuperscript{219} At 428 e.
To gain guidance of the intention regarding the scope of application of the Act, he also considered the legislation which the Act repealed, namely the Prevention of Illegal Squatting Act,\textsuperscript{220} which provided for control of illegal squatting on public or private land. Schwartzman J noted that throughout the Act emphasis was placed on the notion of the unlawful occupation of land, and that it "does not purport to deal in general or specific terms with the unlawful occupation of immovable property lawfully built on land."\textsuperscript{221} He held that the word "land" was to be equated with vacant land and that it did not encompass permanent structures that had acceded to land,\textsuperscript{222} because, if this had been the intention, the legislature would clearly have stated it. Schwartzman J therefore found that the Act could not have been intended to alter the common law of eviction. Amongst the absurdities that would arise if PIE were applied to the unlawful occupation of immovable property, were that a landlord would be unable to evict a tenant whose rental agreement had lawfully terminated as well as a mortgagor who failed to pay his mortgage. The words "a person who occupies land without the express or tacit consent of the owner" was therefore held to refer to "a person who has without any formality or right moved on to vacant land of another and constructed or occupied a building or structure thereon."\textsuperscript{223} If the legislature intended to alter the common-law right of property owners, the definition of "unlawful occupier" would clearly have included persons who have a contractual agreement.\textsuperscript{224}

\textsuperscript{220} 52 of 1951.
\textsuperscript{221} At 429 c.
\textsuperscript{222} At 429 d.
\textsuperscript{223} At 429 i.
\textsuperscript{224} At 430 a.
In the light of these considerations, the buildings and structures referred to in section 4(10) of the Act were taken to be those that would be erected on land which was occupied without the required consent of the landowner.\(^{225}\) The Act was also read to have as its sole objective the regulation and control of persons who occupy informal settlements, and accordingly it was held that the Act does not have any bearing on common-law relationships.\(^{226}\) The Act was therefore held to have no application to the facts of the case and the settlement was accordingly made an order of court.

By providing that the sole purpose of the Act is to regulate and control persons who occupy informal settlements i.e. squatters,\(^{227}\) the court effectively placed the Act within the narrow context of land reform and not tenure reform. In this perspective the application of the Act to bond defaulters and defaulting tenants would be irrational, hence the court’s exclusion of these persons from the protection afforded by the Act.

In *Ross v South Peninsula Municipality*\(^{228}\) the respondent issued a summons against the appellant claiming her eviction from the premises she occupied.\(^{229}\) The basis for the action was simply that the respondent owned the premises and that the appellant occupied the premises while she had no right in law to do so.\(^{230}\) The respondent, whose form of pleading was in accordance with established common law principles, denied the existence of an agreement warranting such occupation. The court referred to an article of Purshotam,\(^{231}\) in which the author interprets the Act in such a manner that it would be

\(^{225}\) At 430 c.
\(^{226}\) At 430 f.
\(^{227}\) At 429 j.
\(^{228}\) 2000 (1) SA 589 (C).
\(^{229}\) *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) at 591 E.
\(^{230}\) At 591 E.
\(^{231}\) “Equity for Tenants Prevention of Illegal Eviction From and Unlawful Occupation of Land Act” 1999 (June) *DR*
applicable to instances like the one that was before the court. Purshotam had considered the meaning of “building or structure” to include a permanent dwelling, and the reference to land to include any building or structure on the land in question. As the author had failed to consider the judgment of Schwartzman J in ABSA Bank Ltd v Amod, which the court felt was of relevance to the present matter because both cases dealt with an application for an eviction from a residential suburb, the court expressed disapproval of this interpretation. The Court also clarified the application of the Constitutional provision in relation to commercial property by stating that the Constitution only refers to eviction from a home and would thus find no application in cases where the relevant property is business premises or any such premises which do not constitute a home.

The court’s refusal to apply PIE outside of the context of squatting seems to show that the Act was intended solely for furthering the purposes of land reform. This denies any distinct contribution to secure tenure and thus places bond defaulters and defaulting tenants beyond the application of the Act. This is further evidenced by the court’s refusal to apply the Act in instances where the property being unlawfully occupied includes business premises or any such premises which do not constitute a home.

In Betta Eiendomme the respondent occupied the relevant premises in terms of a written lease. When he failed to pay his rent which had become due, the applicant proceeded to institute an eviction action against him. As the action was undefended,
default judgment was granted for rental and damages,\textsuperscript{240} but an ejectment order was not granted. The judge had an unambiguous stance with regard to the application of section 26(3) of the Constitution: The object of the provision does not extend to ordinary cases of trespass,\textsuperscript{241} be it squatting or holding over or otherwise.\textsuperscript{242} According to Flemming DJP, section 26(3) sought to protect those whose “ownership, possession or occupation” had been subjected to arbitrary interferences in terms of legislation, so as to ensure that the forced removals which beset the country during the previous dispensation would “never again” take place. He held that section 26 of the Constitution does not contemplate horizontal application. The owner of property should thus not bear the burden of providing housing to those who claim it. Only those who are vested with legitimate ownership are entitled to exercise the rights incumbent to it. It could not have been Parliament’s intention to oblige a landowner to accommodate unlawful occupiers on their property. Moreover, the sanctity of contract as well as the ensuing rights find protection under law and PIE does not apply to issues arising from lease contracts between landlords and tenants.

In \textit{Betta Eiendomme}\textsuperscript{243} the court slightly deviates from the earlier judgments in that section 26(3) is held to have as its sole objective the prevention of arbitrary interferences with property rights. This is evidenced by the court’s reference to ensuring that forced removals never again take place. The court also stressed government’s responsibility towards land reform by clarifying that landowners should not bear the brunt of accommodating unlawful occupiers on their property.

\textsuperscript{240} At 470 para 1.
\textsuperscript{241} Trespassing is the entry onto the land of another person without permission, as opposed to the unlawful occupation where people actually live on the land of another without permission.
\textsuperscript{242} At 472 para 7.2.
\textsuperscript{243} \textit{Betta Eiendome (Pty) Ltd v Ekple-Epoh} 2000 (4) SA 468 (W).
In *Ellis v Viljoen*\textsuperscript{244} the respondent, a newly registered owner, took possession of a farm, excluding a house that was occupied by the appellant.\textsuperscript{245} Her continued occupation in disregard of the notice to vacate the premises as issued to her by the respondent induced the respondent to institute an urgent application in the court *a quo* for her ejectment. The court *a quo* held that PIE was not applicable as the appellant had initially taken occupation of the house with the consent of its owner.\textsuperscript{246} The common law rights of the parties would thus find application with regard to the determination of the matter.\textsuperscript{247} Counsel for the appellant, however, argued that PIE was applicable. The court *a quo* relied on the decision in *ABSA Bank v Amod*\textsuperscript{248} as the facts relating to the applicability of PIE were similar to those of the present case. On appeal, Thring J agreed with the judgment in *ABSA Bank v Amod*\textsuperscript{249} "as regards the finding that the Act does not apply to a situation where property is occupied by a person who initially took occupation thereof in terms of a contract or with the consent of the owner, but whose right to remain in occupation has since been terminated.\textsuperscript{250} The court *a quo* was thus correct in finding that the Act was not applicable to the matter.

This judgment provides firm support for the idea that PIE was intended to further only land reform by being applicable solely to instances where property was initially occupied without the consent of the lawful owner.

In cases such as *Ross v South Peninsula Municipality*, *Betta Eiendomme v Ekple-Epoh*, *Ellis v Viljoen* and *Brisley v Drotsky* the decision in *ABSA Bank v Amod* was followed in

\textsuperscript{244} 2001 (4) SA 795 (C).
\textsuperscript{245} At 796 I.
\textsuperscript{246} At 799 G.
\textsuperscript{247} At 799 F.
\textsuperscript{248} [1999] 2 All SA 423 (W).
\textsuperscript{249} [1999] 2 All SA 423 (W).
\textsuperscript{250} At 801 H-I.
that it was held that the Act does not apply to persons who initially occupied premises with the owner’s consent but whose occupation had subsequently become illegal. However, in Bekker v Jika\textsuperscript{251} and Ridgway v Janse van Rensburg\textsuperscript{252} the courts departed from the precedent set in Amod. In Bekker v Jika\textsuperscript{253} the respondent refused to vacate the property previously owned by him, after it had been sold in execution. The court, in considering whether to grant an eviction order, concluded that the respondent was indeed an unlawful occupier for purposes of the Act.

In Ridgway v Janse van Rensburg,\textsuperscript{254} the applicant purchased the property at a sale in execution. The former owner (the respondent), however, refused to vacate the property, inducing the applicant to apply for an eviction order. In deciding whether PIE would be applicable, the court considered the restrictive interpretation of the Act in Amod, as well as subsequent cases which followed the approach in Amod. The court, however, following the decision in Bekker v Jika departed from the approach that the Act would not apply where occupation was initially lawful but had subsequently become unlawful.

The leading authority on the application of PIE has since been the case of Ndlovu v Ngcobo; Bekker and Another v Jika\textsuperscript{255} (hereafter Ndlovu), where the Supreme Court of Appeal (SCA) was called upon to determine whether “unlawful occupiers” referred only to those persons who unlawfully took possession of land (squatters) or whether it also referred to persons whose once lawful possession subsequently became unlawful (cases of holding over). The legal implications of this question are not to be taken lightly. If it

\textsuperscript{251} [2001] 4 All SA 573 (SE).
\textsuperscript{252} 2002 4 SA 186 (CPD).
\textsuperscript{253} [2001] 4 All SA 573 (SE).
\textsuperscript{254} 2002 4 SA 186 (CPD).
\textsuperscript{255} 2003 (1) SA 113 (SCA).
was held that PIE does not apply to cases of holding over, then an eviction could be
effected by simply satisfying the common law requirements that the applicant is the
owner of the residence and that the tenant or mortgagee is in continued occupation of the
premises in breach of the contract. On the other hand, if PIE is applicable, then the
procedure for eviction becomes more complicated, costly, and protracted.

Since the Act defines “unlawful occupier” in the present tense, Harms JA for the majority
held that when the application to evict was made, both occupiers were unlawful occupiers
because they occupied the relevant land without the required consent of the owner.\textsuperscript{256} He
held that the exclusion of holders-over from the definition required more than simply
changing the timeframe within which the Act is applicable. The definition would need to
be amended to apply to ‘a person who \textit{occupied and still} occupies land without the
express or tacit consent of the owner or person in charge, or without any other right in
law to occupy such land.’\textsuperscript{257} In the absence of a justification for such an amendment by
the Act itself, Harms JA accordingly refused to depart from the ordinary meaning of the
definition. Accordingly, in terms of the textual meaning, PIE applies to all unlawful
occupiers, regardless of whether their possession was initially lawful.\textsuperscript{258} Consequently,
the owners of the relevant dwellings had to follow the procedures in PIE in order to
obtain an eviction order.\textsuperscript{259}

According to Harms, PIE does not have the effect of expropriating landowners of their
property.\textsuperscript{260} Indirect expropriation is also not anticipated by the Act and the landowner

\textsuperscript{256} At 120 para 5.
\textsuperscript{257} At 120 para 5.
\textsuperscript{258} At 122 para 11.
\textsuperscript{259} At 125 para 23.
\textsuperscript{260} At 123 - 124 para 17.
retains the protection of section 25 of the Bill of Rights. PIE merely delays or suspends the landowner’s ability to exercise his or her full proprietary rights until it is determined whether it is just and equitable to evict the unlawful occupier and under what conditions.262 This is what the procedural safeguards afforded in section 4 envisage.263 The substantive requirements for obtaining an eviction order thus remain as prescribed in terms of the common law.

It has been commented that in terms of this judgment, the only real effect of extending PIE to cases of holding over, is to require the owner’s observance of the unnecessary procedural measures provided for in the Act.264

The Ndlovu judgment has also led to the constitutionality of the Act being questioned due to the fact that the Act is perceived as being arbitrary. Hopkins and Hofmeyr265 argue that the Constitutional Court has clearly defined the meaning of “arbitrary”. In First National Bank of South Africa Ltd t/a Wesbank v Commissioner for the South African Revenue Service and the Minister of Finance266 the Court held that “a deprivation is arbitrary when the law does not provide sufficient reason for the particular deprivation in question.” A law is thus arbitrary if it is irrational; if there is no rational connection between the law and the object which it seeks to achieve. The authors argue that the law is also disproportionate – further supporting their view that it is arbitrary. This they argue is due

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261 At 123 - 124 para 17.
262 At 123 - 124 para 17.
263 At 123 - 124 para 17.
266 2002 (4) SA 768 (C).
to the fact that less restrictive means can be employed to achieve the same end.\footnote{This is supported by Harms JA who held that the rights of owners to evict holders over is substantively the same under PIE as it is under the common law. PIE thus merely complicates the process.} By affording bond defaulters and defaulting tenants the same protection as squatters, the Ndlovu judgment broadens the purpose of PIE beyond that of land reform. The Act is thus given a more extended purpose than merely alleviating the plight of squatters.

\footnote{By affording bond defaulters and defaulting tenants the same protection as squatters, the Ndlovu judgment broadens the purpose of PIE beyond that of land reform. The Act is thus given a more extended purpose than merely alleviating the plight of squatters.}

The protection afforded to unlawful occupiers arises out of the additional procedural requirements introduced by the Act, which enables the courts to give effect to the substantive protection that the Act was intended to provide. The procedural requirements in section 4 of the Act facilitate the courts’ ability to consider relevant circumstances as mentioned in section 4(6) and 4(7). The requirement that a hearing be held ensures that \textit{ex parte} applications for eviction orders are no longer possible. The presence of both parties is required, enhancing the position of the court to evaluate the relevant circumstances. Section 4(2), which provides that “the court must serve written and effective notice of the proceedings on the unlawful occupier...” at least 14 days before the hearing, is a further attempt to guarantee the presence of the unlawful occupier at the hearing. The additional procedural steps which the Act introduces ensure that courts will be in a position to reflect on the warranted relevant circumstances. When Harms JA’s judgment is considered in light of these arguments, a discrepancy emerges. His opinion that PIE merely delays the landowner’s ability to exercise his full proprietary rights and that no substantive changes would therefore occur, indicates that the means deployed does not achieve the intended purposes.

According to Hopkins and Hofmeyr the fact that less restrictive means are available to realize the same end amounts to a violation of the principle of proportionality. This leads to the conclusion that the arbitrary interference with property rights as displayed by PIE, is in direct conflict with the section 25(1) of the Constitution. In order to avoid this unconstitutionality, the authors propose the utilization of section 5 of the Act which provides for urgent proceedings for eviction. For this to happen, the Court must be satisfied that there is a real and imminent danger of substantial injury or damage to any person or property if the eviction order is not granted; that the hardship to the owner or any other person affected is likely to exceed the hardship to the unlawful occupier against whom the order is sought if the order is not granted; and that no other effective remedy is available. From this the authors infer that the cost and prolonged proceedings suffered by an owner would amount to substantial damage. The hardship endured by the owner, will therefore generally exceed the hardship to the unlawful occupier against whom the order is sought. Subsequently, no other effective remedy is available to the owner.

In the \textit{FNB} case the court held that an example of deprivation is dispossessing an owner of the rights, use and benefit to and of corporeal movable goods, and that the infringement of section 25(1) of the Constitution is therefore limited to determining whether the deprivation of property is arbitrary. The context in which arbitrary is placed in terms of section 25 was held not to be limited to non-rational deprivations, in terms of there being no rational connection between the relevant law and the object which it seeks to achieve. The enquiry is thus broader than merely rationality, but is narrower than that of the proportionality assessment mandated by section 36 of the Constitution. The justification for this is that the standard prescribed in section 36 is reasonableness and justifiability, while section 25 stipulates the standard of arbitrariness. The legislative context to which the prohibition against arbitrary deprivation has to be applied as well as the nature and degree of the deprivation are thus important considerations in every case to which section 25(1) is in dispute. In some cases the legislative deprivation might be of such a nature that it does not require more than a rational connection between means and ends, while in other cases, the objective sought to be achieved would have to be more persuasive to avoid the deprivation from being arbitrary. In terms of section 25 the standard is arbitrary and not, reasonable and justifiable as in section 36. As arbitrariness and proportionality are separate and distinct concepts the argument propounded by Hopkins and Hofmeyr, is highly questionable and unconvincing.
Compelling courts to consider the socio-economic status of these categories of persons evidences the broader purpose of the Act beyond land reform.

4.2.2 Conclusion

In ABSA Bank v Amod the court held that the definition of land did not encompass permanent structures that have acceded to the land. This definition has shifted to one that includes structures that were present on the land prior to occupation, as well as those that were erected subsequently.\(^{268}\) As squatters are likely to erect structures for living purposes, the latter meaning is only logical. The diverse interpretations relating to the term “unlawful occupiers” is a consequence of the vague drafting of the Act. Prior to Ndlovu, the courts on occasion firmly held that PIE does not apply to persons who initially lawfully occupied property with the owner’s consent but whose occupation had since become unlawful. Ndlovu has, however, turned this position on its head, obliging landowners to comply with the provisions of PIE before being entitled to an eviction order against vulnerable tenants and mortgagees. As the courts are now in effect required to consider the impact that an eviction order could have on these groups of occupiers, the scope of the Act has rapidly expanded, leading to a broadening of the interpretation of the term “relevant circumstances”.\(^{269}\) From the interpretation given to the term “unlawful occupier” it becomes apparent that the courts view PIE as a means of effecting social reform in the broader sense, rather than simply land reform. The extended scope of

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\(^{268}\) Bekker v Jika [2001] 4 All SA 573 (SE); Ridgeway v Janse van Rensburg (2002) 4 SA 186 (CPD); Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA).

application of the Act along with the subsequent consideration of socio-economic factors by the Courts provides evidence of this. These socio-economic considerations do not contribute directly to providing access to land nor tenure security but rather seek to advance the plight of the disadvantaged in general, at most impacting indirectly on access to land or secure tenure.

4.3 “Relevant circumstances”

Evictions have explicitly been addressed in section 26(3) of the Constitution, where the courts are mandated to consider “all the relevant circumstances” that relate to a possible eviction. The difficulty lies in the fact that the Constitution does not elaborate on the circumstances to be considered, which leaves the phrase subject to diverse interpretations.

Sections 4(6) and 4(7) of PIE make a distinction between unlawful occupiers who have been in occupation of the land for more and for less than six months respectively. In both instances, when considering whether it is just and equitable to grant an eviction order, the Court must consider all the relevant circumstances detailed in the Act. As the specific circumstances to be considered are contained in the Act itself, the problem that arises with regard to the interpretation of the corresponding Constitutional provision should therefore not arise in the case of the legislation. However, case law reveals a diversity of interpretations, also with regard to these provisions of the Act. In order to arrive at a just and equitable decision, a court has to consider all relevant circumstances. The notion of justness and equity has however also been subject to interpretation. There are also
discrepancies as to who bears the onus of providing the court with these relevant circumstances.

4.3.1 How the Courts have interpreted “relevant circumstances”

In *Ross v South Peninsula Municipality*,\(^{270}\) as indicated before,\(^{271}\) an eviction order was sought against the appellant on the basis that the appellant had no right to occupy the relevant property.\(^{272}\) As an eviction can only be effected by a court order made after considering all the relevant circumstances,\(^{273}\) the court had to determine whether this constitutional provision altered the common law with regard to the rights flowing from ownership by placing an onus on a landowner to inform the court of circumstances justifying the eviction of a person in possession of the owner’s property if it is the occupier’s home.\(^{274}\) The appellant argued that the Constitution placed an onus on the respondent to provide facts which supported the relevant allegations.\(^{275}\) This, along with facts provided by the appellant, is the first step required to enable the court to consider all the relevant circumstances before deciding on the matter.\(^{276}\) Josman AJ held that substantive law determined who bore the onus.\(^{277}\) However, there is no general rule which can be applied to determine who bears the onus. Where there is no such general rule, policy considerations as well as fairness based on experience play a pivotal role in

\(^{270}\) 2000 (1) SA 589 (C).
\(^{271}\) See 41.
\(^{272}\) At 591E.
\(^{273}\) Section 26(3).
\(^{274}\) At 593 E.
\(^{275}\) At 593 E.
\(^{276}\) At 593 F.
\(^{277}\) At 593G.
determining where the onus lies. It was held that the incidence of onus can be affected by a constitutional requirement and that broad reasons of experience and fairness had to be considered in order to determine where the onus was to be placed in that case.

The manner in which relevant circumstances should be presented to the court was also at issue. In this regard, Josman AJ, distinguished between inquisitorial and adversarial systems. The court observed that in inquisitorial legal systems, a judicial officer is able to call for and gather whatever information is required, whereas adversarial systems require the parties to place the relevant information before the court. Following the dictates of an adversarial system, the plaintiff has to place relevant information before the court.

The pleadings thus provide a canvas from which the court is to adduce and consider all the relevant circumstances. Reference was made to the fact that, where necessary, the court can call on either of the parties to expand on issues that have been raised. In light of the fact that most of the parties against whom eviction orders are brought are ignorant of the complexities of our legal system, this ruling is of vital importance in ensuring that an equitable result is reached. A defended action allows both parties the opportunity to bring forth information pertaining to the situation. In effect, this enables the court to have sufficient information before it to consider all the relevant circumstances prescribed by the Constitution. In the case of an undefended action where the plaintiff seeks default

\[278\text{ At 594 B.} \]
\[279\text{ At 595 C.} \]
\[280\text{ At 595 G.} \]
\[281\text{ At 595 H.} \]
\[282\text{ At 595 I.} \]
\[283\text{ At 596 B.} \]
\[284\text{ At 596 D.} \]
judgment, the onus remains on the plaintiff although less evidence will be required from
him or her with regard to the defendant’s knowledge of the relevant matter.285

The court boldly concluded that section 26(3) of the Constitution had indeed altered the
common law “to the extent that a plaintiff seeking to evict a person from his or her home
is now required to allege relevant circumstances which entitle it to issue such an
order.”286 Mere allegation of illegal occupation on the appellant’s behalf, as in this
instance, is thus insufficient to warrant an order of eviction.287 While the court did not
consider which circumstances were relevant in this instance, it did state that PIE, which
came into effect after the cause of action arose, could be of assistance in this respect.288

The legislature’s concern that the rights of the elderly, children, disabled persons and
households headed by women should be protected in the context of an eviction, is of
particular relevance here. Agreeing with the decision in ABSA Bank Ltd v Amod289
therefore, the court dismissed the appeal.

The affirmation of the change induced by section 26(3) of the Constitution makes this
judgment of particular importance. The property owner must allege and prove relevant
circumstances that would warrant an eviction order. This effectively connotes an
interpretation which goes further than simply advancing the purposes of land reform in
that unlawful occupiers are afforded added benefit. Although no definitive ruling was
made as to what constitutes relevant circumstances, the judgment seems to tip the scales
in favour of tenants; providing for greater protection against arbitrary evictions. The

285 At 596 E-G.
286 At 596 H.
287 At 596 H.
288 At 596 I.
289 [1999] 2 All SA 423 (W).
court’s ruling that PIE could be of assistance in determining which circumstances are relevant places the Act within the labyrinth of land reform. This is evidenced by the fact that it was held that PIE would not have been applicable to the case if the time frame had been different, therefore excluding persons who initially took occupation of property with consent of the owner. From this it can be inferred that the court agreed that the Act was intended to apply solely to cases of squatting, emulating the notion that PIE was intended to further the purposes of land reform. However, in consideration of the fact that it was stated that section 26(3) of the Constitution had altered the common law, the impression is created that something greater is at stake than merely land reform. The court seemed to be leaning towards considering the greater social context within which evictions take place.

In *Betta Eiendomme (Pty) Ltd v Ekple–Epoh*\(^{290}\), the applicant instituted an eviction action order against the respondent.\(^{291}\) The magistrate followed the *Ross*\(^{292}\) decision and held that “illegal occupation [was] in itself not sufficient relevant circumstances for the granting of an order of the eviction of a person from his home.”\(^{293}\) In view of the fact that no magistrate was likely to depart from the decision in the *Ross* case, the Witwatersrand Local Division was approached. The court pointed out that the cause of action arose prior to the commencement of PIE, rendering the statute irrelevant to the present case and that the common law right of ownership was not affected by the Constitution.\(^{294}\) The court was of the view that it was not necessary to restrict the rights of an owner against an unlawful occupier in order to advance the values underpinning the Constitution or to

\(^{290}\) 2000 (4) SA 468 (W).

\(^{291}\) See 42.

\(^{292}\) *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C).

\(^{293}\) *Betta Eiendomme (Pty) Ltd v Ekple–Epoh* 2000 (4) SA 468 (W) at 470 para 1.

\(^{294}\) At 475 para 10.1.
uphold the spirit, purport and objects of the Bill of Rights. The constitutional requirement that “all relevant circumstances” had to be considered was held to include the injustice of causing the owner loss by sustaining the practice of unlawful occupation, as well as the way in which society will react to the manner in which the court has exercised its discretion. The cancellation of the lease resulted in a contractual obligation to reinstate possession of the property to the applicant. The required protection of this right of the applicant was also considered a “relevant circumstance”. Ruling that it was the parties’ and not the court’s duty to elicit relevant circumstances, the court (endorsing Amod which was subsequently also endorsed by Ross), eventually granted an order of ejectment against the respondent.

By supporting earlier decisions, it is clear the court in Betta Eiendomme (Pty) Ltd v Ekple-Ephoh interpreted PIE as advancing only the notion of land reform. The court was adamant that the Act had no application to instances where occupation was initially lawful. The court favoured the protection of lawful owners and advanced numerous considerations which were sympathetic to their plight.

In Ellis v Viljoen the respondent instituted an urgent application in the court a quo for the ejectment of the appellant. Since the court a quo was of the view that Ellis

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295 At 475 para 10.1.
296 Section 26(3).
297 Betta Eiendomme (Pty) Ltd v Ekple-Ephoh 2000 (4) SA 468 (W) at 475-476 para 12.1.
298 At 476 para 12.3.
299 At 476 para 13.2.
300 At 476 para 13.2.
301 2000 (4) SA 468 (W).
302 See n 297, 298, 299 and 300.
303 2001 (4) SA 795 (C).
304 See 34.
occupied the house in terms of a *precarium*, PIE was held to be of no application. The ejectment order, which was subsequently granted, was now on appeal. With regard to the appellant’s argument that the court *a quo* erred in finding that she bore the onus of justifying her continued occupation of the property, the court held that this would be of relevance only where there was a material dispute of fact, which in the present instance was not the case. The judge disagreed with the *Ross* case insofar as it was held there that a plaintiff seeking an eviction order against an unlawful occupier is now required to allege relevant circumstances which enable the court to grant such an order, and that this requirement would not be satisfied by the usual allegations that the plaintiff is the owner of the property and that the defendant is occupying it illegally. Accordingly, the incidence of the onus of proof had not been altered by section 26(3) of the Constitution. The judge agreed with the judgment in the *Betta Eiendomme* case insofar as it was held there that the right of ownership, as recognized before the Constitution, had not been affected by the Constitution. If the only relevant circumstances before the court were that the plaintiff was the owner and that the defendant was in possession, it would be fitting to grant an eviction order. In terms of the *Ross* case, these allegations would be insufficient to warrant an order of eviction, which the judge in the *Ellis* case equated with an unlawful deprivation of property. The court found that there was no sound basis for the contention advanced on behalf of the appellant that the court *a quo* failed to

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305 At 799 G.
306 At 799 G.
307 At 802 I-J.
308 *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C).
309 *Ellis v Viljoen* 2001 (4) SA 795 (C) at 804 H-J.
310 *Betta Eiendomme (Pty) Ltd v Epile –Epoh* 2000 (4) SA 468 (W).
311 *Ellis v Viljoen* 2001 (4) SA 795 (C) at 805 A-B.
312 At 805 C.
313 *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C).
314 *Ellis v Viljoen* 2001 (4) SA 795 (C) at 805 F-H.
consider all of the relevant circumstances. In light of the absence of a legal basis on which to justify the continued occupation by the appellant, the appeal was dismissed.315

The court’s refusal to consider that the Constitution has altered the incidence in the onus of proof in this matter follows the consistent reluctance of the courts to depart from the common law of evictions. The court’s refusal to consider PIE as guidance in ascertaining the relevant circumstances in the instance where occupation had initially been lawful, displays a trend of placing PIE within the narrow confines of land reform, displacing any conception that the Act could have the broader purpose of raising the stakes of secure tenure for occupiers other than squatters.

The appellant in Brisle v Drotsky316 had a lease agreement with the respondent. Upon her failure to pay rent timeously the respondent terminated the lease and instituted eviction proceedings. The appellant contested the proceedings and used the decision in Ross317 as a basis for her argument that merely alleging that the lessor was the owner of the property, and that she (the lessee) was in unlawful occupation of it, did not entitle the lessor to an ejectment order. She contended that the circumstances in which the contractual agreement was terminated, as well as her socio-economic status were relevant circumstances that the court a quo should have taken into consideration. In considering the matter, the Court held that section 26(3) of the Constitution does indeed have horizontal application. Although the section states that all relevant circumstances should be considered, it does not indicate that any circumstance will hold as a relevant

315 At 807 A-C.
316 2002 (4) SA 1 (SCA).
317 Ross v South Peninsula Municipality 2000 (1) SA 589 (C).
circumstance. Relevant circumstances should be interpreted to mean only legally relevant circumstances. This interpretation was held to be apparent as section 26(3) does not provide the court with a discretion to refuse to grant an ejectment order to an owner in certain circumstances where the owner would otherwise be entitled to such an order. An owner is lawfully entitled to possession of his property and to an ejectment order against an unlawful occupier of such property, except if that right to possession is restricted by the Constitution, another law, and a contract or on some further legal basis. In the present case, the lessor had cancelled the lease leaving her with no contractual right in terms of which she was entitled to occupy the property. Since she had not alleged any other statutory basis for her occupation of the property, save for section 26(3), the court had no discretion to refuse the eviction order. The fact that the plaintiff is the owner and the defendant is in possession thus constituted the only relevant circumstances to be considered by the court. Relevant circumstances with reference to section 26(3) therefore did not include the personal circumstances of the lessee, nor the availability of alternative accommodation. The Appeal Court decided that the court a quo had considered all the relevant circumstances and the decision in Ross v South Peninsula Municipality was overruled.

By overruling the decision in Ross v South Peninsula Municipality, the court once again detracts from the social aspects of evictions. By interpreting relevant circumstances

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318 Brisley v Drotsky 2002 (4) SA 1 (SCA) at 20-21 para 41-42.
319 At 21 para 42.
320 At 21 para 42.
321 At 21 para 43.
322 At 21-22 para 44-45.
323 At 22 para 45.
324 At 22 para 45.
325 2000 (1) 589 (C).
326 2000 (1) 589 (C).
to mean only legally relevant circumstances, the scope for considering the social context of persons against whom eviction orders are sought is effectively eliminated. Denying the consideration of factors such as personal circumstances of the lessee or the availability of alternative accommodation, which is specifically provided for by PIE, implies that the Act has no influence outside the scope of land reform.

In *Baartman & Others v Port Elizabeth Municipality*\(^{327}\) the appeal related to the application of section 6(1) of PIE.\(^ {328}\) The respondent municipality successfully applied in the High Court for an eviction order against the appellants who had unlawfully occupied privately-owned property without the requisite consent of the landowner.\(^ {329}\) Since there was no dispute relating to the High Court’s ruling that the appellants were in unlawful occupation of the property,\(^ {330}\) the Appeal Court proceeded on the basis of this finding.\(^ {331}\) As it was an organ of state that was seeking the eviction order, section 6 of the Act and the procedures set out in section 4, with the necessary changes, had to be followed.\(^ {332}\) Section 6(3) reads as follows:

> “In deciding whether it is just and equitable to grant an order for eviction, the Court must have regard to -

a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;

b) the period the unlawful occupier and his or her family have resided on the land in question; and

c) the availability to the unlawful occupier of suitable alternative accommodation or land.”

\(^{327}\) 2004 (1) SA 561 (SCA).
\(^{328}\) At 562 H.
\(^{329}\) At 563 A-D.
\(^{330}\) At 563 H.
\(^{331}\) At 563 H.
\(^{332}\) At 563 l.
Since counsel for the appellant wanted to prevent the court from considering any relevant circumstances other than these, it argued that the factors mentioned in section 6(3) constituted a *numerus clausus*.\(^{333}\) Had the argument succeeded, factors such as those referred to in section 4(6) and 4(7), amongst which the rights and needs of the elderly, children, disabled persons and households headed by women, would not have been considered by the court.\(^{334}\) However, the Appeal Court disagreed, making *all* relevant circumstances subject to consideration including those in section 4(6) and (7).\(^{335}\) The court explained that in this instance the separation of subsections 6(1)(a) and (1)(b) by the word ‘or’, would not preclude it from having regard to the public interest when the circumstances in section 6(1)(a) were relevant, as the interests of the public inevitably impact upon the justness and equitability of the order.

By subjecting all relevant circumstances to consideration, the court broadened the scope for considering how unlawful occupiers are socially situated. This displays the way in which PIE can be utilised to further the notion of social transformation which encapsulates land reform. In doing so, the court displayed its commitment to advancing the plight of all unlawful occupiers.

In *ABSA Bank v Murray*\(^{336}\) a mortgage bond was registered in favour of the applicant against the home of the respondents as security for a loan granted by the applicant.\(^{337}\) Both respondents were sequestrated.\(^{338}\) The applicant itself purchased the property at the

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\(^{333}\) At 564 D-E.
\(^{334}\) At 564 D-E.
\(^{335}\) At 564 F-G.
\(^{336}\) 2004 (2) SA 15 (C).
\(^{337}\) At 18 J.
\(^{338}\) At 19 A.
ensuing auction\textsuperscript{339} and resold it. The respondents however remained in occupation of the property, giving rise to an application for their eviction.\textsuperscript{340} The application was made in terms of section 4 of PIE. The respondents argued that it would not be just and equitable in the circumstances for the court to grant an order for their eviction.\textsuperscript{341}

As the respondents had already been in unlawful occupation of the property for more than six months when the proceedings were initiated,\textsuperscript{342} the relevant provisions of the Act were sections 4(7) and 4(8). The first provides that

\begin{quote}
"a Court may grant an order for eviction ... after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of State or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."
\end{quote}

Section 4(8) provides the following:

\begin{quote}
"[i]f the Court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in para (a)."
\end{quote}

The respondent submitted numerous personal circumstances in support of their contention that it would not be just and equitable for an eviction order to be granted.\textsuperscript{343} In

\textsuperscript{339} At 19 A-B.
\textsuperscript{340} At 19 B.
\textsuperscript{341} At 19 D-E.
\textsuperscript{342} At 19 E.
response, counsel for the applicant argued that the personal circumstances of the respondents were legally irrelevant and afforded no basis to refuse an eviction order. 344 It was contended that the requirements in section 4(7) were only relevant with regard to the determination of whether or not a period of notice should be afforded to the respondents before the eviction order could be enforced, and if so, the period of such notice. 345 Based on the decision in Brisley v Drotsky, 346 the appellant argued that the court a quo should have taken into account the circumstances under which the appellant’s lease had been cancelled, as well as the socio-economic consequences that an eviction order was likely to have on her and her family. 347 As the circumstances relied upon were held not to be legally relevant, the argument was rejected. 348

It should be noted that the eviction proceedings in Brisley 349 were instituted in terms of section 26(3) of the Constitution and not in terms of section 4 of PIE. The decision was handed down before precedent had been set that PIE applies even in cases where occupation was initially lawful. 350 PIE limits an owner’s right of possession thereby granting the court discretion to issue an ejectment order in the circumstances provided by the Act. In light of this, the dictum that “an owner is in law entitled to possession of his property and to an ejectment order against a person who unlawfully occupies his property except if that right is limited by the Constitution, another statute, a contract or some other legal basis” 351 was held to be of relevance to the present case. This dictum along

343 At 20 A.
344 At 20 J-J.
345 At 20-21 J-A.
346 2002 (4) SA 1 (SCA).
347 ABSA Bank v Murray 2004 (2) SA 15 (C) at 21 para 12.
348 At 21 para 12.
350 ABSA Bank v Murray 2004 (2) SA 15 (C) at 22 para14-15.
351 Brisley v Drotsky 2002 (4) SA 1 (SCA) at 21 para 43.
with the wording of the relevant statutory provision indicates that the relevant circumstances might result in the court declining to grant a property owner relief in accordance with his or her common-law rights unless and until the pertinent circumstances were addressed or advanced.\textsuperscript{352}

In order to arrive at an opinion which would be just and equitable after considering all the relevant circumstances, the validity of a defence raised against an eviction order is also subjected to scrutiny in terms of these criteria.\textsuperscript{353} When making such a determination the court needs to balance the rights of the owner \textit{vis-à-vis} those of the occupier.\textsuperscript{354} PIE provides a legal means of achieving this end. It does not facilitate the exclusion of either class or category of rights and leaves it to the courts to seek to address the dispute between them justly and equitably.\textsuperscript{355} An enquiry relating to the determination of what is just and equitable was held to involve more than merely deliberation with regard to the immediate parties but rather a holistic view entailing the social and economic repercussions entwined in the regulation of proprietary rights.\textsuperscript{356} The determination of what is just and equitable in the circumstances will thus often necessitate the contextualization of the direct circumstances of the case in the national, social and economic macrocosm by the court.\textsuperscript{357} In the present case, that would mean recognizing the need for financial institutions to have effective security.\textsuperscript{358} Failure to take cognizance of this particular need of financial institutions would obstruct the realization of the right

\textsuperscript{352} \textit{ABSA Bank v Murray} 2004 (2) SA 15 (C) at 23 para 18.
\textsuperscript{353} At 23 para 19.
\textsuperscript{354} At 24 para 21.
\textsuperscript{355} \textit{ABSA Bank v Murray} 2004 (2) SA 15 (C) at 24 para 21.
\textsuperscript{356} At 24-25 para 22.
\textsuperscript{357} At 25 para 22.
\textsuperscript{358} At 25 para 22.
of access to adequate housing for all.\textsuperscript{359} It therefore follows that the effect that an eviction order will have on the basic rights of the person(s) being evicted, including his/her socio-economic rights, will influence the enquiry.\textsuperscript{360} So too should the Constitutional rights of the owner, along with other relevant basic rights, be considered.\textsuperscript{361} However, 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.\textsuperscript{362}

The court discarded the argument that PIE is redistributive in nature and described this submission as a “misdirected perception of the object of the legislation”.\textsuperscript{363} This contention heavily favours unlawful occupiers giving an unbalanced result that stands in direct opposition to the exercise of judicial discretion.\textsuperscript{364} It was further held that the wording of the statute and constitutional text do not support this view.\textsuperscript{365} Binns-Ward AJ shed some light with regard to the nature of the Act by stating the following:

“The legislation is plainly regulatory in effect. It does not afford a mechanism to divest an owner of his property. It does, however, afford a basis upon which the judiciary can and must regulate the exercise of the relevant proprietary right to possession by the owner of his or her property against an unlawful occupier, to whom the property has become a home, in a manner as far as practically achievable consistently with the Bill of Rights and the founding principles of the Constitution.”\textsuperscript{366}

The respondent’s occupation was a consequence of a mortgage loan contract between the respondent and the applicant without which the respondent would not have had the financial means to acquire the property. In the interests of the broader community it

\textsuperscript{359} At 25 para 22.
\textsuperscript{360} At 26 para 29.
\textsuperscript{361} At 28 para 34.
\textsuperscript{362} At 27 para 31.
\textsuperscript{363} At 27 para 31.
\textsuperscript{364} At 28 para 34-35.
\textsuperscript{365} At 27 para 31.
\textsuperscript{366} At 27 para 32.
would not be just to interfere with the effectiveness of the applicant’s (the bank’s) security. Due to the first respondent’s relative economic sophistication and his offer to pay rent to the applicant, there is no reason why he would not be able to continue to provide for his dependants if he were given sufficient notice to arrange for alternative accommodation. The respondents had been aware for over a year of the bank’s intention to evict them and thus had sufficient time to prepare to vacate the property. The six weeks’ notice to vacate the property was therefore just and equitable. As the first respondent was deemed to be articulate and intelligent enough to address the court, there was no reason to postpone the matter until the respondent had secured legal representation. Binns-Ward AJ indicated the above mentioned matters as those which influenced his decision. He accordingly found that the respondents were not entitled to remain in occupation of the property.

In ABSA BANK v Murray the court went to great lengths to balance the rights of the occupier and that of applicant. Numerous factors were mentioned as being relevant to the inquiry. The most pertinent of these being the effect that an eviction order will have on the rights of the person(s) being evicted including his or her socio-economic rights. This inextricably broadens the ambit of PIE to include the advancement of social reform, as the position of unlawful occupiers in society was held to be of relevance.

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367 At 30 para 46.  
368 At 30-31 para 46-47.  
369 At 31 para 47-48.  
370 At 31 para 49.  
371 2004 (2) SA 15 (C).
4.3.2 Conclusion

These cases show that the courts initially took a conservative stance with regard to whether the Constitution has altered the rights emanating from ownership. Although Ross brought a shift in providing for an alteration to the common law of evictions, this was swiftly overruled by Betta Eiendomme, Ellis v Viljoen and Brisley. What constitutes “relevant circumstances” in terms of section 26(3) of the Constitution has therefore been clarified to some extent. In the absence of any other relevant circumstances, only legally relevant circumstances such as proof of ownership and unlawful occupation will suffice in the determination of whether an ejectment order is warranted. The effect of the Brisley judgment is that the socio-economic status of the occupier, even if he/she falls within a designated vulnerable group in terms of PIE, is not relevant. This reflects a narrow interpretation of the term “relevant circumstances”. By excluding the social setting of unlawful occupiers, these cases denote the purpose of PIE as solely furthering the objectives of land reform, rather than aiming to broaden social reform.

A broader interpretation of the term would see the courts vested with a general discretion in terms of section 26(3). While this does not seem to have been sanctioned by the courts, Betta Eiendomme did have a slightly broader tone. Here the court included the injustice of causing the owner loss by sustaining the practice of unlawful occupation,\(^{272}\) whether the court’s decision will be socially accepted\(^{273}\) and the required protection of rights flowing from a contract as relevant circumstances. A pivotal consideration would be whether an eviction would lead to the breach of any of an occupier’s rights as contained in the bill of rights, in other words, the consequences of an eviction should be a focal

\(^{272}\) Betta Eiendomme (Pty) Ltd v Ekple –Epoh 2000 (4) SA 468 (W) at 475-476 para 12.1.
\(^{273}\) At 476 para 12.3.
point. Despite the inclusion of more factors as relevant circumstances, *Betta Eiendomme* does not distinctly define what exactly constitutes relevant circumstances.

The *Baartman* and *ABSA Bank* decisions go further. Insofar as the circumstances provided in section 4(6) and (7) of PIE are held to be applicable in the instance where an organ of state institutes eviction proceedings, it has important consequences in relation to a just an equitable decision. The basic rights of the evictee including socio-economic rights are to play a role in the consideration of granting an eviction order. The *ABSA Bank* decision provides evidence of a move to afford vulnerable members of society greater protection. The increased considerations evidence an attempt to utilise PIE for purposes beyond land reform. The emphasis placed on the socio-economic status of unlawful occupiers is indicative of the intention to concentrate on improving the social context within which these persons find themselves. The fact that so many factors need to be considered before reaching a decision makes it more difficult to evict occupiers unjustly. However, it has yet to be seen whether the substance of “relevant circumstances” will be expanded.

The court’s interpretation of “relevant circumstances” does not upgrade the tenure of unlawful occupiers. This cannot be done, as unlawful occupiers have no vested rights in the property to begin with. There is also no indication that the courts view PIE as a means of facilitating access to land. They vehemently discarded this notion in *ABSA Bank v Murray* by stating that PIE is not redistributive in nature and does not provide a means of divesting an owner of his property. Those protected by the Act therefore do not receive anything, be it transformation of subordinate land rights or a means of accessing land. However, in *Murray* the relevance of considering the socio-economic status of occupiers
illustrates the potential of the Act as a mechanism of effecting social reform. The court also lays emphasis on the procedural nature of the Act. Binns-Ward AJ accentuated the regulatory effect of the Act in ABSA Bank v Murray. As these cases display, the courts have moved from a position which saw PIE applicable only to instances where the purposes of land reform were furthered, to one where PIE finds application in a broader sense of effecting social reform. This is evidenced by the courts inclination, in later cases,\textsuperscript{374} to consider a wider array of factors than those listed in the Act when deciding to grant an eviction order.

4.4 Suitable Alternative Accommodation

That everyone has the basic human right of access to adequate housing is beyond dispute. Who should bear the burden of providing such accommodation is, however, a contentious issue. This requirement of PIE\textsuperscript{375} displays the intention of addressing homelessness as providing alternative accommodation at the instance of an ejectment order would eliminate such a situation.

Linked to the subject of access to housing, is access to land itself. In rapidly emergent urban centers, access to land is becoming progressively more difficult due to a range of conflicting industrial, housing, commercial and agricultural demands.\textsuperscript{376} In the absence of an ownership relationship, lack of secure land tenure puts residents at risk of being evicted and greatly limits their ability to access services. It inhibits individual investment

\textsuperscript{374} Baartman and Others v Port Elizabeth Municipality 2004 (1) SA 557 (SCA); ABSA BANK v Murray 2004 (2) SA 15 (C).
\textsuperscript{375} Section 4(7) and 6(3)(c).
in housing, hinders good governance, and undermines long-term planning by local
government. Secure tenure is a key element of the fulfillment of government’s
constitutional obligation with regard to the provision of access to adequate housing.

4.4.1 How the courts have interpreted “alternative accommodation”

The appeal in *Baartman & Others v Port Elizabeth Municipality* related to the
application of section 6(1) of PIE. The respondent municipality successfully applied to
the High Court for an eviction order against the appellants who had unlawfully occupied
privately owned property without the requisite consent of the landowner. As no dispute
was raised relating to the High Court’s ruling that the appellants were in unlawful
occupation of the property, the Appeal Court proceeded on the basis of this finding.
Organs of State, when seeking an eviction order in terms of section 6 of the Act, are
required to follow the procedures set out in section 4, with the necessary changes.
Section 6(1) provides that

“[a]n organ of state may institute proceedings for the eviction of an unlawful occupier from land which
falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in
question is sold in a sale of execution pursuant to a mortgage, and the Court may grant such an order if
it is just and equitable to do so, after considering all the relevant circumstances, and if”

377 International Council for Local and Environmental Initiatives “Provision of Land and Shelter” Local
Government Implementation Guide for the Johannesburg Plan of Implementation and the Millennium
378 2004 (1) SA 561 (SCA).
379 At 562 H.
380 At SA 563 A-D.
381 At 563 H.
382 At 563 H.
383 At 563 I.
(a) the consent of that organ of State is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or

(b) it is in the public interest to grant such an order.”

The court explained that the separation of subsections 6(1)(a) and (1)(b) by the word “or”, in this instance, would not preclude the court from having regard to the public interest when the circumstances in section 6(1)(a) are relevant, as the interests of the public inevitably impact upon the justness and equitability of the order.³⁸⁴

“In deciding whether it is just and equitable to grant an order for eviction, the Court must have regard to -

(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;

(b) the period the unlawful occupier and his or her family have resided on the land in question; and

(c) the availability to the unlawful occupier of suitable alternative accommodation or land.”³⁸⁵

Because they had illegally occupied the land without the respondent’s consent, the appellants were willing to relocate to alternative land provided that they would not have to face the prospect of being evicted again, once relocated.³⁸⁶ In essence they sought security of tenure in terms of the alternative land to which they were relocated.

Although the municipality had a long-term housing development programme, no form of interim (immediate) relief to those in desperate need of access to housing was available.³⁸⁷ Owing to the obligation placed on the State in terms of section 26 of the

³⁸⁴ At 564 H.
³⁸⁵ Section 6(3) PIE.
³⁸⁶ At 565 C-D.
³⁸⁷ At 565 F-G.
Constitution, which requires it to take legislative and other measures within the available resources to achieve the progressive realization of the right to access to adequate housing, the availability of land, was held to be the important factor.\textsuperscript{388} Since the ownership of the alternative land suggested by the respondent could not be clearly ascertained by the affidavits presented to the court,\textsuperscript{389} the court held that it would not be in the public interest to evict the appellants and to relocate them to land when there was no assurance of some measure of security of tenure.\textsuperscript{390}

From this judgment there is no evidence to support the fact that the relationship between the unlawful occupiers and the property which they will continue to occupy will be altered from its current unlawful status. The appellants will thus continue to be in unlawful occupation of the property. As these occupants cannot be evicted, the question is raised as to whether they are in effect granted security of tenure in relation to the land which they are illegally occupying. This seems to be an example of the illogical consequences resulting from legislative interpretation, and the confusion of the objectives of PIE in relation to its place in the land reform programme.

\textit{Modder East Squatters & Another v Modderklip Boerdery (Pty) Ltd} (SCA 187/03); \textit{President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd} (SCA 213/03) contained an even more progressive decision. This case dealt with two related matters, the first being an application for leave to appeal against an eviction order granted against the Modder East Squatters who unlawfully occupied a portion of

\begin{footnotesize}\begin{tabular}{ll}
\textsuperscript{388} & At 567 B. \\
\textsuperscript{389} & At 567 E-F. \\
\textsuperscript{390} & At 567 F.
\end{tabular}\end{footnotesize}
farmland owned by Modderklip Boerdery (Pty) Ltd. The second matter related to the landowners’ attempts to get the State to assist in executing the eviction order.

In terms of the PIE, the respondent (Modderklip Boerdery) successfully applied to the High Court for an eviction order against 40 000 unlawful occupiers residing on a portion of its land. Since the occupiers failed to vacate the premises within two months as specified by the court, the Sheriff who had the authorization to evict the unlawful occupiers informed the landowner that R1.8 million, later increased to R2.2 million, was required as a deposit to cover the costs of the eviction. Since the respondent was both unable and unwilling to sustain the expense, he applied to the High Court for an order against the State to compel it to carry out the court order. He argued that the State was not only constitutionally mandated to protect his property rights but had the duty to provide alternative land to the occupants. The court agreed, holding that the State had breached its constitutional obligations towards the landowner and the occupiers by failing to maintain the efficacy of the earlier Court order; and to realise the occupiers’ right of access to adequate housing and land.

The State appealed against this decision. In respect of the occupiers’ right of access to adequate housing, the court held that the State had not taken any steps to cater for those occupiers who fell in the category of those in “desperate need” and that it did not have any plan for the “immediate amelioration of the circumstances of those in crisis” at any of its three levels of government. The medium and long-term plans provided no apparent solution at the given time. As to the contention that the “unlawful occupation of

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392 At 2 para 8.
393 At 10 para 41; also see court order at 13 para 52.
394 At 6 para 22.
land cannot be allowed to undermine plans and programmes for orderly settlement, and in particular to prejudice law abiding citizens who patiently await their turn to benefit from housing and law reform programmes”, the Court held that no evidence supported the notion that the occupation had taken place with the intention of ‘queue-jumping’.

The Court therefore thought that the State had breached its constitutional obligations to both the landowner and the unlawful occupiers and reminded the State of its obligation to ensure at the very least, that evictions were executed humanely. Since it was clear from the facts that this was not possible unless the State provided land for the occupiers’ relocation, the residents were entitled to remain in occupation of the land until the State or provincial authority had made alternative land available to them.

As no other remedy was apparent, the State was also ordered to pay the landowner constitutional damages arising from the breach of the right to property. In the calculation of these damages, the Court indicated that the expropriation principles would be applicable.

This case further illustrates the potential of PIE to ensure social reform. By emphasising the notion of humane evictions, the court extends the ambit of protection afforded to unlawful occupiers, as this concept invariably incorporates an array of social considerations. In this context the Act is applied in a manner which extends beyond merely alleviating the plight of the poor.

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395 At 6 para 25.
396 At 6 para 26.
397 At 6 para 26.
398 At 11 para 43.
399 The continued occupation of the occupiers on the property divests Modderklip Boerdery of the use of that land and thus effectively expropriates it. Therefore, although no expropriation occurred as the state is at liberty to decide whether to expropriate the land or not, the Court ordered that damages were to be calculated in terms of section 12(1) of the Expropriation Act 63 of 1975.
In *ABS Bank v Murray*, the Court held that the contextual link between section 26 of the Constitution and PIE was the basis for the procedural provision that a property owner seeking an eviction order in terms of the Act is required to serve notice of the proceedings on the relevant municipality. Municipalities are the organs of State which fulfil the primary role of discharging the constitutional duty on the State in terms of section 26(2) of the Constitution to achieve the progressive realization of the right to access to adequate housing. However, the judge held that “[m]unicipalities ... are ... responsible for a number of other functions pertaining to socio-economic constitutional rights; cf ss 25(5)-(8) (identification and provision of land for settlement and taking measures to achieve land, water and related reform to redress the results of past racial discrimination).” In terms of *ABS*, the duty of the municipality is therefore wider than required by section 26(2).

The court’s emphasis on the role of municipalities in providing land fortifies the relevant provisions of PIE and gives unlawful occupiers greater leverage when demanding alternative land for their relocation. It encompasses the element of socio-economic conditions in the milieu of evictions and gives the Act a social reform component.

In *Port Elizabeth Municipality v Various Occupiers* an eviction order was sought against numerous persons who unlawfully occupied privately owned land for periods ranging from two to eight years. The occupiers were willing to relocate provided that they were given reasonable notice and suitable alternative land. The occupiers rejected

400 2004 (2) SA 15 (C).
401 At 29 G.
402 At 30 A-B.
403 2004 (12) BCLR 1268 (CC).
404 At 1271 para 2.
the alternative land which was ear-marked for their relocation, claiming that it was not suitable and that there was no guarantee that they would have security of occupation there. 405 The High Court held that it was in the public interest to terminate the unlawful occupation. 406 The matter was taken on appeal to the Supreme Court of Appeal. The Appeal Court held that the matter at issue was the provision of land for occupation in terms of which there was a measure of security of tenure, and that the availability of suitable alternative land was an important consideration due to the length of time that occupation had occurred and because the eviction order was sought by an organ of state. 407 The appeal was upheld as it was unclear whether the land to which the occupiers were to be relocated was owned by the municipality or privately owned. In the absence of a guarantee of security of tenure in relation to the land, the court held that the High Court erred in its decision. It is against this order which the municipality has appealed to the Constitutional Court.

In determining the matter, the court gave an elaborate account of the historical and constitutional context in which PIE is to be interpreted and pointed out that the Constitution recognizes that land rights and the right of access to housing and of not being arbitrarily evicted, are closely linked. 408 It was held that PIE provides some “legislative texture” to aid the courts in determining the approach to eviction as required by the Constitution. 409 The court held that the real question was whether the municipality had seriously considered the requests of the occupiers that they be provided suitable

405 At 1272 para 2.
406 At 1272 para 4.
407 At 1272 para 5.
408 At 1279 para 19.
409 Section 26(3); at 1280 para 24
alternative land.\textsuperscript{410} The municipality’s failure to furnish the court with sufficient information as to the status of the alternative land indicated for their relocation was held to be an indication of its failure to respond reasonably to the situation of the occupiers.\textsuperscript{411} The court concluded that it would not be just and equitable to grant an eviction order.

The attention given to the legislative history of PIE seems to emphasize the view that the Act was intended to address the legacy of social inequality which resulted from apartheid by facilitating social transformation in a broader sense.

\subsection*{4.4.2 The evolving jurisprudence of PIE}

These cases show that as far as the provision of alternative land is concerned, the judiciary tends towards interpreting PIE broadly. The courts have displayed a shift from interpreting the Act in a manner which regards the Act as solely furthering the purposes of land reform, to one which sees the Act serving a broader purpose encompassing more than merely alleviating the plight of the poor. The \textit{Modderklip} decision is, for example, sure to bring relief to landowners who have followed the correct legal procedure in order to obtain an eviction order but have been unable to carry it out because of the exorbitant financial costs involved and the State’s failure to enforce the requirement. In this way, the Court succeeded in balancing the competing rights of landowners and those of occupiers in the milieu of evictions, setting a platform for compelling the State to fulfill its constitutional obligations. Legal certainty and concrete protection is afforded to both

\textsuperscript{410} At 1296 para 58.
\textsuperscript{411} At 1296 para 58.
vulnerable occupiers and landowners who find themselves in comparable circumstances in future. The State can therefore no longer escape its obligations towards the landless.

As the level of government closest to the people, local government is in the ideal position to meet the needs of those within its area of jurisdiction effectively and promptly. It has been mandated by the Constitution to “structure and manage its administration and budgeting and planning process to give priority to the basic needs of the community and to promote the social and economic development of the community”.\textsuperscript{412} Thereby its powers and functions to support socio-economic and local economic development aptly have been enhanced, as emphasized by the judge in \textit{ABSA Bank v Murray}.

According to the Local Government Implementation Guide,\textsuperscript{413} local government can play a role in presenting both adequate and suitable shelter by regularly assessing planning processes in order to contain the continuing expansion of informal settlements; regulating means that guarantee secure tenure, thereby reducing the risk of eviction in informal settlements; securing viable partnerships with various sectors in order to access funding for affordable housing; increasing pioneering financing plans such as “public-private partnerships and micro-credit schemes that allow for low-cost housing development or improvement to existing housing;” implementing policies that guarantee the use of some municipal lands for cost-effective housing; “promoting mixed use planning that encourages the provision of affordable housing in the city centre;” commissioning inclusive planning processes to make sure that housing programs include considerations of local conditions and culture; escalating the availability of social housing; and

\textsuperscript{412} Section 153 (a).
“recognizing the rights of women and female heads of households, particularly in terms of access to land title and in inheritance issues.”

From these conclusions, it is evident that our courts have an evolving jurisprudence with regard to PIE. They seem to lean towards addressing the vast socio-economic inequities facing our society. More recent cases display an attempt to give more actual effect to the relevant constitutional rights than earlier decisions. The courts therefore seem to be aligning themselves with the government’s proclaimed intention to redress the injustices of apartheid, foster national reconciliation and stability, underpin economic growth, improve household welfare and alleviate poverty; a trend that should give the destitute some hope. However, the courts do not appear to do this in relation to effecting land reform or any of its specific programmes. The courts are more concerned with wider social and political responsibilities in respect of unlawful occupiers and use PIE as a means of facilitating the social transformation needed by this category of persons.

4.5 Conclusion

It seems that mixed signals are forthcoming from the courts’ treatment of the various problematic interpretations of PIE. The interpretations relating to the “availability of suitable alternative accommodation” to the unlawful occupier seem to further the end of social reform, while those relating to “unlawful occupier” (but for Ndlovu) further the purposes of land reform, and the interpretations given to relevant circumstances contain elements which furthers both social reform and land reform. Due to the difficulty experienced by the courts in interpreting PIE, it has been proposed that the Act be amended to provide certainty as to its application. Amending the Act will no doubt have
significant implications for the manner in which the courts will apply the Act, and therefore it is necessary to consider these proposed amendments and the impact that they could have on the question of how PIE is suited in the context of land reform. The proposed amendments will be discussed in chapter five with a view to addressing this question.
CHAPTER FIVE

PROPOSED AMENDMENTS TO PIE

5.1 Introduction

As mentioned above, the court in *Ndlovu v Ngeobo and Bekker & Bosch v Jika*[^1] broadened the ambit of the Act. Bond defaulters and tenants who do not pay rent, now fall within the ambit of the definition of “unlawful occupier”, exactly as squatters do. This means that landlords have to undergo a time-consuming process if they want to secure a legal eviction. Because such cases have often been referred to the High Courts, they have also been very expensive. The principles of the law of contract might be violated if landlords, developers and banks have to comply with the burdensome provisions of PIE when evicting tenants and mortgagors. This may result in a retreat from the rental housing market.[^2] The government accordingly proposed amendments to exclude tenants and mortgagors from the operation of the Act. To analyse the relevance of PIE to land reform, these amendments need to be taken into account.

5.2 The Draft Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill 2003

The Draft Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill 2003 was published and gazetted for public comment. A “Special

[^1]: 2003 (1) SA 113 (SCA).
Tribunal” and the “Land Claims Court” may now be included under the definition of a “court”. This opens up access to the courts and also lessens the costs involved. The definition of land has also been widened to include a “portion of” land and “buildings and structures” on land as well as to make specific reference to residential and commercial land. Although structures on land have been included in this definition by the courts, this amendment will bring more certainty to the position as this particular definition was subjected to varying interpretations.\textsuperscript{416} This section is further amended by the insertion of the definition of “occupy” as meaning to take possession of land or to erect a building or structure on land and “occupier” and “occupation” have corresponding meanings. This adds certainty to the scope of application of the Act. It will only apply to persons who occupy land with the intention of owning the land and in so doing erect structures on it. The Act evidently will then only apply to squatters. This reinforces the position of addressing the specific situation of squatting, excluding the possibility that the Act affords access to land or security of tenure in the broader context of social reform.

The proposed amendments to section 2 further qualify the application of the Act, excluding proceedings for the eviction of any tenant or former tenant; those initiated by a mortgagee for the foreclosure of the bond and the eviction of a mortgagor or of any person holding title through the mortgagor and also to any land acquired by way of a sale in execution or judicial sale of property. Parties who occupy property by virtue of the unlawful occupier’s occupation (such as dependants), are therefore clearly excluded form the procedures embodied in the Act.

\textsuperscript{416} In terms of \textit{ABSA Bank v Amod} land did not encompass permanent structures that have acceded to the land.
A further amendment to section 3 prohibits the arrangement of occupation of land without the owner’s consent or receiving or soliciting a consideration for these activities. Contravention of this prohibition is an offence and penalties may be imposed. Whereas the prohibition against such activities in PIE is restrictive; the amendment creates more offences, such as arranging occupation of land without the owner’s consent or receiving or soliciting a consideration for doing so is also prohibited. Any participation in such arrangement is prohibited. The receipt of any funds in connection with such activities is also prohibited. Contravention of any of the provisions in section 3, upon conviction, will result in forfeiture of any benefits received. Procedural difficulties are also corrected. The amendments therefore will affect persons who are currently illegally occupying buildings and persons illegally receiving income from tenants illegally occupying land or buildings. They also increase efforts to criminalize poor and landless persons and extend the definition of a Court.

The proposed amendment to the definition of “unlawful occupier” which seeks to exclude bond defaulters and persons who initially occupied property with the owner’s consent and continue to occupy it after such consent has been terminated, from the scope of application of the Act, is the most decisive amendment. Its aims are “to change the definition of ‘unlawful occupier’ so that it is not open to different interpretations; to change the definition of ‘unlawful occupier’ so as to leave no doubt that the intention of the Act will be to remove originally lawful occupiers from the definition of ‘unlawful occupiers’ therefore providing protection for the rights of landlords and bond grantors; to

\[417\] Such as omitting any reference to the Court having to serve notices. The amendment to section 6 provides the conditions under which an organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction.
create a more financially stable environment for landowners in South Africa; to ensure that all tenants are not prejudiced by being required to pay very large deposits when taking occupation of rented premises; and to ensure that applicants for bond finance are not subjected to even more stringent financial hurdles before having access to bond assistance."\(^{418}\)

Persons who already lawfully own a home and unlawfully occupy land forfeit the protection afforded by the Act.

These amendments add certainty to the manner in which categories of unlawful occupiers are to be evicted. While they will be evicted under PIE, tenants who hold over will be evicted under the Rental Housing Act\(^ {419}\) and mortgagors who hold over will be evicted in terms of the mortgage agreement. These proposed amendments will restore the situation to the way it was before PIE became applicable.\(^ {420}\) It should, however, be kept in mind that it would still result in an eviction from "a home" (when applicable) which would, in terms of section 26(3) of the Constitution, still have to be in terms of a court order and only after all the relevant circumstances have been considered.

It should also be noted that the Rental Housing Act of 1999 does not contain provisions that afford procedural protection for vulnerable tenants in eviction proceedings. The protective measures relating to rent control and the limitation of eviction proceedings originally contained in the Rent Control Act\(^ {421}\) that were retained in section 19 of the

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\(^{419}\) 50 of 1999.


\(^{421}\) 80 of 1976.
Rental Housing Act, have also since been removed.\textsuperscript{422} In the absence of these protective mechanisms, the lack of protection under PIE is likely to undermine the government’s attempt “to give effect to the right of access to adequate housing and the right to human dignity.”\textsuperscript{423}

For these reasons, the amendments will tighten the law to protect landowners and, in so doing, protect the rights of the privileged to the exclusion of the less privileged.\textsuperscript{424} The proposed amendments would alleviate numerous flaws in the Act. These amendments however distinctly advantage sectors who have expressed concern as to the negative effect which the Act has on them. These are, ironically, parties who do not find themselves in desperate situations in relation to their socio-economic status such as financial institutions. Before the amendments are adopted, it should thus be carefully considered who the true beneficiaries should be under the Act. Currently the amendments do not stand the disadvantaged in good stead. Rights of property owners and landlords are thus prioritized. Instead of a balanced approach to the rights of landowners and the difficulties facing illegal tenants and those persons occupying land illegally,\textsuperscript{425} occupiers who, by virtue of their socio-economic circumstances, can no longer afford to meet the terms of their lease or mortgage agreements would be excluded from the protection of

Vulnerable members of society who find themselves in desperate circumstances are thus further victimized; rendering the actions of government inconsistent in relation to its constitutional obligation to prioritize the needs of such persons.

5.3 Conclusion

From the tone and content of the amendments, it does not seem as if Parliament intended to extend the provisions of the Act to include tenants and mortgagors when PIE was initially debated. The aggressive pursuance of the aims of land reform and housing and the realization of socio-economic rights is the only effective combatant for the problem of illegal occupation of land. Although the amendments adequately address the problems that arose from the *Ndlovu* judgment, those who are destitute fail to receive the attention and protection they so desperately require. The amendments therefore seem to be a drawback from the progressive stance that the courts were developing to effect social transformation. They will not, however, have any bearing on the status of PIE as land reform legislation as the Courts, at present, do not seem to utilize the Act in a manner envisioned towards land reform.

In chapter six the effects of the Courts' progressive interpretation of the Act and of the proposed amendments are evaluated in terms of the objectives of the South African

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policy on land reform and the three elements of the reform programme, as contained in the White Paper.
CHAPTER SIX

INTERPRETING PIE

6.1 Introduction

Since its inception, many questions have been raised about PIE’s purpose. It is argued that the Act’s focal point is to address the plight of unlawful occupiers, specifically squatters. As shown in chapter four, the vague drafting of the Act has however led to varying interpretations in this regard. While the proposed amendments would alleviate this problem, they will not improve the situation of the vulnerable.

As was indicated in 2.2.4, section 26 of the Constitution which deals with the right to housing is the basis of PIE. However, the extent to which the Act contributes to the realization of this right, which is intimately linked to land reform, is not apparent. This raises the question of whether the Act was perhaps intended to deal exclusively with the problem of squatting. In this chapter, the Act, along with the amendments, is systematically compared to the objectives of the land reform policy and its three components in order to clarify this question.

6.2 The Court’s jurisprudence with regard to the interpretation of PIE

PIE has been viewed with dissatisfaction by landowners who argue that it unjustifiably impedes their common law right to evict unlawful occupiers from their land promptly. Their argument is that the procedural and substantive requirements of the Act are burdensome.429 These requirements, they argue, in the perspective of

increasing land invasions and the swell of informal settlements in South Africa, make it exceedingly difficult for landowners to evict unlawful occupiers from their land.\footnote{Fife “Judges tell our law makers to keep their promises to owners and squatters” (2004) Financial Mail <http://free.financialmail.co.za> 24/06/2004} Although these contentions are credible, it must be borne in mind that the Constitution is the supreme law of the land, and that PIE attempts to bring the owner’s common law right to evict in line with the constitutional principles central to evictions, which are entrenched in section 26(3) of the Constitution. Although the provisions dealing with the eviction of unlawful occupiers expressly override the common law in terms of section 4(1) of the Act, a property owner’s common law position essentially remains intact insofar as the owner may still institute proceedings by alleging ownership of the land and the defendant’s occupation of it.\footnote{Hopkins and Hofmeyr “The constitutional anomaly created by extending PIE” 2003 (March) DR <www.derebus.org.za> 26/04/2004.} The protection afforded by the Act only comes into play once the defendant lays claims to it.\footnote{Hopkins and Hofmeyr “The constitutional anomaly created by extending PIE” 2003 (March) DR <www.derebus.org.za> 26/04/2004; Gildenhuyss “Evictions A Quagmire for the Unwary” <http://butterworths2.uwc.ac.za/nts/gateway.dll?c=9e/y5a/c6a/4p2k> 14/07/2004.} The Act thus effects the objective of land policy with regard to protecting the rights of both the owner and occupier.

Prior to Ndlouvu, the socio-economic status of unlawful occupiers was regarded as irrelevant. However, by expanding the protection of PIE to tenants who continue to occupy property after the owner’s consent has been revoked and to mortgagees, the judgment now in effect enjoins the courts to consider the impact that an eviction order could have on these vulnerable groups of occupiers.\footnote{Christmas A “Proposed amendments to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act – A setback for vulnerable occupiers” (2004) ESR Review 5(3) <www.communitylawcentre.org.za/ser/esr2004/2004july_eviction.php> 7/09/2004.} This decision has since been fortified by the decision in ABSA Bank where the court expressly stated that the effect that an eviction order would have on the basic rights, including socio-economic rights,
of the evictee should from part of the enquiry.\textsuperscript{434} \textit{Baartman} provided for further considerations in the enquiry.\textsuperscript{435} The courts have increasingly taken cognizance of the inequities which riddle society. Expanding the protection of PIE in this way to persons who are not envisaged as beneficiaries in terms of land reform shows a clear commitment to social transformation. This is evidenced by the court’s failure to interpret the Act in a manner which transforms subordinate land rights. It is doubtful that the Act can be interpreted in such a way as unlawful occupiers have no right in law to the property being occupied. It is therefore illogical to consider that PIE could provide a means of securing rights in land which never existed. If however alternative accommodation is provided, the protected receive the benefit of such property as well as secure tenure in respect of it. In this sense the Act could provide a mechanism for promoting access to land.

Earlier judgments were in keeping with the scope of application of the Act, that is, the term “unlawful occupier” was interpreted narrowly insofar as it was held to apply only to persons who occupied property without ever having the owner’s consent to do so.\textsuperscript{436} There was also a general consensus that the Act was not applicable to contractual relationships and that it was not intended to alter the common law of eviction.\textsuperscript{437} This was justified in \textit{ABSA Bank v Amod} by the reasoning that the Act was intended to regulate and control persons occupying informal settlements.\textsuperscript{438} In \textit{Betta Eiendomme} the aim of the Act was held to be the prevention of forced removals.\textsuperscript{439}

\textsuperscript{434} At 26 l.
\textsuperscript{435} At 564 l.
\textsuperscript{436} \textit{ABSA Bank Ltd v Amod} [1999] 2 All SA 423 (W); \textit{Betta Eiendomme (Pty) Ltd v Ekple–Epoh} 2000 (4) SA 468 (W); \textit{Ellis v Viljoen} 2001 (4) SA 795 (C); \textit{Briskley v Drotsky} 2002 (4) SA 1 (SCA). See ch 3 para 3 2 1.
\textsuperscript{437} \textit{ABSA Bank Ltd v Amod} [1999] 2 All SA 423 (W); \textit{Ross v South Peninsula Municipality} 2000 (1) SA 589 (C); \textit{Betta Eiendomme (Pty) Ltd v Ekple–Epoh} 2000 (4) SA 468 (W); \textit{Ellis v Viljoen} 2001 (4) SA 795 (C); \textit{Briskley v Drotsky} 2002 (4) SA 1 (SCA).
\textsuperscript{438} \textit{ABSA Bank Ltd v Amod} [1999] 2 All SA 423 (W) at 430 d.
\textsuperscript{439} \textit{Betta Eiendomme (Pty) Ltd v Ekple–Epoh} 2000 (4) SA 468 (W) at 472 para 7.1.
Van der Walt submits that this restrictive interpretation of the Act appears to be inspired by conjecture about stability and change rather than by definitive arguments based on the provisions of the Act itself, and that there are no conclusive textual reasons in the Act for excluding categories of persons who initially occupied property lawfully, but whose occupation has subsequently become unlawful. He further submits that “the restrictive interpretation of land reform laws in Amolod seems to be based on a particular view of the aesthetic of land reform legislation rather than an intrinsic evaluation of the provisions of any specific statute or the history of land law and land reform.” In Ndlovu the protection afforded by the Act was extended beyond the scope elicited by earlier cases. This acknowledges the vulnerability of these categories of persons and their need for statutory protection against unlawful evictions. The Court, refusing to depart from the ordinary meaning of the term, took a literal approach in terms of who should be afforded protection under the Act. The approach taken by the Court resulted in the term “unlawful occupier” being defined as a person who at the time proceedings are instituted has no consent or other legal right to occupy the property in question. This illustrates the vague drafting of the Act, which caused distortion of the context of the term. In order for social policy to be effectively applied through legal means, adequate attention needs to be given to the features of the statutes giving effect to that policy. At present the Act thus applies to squatters, bond defaulters and vulnerable tenants.


Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA) at 120 para 5.

At 20 para 5.

At 20 para 5.


See 2 2 4.
It is not the duty of private individuals to provide housing for persons who are found to be in unlawful occupation of their property. Consequently section 26(1) of the Constitution is not enforceable against landowners. As government is constitutionally mandated to provide legislative and other means to achieve the realization of the right of access to adequate housing, this burden, which essentially gives effect to an owner’s right not to be deprived of his property and the occupier’s right of access to adequate housing, is primarily laid on the state. Sections 4(7) and 6(2)(c) of PIE, which provide that a Court must consider the availability of alternative accommodation or land to the unlawful occupier whilst determining whether it would be just and equitable to grant an eviction order, link PIE to access to housing and therefore seemingly also to security of tenure, which is irrefutably connected to access to housing. It is also an attempt to prevent instances of squatting once eviction orders are obtained so as to discontinue the vicious cycle of unlawful occupation and subsequent eviction. The Baartman decision is indicative of this, as it was held not to be in the public interest to evict people and relocate them to land where there is no security of tenure.

The most progressive stance yet to be taken by our Courts in terms of the relevant rights was displayed in Modderklip Boerdery, where the Court firmly pointed out that the state was in breach of its constitutional obligations with relation to both the landowner and the occupiers. The Court’s commitment to changing the position of vulnerable members of society was evidenced by its statement that the desperate were

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447 Section 26 (2) of the Constitution.
448 See 5-7.
449 Baartman & Others v Port Elizabeth Municipality 2004 (1) SA 561 (SCA) at 567 D-E.
450 Modder East Squatters & Another v Modderklip Boerdery (Pty) Ltd (SCA 187/03); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (SCA 213/03) at 10 para 41; also see court order at 13 para 52.
not being catered for by government programmes.\textsuperscript{451} The requirement of humane evictions was held to encompass the notions of alternative accommodation as well as security of tenure, which undoubtedly promotes land reform.\textsuperscript{452} The effect of the court order was in essence to expropriate the land which was being unlawfully occupied. This seems to have quaintly balanced the interests of the affected parties and managed to compel government to comply with its constitutional obligations in this regard. The outcome of the appeal against the judgment of De Villiers, J will be indicative of the Court’s determination to hold government accountable. The judgment in \textit{ABSA Bank v Murray}\textsuperscript{453} further reinforces this position by stating that local government has a central role to play in discharging the obligation in section 26(2).\textsuperscript{454} This is a great advance for both landowners and occupiers. A Court order giving effect to the consideration of the provision of alternative accommodation provided in section 4(7) and 6(3)(c) of the Act gives effect to the right of access to housing. As the Court has indicated in \textit{Baartman and Modderkloof}, the provision of alternative accommodation is meaningless without the guarantee of security of tenure. In view of this, PIE could be perceived as linked, through this provision, to security of tenure. It is however up to the Courts to display, through their judgments, how effective this provision is.

6.3 The Purpose and Effect of PIE in relation to the Objectives of Land Reform

In light of the fact that PIE provides for “fair procedures for the eviction of unlawful occupiers, who occupy land without the permission of the owner or the person in

\textsuperscript{451} At 6 para 22.
\textsuperscript{452} At 6 para 26.
\textsuperscript{453} 2004 (2) SA 15.
\textsuperscript{454} At 29-30 G-B.
charge of such land." Carey Miller argues that it ultimately endeavours to address the legacy of unfair deprivation of land and land rights that underpinned apartheid land law. As the Act has been interpreted as intending to afford protection to squatters who occupy land with no legal right to do so, the extent to which this vests unlawful occupiers with rights in respect of another’s land is a vexed question. Be this as it may, the Act succeeds in redressing the injustices of the past in relation to arbitrary evictions, by providing for clearly defined procedures that need to be complied with before an eviction order can be granted. This end is furthered by the inclusion of the socio-economic context of the occupier in the ambit of the term “relevant circumstances”.

The way in which the Act was interpreted in *Ndlovu* affects the rental market. Landlords fear having to endure a lengthy and costly procedure for eviction of defaulting tenants. Similarly financial institutions cannot be blamed for a reluctance to grant finance to homeowners, as these institutions lend against the security of property. They will not do so if it is costly and difficult to evict a defaulting borrower. The application of the Act in this way also prevents landlords from accumulating capital to generate further income. That could stunt economic growth if such application of the Act is continued. The economic position of the unlawful occupier is however placed at a distinct advantage, be it at the expense of the property owner, as the occupier does not remunerate the owner for use of his premises during the period of unlawful occupation. It could be argued that this economic advantage improves the welfare of the occupant by alleviating conditions of poverty. The Court has however

455 Carey Miller *Land Title in South Africa* (2000) 517.
457 See for example *ABSA Bank Ltd v Amod* [1999] 2 All SA 423 (W); *Betts Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W); *Ellis v Viljoen* 2001 (4) SA 795 (C); *Brisley v Drotsky* 2002 (4) SA 1 (SCA).
explicitly stated that the procedural safeguards in PIE merely delay or suspend the landowner’s exercise of his or her full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions.\textsuperscript{458} This is also apparent from the Act itself. In light of this, the temporary nature of the occupation which the Act might guarantee does not sustain the notion of bolstering household welfare or lowering poverty levels. On the face of it the Act therefore does not promote the objective of underpinning economic growth, but rather stands opposed to it. The Act could be seen as impeding rather than promoting, this objective of the land reform policy. However, regard must be had to the fact that the Act through sections 4(7) and 6(3)(c) promotes access to housing by requiring the Court to consider whether alternative accommodation has been made available for the relocation of the unlawful occupier. If this provision is duly observed, the rights of both the landowner and occupier are realised. This will create a stable and reconciliatory environment.

This synopsis displays the hybrid effect of PIE in terms of its compliance with the overall objectives of the land reform policy. Although it seems to contribute to the areas of access to land and tenure reform, this contribution is minimal to say the least. Its main effect thus far seems to have been the promotion of procedural safeguards to eviction, and thus indirectly to access to housing. It should, however, also be considered whether the proposed amendments might bring the Act more in line with land reform goals. By amending the definition of unlawful occupier to exclude vulnerable tenants and bond defaulters, as well as persons who already own a home at the time of unlawfully occupying land, a large number of people will be excluded from the protection afforded by the Act. In the instance of such exclusions it would be

\textsuperscript{458} Nellovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA) at 123 - 124 para 17.
more difficult to compel government to comply with its Constitutional obligation of providing access to adequate housing. It would, however, give PIE more of an edge in the land reform context specifically, apparently at the cost of broadening social reform. PIE currently at least requires the consideration of the availability of adequate alternative accommodation in the instance where unlawful occupation has occurred for longer than six months. This gives effect to section 26(1) of the Constitution.

The Supreme Court of Appeal has also displayed a trend of holding government accountable in relation to the provision of alternative accommodation. If the amendments are adopted, the exclusion of vulnerable occupiers from the protection of the Act makes the task of obliging government to fulfill its constitutional obligations even more onerous. The amendments focus on stabilizing the financial environment in South Africa. This in turn will make it easier for tenants and applicants for bonds to receive financial backing. However, denying these persons protection under the Act overrides the effort of making it easier for them to attain financial assistance. Fewer people will have a means of holding government accountable for the enforcement of the rights contained in the Bill of Rights. These persons should be enabled to participate in the property market, which will stimulate financial stability and in turn facilitate economic growth, foster national reconciliation and stability, improve household welfare, alleviate poverty and ultimately redress the injustices of the past. Although landowners' as well as financial institutions are placed at a clear economic advantage in terms of the proposed amendments, those who require much needed protection and assistance in terms of realizing their constitutional rights are literally left out in the cold. These are after all the persons who should be benefiting from any reform programme.
From its text,\textsuperscript{459} it is evident that the Act is intended to regulate control of land throughout the country by regulating the eviction process. In so doing it could be seen to have the psychological effect of promoting access to land, by giving occupiers a sense of security and protection against arbitrary eviction. The Courts have explicitly addressed this issue by discarding the notion that the Act is of a redistributive nature,\textsuperscript{460} as this would unduly favour unlawful occupiers.\textsuperscript{461} As the Act has preliminarily been classified as effecting tenure reform, this assumption will be re-assessed.\textsuperscript{462}

\subsection*{6.4 Land Tenure Reform}

The land tenure reform programme aims to provide people with secure tenure where they live, to prevent arbitrary evictions and fulfil the constitutional requirement that all South Africans have access to legally secure tenure in land.\textsuperscript{463} Tenure reform is not necessarily aimed at providing land ownership as such. Tenure, be it holding land as tenant, in terms of a contract, or in terms of another right in law, may still be secure without constituting ownership. As long as the basis for the land holding is clear, the terms of the occupation or land holding are clearly set out and the eviction of persons in these circumstances are regulated lawfully, the tenure remains secure. The tenure reform programme’s aim of preventing arbitrary evictions cements PIE’s position in this programme. It has been shown that the Act also facilitates access to housing and in turn security of tenure.\textsuperscript{464} Although PIE has brought new rights to many, the Act displays a significant weakness in the area of providing long-term security. The

\textsuperscript{459} See long title; preamble and section 2.
\textsuperscript{460} \textit{ABS Bank v Murray} 2004 (2) SA 15 (C) at 27 E.
\textsuperscript{461} At 28 E-F.
\textsuperscript{462} See 2 2 4.
\textsuperscript{464} See 4-8 para 1.2.
amendments further deter the effectiveness of the Act in relation to these aspects. The extent of the contribution to these areas therefore requires attention.

Tenure reform is a long-term project involving permanent reform of the legal basis of landholding.\textsuperscript{465} While PIE is markedly related to the holding or possession of land\textsuperscript{366} as well as the terms of such holding or possession,\textsuperscript{467} it has been held to suspend the rights of landowners only temporarily. Accordingly, any right derived in relation to property during this suspensive period can only be temporary in nature. This is apparent as the property can never become that of the unlawful occupiers. In the case of an eviction being made subject to the provision of alternative accommodation or various other procedural irregularities delaying the receipt of such an order, the period of time in terms of which the owner's right to his property is suspended could however be indefinite. It is thus evident that the courts play a major role in constructing the effect of the Act on both landowners and unlawful occupiers. Among the land rights fortified by tenure reform are rights to occupy a homestead; rights to transact, give, mortgage, lease, rent and bequeath areas of exclusive use; rights to exclude others from the above-listed rights, at community and/or individual levels; and, linked to the above rights to enforcement of legal and administrative provisions in order to protect the rights holder\textsuperscript{468}.

The Act undeniably strengthens an occupier's right of occupation. This right can however only be temporarily invoked during the period of time taken by the court to

\textsuperscript{465} Carey Miller \textit{Land Title in South Africa} (2000) 456.
make a determination as to the application for an ejectment order.\textsuperscript{469} The interpretation of the Act by the courts\textsuperscript{470} seems to have weakened rather than strengthened the rights to lease, transact, rent, etc, due to the fear of having to undergo a painstaking process to effect an eviction. It aims to provide a means of balancing the rights of occupiers and those of property owners, thereby protecting the rights of the parties concerned. As unlawful occupiers do not have the consent of the owner to occupy the premises, it is difficult to conceptualize the fact that such persons are afforded protection from being evicted under law. It is well-known that the unlawful occupation of land is one of the biggest threats to ownership, good governance and developmental efforts.\textsuperscript{471} The problem is exacerbated by the wording of section 26(3) which provides that “[n]o one may be evicted from their home ...” It would seem to make more sense to protect people who live on land with the consent of the owner or person in charge against unfair evictions.

This problem must however be seen in historical context. The denial of land rights is at the root of the problem. PIE does not attempt to address this problem directly by seeking to secure rights to land, but rather aims to do so by attending to arbitrary evictions which have beset the past through both procedural and substantive protection for those who are vulnerable to evictions.

It must also be borne in mind that it is unconstitutional to evict persons or to demolish their dwellings without due process of law and a court order. Although this is a costly and time-consuming process for the property owner, the overall objective of

\textsuperscript{469} Hopkins and Hofmeyr “The constitutional anomaly created by extending PIE” 2003 (March) DR
\textsuperscript{470} Ndlovu v Ngcobo and Bekker & Bosch v Itka 2003 (1) SA 13 (SCA); Baartman & Others v Port Elizabeth Municipal 2004 (1) SA 561 (SCA); Modder & East Squatters & Another v Modderklip Boerdery (Pty) Ltd (SCA 187/03); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (SCA 213/03).
protecting vulnerable members of society must be considered. Landowners do not in all cases have to resort to the “cumbersome” procedures spelled out in PIE. In the event of someone being in the process of occupying the land and erecting a structure, the owner can remove structures that are only partially complete or that are complete but have not yet been occupied.\textsuperscript{472} This action of counter-spoliation thus only requires that the structure be partially complete and or unoccupied.\textsuperscript{473} An urgent interdict can also be sought to prevent persons from unlawfully occupying property in the event of there being a clear indication of the intention to take up unlawful occupation.

By providing factors to be considered by the Court prior to the issuing of an ejectment order,\textsuperscript{474} the Act attempts to facilitate an understanding of the context in which those who are intended to benefit find themselves. No indication is however given as to whether the list of factors is exhaustive. The Act merely provides that a “just and equitable” decision must be made.\textsuperscript{475} As this phrase has also been subjected to debate\textsuperscript{476} with regard to its content, this provision in itself is not very functional.

Ostensibly, therefore, the Act does not make any significant long-term contribution to the delivery of tenure reform in terms of the rights-based approach which has been adopted in this regard. Although it provides protection against illegal evictions, it cannot be seen to transform inferior land rights into legally enforceable rights in terms of property that is being occupied unlawfully. The only right created in terms of the Act is the right to fair procedure.\textsuperscript{477} The difficulty lies therein that the right to occupation without consent seems to be embedded in effecting this right, as “a court

\textsuperscript{474} Sections 4(6), 4(7) and 6(3)(c).
\textsuperscript{475} Sections 4(6), 4(7), 6(1) and 6(3).
\textsuperscript{476} Baartman & Others v Port Elizabeth Municipality 2004 (1) SA 561 (SCA); ABSA Bank v Murray 2004 (2) SA 15 (C).
order in terms of the Act that entrenches the position of unlawful occupiers of land indirectly creates a new, enforceable right.\footnote{Mostert "The diversification of land rights and its implications for a new land law in South Africa. An appraisal concentrating on the transformation of the South African system of land registration." Paper presented at the Fourth Biennial Conference of the Centre for Property Law at the University of Reading, March 2002.} The \textit{Baartman} and \textit{Modderklip} cases display the bizarre consequences which result from this. In these cases the unlawful occupiers could not be evicted. This creates confusion as to the status of these occupiers in relation to the land being occupied. It is apparent that measures should be taken, either by the legislature or the judiciary, to clarify this position.\footnote{Mostert "The diversification of land rights and its implications for a new land law in South Africa. An appraisal concentrating on the transformation of the South African system of land registration." Paper presented at the Fourth Biennial Conference of the Centre for Property Law at the University of Reading, March 2002.}

There is no feasible argument to support the notion that the Act provides the right to choose an appropriate tenure system. The regulation of evictions does not offer a choice of such systems. It therefore does not assist in building a unitary non-racial system of land rights allowing people to choose the tenure system appropriate to their needs. By providing circumstances which should be considered before an eviction order is granted, the Act attempts to bring eviction proceedings in line with the human rights guaranteed in the Constitution. It can however not be claimed that it brings tenure systems in line with the rights entrenched in the Bill of Rights. Unless alternative accommodation is provided subsequent to an eviction order being issued, the Act evidently does not have a longterm effect on tenure security.

The regulatory nature of the Act is clearly revealed in its preamble, which contains the objective: provision for the prohibition of unlawful eviction and procedures for the eviction of unlawful occupation. The court in \textit{ABSA Bank v Murray} reinforced the regulatory nature of the Act and added that it does not afford a mechanism to divest an owner of his property, but a means by which the judiciary must regulate
proprietary rights.\textsuperscript{480} PIE was held to be an example of a limitation of an owner's proprietary rights. However, \textit{Brisley}\textsuperscript{481} does not support the argument that PIE is merely procedural in nature. The argument that the procedural provisions of the Act facilitate substantive protection of unlawful occupiers justifies this position.\textsuperscript{482} The amendments affect the position of the Act in relation to the objectives of tenure reform only insofar as the number of people who will be afforded consideration in terms of the Act will be smaller. In other words, the realisation of access to housing will effectively be curbed.

6.5 Conclusion

The South African land reform programme is rights based to a significant degree. This is a matter of constitutional obligation. However rights do not have meaning unless the holders of the rights are able to enforce them consistently and effectively. In practice, the enforcement mechanisms remain weak and are often complicated by competing rights. The complexity of PIE lies therein that it treads on new terrain, both in relation to the social changes toward which it is directed and in relation to the legal means used to facilitate such changes. The main achievement of the tenure reform programme has been to pass a number of laws\textsuperscript{483} to begin to regulate the eviction of people occupying land belonging to others. PIE is amongst the most important of these. As tenure reform contemplates the prevention of arbitrary evictions, there is no doubt that PIE aims towards land reform. This seems to be its defining feature in the

\textsuperscript{480} 2004 (2) SA 15 (C) at 27-28 G-A.
\textsuperscript{481} \textit{Brisley v Drotsky} 2002 (4) SA 1 (SCA).
\textsuperscript{482} Hopkins and Hofmeyr "The constitutional anomaly created by extending PIE" 2003 (March) \textit{DR} <www.derebus.org.za> 26/04/2004.
scheme of land reform. However, by providing that a court must consider the availability of alternative accommodation before an eviction order is granted, the Act contributes to the realization of the right of access to housing. More effective access to land in terms of the Act can only be achieved by the decision of courts requiring the state to provide appropriate alternative accommodation as the relevant land being occupied cannot become the property of the unlawful occupier, ownership is therefore not attainable unless the state assists the unlawful occupier to purchase the land. Although security of tenure is intricately connected to access to housing, the Act itself does not directly contribute to securing it. While it could be seen to facilitate tenure security, the Act displays a hybrid nature in relation to procedural protection, access to housing and security of tenure. The most significant feature of the Act is however the procedural protection that it affords as it has only a limited contribution to access to housing and tenure security. However, the amendments further minimize the effectiveness of the Act in relation to the optimal realisation of access to housing and security of tenure. They should thus be re-evaluated with this in mind. Chapter seven concludes this study with a summary of the findings.
CHAPTER SEVEN
FINDING A PLACE

7.1 The research question

The aim of the study was to determine the degree to which PIE is in line with the objectives of South Africa’s land reform policy with regard to the promotion of access to land and security of tenure and to what extent the Act has contributed to land reform.

As explained in Chapter One, the study set out to provide a description of current land policy with regard to evictions and the objectives that it seeks to achieve, indicating the degree to which the implementation of these objectives have been successful, as well as the constraints hampering their realisation. An analysis of parts of PIE and relevant cases in which the Act was interpreted and applied was also provided, and used in the assessment of PIE against the objectives of land policy to measure its contribution to land reform. Chapter Five now concludes this study with a summary of the findings.

7.2 Summary of findings

For decades many South Africans have been subjected to forced removals and denied the exercise of land rights. Legislative measures employed by the government during apartheid cemented the denial of land rights. South Africa’s infamous history with regard to its racially-based denial of land rights has necessitated reform in this area. To this end the post-apartheid government has embarked on a far-reaching land reform programme. The Department of Land Affairs, in 1997, produced the White Paper on Land Policy which serves as the policy document effecting land reform. In terms of the White Paper,
land reform encompasses the key elements of restitution, redistribution and land tenure reform. It has been shown that these components are interlinked and that they encompass the notion of access to housing.\textsuperscript{484}

South Africa’s land policy is described as seeking to address the injustices of the past, the need for a more equitable distribution of landownership, the need for land reform that will minimise poverty and contribute to economic growth and the lack of security of tenure for all and a system of land management that will make land available for development while supporting land use patterns.\textsuperscript{485} Its three elements aim to address the plight of those dispossessed of their land by racially based legislation and practices, provide the poor with access to land to improve their way of life and strengthen insecure land titles respectively.

Various laws have been promulgated to achieve these objectives. A number of statutes have been promulgated to ensure that the forced removals that beset the country will “never again” take place. The most vociferous law providing for procedural protection against unlawful evictions is PIE. The Act has as its aim the prohibition of unlawful evictions, and provides procedures for the eviction of unlawful occupiers. It also repeals the Prevention of Illegal Squatting Act\textsuperscript{486} which has been described as the most notorious of the Apartheid laws.\textsuperscript{487} However, as the Act has its roots in section 26(3) of the Constitution, it has been linked to the right of access to adequate housing, which has led to the interpretation that the Act was a means of effecting land reform.

\textsuperscript{484} See ch 1 para 1 2; ch 2 para 2 2.
\textsuperscript{486} 52 of 1951.
The courts have progressively broadened the ambit of the Act. In relation to the “relevant circumstances” to be considered whilst contemplating an application for an eviction, the occupier’s socio-economic status is now deemed to be an important consideration.\textsuperscript{488} The factors in section 4(6) and (7) have also been held as relevant considerations where an organ of state institutes eviction proceedings.\textsuperscript{489} The courts have thus made a clear shift from the conservative stance in earlier cases, leading to the plight of the poor being advanced as they are now afforded further protection in terms of the Act.\textsuperscript{490} The scope of application of the Act has also been expanded to include a larger group of vulnerable persons, which has further enjoined courts to consider the impact of an eviction order on these categories of persons.\textsuperscript{491}

The most significant aspect of the Act is however the requirement that consideration must be given to the “availability of suitable alternative accommodation or land” upon the eviction of the unlawful occupier.\textsuperscript{492} Although this provision is only relevant at the instance where unlawful occupation has occurred for more than six months and where an organ of state institutes the proceedings, it goes a long way in alleviating the plight of the poor and addressing the desperate situations in which these persons find themselves. Our courts have ardently given effect to this provision compelling government to realise its constitutional obligations.\textsuperscript{493} A decision of the courts requiring the state to comply with this provision gives effect to section 26 of the Constitution. However, it gives rise to the question of security of tenure in relation to the alternative land to which the occupiers are

\textsuperscript{488} See n 360.
\textsuperscript{489} See n 335.
\textsuperscript{490} See ch 4 para 4 2 2 and para 4 3 2.
\textsuperscript{491} See ch 4 para 4 2 2.
\textsuperscript{492} See ch 4 para 4 4 2.
\textsuperscript{493} See ch 4 para 4 4 1.
to be relocated. The court has held that in order for evictions to be conducted humanely there has to be a measure of security in relation to such land.\textsuperscript{494} If not, these occupiers will remain in unlawful occupation and once again be subject to eviction proceedings. The Act itself does however not provide for such security.

Although security of tenure is implicit to the right of access to adequate housing there is no direct means to effect this in terms of the Act. Although it could be seen to facilitate tenure security by requiring the provision of alternative accommodation, the enforcement of this provision by the courts is the only means of permanently enforcing the right embodied in section 26 of the Act. Where this provision is not applicable, in other words, where occupation has occurred for less than six months, the procedural and substantive protection offered by the Act only provide temporary security for the occupier, as the property can never become his or hers. The proposed amendments vastly decrease the categories of people who would benefit under this provision, thereby limiting the realization of the rights of access to adequate housing. They therefore detract from the progressive interpretation which our Courts have afforded the Act.

7.3 Implications

It is evident from this investigation that the Act was intended to further the purposes of land reform. The interpretation of the Act by the courts, however, supports the notion of employing the Act as a means of effecting broader social reform, which incorporates more than mere land reform. The current application of the Act by the courts therefore seems more suited to further this end rather than land reform. This is supported by the fact that the courts have extended the application of the Act to persons who are not

\textsuperscript{494} See n 394.
envisaged as beneficiaries in terms of land reform programmes. Once the vague drafting of the Act is attended to, squatters will be the sole subjects of its protection.\textsuperscript{495} This will bring closure to the fact that the Act was intended to effect land reform in a narrow sense and exclude any impact that the Act might have outside the context of squatting. The extent to which the common-law position of landowners is affected by the Act remains unclear. It seems as though it will only succeed if there is lack of vigilance by the courts when approached with an undefended action. If, however, the Act is reverted to its original position, the application of section 26(3) of the Constitution to non-PIE matters will once again feature prominently.\textsuperscript{496}

Although the Act does make a contribution to giving effect to the right of access to adequate housing, it only has limited effect in this regard. As far as ensuring tenure security is concerned, the Act plays a pivotal role in the prevention of arbitrary evictions. This is however as far as the Act goes. Although it can be argued that by giving effect to the right of access to adequate housing, the Act gives effect to tenure security by implication, as these rights are intertwined, it is still up to the court to determine the extent of the Act in relation to all these aspects.

7.4 Conclusion

In the context of furthering the purposes of land reform, it is illogical to apply the Act to defaulting tenants or bond defaulters outside the context of squatting. As it seems that this is the purpose of the Act, the interpretation of the Act by the courts as a means of

\textsuperscript{495} In terms of the proposed amendments to the Act.
\textsuperscript{496} As in the cases of \textit{ABSA Bank Ltd v Amod} [1999] 2 All SA 423 (W); \textit{Ross v South Peninsula Municipality} 2000 (1) SA 589 (C); \textit{Betta Eiendomme (Pty) Ltd v Ekple-Epoh} 2000 (4) SA 468 (W); \textit{Ellis v Viljoen} 2001 (4) SA 795 (C); \textit{Brisley v Drotsky} 2002 (4) SA 1 (SCA).
effecting social reform has to be reconciled with this notion, particularly if the amendments are adopted. This would mean excluding bond defaulters and defaulting tenants from the scope of application of the Act.
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