

**ILLEGAL EVICTION AND UNLAWFUL OCCUPATION OF LAND:
A COMPARATIVE PERSPECTIVE**

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by

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ABSTRACT

This study examines how the unlawful occupation of land has been dealt with in South Africa. This has been done by way of analysing relevant legislation, case law and literature. This study also places into perspective the context in which people unlawfully occupy land. It further analyses how the current legal position with regard to the unlawful occupation of land affects the position of both unlawful occupiers and landowners. A survey of international instruments recognising the right to housing and the right to property has been conducted in order to determine whether South African law is in line with international law concerning the right to housing and the right to property. A comparative analysis of the experience with unlawful occupation of land in Zimbabwe and Britain was also undertaken. This was mainly done by way of a literature survey. This study is aimed at finding a balance between the demands of both landowners and the homeless and further illustrates how the position of unlawful occupiers of land can be strengthened without infringing the rights of landowners more than what is necessary.

OPSOMMING

Hierdie studie ondersoek hoe die onregmatige besetting van grond in Suid-Afrika gehanteer is. Dit word gedoen bywyse van die analise van relevante wetgewing, regspraak en literatuur. Hierdie studie plaas ook die konteks waarin mense grond onregmatig beset in perspektief. Verder, analiseer dit hoe die huidige regsposisie met betrekking tot die onregmatige besetting van grond die posisie van beide onregmatige okkupeerders en grond eienaars affekteer. Internasionale instrumente wat erkenning gee aan die reg op behuising en die reg op eiendom word bestudeer ten einde te bepaal of die Suid-Afrikaanse reg in ooreenstemming is met internasionale reg rakende die reg op behuising en die reg op eiendom. Ondersoek na die onregmatige besetting van grond in Zimbabwe en Brittanje word ook gedoen. Dit was hoofsaaklik gedoen bywyse van 'n literatuur studie. Hierdie studie probeer 'n balans vind tussen die regte van grondeienaars en haweloses en illustreer hoe die posisie van onregmatige okkupeerders van grond verbeter kan word sonder om meer as wat nodig is inbreuk te maak op die regte van grondeienaars.

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LIST OF ABBREVIATIONS

CILSA	Comparative and International Law of South Africa
De Jure	De Jure
De Rebus	De Rebus
JAL	Journal of African Law
J Mod Afr Stud	Journal of Modern African Studies
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
PISA	Prevention of Illegal Squatting Act 52 of 1951
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal of Contemporary Roman-Dutch Law)
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

CHAPTER ONE

INTRODUCTION¹

1 Research problem

In terms of the *Prevention of Illegal Squatting Act*² (hereafter *PISA*) a landowner could without an order of court demolish any building or structure erected on his or her land without consent.³ *PISA* did not provide for fair procedures in terms of which people could be evicted and for many years, families had been evicted with no regard for their rights as individuals. South Africa became a democratic society in 1994 and the *Constitution of the Republic of South Africa*⁴ (hereafter the interim *Constitution*) brought with it a sense of respect for human rights. The repeal of draconian apartheid-inspired legislation such as *PISA* became inevitable. The interim *Constitution* was replaced by the *Constitution of the Republic of South Africa*⁵ (hereafter the final *Constitution*) which stipulates that no one may be evicted from their home or have their home demolished without an order of court.⁶ The *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act*⁷ (hereafter *PIE*), which has repealed *PISA*, is a direct consequence of section 26(3) of the final *Constitution*.

However, *PIE* seems to be a direct response to the inhumane action that was allowed by *PISA*. Although *PIE* gives recognition to the right not to be deprived of property, the legislature has not fully considered the impact of *PIE* on the right not to be deprived of property in instances where the unlawful occupation relates to privately owned property, especially residential property. It seems that *PIE* lacks a proper balance between the rights of unlawful occupiers and the rights of owners. This study therefore addresses the question of how the position of unlawful occupiers

1 This study takes into account developments up to December 2002.

2 52 of 1951.

3 See also *Kgosana v Otto* 1991 2 SA 113 (W) 116A; *Mbangi v Dobsonville City Council* 1991 2 SA 330 (W) 331G.

4 200 of 1993.

5 108 of 1996.

6 Section 26(3).

7 19 of 1998.

of land can be strengthened without weakening the position of landowners.

This study is outlined as follows:

- In chapter two international instruments relating to the right to housing and the right to property are considered. This has been done in order to seek guidance as to the correct interpretation of the right to have access to adequate housing⁸ and the right not to be deprived of property⁹ as enshrined in the final *Constitution*. The final *Constitution* requires that international law must be considered in the interpretation of the Bill of Rights.¹⁰ International law also plays an important role when interpreting the provisions of *PISA* and *PIE*.
- In chapter three consideration is given to how foreign law addresses the issue of unlawful occupation of land. The unlawful occupation of land in South Africa takes place in a different context to that in other countries. However, South Africa can through lessons learnt in other countries try to effectively address the problem of unlawful occupation of land on its own soil. Specific reference is therefore made to how the unlawful occupation of land is being dealt with in Zimbabwe and Britain respectively. Lessons learnt from these countries have been outlined in chapter 8 below.
- In chapter four the right to have access to adequate housing and the right not to be deprived of property as enshrined in the final *Constitution* are discussed. This has been done in order to determine the extent of the constitutional protection of these rights in light of the effect of the provisions of *PISA* and *PIE*.
- In chapter five the provisions of *PISA* are analysed in order to determine whether it could have stood the test of our new constitutional democracy. This chapter also looks at how the provisions of *PISA* have been interpreted by the courts.
- In chapter six the provisions of *PIE* are analysed in order to determine its compliance with the final *Constitution*, and to what extent it has improved the position of unlawful occupiers and how this has affected the rights of owners. It further considers the

8 Section 26(1) of the final *Constitution*. See also the discussion at 4.1 below.

9 Section 25(1) of the final *Constitution*. See also the discussion at 4.2 below.

10 Section 39(1). See also the discussion at point 2 below.

applicability of *PIE* to the relationship between landlords and tenants. This has been done given the recent Supreme Court of Appeal judgment in *Ndlovu v Ngcobo; Bekker v Jika*¹¹ which held that the provisions of *PIE* also apply to tenants who fail to pay their rent or mortgagors who default on bond payments.¹² Consideration is also given to the feasibility of criminalising the unlawful occupation of land. This has been done in light of the Department of Housing's recommendation that *PIE* be amended to make the unlawful occupation of land a criminal offence.¹³

- In chapter seven the justification for the limitation on the right not to be deprived of property is examined.
- In chapter 8 recommendations for the amendment of *PIE* are made.

As the topic of unlawful occupation of land is a general one, a broad research methodology has been adopted. This study considers international instruments pertaining to the right to have access to adequate housing¹⁴ and the right not to be deprived of property,¹⁵ comparative literature, writings on the topic (periodicals, books, case law, Internet sources), and legislation. Individuals with expert knowledge on the topic have also been consulted.

The terms “unlawful occupier(s)” and “squatter(s)” and the terms “land” and “property” are used interchangeably.

11 2003 1 SA 113 (SCA).

12 See also the discussion at 6.2.1 below.

13 See also the discussion at 6.2.2 below.

14 Section 26(1) of the final *Constitution*. See also the discussion at 4.1 above.

15 Section 25(1) of the final *Constitution*. See also the discussion at 4.2 above.

CHAPTER TWO

INTERNATIONAL LAW

2 Introduction

When interpreting the Bill of Rights,¹⁶ regard should be had to international law.¹⁷ Section 39(1) of the final *Constitution* provides as follows:

When interpreting the Bill of Rights, a court, tribunal or forum ...

(b) must consider international law ...

In *S v Makwanyane*¹⁸ Chaskalson P states as follows:

[P]ublic international law would include non binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which chapter 3 [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparative instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].

He went on to say:¹⁹

In dealing with comparative law we must bear in mind that we are required to construe

16 Chapter 2 of the final *Constitution*.

17 Rautenbach IM and Malherbe EFJ *Constitutional Law* 3th ed (Butterworths Durban 1999) 45; O'Shea Andreas "International Law and the Bill of Rights" in *Bill of Rights Compendium* (Butterworths Durban 2002) 7A - 6.

18 1995 3 SA 391 (CC) [35].

19 See 415D-E of the judgment.

the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution.²⁰

Section 39(1) should be read with section 233 of the final *Constitution* which stipulates as follows:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The standards set down in international instruments with regard to adequate housing and forced evictions are of cardinal importance. It is internationally recognised that forced evictions should infringe the right to housing as little as possible.

Various international instruments, to some of which South Africa is a party, recognise that forced evictions constitute violations of a wide range of internationally recognised human rights, including the right to housing. The following are a number of international human rights instruments in which the right to housing is entrenched.

2.1 *International instruments relating to the right to housing*

In terms of article 11(1) of the *International Covenant on Economic, Social and Cultural Rights*,²¹ state parties to the *Covenant* recognise that everyone has a right to an adequate standard

20 See also *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) 798E.

21 1966. Adopted by the General Assembly res 2200 A (XXI) of 16 December 1966, entered into force on 3 January 1976 and ratified by South Africa on 3 October 1994. See also Dugard J *International Law: A South African Perspective* (Juta Kenwyn 1994) 209. In *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) considerable weight was attached to the *International Covenant on Economic, Social and Cultural Rights* in interpreting the right to have access to adequate housing contained in section 26 of the *final Constitution*. In this case, the *amici* argued that in interpreting section 26, an approach similar to that taken by the Committee on Economic, Social and Cultural Rights in paragraph 10 of General Comment 3 issued in 1990 should be adopted: "On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that minimum core obligation

of living, including adequate housing. Article 2(1) of the *Covenant* requires state parties to use “all appropriate means”, including the adoption of legislative measures to promote the right to adequate housing. The United Nations Committee on Economic, Social and Cultural Rights is responsible for examining states' compliance with universally recognised economic, social and cultural rights. The committee issues general comments as a means of providing greater interpretative clarity as to the intent, meaning and content of the *Covenant*. General Comment No 4 was adopted by the Committee on 12 December 1991 which provides as follows:

- Individuals as well as families are entitled to adequate housing regardless of age, economic status, group or other affiliation or status. The right to adequate housing must not be subjected to any form of discrimination.
- The right to housing should not be interpreted in a narrow sense, but should be seen as a right to live somewhere in security, peace and dignity. The Committee is of the view that various factors determine whether shelter can be considered as “adequate housing”. Furthermore, although adequacy is determined in part by social, economic, cultural, climatic and ecological factors, the following aspects of the right must be taken into account:
 - availability and accessibility of services, materials, facilities and infrastructure;
 - affordability of housing;
 - adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, heat, rain or other threats to health;
 - adequate housing must be accessible to those entitled to it;
 - adequate housing must be in a location which allows access to employment options, health care services, schools, child care centres and other facilities; and

to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.”

- adequate housing should be culturally adequate.

As appropriate procedural protection and due process are essential aspects of all human rights, especially relating to a matter such as forced eviction, the UN Committee adopted General Comment No. 7 on 16 May 1997. The Committee considers that the procedural protections which should be applied in relation to forced evictions include:

- an opportunity for genuine consultation with those affected;
- adequate and reasonable notice to all affected persons prior to the scheduled date of eviction;
- information on the proposed evictions and where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- governments or their representatives should be present during an eviction, especially where groups of people are involved;
- all persons carrying out the evictions should be properly identified;
- evictions should not take place in bad weather or at night unless the affected persons consent otherwise;
- provision should be made for legal remedies; and
- provision where possible, of legal aid to persons who are in need of it to seek redress from the courts.

On 13 June 1997 the United Nations High Commissioner for Human Rights and the Centre for Human Rights issued *Comprehensive Human Rights Guidelines on Development-Based Displacement*, which were adopted by the Expert Seminar on the Practice of Forced Evictions. These guidelines provide, *inter alia*, that:

- States should apply appropriate civil and criminal penalties against any person or entity, whether public or private, who carries out any forced evictions, not in full conformity with applicable law and the Guidelines.
- States should secure by all appropriate means the maximum degree of effective protection against the practice of forced evictions. Special consideration should be given to the rights of indigenous people,

children and women, particularly female-headed households and other vulnerable groups. These obligations are of an immediate nature and are not qualified by resource-related considerations.

- States should ensure that adequate and effective legal or other appropriate remedies are available to any person claiming that his or her right of protection against forced evictions has been violated or is under threat of violation.
- States should ensure that no person, group or community is rendered homeless or is exposed to the violation of any other human right as a consequence of a forced eviction.
- States should adopt appropriate legislation and policies to ensure the protection of individuals, groups and communities from forced evictions, having due regard to their best interest. States are encouraged to adopt constitutional provisions in this regard.
- All persons have the right to adequate housing which includes, *inter alia*, the integrity of the home. The home and its occupants must be protected against any acts of violence or other forms of harassment. The home and its occupants must further be protected against any arbitrary or unlawful interference with privacy or respect of the home.
- All persons threatened with forced evictions, notwithstanding the rationale or legal basis thereof, have the right to (a) a fair hearing before a competent, impartial and independent court or tribunal; (b) legal counsel, and where necessary, sufficient legal aid; and (c) effective remedies.
- States should adopt legislative means prohibiting any forced evictions without a court order.²² The court must consider all relevant circumstances of affected persons, groups and communities and any decision should be in full accordance with the principles of equality, justice and internationally recognised human rights.

Section 14(2)(h) of the *Convention on the Elimination of all forms of Discrimination against*

²² A prohibition against forced evictions without an order of court has been included in section 26(3) of the final *Constitution*. See also the preamble of *PIE* and the discussion on section 26(3) of the final *Constitution* at 4.1 below.

*Women*²³ provides that state parties to the *Convention* must take “all appropriate measures” to eliminate discrimination against women in rural areas. State parties should also ensure that women enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply.

Section 21 of the *Convention relating to the Status of Refugees*²⁴ states “as regards housing, the contracting states, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and in any event, not less favourable than that accorded to aliens generally in the same circumstances.”

In terms of section 27(1) of the *Convention on the Rights of the Child*,²⁵ state parties to the *Convention* recognise the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development. Section 27(3) stipulates that state parties must take appropriate measures to assist parents and others responsible for the child to implement this right. State parties must also in the case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

In terms of section 5(e)(iii) of the *International Convention on the Elimination of all Forms of Racial Discrimination*,²⁶ state parties to the *Convention* undertake to guarantee the right to economic, social and cultural rights, in particular the right to housing.

Section 25 of the *Universal Declaration of Human Rights*²⁷ states that everyone has a right to a

23 Adopted in 1979 by the UN General Assembly. Entered into force on 3 September 1981. Signed by South Africa on 29 January 1993 and ratified by South Africa on 15 December 1995. See also Dugard *International Law* 212.

24 Adopted on 28 July 1951 by the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons under General Assembly resolution 429(v) of 14 December 1951. Entered into force on 22 April 1954 and acceded to by South Africa on 12 January 1996.

25 Adopted by the UN General Assembly in 1989. Entered into force on 2 September 1990. Signed by South Africa on 29 January 1993 and ratified by South Africa on 16 June 1995.

26 1966. Entered into force on 4 January 1969. See also Dugard *International Law* 211.

27 Adopted in 1948 by the UN General Assembly. See also Dugard *International Law* 204.

standard of living adequate for his or her or families' well-being, and housing.

2.2 *International instruments relating to the right to property*

The right to acquire and hold property is recognised in several democracies. The following are examples of international instruments giving recognition to the right to property:

Article 17 of the *Universal Declaration of Human Rights* states as follows:

Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.²⁸

Article 1 of the *First Protocol of the European Convention on Human Rights*²⁹ provides as follows:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of International Law.

The *African Charter on Human and People's Rights*³⁰ provides as follows:

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

The *American Convention on Human Rights*³¹ states as follows:

28 See also section 25(1) of the final *Constitution*; Devenish GE *A commentary on the South African Bill of Rights* (Butterworths Durban 1999) 344.

29 1952. Came into operation in 1954.

30 Approved by the Organisation of African Unity (OAU) in 1981 and came into force in 1986. See also Dugard *International Law* 224; Dlamini CRM "Towards a regional protection of human rights in Africa: The African Charter on Human and Peoples' Rights" 1991 *CILSA* 189.

31 1969.

(1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

(2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.³²

2.3 The role of international law in South Africa

Where legislation is silent on the observance of human rights,³³ the South African courts can invoke the principles of international human rights law.³⁴ As customary international law has always been part of our common law,³⁵ the courts can also apply these norms of human rights law that had acquired the status of custom, unless they are in conflict with legislation.³⁶ International human rights conventions and declarations not binding on South Africa, either as custom or treaty might be invoked by the courts as a guide to judicial policy in the formulation of a rule of law.³⁷ South African courts could, even before our new constitutional dispensation, have regard to international law when interpreting legislative provisions.³⁸ Furthermore, any interpretation of *PISA* and *PIE* must be consistent with international law.

2.4 Summary

Section 39(1) of the final *Constitution* requires that international law be taken in to account when interpreting the Bill of Rights. This chapter therefore studies various international instruments, to some of which South Africa is a party. These instruments recognise the right to property and

32 See also section 25(2) of the final *Constitution*.

33 *PISA* is a clear example of one of the draconian apartheid legislation which disregarded respect for human rights.

34 Dugard J "The role of international law in interpreting the Bill of Rights" 1994 *SAJHR* 208.

35 *South Atlantic Islands Development Corporation v Buchan* 1971 1 SA 234 (C) 238C-D; Dugard *International Law* Chapter 4.

36 Dugard 1994 *SAJHR* 208 - 209.

37 Dugard 1994 *SAJHR* 208 209; Mann FA *Studies in International Law* (Oxford Clarendon Press 1973) 340; *Blathwayt v Cawley (Baron)* 1976 AC 397 (HL) 426.

38 However, in the past, courts showed no indication to invoke the principles of international law. See for example *S v Petane* 1988 3 SA 51 (C) 58G-J; *S v Rudman* 1989 3 SA 368 (E) 376A-B.

also acknowledge the fact that forced evictions constitute violations of internationally recognised human rights, including the right to housing.

CHAPTER THREE

COMPARATIVE ANALYSIS

3 Introduction

Section 39(1)(c) of the final *Constitution* states that “when interpreting the Bill of Rights, a court, tribunal or forum may consider foreign law.”³⁹ Unlike section 35 of the interim *Constitution*, section 39 no longer requires reference to comparable foreign case law,⁴⁰ but simply allows courts to refer to foreign law.⁴¹ This makes it possible for courts to move beyond the restriction and to learn from non-comparable systems.⁴²

Unlawful occupation of land is a world-wide problem. The unlawful occupation of land is mainly confined to third world countries, although it also occurs in some European countries and States in the USA.⁴³ In most of these countries, the vast number of unlawful occupiers and the lack of alternative land have compelled authorities to recognise illegal settlements. These occupiers then continue gradually to improve their houses and slowly the settlements become an established part of the city.⁴⁴ As the production of public housing cannot meet the demand of low-

39 See also Rautenbach and Malherbe *Constitutional Law* (1999) 46.

40 Rautenbach and Malherbe *Constitutional Law* (1999) 46 states that the reference to “case law” did not preclude courts from having regard to any other foreign law.

41 Kroeze *IJ Between Conceptualism and Constitutionalism: Private-Law and Constitutional Perspectives on Property* (Doctoral thesis University of South Africa, Pretoria 1997) 260.

42 Kleyn DG “The constitutional protection of property: a comparison between the German and the South African approach” 1996 *SAPL* 402.

43 Mark Gimson “Everybody's doing it: A look at some of the worlds diverse squatting movements” Internet: <http://www.squat.freemove.co.uk/story/ch20.htm> (Date of access: 23-12-2002).

44 In Turkey, upgrading of “squatter” settlements is considered an appropriate response to the situation. See in this regard Rusen Keles “Squatting problems and policies in a social welfare state: The case of Turkey” 2001 *United Nations Centre for Human Settlements (Habitat)* Internet: <http://www.unhcr.org/hd/hdv7n3/15.htm> (Date of access: 23-12-2002). Kenya has also experienced a rapid increase in informal settlements over the past few years. The government of Kenya, in conjunction with the United Nations Centre for Human Settlements (Habitat), is in the process of pursuing joint projects to confront the issue of informal settlements on a city-wide scale and to improve the living conditions in these settlements. See in this regard “Slum upgrading: Lessons learned in Nairobi” 2001 *United Nations Centre for Human Settlements (Habitat)* Internet: <http://www.unhcr.org/hd/hdv7n3/12.htm> (Date of access: 23-12-2002). Many countries are facing a huge housing backlog and will probably have

income families, most governments start to view informal settlements, most of which were erected illegally, as part of the solution.⁴⁵ Although some of these countries have responded to the unlawful occupation of land, these processes are not particularly relevant to the South African context. This study therefore focusses on the unlawful occupation of land in Zimbabwe and Britain only. Although Zimbabwe never had a proper system to deal with the unlawful occupation of land, it has been chosen because of its similar history to South Africa with regard to land dispossession and the unequal distribution of land. Furthermore, although the unlawful occupation of land in Britain takes place in a different context to that of South Africa, Britain has progressive measures in place to deal with the unlawful occupation of land. This study will show what South Africa can learn from Zimbabwe's experience with the unlawful occupation of land and how to reduce such unlawful actions through learning from the position in Britain.⁴⁶

In this chapter, reference to "unlawful occupation of land" also includes the "unlawful occupation of buildings".

3.1 *Zimbabwe*

Before discussing the issue of unlawful occupation of land, it is important to outline the historical process that has led to the current land invasions in Zimbabwe. Throughout the history of Zimbabwe, land has remained the most important political and economic issue in the country. Racially-based land policies were a cause of insecurity, landlessness and poverty amongst black Zimbabweans. The *Lippert Concession* of 1889 was the first legal instrument passed to ensure division of the ownership of land between blacks and whites. This concession preceded the actual occupation of Zimbabwe. The act resulted in the British South African Company (BSAC) buying concessions from the British monarch which were then used as a basis for land expropriation. Following the Lippert Concession, the *Native Reserves Order in Council of 1898* created native

to face the proliferation of "squatter" settlements in the future, particularly in Africa and Asia where urbanisation will continue unabated over the next decades. See in this regard Marcello Balbo "Shelter: Emerging trend and policies" 2001 *United Nations Centre for Human Settlements (Habitat)* Internet: <http://www.unchsh.org/hd/hdv7n3/6.htm> (Date of access: 23-12-2002).

45 Marcello Balbo 2001 *United Nations Centre for Human Settlements (Habitat)* Internet: <http://www.unchsh.org/hd/hdv7n3/6.htm> (Date of access: 23-12-2002).

46 See also chapter 8 in this regard.

reserves for blacks only. This order was passed against the background of systematic land expropriation by white settlers. The result was that native reserves were set up haphazardly in low profile areas which subsequently became the present communal areas. The period from 1890 to 1920 was a period of conquest and land expropriation. The BSAC was in the forefront of the occupation of Mashonaland and Matebeleland. These processes were accompanied by the seizure of land and cattle. The *Land Apportionment Act* was enacted in 1930. The main purpose of this Act was to formalise the separation by law of land belonging to blacks and whites respectively.⁴⁷

Just prior to the political transformation in 1980, approximately 6000 white farmers occupied 39% of the total land area in Zimbabwe. This portion of the land comprised the most fertile land in the country. However, only 42% of the total land area of the country were allocated to the black majority.⁴⁸ The issue of land as well as the racist oppressive political system were some of the leading reasons why blacks took up arms and fought a protracted war until political/military victory in 1980.⁴⁹ Negotiations which culminated in the end of the war and which ushered in black majority rule were held at Lancaster House in Britain. The constitutional document that was to become the Supreme law of Independent Zimbabwe was hammered out at these negotiations. Subsequent to these negotiations, agreement was reached on the following:⁵⁰

- (a) Land imbalances were to be redressed within the confines of the new constitution.
- (b) Britain pledged to fund the resettlement programme in order to ensure that provisions for compulsory acquisition without compensation did not go into the new constitution.

47 Mulenga S *The land problem: Zimbabwe and South Africa - Comparative analysis* (27 April 2000), Department of Political and Administrative Studies, University of Zimbabwe.

48 See also Van Horn A "Redefining 'property': The constitutional battle over land redistribution in Zimbabwe" 1994 *JAL* 144 147; Naldi GJ "Land reform in Zimbabwe: Some legal aspects" 1993 *J Mod Afr Stud* 585; Moyo S *The land question in Zimbabwe* (Harare 1995) 104; Moyo S and Skalness T "Land reform and development strategy in Zimbabwe: State autonomy, class and agrarian lobby" 1990 *Africa Focus* 201; Naldi GJ "Constitutional challenge to land reform in Zimbabwe" 1998 *CILSA* 78.

49 See also Chaminuka P "Overview of Zimbabwe's land reform process" 2001 *The Human Rights Observer* Internet: http://afronet.org.za/theobserver/volume6_9.htm (Date of access: 22-12-2002).

50 Mulenga *The land problem* (27 April 2000).

- (c) Land was to be acquired on a willing seller willing buyer basis.⁵¹

However, the new government of president Robert Mugabe, leader of the Zimbabwe African National Union Patriotic Front (Zanu-PF), was bound by “sunset clauses” in the Lancaster House Agreement that gave special protections to white Zimbabweans for the first ten years of independence. These included provisions that the new government would not engage in any compulsory land acquisition and that when land was acquired, the government would pay promptly adequate compensation for the property.⁵² Due to a variety of reasons, the resettlement programme did not perform to expectations. Firstly, under the willing buyer willing seller principle land was not offered in sufficient bulk to the government. Secondly, the land offered to the government was the poorer quality land in regions of low rainfall patterns and poor ecological soils. Thirdly, because of the “fair market price” clause, the government was greatly constrained because it did not have sufficient funds forthcoming to buy the land.⁵³ In the first decade of independence, the government acquired 40 percent of the target of eight million hectares, resettling more than 50 000 families on more than three million hectares.⁵⁴

Released from the constraints of the Lancaster House Agreement in 1990, the Zanu-PF government amended the provisions of the constitution concerning property rights. Compulsory acquisition of land for redistribution and resettlement became possible.⁵⁵ Having realised that landowners were either unwilling to sell or claimed double the amount their land was worth, the government enacted the *Land Acquisition Act*.⁵⁶ The main aim of the Act was to enable the government to acquire land compulsory on which it could resettle approximately 162 000

51 See also *Democracy and Land Reform in Zimbabwe* (2002) Report on the International Peace Academy (IPA) Workshop Internet: http://www.ipacademy.org/PDF_Reports/REPORT_ZIMBABWE.pdf (Date of access: 22-12-2002).

52 “Zimbabwe: Fast track land reform in Zimbabwe” in *Human Rights Watch* (2002) Internet: <http://www.hrw.org/reports/2002/zimbabwe/> (Date of access: 22-12-2002).

53 Muleng *The land problem* (27 April 2000). See also the Report of the Zimbabwe Mission (2001). The Zimbabwe Mission was organised by the Human Rights Institute of the International Bar Association.

54 *Land, Housing and Property Rights in Zimbabwe* (2001) Centre for Housing Rights and Evictions (COHRE); Geneva Internet: <http://www.cohre.org> (Date of access: 22-12-2002).

55 “Zimbabwe: Fast track land reform in Zimbabwe” in *Human Rights Watch* (2002)

56 3 of 1992. See also Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (Juta Kenwyn 1999) 478 - 488.

communal farming families.⁵⁷ This Act provided for fair compensation for land acquired for resettlement purposes. Despite the new law, the government's land acquisition and resettlement slowed down. In the face of government failure to deliver, grassroots land occupations were already taking place in the 1980's and 1990's.⁵⁸ In many instances government security forces removed people from the land with some brutality. This was particularly the case in the context of the conflict in the 1980's in Matabeleland between Zanu-PF and the Zimbabwe African People's Union (Zapu), the other main liberation movement.⁵⁹ As Zimbabwe never had a formal system in place to deal with unlawful occupations of land, people were removed from land unlawfully occupied by them without an order of court. By late 1997 and 1998, much larger scale occupations were taking place.⁶⁰ The resettlement process had also been very slow because donor funding had not been available.

An International Donor's Conference was held in Harare from 9 to 11 September 1998. The objective of the conference was to inform the donor community about phase two of the land reform programme and to mobilise donor support.⁶¹ A set of principles was adopted to govern phase two of land resettlement in Zimbabwe, including respect for a legal process, transparency, poverty reduction, affordability, and consistency with Zimbabwe's wider economic interests. Nevertheless, relations between the donors and the Zimbabwean government broke down. The Zimbabwean government accused the donors of not actually making available the funds that they had pledged and of protecting the neo-colonial interests of white-owned agribusiness. On the other hand, the donors accused the government of continued lack of transparency and failure to adhere to the principles agreed at the conference.⁶²

57 Naldi GJ 1993 *J Mod Afr Stud* 585; Naldi G J 1998 *CILSA* 78 79.

58 See also *Democracy and Land Reform in Zimbabwe* (2002).

59 Moyo S "The interaction of market and compulsory land acquisition processes with social action in Zimbabwe's land reform" 2001 (Unpublished paper) Internet: <http://afronet.org.za/theobserver/volume6-9.htm> (Date of access: 20-12-2002).

60 Moyo S 2001.

61 Mulenga *The land problem* (27 April 2000).

62 *Land, Housing and Property Rights in Zimbabwe* (2001) ; Moyo S 2001; Chaminuka P 2001 *The Human Rights Observer* Internet: http://afronet.org.za/theobserver/volume6_9.htm (Date of access: 22-12-2002); Moyo S "Land reform in Zimbabwe: Key processes and issues" 2000 Internet: <http://afronet.org.za/theobserver/volume6-9.htm> (Date of access: 20-12-2002).

By the end of 1999 the Zimbabwean government had not made much progress with phase two of the land resettlement programme for the poor.⁶³ The Zimbabwean government blamed Britain which it claimed had reneged on commitments made to provide financial assistance for land reform.⁶⁴ The extent and nature of these commitments are, however, like a number of other issues, a matter of dispute.⁶⁵ In February 2000 a draft Constitution put to a referendum was rejected by a majority of the voters. The Constitution provided that if Britain did not provide funds for land acquisition, then the Government would proceed to expropriate land without compensation.⁶⁶ In the face of the challenge presented by the Movement for Democratic Change (MDC) and other increasingly outspoken critics of his government, president Mugabe and Zanu-PF responded by reviving the call for radical land redistribution to fulfil the promises made at independence, giving official blessing to a new wave of land occupations led by members of the War Veterans Association that had rapidly accelerated following the referendum results. Members of the army were also involved in coordinating and facilitating these occupations.⁶⁷ From 16 February 2000, war veterans of the 1970s Liberation War occupied commercial ranches and farms. By mid-March 2000, more than 500 farms had been unlawfully occupied.⁶⁸ The Zimbabwean government formally announced the fast track resettlement program in July 2000, stating that it would acquire more than 3000 farms for redistribution. According to the Commercial Farmer's Union (CFU), more than 1600 commercial farms were occupied by settlers led by war veterans in the course of the year 2000.⁶⁹ In October 2001, the CFU estimated that 1948 farms have been physically occupied and that the number of people occupying farms had risen to 104 000. By the end of 2001, 114 830 households have physically moved and resettled

63 See also Erasmus J *The interaction between property rights and land reform in the new constitutional order in South Africa* (Doctoral thesis University of South Africa 1998) 359 - 360.

64 "Zimbabwe: Fast track land reform in Zimbabwe" in *Human Rights Watch* (2002).

65 Report of the Zimbabwe Mission (2001).

66 Report of the Zimbabwe Mission (2001). See also Johnson RW *The victory for the No vote in Zimbabwe's constitutional referendum has stunned the ruling party and thrown it into chaos* (17 March 2000) Helen Suzman Foundation; Ligner I "Maoist-style political crackdown in Zim" *Daily Mail and Guardian*, Harare (16 May 2000).

67 "Zimbabwe: Fast track land reform in Zimbabwe" in *Human Rights Watch* (2002); Chaminuka P 2001 *The Human Rights Observer* Internet: http://afronet.org.za/theobserver/volume6_9.htm (Date of access: 22-12-2002).

68 Report of the Zimbabwe Mission (2001).

69 *Land, Housing and Property Rights in Zimbabwe* (2001); Moyo S 2001.

on 4.37 million hectares of land.⁷⁰ New legislation has been enacted to supplement the original laws providing for the fast track program and to legalise processes that were formally illegal at the time they were begun.⁷¹ The *Rural Land Occupiers (Protection from Eviction) Act* was promulgated in 2001. The aim of the Act is to restrict or suspend for a certain period any legal proceedings for the eviction of certain occupiers of rural land, who on 1 March 2001 were in occupation of such land in anticipation of being resettled. In terms of this Act, people who were still on such land at the date of commencement of the Act should qualify for settlement on that or any other land in accordance with relevant administrative criteria.

Various ministers in the Zimbabwean government have declared the land reform process completed.⁷² The land reform process has been successful in that sufficient land has been taken away from the white minority landowners for purposes of resettling the black majority. However, the success of the land reform process is dimmed by the lamentable state of the Zimbabwean economy and the increasing famine amongst Zimbabweans. The supply of crops has also drastically reduced. The majority of Zimbabwe's most productive farms are no longer producing more than a tenth of their prior capacity.⁷³ This is because black Zimbabweans were provided with land without equipping them with the necessary skills and resources to farm productively.

This study does not consider whether Zimbabwe is a party to any of the international instruments discussed in chapter two above. It is clear, however, that the evictions of white farmers from their land is in direct conflict with various international instruments recognising the right to property.

3.2 *Britain*

English law has never regarded squatting by itself as a criminal offence.⁷⁴ The law regards a

70 "Zimbabwe: Fast track land reform in Zimbabwe" in *Human Rights Watch* (2002).

71 "Zimbabwe: Fast track land reform in Zimbabwe" in *Human Rights Watch* (2002).

72 "The success of the land reform programme" (13 December 2002) JAG Zimbabwe Internet: <http://www.justiceforagriculture.com/newsrelease131202.5html> (Date of access: 22-12-2002).

73 Ibid.

74 The position is different in Scotland. In terms of the *Trespass (Scotland) Act* 1865, it is a criminal offence to "lodge in any premises or encamp on any land which is private property without the consent or

squatter as a trespasser.⁷⁵ Trespassers have no right to possession of land they trespass upon, regardless of their need or the reason the owner wants to evict them. For years squatters have invoked the *Forcible Entry Act* of 1381 to counter threats of forcible eviction without a court order. This Act has forbidden forcible entry on any land or into any building. Halsbury's Laws of England further states: "A person commits an offence both at common law and by statute who enters forcibly upon any land or tenements without due warrant of law." In other words, even a squatter who was on land when there was a forcible entry could have the person who entered the property by force prosecuted for forcible entry and no squatter could be convicted of forcible entry provided no force was used to enter unoccupied property. If squatters have secured the property, for example, by putting a lock on the door - making it impossible for the owner to enter except by force - then the owner could not enter without using force. Thus, squatters were usually secure until the owner has obtained a possession order from the civil courts.⁷⁶

A major stumbling block in using the court procedures was the fact that owners had to find out the names of the squatters before they could seek possession of their property. Possession orders could not be made against unnamed people and even if possession orders were obtained, they could be executed only against the people named on them. This allowed squatters to exchange houses in order to prevent eviction. In order to address this state of affairs, Order 113 of the Rules of the Supreme Court and Order 26 of the County Court Rules were enacted in 1970. These rules allowed an owner to obtain a possession order against unnamed trespassers after seven days of service of the summons, provided reasonable steps were taken to discover the names of the trespassers. In 1977, the new rules for both High Court and County Court proceedings reduced the seven-day advance warning period to five and removed the requirement to take "reasonable steps". Thus, landlords were only required to state in an affidavit that they do not know the names of any of the unlawful occupiers.⁷⁷

permission of the owner or legal occupier".

75 "Squatter" is not a legal term. This term is, however, generally being used in literature on the unlawful occupation of land in Britain. This study therefore also uses the term "squatter", where appropriate in the discussion of the position in Britain with regard to the unlawful occupation of land. For purposes of this study "squatter" and "unlawful occupier" have the same meaning.

76 Watkinson D "The erosion of squatters rights" Internet: <http://www.squat.freemove.co.uk/story/ch14.htm> (Date of access: 2-10-2002).

77 Ibid.

In 1972, the Law Commission of England commenced with an investigation of which its mandate was to “examine the statutes of forcible entry 1381 to 1623 and relevant common law defences, and consider in what circumstances entering or remaining upon property should constitute a criminal offence or offences and in what form any such offence or offences should be cast.” The Law Commission proposed in its final report, which was published in March 1976, the following offences:⁷⁸

- *Using or threatening violence to secure entry into premises knowing someone on the premises is opposed to the entry:*⁷⁹ The enactment of this offence has repealed the *Forcible Entry Acts*. It became possible for landlords to evict squatters whilst they were not on the premises. However, if there were people (squatters) on the premises who made their presence known, then it is an offence to try to evict them. It was also no defence that the defendant had a right to possession.⁸⁰ This position was changed by the *Criminal Justice and Public Order Act* of 1994 which provides for a speedier way to evict squatters under certain circumstances. This Act stipulates that the provision of violent entry into premises in the *Criminal Law Act* does not apply to a person who is a displaced residential occupier⁸¹ or a protected intending occupier⁸² of the premises in question or who is acting on behalf of such an occupier.⁸³ Thus, a displaced residential occupier, a protected intending occupier or a person acting on behalf of such occupiers does not need to obtain an interim possession order before evicting squatters.⁸⁴ It is an offence if a person deliberately makes a false statement about whether he or she is a protected

78 These offences became law as part of Chapter 45 of the *Criminal Law Act* of 1977.

79 Section 6 of the *Criminal Law Act* of 1977.

80 Mike Harwood “Law of Property: This is our home: keep out! Repossession of Mortgaged Property (Part 2)” 2000 *Consilio* 1 Internet: <http://www.spr-consilio.com/keepout.pdf> (Date of access: 27-12-2002).

81 A displaced residential occupier is a person who was already living in property before being excluded by squatters. For example, persons who come back from holiday to find squatters in their house will be displaced residential occupiers.

82 Protected intending occupiers refer to certain categories of persons (tenants, licensees, purchasers of newly bought houses) who are prevented from moving into their new homes by squatters. See in this regard section 74(1) of the *Criminal Justice and Public Order Act* of 1994.

83 Section 72(2) of the *Criminal Justice and Public Order Act* of 1994.

84 The information can be accessed at http://tash.gn.apc.org/law_impl.htm (Date of access: 27-12-2002).

intending occupier.⁸⁵

- *Being on premises as a trespasser and failing to leave after having been required to do so by or on behalf of a displaced residential occupier or a protected intending occupier.*⁸⁶ This provision was amended by the *Criminal Justice and Public Order Act* of 1994 in that the Act provides the following defences to a trespasser:
 - the accused believed that the person requiring him to leave the premises was not a displaced residential occupier or protected intending occupier of the premises or a person acting on behalf of such an occupier;⁸⁷
 - the premises in question are or form part of premises used mainly for non-residential purposes;⁸⁸ and
 - that he (the trespasser) was not in any part of the premises used wholly or mainly for residential purposes;⁸⁹
 - the person claiming the status of a protected intending occupier failed to produce to the accused a statement stating that he or she is a protected intending occupier.⁹⁰

The *Criminal Justice and Public Order Act* of 1994 further creates an offence of failure to obey an interim possession order. A squatter commits the offence if he or she is on premises as a trespasser and fails to leave the premises within 24 hours of the serving of an interim possession order or returns to the premises within one year.⁹¹

85 Section 75(8) of the *Criminal Justice and Public Order Act* of 1994.

86 Section 7 of the *Criminal Law Act* of 1977. See also "A guide to the complexities of the Criminal Justice and Public Order Act of 1994" Internet: <http://www.urban75.org/legal/cja.html> (Date of access: 17-12-2002).

87 Section 73(2).

88 Section 73(3)(a).

89 Section 73(3)(b).

90 Section 74(9).

91 The information can be accessed at http://tash.gn.apc.org/law_impl.htm (Date of access: 27-12-2002).

The *Criminal Justice and Public Order Act* of 1994 also gives the police wide powers to deal with unlawful occupiers. In terms of the Act, a senior police officer may direct persons to leave land if he or she reasonably believes that (a) they are trespassing on land and are present there with the common purpose of residing there for any period, (b) that reasonable steps have been taken by or on behalf of the occupier to ask them to leave, (c) that any of those persons has caused damage to the land, or to property on the land, or (d) they used threatening, abusive or insulting words towards the occupier, a member of his family or an employee or agent of his.⁹² A person commits an offence if he or she fails to leave the land as soon as reasonably practicable, or having left again enters the land as a trespasser within a period of three months.⁹³ A constable in uniform who reasonably suspects that a person is committing an offence may arrest him without a warrant.⁹⁴ It is a defence for an accused to show that (a) he was not trespassing on the land, and (b) he had reasonable excuse for failing to leave the land as soon as reasonable practicable or for again entering the land as a trespasser.⁹⁵

The Civil Procedure (Amendment) Rules 2001⁹⁶ came into force on 15 October 2001. The purpose of these Rules is to fast track the eviction of unlawful occupiers. In terms of these Rules, landlords and homeowners can also go to court to obtain an Interim Possession Order (IPO) against alleged squatters. Once an order is granted, the squatters have 24 hours after receiving the IPO to vacate the property. Refusal to comply is a criminal offence under section 76 of the *Criminal Justice and Public Order Act* of 1994. A person guilty of an offence can be imprisoned for up to 6 months and/or fined. However, the fast track procedure cannot be used unless the claim for possession is made within 28 days of the date the owner first knew that the premises were being occupied without consent. This new procedure cannot be used if the occupier is or

92 Section 61(1) of the *Criminal Justice and Public Order Act* of 1994. See also "A guide to the complexities of the Criminal Justice and Public Order Act of 1994" Internet: <http://www.urban75.org/legal/cja.html> (Date of access: 17-12-2002); Henderson J "Criminal Justice and Public Order Act 1994" 1995 *Criminal Bar Association Newsletter* Internet: http://www.criminalbar.co.uk/newsletters/12_1995.pdf (Date of access: 21-12-2002).

93 Section 61(4) of the *Criminal Justice and Public Order Act* of 1994.

94 Section 61(5) of the *Criminal Justice and Public Order Act* of 1994.

95 Section 61(6) of the *Criminal Justice and Public Order Act* of 1994.

96 These Rules amended Order 24 of the County Court Rules 1981 and Order 113 Rules of the Supreme Court. The information can be access at <http://www.letlink.co.uk/Facts/Lfacts14.htm> (Date of access: 17-12-2003).

was a tenant.⁹⁷

Given the increase of actions by unlawful occupiers causing damage to land, England and Wales have introduced into Parliament the *Trespassers on Land (Liability for Damages and Eviction) Bill 2002*. The Bill makes a person who is trespassing on land with the purpose of residing there liable for any damage caused to that land or property on that land, while he or she is present there, whether caused by that person or any other person.⁹⁸ This Bill also amends the *Criminal Justice and Public Order Act* of 1994 by stipulating that “where a local authority reasonably believes that any person is trespassing on land in its area for the purpose of residing there, and that reasonable steps have been taken by or on behalf of the occupier to ask him to leave and he has failed to do so, it may, with the agreement of the occupier, request the Chief Constable for the area to issue a direction ... for any such person to leave the land and the remove any vehicles or other property he has with him on the land, and the Chief Constable shall comply with such request”.⁹⁹

3.3 *Summary*

This chapter discusses the unlawful occupation of land in other jurisdictions. Specific reference is made to Zimbabwe as Zimbabwe and South Africa have almost similar problems with regard to the issue of land which emanate from the historical colonial nature of land dispossession and distribution in both countries. The issue of land as well as the racist oppressive political system in Zimbabwe led to a protracted war until political victory in 1980. The period between 1980 and 1999 witnessed various negotiations between the government of Zimbabwe, Britain and other donors. The main purpose of these negotiations was to redress the land imbalances within Zimbabwe. However, given the lack of donor funding to support land reform, the Zimbabwean government expropriated land without compensation. This was followed by a wave of land invasions. Various white-owned farms were unlawfully occupied by so-called war veterans. The

97 The information can be access at <http://www.letlink.co.uk/Facts/Lfacts14.htm> (Date of access: 17-12-2003).

98 Clause 1(1) of the Bill.

99 Clause 2(2)(b) of the Bill.

unlawful occupation of land was further encouraged by the *Rural Land Occupiers (Protection from Eviction) Act 2001* which suspended legal proceedings for the eviction of occupiers of rural land, who on 1 March 2001 were in occupation of such land in anticipation of being resettled. The current widespread famine in Zimbabwe is a direct result of the unlawful occupation of land i.e people were provided with land without equipping them with the necessary skills and resources to farm productively.

Reference is also made to how the unlawful occupation of land is being dealt with in Britain. Britain has progressive measures in place to deal with the unlawful occupation of land. For example, the *Criminal Justice and Public Order Act* of 1994 creates the concepts of “displaced residential occupier” and “protected intending occupier”. These categories of occupiers may evict unlawful occupiers without an order of court. New legislation proposed for England and Wales also makes a person who is trespassing on land, with the purpose of residing there, liable for any damage caused to that land or property on that land.

CHAPTER FOUR

RIGHT TO HAVE ACCESS TO ADEQUATE HOUSING AND THE RIGHT TO PROPERTY

4 Introduction

This chapter analyses the right to have access to adequate housing¹⁰⁰ and the right not to be deprived of property¹⁰¹ enshrined in the final *Constitution*.

4.1. *The right to have access to adequate housing*

The Freedom Charter¹⁰² provides for the right to housing in the following terms:

All people shall have the right to live where they choose, to be decently housed, and to bring up their families in comfort and security. Unused housing space shall be made available to the people.¹⁰³

Despite this call for adequate housing, the crisis of homelessness has grown as years of apartheid housing policies provided little or no funding for housing black people in the urban areas in order to ensure that black people did not become permanent residents of the city.¹⁰⁴

The lack of adequate housing has also led to an increase of unlawful occupations of land. The context within which people occupy land unlawfully needs to be explored. The degree of homelessness, overcrowding and squatting that is prevalent today has its roots in the

100 Section 26(1).

101 Section 25(1).

102 Adopted at the Congress of the People in Kliptown on 26 June 1955.

103 The information can be accessed at <http://www.anc.org.za/ancdocs/history/charter.html> (Date of access: 23-03-2000).

104 O' Regan C "Informal housing, crisis management and the environment" 1993 *SAPL* 192 193.

discriminatory policies of the past. For example, the *Black Land Act*¹⁰⁵ provided for the segregation of all land in the then Union in terms of which it appears that approximately seven percent of the land in the Union was reserved for the use of blacks and the remainder for the use of whites.¹⁰⁶ Land was unequally divided in favour of whites despite the fact that blacks were in the majority. Section 1 of the Act provided that no black person was entitled to “enter into an agreement for the purchase, hire or other acquisition” of land assigned for the use of whites. Another such law is the *Development Trust and Land Act*¹⁰⁷ which prohibited occupation and ownership of land in a “controlled” area, that is, white rural areas. Squatting has become a way of life for most people in the absence of any other means of ensuring adequate shelter. It thus has to be kept in mind that people squat because they have to, not because they want to.¹⁰⁸ The high rate of unemployment in South Africa as well as migration to the cities is also contributing to the squatting problem. As the South African history is well known, there is no need to make an in-depth historical analysis of past discriminatory practices. Although government is in the process of addressing the issue of homelessness, the demand for housing remains considerably high. Unlawful occupants of land should thus be treated within the framework of the South African history.

The African National Congress's articulation of the right to housing is not unprecedented, but is based on various international human rights documents of the United Nations.¹⁰⁹ The right to housing was one of the main political demands of the people who elected the current legislature in South Africa's first democratic elections. The right to housing is accordingly reflected in

105 27 of 1913. See also Van der Walt AJ and Pienaar GJ *Introduction to the Law of Property* 1st ed (Juta Kenwyn 1996) 346 and 432; Van der Walt AJ and Pienaar GJ *Introduction to the Law of Property* 2nd ed (Juta Kenwyn 1997) 432; Van der Walt AJ and Pienaar GJ *Inleiding tot die Sakereg* 3de uitg (Juta Kenwyn 1999) 356; Van der Walt AJ and Pienaar GJ *Introduction to the Law of Property* 4th ed (Juta Cape Town 2002) 353 - 354.

106 O' Regan C “No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act” 1989 *SAJHR* 361 363; Robertson MK “Black Land Tenure: Disabilities and Some Rights” in Rycroft A (ed) *Race and the Law in South Africa* (Juta Cape Town 1987) 121.

107 18 of 1936.

108 *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2000 2 SA 1074 (SE).

109 Robinson 1993 *Harvard Civil Rights - Civil Liberties Law Review* 505 511. See also 2.1 below.

section 26 of the final *Constitution*.¹¹⁰ Section 26 stipulates as follows:

- (1) Everyone has the right to have access to adequate housing.¹¹¹
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.¹¹²

The question whether the right to have access to adequate housing is enforceable against the state needs to be addressed. Subsection (2) places a positive obligation on the state to meet its constitutional obligation. This obligation is, however, qualified by the words “reasonable legislative and other measures” and “within its available resources”.¹¹³ These two qualifiers were considered in *Government of the Republic of South Africa v Grootboom*.¹¹⁴ With regard to “reasonable legislative and other measures”, the Constitutional Court held that legislative measures by themselves are not enough. The state is obliged to achieve the intended results, and legislative measures have to be supported by appropriate, well-directed policies and programmes implemented by the executive. Furthermore, these policies and programmes must be reasonable both in their conception and their implementation. With regard too “within its available

110 It is interesting to note that the right to housing was not contained in the interim *Constitution*. This is despite the fact that the inclusion of the right to housing was advocated in the Freedom Charter and a number of statements contained in the Constitutional Guidelines for a Democratic South Africa.

111 This is in line with article 11(1) of the *International Covenant on Economic, Social and Cultural Rights* of 1966 which recognises the right to adequate housing. General Comment no. 4 (1991) of the UN Committee on Economic, Social and Cultural Rights gives useful guidelines of what constitute “adequate housing”. See also the *Comprehensive Human Rights Guidelines on Development-Based Displacement* (1997) which states that all persons have the right to housing. See in this regard 2.1 above.

112 This provision indicates that evictions and the demolition of homes cannot take place on the basis of an administrative decision alone. See in this regard De Waal J, Currie I and Erasmus G *The Bill of Rights Handbook* 4th ed (Juta Lansdowne 2001) 446; *Uitenhage Local Transitional Council v Zenza* 1997 8 BCLR 1115 (SE). See also *Pedro v Greater George Transitional Council* 2001 2 SA 131 (C) 134E. The protection against eviction without an order of court is also in line with the *Comprehensive Human Rights Guidelines on Development-Based Displacement* (1997) which require states to adopt legislative means prohibiting evictions without a court order. See in this regard 2.1 above.

113 Rautenbach and Malherbe *Constitutional Law* (1999) 376; Currie I and De Waal J *The new Constitutional and Administrative Law* (Juta Lansdowne 2001) 399.

114 2000 11 BCLR 1169 (CC).

resources”, the Constitutional Court held that the state is not required to do more than what its available resources permit. Thus, both the content of the obligation in relation to the rate at which it is achieved, as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. The court, however, held that there is an obligation on the state to provide homeless people with immediate interim relief.¹¹⁵ Section 26 thus places a minimum core obligation on the state to provide the homeless with interim shelter. The court also considered the term “progressive realisation” in subsection (2) and held that it was contemplated that the right could not be realised immediately.¹¹⁶ However, the state must take steps to achieve the realisation of this right.¹¹⁷ Subsection (3) provides that an eviction order may be granted only after the court has considered all the relevant circumstances. In *Brisley v Droskey*¹¹⁸ the court held that the relevant circumstances referred to in subsection (3) must be juridical¹¹⁹ relevant. In this case, the court refused to regard the socio-economic circumstances of the appellant as relevant circumstances. The court further held that subsection (3) does not provide the court with a discretion to refuse an eviction order under certain circumstances. Meaning, where an application for an eviction order is made in terms of the common law and the circumstances placed before the court is not juridically relevant, the court must grant an eviction order if the owner proves that he is the owner of the property and that the defendant’s occupation thereof is unlawful.

115 See also *Minister of Public Works v Kyalami Ridge Environmental Association and Others* 2001 7 BCLR 652 (CC) in which the court confirmed the government’s constitutional duty to provide the homeless with access to adequate housing.

116 See also *Groengras Eiendom (Pty) Ltd v Elandsfontein Unlawful Occupants* 2002 1 SA 125 (T) 137D. It is important to note that the final *Constitution* provides for a right of access to adequate housing and not a right to adequate housing as such. This in itself is a significant distinction since it implies that there is no obligation on the state to provide free housing on demand. See in this regard Pienaar J and Muller A “The impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on homelessness and unlawful occupation within the present statutory framework” 1999 *Stell LR* 370 375; Devenish GE *A commentary on the South African Constitution* (Butterworths Durban 1998) 73; Devenish GE *A commentary on the South African Bill of Rights* 361; De Waal, Currie and Erasmus *The Bill of Rights Handbook* (2001) 444 - 445; De Vos “Pious wishes or directly enforceable human rights?: social and economic rights in South Africa’s 1996 Constitution” 1997 *SAJHR* 87.

117 This corresponds with article 2(1) of the *International Covenant on Economic, Social and Cultural Rights* of 1966 which requires state parties to use “all appropriate means” to promote the right to adequate housing. See in this regard 2.1 above.

118 2002 4 SA 1.

119 Garner defines ‘juridical’ as ‘relating to judicial proceedings or the law’. See in this regard Bryan A Garner *A Dictionary of Modern Legal Usage* (Oxford University Press 1987) 322.

Government is thus under a constitutional obligation to realise the right to have access to adequate housing. However, this constitutional obligation does not create an enforceable right against the state. It only calls upon the state to bring about a certain state of affairs to help achieve the progressive realisation of the right to have access to adequate housing.¹²⁰ In order to fulfil its constitutional obligation, government has initiated several developmental and legislative programmes such as land reform programmes, the *Extension of Security of Tenure Act*¹²¹ which assist people to gain access to land with secure tenure, the *Housing Act*,¹²² the *Housing Consumers Protection Measures Act*,¹²³ and the *Development Facilitation Act*.¹²⁴ At provincial level there is, for example, the *Western Cape Housing Development Act*.¹²⁵

The question whether section 26 of the final *Constitution* has horizontal application needs to be addressed. The court in *Betta Eiendomme (Pty) Ltd v Ekple-Epoh*¹²⁶ held that section 26 has only vertical application. However, although it can be argued that subsection (1) and (2) of section 26 have only vertical application, there seems to be no reason why subsection (3) should not also apply to natural persons. In fact, section 8(2) of the final *Constitution* stipulates that a provision of the Bill of Rights binds a natural and a juristic person if, and to the extent that, it is applicable. Thus, even in a matter concerning natural persons, section 26(3) requires a court to take into account all relevant circumstances before making an eviction order. This view is supported by *Brisley v Drotzky*.¹²⁷

4.2 The right not to be deprived of property

120 Van der Walt AJ "Squatting and the right to shelter" 1992 *TSAR* 41; Rautenbach IM and Malherbe EFJ *Constitutional Law* 2nd ed (Butterworths Durban 1996) 330.

121 62 of 1997.

122 107 of 1997.

123 95 of 1998.

124 67 of 1995.

125 6 of 1999.

126 2000 4 SA 468 (W).

127 2002 4 SA 1 (HHA).

The common law is summarily presented by Grotius in that he states that ownership consists in the right to recover lost possession.¹²⁸ Thus, where an owner of property has sued for eviction, his cause of action was the fact that he is the owner, and therefore *prima facie* entitled to possession.¹²⁹ Consequently, the South African courts have held that in a claim for eviction, it was sufficient to allege that the plaintiff is the owner of the property and that the defendant is in possession thereof.¹³⁰ Wrongful or unlawful occupation was therefore not a requirement.¹³¹

However, the common law right to eviction has been modified as a consequence of section 26(3) of the final *Constitution*.¹³² Flemming DJP in *Betta Eiendomme (Pty) Ltd v Ekple-Epoh*¹³³ disagrees with this view. Flemming wrongly held that the right of ownership as recognised before the enactment of the *Constitution* has not been affected by the *Constitution*. He further held that no necessity arises to restrict the rights of an owner against the rights of an unlawful occupier in order to “promote the values that underlie” the *Constitution* or to “promote the spirit, purport and objects of the Bill of Rights”.¹³⁴ He is also of the view that ownership still carries within it the right to possession. Thus, in his view, it is “right and proper” that an owner be granted an eviction order against “someone who has no business interfering with the possession” if the owner proves that he is the owner and that the defendant is in possession. This view is supported by Thring J in *Ellis v Viljoen*.¹³⁵ It is, however, difficult to agree with both Flemming and Thring that the common law position with regard to ownership was not affected by the *Constitution* and

128 De Groot Inleydinge tot de Hollandsche Rechtsgeleerdheid 2 3 1 and 2 3 4.

129 Hawthorne L “The right of access to adequate housing - Curtailment of eviction” 2001 *De Jure* 584 585; *Brisley v Drotosky* 2002 4 SA 1.

130 *Graham v Ridley* 1931 TPD 476; *Singh v Ramrathan* 1940 NPD 381; *Karim v Baccus* 1946 NPD 721; *Loesch v Crowther* 1947 2 SA 476 (O); *Myaku v Haverman* 1948 3 SA 457 (A); *Apollo Investments (PTY) Ltd v Patrick Hillock, Munn & Co (Pty) Ltd* 1949 1 SA 496 (W); *Moosa v Samugh* 1952 1 SA 29 (N); *Jeena v Minister of Lands* 1955 2 SA 380 (A); *Munsamy v Gengemma* 1954 4 SA 468 (N); *Krugersdorp Town Council v Fortuin* 1965 2 SA 335 (T).

131 Hawthorne 2001 *De Jure* 584 585.

132 *Ross v South Peninsula Municipality* 2000 1 SA 589 (C). See further the discussion at 4.1 above. Although section 26(3) imposes a limitation upon the common law right of an owner to evict unlawful occupants from his or her land, it does not take that right away.

133 2000 4 SA 468 (W).

134 See also sections 39(1) and (2) of the final *Constitution*.

135 2001 5 BCLR 487 (C) 497B.

the Bill of Rights. Case law¹³⁶ and various authors¹³⁷ agree that the *Constitution* has indeed affected the right of ownership in order to promote the values underlying the *Constitution* and to promote the spirit, purport and objects of the Bill of Rights. The introduction of section 26(3) has not only brought evictions within the rule of law, but has placed the courts under the obligation to take all relevant circumstances into consideration before granting an eviction order in lieu of a single-minded concentration on the right of ownership.¹³⁸ Davis, Cheadle and Haysom state that the relevant circumstances which the court must consider before it makes such an order should include at least the personal circumstances of those being deprived of accommodation, and the availability of alternative accommodation.¹³⁹

The “right to property” is reflected in the final *Constitution* as follows:

No one may be deprived of property except in terms of law of general application,
and no law may permit arbitrary deprivation of property. ...¹⁴⁰

The meaning of arbitrary has extensively been discussed in *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*.¹⁴¹ The court concluded that a deprivation of property is arbitrary as meant by section 25(1) when the “law” referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.¹⁴² Van der Walt¹⁴³ concedes that the

136 *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2000 2 SA 67 (C); *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2000 2 SA 1074 (SE); *Absa Bank Limited v Amod* 1999 2 ALL SA 423 (W); *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC).

137 Hawthorne 2001 *De Jure* 584 589; De Waal Currie and Erasmus *The Bill of Rights Handbook* (2001) 448.

138 Hawthorne 2001 *De Jure* 584 589. See also the discussion at 4.1 above.

139 Davis D, Cheadle H, Haysom N *Fundamental rights in the Constitution: commentary and cases: a commentary on Chapter 3 on Fundamental Rights of the 1993 Constitution and Chapter 2 of the 1996 Constitution* (Juta Kenwyn 1997) 349.

140 Section 25(1).

141 2002 4 SA 768 (CC).

142 The court held that sufficient reason is to be established as follows:

(a) It is to be determined by evaluating the relationship between the means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in
(continued...)

meaning of “arbitrary” may be to ensure that no law can delegate the arbitrary power to effect a deprivation to some state body or official. Legislative measures will also be arbitrary when they bear no rational relationship to the legislative goal they are intended to achieve.¹⁴⁴

The “right to property” in section 25 of the final *Constitution* is formulated in a negative way.¹⁴⁵ The fact that this right is formulated in a negative form does not have any practical implications on the protection it enjoys.¹⁴⁶ It is interesting to note that the formulation of the “right to property” in the final *Constitution* differs from the formulation in the interim *Constitution*.¹⁴⁷ Section 25 of the final *Constitution* does not expressly protect the right to acquire, hold and dispose of property as section 28(1) of the interim *Constitution*. At first glance, section 25 seems to be a lesser protection of the “right to property”. However, the Constitutional Court argued that a wide variety of formulations are being adopted to protect the right to property and that no

142 (...continued)

question.

- (b) A complexity of relationships has to be considered.
- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
- (d) Regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
- (e) Where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive.
- (f) When the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

143 Van der Walt AJ *The constitutional property clause - A comparative analysis of section 25 of the South African constitution of 1996* (Juta Kenwyn 1997) 107.

144 Erasmus J *The interaction between property rights and land reform* 262.

145 See also Currie and De Waal *The new Constitutional and Administrative Law* 388 and 393; Erasmus J *The interaction between property rights and land reform* 247; *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) 793A.

146 See also *In Re Certification of the Constitution of the RSA, 1996* 1996 4 SA 744 (CC) 798; Rautenbach and Malherbe *Constitutional Law* (1996) 329; Rautenbach and Malherbe *Constitutional Law* (1999) 374; Kroeze *Private-Law and Constitutional Perspectives on Property* 257 - 258; Badenhorst PJ “Property and the Bill of Rights” in *Bill of Rights Compendium* (Butterworths Durban 1998) 3FB - 19.

147 Section 28(1) of the interim *Constitution*. See also Van der Walt AJ *Constitutional Property Clauses* (1999) 349 - 353; Kroeze *Private-Law and Constitutional Perspectives on Property* 257 - 258.

universal recognised formulation of the right to property exists.¹⁴⁸ Van der Walt¹⁴⁹ states that the formulation of the right to rights in property in section 28 of the interim *Constitution* can be attributed to the fact that the drafters wanted to provide equal protection for both common law and customary law property rights. Section 28 provided protection to a wide range of rights in property. The fact that the formulation of section 28 has not been adopted in section 25 does not necessarily mean that “rights in property”, which enjoyed protection under section 28, are not afforded the same protection under section 25. The court is under a constitutional duty to protect the “right to property”. This duty flows from a reading of sections 7(2), of the final *Constitution*. This section stipulates that “the state must respect, protect, promote and fulfil the rights in the Bill of Rights”.

4.3 *Summary*

This chapter analyses the constitutional right to have access to adequate housing in section 26(1) of the final *Constitution* and the right not to be deprived of property in section 25(1) of the final *Constitution*. Although the right to have access to adequate housing is qualified in that the state is not required to do more than what its available resources permit, the Constitutional Court in *Government of the Republic v Grootboom*¹⁵⁰ held that there is an obligation on the state to provide homeless people with immediate interim relief. However, the right to have access to adequate housing does not create an enforceable right against the state. It only calls upon the state to bring about a certain state of affairs to help achieve the progressive realisation of this right. The common law right to ownership has also been modified as a consequence of section 26(3) of the final *Constitution* in order to promote the values underlying the final *Constitution* and to promote the spirit, purport and objects of the Bill of Rights.

148 *In Re Certification of the Constitution of the RSA, 1996* 1996 4 SA 744 (CC) 798.

149 Van der Walt 1995 *SAPL* 278 307.

150 2000 11 *BCLR* 1169 (CC).

CHAPTER FIVE

PREVENTION OF ILLEGAL SQUATTING ACT 52 OF 1951 (PISA)

5 Introduction

This chapter analyses the provisions of *PISA* in order to determine its constitutionality in light of the final *Constitution*. It further discusses the courts' interpretation of the provisions of *PISA*.

5.1 *Analysis of the provisions of PISA*5.1.1 *Entering upon or into land or a building, or remaining on or in such land or building without permission*

Section 1 of the *PISA*¹⁵¹ stated that no person is allowed to enter upon land or into a building without any lawful reason.¹⁵² Furthermore, no person is allowed to remain on or in any land or building without the permission of the owner or lawful occupier of such land or building.¹⁵³ This section is ambiguous as it is not clear whether it applies to persons who have no intention of remaining in or on the property. On a literal interpretation of the section, any person who enters property without lawful reason and who has no intention of remaining on such property for the purpose of squatting, can be convicted for contravening the section. The courts tried to mitigate the harsh effect of this section by interpreting it narrowly. For example, in *R v Phiri*¹⁵⁴ the court

151 *PISA* has been repealed by the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (*PIE*). See also the discussion at chapter 6 above.

152 See also Pienaar G and Bouillon S "Die behuisingsbeplanning van informele nedersettings en plakkerskampe" 2002 *Koers* 159 160.

153 The court in *R v Matsabe; R v Mbalate* 1957 3 SA 210 (T) held that, read with section 11(1) of *PISA*, the fact that the alleged offence was committed in a particular area is an essential ingredient of the offence. The courts have also held that section 1 of *PISA* provided for two distinct offences namely, (a) entering upon any land or into any building without lawful reason, and (b) remaining on or in any land or building without the permission of the owner or the lawful occupier of such land or building. See in this regard *R v Phiri* 1954 4 SA 708 (T); *R v Press* 1956 3 SA 89 (T) 91B; *Lolwana v Port Elizabeth Divisional Council* 1956 1 SA 379 (E) 381E; *S v Bhengu* 1968 3 SA 606 (N) 607H; *R v Zulu* 1959 1 SA 263 (AD).

154 1954 4 SA 708 (T). See also *S v Bhengu* 1968 3 SA 606 (N) in which the court held that section 1(a) of *PISA* was not intended to make it an offence for a person merely to remain for longer than is necessary

held that “the section goes further than controlling squatting; in its plain meaning it also penalises persons who enter into or on land without lawful reason even if there is no question of squatting ...”. The court thus decided that the section did not intent to penalise a person who only entered on or into property without a lawful reason, but with no further object.¹⁵⁵

Section 1(2)¹⁵⁶ of *PISA* provided as follows:

If in the prosecution of a person for a contravention of subsection (1) it is proved -

- (a) that he entered upon or into land or a building of any other person, it shall be presumed that that person entered upon or into the land or building without lawful reason;
- (b) that he remained on or in any land or building of any other person, it shall be presumed that that person so remained without the permission of the other person, unless the contrary is proved.

This section created a rebuttable presumption in favour of the state. The burden of proof was thus shifted to the accused to prove on a balance of probabilities that he or she had lawful reason to enter upon or into and/or to remain on or in any land or building.¹⁵⁷ Even if the accused has raised reasonable doubt, but failed to prove his or her case on a balance of probabilities, there must nevertheless be a conviction. Whilst if the burden of proof was on the state and the state failed to prove its case beyond reasonable doubt, there can be no conviction.

In *R v Bhulwana; S v Gwadiso*,¹⁵⁸ the court held that the imposition of a burden of proof on the

without permission after entering upon land for a lawful purpose. The court further held that the setting down, more or less indefinitely, upon land or in a building, is what was intended to be prohibited in the second part of section 1(a) of *PISA*. See further in this regard *Mbatha v Additional Magistrate, Mahlabitini* 1963 3 SA 270 (N) 273F and 276F-H.

155 See also 5.2 below for a more detailed discussion on how the courts tried to mitigate the harsh effects of *PISA*.

156 Added by section 1 of Act 104 of 1988. See also Pienaar and Bouillon 2002 *Koers* 159 160.

157 See Lewis C “The Prevention of Illegal Squatting Act: The promotion of homelessness?” 1989 *SAJHR* 233 235.

158 1996 1 SA 388 (CC).

accused is a breach of the presumption of innocence as enshrined in section 25(3)(c) of the interim *Constitution*.¹⁵⁹ Thus, the enshrinement of the presumption of innocence in the *Constitution* requires that the prosecution bears the burden of proving all the elements of a criminal charge. The presumption of innocence is a fundamental principle in South African law, even prior to the interim *Constitution*. For example, in *R v Ndhlovu*,¹⁶⁰ the Court supported the presumption of innocence and held as follows:

In all criminal cases it is for the Crown to establish the guilt of the accused, not for the accused to establish his innocence. The onus is on the Crown to prove all averments necessary to establish his guilt.

5.1.2 Court orders for the ejectment of trespassers

Section 3 of *PISA* dealt with the orders that a court could make for the ejectment¹⁶¹ and transfer of trespassers and for the demolition of structures. This section made it mandatory for a court to issue an order for the summarily eviction of a person from land or a building concerned if convicted.¹⁶² This section precluded the court from suspending the operation of an eviction order and more particularly from suspending its operation pending the outcome of an appeal.¹⁶³ The eviction of unlawful occupiers of land was not previously mandatory.¹⁶⁴ For example, in *S v Govender*,¹⁶⁵ an Indian woman had been convicted of contravening section 26(1) of the *Group Areas Act*¹⁶⁶ in that she had unlawfully occupied premises in a so-called white area. In this case,

159 The corresponding section of the final *Constitution* is section 35(3)(h).

160 1954 AD 369.

161 *PISA* made use of the word "ejectment" which has a similar meaning as eviction. For purposes of consistency, the word eviction is being used throughout this study.

162 The removal of the discretion of the courts was contrary to the general principles of our law in that it is the courts, not parliament, that should have discretionary power to decide on appropriate sentences. See in this regard *R v Arbee* 1956 4 SA 439 (A) 443.

163 However, the court in *Ntuli v van der Merwe* 1963 2 SA 88 (N) 92A stated that the fact that a magistrate has power to make an order of summarily eviction does not mean that the order must be given effect to immediately.

164 Lewis 1989 *SAJHR* 235.

165 1986 3 SA 969 (T).

166 36 of 1966.

the court considered whether the issuing of an eviction order in terms of section 46(2)(b) of the *Group Areas Act* is discretionary or not. The court held that as an eviction order, in most cases, seriously affects the lives of the person(s) concerned, such an order should not be made without the fullest enquiry. Furthermore, the court should not make such an order unless requested to do so and if there appears to be no onus upon the convicted person to dissuade the court from granting the order. The court also found that the following may be relevant to its discretion: the nature of the area concerned; the attitude of the neighbours; the policy and views of the Department of Community Development or any other interested Department of State; the attitude of the landlord; the prospects of a permit being issued for continued lawful occupation of the premises; the personal hardship that such an order may cause and the availability of alternative accommodation.

It is clear that the objective of *PISA* was to make it impossible for certain groups of people to stay in specified areas.¹⁶⁷

5.1.3 *Erection of buildings or structures without approval of local authority*

Section 3A(1)(a)(i)¹⁶⁸ made it an offence for the owner or lessee of land to permit the erection of any building or structure intended for occupation by persons on such land unless a plan of the building or structure has been approved by a local authority.¹⁶⁹ Section 3A(1)(c) placed a burden on the owner or lessee to prove that the land has been occupied without his or her consent. In terms of section 3A(2), the penalties for committing the offence have been increased from two thousand rand to ten thousand rand, and from 12 months imprisonment to five years imprisonment.¹⁷⁰ This section made it virtually impossible for an owner to allow the erection of a structure on his property. Due to the severe penalties, evictions by owners should have occurred on a large scale.

167 *R v Matsabe; R v Mbalate* 1957 3 SA 210 (T) 211E.

168 Inserted by section 2 of Act 92 of 1976.

169 See also *Executive Suit v Pietermaritzburg-Msunduzi Transitional Local Council* 1997 4 SA 695 (N); Van der Walt AJ "Land reform in South Africa since 1990 - an overview" 1995 *SAPL* 1 8.

170 Inserted by section 4(a) of Act 104 of 1988.

Section 3A(3) stipulated that the convicted owner or lessee must, unless the court orders otherwise, at own expense demolish and remove the erected building or structure from the land. It is interesting to observe that the section did not require notice to the occupants of the building or structure prior to the demolition and removal of the building or structure. The occupants of the building or structure were also not prior to the hearing invited to present their case in court. No recognition was thus given to the common law rule of *audi alteram partem*.

Section 3A not only dealt with the unlawful occupation of a building or structure, but also with the legal occupation thereof. This was contrary to the main object of *PISA* which was the prevention of unlawful squatting and not the regulation of the erection of buildings. The *National Building Regulations and Buildings Standards Act*¹⁷¹ (hereafter the *Buildings Standards Act*) regulates the erection of any building in respect of which plans and specifications are to be approved by a local authority. A provision such as section 3A which main aim was to prevent that a building or structure is erected on land without the permission of the local authority concerned, will better fit under the *Buildings Standards Act*. It is, however, interesting to note that the powers afforded to a local authority under section 3A of *PISA* were far wider than those afforded to it under the *Buildings Standard Act*.¹⁷² This might be the reason why local authorities preferred to exercise their powers under *PISA*.

5.1.4 *Right to demolish unauthorised building or structure*

Section 3B of *PISA* permitted the summarily demolition, by the owner of land, of any structure that has been erected without his or her consent and to remove the material from the land.¹⁷³ Furthermore, an officer of a local authority and an officer of an administration also had the power to demolish, without an order of court and at the expense of the owner of the land, any building or structure which -

171 103 of 1977.

172 *Despatch Municipality v Sunridge Estate and Development Corporation (Pty) Ltd* 1997 4 SA 596 (SE).

173 See also *Kgosana v Otto* 1991 2 SA 113 (W) 116A; *Mbangi v Dobsonville City Council* 1991 2 SA 330 (W) 331G.

- can be used for occupation by persons;
- does not comply with the requirements needed for a plan or description for approval by a local authority before a building or structure may be erected; and
- is situated within the area of jurisdiction of the local authority on land which is not the property of the local authority or the administration.

In terms of *PISA*, an owner, a local authority and an officer of an administration were contrary to the common law allowed to take the law into their own hands.¹⁷⁴ In terms of the common law, an owner has to apply for an order of court to demolish any building or structure erected on land and to evict the unlawful occupiers therefrom.¹⁷⁵ An owner who has unlawfully been dispossessed of his property can recover possession thereof by means of the *rei vindicatio*.¹⁷⁶ It is not necessary for the owner to allege or prove that the defendant is in unlawful possession. The onus therefore rests on the defendant to prove his entitlement to the thing.¹⁷⁷

Section 3B was not only in conflict with section 26(3) of the final *Constitution* which places a preventative obligation on the state to protect the right to have access to adequate housing against unlawful evictions, but had also infringed the right to have access to adequate housing in section 26(1) of the final *Constitution*, especially when regard is had to the South African history of redistribution of land.¹⁷⁸ Thus, in light of South Africa's new constitutional dispensation, these sections are unconstitutional as it allowed inhumane action to be committed against people who never had free access to land.¹⁷⁹

174 The right to demolish a building or structure erected without consent is in direct conflict with the principles underlying international law concerning the right to housing. It is clear that the policy decisions which formed the basis for *PISA* did not take cognisance of other internationally recognised fundamental rights such as the right to human dignity and the right to housing.

175 O' Regan 1989 *SAJHR* 361 387.

176 This principle means that an owner cannot be deprived of his property against his will and he is entitled to recover it from any person who retains possession of it without his consent. The owner who institutes the *rei vindicatio* must prove the following: (a) that he is the owner, (b) that the defendant is in occupation or possession at the commencement of the action, and (c) the thing claimed is capable of being identified. See in this regard Van der Walt and Pienaar *Introduction to the Law of Property* (1996) 191 - 192.

177 *Chetty v Naidoo* 1974 3 SA 13 (A).

178 See also De Waal, Currie and Erasmus *The Bill of Rights Handbook* (2001) 447.

179 See also *Despatch Municipality v Development Corporation (Pty) Ltd* 1997 4 SA 596 SE.

Note should be taken that the section 3B did not allow the summarily eviction of unlawful occupiers, but only the summarily demolition of any building or structure illegally erected. An order of court needed to be obtained before unlawful occupiers could be evicted. The rationale for this distinction is not clear. However, this distinction did not make much of a difference as landowners would not have demolished structures unlawfully erected on their land without evicting the occupiers thereof simultaneously. Unlawful occupiers were certainly not aware of the fact that they may not be evicted from land without a court order.

Section 3B, by allowing the summarily demolition of structures, deprived unlawful occupiers from claiming restoration of possession in terms of a spoliation order.¹⁸⁰

5.1.5 *Demolition of a building or structure without prior notice*

An owner of land, an officer of a local authority and an officer of an administration were not only allowed to demolish a building or structure and to remove the material or contents thereof, but could do so without any prior notice to the occupants of such a building or structure.¹⁸¹ This provision was amended by section 3B(2) of the *Prevention of Illegal Squatting Amendment Act*¹⁸² which stated as follows:

A building or structure ... may be demolished only after at least seven days written

180 A spoliation order is a possessory remedy. It merely restores the *status quo ante* the illegal action. Whether the person has a right to the object in question is irrelevant. See further *Burnham v Neumeyer* 1917 TPD 630; *Meyer v Glendinning* 1939 CPD 84; *Nienaber v Stuckey* 1946 AD 1049; *Mans v Loxton Municipality* 1948 1 SA 966 (C); *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977 1 SA 230 (E); *De Beer v Firs Investments Ltd* 1980 3 SA 1087 (W); *Kgosana v Otto* 1991 2 SA 113 (W); *Mbangi v Dobsonville City Council* 1991 2 SA 330 (W); *Plaatjies v Olivier* 1993 2 SA 156 (O); *Ness v Greef* 1985 4 SA 641 (C); *Mbuku v Mdinwa* 1982 1 SA 219 (Tk); *Yeko v Qana* 1973 4 SA 735(A); *Nino Bonino v De Lange* 1906 (TS) 120; Van der Walt AJ “Defences in spoliation proceedings” 1985 *SALJ* 172; Van der Walt AJ “*Naidoo v Moodley* 1982 4 SA 82 (T): Mandament van spolie” 1983 *THRHR* 237; Sonnekus JC “Spolie and contra spolie: *Ness v Greef* 1985 4 SA 641 (K)” 1986 2 *TSAR* 243; Olivier NJJ, Pienaar GJ and Van der Walt AJ *Sakereg: Studentehandboek* 1e uitg (Juta Kaapstad 1989) 231 - 255; Olivier NJJ, Pienaar GJ and Van der Walt AJ *Sakereg: Studentehandboek* 2de uitg (Juta Kaapstad 1992) 197 - 198; Van der Walt AJ “Squatting, spoliation orders and the new constitutional order: *Rikhotso v Northcliff Ceramics (Pty) Ltd* 1997 1 SA 526 (W)” 1997 *THRHR* 523; Blumberg M “Mandament van spolie - Restoration of the status quo ante revisited: *Rikhotso v Northcliff Ceramics (Pty) Ltd* 1997 1 SA 526 (W)” 1997 *THRHR* 529.

181 Section 3B(2) of *PISA*.

182 92 of 1976.

notice of the intention to demolish has been given to the person who erected the building or structure or who caused it to be erected.

In *Fredericks v Stellenbosch Divisional Council*¹⁸³ the court granted a spoliation order against the respondent as the respondent has unlawfully demolished unlawful occupiers' houses on its land without having first given them seven-days written notice in terms of section 3B(2) of *PISA* as amended.¹⁸⁴

In 1977, the Minister of Community Development, Steyn, SJM introduced a further amendment to *PISA*. He said the following in the House of Assembly:

... it is clear that there are other forces at work, forces whose object it is to encourage and perpetuate squatting in order to foment racial dissatisfaction and racial hatred and to discredit the government of South Africa. How else does one explain the recent court cases which were aimed at thwarting the authorities when they wanted to take steps to put an end to illegal squatting, which constitutes a danger to society? ... Money for court cases seems to be no problem to these indigent people who have no right to be on the land in question, and are breaking quite a number of laws, laws pertaining to entry, and to building and health regulations etc. Every possible technical point, however small, is seized upon to thwart any action against this scourge by means of protracted court proceedings. The squatters in question, or the people inciting them, were successful in their court application, not because they had the law on their side, but merely on the ground of technical points of law pertaining, for the most part, to faulty notices of intention to demolish, notices which are required in terms of the Act. This obvious defiance of state authority, not by the unfortunate squatters themselves, but obviously by persons and organizations hiding behind them for their own obscure motives, cannot be tolerated.¹⁸⁵

As the 1976 amendment to *PISA* allowed unlawful occupiers threatened with eviction to initiate

183 1977 3 SA 113 (C).

184 See also Blecher MD "Spoliation and the demolition of legal rights" 1978 *SALJ* 8; Roos JW "On illegal squatters and spoliation orders II" 1989 *SAJHR* 395.

185 O' Regan 1989 *SAJHR* 361 372.

litigation on the ground of technicalities, the seven-days notice provision was removed.¹⁸⁶

5.1.6 *Fees and the organisation of illegal squatting*

Section 4 of *PISA* prohibited the collection of fees or the exercising of authority in regard to the organisation of illegal squatting. Similar to section 3 of *PISA*, this section did not give the court any discretion to make an order for the summarily eviction of the occupants of the land or buildings concerned.¹⁸⁷

5.1.7 *Administrative powers of magistrates*

Section 5 of *PISA* gave a magistrate administrative powers to grant eviction orders. A magistrate who was satisfied on affidavits placed before him or her that any person has entered upon or into land or a building without the permission of the owner or lawful occupier thereof, and is remaining thereon or therein against the will of the owner or lawful occupier and refuses, despite warning, to depart therefrom, could after consultation with the local authority concerned do the following (a) issue such orders or give such instructions necessary to effect the removal of such persons from the land or building, or (b) effect the transfer of such persons to another place, or (c) ensure the demolition and removal from such land of all buildings and structures erected thereon by the unlawful occupiers. Before the 1988 amendment¹⁸⁸ to *PISA*, affected parties were given no opportunity to defend their case. Subsequently, the 1988 amendment introduced provision 5(1)(aa) which required that before a magistrate issues any order, the magistrate should be satisfied that notice has been given to the affected persons that an application for their removal

186 The provision that no prior notice to the occupants of a building is needed before demolishing such building remained on the statute book four years after South Africa has signed the *International Covenant on Economic, Social and Cultural Rights*. General Comment no. 7 (1997) of the UN Committee on Economic Social and Cultural Rights explicitly provided that reasonable notice should be given to all affected persons prior to the scheduled date of eviction. See in this regard 2.1 above. Over the years *PISA* became a political football between the courts and the legislature. Every time the courts interpreted a provision in a sympathetic way favouring unlawful occupiers, the politicians amended the law. See in this regard Pienaar and Muller 1999 *Stell LR* 370 378. However, during the early nineties, the courts started to apply the provisions of *PISA* more sympathetic in favour of unlawful occupiers. See also Pienaar and Bouillon 2002 *Koers* 159 161.

187 See the discussion on section 3 of *PISA* at 5.1.2 above.

188 Act 104 of 1988.

will be made.¹⁸⁹ The affected persons were also entitled to be represented before the magistrate.¹⁹⁰

The above section, as amended, was the only section in *PISA* that gave unlawful occupiers of land and/or buildings the right to be heard before any order for eviction was made.

5.1.8 *Transit areas*

Section 6(3) empowered local authorities to declare a portion of land to be a transit area for the temporarily settlement of homeless persons. Pienaar and Muller¹⁹¹ indicates that the establishment of transit areas was a useful instrument to control unlawful occupation of land. In addition, section 6(4) provided that no compensation shall be payable for the use of a transit area on private land that was occupied by homeless persons, unless the owner or lawful occupier of such land can prove that it was so occupied without permission. Clearly, this provision was aimed at discouraging landowners from allowing unlawful occupiers to live on their land.¹⁹²

5.1.9 *Eviction of persons from land or buildings situated outside a local authority's jurisdiction.*

Section 6E made provision for the establishment of a committee by an administrator¹⁹³ for any area under his authority outside the area of jurisdiction of a local authority. Section 6F provided for the eviction of people living on land or in buildings situated outside the area of jurisdiction of a local authority and who were not employed by the owner or lawful occupier of such land or buildings. One of the functions of the committee established under section 6E was to investigate whether persons occupying land or a building or structure situated in an area outside the jurisdiction of a local authority, were employed by the owner or legal occupier thereof. This section made it mandatory for an officer of the administration to commence an investigation once

189 See also O' Regan 1989 *SAJHR* 361 382; *Zungu v Acting Magistrate, Umlazi* 1962 3 SA 782 (D and CLD); *Thubela v Pretorius* 1961 3 SA 153 (T); *Thubela v Pretorius* 1961 4 SA 506 (T).

190 Section 5(1)(b)(iii)(bb) of *PISA*.

191 Pienaar and Muller 1999 *Stell LR* 370 383.

192 O' Regan 1989 *SAJHR* 361 393.

193 An Administrator as defined in section 1 of the *Provincial Government Act* 69 of 1986.

there were reasonable grounds to believe that such building or structure or land was occupied by persons not employed by the owner or legal occupier thereof. Persons not employed by the owner or legal occupier would appear to include retired workers and members of a farm worker's family who would ordinarily have a right to remain on the land, even though not employed. This section introduced a mechanism whereby unemployed residents on white farms could easily and forcibly be removed from those farms.¹⁹⁴ If the committee found that the building or structure or land was being so occupied, it was obliged to notify the owner or legal occupier of its findings and request him or her to evict the occupants within thirty days of receiving the notice. The owner or legal occupier was compelled to evict the occupiers, even when they were present on the land with consent. The owner or legal occupier could, within 14 days after such notice had been served on him or her, object against such notice but had to give reasons to the committee for objecting. Once again, notice was only served on the owner or legal occupier and not on the occupants of the building, structure or land concerned.¹⁹⁵ Furthermore, only the owner or lawful occupier had the right to object against the order of the committee.¹⁹⁶

5.1.10 *Appeal or review proceedings against an order for eviction*

In terms of the common law, when a convicted person appeals against a sentence imposed on him or her by a court of law, the operation of the sentence is automatically suspended pending the appeal.¹⁹⁷ Section 11B of *PISA* provided that an appeal or review proceedings against any conviction, punishment or order would not have the effect of suspending such conviction, punishment or order.¹⁹⁸ This was contrary to the general principle of South African law. In *Beinash T/A Beinash & Co v Reynolds*,¹⁹⁹ the court reviewed a decision of a taxing master to tax a bill of costs at a time when an application for leave to appeal had been noted. Rule 49(11) of

194 O' Regan 1989 *SAJHR* 361 384.

195 Section 6F(2) of *PISA*. See also the discussion at 5.1.5 above.

196 Section 6F(3) of *PISA*.

197 *Reid v Godart* 1938 AD 511 513.

198 Notwithstanding the clear wording of section 11B, the court in *Ntuli v Van der Merwe* 1963 2 SA 88 (N) 92B-C held that there is nothing that prevent a magistrate from providing in any eviction order that it was not to come into effect until the result of an appeal which has been noted was known.

199 1999 1 SA 1094 (W).

the *Uniform Rules of Court* provides that an appeal or review against an order of court will suspend the operation of that order pending the outcome of the appeal or review, unless the court directs otherwise.²⁰⁰ The main issue which the court had to decide was whether the provisions of rule 49(11) intended to deviate from the common law. The court referred to *Reid v Godart*,²⁰¹ where De Villiers JA said:

Now, by the Roman-Dutch law the execution of all judgments is suspended upon the noting of an appeal; that is to say, the judgment cannot be carried out and no effect can be given thereto, whether the judgment be one for money ... or for any other thing or for any form of relief granted by the Court appealed from ... [T]he foundation of the common-law rule as to the suspension of a judgment on the noting of an appeal, is to prevent irreparable damage from being done to the intending appellant.

The court also referred to *Sirioupoulos v Tzerefos*²⁰² where, in discussing the common law position, Flemming J said:

Daarvolgens het notering van appél die wyer effek om tot afhandeling van die appel die bevel self sy krag te ontnem: alhoewel die bevel bly staan het dit geen werking nie.

Thus, the court in the *Beinash* case concluded that rule 49(11) does not change the common law. Furthermore, in case of any doubt, it is the duty of the court to interpret the rule as being consistent with the common law.

An appeal or review of proceedings against a conviction can carry on for months and can further be delayed if a further appeal is made to the Supreme Court of Appeal. Thus, the purpose of section 11B was to avoid unlawful occupiers from remaining on property pending an appeal or a review of proceedings.

200 Erasmus H J *Superior Court Practice* (Juta Kenwyn 1994).

201 1938 AD 511.

202 1979 3 SA 1197 (O).

5.2 Courts' interpretation

As is apparent from the foregoing discussion, the effect of the provisions of *PISA* has clearly infringed the human rights of many people. This is not surprising as *PISA* was introduced in an era when there was no respect for human dignity.²⁰³ However, when interpreting the provisions of *PISA*, the courts tried to mitigate its harsh effects. The following are examples of such cases:²⁰⁴

In *Mpisi v Trebble*,²⁰⁵ the court interpreted section 3B narrowly by stating that the respondent was only entitled to demolish the appellant's shack in the sense of pulling or tearing it down without causing any greater damage to the constituent materials of the structure. Thus, the respondent was not entitled, after pulling the shack down, to burn its component materials. The court further held that the fact that a person was unlawfully occupying another's land does not *per se* deprive him or her of his or her rights in movable property brought onto such land. The court, however, took note of the fact that the word "demolish" has a wider meaning (to destroy), but said that the narrow meaning should prevail.²⁰⁶

In *Rikhotso v Northcliff Ceramics (Pty) Ltd*,²⁰⁷ the respondents have not only dismantled the applicant's dwelling, but also burnt its contents. The respondents argued that the initial dismantling of the dwelling should be distinguished from the act of burning. Meaning that only the act of burning should be found unlawful, whilst the dismantling of the dwelling would be in accordance with section 3B. The court refused to accept this distinction and viewed the dismantling and burning of the dwelling as one continuous act. Referring to *Mpisi v Trebble*, the court said that section 3B should be construed narrowly. Thus, any dispossession which is

203 Prior to the democratic elections on 27 April 1994, apartheid thrived in South-Africa and the lack of respect for human rights was characteristic of the apartheid era.

204 See also *Port Nolloth Municipality v Xhalisa*; *Luwalala v Port Nolloth Municipality* 1991 3 SA 98 (C) 106; *S v Bhengu* 1968 3 SA 606 (N) 610C-D; *R v Phiri* 1954 4 SA 708 (T); Van der Walt AJ and Pienaar GJ *Introduction to the Law of Property* (1996) 435; Kroeze *Private-Law and Constitutional Perspectives on Property* 247; Van der Walt AJ 1992 TSAR 40 - 55.

205 1994 2 SA 136 (A).

206 See also Purshotam Ranjit "A burning question: demolitions and removals in terms of the Prevention of Illegal Squatting Act" 1993 *SAPL* 125 - 127.

207 1997 1 SA 526 (W).

combined with a burning of the materials could be declared unlawful, since it exceeded the authority provided by the Act.²⁰⁸

In *Kayamandi Town Committee v Mkhwaso*,²⁰⁹ the applicant, a town committee, launched an urgent application against nine respondents for an order that they vacate and be prohibited from preoccupying certain stands under the applicant's control. The court had to consider whether the provisions of *PISA* placed an obligation on the applicant to make alternative land available to the unlawful occupiers prior to removing them. The court held that although *PISA* did not explicitly state that the availability of alternative land had to be considered before a decision to evict unlawful occupiers was taken, the tenor of *PISA* clearly indicated that the availability of land had to be considered.²¹⁰ Furthermore, as landowners, local and provincial authorities have extensive powers to remove unlawful occupiers from land, consideration should be given to the availability of alternative land to relocate unlawful occupiers.²¹¹ The court thus held that the administration of the Act should be fair and reasonable.

5.3 Summary

This chapter analyses the provisions of *PISA* with the view to determine whether its provisions could have passed the test of our new constitutional democracy. The analysis of *PISA* indicates that the majority of its provisions were in conflict with both the interim and final *Constitutions*. Section 1(2) of *PISA* created a rebuttable presumption in favour of the state in that the accused had to prove on a balance of probabilities that he or she had lawful reason to enter upon or into and/or to remain on or in any land or building. This burden of proof was clearly in conflict with

208 Van der Walt AJ 1997 *THRHR* 522 523; Du Plessis W, Olivier N, Pienaar J "Land reform continues during 1997" 1997 *SAPL* 531 546.

209 1991 2 SA 630 (C). See also Du Plessis W and Olivier NJJ "Plakkery en uitsettingsbevele: Kayamandi Town Committee v Mkhwaso 1991 2 SA 392 (K) en Beyers v Mlanjeni 1991 2 SA 392 (K)" 1991 *De Jure* 365.

210 The court's decision is consistent with the principles underlying international law concerning the right to housing even though the court did not explicitly state that it is allowed to have regard to international law where domestic legislation is silent on the observance of human rights. See also the reference to the *Comprehensive Human Rights Guidelines on Development-Based Displacement* in 2.1 above which provide that states should ensure that no person, group or community is rendered homeless as a consequence of forced eviction.

211 See also Hawthorne L 2001 *De Jure* 584 591.

the presumption of innocence as enshrined in section 25(3)(c) of the interim *Constitution* and section 35(3)(h) of the final *Constitution*. In terms of section 3A(1)(a)(i), it was an offence for an owner or lessee of land to permit the erection of any building or structure intended for occupation by persons on such land, unless a plan of the building or structure has been approved by a local authority. Section 3A(3) provided that the convicted owner or lessee must, unless the court orders otherwise, at own expense demolish and remove the erected building or structure from the land. This section did not require notice to the occupants of the building or structure prior to the demolition and removal of the building or structure. The common law rule of *audi alteram partem* was also ignored in that the occupants was not prior to the hearing invited to present their case in court. In terms of section 3B of *PISA*, an owner could summarily demolish any structure that has been erected without his or her consent. This was clearly in conflict with section 26(3) of the final *Constitution* which provides that no one may be evicted from their home, or have their home demolished without an order of court. Section 11B of *PISA* provided that an appeal or review proceedings against any conviction, punishment or order would not have the effect of suspending such conviction, punishment or order. This was contrary to the common law in terms of which an appeal against a sentence automatically suspend the operation of such sentence. The only positive aspect of *PISA* was section 6(3) which empowered local authorities to declare a portion of land to be a transit area for the temporary settlement of homeless persons. This in effect helped control the unlawful occupation of land. As an apartheid-inspired piece of legislation, the repeal of *PISA* was inevitable. In this chapter, reference is also made to case law in which to courts have tried to mitigate the harsh effects of the provisions of *PISA*.

CHAPTER SIX

PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT 19 OF 1998 (PIE)

6 Introduction

This chapter gives a detailed analyses of the provisions of *PIE*. It further considers the applicability of *PIE* to the relationship between landlords and tenants, and the feasibility of criminalising the unlawful occupation of land.

6.1 *Analysis of the provisions of PIE*

The courts will not easily grant orders which have the effect of violating fundamental rights such as the right to have access to adequate housing. All courts are now duty-bound to exercise vigilance in each and every case and to determine the nature, intensity, degree and manner of the interest being violated and to subject the matter to the appropriate scrutiny.²¹² *PIE* is significant in its repealing of the apartheid inspired *PISA* which has destabilised families and entire communities by denying them the right to procuring secure and stable shelter for themselves in suitable locations. *PIE* also brings considerable changes in the procedure to be followed before people can be evicted from land unlawfully occupied by them. It cannot be said that people occupying property unlawfully have a right to such property. *PIE*, however, gives recognition to the fact that thousands of people are without shelter and if evicted from land unlawfully occupied by them, just procedures should be followed.²¹³

Although *PIE* has improved the position of unlawful occupiers substantially,²¹⁴ it has received

212 Ranjit "Equity for tenants" 1999 *De Rebus* 28 - 29; *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 4 SA 631 (CC) 673C.

213 See also *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 1 SA 113 (SCA) where the Supreme Court of Appeal held that the provisions of *PIE* apply to tenants who fail to pay their rent or mortgagors who default on bond payments. See in this regard the discussion at 6.2.1 below.

214 This legislation has received a warm welcome from various quarters as the draconian provisions of its predecessor could not be allowed in a democratic society.

a lot of criticism from both private landowners and local authorities. The following statement illustrates some of the concerns against *PIE*:

Graham Richards, chief executive officer of the Port Elizabeth municipality, says the council is caught between a rock and a hard place. On the one side is an enraged community demanding the council to do something about the problem, and on the other hand is a law making it impossible for anything to be done. Graham says the law is also stifling development.²¹⁵

A detailed analysis of the provisions of *PIE* follows.

6.1.1 *Scope of PIE*

PIE defines “land” to include a portion of land.²¹⁶ Section 2 further stipulates that *PIE* applies in respect of all land throughout the Republic. Thus, *PIE* applies to municipal, private and state-owned land. In *Absa Bank v Amod*,²¹⁷ Schwartzman J held that in view of the background to the present Act, inter alia, the repealing of *PISA*, the “word ‘land’ must mean vacant land (an expanse of country: ground: soil: see *Concise Oxford Dictionary*) and does not include permanent structures that have acceded to land”.²¹⁸ This narrow interpretation has unfortunate implications. For example, in the event of a large unidentified crowd occupying a building, the owner would have to rely on either a common law eviction - a process fraught with procedural difficulties because of the lack of the identity of the defendants or by laying a charge of trespassing and requesting the court, under the *Trespass Act*,²¹⁹ to grant an eviction order. Thus, the court clearly erred in its interpretation of “land”. “Land” as defined in *PIE* should be interpreted to include any building or structure on the land in question.²²⁰

215 The information can be accessed at <http://home.global.co.za/~tands/opinionz/general/squatters-you01.html> (Date of access: 11-12-2001).

216 Section 1.

217 1999 All SA 423 (W).

218 See 429d of the judgment.

219 6 of 1959.

220 Ranjit 1999 *De Rebus* 28.

PIE is not specific as to where the land should be situated nor does it specify the size of the land. Places such as soccer fields or holiday homes utilised for a couple of weeks a year are at risk of being unlawfully occupied.²²¹ Because *PIE* is so wide in its reach, it creates certain absurdities. For example, if the backyard of a private house is being unlawfully occupied, the owner will not be able to evict the unlawful occupiers without an order of court, even if the land has been occupied for less than two days. The court is also required to give 14 days notice to the unlawful occupiers before the hearing of the proceedings.²²²

6.1.2 *Right to receive notice and to apply for legal aid*

In terms of section 4(2), unlawful occupiers have the right to receive at least 14 days notice before the hearing of an application for an eviction order.²²³ Section 4(5) states that the notice must, inter alia, mention that the unlawful occupier has the right to apply for legal aid.²²⁴ The right to apply for legal aid is again granted to the unlawful occupier with regard to urgent proceedings for eviction.²²⁵ *PIE* does not give to the owner or the person in charge of land a right to apply for legal aid. An owner is defined as the registered owner of land, including an organ of state. There is not really any doubt that an organ of state exercising a power or function in terms of *PIE* would be able to pay for its own legal cost. However, *PIE* wrongly assumes that all private landowners would be in a position to carry their own legal cost.

221 See also the discussion at 6.2.1 below where the Supreme Court of Appeal has extended the application of *PIE* to residential properties occupied by a tenant who against the wishes of the owner remain in occupation of the property after the right to occupy such property has ceased.

222 Section 4(2).

223 See also Deneys Reitz Attorneys "Property Update" (May 2000) 2. The court in *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 4 SA 1222 (SCA) stated that the contents and the manner of service of the notice contemplated in section 4(2) must be authorised and directed by an order of the court concerned. The requirement of notice to unlawful occupiers before eviction is in line with General Comment no. 7 (1997) of the UN Committee on Economic, Social and Cultural Rights which requires that adequate and reasonable notice must be given to all affected persons prior to the scheduled date of eviction. See in this regard 2.1 above.

224 See also General Comment no. 7 (1997) of the UN Committee on Economic, Social and Cultural Rights which provides that, where possible, legal aid should also be provided to persons who are in need of it to seek redress from the courts; and the *Comprehensive Human Rights Guidelines on Development-Based Displacement* (1997) which provide for legal remedies to any person claiming that his or her right to protection against forced evictions has been violated or is under threat of violation.

225 Section 5(3).

Section 4(2) also requires that a notice of the proceedings must be effective. Section 4(5) further prescribes what should be the content of such a notice. The meaning of an “effective” notice was discussed in *Cape Killarney Property Investments (Pty) Ltd v Mahamba*.²²⁶ The court held that the purpose of section 4(5) is to provide protection to occupants by alerting them to the threat to their occupation and the basis thereof; alerting them to the provisions of *PIE* and the protection and defences afforded to them by *PIE*; advising them of their rights to legal representation; and informing them of the date and place of the hearing. The court further held that an enquiry into whether the notice in any given case was effective had to begin with an investigation into the circumstances of the persons sought to be evicted. As the overwhelming majority of the respondents were Xhosa speaking and many were illiterate, the court held that in order for the notice to have been effective, it should have been accompanied by a Xhosa translation and the contents of the order should have been broadcasted in Xhosa by loudhailer throughout the community at times when many of the occupants would have been present.²²⁷

6.1.3 Granting of an eviction order

Section 4(6)²²⁸ of *PIE* gives the court a discretion to grant an order for eviction.²²⁹ The court will only grant an eviction order if it is of the opinion that it is **just** and **equitable** to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.²³⁰ “Just” is defined in the Cambridge

226 2000 2 SA 67 (C).

227 See also Du Plessis W, Olivier N, and Pienaar J “New measures to expedite land reform” 2000 *SAPL* 549 563.

228 Applies to land occupied for less than six months.

229 Section 3(1)(a) and 4(3)(a) of *PISA* did not give the court any discretion to grant an order for eviction. See in this regard the discussion at 5.1.2 above. Also, section 26(3) of the *Constitution* does not give the court a discretion to grant an eviction order. See in this regard the discussion at 4.1 above.

230 This is also repeated in the preamble of *PIE*. The *Diepsloot Residents' and Landowners Association v Administrator, Transvaal* 1993 1 SA 577 (T) is an example where the court allowed room for consideration of all the relevant circumstances and for a proper weighing of all the interests that are involved. For a discussion on the *Diepsloot* case see Van der Walt and Pienaar *Introduction to the Law of Property* (1996) 427 - 428; Van der Walt 1995 *SAPL* 1 26 - 28; Van der Walt AJ “Notes on the interpretation of the property clause in the new Constitution” 1994 *THRHR* 181 187- 189; Du Plessis W, Olivier N and Pienaar J “Land: new developments 1993” 1993 *SAPL* 361 371. See also the *Comprehensive Human Rights Guidelines on Development-Based Displacement* (1997) which stipulate that special consideration should be given to the rights of indigenous people, children and women, particularly female-

Dictionary²³¹ as “morally correct” and “equitable” is defined as “fair and reasonable”. Meaning that the court must determine whether an eviction order is fair as opposed to being legally correct. When considering the relevant circumstances, the court also needs to consider the constitutional right of the unlawful occupiers to have access to adequate housing.²³² Section 4(6) also means that although a land owner applies for an eviction order, there is no guarantee that such an order would be granted, even if the land has been occupied for less than two days. This has a huge impact on the right not to be deprived of property, especially in the case of land owned by a private owner. To go even further, an owner whose backyard is being unlawfully occupied has no guarantee that the court will grant an eviction order. An owner in the latter instance is able to institute urgent proceedings for the eviction of unlawful occupiers.²³³ The onus of proof imposed on an applicant during these proceedings presents its own difficulties.²³⁴ In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter*²³⁵ the court held that two diametrically opposed fundamental interests need to be weighed against each other. On the one hand is the traditional real right inherent in ownership reserving exclusive use and protection of property to the landowner, and on the other hand is the genuine despair of people in dire need of adequate accommodation. The court further held that the use of the term “just and equitable” related to both interests, that is what is just and equitable not only to the persons who have occupied the land unlawfully, but to the landowners as well.²³⁶

Similar to section 4(6), section 4(7) of *PIE* stipulates that “a court may grant an order for eviction ... after considering all the relevant circumstances ... including the rights and needs of the elderly, children, disabled persons and households headed by women.” Unless the papers to be served on the respondent (unlawful occupier) contain information from the applicant as to the existence or non-existence of these relevant circumstances, or contain an invitation to the respondent to

headed households and other vulnerable groups. See in this regard 2.1 above.

231 Paul Procter *Cambridge International Dictionary of English* (Cambridge University Press 1995) 465 and 774.

232 See also the discussion at 4.1 above.

233 Section 5.

234 See the discussion at 6.1.4 below.

235 2000 2 SA 1074 (SE).

236 See also *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* 2001 4 SA 385 (W) 390G/H • H/I.

place any relevant factors before the court for consideration, the court will not be able, in the absence of the respondent, to make a finding that all the relevant circumstances have been considered.²³⁷ In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter*,²³⁸ the court held that the application should not be dismissed merely because of the fact that the applicant had not dealt with the requirement as to whether there was alternative land available. Furthermore, *PIE* should not be interpreted in such a way which could give rise to the indirect expropriation of land by ignoring the rights of landowners.

Section 4(7) applies to the situation where the land in question has been occupied for more than six months at the time the proceedings were instituted. This section requires that landowners should consider the availability of alternative land or whether land can reasonably be made available for the relocation of the unlawful occupiers.²³⁹ The owner should thus inform the court of the steps taken to establish the availability of alternative land or accommodation. The local authority should in these circumstances be subpoenaed to apprise the court about the availability of such land or the efforts made to identify such land. *PIE* does not define “reasonably” and seems to be vague. Would it perhaps be possible to argue that an owner is able to make land reasonably available if he or she is able to make alternative land available at a very small or

237 See Appendix A below for an example of a notice in terms of section 4(2) of *PIE*. See also Purshotam 1999 *De Rebus* 28. In *Ross v South Peninsula Municipality* 2000 1 SA 589 (C) the court held that there is an *onus on the owner* (plaintiff) to place the relevant circumstances before the court that will justify the eviction of the unlawful occupier (defendant). See also *Eskom v First National Bank of Southern Africa LTD* 1995 2 SA 386 (A). Although the court in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2000 2 SA 1074 (SE) was hesitant to place an onus on either of the parties, it held that both parties should have place information before the court as to whether there was alternative land available. However, on appeal, the court in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001 4 SA 759 (E) held that the onus was on the unlawful occupiers to place all relevant information before the court as information concerning the needs of the elderly, children, disabled persons and household headed by women would be peculiarly within the knowledge of the unlawful occupiers, and that unlawful occupiers who wish to be given the additional protection of section 4(7) have to make full disclosure of all relevant circumstances. The court further held that the owner was not obliged to do the same. In *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* 2001 4 SA 385 (W) the court held that with regard to “all the relevant circumstances” required for an application in terms of section 4(6), an applicant who is a private owner should place before the court the relevant circumstances known, or which could reasonably expected to be known, to him or her. Furthermore, if unlawful occupiers wish to raise equitable considerations not within the knowledge of the applicant, it is incumbent upon them to raise such considerations.

238 2000 2 SA 1074 (SE).

239 This is in line with the *Comprehensive Human Rights Guidelines on Development-Based Displacement* (1997) which provide that states should ensure that no person, group or community is rendered homeless as a consequence of a forced eviction. See also Deney's Reitz Attorneys (May 2000) 2.

reasonable price? This provision creates further uncertainty for landowners.

On a reading of section 4(7), there seems to be no obligation on a private landowner to provide alternative land for the relocation of unlawful occupiers. However, such a landowner must take reasonable steps to determine the availability of alternative land. In *Beyers v Mlanjeni*,²⁴⁰ the court considered the availability of alternative accommodation as irrelevant.²⁴¹ In *Kayamandi Town Committee v Mkhwaso*,²⁴² a town committee launched an urgent application against unlawful occupiers for an order that they vacate and be prohibited from preoccupying certain specified stands under its control. To the question whether the council should have considered the availability of alternative land, the court held:

It seems to me that the applicant was not entitled, then, to take a resolution for the removal of a large body of squatters from land controlled by it without first having considered whether at least a transit area could be made available where they could erect their own shelters. I cannot, of course, say that squatters may not be evicted from land controlled by a local authority until other land has been found for them. But what I can say, and what I do say, is that a local authority may not take a decision to remove squatters from land which it controls unless it has given consideration to what is to be done with them.

PIE requires from an organ of state or municipality to consider the availability of alternative land before evicting unlawful occupiers.²⁴³ In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter*,²⁴⁴ the court granted an eviction order in favour of the municipality (applicant). However, the order was suspended pending the availability of suitable alternative land or accommodation for the resettlement of the unlawful occupiers (respondents). On appeal against the conditional suspension, the court in *Port Elizabeth Municipality v Peoples Dialogue on Land*

240 1991 2 SA 392 (C) 396.

241 See also Du Plessis and Olivier 1991 *De Jure* 365.

242 1991 2 SA 630 (C). See also the discussion at 5.2 above.

243 Section 4(7).

244 2000 2 SA 1074 (SE).

*and Shelter*²⁴⁵ held that the availability of land for the relocation of the unlawful occupiers was only one of the factors to be taken into account in terms of both section 4(7) and section 6(3) of *PIE*, and that the apparent lack of alternative land was not an absolute bar to the grant of an eviction order. The court argued that if the availability of suitable alternative land or accommodation is made a pre-condition for the granting of an eviction order, it would be open to any person to occupy land unlawfully in order to force an organ of state to provide him or her with suitable alternative land or accommodation. This is in fact true. However, the court lost sight of the broader picture, that is the housing shortage which is also exacerbated by the fact that the South African land reform process is disappointingly slow.²⁴⁶ Peoples frustration and anger with the slow land reform process have several times been expressed in the unlawful occupation of land. This is evident by the recent unlawful occupation of Bredell, near Kempton Park; and the farm Groot Valkfontein outside Kuruman in the Northern Cape by land restitution claimants who had lost patience with the pace of land reform.²⁴⁷ Also, the court did not take cognisance of *Government of the RSA v Grootboom*²⁴⁸ where it was held that even though the right to have access to adequate housing could not be realised immediately,²⁴⁹ temporary relief must be given to people who have no access to land, people who are living in intolerable conditions and people who are in crisis because of natural disasters or whose homes are under threat of demolition. Thus, even though an organ of state or municipality is not required to provide unlawful occupiers immediately with alternative permanent land, they have a positive obligation to make interim relief available to such persons. This is in line with the final *Constitution* which stipulates that “everyone has the right to have access to adequate housing.” In light of the Constitutional Court judgment in the *Grootboom* case, it seems that a court will also not be able to make an order in

245 2001 4 SA 759 (E).

246 Land reform in South Africa since 1994 has been carried out through three different ways, namely Redistribution, Restitution, and Tenure reform. See also Carey-Miller DL “The Reform of South African Land Law in its Roman-Dutch Context - New Wine?” in Jackson P and Wilde DC (eds) *Property Law: Current Issues and Debates* (Dartmouth Ashgate 1999) 288 - 299.

247 *Sowetan News* (13 May 2001).

248 2000 11 BCLR 1169 (CC).

249 Subsection 26(2) of the final *Constitution* qualifies the right to have access to adequate housing by stating that the state must take reasonable measures **within its available resources** to achieve the progressive realisation of this right. This is also in line with paragraph 10 of General Comment 3 of the United Nations Committee on Economic, Social and Cultural Rights. See in this regard 2.1 above. See also *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C) 283 and *Soobramoney v The Minister of Health, KwaZulu Natal* 1998 1 SA 765 (CC) [11].

terms of section 4(6) of *PIE*, although this section does not require that consideration be given to the availability of alternative land, without considering whether interim relief can be made available. Thus, the right to adequate housing includes the right to basic shelter and there is a constitutional duty on the state to provide homeless people with basic shelter.

PIE is a consequence of section 26(3). It seems as if section 4 of *PIE* elevates unlawful occupation above ownership in the sense that even if unlawful occupation is proved, the court must be guided by certain considerations which are extraneous to the real rights of the owner and the absence of any rights on the part of the occupier.²⁵⁰

Section 4(8) states that the court must grant an order for eviction if it is satisfied that all the relevant requirements have been complied with and that no valid defence has been raised by the unlawful occupier. When interpreting “valid defence” within the context of *PIE*, it not only refers to a valid defence in law, but any defence that is just and equitable will qualify as a “valid defence”.²⁵¹

6.1.4 *Urgent proceedings for eviction*

PIE makes provision for urgent proceedings to evict unlawful occupiers.²⁵² An urgent application for eviction brought under section 5 is neither bound by the time constraints of section 4 nor obliged to set out the details prescribed by section 4(6) and (7). In terms of section 5(1), the owner has the following burden of proof:²⁵³ (a) the court should be satisfied that there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land; (b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought; (c) there is no other effective remedy available. An

250 *Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants* 2002 1 SA 125 (T) 136H.

251 Purshotam 1999 *De Rebus* 28.

252 See also Deneys Reitz Attorneys (May 2000) 2.

253 The court in *Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants* 2002 1 SA 125 (T) held that the court would have to be satisfied that the factors mentioned in section 5(1) were present before it could grant an interim eviction order on an urgent basis.

eviction order, if granted, will be carried out before the date set for the hearing. *PIE* does not stipulate when the hearing for the final eviction order will take place. It is assumed that the hearing will be scheduled as early as possible.

In interpreting section 5(1), it seems that if the owner fails to prove any of the abovementioned requirements, he or she will not be able to obtain relief in terms of this section. With regard to requirement (b), the court will not lightly make a finding that the hardship to the owner or any other affected person exceeds the hardship that the unlawful occupier may suffer when weighing the financial lost or inconvenience to the owner against the considerable inconvenience and personal hardship to be suffered by the respondent (unlawful occupier), especially where children and the elderly are concerned. Section 5 is a further impairment to the right not to be deprived of property as it would not always be easy for a landowner to discharge the onus of proof created by the section. Once again, a distinction should be drawn between land owned by private persons and land owned by an organ of state.

6.1.5 *Reinstatement of unlawful occupier*

Section 5 does not require the applicant (owner or person in charge of land) to demonstrate that proper and adequate provision has been made for the reinstatement of the respondent (unlawful occupier) in the event that the final eviction order is not granted.²⁵⁴ In the interest of fairness, *PIE* should have provided for the reinstatement of unlawful occupiers if the final eviction order is not granted.

6.1.6 *Written and effective notice in urgent proceedings for eviction*

Section 5(2) requires that written and effective notice of the intention of the owner or person in charge to obtain an order for eviction in terms of section 5(1) should be given to the unlawful occupier(s). This section does, however, not stipulate the period of notice as in section 4(2), nor

254 Purshotam 1999 *De Rebus* 28 30. The *Extension of Security of Tenure Act* protects occupiers of rural and peri-urban land against unfair evictions. In terms of section 15(1)(d) of this Act, the court must be satisfied that adequate arrangements have been made for the reinstatement of any person evicted if the final order is not granted. See also *Grant Valley Estates (EDMS) Bpk v Nkosi* (unreported) LCC Case 73/99.

does it state what is meant by “written and effective notice”. In the absence of a period for notice, it is assumed that the legislature intended that a reasonable period of notice be given. It is, however, clear that if “effective notice” is not given, it will constitute a fatal defect and will preclude the granting of an eviction order.²⁵⁵

Section 5(2) raises the question whether the requirement of notice does not defeat the purpose of section 5(1). What about instances where the unlawful occupier is materially damaging the property by breaking down the walls or where notice to the unlawful occupier is undesirable because he or she has indicated that the institution of any court proceedings will result in him or her burning down the building? Will the court in these instances be obliged in terms of section 5 to give notice to the respondent as *PIE* makes it mandatory for the court to give notice?

6.1.7 Eviction at the instance of an organ of state

Section 6 of *PIE* deals with evictions at the instance of an organ of state.²⁵⁶ In terms of this section, an order for the eviction of an unlawful occupier may be granted provided that it is just and equitable to do so and after the court has considered all the relevant circumstances which include a consideration of whether it is in the public interest to grant an eviction order. In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to the following factors:²⁵⁷

- (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

255 See *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2000 2 SA 67 (C). See also the discussion on section 4(2) at 6.1.2 above.

256 Section 239 of the final *Constitution* defines an organ of state as “any Department of State or administration in the national, provincial or local sphere of government”.

257 Section 6(3). The court in *Pedro v Greater George Transitional Council* 2001 2 SA 131 (C) 135A-B held that the provisions of section 6(3) are peremptory and that the court must have regard to the factors enumerated in section 6(3) in deciding whether it is just and equitable to grant an order for eviction. See further *Cape Killarney Property Investments v Mahamba* 2000 2 SA 67 (C) 76G; *S v Govender* 1986 3 969 (T) 971I-J.

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

With regard to point (c), the requirement of “suitable alternative accommodation” is not defined in *PIE*. A different meaning should be attached to “suitable alternative accommodation” as it differs from the provisions of section 4(7) which requires the allocation of alternative land to a person who is evicted provided that he has been in occupation for more than six months. The term “suitable alternative accommodation” is, however, defined in the *Extension of Security of Tenure Act*²⁵⁸ (insofar as it is relevant for the purposes of section 6) as meaning alternative accommodation which is safe and overall not less favourable than the occupiers' previous situation and suitable having regard to -

- (a) the reasonable needs and requirements of all the occupiers in the household in question for residential accommodation;
- (b) their joint earning abilities; and
- (c) the need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active.

Thus, the term “suitable alternative accommodation” seems to go much further than the “allocation of alternative land”.²⁵⁹ This will mean that if an eviction order in terms of section 4(7) is granted in favour of an organ of state, the unlawful occupiers may not be relocated on land in the middle of nowhere, but must be relocated near employment opportunities and other economic activities.²⁶⁰

6.1.8 Transit areas

PIE does not specifically provide for transit areas. However, reference to such areas is found in

258 62 of 1997.

259 Purshotam 1999 *De Rebus* 28 30.

260 See also General Comment no. 4 (1991) of the UN Committee on Economic, Social and Cultural Rights which states that adequate housing must be in a location which allows access to employment opportunities, health care services, schools, child care centres and other facilities. See in this regard 2.1 above.

section 11 which deal with the repeal of legislation. Section 11(4) stipulates that any land declared as a transit area in terms of section 6 of *PISA* shall continue to exist until such transit area is abolished by the relevant local authority. The absence of provisions in *PIE* providing for the establishment of transit areas is unfortunate as transit areas could play a positive role in the regulation of unlawful occupation of land. For example, the court in the *Grootboom* case held that there is an obligation on the state to provide homeless people with immediate interim relief.²⁶¹ Accommodating people in a transit area will certainly serve as a form of interim relief.²⁶²

6.2 Amendments to *PIE*

6.2.1 *The applicability of PIE to the relationship between landlords and tenants*

PIE is currently being misinterpreted as cases to which it is not applicable are brought before the court.²⁶³ For example, courts are being approached for eviction orders in terms of *PIE* in the case of a tenant whose lease agreement has been cancelled and who against the wishes of the owner remains in occupation of the property.²⁶⁴ *PIE* should certainly not be applicable in the latter matter because on the date when the property was originally occupied, it was occupied with the consent of the owner or the person in charge.²⁶⁵ The purpose of *PIE* is to provide for procedures for the eviction of unlawful occupiers and its provisions were never intended to regulate the relationship between landlords and tenants. The fact that the owner or person in charge has now withdrawn his or her consent is irrelevant. The wording of *PIE* is "... a person who occupies land without ... consent" not "a person who is in occupation of land without consent". However, the

261 See the discussion at 4.1 below.

262 See also *Kayamandi Town Committee v Mkhwaso* 1991 2 SA 630 (CPD) where the court held that the town committee was not entitled to take a resolution for the removal of a large body of unlawful occupiers from land controlled by it without first having considered whether at least a transit area could be made available where they could erect their own shelters. See also the discussion at 5.1.8 and 5.2 above.

263 Telephonic interview with Mr Thatcher from the Department of Housing on 27 November 2000, Pretoria. See also *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 1 SA 113 (SCA).

264 *Esterhuyze v Khamadi* 2001 1 SA 1024 (LCC).

265 In *Ellis v Viljoen* 2001 5 BCLR 487 (C) 491G-H the court confirmed that the provisions of *PIE* do not apply in cases where the initial occupation of property was with consent, but where the right to remain in occupation has terminated. See also *Ross v South Peninsula Municipality* 2000 1 SA 589 (C); *Van Zyl v Maarman* 2001 1 SA 957 (LCC); *Absa Bank Ltd v Amod* 1999 2 B ALL SA 423 (W); Du Plessis W, Olivier N and Pienaar J "Land reform: A never-ending process" 2000 *SAPL* 230 248.

owner or person in charge is entitled to institute proceedings for eviction under the common law. The same principle can also be applied to a person who was previously the owner of property which has since been sold in execution, but who refuses to vacate the premises. In this instance, the previous owner of the property had a right in law to occupy the property. Although the previous owner is staying on the property against the wishes of the new owner, he or she is not an unlawful occupier as defined in section 1 of *PIE*. An eviction order will thus have to be obtained in terms of the common law. Purshotam²⁶⁶ also wrongly believes that tenants who have had their leases terminated, but who remain in occupation, would fall within the definition of “unlawful occupier” as defined in *PIE*. The court in *Absa Bank Ltd v Amod*²⁶⁷ correctly argued that if it was the intention of the legislature to affect the common-law right of property owners, the definition of “unlawful occupier” would have included a person who, having had a contractual right to occupy such property, is now in unlawful occupation by reason of the termination of the right of occupation.

The incorrect application of *PIE* in practice has caused the Department of Housing to draft amendments to the Act in order to exclude explicitly the landlord-tenant situation from the ambit of the Act. The draft amendments were, however, not available at the time of this writing.

Disappointingly, the Supreme Court of Appeal in *Ndlovu v Ngcobo; Bekker v Jika*²⁶⁸ held that *PIE* applies to a broader sector than just “land invaders” or “squatters”.²⁶⁹ In the *Ndlovu* appeal the tenant’s lease was terminated lawfully, but he refused to vacate the property. In the *Bekker* appeal the respondent lived in his house for over a year without making bond repayments. The property was sold in execution and transferred to the appellants and the erstwhile owner refused to vacate. In both cases, the court extended the definition of “unlawful occupier” in section 1 of *PIE* to cases where persons occupied property with consent or other right, but where their occupation of the property later becomes unlawful. The court accordingly held that the provisions

266 Purshotam 1999 *De Rebus* 28.

267 1999 2 ALL SA 423 (W).

268 2003 1 SA 113 (SCA).

269 See also De Bruin P “Homeowners, tenants get same rights as squatters” *News24* (01-09-2002) Internet http://www.news24.com/News24/Finance/Economy/0,4186,2-8-25_1251120,00.html (Date of access: 21-11-2002).

of *PIE* are also applicable to “cases of holding over”.²⁷⁰ Meaning that the procedures in terms of *PIE* will need to be followed in order to evict tenants who fail to pay their rent or mortgagors who default on bond payments. In justifying the application of *PIE* to cases of holding over, the court also pointed out that *PISA* did not only deal with persons who unlawfully took possession of land, but also dealt with persons whose possession was lawful but became unlawful.²⁷¹

The court clearly erred in its interpretation of *PIE*. According to the rules of interpretation, if it is not possible to determine the legislature’s intention through a literal interpretation, external aids may be used to determine the intention of the legislature. Taking cognisance of the hardship unlawful occupiers have experienced before the enactment of *PIE* and that unlawful occupiers were generally understood as those who were homeless due to the lack of means to afford a home, it could not have been the intention of the legislature that the provisions of *PIE* should apply to “cases of holding over”. The purpose of *PIE* is to provide for just procedures for the eviction of those who unlawfully occupy land because of being destitute. The court has given an interpretation to the *PIE* which leads to absurdities which the legislature did not intend. The following example illustrates a possible absurdity. Where a property owner leases his residential property to a millionaire who fails to pay the monthly rental, possession of the property on termination of the lease would not be possible unless the owner complies with section 4 of *PIE* as the millionaire tenant would be considered an “unlawful occupier”. Furthermore, the court would not be able to grant an eviction order unless the court is satisfied that it is just and equitable to do so and then only after considering whether there is land available to which the millionaire tenant can be relocated if the property has been occupied for more than six months.²⁷² The courts should therefore be cautious not to allow financially sound people to abuse the law. It seems that the court in the *Ndlovu* case did not fully consider the effect of its decision on the property market. This judgment also has the effect that property owners will become more discerning when choosing tenants and will demand higher deposits to cover costs should a court order for eviction need to be obtained.²⁷³ This means that those who cannot afford to pay more

270 See also *Ridgway v Janse Van Rensburg* 2002 4 SA 186 (CPD) in which the court applied the provisions of *PIE* to mortgagors.

271 Section 1(a) of *PISA*.

272 See for example *Absa Bank Ltd v Amod* 1999 2 ALL SA 423 (W).

273 See also Minton I “Landlords at risk” *Home Front* (9-10-2002)

than one-month deposit will be denied access to rental accommodation. In fact, this might force those who cannot afford to pay a high deposit to unlawfully occupy property. Banks would also be hesitant to grant substantial bonds on properties. In cases where tenants fail to pay their rent or mortgagors default on bond payments, the proper approach would be to consider whether it is just and equitable, taking into account all the relevant circumstances as prescribed by section 26(3) of the final *Constitution*, to evict such tenants or mortgagors.²⁷⁴

However, in terms of section 6(1) of *PIE*, a mortgagor is regarded as an unlawful occupier. This raises the question whether it was not the legislator's intention to include the said category of persons under the ambit of *PIE*. The majority judgment in the *Ndlovu* case concluded that the insertion of the phrase "except where the unlawful occupier is a mortgagor" in section 6(1) makes no sense. The court argued that a mortgagor, being an owner, cannot be an unlawful occupier; only when the property has been sold in execution and transferred to a purchaser can the possession of the erstwhile owner become unlawful. Thus, the use of the phrase in section 6(1) cannot be used to interpret the definition of unlawful occupier.²⁷⁵ Unfortunately, despite this conclusion, the court extended the application of *PIE* to bond defaulters. However, the dissenting judgment in the *Ndlovu* case argued that if the intention of the legislator was that *PIE* should apply to cases of holding over, it would not have been necessary to refer specifically to ex-mortgagors in section 6(1).²⁷⁶ The inclusion of the reference to "mortgagor" in section 6(1) is not clear. However, on a reading of *PIE* in whole, it could not have been the legislator's intention that the application of *PIE* be extended to bond defaulters.

With regard to the question whether the application of *PIE* should be extended to the tenant-landlord relationship, the majority judgment in the *Ndlovu* case accepted the argument that it was the legislator's intention to protect tenants who, for instance, lose their work or fall ill and cannot afford to pay the rent. The court found that Schwartzman J in *ABSA Bank LTD v Amod*,²⁷⁷ in

Internet: <http://mymoney.iafrica.com/homefront/173425.htm> (Date of access: 9-10-2002).

274 See also the discussion with regard to the horizontal application of section 26(3) of the *Constitution* at 4.1 above.

275 See 121D-F of the judgment.

276 See 146G of the judgment.

277 1999 2 B ALL SA 423 (W).

which it was held that *PIE* does not apply to cases of holding over, overlooked the poor and failed to remind himself of the fact that the *Constitution* requires courts to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation.²⁷⁸ The court's reason for extending the application of *PIE* to the tenant-landlord relationship is not convincing. Measures, such as government's land reform programme are in place for addressing the plight of the poor regards housing. Excluding tenants from the application of *PIE* does not deny them their basic fundamental rights when evicted. The court granting an eviction order will be bound by the provisions of section 26(3) of the *Constitution* which stipulates that the court must consider all the relevant circumstances.²⁷⁹

The majority judgment considered the argument that *PIE* does not apply to cases of holding over given the provisions contained in the *Extension of Security of Tenure Act*²⁸⁰ (*ESTA*) and the *Rental Housing Act*.²⁸¹ *ESTA* deals with a particular class of persons whose lawful occupation has terminated, whilst the *Rental Housing Act* deals with the eviction of tenants. The court dismissed this argument without explaining how *PIE* is to be reconciled with the said Acts. The dissenting judgment correctly argued that if *PIE* was intended to apply to the tenant-landlord relationship, the *Rent Control Act*²⁸² which preceded the *Rental Housing Act* would have been repealed. Furthermore, the latter Act would not have been necessary if *PIE* was to be applied to leases.

Olivier JA in the dissenting judgment in which Nienaber JA concurred, rightly concludes that the provisions of *PIE* do not apply to ex-tenants, and that *PIE* applies only to persons who occupied property unlawfully and who never had and does not now have consent or another right to be in occupation.

It is worth mentioning that the Democratic Alliance (DA) has introduced a private member's bill

278 See 123C of the judgment.

279 See 4.1 above for the courts interpretation of relevant circumstances.

280 62 of 1997.

281 50 of 1999.

282 80 of 1976.

into Parliament which aims to stop defaulting tenants and bondholders from using the protection of the ruling in the *Ndlovu* case to stay on property, while refusing to pay rent or bond payments.²⁸³

6.2.2 *Criminalisation of unlawful occupation of land*

South Africa has recently experienced an increase in unlawful occupation of land, including an instance at Bredell near Kempton Park when Pan African Congress members were apparently selling plots for R25.²⁸⁴ The spate of unlawful land invasions can be attributed to several factors. These are, *inter alia*, the slow progress of the land reform programmes, the recent invasions of farms in Zimbabwe,²⁸⁵ and people's feeling that government is not fulfilling promises made during the country's first democratic elections. The increase in the unlawful occupation of land, and perhaps also fear for Zimbabwean-style land invasions has caused the Minister of Housing, Sankie Mthembi-Mahanyele, to commence with the drafting of amendments to *PIE*. According to the Minister, the current law makes it difficult for the state to uphold the rule of law. The proposed amendments to *PIE*, *inter alia*, provide that those found guilty of unlawfully occupying land could be sentenced to a maximum of two years imprisonment and/or a fine.²⁸⁶ The draft amendments, were, however, not available at the time of this writing.

The proposed amendments to *PIE* were strongly criticised by the National Land Committee (NLC). The NLC director, Zakes Hlatshwayo, responded to the proposed amendments as follows:

Government's efforts to stem land invasions by criminalising poor and landless people showed it was more concerned with grandstanding to the international community and placating foreign investors than responding to the desperate pleas of its own

283 Hartley W "Amendment aims to ensure stability for landowners" *Business Day* (2002-11-8) 2.

284 See also Du Plessis, Olivier and Pienaar 2000 *SAPL* 549.

285 See 3.1 above.

286 The information can be accessed at <http://iafrica.com/news/sa/801257.htm> (Date of access: 21-12-2001). See also the press release by the National Land Committee on 14 August 2001 entitled "Criminalising the poor will not solve the land problem".

constituency.²⁸⁷

Criminalising the unlawful occupation of land is certainly not feasible, especially when regard is had to the history of land distribution in South Africa which cannot be de-linked from the current housing shortage problem and the unlawful occupation of land. People squat because they are homeless. Rather than criminalising unlawful occupiers, Government should devise other measures to deal with homelessness and the unlawful occupation of land in South Africa²⁸⁸.

6.3 Summary

This chapter analyses the provisions of *PIE*. The analysis of the provisions of *PIE* shows that although *PIE* is positive in that it has improved the position of unlawful occupiers of land, it has weakened the right not to be deprived of property. The right not to be deprived of property is further limited in that *PIE* applies to all land, including private residential property. Because *PIE* is so wide in its reach, it creates certain absurdities. For example, where persons come back from holiday to find that their home is being unlawfully occupied, the procedure for eviction in terms of *PIE* must be followed. Meaning, that the unlawful occupiers cannot be evicted without an order of court - a time-consuming and costly process. Furthermore, as *PIE* requires the court to take cognisance of other relevant circumstances such as the rights and needs of the elderly, children, disabled persons and households headed by women, an owner has no guarantee that an eviction order will be granted.

Unlike its predecessor, *PIE* requires that unlawful occupiers of land must receive 14 days notice before the hearing of an application for an eviction order. *PIE* also differs from *PISA* in that it gives the court a discretion to grant an order for eviction. *PIE* further provides that where land has been unlawfully occupied for more than six months, the availability of alternative land must be considered. This is in line with the constitutional right to have access to adequate housing. *PIE* however, unlike *PISA*, fails to specifically provide for the establishment of transit areas. This is unfortunate as transit areas could play a positive role in the regulation of the unlawful

287 The information can be accessed at <http://iafrica.com/news/sa/801257.htm> (Date of access: 21-12-2001).

288 See the recommendations at chapter 8 below.

occupation of land.

This chapter further considers the applicability of *PIE* to the relationship between landlords and tenants. When considering the category of persons *PIE* (and its predecessor *PISA*) intends to target, it is clear that the provisions of *PIE* are not applicable to instances where the initial occupation of the property was lawful. However, the Supreme Court of Appeal in *Ndlovu v Ngcobo; Bekker v Jika*²⁸⁹ has expressed a contrary view and held that the provisions of *PIE* are applicable to the relationship between landlords and tenants as well as cases where a person fails to make bond payments. This chapter also discusses the feasibility of criminalising the unlawful occupation of land.

289 2003 1 SA 113 (SCA).

CHAPTER SEVEN

JUSTIFICATION OF THE LIMITATION ON THE RIGHT NOT TO BE DEPRIVED OF PROPERTY

7 Introduction

This chapter examines whether the limitation on the right not to be deprived of property is justified in terms of section 36 of the final *Constitution*.

7.1 Constitutional analysis

The fundamental rights enshrined in chapter 2 of the final *Constitution* are not absolute. Section 7(3) of the final *Constitution* lays down the general rule that all the rights in the Bill of Rights are limited in principle: “The rights in the Bill of Rights are subject to the limitations contained in or referred to in section 36, or elsewhere in the Bill”.²⁹⁰ These rights may be limited provided that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.²⁹¹

In order to determine the constitutionality of the provisions of *PIE*, a two-stage approach needs to be followed.²⁹² Firstly, it should be determined whether the right not to be deprived of property contained in section 25(1) of the final *Constitution* is being infringed by *PIE*. Van der Walt²⁹³ draws a distinction between internal modifiers, specific limitation provisions and the general limitation provision. In his view, internal modifiers define the scope of a right and everything excluded will not enjoy protection.²⁹⁴ He explains that internal limitations within a

290 Van der Walt AJ “The limits of constitutional property” 1997 *SAPL* 275 278.

291 See also Currie and De Waal *The new Constitutional and Administrative Law* 339 - 340.

292 *S v Makwanyane* 1995 3 SA 391 (CC) 100 - 102 ; *Ferreira v Levin*; *Vryenhoek v Powell* 1996 1 BCLR (CC) 26 H (par 44). See also Carey Miller DL *Land Title in South Africa* (Juta Kenwyn 2000) 294 - 295; Currie and De Waal *The new Constitutional and Administrative Law* 339; De Waal, Currie and Erasmus *The Bill of Rights Handbook* (2001) 426.

293 Van der Walt 1997 *SAPL* 275 279.

294 Van der Walt 1997 *SAPL* 275 280.

specific right make provision for the imposition of limitations on the specific right.²⁹⁵ Furthermore, the limitations contained in a protected right must be read with the general limitation provision in section 36.²⁹⁶ During the first leg of the two-stage approach, the scope of the affected right, including the effect of internal modifiers, must be determined.²⁹⁷ If it is found that the right not to be deprived of property has been infringed, then it should be determined whether the infringement of the right is justified in terms of the limitation clause. Both section 25 and 36 set out constitutional justifications for the imposition of limitations on the right not to be deprived of property.

PIE is clearly overbroad in its reach as it applies to all land, including land or buildings that are being used for residential purposes. *PIE* infringes the right not to be deprived of property in that ownership is being suspended until a order of court has been obtained for the eviction of the unlawful occupiers. Following is an analysis of the limitation clause to determine whether the infringement of the right not to be deprived of property is justified.

Section 36(1) stipulates that the Bill of Rights may be limited only in terms of law of general application. *PIE* is a law (statute) of general application. Section 36(1) further states that a limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This means that there must be a balance between the limitation and the purpose of the limitation.²⁹⁸ Section 36(1) sets out several factors that need to be considered when determining whether a limitation on a right is reasonable and justifiable. This section should be read together with section 7(3). Following is an analysis of these factors in relation to the right to property.

295 Van der Walt 1997 *SAPL* 275 282.

296 Erasmus J *The interaction between property rights and land reform* 255.

297 Van der Walt 1997 *SAPL* 275 283.

298 Rautenbach and Malherbe *Constitutional Law* (1996) 312.

(a) *The nature of the right*

Woolman²⁹⁹ states that this factor is seen as a consideration that helps to determine the level of scrutiny of the *specific limitation*.³⁰⁰ Rautenbach and Malherbe³⁰¹ argue that when the “nature of a right” is considered, it is important to determine the permissibility of the purpose which may justify the limitation of the right concerned and the scope of discretion which the person who limits the right should be afforded in terms of alternative ways to limit the right. It is also stated that the “nature of the right” relates mainly to the importance of the right in an “open and democratic society based on human dignity, equality and freedom”.³⁰² The right that is being protected is the right not to be deprived of property. When regard is had to the nature of this right, it is apparent that this right is by nature a right that requires active protection. As millions of people have been deprived of rights in property, the protection of the right in question is essential in an open and democratic society. Thus, the level of scrutiny of the limitation imposed by *PIE* on this right must be high.

(b) *The importance of the purpose of the limitation*

This factor is seen by Woolman³⁰³ as a threshold question that evaluates the justification of a limitation in view of its capacity to serve any of the values in the Bill of Rights. He, however, does not explain how it must be determined whether the objective justifies the limitation without employing the proportionality test and the balancing of interest. Rautenbach and Malherbe³⁰⁴ are of the view that the importance of the purpose of a right may play a role in determining the scope of discretion which should be afforded for limiting a right for a particular purpose. The purpose of the limitation on the right to property is to create a just procedure to be followed before people can be evicted from land unlawfully occupied by them. The limitation on the right in question

299 Van der Walt 1997 *SAPL* 275 321.

300 My emphasis.

301 Rautenbach and Malherbe *Constitutional Law* (1999) 352.

302 De Waal J, Currie I and Erasmus G *The Bill of Rights Handbook* (Juta Cape Town 1998) 152.

303 Rautenbach and Malherbe *Constitutional Law* (1996) 315.

304 Rautenbach and Malherbe *Constitutional Law* (1999) 353.

is closely linked to the fact that past evictions of unlawful occupiers were grossly inhumane.

(c) *The nature and extent of the limitation*

This factor, according to Woolman,³⁰⁵ involves a proper cost benefit analysis of the benefit of the limitation for society and the imposition it involves for an individual right-holder. According to Rautenbach and Malherbe,³⁰⁶ it should be determined how the interest and conduct protected by the right are affected by the limitation.³⁰⁷ The extent of the limitation on property used for residential purposes is disproportionate to the purpose of the limitation. The restriction on the right to the enjoyment and use of one's property is much more severe when unlawful occupiers are occupying your backyard³⁰⁸ compared to an open field of land not used for residential purposes.

(d) *The relation between the limitation and its purpose*

Woolman³⁰⁹ argues that once it is established that the limitation can serve the values of the Bill of Rights, the next question is to determine whether the means employed are rationally related to the achievement of the objective. The limitation on the right not to be deprived of property is indeed achieving the attended purpose of the legislation in question. But as seen in (c) above, the extent of the limitation is disproportionate in as far as it applies to property used for residential purposes.

(e) *Less restrictive means to achieve the purpose*

Taking into account this factor is important, because it obliges those limiting the rights and the

305 Rautenbach and Malherbe *Constitutional Law* (1996) 316.

306 Rautenbach and Malherbe *Constitutional Law* (1996) 315.

307 See also Rautenbach and Malherbe *Constitutional Law* (1999) 354; *S v Bhulwana: S v Gwadiiso* 1995 12 BCLR 1579 (CC), 1996 1 SA 388 (CC) [18].

308 This example seems unlikely, but the provisions of *PIE* allows for the occurrence of such a situation.

309 Rautenbach and Malherbe *Constitutional Law* (1996) states that the limitation imposed must promote the purpose. See also Rautenbach and Malherbe *Constitutional Law* (1999) 355.

courts reviewing its constitutionality to have due regard to alternative ways in which the purpose can be achieved.³¹⁰ There are less restrictive means to achieve the purpose of *PIE*. These are discussed under chapter 8 below.

7.2 Summary

This chapter considers the justification of the limitation on the right not to be deprived of property in terms of section 36 of the final *Constitution*. The provisions of *PIE* infringe the right not to be deprived of property in that the right to enjoy one's property is being suspended until an order of court has been obtained for the eviction of the unlawful occupiers. This infringement is not justified as the limitation on the right not to be deprived of property is disproportionate to the purpose of the limitation as far as it relates to private property used for residential purposes. Although the limitation on the right not to be deprived of property achieves the intended purpose of *PIE*, i.e to provide for fair procedures for the eviction of unlawful occupiers, the purpose of *PIE* can be achieved through less restrictive means.

310 Rautenbach and Malherbe *Constitutional Law* (1999) 356.

CHAPTER EIGHT

CONCLUSION AND RECOMMENDATIONS

8 Summary

As an apartheid-inspired piece of legislation, *PISA* did not provide for fair procedures for the eviction of unlawful occupiers. It also lacked respect for internationally recognised human rights such as the right to housing³¹¹ and the right to human dignity. *PISA* has been repealed by *PIE*. Unlike *PISA*, *PIE* places unlawful occupiers of land in a better position in that no one may be evicted from land unlawfully occupied or have their homes demolished without an order of court. Furthermore, notice must be given to unlawful occupiers. *PIE* also gives recognition to the fact that when evicting unlawful occupiers, consideration must be given to the availability of alternative land. Furthermore, unlawful occupiers have a right to apply for legal aid. *PIE* indeed brought the procedures concerning the eviction of unlawful occupiers in line with the final *Constitution*. Section 26 of the final *Constitution* gives recognition to the right to have access to adequate housing and protects persons from the act of illegal eviction. The provisions of *PIE* are also in line with international law concerning the right to housing.³¹² Although *PIE* has considerably improved the position of unlawful occupiers, it fails to address the issue of unlawful occupation of land in South Africa, thereby leaving room for Zimbabwean-style land invasions. *PIE* also makes provision for urgent proceedings for the eviction of unlawful occupiers. Unfortunately, the onus of proof created by this provision is difficult to discharge and creates a further impairment to the right not to be deprived of property. Unlike *PISA*, *PIE* fails to provide for the creation of transit areas. This is regrettable as transit areas served as a mechanism to control the unlawful occupation of land. Unfortunately, in its attempt to promote the right to have access to adequate housing, *PIE* violates the right not to be deprived of property as enshrined in section 25 of the final *Constitution*. Learning from how the unlawful occupation of land has been dealt with in Britain, recommendations are made for ensuring that the limitation on the right not to be deprived of property is not disproportionate to the purpose of *PIE*.

311 See the discussion at 2.1 above.

312 See the discussion at 2.1 above.

Disappointingly, the provisions of *PIE* are being misinterpreted as cases to which it is not applicable are brought before the court. This has been aggravated by the Supreme Court of Appeal judgment in *Ndlovu v Ngcobo; Bekker v Jika*³¹³ which wrongly held that the provisions of *PIE* also apply to cases where tenants fail to pay their rent or in cases where mortgagors default on bond payments.

In conclusion it is therefore recommended that:

- Similar to the transit areas created in terms of *PISA*, the homeless should be provided with temporary shelter until permanent accommodation can be made available.
- Government should find effective ways to reduce the high rate of unemployment which will in turn have the effect of reducing instances of unlawful occupation of land.
- Land reform in South Africa should be fast-tracked.
- *PIE* should be amended to provide that, where residential property has been occupied, whether for less or more than six months, the court should, in accordance with the *Grootboom* case, order that the local authority in which jurisdiction the property is situated must provide the unlawful occupier with immediate interim accommodation.
- Where an application is made to evict unlawful occupiers from private property, especially residential property, the case should be dealt with expeditiously.
- The court should be able to dispense with the requirement of notice as currently required by section 5(2) of *PIE* where the court is satisfied that the giving of notice may place at risk the life of the owner or person in charge of the land or where it may result in damage to the property concerned.
- *PIE* should be amended to provide that a private owner whose property is being unlawfully occupied has the right to apply for legal aid.
- *PIE* should be amended to specifically exclude its application from instances where persons have occupied property under a contractual or other right to do so and who continue to occupy such property after their right to do so has lawfully been terminated or has come to an end.
- The relationship between landlords and tenants should continue to be regulated by the

principles of the law of contract.

- Specially designated courts should be introduced to deal with the eviction of persons from property in “cases of holding over”.

8.1 *Addressing the problem of unlawful occupation of land*

PIE does not address the problem of land invasion adequately in that it fails to acknowledge the fact that South Africa has a housing shortage and that for this reason, people will continue to occupy land unlawfully. *PIE* has certainly brought the eviction of unlawful occupiers in line with section 26 of the final *Constitution* in that it provides for fair procedures for the eviction of unlawful occupiers from land. *PIE*, however, fails to address the problem of the unlawful occupation of land. The unlawful occupation of land will therefore continue as long as there is not enough alternative land available. Uncontrolled unlawful occupation of land can have a negative effect on the property market and indirectly also on tourism, thereby damaging the local economy. In order to avoid the Zimbabwean-style land grabbing³¹⁴ and to reduce the instances of the unlawful occupation of property, it is recommended that, similar to the transit areas created in terms of *PISA*,³¹⁵ the homeless should be provided with temporary shelter until permanent accommodation can be made available.³¹⁶ Areas therefore need to be identified where local authorities can temporarily accommodate people. It is, however, imperative that national and provincial government enable local authorities in this regard.³¹⁷ There seems to be no reason why *PIE* cannot be amended to provide for the establishment of transit areas similar to that provided for in *PISA*.³¹⁸

314 See the discussion at 3.1 above.

315 See 5.1.8 above.

316 This is in line with international law concerning the right to housing. See also General Comment no. 7 (1997) of the UN Committee on Economic, Social and Cultural Rights; and *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

317 See also Pienaar and Bouillon 2002 *Koers* 159 167 and 173.

318 Some local authorities are already making use of “transit camps” as a method of temporary shelter. See also *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 7 BCLR 652 (CC) where the court found that the current legislative framework is not designed or appropriate for the provision of temporary accommodation to victims of floods..

Various factors contribute to the unlawful occupation of land in South Africa. Chief amongst these is the high rate of unemployment. Government needs to find effective ways to reduce the high rate of unemployment which will in turn have the effect of reducing instances of unlawful occupation of land. Similarly, land reform needs to be fast-tracked.³¹⁹

8.2 *Unlawful occupation of private property*

In terms of *PIE*, it is inadequate to claim only ownership and the unlawful possession of property in order to obtain an eviction order.³²⁰ An owner who can prove no more than the total absence of any right of the occupier, loses ownership *pro tanto* unless the court is provided with facts that will make it just and equitable to grant an eviction order. The infringement of the right to property is far greater where private residential property is being unlawfully occupied.³²¹ In the case of urban property, the owner is further burdened by expenses (land taxes, liability for water and electricity) of which the advantage is gratuitously enjoyed by the unlawful occupier. It is therefore recommended that *PIE* be amended to provide that, where residential property has been occupied, whether for less or more than six months, the court should, in accordance with the *Grootboom* case, order that the local authority in which jurisdiction the property is situated must provide the unlawful occupier with immediate interim accommodation until permanent accommodation can be made available.³²² Immediate interim accommodation could include the creation of transit areas. However, the legislature's intention should be clear that the court's power should be exercised only in favour of those who unlawfully occupy property because of being destitute and who genuinely do not have any other means to provide for their own shelter. This will ensure that financially sound people do not misuse the provisions of *PIE*. Providing unlawful occupiers with immediate interim accommodation will avoid a situation where the court

319 It is hard to disagree with the following statement made by Zakes Hlatshwayo, National Land Committee Director: "President Thabo Mbeki's government can shout itself hoarse on the claim that what happened in Zimbabwe cannot happen here because we have a land reform programme, but this will continue to sound like hot air as long as the land reform programme continues to fail." South Africa thus needs to speed up its land reform programmes if it wants to prevent the Zimbabwean-style land invasions. Learning from the Zimbabwean experience, South Africa's land reform programmes must provide for training and facilities to make it possible for resettlement farms to produce comparable harvest.

320 See the discussion at 6.1.3 above.

321 See the discussion at chapter 7 above.

322 See the discussion at 4.1 above.

would refuse to grant an eviction order because the hardship to the unlawful occupiers if evicted exceeds the hardship to the owner if an eviction order is not granted. Furthermore, in order to ensure that the right not to be deprived of property is limited as little as possible, it is recommended that where an application is made to evict unlawful occupiers from private property, especially residential property, the case be dealt with expeditiously.

Alternatively, it is recommended that the concepts of “displaced residential occupier” and “protected intending occupier” in the *Criminal Justice and Public Order Act* of 1994 be incorporated in South African law.³²³ Making it a criminal offence not to leave premises when requested to do so by a displaced residential occupier or a protected intending occupier will certainly serve as a deterrent not to occupy residential property.

The possibility of damage to property cannot be excluded where such property is being unlawfully occupied. This is evident by the current land invasions in Zimbabwe. It is therefore recommended that similar to the position proposed by the *Trespassers on Land (Liability for Damages and Eviction)* Bill 2002, unlawful occupiers of land should be held liable for damage cause to that land or property on that land.³²⁴

8.3 *Urgent proceedings for an eviction order*

The court should be able to dispense with the requirement of notice as currently required by section 5(2) of *PIE* where the court is satisfied that the giving of notice may place at risk the life of the owner or person in charge of the land or where it may result in damage to the property concerned.

8.4 *Right to apply for legal aid*

PIE should be amended to provide that a private owner whose property is being unlawfully occupied has the right to apply for legal aid. The right to apply for legal aid could be made

³²³ See the discussion at 3.2 above.

³²⁴ See the discussion at 3.2 above.

subject to sufficient prove that the owner's income does not exceed a prescribed amount.³²⁵

8.5 *The application of PIE to tenants and bond defaulters*

The majority judgment in *Ndlovu v Ngcobo; Bekker v Jika*³²⁶ argued that *PIE* only delay the exercise of the landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier.³²⁷ However, occupation delayed is occupation denied.³²⁸ Occupation denied can be hugely detrimental to the party so affected. In the case of "genuine squatters", the provisions of *PIE* are designed to achieve a reconciliation between the hardship of the squatters if evicted and the harm to the owner if an eviction order is not granted. It cannot be said that the provisions of *PIE* were intended to apply to persons who deliberately refuse to vacate the property when their claim or term for occupation has terminated or who default on bond payments. It is therefore recommended that *PIE* should be amended to specifically exclude its application from instances where persons have occupied property under a contractual or other right to do so and who continue to occupy such property after their right to do so has lawfully been terminated or has come to an end.³²⁹ This can be achieved by amending the definition of unlawful occupier to explicitly exclude the said category of persons. Furthermore, it is recommended that the relationship between landlords and tenants should continue to be regulated by the principles of the law of contract.

8.6 *Specially designated courts*

In theory, having to obtain a court order to evict a tenant or a buyer who defaulted on bond

325 See also the discussion at 6.1.2 above.

326 2003 1 SA 113 (SCA).

327 See also the discussion at 6.2.1 above.

328 This is clearly illustrated by a recent case where a Benoni farmer was *de facto* disowned of his property in that he could not afford to pay the 1.8 million rand demanded by the sheriff for removing the unlawful occupiers from his land. See in this regard Mulder N "Farmer tackles government to oust 40 000 squatters" *News24* (19-9-2002) Internet http://www.news24.com/News24/South_Africa/Gaut.../0,1113,2-7-829_1259908,00.htm (Date of access: 21-11-2002).

329 See also the position in Britain where the fast-track procedure created by the Civil Procedure Amendment Rules of 2001 to evict unlawful occupiers cannot be used if the occupier is or was a tenant. See in this regard 3.2 above.

payments may not seem to be unreasonable. However, the reality is that the statutory procedures for eviction prescribe by *PIE* are cumbersome and expensive. Furthermore, overburdened courts mean that an eviction order can take several months to be granted. Thus, should the issue of whether the provisions of *PIE* apply to “cases of holding over”, taking into account the right not to be deprived of property in section 25 of the final *Constitution*, comes before the Constitutional Court, and if the Constitutional Court finds that the provisions of *PIE* so apply, or in the absence of the recommended amendments to *PIE*, it is recommended that specially designated courts be introduced to deal with the eviction of persons from property in “cases of holding over”. The introduction of such courts will ensure that applications for eviction orders are dealt with swiftly.

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APPENDIX A

The following are examples of a notice in terms of section 4(2) and an affidavit in support of such notice.

PH		CASE NO
IN THE MAGISTRATE'S COURT FOR THE DISTRICT OFHELD AT		
In the matter between		
	Applicant	
and		
	Respondent	
NOTICE IN TERMS OF THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT 19 OF 1998		
TAKE NOTICE THAT Application will be made on behalf of the abovementioned applicant at [time and date] in Court [number] or as soon thereafter as the Applicant may be heard for an order in the following terms:		
1	1.1	evicting the respondents from the building known as in terms of section 4(1) and section 6(1) of Act 19 of 1998 on the grounds that the respondents are in unlawful occupation of the said property and that it is just and equitable that they should be evicted from the property.
	1.2	directing the Sheriff of the Court or his lawful Deputy to demolish all structures erected by the Respondents on the property, to remove same from the property, and to tender the return of the materials to the Respondents at a time not more than one week after the said demolition and removal.
2	The Applicant is authorised to serve this Notice and Supporting Affidavit in the following manner:	
	2.1	by having a copy of this Notice and Supporting Affidavit attached to the principal door of each room or dwelling;
	2.2	by having the Sheriff read out this Notice and Supporting Affidavit by means of a loudhailer in English and [another official language]
3	The Respondents are alerted to the fact that they are entitled to:	
	3.1	Appear before the court on at to defend this action.
	3.2	Bring to the attention of the court at the hearing all relevant circumstances which would establish that the granting of an eviction order is unfair and unjust.
	3.3	Apply for Legal Aid [address of office situated closest to respondents]
4	Kindly take notice that the affidavit of will be used in support of this notice.	
DATED AT ON THIS THE 2000		

In the Magistrate's Court for the District of held at

Case No. of 19.....

In the matter between

and

Applicant

Respondent

I, the undersigned an adult male businessman of[address].

declare on oath as follows

- (a) I am the applicant in this action [or the facts herein stated are within my own knowledge and I am duly authorised to make this affidavit].
- (b) I am the owner of the property
- (c) The respondents are a group consisting of
- (d) The respondents took occupation of the premises under the following circumstances, viz
- (e) The respondents have no legal right to be in possession of my property.
- (f) The respondents have erected the following structures on the premises, viz
- (g) The respondents have caused the following damaged to the property, viz
- (h) The health and safety of the respondents and members of the public are at risk because
- (i) The respondents have been in occupation of the land for less than /more than 6 months.
- (j) I am suffering the following prejudice due to the respondents being in possession of my property, viz
- (k) The following steps have been taken by me to remove the respondents from my property, viz
- (l) The following alternative accommodation is available, viz OR
- (m) The following steps have been taken by me to establish the availability of alternative accommodation, viz..
- (n) The following steps have been taken by me to reach an agreement with the respondents, viz
- (o) Alternative dispute resolution has been used with the following result, viz OR
- (p) Alternative dispute resolution has been used because
- (q) I am aware of no fact or reason which would justify the respondents or anyone claiming title through them for remaining on the premises.
- (r) I am aware of no reason why the elderly, the children, the disabled persons and the households headed by children should remain on the premises.

.....

Signature

The deponent has acknowledge that he knows and understands the contents of this affidavit etc.