

**A CRITICAL ANALYSIS OF THE INFLUENCE OF THE “ PREVENTION OF THE  
ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT 19 OF  
1998” ON INVESTMENT IN RESIDENTIAL INCOME-PRODUCING PROPERTY**

BY

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## DECLARATION

I, Brink Botha, hereby certify that this treatise is an original document. The information used in the compilation of this treatise was taken from both primary and secondary sources. Wherever secondary sources have been made use of the necessary reference has been made to the author(s).

B Botha

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## **CHAPTER 1**

### **1.1 INTRODUCTION TO THIS STUDY**

This research will focus on the influence of legislation (as indicated in this research) on the investment decision in residential income-producing property.

Assumptions, as recorded in the hypothesis of this study, indicate that the legislation had a changing influence on the investment decision in residential income-producing property in comparison to the time period prior to the promulgation of the legislation.

The research methodology will be based on a comparative analysis of the current legislation and the proposed Draft Amendment Bill. This analysis will be tested by means of a case study analysis incorporating a phenomenological study based on written data.

The problems, sub-problems and hypothesis will be addressed and tested in this research in conjunction with the prescribed research methodology.

This research is concluded by means of a synopsis and recommendations.



## **1.2**

## **THE PROBLEM AND ITS SETTING**

### **1.2.1 Statement of the problem**

The “Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19” (PIE Act) was promulgated in 1998 in South Africa. One of the far-reaching effects of the promulgation of this Act is that prospective investors are compelled to change the criteria used for the decision to invest in Real Estate in order to achieve the projected results. The Department of Housing however published a Draft Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill in August 2003 for public information, discussion and comment. This Draft Amendment Bill amends certain conditions in terms of investment decision criterion.

Case studies is used to discuss the constitutional anomaly created by extending the PIE Act and reference is made to the PIE Act and its impact on defaulting tenants and mortgagors. These data indicate the above-mentioned problem statement and will be analysed in the context of the amended conditions of the PIE Act of 1998 in this research.

## **1.2.2 Statement of the sub-problems**

### **Sub-problem one**

The new law has affected the criteria used by investors for making investment decisions. Court judgements in PIE related cases indicated the effect of the decisions compared to common law.

### **Sub-problem two**

The Act brought about differences by sheer necessity in legal and binding contractual agreements between parties in the case of investment in income-producing property. Landlords, who have units in poor residential areas, can be prejudiced by the PIE Act, particularly those who did not do their homework in respect of prospective tenants. It is further stated that in future, such landlords will have to apply greater commercial circumspection in contracting with tenants.

### **1.2.3 Hypotheses**

#### **Hypothesis one**

The implementation of the PIE Act has a detrimental effect on the decision to invest in Real Estate.

#### **Hypothesis two**

The Act has brought about many changes. One of the most significant is the criterion used by property developers and especially investors in income-producing property when making investment decisions.

#### **Hypothesis three**

The implementation of the PIE Act resulted in changes in the conditions pertaining to legal and binding contracts that need to be agreed upon between parties involved in investment in residential income-producing property.

#### **1.2.4 Delimitations**

The following delimitations will be applicable to this investigation:

- The investigation will be confined to the area that falls under the jurisdiction of this act (South Africa).
- This qualitative study will be based on demarcated case studies as included in this study. These specific case studies focus on the problem statements and hypothesis as indicated in this research.

#### **1.2.5 Definitions of terms**

- **Real Estate**

Real estate is the physical land and appurtenances affixed to the land, e.g., structures. Real Estate is immobile and tangible. The legal definition of Real Estate includes land and all things that are natural part of the land (e.g., trees, minerals) as well as all things that are attached to it by people (e.g., buildings, site improvements). All permanent building attachments (e.g., cabinets, elevators) are usually considered part of the Real Estate. Real Estate includes all attachments, both below and above the ground (Appraisal Institute, 1992).

- **Investment in Real Estate**

According to Greer (1996) investment in Real Estate is the purchasing of a stream of anticipated future cash receipts that are expected to be generated by Real Estate.

- **Mortgagor**

An individual that possesses a mortgage bond as pre-requisite of ownership of a portion of Real Estate.

- **Phenomenological study**

According to Leedy (2001), a phenomenological study is a study that attempts to understand people's perceptions, perspectives and understandings of a particular situation.

## **1.2.6 Abbreviations**

PIE Act - Prevention of Illegal Occupation and Unlawful Occupation of Land Act 19 of 1998

LSSA - Law Society of South Africa

COSATU - Congress of South African Trade Unions

## **1.2.7 Assumptions**

- It is assumed that the reader understands the general concept of an “act” as part of general legislation.
- It is assumed that the PIE Act has a detrimental effect on the decision to invest in income-producing property.
- The PIE Act has brought about many changes in the decision to invest in income producing property.
- The implementation of the PIE Act resulted in changes in conditions of legal and binding contracts between parties involved in investment in residential income-producing properties.

### **1.2.8 Importance of the study**

- This study will analyse legal case studies pertaining to the influence of PIE in the property investment sector. The case will be analysed in conjunction with a comparative analysis of the amendments of the Draft Amendment Bill of the PIE Act. A phenomenological study on written comment on the above-mentioned scenarios will be analysed to be able to establish certain outcomes. This study will clarify speculative issues regarding the investment decision in income producing residential property under the jurisdiction of the PIE Act.
- This study will highlight important factors to be taken into consideration by current investors in income-producing property.

## **CHAPTER 2**

### **2            REVIEW OF RELATED LITERATURE**

#### **2.1            Background**

A general literature search was conducted in the combined disciplines of the PIE legislation as well as investment in residential income-producing property. Generic literature is available on the two individual disciplines, but not on the combined topic that falls within this research.

The following generic topics were located:

- Financial investment
- Investment in Real Estate
- Legislation, with specific reference to PIE

#### **2.2            Literature relating to sub-problem one**

- **Essentials of Real Estate Economics**

According to McKenzie (1996) a projection of a vacancy factor, credit loss and Net Operating Income are important factors in the



investment decision. The hypothesis of this research indicates changes to these assumptions. Comparative analysis and data analysis will be used in drawing conclusions.

- **Readings in Real Estate Investment Analysis**

Kinnard (1977), on behalf of the American Institute of Real Estate Appraisers of the National Association of Realtors, states that the majority of investor clients are equity investors. Their standard of acceptability must prevail in reporting what the present worth of the rights to income they may acquire actually is.

A comparative analysis will be drawn between previously accepted norms and newly adjusted and accepted norms in terms of relevant projections in the planning criteria for the potential investor in Real Estate.

- **The appraisal of Real Estate**

The text deals with valuation techniques. The Appraisal Institute (1992) states that for the application of any capitalization procedure, a reliable estimate of income expectancy must be developed. This research will focus on the influence and possible variable that is stated in hypothesis one.

- **Property Valuation in South Africa**

Jonker (1992) discusses various evaluation approaches especially focused on the South African environment. Analysis on relevant collected data and other comparable literature will be used to draw certain conclusions to prove the hypothesis in this research.

- **Investment analysis for Real Estate decisions**

Greer (1992) emphasises the decision making process for investment in Real Estate. He says that Real Estate investors, either directly or indirectly, purchase a stream of anticipated future cash receipts that are expected to be generated by Real Estate. All the hypothesis of this research focuses on the projected difference in these anticipated results because of the PIE legislation. This literature will be used as a benchmark for critical conclusions in the findings of this research.

## 2.3 Literature relating to sub-problem two (see 1.2)

- **Risk, uncertainty and decision making in Property Development**

Byrne and Cadman (1984) discuss the decision-making process for investment in Real Estate. The significance of this text is the fact that it was written almost two decades ago when the PIE Act was still nonexistent. This basic decision-making criteria stipulated in this text will be used as motivation in the results of the findings in this research.

- **Basis Real Estate Finance and Investment**

Epley (1980) lists “reliability of yield” as one of his criteria in his perfect investment. The hypothesis of this research questions this specific reliability of the yield after PIE legislation.

- **The Estate Agency Business**

This text will be utilised as a mere background to specific conditions relating to the technical aspects of Real Estate.

## 2.4

### Literature relating to sub-problem one and sub-problem two

- **Juta's Business Law**

Coertse (1999) discusses rights in land from a legal point of view. Critical matters including the PIE Act and other relevant Acts are analysed in the context of the two research problems.

- **Butterworths Property Law Digest (2001: 21)**
- **Butterworths Property Law Digest (2002: 19)**
- **Butterworths Property Law Digest (2002: 16)**
- **Butterworths Property Law Digest (2002: 3)**
- **Butterworths Property Law Digest (1999: 5)**

Specific case studies revolving around unlawful occupation are analysed in the case update of this article. This literature will be used as part of the qualitative methodology as mentioned before.

- **Butterworths Property Law Digest**

Pienaar (1999) discusses the effect of the PIE Act on owners and unlawful occupiers of land from a legal point of view. The study of the effect on the landlords indicate certain precautions, long term provisions and possible changes as a result of the proclamation of the PIE Act.

- **De Rebus: Dispute resolution**

In this article, Stein (1999) discusses legal methods in solving disputes. This generic legal information will be analysed in the research problems.

- **De Rebus: Case studies**

The Law Society of South Africa (LSSA) voices concern about property law ruling in specific case studies regarding the PIE Act. Implication to various parties involved in the legal matter are being analysed in this article.

- **De Rebus: Putting profits before human rights**

The issues of the Bill of Rights and protection of rights are discussed by Jazbhay (2002) in this article. He analyses certain case studies and compares judgements. These findings are discussed in relation to the human rights issue from a legislative point of view.

- **Finance week: We won't follow Zimbabwe**

Makoe (2002) discusses issues of land reform and legal rights in property from a government perspective, in this article with the heading: "We won't follow Zimbabwe". This information will be incorporated in the analysis of the other phenomenological studies.

- **Finance week: Will judgement threaten investment?**

"Will judgement threaten investment?" This heading and other crucial questions that form part of the two main sub-problems of this research are investigated by Muller (2000). Implications of the PIE Act on investment are discussed and tentative conclusions are drawn.

- **Finance week: State-sponsored land grab**

The issue of state sponsored land grab is discussed in this article.

Keenan (1998) supports a statement that the PIE Act amounts to legal deprivation of an owner's rights.

- **“Tydskrif vir die Suid Afrikaanse reg”**

Van der Walt (2002) discuss a model to evaluate South African land-reform legislation including exclusivity of ownership, security of tenure and eviction orders.

## **CHAPTER 3**

### **3            THE PRESENTATION OF THE DATA**

In this chapter the data will be presented in 3 categories, namely:

- The amended clauses of the Draft Amendment Bill of the PIE Act will be compared to the existing clauses in the PIE Act of 1998 in the form of a comparative analysis incorporating relevant literature.
- The analysis of an applicable case study incorporating the existing PIE Act as well as the Draft amended Bill of the PIE Act.
- Phenomenological study based on written data indicating perception in terms of the existing PIE Act incorporating the Draft amended Bill of the PIE Act.



### 3.1 Comparative analysis

#### 3.1.1 Comparative analysis of section 1 of the PIE Act

##### **Amended section 1 of the PIE Act**

*Section 1 of the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act, 1998*

*(hereinafter referred to as "the Act"),*

*is hereby amended-*

*(1) by the substitution for the definition of "court" of the following definition:*

*"court" means any division of the High Court or the magistrate's court in whose area or jurisdiction the land in question is situated, and includes a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996) and a Land Claims Court established under section 22 of the Restitution of Land Act, 1994 (Act No. 22 of 1994).*

*(2) by the substitution for the definition of "land" of the following definition:*

**"land"** *includes a surveyed or unsurveyed portion of land and buildings or structures on land;*

(3) by the insertion of the following definition after the definition

"municipality";

**"OCCUPY"** means to take possession of land or to erect a building or structure on land and 'occupier" and "occupation" have corresponding meanings;

(4) **by** the substitution for the definition of "unlawful occupier" of the following definition:

**"unlawful occupier"** means a person who occupies land without the express or tacit consent of the owner or person **in** charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of **1996**), and excluding any person who having initially occupied with such consent thereafter continues to OCCUPY once such consent has been withdrawn.

## **Existing section 1 of the PIE Act**

**1.** *In this Act, unless the context indicates otherwise—*

*(i) “building or structure” includes any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter;*

*(ii) “consent” means the express or tacit consent, whether in writing or otherwise, of the owner or person in charge to the occupation by the occupier of the land in question;*

*(iii) “court” means any division of the High Court or the magistrate’s court in whose area of jurisdiction the land in question is situated;*

*(iv) “evict” means to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will and “eviction” has a corresponding meaning; (xi)*

*(v) “land” includes a portion of land; (iii)*

*(vi) “Minister” means the Minister designated by the State President; (v)*

*(vii) “municipality” means a municipality in terms of section 10B of the Local Government Transition Act, 1993 (Act No. 209 of 1993); (vi)*

*(viii) “organ of state” means an organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996); (ix)*

*(ix) “owner” means the registered owner of land, including an organ of state; (i)*

*(x) “person in charge” means a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question; (viii)*

*(xi) “unlawful occupier” means a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996). (vii)*

### **Comparative analysis**

The amendment adds to the definition of courts and includes any division of the High Court or the magistrate’s court in whose area or jurisdiction the specific land is situated. Special tribunals in terms of the Special Tribunals Act, 1996 will be allowed to execute orders or impose fines. The amended Bill highlights ‘surveyed or unsurveyed portion of land’ in relation to the term ‘land’ in the existing PIE act. It furthermore stipulates that “unlawful occupier” excludes any person who having initially occupied with such consent thereafter continues to occupy once such consent has been withdrawn.

### **3.1.2 Amended section 2 of the PIE Act**

*The following section is hereby substituted for section 2 of the Act:*

*(1) Subject to subsection (2) [T] this Act applies in respect of all land throughout the Republic.*

*(2) This Act does not apply in respect of any proceedings:*

*(a) for the eviction of any tenant or former tenant or any person occupying land through the title of such tenant or former tenant;*

*QIJ by a mortgagee for the foreclosure of the bond and the eviction of a mortgagor or of any person holding title through the mortgagor;*

*(c) to any land acquired by way of a sale in execution or judicial sale of property.*

### **Existing section 2 of the PIE Act**

#### ***Application of Act***

**2.** *This Act applies in respect of all land throughout the Republic.*

## Comparative analysis

The amended Bill inserts the following sections in comparison to the existing PIE Act:

- The Act does not apply for the eviction of any tenant or former tenant or any person occupying land through the title of such tenant or former tenant.
- The Act does not apply in respect of any proceedings by a mortgagee for the foreclosure of the bond and the eviction of a mortgager or of any person holding title through the mortgager.
- The Act does not apply to any land acquired by way of sale in execution or judicial sale of property.

### 3.1.3 Amended section 3 of the PIE Act

*The following section is hereby substituted for section 3 of the Act:*

***3. Prohibition against arranging occupation of land without owner's consent or receiving or soliciting a consideration for arranging an unlawful occupation of land.***

*(1) No person may arrange or organise or permit a person or persons to occupy land without the consent of the owner or person in charge of that land.*

**3. Prohibition of receipt or solicitation of consideration in respect of unlawful occupation of land.**

*(1) No person may directly or indirectly receive or solicit payment of any money or rent or other consideration as a fee or charge for participation in, or arranging or organising or permitting a person to occupy land without the consent of the owner or person in charge of that land. The money or rent or consideration referred to above includes, but is not limited to, membership fees, legal costs, administration costs, services, services connection fees or payment for any socio economic infrastructure.*

**[(2)]** *& Any person who contravenes [a] any of the provision<sup>2</sup> of subsections (1) and (2) is guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years, or to both such time and such imprisonment.*

**[(3)]** *If The court which convicts any person of a contravention of this section, must order any money or rent or any assets acquired with such money or rent, or other consideration received by that person which have*

*been seized, to be forfeited, and the said money and the proceeds of the sale of such assets or such other consideration be paid to the person or persons from whom the money, assets or other consideration was received, and where such person or persons cannot be positively identified, into the relevant municipal operating account or the National Revenue Fund as the case may be. Where the money or consideration forfeited is rental money, which was paid to a person other than the landlord or his or her agent such money shall be paid to the landlord or his or her authorized nominee.*

**[(4)]** *If any money has been received in contravention of subsection [(1)] & but has not been seized or made available for purposes of confiscation, the court which convicts any person of a contravention of this section, may order the amount proved to the satisfaction of the court to have been received by such person to be paid to the person or persons from whom the money or other consideration was received, and where such person or persons cannot be positively identified, into the relevant operating account or the National Revenue Fund as the case may be, and such order has the effect of and may be executed against such person as if it were a civil judgment in favour of that person or persons from whom the money or other consideration was received or in favour of the State.*



### **Existing section 3 of the PIE Act**

#### ***Prohibition of receipt or solicitation of consideration in respect of unlawful occupation of land***

*(1) No person may directly or indirectly receive or solicit payment of any money or other consideration as a fee or charge for arranging or organising or permitting a person to occupy land without the consent of the owner or person in charge of that land.*

*(2) Any person who contravenes a provision of subsection (1) is guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years, or to both such fine and such imprisonment.*

*(3) The court which convicts any person of a contravention of this section, must order any money or other consideration received by that person which have been seized, to be forfeited, and the said money and the proceeds of such other consideration may be paid to the person or persons from whom the money or other consideration was received, and where such person or persons cannot be positively identified, into the National Revenue Fund.*

*(4) If any money has been received in contravention of subsection (1) but has not been seized or made available for purposes of confiscation, the court which convicts any person of a contravention of this section, may order the amount proved to the satisfaction of the court to have been received by such person to be paid to the person or persons from whom the money or other consideration was received, and where such person or persons cannot be positively identified, into the National Revenue Fund, and such order has the effect of and may be executed against such person as if it were a civil judgment in favour of that person or persons from whom the money or other consideration was received or in favour of the State.*

### **Comparative analysis**

The amendments concern individuals who arrange illegal occupations and unlawful receipt of remuneration for related activities. It clearly indicates the arrangement of occupation of land without the owner's consent or the arrangement of an unlawful occupation of land without consent of the owner of the land.

### 3.1.4 Amended section 4 of the PIE Act

*(1) The following subsections are substituted for subsections (2) and (3) of section 4 of the Act:*

*(section 2) At least 14 days before the hearing of the proceedings contemplated in*

*subsection (1) **[the court must serve]** written and effective notice of the proceedings must be served on the unlawful occupier and the municipality having jurisdiction.*

*(section 3) **[Subject to the provisions of subsection (2),]** **[t]** The procedure for the serving of notices and filing of papers in terms of this Act is as prescribed by the rules of the court in question.*

*(2) The following new subsection is to be inserted after subsection (7) of section 4 of the Act: -*

*(7B) If a court finds that an unlawful occupier referred to in subsections (6) and (7) above occupied the land in question when he or she was at the time already occupying a home, the Court may, after considering all the relevant circumstances as contemplated in section 26(3) of the Constitution, order the eviction of such unlawful occupier, but must not take into account any of the specific circumstances referred to in subsections (6) and (7) above.*

## **Existing section 4 of the PIE Act**

### ***Eviction of unlawful occupiers***

*4. (1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.*

*(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.*

*(3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.*

*(4) Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.*

*(5) The notice of proceedings contemplated in subsection (2) must—*

- (a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;*
- (b) indicate on what date and at what time the court will hear the proceedings;*
- (c) set out the grounds for the proposed eviction; and*
- (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.*

*(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.*

*(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made*

*available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.*

*(8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine—*

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

*(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph*

*(a).*

*(9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.*

*(10) The court which orders the eviction of any person in terms of this section may make an order for the demolition and removal of the buildings or structures that were occupied by such person on the land in question.*

*(11) A court may, at the request of the sheriff, authorise any person to assist the sheriff to carry out an order for eviction, demolition or removal subject to conditions determined by the court: Provided that the sheriff must at all times be present during such eviction, demolition or removal.*

*(12) Any order for the eviction of an unlawful occupier or for the demolition or removal of buildings or structures in terms of this section is subject to the conditions deemed reasonable by the court, and the court may, on good cause shown, vary any condition for an eviction order.*

### **Comparative analysis**

The proposed amendments deal with the manner in which the court serves written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction. The amendment furthermore states that if the court finds that the unlawful occupier referred to occupied the land in question when he or she was at the time already occupying a home, the Court may, after considering all the relevant circumstances, order the eviction of such unlawful occupier, but must not take into account any of the specific circumstances referred to.

### 3.1.5 Amended section 5 of the PIE Act

*The following subsection is substituted for subsection (2) of section 5 of the Act:*

*(2) Before the hearing of the proceedings contemplated in subsection (1), **[the court must give]** written and effective notice of the intention of the owner or person in charge to obtain an order for eviction of the unlawful occupier must be given to the unlawful occupier and the municipality in whose area of jurisdiction the land is situated.*

### Existing section 5 of the PIE Act

#### ***Urgent proceedings for eviction***

**5.** *(1) Notwithstanding the provisions of section 4, the owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order, and the court may grant such an order if it is satisfied that—*

- (a) 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, if an order for eviction is granted; and*

*(c) there is no other effective remedy available.*

*(2) Before the hearing of the proceedings contemplated in subsection (1), the court must give written and effective notice of the intention of the owner or person in charge to obtain an order for eviction of the unlawful occupier to the unlawful occupier and the municipality in whose area of jurisdiction the land is situated.*

*(3) The notice of proceedings contemplated in subsection (2) must—*

*(a) state that proceedings will be instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;*

*(b) indicate on what date and at what time the court will hear the proceedings;*

*(c) set out the grounds for the proposed eviction; and*

*(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.*

### **Comparative analysis**

The amendment stipulated the written notice that must be served to the unlawful occupier of the intention of the owner to obtain an eviction order.

### 3.1.6 Amended section 6 of the PIE Act

*The following subsection is substituted for subsection (1) of section 6 of the Act:*

*(1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, **except where the unlawful occupier is a mortgagor and the land in question is sold in a sale in execution pursuant to a mortgage**-and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if -*

*(a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained: or*

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

### **Existing section 6 of the PIE Act**

#### ***Eviction at instance of organ of state***

**6.** *(1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold*

*in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—*

*(a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or*

*(d) it is in the public interest to grant such an order.*

*(2) For the purposes of this section, “public interest” includes the interest of the health and safety of those occupying the land and the public in general.*

*(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—*

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

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

*(e) the availability to the unlawful occupier of suitable alternative accommodation or land.*

*(4) An organ of state contemplated in subsection (1) may, before instituting such proceedings, give not less than 14 days' written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier.*

*(5) If an organ of state gives the owner or person in charge of land notice in terms of subsection (4) to institute proceedings for eviction, and the owner or person in charge fails to do so within the period stipulated in the notice, the court may, at the request of the organ of state, order the owner or person in charge of the land to pay the costs of the proceedings contemplated in subsection (1).*

*(6) The procedures set out in section 4 apply, with the necessary changes, to any proceedings in terms of subsection (1).*

### **Comparative analysis**

The amendment describes under which conditions an organ of state may institute proceedings for the eviction of an unlawful occupier from land, which falls within its area of jurisdiction

### 3.2 Case study

Recent judgment of the Supreme Court of Appeal in *Ndlovo v Ngcobo* and *Bekker v Jika* was the cause of much concern to property owners, landlords and letting agents (The estate agency affairs board's comment on the recent judgment handed down by the Bloemfontein Supreme Court of Appeals in the matter *Ndlovo and others v Bekker and others*).

These cases will be used as case studies in this research. Various comments from publications will be reflected in the statements, assumptions and recommendations.

The Estate Agency Board states that the perception originated from the above-mentioned cases that situations may arise where a landlord has no choice but to put up with an unlawful occupier indefinitely after cancellation of the lease.

The two most important questions that came from the judgments in the above-mentioned case studies are the following:

- Does the PIE Act afford the former owner of land protection against eviction where the person refuses to vacate the property after the bondholder sold the property in execution to a new owner?

- Does the PIE Act afford a former lessee protection against eviction where that person refuses to vacate the premises after the landlord has lawfully cancelled the lease?

Common law prescribes that a property owner is entitled to an eviction order if it can be established that he is the lawful owner of the property and that the person in occupation has no right to remain in possession thereof. The critical issue in the case study was to determine if the defaulted party in the two cases fell under the jurisdiction of the PIE Act.

It was argued on behalf of the appellant in *Ndlovu* that PIE affords unlawful occupiers limited protection in eviction proceedings. Council for the appellants in *Bekker* argued that PIE was not intended to apply to holding over cases. The court delivered a split judgment. The majority noted that PIE has its origins in section 26 (3) of the Constitution, which prohibits evictions from a property without a court order. (Chetty, 2003)

Chetty (2003) highlights two important issues in this article applicable to the PIE Act 19 of 1998. In the one case study *Ndlovu* was not judged as an unlawful occupier and therefore enjoyed protection under the PIE Act. The PIE amendment Bill however changed the section of the Act that influenced the decision in section 1 as described in the beginning of this chapter.

In the second case study, *Jika* fell into bad debt with the mortgage bond and the property was sold in a sale of execution. The new owners filed for unlawful occupation, but the Supreme Court did not constitute. The PIE amendment Bill also changed the section of the Act that influenced the decision in section 2 as described in the beginning of this chapter.

There is a fundamental difference between the circumstances under which an eviction order can be granted in terms of common law and the PIE Act. In common law, a court is not called upon to determine whether it is just, equitable and fair to evict the unlawful occupier and none of the aspects in the PIE Act needs to be considered. Under the jurisdiction of the PIE Act, an eviction order cannot be granted unless the court is of the opinion that it is just and equitable to do so. In such a case all the considerations as stipulated in the Pie Act need to be taken into consideration.

### 3.3 Phenomenological study

This study attempts to understand the perceptions and perspectives of nominated experts in the field of the study that this research is conducting. (Leedy, 2001)

The researcher listed the following set of semi-structured questions:

- What is your perception on investment potential in residential income-producing property after the promulgation of the PIE Act of 1998?
- Will the promulgation of the proposed Draft Amendment Bill of the PIE Act have a positive influence on the property sector?
- What specific clauses in the PIE Act of 1998 were evident in the judgment of the two prominent cases of the Supreme Court of Appeal between *Ndlovu v Ngcobo* and *Bekker v Jika*? (Case study included in this research as appendix 3)
- Do you foresee any shortcomings in the proposed Draft Amendment Bill of 2003 based on the PIE Act of 1998?



- Is the term 'unlawful occupier' now clearly defined in the context of the jurisdiction of the PIE Act?
- What is the impact of 'common law' in the context of PIE legislation?

The following nominated extracts were tested in this phenomenological analysis of this study:

- Norris (2003) writes in his capacity as Property Editor of the Cape Argus that the proposed Draft Amendment Bill of the PIE Act will stimulate investment. He states that the controversial ruling in the two case studies as discussed in this research sowed confusion and shock amongst property owners and professionals.
- Slot (2003) said that the amendments would definitely stimulate investment in residential property. He added that it is a victory for law of contracts.
- COSATU (2003) reflect their concern that amendments to address the shortcomings with regards to the rights of property owners outlined in the PIE Act, do not afford enough protection to the lessee of the property.
- Chetty (2003) concluded the article by saying that the majority judgment in the case studies referred to in this research, is a landmark in ensuring that

people are protected from arbitrary evictions without necessarily undermining the interest of property owners.

- PIE sought to define, but not limit, the relevant circumstances that a court should consider before evicting people. It sought to codify the process and the considerations for the eviction of what is termed unlawful occupiers (Spohr, 2002).
- Gildenhuys (1999) introduced his article by stating that inherent in the nature of ownership of land is that the owner of the land is entitled to possession thereof. Others can however acquire a right to possession of the land, such as a tenant under a lease, or a building contractor under a builder's lien.
- The question arises whether the State, in promulgating the PIE Act, has not shifted their social responsibility to provide for and tend to the needs of the elderly, children and disadvantaged people onto individual landowners (Pienaar, 1999).
- Muller, (2002) reported newspaper headlines that implied that tenants have the same right as squatters. She further stated that the reports causes panic among rental property owners who concluded that tenants would be entitled to occupy property without paying rent.

The outcome of the phenomenological questionnaire is as follows:

**Question**

- What is your perception on investment potential in residential income-producing property after the promulgation of the PIE Act of 1998?

**Answer**

The general perception is negative and a significant negative impact was indicated by the extracts. This outcome is based on perceptions before the Draft Amendment Bill of the PIE Act was published in the Gazette for comment.

**Question**

- Will the promulgation of the proposed Draft Amendment Bill of the PIE Act have a positive influence on the property sector?

**Answer**

The perspective of the analysis is positive and the general feeling is that investment in income-producing property will be stimulated again and in some cases status quo will be maintained.

### **Question**

- What specific clauses in the PIE Act of 1998 were evident in the judgment of the two prominent cases of the Supreme Court of Appeal between *Ndlovu v Ngcobo* and *Bekker v Jika*?

### **Answer**

- The issue of the defaulting mortgagee that was evident in the case study between *Bekker v Jika*.
- The understandable definition of an 'unlawful occupier' in the context of the study was vague before the publishing of the Draft amendment Bill of the PIE Act.

### **Question**

- Do you foresee any shortcomings in the proposed Draft Amendment Bill of 2003 based on the PIE Act of 1998?

### **Answer**

A low percentage of negativity has been stated. The general perception is that the Draft Amendment Bill of the PIE Act will

maintain status quo as before the promulgation of the PIE Act in 1998.

**Question**

- Is the term 'unlawful occupier' now clearly defined in the context of the jurisdiction of the PIE Act?

**Answer**

Yes

**Question**

- What is the impact of 'common law' in the context of PIE legislation?

**Answer**

The general perception and understanding of the sampling statements of this study is that the rules of common law regarding ownership of property will be applicable when an eviction case does not fall under the jurisdiction of the PIE Act.

## **CHAPTER 4**

### **4            THE ANALYSIS AND INTERPRETATION OF THE DATA**

In this chapter, the reviewed literature data will be implemented in conjunction with the comparative analysis assumptions of chapter 3 to analyse and interpret the main research problem and sub-problems. The research methodology comprising the phenomenological study of written data as well as case study analysis will be incorporated in the above-mentioned analysis to prove the hypothesis of this research.

#### **4.1            Analysis and interpretation of data relating to the problem statements**

##### **4.1.1            The main problem statement**

Investors are compelled to change the criteria used for the decision to invest in Real Estate in order to achieve the projected results due to the promulgation of the PIE Act in 1998. The Department of Housing however published a Draft Amendment Bill of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 in 2003 for public information, discussion and comment. The draft amendment Bill amends certain conditions in terms of investment decision criterion.

#### **4.1.1.1 Analysis and interpretation of data relating to the main problem statement**

Kinnard (1977) discuss the statistical right to income of the prospective investor. The PIE Act introduced a lengthy eviction process in the case of Illegal Eviction of an Unlawful Occupier. Lotz (2003) listed the procedure in the case of the eviction of an unlawful occupier. He stated that Section 4 of the Act introduced a unique and peremptory procedure, which had to be followed in order to evict unlawful occupiers from land.

He summarised the modus operandi procedural analysis as follows:

- Ordinary Court proceedings still to be followed.
- In addition to the above and at least 14 days before the hearing of the eviction proceedings, the unlawful occupier as well as the municipality having jurisdiction must be given notice of the proceedings.
- The notice must contain the following particulars:
  - That proceedings are being instituted in terms of the Act for the eviction of the unlawful occupier
  - The date and time of the proceedings
  - The grounds for the proposed eviction
  - That the unlawful occupier is entitled to appear before Court to defend the matter
  - That the unlawful occupier has the right to apply for legal aid

- The court will issue an Order for the eviction of an unlawful occupier when it is satisfied that:
  - No valid defence has been raised by the unlawful occupier.
  - That all the requirements of the Act have been complied with.
  - 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.

Lots (2003) further states that if the unlawful occupier has occupied the land in question unlawfully for more than a period of 6 months at the time when the proceedings are initiated, the Court must, in addition to the above requirements, consider whether land has been made available or can reasonably be made available for the relocation of the unlawful occupier. Once a court has made an Order for the Eviction of the unlawful occupier it must consider and determine:

- The date upon which the unlawful occupier must vacate the land
- The date on which an Eviction order may be carried out

The above-mentioned guideline in terms of the eviction procedure was based on the PIE Act of 1998. The amendments as stipulated in chapter 3



of this treatise, clearly states that a defaulting tenant does not fall in this category, but that the above-mentioned procedure only refers to the so-called 'squatters'.

#### **4.1.2 Sub-problem one**

The new law has affected the criteria used by investors for making investment decisions.

##### **4.1.2.1 Analysis and interpretation of data relating to sub-problem one**

According to Costa (2003) court judgements in PIE related cases indicated the effect of the decisions compared to common law. Greer (1992) states that investors in income producing property purchase a stream of anticipated future cash receipts. The eviction procedure discussed in the main problem analysis initiated the concerns that lead to this sub-problem. The proposed amendments however clearly identify that typical 'anticipated future cash receipts' in the form of rental income will maintain status quo as before the promulgation of the Act.

### **4.1.3 Sub-problem two**

The Act brought about differences by sheer necessity in legal and binding contractual agreements between parties in the case of investment in income-producing property.

#### **4.1.3.1 Analysis and interpretation of data relating to sub-problem one**

Costa (2003) says that landlords, who have units in poor residential areas, will be prejudiced by the PIE Act, particularly those who did not do their homework in respect of prospective tenants. He further states that in future, such landlords will have to apply greater commercial circumspection in contracting with tenants.

Epley (1980) discusses the 'reliability of yield' as one of the criteria in his investment model. To be able to realise this 'reliability of yield', the thorough understanding of contractual agreements is of outmost importance. The PIE Act of 1998 affected this contractual agreement as a result of the lengthy eviction procedure as discussed in the analysis of the main problem. Pro-active clauses had to be added to traditional pro forma lease agreements to secure 'reliability of yield'. The proposed amendment to the PIE Act clearly defines unlawful occupiers. This definition clarifies the issue that traditional lessees under normal circumstances do not fall under the jurisdiction of the proposed Amended PIE Act.

## **4.2 Analysis and interpretation of data in terms of the hypothesis**

### **4.2.1 Hypothesis one**

The implementation of the PIE Act of 1998 has a detrimental effect on the decision to invest in Real Estate.

#### **4.2.1.1 Outcome of the research based on hypothesis one**

This research proves the hypothesis to be correct. The promulgation of the proposed amendment to the PIE Act will prove the hypothesis wrong.

### **4.2.2 Hypothesis two**

The Act has brought about many changes. One of the most significant is the criterion used by property developers and especially investors in income-producing property when making investment decisions.

#### **4.2.2.1 Outcome of the research based on hypothesis two**

This research proves the hypothesis to be correct. The promulgation of the proposed amendment to the PIE Act will prove the hypothesis wrong.

### **4.2.3 Hypothesis three**

The implementation of the PIE Act resulted in changes in the conditions legal and binding contracts that need to be agreed upon between parties involved in investment in residential income-producing property.

#### **4.2.3.1 Outcome of the research based on hypothesis three**

This research proves the hypothesis to be correct. The promulgation of the proposed amendment to the PIE Act will prove the hypothesis wrong.

## **CHAPTER 5**

### **5            SUMMARY CONCLUSIONS AND RECOMMENDATIONS**

#### **5.1         Summary**

This research is based on existing legislation and compared to proposed amendments to the existing legislation. The research problems and hypothesis were based on the existing legislation and this research recommended answers to the problems and proof to the hypothesis with the application of the three-sided research methodology utilized.

#### **5.2         Conclusions**

The PIE Act of 1998 caused panic amongst investors, potential investors and other parties concerned in the property market. The important factor was that the legislation had an influence on the projected income stream for investors in residential income-producing property. The judgments in the case studies used in this research determined that the defaulted tenants were protected by the PIE Act of 1998. The consequence of this judgment is that a lengthy and costly eviction procedure has to be followed that reduces the projected income stream that was expected under normal circumstances. The projected determination of the income stream in investment in residential income-producing property is one of the most

important criteria in the investment decision for such investors. Financial feasibility of the investment decision is based on the projected income stream. The outcome of this research proved that the promulgation of the PIE Act had a negative influence on the known possibilities of investment in residential income-producing property. The proposed Draft Amendment Bill of the PIE Act amended the critical conditions under dispute and reinstated the accepted believe of investment in residential income-producing property as it was before the promulgation of the PIE Act in 1998. Important criteria have been indicated by this research that lead to the recommendations and synopsis.

### **5.3 General recommendations**

The study focused on the influence of the PIE Act of 1998 on the investment decision in residential income-producing property. This research was aimed in providing guidelines for current and prospective investors in residential income-producing property. The study determined that the Draft amendment Bill of the PIE Act introduced answers to critical issued that was investigated in this research.

## 5.4 Synopsis

Although this research verifies the answers as discussed, the following recommendations can be made to current and prospective investors in residential income producing property:

- Establish a clear understanding and general knowledge of the common law applicable to eviction.
- Clearly define the term 'unlawful occupier' in the context of the current or prospective investment in residential income-producing property.
- Have thorough knowledge of contractual clauses that is applicable in the agreement between the investor and the tenant for the specific criteria of investment.
- Define investment criteria in terms of target socio economical prospective tenant groups as part of an effective risk management model or strategy.

## **5.5 Final recommendation**

The findings of this study may be used for further research for a doctoral study partially investigating risk management as decision criteria for investment in income-producing property.



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## **APPENDICES**

Copies of relevant research documentation will be attached under this section in the Research Report with the existing Act as indicated below.

### **Appendix 1**

- **Prevention of illegal eviction from and unlawful occupation of land act 19 of 1998**

**An act of parliament: South Africa (1998.) Full text extract from the Government Gazette number 18964 of 1998**

***“REPUBLIC OF SOUTH AFRICA***

***PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL  
OCCUPATION OF LAND ACT***

***GENERAL EXPLANATORY NOTE:***

***ACT***

***To provide for the prohibition of unlawful eviction; to provide for procedures for the eviction of unlawful occupiers; and to repeal the Prevention of Illegal Squatting Act, 1951, and other obsolete laws; and to provide for matters incidental thereto.***

**PREAMBLE**

**WHEREAS** *no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property;*

**AND WHEREAS** *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;*

**AND WHEREAS** *it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of landowners to apply to a court for an eviction order in appropriate circumstances;*

**AND WHEREAS** *special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and that it should be recognised that the needs of those groups should be considered;*

**BE IT THEREFORE ENACTED** *by the Parliament of the Republic of South Africa, as follows:—*

## **Definitions**

**1.** *In this Act, unless the context indicates otherwise—*

*(i) “building or structure” includes any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter;*

*(ii) “consent” means the express or tacit consent, whether in writing or otherwise, of the owner or person in charge to the occupation by the occupier of the land in question;*

*(iii) “court” means any division of the High Court or the magistrate’s court in whose area of jurisdiction the land in question is situated;*

*(iv) “evict” means to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will and “eviction” has a corresponding meaning; (xi)*

*(v) “land” includes a portion of land; (iii)*

*(vi) “Minister” means the Minister designated by the State President; (v)*

*(vii) “municipality” means a municipality in terms of section 10B of the Local Government Transition Act, 1993 (Act No. 209 of 1993); (vi)*

*(viii) “organ of state” means an organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996); (ix)*

*(ix) “owner” means the registered owner of land, including an organ of state; (i)*



(x) “person in charge” means a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question; (viii)

(xi) “unlawful occupier” means a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996). (vii)

### **Application of Act**

**2.** This Act applies in respect of all land throughout the Republic.

### **Prohibition of receipt or solicitation of consideration in respect of unlawful occupation of land**

**3.** (1) No person may directly or indirectly receive or solicit payment of any money or other consideration as a fee or charge for arranging or organising or permitting a person to occupy land without the consent of the owner or person in charge of that land.

*(2) Any person who contravenes a provision of subsection (1) is guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years, or to both such fine and such imprisonment.*

*(3) The court which convicts any person of a contravention of this section, must order any money or other consideration received by that person which have been seized, to be forfeited, and the said money and the proceeds of such other consideration may be paid to the person or persons from whom the money or other consideration was received, and where such person or persons cannot be positively identified, into the National Revenue Fund.*

*(4) If any money has been received in contravention of subsection (1) but has not been seized or made available for purposes of confiscation, the court which convicts any person of a contravention of this section, may order the amount proved to the satisfaction of the court to have been received by such person to be paid to the person or persons from whom the money or other consideration was received, and where such person or persons cannot be positively identified, into the National Revenue Fund, and such order has the effect of and may be executed against such person as if it were a civil judgment in favour of that person or persons from whom the money or other consideration was received or in favour of the State.*

### ***Eviction of unlawful occupiers***

*4. (1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.*

*(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.*

*(3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.*

*(4) Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.*

*(5) The notice of proceedings contemplated in subsection (2) must—*

*(a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;*

*(b) indicate on what date and at what time the court will hear the proceedings;*

*(c) set out the grounds for the proposed eviction; and*

*(f) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.*

*(3) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to*

*(4) do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.*

*(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.*

*(8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the*

*unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine—*

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

*(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).*

*(9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.*

*(10) The court which orders the eviction of any person in terms of this section may make an order for the demolition and removal of the buildings or structures that were occupied by such person on the land in question.*

*(11) A court may, at the request of the sheriff, authorise any person to assist the sheriff to carry out an order for eviction, demolition or removal subject to conditions determined by the court: Provided that the sheriff must at all times be present during such eviction, demolition or removal.*

*(12) Any order for the eviction of an unlawful occupier or for the demolition or removal of buildings or structures in terms of this section is subject to the conditions deemed reasonable by the court, and the court may, on good cause shown, vary any condition for an eviction order.*

### ***Urgent proceedings for eviction***

**5.** (1) *Notwithstanding the provisions of section 4, the owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order, and the court may grant such an order if it is satisfied that—*

*(g) 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, if an order for eviction is granted; and*

*(c) there is no other effective remedy available.*

(2) *Before the hearing of the proceedings contemplated in subsection (1), the court must give written and effective notice of the intention of the owner or person in charge to obtain an order for eviction of the unlawful occupier to the unlawful occupier and the municipality in whose area of jurisdiction the land is situated.*

(3) *The notice of proceedings contemplated in subsection (2) must—*

*(a) state that proceedings will be instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;*

*(b) indicate on what date and at what time the court will hear the proceedings;*

(c) set out the grounds for the proposed eviction; and

(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.

***Eviction at instance of organ of state***

**6.** (1) *An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—*

*(a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or*

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

(2) *For the purposes of this section, “public interest” includes the interest of the health and safety of those occupying the land and the public in general.*

(3) *In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—*

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

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

*(h) the availability to the unlawful occupier of suitable alternative accommodation or land.*

*(4) An organ of state contemplated in subsection (1) may, before instituting such proceedings, give not less than 14 days' written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier.*

*(5) If an organ of state gives the owner or person in charge of land notice in terms of subsection (4) to institute proceedings for eviction, and the owner or person in charge fails to do so within the period stipulated in the notice, the court may, at the request of the organ of state, order the owner or person in charge of the land to pay the costs of the proceedings contemplated in subsection (1).*

*(5) The procedures set out in section 4 apply, with the necessary changes, to any proceedings in terms of subsection (1).*



## **Mediation**

*7. (1) If the municipality in whose area of jurisdiction the land in question is situated is not the owner of the land the municipality may, on the conditions that it may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act:*

*Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the municipality may determine.*

*(2) If the municipality in whose area of jurisdiction the land in question is situated is the owner of the land in question, the member of the Executive Council designated by the Premier of the province concerned, or his or her nominee, may, on the conditions that he or she may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the said member of the Executive Council may determine.*

*(3) Any party may request the municipality to appoint one or more persons in terms of subsections (1) and (2), for the purposes of those subsections.*

*(4) A person appointed in terms of subsection (1) or (2) who is not in the full-time service of the State may be paid the remuneration and allowances that may be determined by the body or official who appointed that person for services performed by him or her.*

*(5) All discussions, disclosures and submissions, which take place or are made during the mediation process, shall be privileged, unless the parties agree to the contrary.*

### **Offences and private prosecutions**

*(1) No person may evict an unlawful occupier except on the authority of an order of a competent court.*

*(2) No person may wilfully obstruct or interfere with an official in the employ of the State or a mediator in the performance of his or her duties in terms of this Act.*

*(3) Any person who contravenes a provision of subsection (1) or (2) is guilty of an offence and liable on conviction to a fine, or to imprisonment not exceeding two years, or to both such fine and such imprisonment.*

*(4) Any person whose rights or interests have been prejudiced by a contravention of subsection (1) has the right to institute a private prosecution of the alleged offender.*

*(5) The provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), apply to a private prosecution in terms of this Act: Provided that if—*

*(a) the person prosecuting privately does so through a person entitled to practice as an advocate or an attorney in the Republic;*

*(b) the person prosecuting privately has given written notice to the public prosecutor with jurisdiction that he or she intends to do so; and*

*(c) the public prosecutor has not within 28 days of receipt of such notice, stated in writing that he or she intends to prosecute the alleged offence, then—*

*(i) the person prosecuting privately need not produce a certificate issued by the Attorney General stating that he or she has refused to prosecute the accused;*

*(ii) the person prosecuting privately need not provide security for such action;*

*(iii) the accused is entitled to an order for costs against the person prosecuting privately if—*

*(a) The charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal; and*

*(b) The court finds that such prosecution was unfounded or vexatious; and*

*(iv) the Attorney General is barred from prosecuting except with the leave of the court concerned.*

### ***Jurisdiction of magistrate's court***

**9.** *Notwithstanding any provision of any other law, a magistrate's court has jurisdiction to issue any order or instruction or to impose any penalty authorised by the provisions of this Act.*

### ***Transfer of powers, duties or functions***

**10.** *The President may by proclamation in the Gazette, either generally or in respect of such area or in such circumstances as may be specified in the proclamation, provide that any power, duty or function which in terms of this Act is permitted or required to be exercised, carried out or performed by any authority or person mentioned in the Act, may be or must be, as the case may be, exercised, carried out or performed by such authority or person, including a person in the service of such authority or an organ of state, as may be specified in the proclamation.*

### ***Repeal and amendment of laws, and savings***

**11.** (1) *The laws mentioned in Schedule I are hereby repealed to the extent indicated in the third column thereof.*

(2) *The Extension of Security of Tenure Act, 1997, is hereby amended to the extent indicated in Schedule II.*

*(3) Any law in force in those parts of the Republic, which formerly constituted the national territories of the entities known as Transkei, Bophuthatswana, Venda, Ciskei, Gazankulu, KaNgwane, KwaZulu, KwaNdebele, Lebowa and QwaQwa, is hereby repealed to the extent that such law is inconsistent with or deals with any matter dealt with by this Act.*

*(4) Notwithstanding subsection (1), any transit area declared in terms of section 6 of the Prevention of Illegal Squatting Act, 1951 (Act No. 52 of 1951), and all by-laws relating to such transit area, shall continue to exist as if that Act has not been repealed, until such transit area is abolished by the relevant local authority.*

### **Regulations**

*12. The Minister may make regulations in respect of any matter, which is required to be prescribed by the Minister in terms of this Act, or which is necessary or desirable in order to achieve the objectives of this Act, and any such regulation may create offences and provide for penalties in respect thereof.*

### **Short title**

*13. This Act is called the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998.*

**SCHEDULE I**

**LAWS REPEALED**

**(Section 11(1))**

**No. and year of law Short title Extent of repeal**

*Act No. 52 of 1951 Prevention of Illegal Squatting Act, 1951*

*The whole Act No. 24 of 1952 Prevention of Illegal Squatting  
Amendment Act, 1952*

*The whole Act No. 62 of 1955 General Law Amendment Act, 1955  
Section 30*

*Act No. 76 of 1963 Black Laws Amendment Act, 1963 Section 12*

*Act No. 92 of 1976 Prevention of Illegal Squatting Amendment Act, 1976*

*The whole*

*Act No. 72 of 1977 Prevention of Illegal Squatting Amendment Act, 1977*

*The whole*

*Act No. 33 of 1980 Prevention of Illegal Squatting Amendment Act, 1980*

*The whole*

*Act No. 68 of 1986 Abolition of Influx Control Act, 1986 Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15*

*Act No. 104 of 1988 Prevention of Illegal Squatting Amendment Act, 1988*

*The whole Act No. 80 of 1990 Prevention of Illegal Squatting Amendment Act, 1990*

*The whole Act No.108 of 1991 Abolition of Racially Based Land Measures Act, 1991 Sections 20 and 21*

*Act No. 113 of 1991 Less Formal Township Establishment*

*Act, 1991, Section 31, and that part of the Schedule amending the Prevention of Illegal Squatting Act, 1951*

*Act No. 134 of 1992 Provincial and Local Authority Affairs Amendment Act 1992, Section 1*

*Act No. 88 of 1996 Abolition of Restrictions on the Jurisdiction of Courts Act, 1996, Sections 3 and 4*

## **SCHEDULE II**

### **LAWS AMENDED**

#### **(Section 11(2))**

1. Section 29 of the Extension of Security of Tenure Act, 1997, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) The provisions of the Prevention of Illegal **[Squatting Act, 1951 (Act No. 52 of 1951)]** Eviction from and Unlawful Occupation of Land Act, 1998, shall not apply to an occupier in respect of land which he or she is entitled to occupy or use in terms of this Act.”



## Appendix 2

### **PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND AMENDMENT BILL, 2003**

*(As introduced)*

*(MINISTER OF HOUSING)*

*[B – 20031*

#### **GENERAL EXPLANATORY NOTE:**

*Words in **bold** type in square brackets indicate omissions from existing enactments.*

*Words underlined with a solid line indicate insertions in existing enactments.*

*To amend the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, **1998 so***

*as to amend certain definitions; to qualify the application **of the Act**; to prohibit the arrangement*

*or organisation of occupation of land and buildings without the owner's consent; to amend*

*certain provisions relating to the prohibition of receipt or solicitation of consideration in respect*

*of unlawful occupation of land and buildings; to create offences and penalties for contravention*

*of certain provisions and to provide for matters connected therewith,*

*BE IT ENACTED by the Parliament of the Republic of South Africa, as follows*

**1. Amendment of section 1 of Act 19 of 1998**

*Section 1 of the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act, 1998*

*(hereinafter referred to as "the Act"), is hereby amended-*

*(1) by the substitution for the definition of "court" of the following definition:*

*"court" means any division of the High Court or the magistrate's court in whose area or*

*jurisdiction the land in question is situated, and includes a Special Tribunal established*

*under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act*

*No. 74 of 1996) and a Land Claims Court established under section 22 of the Restitution of Land Act, 1994 (Act No. 22 of 1994).*

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(2) **by** the substitution for the definition of "land" of the following definition:

**"land"** includes a surveyed or unsurveyed portion of land and buildings or structures on - land;

(3) by the insertion of the following definition after the definition

"municipality";

**"OCCUPY"** means to take possession of land or to erect a building or structure on land and "occupier" and "occupation" have corresponding meanings;

(4) **by** the substitution for the definition of "unlawful occupier" of the following definition:

**"unlawful occupier"** means a person who occupies land without the express or tacit consent of the owner or person **in** charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of **1996**), and excluding any person who having initially occupied with such consent thereafter continues to OCCUPY once such consent has been withdrawn.

**3. Amendment of section 2 of Act 19 of 1998.**

*The following section is hereby substituted for section 2 of the Act: '*

**2. Application of Act**

*(1) Subject to subsection (21 [T] this Act applies in respect of all land throughout the Republic.*

*(2) This Act does not apply in respect of any proceedings:*

*(a) for the eviction of any tenant or former tenant or any person occupying land through the title of such tenant or former tenant;*

*QIJ by a mortgagee for the foreclosure of the bond and the eviction of a mortgagor or of any person holding title through the mortgagor;*

*(c) to any land acquired by way of a sale in execution or judicial sale of property.*

**4. Amendment of section 3 of Act 19 of 1998.**

*The following section is hereby substituted for section 3 of the Act:*

**5. Prohibition against arranging occupation of land without owner's consent or receiving or soliciting a consideration for arranging an unlawful occupation of land**

- (1) No person

*may arrange or organise or permit a person or persons to occupy land without the consent of the owner or person in charge of that land.*

***[3. Prohibition of receipt or solicitation of consideration in respect of unlawful occupation of land. –***

*(1) @ No person may directly or indirectly receive or solicit payment of any money or rent or*

*other consideration as a fee or charge for participation in, or arranging or organising or permitting a person to occupy land without the consent of the owner or person in charge of that land. The money or rent or consideration referred to above includes, but is not limited to, membership fees, legal costs, administration costs, services, services connection fees or payment for any socio economic infrastructure.*

***[(2)]*** *& Any person who contravenes [a] any of the provision<sup>2</sup> of subsections (1) and (2) is guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years, or to both such time and such imprisonment.*

***[(3)]** The court which convicts any person of a contravention of this section, must order any money or rent or any assets acquired with such money or rent, or other consideration received by that person which have been seized, to be forfeited, and the said money and the proceeds of the sale of such assets or such other consideration **[may]** be paid to the person or persons from whom the money, assets or other consideration was received, and where such person or persons cannot be positively identified, into the relevant municipal operating account or the National Revenue Fund as the case may be. Where the money or consideration forfeited is rental money, which was paid to a person other than the landlord or his or her agent such money shall be paid to the landlord or his or her authorized e t.*

***[(4)]** If any money has been received in contravention of subsection [(1)] & but has not been seized or made available for purposes of confiscation, the court which convicts any person of a contravention of this section, may order the amount proved to the satisfaction of the court to have been*

*received by such person to be paid to the person or persons from whom the money or other*

*consideration was received, and where such person or persons cannot be positively identified, into the relevant municipal operating account or the National Revenue Fund as the case may be, and such order has the effect of and may be executed against such person as if it were a civil judgment in favour of that person or persons from whom the money or other consideration was received or in favour of the State.*

**Amendment of Section 4 of Act 19 of 1998.**

*(1) The following subsections are substituted for subsections (2) and (3) of section 4 of the*

*Act:*

*(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1) **[the court must serve]** written and effective notice of the proceedings must be served on the unlawful occupier and the municipality having jurisdiction.*

*(3) **[Subject to the provisions of subsection (2),]** **[t]** the procedure for the serving of notices and filing of papers in terms of this Act is as prescribed by the rules of the court in question. .*

*(2) The following new subsection is to be inserted after subsection (7) of section 4 of the Act: -*

*(B) If a court finds that an unlawful occupier referred to in subsections (6) and (7) above occupied the land in question when he or she was at the time already occupying a home, the Court may, after considering all the relevant circumstances as contemplated in section 26(3) of the Constitution, order the eviction of such unlawful occupier, but must not take into account any of the specific circumstances referred to in subsections (6) and (7) above.*

#### **6. Amendment of section 5 of Act 19 of 1998**

*The following subsection is substituted for subsection (2) of section 5 of the Act:*

*(6) Before the hearing of the proceedings contemplated in subsection (1), **[the court must give]** written and effective notice of the intention of the owner or person in charge to obtain an order for eviction of the unlawful occupier must be given to the unlawful occupier and the municipality in whose area of jurisdiction the land is situated.*



## **7. Amendment of section 6 of Act 19 of 1998**

*The following subsection is substituted for subsection (1) of section 6 of the Act:*

*(1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction [,*

***except where the unlawful occupier is a mortgagor and the land in question is sold in a sale in execution***

***pursuant to*** and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if -

*(a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful*

*occupier is occupying a building or structure on that land without such consent having been obtained: or*

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

## **8. Amendment of section 9 of Act 19 of 1998**

*The following section is hereby substituted for section 9 of the Act:*

### ***Jurisdiction of magistrate's and other courts***

*9. Notwithstanding any provision of any other **law**, a magistrate's court as well as a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996) and a Land Claims Court established under section 22 of the Restitution of Land **Rights** Act, 1994 (**Act No. 22** of 1994) [**has**] have jurisdiction to issue any order or instruction or to impose any penalty authorised by the provisions of this Act.*

### ***9. Short title***

*This Act is called the Prevention of Illegal Eviction from and Unlawful Occupation of Land*

*Amendment Act, **2003**, and comes into operation on a date determined by the President by proclamation in the Gazette.*

### Appendix 3

The following insert is a direct quotation from an article published on the website of the Community Law Center of the University of the Western Cape with the title 'Socio Economic Rights Project'.

*The applicability of the Prevention of Illegal Eviction Act:*

*Ndlovu v Ngcobo and Bekker & Bosch v Jika*

*Mahendra R Chetty*

***Ndlovu v Ngcobo and Bekker & Bosch v Jika Supreme Court of Appeal, Cases No. 240/2001 and 136/2002 respectively, 30 August 2002***

*This review focuses on the joint decision of the Supreme Court of Appeal (Supreme Court) in the cases of Ndlovu v Ngcobo and Bekker & Bosch v Jika (later referred to separately as Ndlovu and Bekker respectively). In this decision, the Supreme Court upheld the appeal against the decision of the Natal Provincial Division of the High Court in Ndlovu and dismissed the appeal against the decision of the Full Bench of the Eastern Cape Division of the High Court in Bekker. Essentially, it upheld the contention that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 (PIE), applies not only to people who unlawfully took*

*possession of land (commonly referred to as squatters), but also to people who once had lawful possession that subsequently became unlawful.*

### **The facts**

*Mr. Ngcobo was the holder of a certificate of occupation, which accorded him certain rights and duties as a statutory tenant of a house in KwaNdengezi Township, Pinetown, and Durban. In 1990 he sublet the house to a Mr. Ndlovu. In July 1998, Mr. Ngcobo gave a one-month notice of termination of the lease to Mr. Ndlovu. Upon the latter's refusal to vacate the house, Mr. Ngcobo instituted action in a Magistrate's Court for eviction under common law and, alternatively, in terms of section 4(1) of the PIE. Mr. Ndlovu filed affidavits in opposition. However, the Magistrate found that Mr. Ndlovu was not an 'unlawful occupier' for the purposes of PIE and therefore not entitled to its protection. The appeal to the Full Bench of the Natal Provincial Division of the High Court was dismissed.*

*In Bekker, Mr. Jika owned a property in Kabega Park, Port Elizabeth, which was encumbered by a mortgage bond with a bank. As he failed to comply with the requirements of the bond, the bank issued summons, obtained a default judgment and sold the property to Messrs Bekker and Bosch. When Mr. Jika refused to vacate the property, the new owners approached the Eastern Cape High Court for an eviction order. Plasket, AJ found that PIE was applicable to this case and that, since the new owners had not complied with its requirements, the application was dismissed. The*

*appeal to the Full Bench of the Eastern Cape Division of the High Court was also dismissed.*

### ***Issues before the Supreme Court of Appeal***

*There was no appearance for either respondent in both appeals. However, the appeals were heard concurrently since the appellants were to argue the same issue from different perspectives.*

*In both appeals, the applicants for eviction did not comply with the procedural requirements of PIE. The single issue on appeal was therefore whether they were obliged to do so. The answer to this question turned on the determination of whether an 'unlawful occupier' under PIE refers only those who unlawfully took possession of land (squatters) or whether the term includes persons who lawfully took occupation of land but whose possession subsequently became unlawful.*

*Section 1 of PIE defines an 'unlawful occupier' as:*

*a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996).*

*It was argued on behalf of the appellant in Ndlovu that PIE affords unlawful occupiers limited protection in eviction proceedings. At best, it affords a tenant in eviction proceedings an opportunity to put their case before the court. In terms of the Act, a court may only grant an order for eviction if it is 'just and equitable to do so' after considering 'relevant circumstances' including the rights and needs of the elderly, children, disabled persons and households headed by women. It was therefore argued that PIE exists to ensure that the common law relating to evictions does not result in an unjust and inequitable outcome.*

*Counsel for the appellants in Bekker argued that PIE was not intended to apply to holding over cases. The rights of such tenants, it was submitted, were governed by, among other Acts, the Rental Housing Act, No. 50 of 1999, and not PIE.*

### ***The judgment***

*The Court delivered a split judgment. Harms JA (with whom Mpati JA and Mthiyane JA concurred) delivered the majority judgment. Nienaber JA and Olivier JA delivered dissenting opinions.*

### ***Holding over as 'unlawful occupation'***

*The majority noted that PIE has its origins in section 26(3) of the Constitution, which prohibits evictions from one's home without a court order. It noted further that the definition of 'unlawful occupier' was couched*

*in the present tense. Consequently, both occupiers in Ndlovu and Bekker were holding over without the owners' consent. They therefore fell within PIE's definition of 'unlawful occupier'. The majority held that to exclude persons who hold over from the definition would require more than a mere change in tense. One would have to amend the definition to apply to 'a person who occupied and still occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land'.*

*However, it was held that the Act does not apply to a person who at the time of the application is a lawful occupier although he had formerly been in unlawful possession.*

### ***The mortgagor as an 'unlawful occupier'***

*The appellant in Ndlovu argued that sections 6(1) and 4(7) of the PIE support the position that an ex-mortgagor still in possession of the mortgaged property is an 'unlawful occupier' for purposes of the Act.*

*Section 6(1) gives organs of state legal standing to apply for the eviction of unlawful occupiers from land belonging to others. It has an exception, italicised in the following quote:*

*An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where*

*the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances?*

*The argument was therefore made that, since this section regards a mortgagor as an 'unlawful occupier', the definition of the latter should not be limited to squatters or those who took possession unlawfully. Accordingly, mortgagors would qualify as 'unlawful occupiers'.*

*The Supreme Court found that, on a literal interpretation, the exception 'makes no sense at all' given that a mortgagor, being an owner of property, cannot be an unlawful occupier. However, only when the property is sold in execution and transferred to a third party can the possession of the erstwhile mortgagor/owner become unlawful. It was therefore held that section 6(1) could not be used in the interpretation of 'unlawful occupiers'.*

*Counsel for the appellant in Ndlovu advanced a similar argument in respect of section 4(7). This section empowers courts to consider relevant circumstances when granting an order for eviction in respect of an occupier who has been in occupation for more than six months. 'Except where the land is sold in a sale of execution pursuant to a mortgage,' such circumstances include 'whether land has been made available or can reasonably be made available by a municipality for the relocation of the*



*unlawful occupier'. They also include 'the rights and needs of the elderly, children, disabled persons and households headed by women'.*

*The majority decision held that this section meant that if land were sold in a sale by execution, the court would not consider the circumstances mentioned above. The section, it was held, had nothing to do with the question of holding over by a mortgagor and could therefore not be of assistance in defining an 'unlawful occupier'.*

### ***The rationale of PIE***

*The Court stated that PIE had some roots in the Prevention of Illegal Squatting Act, No. 52 of 1951 (PISA). The latter was enacted to control the population shift from rural areas to urban areas, which constituted a threat to the policy of racial segregation. PISA served to prevent squatting by criminalising it and by providing for a simplified eviction process. By contrast, PIE not only repealed PISA but also decriminalised squatting (subject to the Trespass Act, No. 6 of 1959) and further, subjected the eviction process to constitutional safeguards, especially those contained in sections 26(3) and 34 of the Constitution.*

*Thus, the Supreme Court overruled ABSA Bank Ltd v Amod [1999] All SA 423 (W), which held that PIE did not apply to cases of holding over on the ground that PISA had applied to squatters only. It took the view that PISA did not only deal with persons who unlawfully took possession of land but*

*also dealt with those whose possession was lawful but subsequently became unlawful.*

*Construed in the light of the Bill of Rights, especially section 26(3), and 'the general social and historical context of the country', the Supreme Court reasoned that PIE was intended to offer protection to a 'substantial class of persons' who were poor and vulnerable to evictions.*

*In conclusion, the Supreme Court held that the protection of PIE extended to 'cases of holding over of dwellings and the like'. The appeal in Ndlovu therefore succeeded while that in Bekker failed.*

#### ***In the aftermath of the judgment***

*The Supreme Court's judgment has triggered mixed reaction from various quarters, including the Law Society of South Africa, the South African Commercial Property Association, the Banking Council, and the Estate Agents Affairs Board. Various bodies have expressed serious concern that tenants who fail to pay rent and buyers who default on their bond payments will have the same protection against eviction as illegal squatters.*

*Fear has also been expressed that the judgment would have the effect of 'discriminating against the very people it was intended to protect: women, children, the disabled and the elderly'.*

*It is submitted that these fears have no basis. The Court carefully considered such concerns before it made the decision. This is evident in the majority decision, which states explicitly that the fact that the Bekker appeal fails 'does not imply that the owners concerned would not be entitled to apply for and obtain eviction orders. It only means that the procedures of PIE have to be followed'.*

*The contention that affluent tenants may benefit from PIE is equally untenable. The Supreme Court observed that the landlord could rely on section 4(6) to obtain an order of eviction as long as the application is brought within six months. A court will grant the order if it considers it just and equitable to do so.*

*If the landlord makes the application after six months, an eviction order can be sought under section 4(7) referred to above. Unlike under section 4(6), the rights and needs of the elderly, children, disabled persons and households headed by women cannot be considered in favour of the persons holding over in the application under section 4(7).*

*In either case, the Supreme Court held that PIE only delays or suspends 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 and if so, under what conditions. It does not have the effect of expropriating the property of the landowner.*

*In conclusion, the majority judgment is a landmark in ensuring that poor people are protected from arbitrary evictions without necessarily undermining the interests of property owners.*

*(Mahendra R Chetty is an attorney and Director of the Legal Resources Centre, Durban.)*

