# RE-EVALUATING THE COURT SYSTEM IN PIE EVICTION CASES

CLIREESH CLOETE
*Doctoral Candidate and Research Intern, University of Stellenbosch*
ZSA-ZSA TEMMERS BOGGENPOEL
*Associate Professor in Private Law, University of Stellenbosch*

## INTRODUCTION

The nexus between the court system (meaning in this note the civil-procedure rules and conventions according to which a matter is litigated) and the application of ss 4(1) and 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE') is the focus of this note. These provisions require that a court considers all relevant circumstances before an eviction order can be made. The need to explore this nexus became apparent in the recent case of *Pitje v Shibambo* 2016 (4) BCLR 460 (CC) ('*Pitje* (CC)'). In this case, the Constitutional Court yet again referred an eviction case back to the high court for re-adjudication after stating (para 19):

> '[C]ourts cannot necessarily restrict themselves to a passive role ... . [C]ourts are obliged to probe and investigate the surrounding circumstances when an eviction from a home is sought. This is particularly true when the prospective evictee is vulnerable. These considerations would have enabled the High Court to apply the requirements of PIE justly.'

The dictum forces us to re-evaluate the approach of the courts in eviction cases. In this regard, the central question to this note is whether the court system is required to, or has been changed to, ensure that all relevant circumstances are considered by courts in the eviction context. An exploration of this question is pivotal in determining whether the court system might have an inhibiting or empowering effect on the courts' ability to take all relevant circumstances into account before making eviction orders. Therefore, the first part of this note will briefly set out the eviction remedies that were available to owners in the pre-constitutional and in the constitutional era to contextualise the requirement of PIE that all relevant circumstances must be considered before an eviction order can be granted. The second part investigates the procedural rules that regulated the court system in the pre-constitutional era. It also expounds on the way in which these procedural rules tended to impact on eviction cases. The final part determines whether the Constitution has ushered in the necessary changes to the

court system in the context of evictions. It also considers whether in *Pitje* and similar cases the courts' failure to apply the provisions of PIE justly in the constitutional era can be ascribed (partly or wholly) to the nature of the pre-constitutional court system. This note does not set out to provide primary research for assessing how the courts in every PIE eviction case have applied the provisions of PIE. Instead, a trend with regard to the way in which courts applied PIE in specific cases is identified. This trend is then connected to the constraints and scope of the procedural rules and conventions applied in the cases that are discussed in this note.

## A BRIEF OVERVIEW OF EVICTION REMEDIES FOR UNLAWFUL OCCUPIERS

In the pre-constitutional era a landowner who wished to evict an unlawful occupier from her land had two remedies at her disposal, namely the proprietary remedy (the rei vindicatio) and the apartheid statutory eviction measure (the Prevention of Illegal Squatting Act 52 of 1956) ('PISA') (see Cornelius van der Merwe *Sakereg* 2 ed (1989) 346; Gustav Muller 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* 386; Juanita Pienaar *Land Reform* (2014) 667). These remedies operated in a rights paradigm where ownership was accepted as the strongest right in the hierarchy of rights. Actions for evictions were relatively uncomplicated due to the straight forward requirements of these causes of action, and the landowners' relatively strong rights vis-a-vis the weak position of unlawful occupiers (Van der Merwe op cit at 350; AJ van der Walt *Property in the Margins* (2009) 53).

Section 26(3) of the Constitution of the Republic of South Africa,1996 ushered in a new approach to evictions (see also Sandra Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 270; Pienaar op cit at 661; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 11). Section 26(3) of the Constitution provides that: 'No one may be evicted from their home, or have their home demolished without an order of court made after considering all relevant circumstances. No legislation may permit arbitrary evictions.'

Subsequent to the enactment of s 26(3), PIE was promulgated to replace the pre-constitutional eviction remedies. PIE regulates the eviction of unlawful occupiers occupying premises for residential purposes in the constitutional dispensation (s 4(1) of PIE; Liebenberg op cit at 270; Pienaar op cit at 688). This legislative measure caused a shift from a private-law rights-based approach to eviction disputes, where ownership was key, to an approach where interests other than ownership are considered before an eviction order can be made. Section 4(6) of PIE embodies this shift. It states that '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'. Section 4(7) of PIE repeats the same sentiment, stating that

> '[i]f 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'.

The explicit reference and emphasis on the requirement to consider all relevant circumstances in *Pitje* invites questions about how the court system of civil procedure should be able to assist the court to ensure that this requirement of PIE is met. Therefore, the section below considers the court system of civil procedure according to which judges adjudicated cases in the pre-constitutional and the constitutional era.

## THE COURT SYSTEM IN THE PRE-CONSTITUTIONAL ERA

### *Basic principles*

In the pre-constitutional era, before British occupation, the procedural rules of the Roman-Dutch civil tradition found application in the South African legal system. This meant that the court system was primarily inquisitorial (Hennie Erasmus 'The interaction of substantive law and procedure' in Reinhard Zimmerman & Daniel Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 145).

The inquisitorial nature of the procedural rules and court proceedings placed the presiding officer in a managerial role with regard to all aspects of trials. However, after British occupation, English procedural rules, principles and practices were incorporated into South African law and replaced the Roman-Dutch procedural rules (Erasmus op cit at 146). The English procedural law dictated all relevant factors, including the role of courts, the hierarchy of courts, and the scope of the powers and jurisdiction of the courts (ibid). The most pertinent characteristic of the common-law tradition that the South African legal system inherited in the sphere of procedural law was the adversarial approach to court proceedings. The common-law adversarial approach differs from the inquisitorial approach. The inquisitorial nature of the civil-law tradition requires judges to take up an active role in court proceedings while the adversarial court system requires judges to refrain from interfering with the court proceedings (John Jolowicz 'Adversarial and inquisitorial models of civil procedure' (2003) 52 *International and Comparative Law Quarterly* 290). Both private-law and statutory eviction remedies in the pre-constitutional era were dealt with within the adversarial procedural framework.

The adversarial system of civil procedure is premised on three basic assumptions, namely (a) that disputes between parties are private matters; (b) that the parties are in the best position to plead and argue their cases; and (c) that intervention by the court is not needed (Estelle Hurter 'Seeking truth or seeking justice: Reflections on the changing face of the adversarial

process in civil litigation' 2007 *TSAR* 242). These basic assumptions developed the unique features of the adversarial system of civil procedure, namely (a) that oral evidence and cross examination are two integral elements of a trial; (b) that the parties in dispute bring and argue their own cases; and (c) that the adjudicator is required to make a final and binding decision after considering the evidentiary material in a passive, objective and rational manner (P J Schwikkard & S E van der Merwe *Principles of Evidence* 2 ed (2002) 9; Deon Erasmus & Angus Hornigold 'Court supervised institutional transformation in South Africa'(2015) 18 *PER* 2457; Hennie Erasmus 'Historical foundations of the South African law of civil procedure' (1991) 108 *SALJ* 265). In other words, the parties in a dispute decide upon the relief they prefer and the legal rules, facts and arguments upon which they wish to rely to obtain the relief sought. This feature of the adversarial system of civil procedure is also known as party control (Constantine Theophilopoulos, Corlia van Heerden & Andre Boraine *Fundamental Principles of Civil Procedure* 2 ed (2012) 3; Hurter op cit at 242). The court was confined to the issues as framed by the parties in their pleadings and could not deviate from the pleadings. Hurter explains that the adjudicator plays a passive role in adversarial proceedings because it lacks investigative powers (ibid at 243). Therefore, in the pre-constitutional era courts were generally restricted to the issues as framed in the pleadings of the parties, and were required to take up a passive role. The sub-part below explores the impact of the courts' passive role in court proceedings in eviction cases.

*Case law*

The implications of the adversarial court system in the eviction context are clearly illustrated in *Khuzwayo v Dludla* 2001 (1) SA 714 (LCC) ('*Khuzwayo*'). *Khuzwayo* was decided in the constitutional era. However, it is significant for purposes of this discussion because it highlights the way in which the court perceived its role in eviction cases in the pre-constitutional era. The power of the Land Claims Court in *Khuzwayo* was limited in so far as the parties failed to rely on the applicable legislative measure in their pleadings that would allow them a review of the eviction order granted against them in the Melmoth magistrate's court (*Khuzwayo* ibid para 1). The court held on the basis of *Skhosana & others v Roos t/a Roos SE Oord & others* 2000 (4) SA 561 (LCC) that it would only have jurisdiction in the matter if the occupiers raised a defence against the eviction in terms of the Extension of Security of Tenure Act 62 of 1997 ('ESTA') (*Khuzwayo* (supra) para 10; *Skhosana* (supra) para 22). In the court a quo the plaintiff's cause of action was the common-law rei vindicatio, and the defence raised by the defendants was lawful occupation of the property (*Khuzwayo* (supra) paras 1–4). Based on the pleadings, the court found that the occupiers had raised no defence in terms of ESTA and that it therefore had no automatic review jurisdiction (ibid para 12). The court emphasised that in terms of the adversarial system which regulates the role of presiding officers, it is not the duty of courts to read in defences for parties where they themselves had failed to raise the defence.

Interestingly, the court observed that such an approach leaves those occupiers that ESTA and PIE purport to protect without protection and therefore vulnerable to eviction (ibid para 13). Despite recognising this gap, the court nevertheless rejected the application for review, based on its professed limited powers in this regard (ibid).

Similarly, in *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W), Flemming JA expressed strong statements regarding the role of the court in eviction cases (ibid para 15). He emphasised that the court's role is not to look for defences for parties where they do not expressly raise such defences. He held that the phrase 'all circumstances' in terms of s 26(3) of the Constitution only applies to those circumstances included in the pleadings (ibid). A court is accordingly obliged only to refer to the defences raised in the pleadings in s 26(3) cases (ibid). Therefore, there is no duty on courts to go beyond the pleadings of the parties.

These cases illustrate the way in which courts before and around the turn of the century understood their role when applying eviction remedies. They also illustrate the fact that the passive approach of the courts led them to make decisions in a mechanical manner, even after it became clear that granting an eviction order would potentially be unjust in the circumstances. In view of these findings, the next part of this note explores the nature of the court system in the context of evictions in the constitutional era in light of the Constitution and the new eviction legislation.

## THE COURT SYSTEM IN THE CONSTITUTIONAL ERA

### *Basic principles*

With the advent of the Constitution the adversarial approach to court proceedings for the most part remained unchanged. However, the case law subsequent to those decisions referred to in the previous part of this note relating to s 26(3) of the Constitution and PIE has indicated that the traditional adversarial court system applied in the pre-constitutional era, with its deferent approach to the parties' pleadings, might not be the most suitable court system in the eviction context because of the *just and equitable* requirement in PIE (ss 4(6), 4(7), 4(8), 6(1) and 6(3) of PIE).

The promulgation of PIE made justice and equity the standard for evictions of unlawful occupiers. Courts are enjoined to grant eviction orders only when they are satisfied that it would be just and equitable in a particular case to do so (ss 4(6) and 4(7) of PIE). This requirement was considered authoritatively in 2004 in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) ('*PE Municipality*'). In *PE Municipality* Sachs J explained what just and equitable means in the eviction context by highlighting the complex diametrical fundamental needs and interests it regulates (ibid para 33). PIE aims to ensure that equilibrium can be reached between the opposing interests in the case, namely the plight of the homeless on the one hand, and the property rights of owners, on the other. He explained that these rights are entrenched in ss 26(3) and 25 of the Constitution, respec-

tively. The eviction process under the constitutional order essentially provides a process for the orderly removal of informal settlements (ibid). However, PIE cannot ensure the orderly resettlement of occupiers if it is applied in a legalistic, mechanical fashion because every resettlement is unique and would require a unique arrangement to ensure that the removal is fair and orderly. Accordingly, PIE essentially requires that courts apply its provisions in such a way that will ensure that the outcomes in eviction cases are always just and equitable for all concerned (ibid). The court in *PE Municipality* went on to emphasise that the granting of an eviction order would not be just and equitable for purposes of PIE if it only took one of the parties' circumstances into consideration (ibid). Justice and equity therefore require the court to follow a context-sensitive and balanced approach pertaining to all parties involved and all factors relevant to the inquiry (ibid para 35).

The recent Constitutional Court case of *Occupiers of Erven 87 & Berea v De Wet NO & another* 2017 (5) SA 346 (CC) ('*Berea*') reaffirmed this duty, and indicated that the scope of the obligation on courts to ensure just and equitable evictions also covers those instances where the occupiers purportedly consented to their eviction (ibid paras 52–3). The Constitutional Court held that even where courts are furnished with settlement agreements, their constitutional duty remains to investigate the relevant circumstances in order to ensure that evictions are just and equitable (ibid para 54). In such cases judicial oversight is required in eviction orders because people might consent even though they are not fully aware of their rights or the implications of that to which they are consenting (ibid para 17).

Academic literature underscores the significance of the context-sensitive exercise courts must engage in when confronted with an eviction application in terms of PIE. Liebenberg argues that one of the novel implications of the *PE Municipality* judgment is that it explains the particular constitutional responsibility on courts to strive for a just and equitable solution. Such a solution should be aimed at reconciling the interests of landowners and unlawful occupiers by way of a constitutional, historical and context-sensitive analysis. In this regard, Liebenberg points out that this new constitutional responsibility on the court furnishes the court with a 'broad and expansive' discretion to grant or dismiss an eviction application on the basis of justice and equity (Liebenberg op cit at 278). This discretion is not limited to the substantive question of what would be just and equitable in a particular case. It also extends to procedural aspects of adjudication. Here, she refers to the courts' entitlement 'to go beyond the facts established on the papers before it, and play a more inquisitorial role in procuring "ways of establishing the true state of affairs, so as to enable it to 'have regard' to relevant circumstances" ' as envisioned in *PE Municipality* (ibid).

Similarly, Pienaar observes that 'a rather broad discretion exists for courts to find whether the granting of the eviction order would be just and equitable' (Pienaar op cit at 761). She explains that this broad discretion is aimed at ensuring that both interests and all other relevant factors pertaining

to the applicants' and respondents' position are considered by the court. She stresses the importance of the courts' duty to take account of all relevant circumstances by stating that '[a]ll necessary information has to be before the court, which may include [amongst other things] joining additional parties to effect that, in order for courts to reach a just and equitable conclusion' (ibid at 761).

An interesting question that arises with regard to the just and equitable requirement and the fact that all relevant circumstances should be considered, is what happens when both parties fail to furnish the court with all the relevant circumstances? Do 'all relevant circumstances' refer only to those circumstances that are included in the parties' pleadings, or can it refer to further relevant circumstances *not* included in the parties' pleadings? Furthermore, if the latter is the case, is there any obligation on courts to ensure that they are furnished with all relevant circumstances, and if so, how do we explain the operation of the adversarial court system within this proactive framework required by PIE in eviction proceedings?

With regard to the first question, namely whether all relevant circumstances in a case refer to those circumstances stipulated in the pleadings of the parties, Sachs J in *PE Municipality* ((supra) para 30) provides a starting point to answering this question:

> 'There is nothing in section 6 [of PIE] to suggest that the three specifically identified circumstances are intended to be the only ones to which the court may refer in deciding what is just and equitable. They are peremptory but not exhaustive. It is clear both from the open ended way in which they are framed and from the width of decision making involved in the concept of what is just and equitable, that the court has a very wide mandate and must give due consideration to all circumstances that might be relevant. Thus the particular vulnerability of occupiers referred to in section 4 (the elderly, children, disabled persons and households headed by women) could constitute a relevant circumstance under section 6.'

From this passage it is clear that all relevant circumstances refer to the list of factors in ss 4 and 6 of PIE. However, the court makes it even clearer that the inquiry into all relevant circumstances is not limited to the listed factors. In other words, courts are called upon to consider the circumstances relevant to the specific case before it, above and beyond the specific factors highlighted in PIE. This generous interpretation of 'all relevant circumstances' has been followed in subsequent cases, and has been welcomed by a number of scholars (*Transnet Ltd v Nyawua & others* 2006 (5) SA 100 (D) at 107; *Thutha v Thutha & another* [2010] ZAECMHC 2 para 8; *Arendse v Arendse* 2013 (3) SA 347 (C) para 33; *Mahogany Ridge 2 Property Owners' Association v Unlawful Occupiers of Lot 13113 Pinetown & others* [2013] 2 All SA 236 (KZD) paras 51–3; *Berea* (supra) paras 39–50; Liebenberg op cit at 270; Pienaar op cit at 773).

Furthermore, the court in *PE Municipality* indicated that courts have wide powers with regard to the just-and-equitable requirement, and that these wide powers extend to the courts' ability to consider circumstances that

'might be relevant' in a particular case (*PE Municipality* (supra) para 30). This indicates that courts have the power to consider all relevant circumstances that on the facts of the case might be relevant, even if it is a factor that was not specifically pleaded by any of the parties. The ratio of the court in *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments & others* 2009 (4) All SA 410 (SCA) ('*Daisy Dear Investments*') confirms such a generous interpretation of the role of the court in eviction cases. An eviction order granted by the high court against 2000 unlawful occupiers was set aside by the SCA in *Daisy Dear Investments* on the basis that the court a quo failed mero motu to join the municipality to the proceedings as an interested party. Jafta JA held (paras 13–14):

> 'It seems to me that had the court below not fallen into error in determining whether the order it contemplated was just and equitable to both sides, it could have insisted upon joinder of the municipality. ... The municipality's position in eviction proceedings under PIE differs from that of a third party in ordinary litigation because it has constitutional obligations it must discharge in favour of people facing eviction. It should therefore not be open to it to choose not to be involved. Moreover, s 4 of PIE obliges the courts to be innovative and if it becomes necessary, to depart from the conventional approach.'

Here the court highlighted not only the important role that local government has to fulfil in eviction cases, but also stressed the crucial role courts have to play. This dictum shows that courts have to ensure that they are furnished with all relevant circumstances. This is why they have wide powers to join interested parties and to call for more relevant factors to be placed before them where the parties fail to do what the court considers necessary in the circumstances. The recent Constitutional Court case of *Pitje* (CC) is an example of a case where the court went beyond the specific factors pleaded by the parties before it. The Constitutional Court highlighted the fact that the appellant was elderly and in ill-health — something which was not initially placed before the court — and that this needed to be taken into account to satisfy the provisions of PIE. This factor was not raised to show good cause for rescission purposes in the court a quo (*Shibambo & others v Pitje* [2014] ZAGPPHC 501 (7 March 2014) paras 11–12). However, this did not stop the Constitutional Court from recognising that these factors are important for the purposes of determining whether it would be just and equitable to grant an eviction order in the particular case. The court stressed that these circumstances ought to be considered together with the homelessness factor expressly pleaded by the appellant (see *Pitje* (CC) (supra) paras 18–19).

The remaining question is how this transformed role of the court fits into the framework of the traditional adversarial court system of civil procedure. In *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) the court considered the appropriateness of the adversarial court system in the constitutional eviction paradigm. In the pleadings the plaintiff proffered that she was the owner of the property and that Mrs Ross and all the other persons occupying the property under her had no legal basis to occupy the property

(ibid at 591). Due to the fact that PIE was not in force at that time, the plaintiff relied on the rei vindicatio (ibid at 596). The respondent argued that s 26(3) applied to the dispute, and insisted that all relevant circumstances be considered by the court. Subsequently, the primary focus of the court was to determine whether s 26(3) of the Constitution changed the onus of proof for cases involving the rei vindicatio as set out in *Graham v Ridley* 1931 TPD 476 (ibid at 592). However, during this investigation the court pronounced on the relationship between the adversarial court system and s 26(3) of the Constitution (ibid at 595–6). The court highlighted the difference between the adversarial and inquisitorial court systems and the way in which both systems can accommodate the constitutional requirement for evictions, namely that all relevant circumstances must be considered. It explained that in inquisitorial proceedings the judicial officer is at liberty to call for and collect relevant information herself, while the adversarial process requires the parties to a dispute to place the relevant circumstances before the court (ibid). Ultimately, the court observed that s 26(3) endorses the adversarial court procedure because it is possible for the parties to bring to court all the relevant circumstances (ibid at 596). However, it also indicated that the court may presumably have to call for amplification in certain circumstances, after the parties have placed factors they consider relevant before it (ibid).

Similarly, in the landmark eviction case *PE Municipality* the Constitutional Court highlighted the important role presiding officers have to play in the procurement of all relevant circumstances. Sachs J (*PE Municipality* (supra) para 32; see also the recent case of *Pitje* (CC) (supra) para 19) stressed that:

> 'The obligation on the court is to "have regard to" the circumstances, that is, to give them due weight in making its judgment as to what is just and equitable. The court cannot fulfil its responsibilities in this respect if it does not have the requisite information at its disposal. It needs to be fully apprised of the circumstances before it can have regard to them. It follows that although it is incumbent on the interested parties to make all relevant information available, technical questions relating to onus of proof should not play an unduly significant role in its enquiry. ... Both the language of the section and the purpose of the statute require the court to ensure that it is fully informed before undertaking the onerous and delicate task entrusted to it. In securing the necessary information, the court would therefore be entitled to go beyond the facts established in the papers before it. Indeed when the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain, the court might be obliged to procure ways of establishing the true state of affairs, so as to enable it properly to "have regard" to relevant circumstances.'

This dictum of the Constitutional Court affirms the operation of the adversarial court system. That means that, generally speaking, the parties are in the best position to furnish the court with the relevant circumstances it needs to make a just and equitable order. However, when the parties fail to provide all the relevant circumstances, courts are enjoined to procure such information (see also *Berea* (supra) para 47).

Clearly, the court system required by the constitutional eviction paradigm does not completely fit into the framework of the traditional adversarial

approach. Instead, it requires that the adversarial court system is followed as a starting point. However, where the parties fail adequately to procure and furnish the court with the relevant circumstances, a more inquisitorial approach is triggered. In this regard, the court must take up an investigative and managerial role to ensure that justice and equity prevail. As a result, courts can no longer in the face of an injustice merely state that they are obliged only to have regard to the pleadings of the parties, as was the case in *Khuzwayo* (supra). They are now required to ensure that justice and equity prevail in eviction cases irrespective of any shortcomings of the pleadings. The application of PIE requires a context-sensitive and proactive approach where the boundaries of the adversarial court system fail to provide for the purposes of s 26(3) and PIE.

*Evaluation of case law*

The above discussion of the required court system in the context of evictions illustrates that a clear mandate exists as far as their involvement in eviction proceedings is concerned. However, recent case law has indicated that courts sometimes (a) fail to apply PIE when they should; or (b) fail to have regard to all relevant circumstances when they do apply PIE. In this part of the note, these recent cases are analysed to determine whether these failures could be ascribed to the traditional adversarial approach entrenched in the traditional legal culture of the courts.

*Machele & others v Mailula & others* 2010 (2) SA 275 (CC) ('*Machele*') and *Shibambo & others v Pitje* [2015] ZAGPPHC 89 ('*Shibambo*') are the first cases in which the failure of the courts is addressed. Both cases resulted in appeals to the Constitutional Court after the relevant high courts ordered the eviction of the unlawful occupiers without having regard to the provisions of PIE (*Machele* (supra) para 13; *Shibambo* (supra) para 1). In *Machele* the high court had to decide on two applications, namely (a) the setting aside of the sale of the concerned property on the basis of it being invalid, and (b) in the event that the court dismissed the first application, the court had to consider the eviction of the occupiers of the concerned property (*Philani-Ma-Africa & others v Mailula & others, Mailula v Machele & others* [2008] ZAGPHC 446 para 61; *Machele* (supra) paras 9–11; *Philani-Ma-Africa & others v Mailula & others* 2010 (2) SA 573 (SCA) para 5). The high court approached the two applications as if they were one by granting the eviction as a necessary consequence of the finding that the sale was invalid (*Machele* (supra) para 13; *Philani-Ma-Africa* (supra) para 5). The Constitutional Court pronounced its dismay of the high court's complete disregard of PIE by stating (*Machele* (supra) para 14–16):

> 'The application of PIE is not discretionary. Courts must consider PIE in eviction cases. PIE was enacted by Parliament to ensure fairness in and legitimacy of eviction proceedings and to set out factors to be taken into account by a court when considering the grant of an eviction order. Given that evictions naturally entail conflicting constitutional rights, these factors are of great assistance to courts in reaching constitutionally appropriate decisions.

> That the High Court authorised the eviction without having regard to the provisions of PIE is inexcusable. PIE is of great importance, given that there are still millions of people in our country without shelter or adequate housing and who are vulnerable to arbitrary evictions.'

Similarly, in *Pitje* the high court ordered the eviction of the unlawful occupier after finding that the occupier failed to prove ownership of the premises (*Pitje* (CC) (supra) paras 9–12). The court made an eviction order a natural consequence of unlawful occupation without having regard to all the relevant circumstances. This does not mean that an eviction order may never be granted; rather it emphasises that an eviction order may only be granted once all the requirements of PIE have been met, in order to ensure a just and equitable court order.

The failure of the courts to consider the provisions of PIE in both cases could be ascribed to the fact that the applicants failed to bring the application in terms of the provisions of PIE, and the respondents in turn failed to raise PIE as defence. However, in the constitutional dispensation the mere fact that the parties failed to raise PIE does not exclude its application. Instead, it triggers the duty on the court to take up an inquisitorial role and to raise the provisions of PIE mero motu. It therefore can be argued that by remaining passive where they should have taken up an active role, the courts followed the conventions and rules of the adversarial court system. The result was that the courts failed in their legal responsibility to apply the provisions of PIE.

The second group of cases includes *Vorster v Van Niekerk & others* [2009] ZAFSHC 9 ('*Vorster*'); *Daisy Dear Investments* (supra); *Arendse* (supra) and *Berea* (supra). In these cases, PIE was applied, but the courts failed to have regard to *all relevant circumstances*.

In *Vorster*, the owner of a house sought the eviction of two elderly persons aged 92 and 83 (*Vorster* (supra) para 11). The owner relied on s 4 of PIE for the eviction application (ibid para 9). The unlawful occupiers based their defence on an alleged usufruct that the applicant owner agreed to at the time the occupiers moved into the house (ibid para 5). However, the court found that no such usufruct existed. The court had to determine whether the eviction of the respondents in this case would be just and equitable in terms of PIE, as no legal basis existed for their occupation (ibid para 12). Section 4(7) enjoins the court to take the interests and needs of the elderly into account (ibid). The court held that because the occupiers were elderly persons, it would not be just and equitable to grant an eviction order against them (ibid). Accordingly, the eviction order was denied on the basis that the occupiers were elderly, in line with s 4(2) of PIE.

The requirement that courts may only grant an eviction order if it is just and equitable to do so requires, as has repeatedly been indicated, that the court take *all* relevant circumstances into account when exercising its discretion to grant or refuse an eviction order (ss 4(6) and 4(7); see further *PE Municipality* supra para 23; A J van der Walt *Constitutional Property Law* 3 ed (2011) 525). It is questionable whether the court in *Vorster* took all relevant circumstances into account. It identified the importance of considering the

elderly status of the respondents, but failed to inquire further as to the respondents' financial ability to afford accommodation in an old-age home, or the possibility that the respondents may have other relatives who might be capable of providing accommodation. It is not sufficient to consider one factor alone in an eviction case. The court has a duty to probe for more information before deciding to refuse to grant an eviction order based on one factor. In the process the court failed to undertake a proper balancing exercise, as is required in this context. Where a court does not consider all relevant circumstances, the consequences are, first, that the outcome will not be just and equitable and, secondly, that it will undoubtedly result in non-compliance with the provisions of PIE. In light of the above, the approach followed by the court can also be described as passive and mechanical, because the court failed to take up an inquisitorial role in considering whether the parties had indeed furnished it with all the relevant circumstances.

*Daisy Dear Investments* was a case in which a private landowner sought to evict about 2000 unlawful occupiers in terms of PIE (*Daisy Dear Investments* (supra) para 3). The eviction application was sought as a result of a demand from the Msunduzi Municipality for the owner to evict the occupiers (ibid para 4). The occupiers comprised a large community, and most of the occupiers had occupied the land for more than five years (ibid). Furthermore, the community consisted of poor and unemployed people, with households that were mostly headed by women (ibid para 3). The high court had to determine whether, in the circumstances of the case, an order in favour of eviction would be just and equitable. The court in this case ordered the eviction of the unlawful occupiers without having due regard to the provisions of PIE. What becomes apparent from the decision in this case is the crucial role courts need to play in making sure that an eviction order is only ordered if it is genuinely just and equitable to do so. The court did not ensure that it had all the factors relevant to the case placed before it. It also failed to ascertain why it was not furnished with the relevant information, so that it could be in a position to determine whether it must order the parties to bring such evidence (ibid para 6). Furthermore, the court did not consider the availability of alternative land for relocation purposes, and it appears too easily to have accepted the Municipality's report to be sufficient information regarding the unlawful occupiers (ibid para 7). The court also did not consider whether mediation could have resolved the dispute (ibid para 9). The court's approach in *Daisy Dear Investments* exemplifies the traditional adversarial approach to court proceedings because the court failed to manage the proceedings in a proactive manner after the parties themselves had failed to provide it with adequate and sufficient information to ensure a just and equitable order.

In *Arendse* the court reviewed an order granted by the court a quo for the eviction of a disabled mother and her four minor children (*Arendse* (supra) para 1). The court a quo had ordered the eviction of the respondent on the basis of an allegation made by the applicant that the respondent was able to

obtain suitable alternative accommodation due to the fact that she received a disability pension/provident-fund pay-out (ibid para 18). Meer J pointed out that the court a quo had erred in granting the order without further probing for more information (ibid paras 35–6):

> 'The enquiry conducted by the court a quo in my view fell short by far of the standards prescribed in the aforementioned cases and prescribed in s 4(6) and (7). From the evidence before the second respondent it was clear that the order sought involved an eviction of children by their father, and a woman who, according to the medical evidence, suffered from "bipolar mood disorder secondary stroke, following a sub-arachnoidal bleeding on the right side of her brain ..." and a household headed by such a woman. Yet the second respondent did not consider the rights and needs of the children, disabled applicant and the woman headed household, as he was specifically enjoined to do by s 4(6) and (7) of PIE. Nor did he consider whether alternative accommodation was available to them, a highly relevant consideration in all the circumstances. ... Without considering the rights and needs of the applicant and her children the second respondent could not have formed the opinion that it was just and equitable to evict them.'

Similarly, in *Berea* the Constitutional Court was tasked with reviewing the eviction order granted against the low-income and unemployed occupiers of the Kiribilly Berea flats in Johannesburg, of whom half were women and children (*Berea* (supra) para 3). The high court had ordered the eviction after it was furnished with a settlement agreement in which the occupiers had ostensibly agreed to their eviction. Subsequently, the occupiers appealed the eviction order on the basis that (i) no actual consent existed at the time the order was granted, and (ii) that even if there had been consent, the court still had a duty to take into consideration all the relevant circumstances in order to ensure that their eviction would be just and equitable (ibid para 2). In *Berea* the Constitutional Court was at pains to point out that courts are enjoined to consider all relevant circumstances, and therefore cannot assume a passive role in the eviction process (ibid paras 47, 52 and 53). The starting point in terms of the duties of courts in this context is that courts must be informed of the considerations that would make it just and equitable to grant the eviction order, and if it is not informed of such considerations, a court enquiry cannot be conducted, and an order cannot be made (ibid paras 46, 51 and 54). In this regard, courts must be proactive in establishing all the facts that are relevant to a case. The Constitutional Court found that the high court in this particular matter took a passive approach by assuming there was consent, and that the court therefore abrogated its responsibility to determine actively whether an eviction would be just and equitable.

The circumstances in the *Vorster*, *Daisy Dear Investment*, *Arendse* and *Berea* cases required the respective courts to go beyond the adversarial framework in order to secure a just and equitable outcome, especially because the respective eviction applications involved the most vulnerable groups of people (disabled persons, minor children, elderly people and woman-headed households). Instead, these courts (specifically those of first instance) adopted a passive role, and in so doing, failed to procure all relevant information.

These cases illustrate that in eviction cases in particular, some courts are still ensconced in the traditional adversarial frame of mind, and adopt the view that the matter should be decided on the basis only of what is presented to the court by the parties. The consequence is that they sometimes fail to recognise when parties should have relied on PIE to resist an unlawful eviction application from their homes, and even when they do apply PIE they also sometimes fail to recognise that they have not been furnished with all relevant circumstances in order to make a just and equitable order. Of course, our argument is not that the adjudication of eviction disputes within the adversarial framework is always the reason why courts fail to apply PIE properly. Instead, the argument is rather that *some* of the failures, as illustrated by the cases discussed in this note, can be ascribed to the adjudication of eviction cases in a passive or adversarial, rather than a proactive or more inquisitorial, manner.

## CONCLUSION

This note shows that s 26(3) of the Constitution and PIE require courts to break away from the traditional manner of adjudicating eviction cases. In the pre-constitutional era courts were restricted to a passive role in court proceedings, due to the operation of the traditional adversarial court system. However, it is clear that this could no longer continue to be so in the constitutional era. The Constitution and PIE require courts, where it is necessary to do so, mero motu to go beyond the pleadings of the parties, to order joinder of interested parties, and call upon parties to lead further evidence of relevant factors.

This role is directly linked to the 'just and equitable' requirement in PIE. Case law and academic commentary underscores the importance of an inquisitorial court in eviction matters in order to safeguard the objectives of s 26(3) of the Constitution and PIE. Courts can only make a just and equitable order if they are furnished with *all* relevant circumstances in the cases before them. Accordingly, courts are sometimes obliged to take up a more managerial and inquisitorial role to ensure compliance with the requirements of PIE.

We do accept that the traditional approach is still capable of ensuring that courts make just and equitable orders when the parties in eviction applications plead their cases correctly and furnish courts with all relevant circumstances. However, where party control fails to ensure the advancement of s 26(3) of the Constitution and PIE, the obligation that is placed on courts to manage the proceedings in a more inquisitorial manner is triggered. The cases that are discussed in this note indicate that, despite s 26(3) of the Constitution and PIE having been part of our law for twenty years and more, it remains the case that sometimes courts fail to take up an inquisitorial role when the parties fail to furnish them with the appropriate cause of action on the one hand, and all the relevant circumstances, on the other hand. The courts' failure in this regard can, we argue, be attributed to the pervasive

impact of the traditional adversarial court system that applies in civil disputes generally. The adversarial court system clearly still forms part of the legal culture of the courts in the constitutional dispensation, despite longstanding legal injunctions to the contrary in the case of eviction disputes in particular. This has dire consequences for the transformative thrust of the Constitution in the context of evictions, because the failure of the courts to ensure just and equitable outcomes in eviction cases results in some eviction orders being granted against unlawful occupiers outside of the constitutional framework.