THE RIGHT TO ADEQUATE HOUSING: MAKING SENSE OF EVICTION PROCEDURES IN THE CONTEXT OF RENTAL HOUSING AFTER *NDLOVU V NGCOBO*

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I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

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Abstract

South Africa must address the need for adequate housing. Since democracy in 1994, the government has promulgated a number of acts to achieve the goal of adequate housing for all. These include the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) and the Rental Housing Act (RHA). The problem for the courts is knowing when to apply each act.

To reach the goal embodied in the constitutional right of adequate housing for all, the government has invested R18 billion in housing since 1994. Despite this, the need for housing has escalated. The RHA, in which the legislature tried to create a balance between the rights of landlords and tenants, followed. This was done in order to alleviate some of the pressure to ensure access to land, which rests solely on the shoulders of the government. The legislature tried to create a sphere into which private investors would want to invest their money. A number of recent cases dealing with tenants who defaulted on their rentals and the landlord's capacity to effect eviction raised awareness about the existing inadequacies of the law in this particular field. In a Supreme Court of Appeal ruling, the court found that when a landlord wants to evict a defaulting tenant the time-consuming and costly procedure of PIE should be used.

The assumption underlying this study is that PIE should not be applicable in cases of evicting a defaulting tenant. The rights and duties of the various parties involved in rental housing therefore need to be examined. The main aim is, however, to ascertain which procedure should be employed when obtaining an eviction order against a party holding over and what the effects are when the most appropriate eviction procedure is not used. A well-regulated relationship would ensure the best balance of interest for the landlord, tenant and the government by creating a market

in which a landlord could make money out of letting and more tenants could obtain adequate housing through renting. A further assumption is that the *rei vindicatio* should be used when having a defaulting tenant evicted. It offers an alternative procedure that does not undermine the objectives of the housing legislation.

Opsomming

Suid-Afrika ervaar tans 'n probleem met die verskaffing van behuising vir almal. Sedert die land se verwerwing van demokrasie in 1994 het die wetgewer 'n hele reeks wette aangeneem om die probleem op te los, ondermeer die Wet op Huurbehuising en die Wet op die Voorkoming van Onwettige Uitsetting en Onregmatige Okkupasie van Grond (hierna verwys as PIE). Die howe ondervind soms probleme wanneer daar bepaal moet word wanneer 'n spesifieke wet van toepassing behoort te wees en wanneer nie.

Ten spyte van die R18 miljard wat die regering reeds bestee het aan armes sonder huise, het die getal mense wat sonder geskikte behuising woon gegroei. Die wetgewer het deur die promulgasie van die Wet op Huurbehuising gepoog om 'n mark te skep waarin daar behuising verskaf sal word in die vorm van huurbehuising. Terselfdetyd sal die privaatsektor baie nodige geld in die huurmark kan investeer. Onlangse regsspraak in die verband dui daarop dat daar nog baie leemtes bestaan veral met verwysing na uitsetting. Na 'n resente Appèlhof beslissing sal die verhuurder van die meer tydrowende en duurder prosedures in PIE gebruik moet maak om 'n persoon uitgesit te kry.

Die onderliggende aanname is dat PIE nie van toepassing behoort te wees wanneer 'n verhuurder 'n huurder wat agterstallig is met die huur wil uitsit nie. Die regte van beide huurder en verhuurder word gevolglik bestudeer. Die hoof-oogmerk van die studie is egter om vas te stel watter uitsettingsprosedure die beste sal wees en wat die gevolge sal wees indien die prosedure nie gebruik word nie. 'n Goed gereguleerde huurmark sal sorg dat huurders genoegsame beskerming geniet, dat die verhuurder geld sal kan maak uit die huurmark en dat die regering se druk tot 'n mate verlig word. 'n Verdere aanname is dat die prosedure vir die *rei vindicatio* die korrekte prosedure is om te gebruik om 'n huurder wat versuim om sy/haar huur te betaal uit te sit.

Die *rei vindicatio* word gevolglik bestudeer en daar word getoon dat die prosedure aansienlik van die van PIE verskil. Dit bied 'n alternatief en is nie van so aard dat dit die behuisings wetgewing se oogmerke belemmer nie.

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CHAPTER 1

INTRODUCTION TO THE CONFUSION CAUSED BY *NDLOVU V NGCOBO*[1]

1 1 South Africa's housing problem

The need for adequate housing in South Africa is evident from the large informal settlements adjacent to South Africa's larger metropoles on the one hand, and the importance this issue is afforded in government's national budget on the other.[2] That this situation is a result of apartheid, and especially of the Group Areas Act,[3] is not in dispute. As a result, whites, a minority population group, held and still hold the majority of land in South Africa. This Act and other racial segregation policies also led to huge shortages in housing, mainly in the black communities.[4] In 2000, Singer noted that approximately only ten

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1 2003 1 SA 113 (SCA).

2 The national budget for housing is at R 4 778 836 000 for the term of 2003/4, R 4 848 941 000 (approximately 2% of the overall national budget for 2004/5) for 2004/5 and R 5 172 083 000 for the 2005/6 term online at http://www.treasury.gov.za [21/11/2003]. (This percentage does seem that significant when compared to defence that comprises of nearly 9% of the overall budget.)

3 Act 52 of 1950 and later Act 36 of 1966.

4 Pienaar 2002 *SAPL/PR* 336.

percent of the population owned about 80 percent of the property.[5]

Although apartheid policy is frequently identified as the root of the problem, urbanisation and population growth also had a considerable influence on the present housing situation in South Africa. As a result, the number of people who do not have proper housing facilities increased from 7.5 percent of households in South Africa in 1995 to 12.3 percent in 1999.[6] Currently, the housing shortage is estimated at 3 million units,[7] with the number increasing by up to 200 000 units per year.[8] If not addressed soon, the problem will keep escalating.

1 2 An attempt at balance

To reach the goal embodied in the constitutional right of adequate housing for all,[9] the government invested R18 billion in

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5 Singer *The Edges of the Field* (2000) 17.

6 "South Africa in transition" 2001 *Statistics South Africa* 72.

7 Pienaar 2002 2 *SAPL/PR* 337.

8 Pienaar 2002 2 *SAPL/PR* 337.

9 S 26 of the Constitution of the Republic of South Africa Act 108 of 1996 reads: "(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

housing after 1994.[10] Since this did not significantly reduce the need for housing, the Department of Housing recently changed its focus. While housing policy had initially placed too much emphasis on ownership, it was recognised that a co-ordinated rental housing policy was essential for the provision of adequate housing.[11] The goal of the newly formulated policy therefore goes beyond ownership to regulate and simultaneously stimulate the rental housing market in South Africa. The focus changed from ownership to shelter, as reflected by the Land Reform (Labour Tenants) Act,[12] the Interim Protection of Land Rights Act,[13] the Extension of Security of Tenure Act (ESTA),[14] the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE),[15] and the Rental Housing Act (RHA).[16] This means that instead of attempting to making everyone owners of their own property the focus much rather shifted to providing everyone with some form of shelter or home.

As shown by these Acts, it is almost impossible to consider the right to adequate housing without considering evictions and eviction procedures. This is clear from the provision in the

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10 Department of Housing Yearbook figures for 2002 online at http://www.gov.za/yearbook/2002/housing.htm [05/03/2003].

11 Department of Housing Yearbook 2002.

12 3 of 1996.

13 31 of 1996.

14 62 of 1997.

15 19 of 1998.

16 50 of 1999.

Constitution for adequate housing.[17] Section 26(3)[18] refers only to evictions, which indicates that the right to adequate housing cannot be dealt with without considering evictions and eviction procedures. Because apartheid policy makers used the common law eviction procedure (*rei vindicatio*) as a tool to effect their policies of racial segregation,[19] eviction orders were easily obtainable under apartheid. With the dawn of a democratic South Africa in 1994 and the changes brought about by the Constitution, however, a great deal was done to promote security of tenure and tenure reform in South Africa.

The general question underlying this study is whether the Constitution, by way of these acts, has influenced the common law only in the specific instances that are covered by each act, or whether it has changed the common law eviction procedure in general. Recently a number of cases dealing with tenants who defaulted on their rentals and the landlord's capacity to effect eviction, of which *Ndlovu* is representative, have drawn attention to the existing inadequacies of the law in this particular field.[20]

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17 S 26 of the Constitution (quoted in n 9 above).

18 A subsection of s 26 of the Constitution, the right to adequate housing.

19 Van der Walt 2002 *TSAR* 255.

20 *Absa Bank v Amod* [1999] 2 All SA 423 (W), where the court had to decide whether or not PIE is applicable to the eviction of a party holding over. The court found that PIE should not be applicable, as it is only applicable to vacant land. *Ross v South Peninsula Municipality* 2000 (2) SA 589 (C) had a similar question to be answered and the court in the *Ross* case confirmed the *Absa* decision. In *Betta Eiendomme v Ekple-Epoh* 2000 (4) SA 468 (W) the court found that PIE should not be applicable when having a

The *Ndlovu*[21] decision, which gave rise to the question, has caused so much confusion that the government has proposed extensive amendments to PIE, the provisions of which were applied in that case.[22] Hence this study focuses specifically on the question whether the majority decision in *Ndlovu* was compatible with the objectives of the legislature, and whether the application of PIE, rather the RHA was the appropriate approach. This analysis then serves as *pars pro toto* for the broader research aim.

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defaulting tenant evicted as it would infringe too drastically on the owners' right to property. Flemming DJP found that the common law eviction procedure was still applicable. *Ellis v Viljoen* 2001 4 SA 795 (C) found that PIE should not be applied when having a someone that holds over evicted and Thring J based his decision on the *Absa* case. The Supreme Court of Appeal in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) found that PIE should not be applicable, and stated that the only relevant circumstances when having a party holding over evicted is whether the applicant is the owner and whether the occupier is in unlawful occupation. According to the court in *Brisley* a court should not consider the circumstances listed in PIE when having a defaulting tenant evicted. In *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA) 131 the court found that PIE is applicable when having a party holding over evicted. See in general the discussions in Van der Walt 2002 *SAJHR*; Keightley "When a Home Becomes a Castle: a Constitutional Defence Against Common-Law Eviction Proceedings: *Ross v South Peninsula Municipality*" 1999 117 *SALJ* 26; Lötz and Nagel "Uitsetting van Huurders en Verbandskuldenaars en die Wet op die Voorkoming van Onwettige Uitsetting en Onregmatige Besetting van Grond" 2003 (66) *THRHR* 164; Hawthorne "The Right to Access to Adequate Housing – Curtailment of Eviction?" 2001 vol 3 *De Jure* 584; Spohr 2002 December *LexisNexis Butterworths Property Law Digest* 3; Pope "Eviction and the Protection of Property Rights: a case study of *Ellis v Viljoen*" 2002 *SALJ* 709.

21 *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA).

22 Draft Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill, 2003.

While the *Ndlovu* decision might be seen as the result of poor draftsmanship in respect of PIE, this study holds that misinterpretation lies at the root of the applicability problem. PIE was never intended to apply to rental housing.[23] The majority of the court, however, found that the procedures of PIE should be applied for the eviction of a party holding over, which has resulted in considerable confusion in the rental housing market, as mentioned before. A tenant who has had the lease agreement terminated and refuses to vacate the property becomes a party holding over. Any person who initially has consent to occupy premises, whose consent is withdrawn at a later stage and then refuses to vacate the premises, is considered to be holding over.[24] The majority by virtue of their decision therefore applied PIE to all people who would fall in to above-mentioned groups.

In the case of *Ndlovu v Ngcobo*[25] a valid lease agreement had existed between a landlord and a tenant. When the lease agreement was subsequently terminated, the tenant refused to vacate the property, making him a party holding over. The owner therefore approached the magistrate's court for an eviction order against the ex-tenant, who raised the defence that since the

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23 Chapters 2 and 3 will focus on the respective scopes of PIE and the RHA.

24 As is evident from *Bekker and Another v Jika* 2002 4 SA 508 (E) a party holding over does not need to be a tenant who refuses to vacate, in this case the party holding over was a mortgager whose property had been sold in a sale in execution.

25 2003 1 SA 113 (SCA).

applicant did not comply with the procedural requirements of PIE, he could not be evicted. As a party holding over, he considered himself protected under the eviction procedure of PIE. Dismissing this defence, the magistrate granted an eviction order. Although the Natal Provincial Division, where the appeal was lodged, dismissed not only the appeal, but also the leave to appeal to the Supreme Court of Appeal, the latter court granted the necessary leave. It also decided to deal with two similar cases[26] at the same time. The only question that the court had to consider was whether an applicant, in applying for the eviction order of a party holding over, was obliged to comply with the requirements of PIE.[27]

Through Harms JA, the majority found that the procedures of PIE were in fact applicable. As PIE had its roots in section 26(3) of the Constitution, "no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances"[28] the court had to consider all relevant factors before it could grant an eviction order. The onus on the applicant was, however, only to prove ownership and that the occupier was in unlawful occupation. As "other relevant

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[26] The cases of *Bekker and Another v Jika* 2002 4 SA 508 (E) and *Ndlovu v Ngcobo* [2001] All SA 573 (E) were decided at the same time and therefore became *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA).

[27] The *Bekker* case did not involve a tenant holding over, but a mortgagor that was holding over and as a result the question was the same for both these cases.

[28] The preamble to PIE and s 26(3) of the Constitution.

circumstances"[29] were, almost without exception,[30] within the exclusive knowledge of the occupier, the owner could not be expected to advance such facts before an eviction order could be granted.[31]

Although the minority agreed that the applicant had to prove only ownership and that the occupier was in unlawful occupation, they did not consider PIE applicable to the eviction of parties holding over. Noting that PIE was applicable to land and the demolition of structures erected on such land, they argued that PIE was not intended to apply to leased dwellings and the Rent Control Act,[32] which was replaced by the Rental Housing Act, and was never intended to apply to vacant land.[33]

As mentioned before, the Rental Housing Act[34] is one of the acts that were promulgated to promote tenure-reform in South Africa.[35] With this act, the legislature tried to create a balance between the rights of landlords and tenants. In 1995, 80% of the

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29 E.g. "the elderly, children, disabled persons and households headed by women." See ss 4(6) and 4(7) of PIE.

30 *Ndlovu* 124 [19].

31 *Ndlovu* 124 [19].

32 80 of 1976.

33 *Ndlovu* 149 [87].

34 50 of 1999.

35 Van der Walt 2002 *TSAR* 254-289.

households in South Africa earned an income of R2500 or less.[36] Protection of the tenant from paying exorbitant amounts of rental moneys for accommodation that is not up to standard is therefore important. The only way that the government could get some support from the private sector, however, was to make the rental housing market attractive for both parties.[37]

The legislature therefore also affords the landlord some very important basic rights, of which the right to prompt payment of the rent is the most obvious example.[38] To alleviate some of the pressure on the government for providing housing,[39] these rights are intended to stimulate the private investor to invest money in the rental housing market.[40]

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36 Thomas "The Rental Housing Act" 2000 *De Jure* 236; in 1994 the National Ministry of Housing published a white paper titled *A New Housing Policy and Strategy for South Africa*.

37 Thomas 2000 *De Jure* 236.

38 S 4(5)(*a*) of the Rental Housing Act 50 of 1999. The right to prompt payment of the rent was also one of the landlords' rights under the common law. The Rental Housing Act codified some of these rights.

39 S 2(1)(*a*) states that government should promote a stable and growing environment by introducing some measures, these include encouraging investment in urban and rural areas that are in need of revitalisation and resuscitation and s 2(1)(*b*) which states that Government must facilitate the provision of rental housing in partnership with the private sector.

40 Mukheibir "The Effect of the Rental Housing Act 50 of 1999 on the Common Law of Landlord and Tenant" 2000 *Obiter* 326 "The new legislation is aimed at stimulating interest in investment in the rental housing market to make more property available for rental housing. Because of the culture of non-payment there is not much investor confidence in rental housing. The legislation aims to introduce some stability into the rental housing market and thus encourage investment." The objectives of the Act

Since the private sector would be unwilling to invest money into the rental housing market if there were no financial benefit in return, potential investors need to be assured that they will be adequately protected if they invest money in the rental housing market. Further, the majority of landlords of residential property in South Africa are owners not because of excess wealth, but because they need some form of income to provide for their retirement.[41] Such people cannot afford to invest their money in the rental housing market if it is difficult to evict defaulting tenants. The RHA therefore alleviates possible apprehension about the use of rental housing and limits the negative implications of non-payment of rent on the market.[42]

Although the court[43] in *Ndlovu* did consider the Rental Housing Act, it applied the requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, which applies to squatters.[44] Within the context of this research a

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were found in the "Memorandum on the Objects of the Rental Housing Bill, 1999" Rental Housing Bill 1999 B 29D-99.

41 Green "Law Society of South Africa Seriously Concerned about Property Law Ruling" 2002 October *De Rebus* 10. Roger Green is Chairman of the Standing Committee on Property Law Matters of the Law Society of South Africa (LSSA).

42 Par 2(1) (a) and (b) of the Memorandum on the Objects of the Rental Housing Bill, 1999.

43 *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA).

44 Green 2002 October *De Rebus* 10 "PIE was introduced as part of Government's land reform programme to afford protection to squatters on land who had no legal right to land."

"squatter" includes anyone who took control of property without the necessary consent of the owner or person in charge. Squatter will not just refer to the narrow definition of people who make use of informal housing and will also include queue-jumpers. As the *Ndlovu* decision renders it harder and more expensive for landlords to evict defaulting tenants, it has had a considerable influence on the way in which private investors regard rental housing. According to Green,[45] "tenants who don't pay rent and buyers who default on their bond payments, will have the same protection against eviction as illegal squatters." Green on behalf of the Law Society of South Africa (LSSA) indicates concern about the negative influence of the decision on the rental housing market and the discriminatory effect of the judgment "against the very people it is intended to protect."[46]

Problems that could arise as a result of the *Ndlovu* decision have been identified as: (i) abuse of the provisions of PIE;[47] (ii) prevention of legislation from functioning properly, especially the Rental Housing Act;[48] (iii) total disregard of the normal rules of contract law;[49] (iv) uncertainty regarding the rights and

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45 Green 2002 October *De Rebus* 10.

46 Green 2002 October *De Rebus* 10.

47 Anonymous "Poor hampered by PIE interpretation" 2002 December *De Rebus* 7.

48 Muller "Will judgment threaten investment?" 2002 September *Finance Week* 18; Pienaar "Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits en Lubbe (Eds) *Remedies in Zuid-Afrika en Europa* (2003) 158.

49 4 5 4 *infra.*

enforcement of such rights as an unlawful occupant would have against the owner of a property;[50] (v) the cost and time-consuming nature of the procedure involved;[51] and (vi) the effect this decision would have on the rental housing market in South Africa as a whole.[52]

Of course, the Rental Housing Act is not flawless, but in *Ndlovu* it could have provided adequate protection for all stakeholders if the court had not disregarded the act.[53] Ultimately the problem of evicting defaulting tenants is one concerning landlords and tenants, and not squatters. The question is therefore whether the court was wrong. If this is indeed the case, the question further is which aspects of the decision are disputable and how the court could have handed down a decision that balances the rights of the owner and the tenant better. The main aim is, therefore, to describe the effects when the most appropriate eviction procedure is not used and to ascertain which procedure should be

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50 Pienaar "Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits en Lubbe (Eds) *Remedies in Zuid-Afrika en Europa* (2003) 154.

51 Anonymous 2002 December *De Rebus* 7.

52 Pienaar "Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits en Lubbe (Eds) *Remedies in Zuid-Afrika en Europa* (2003) 158; Green 2002 October *De Rebus* 10; Hopkins and Hofmeyr "The constitutional anomaly created by extending PIE" 2003 March *De Rebus* 15.

53 In the case of *Ndlovu v Ngcobo* 125 [21] – 125 [24] the court was of the opinion that the Rental Housing Act does not cover the eviction of tenants adequately and the majority decided that the procedures as set out in PIE are to be preferred. This was decided even though the parties opposing PIE's applicability to the rental housing market argued that the Rental Housing Act provides an adequate procedure.

employed when obtaining an eviction order against a defaulting tenant.

The study proceeds from the point of departure that a more balanced relationship could be achieved between landlord and tenant in the context of the Rental Housing Act. The latter allows for speedy dispute resolution,[54] and has not substantially qualified the common law eviction procedure.[55] In all instances where no act governs the eviction procedure, the *rei vindicatio* is employed to have someone evicted. It is the use of this common law eviction procedure, which is based on principles that have developed through the ages, that allows the speedy resolution of disputes in terms of the RHA. This, the study holds, is the most important feature of the RHA which contributes to stimulate the rental housing market so that more landlords will attempt to make money out of letting and more tenants will obtain adequate housing through renting.

The significance of this research therefore lies in its attempt to clarify the issues in the *Ndlovu* decision that have caused so much confusion with regard to eviction of a party holding over[56] and to evaluate the government's proposed amendments to PIE to ascertain how the current uncertainty may be resolved.

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54 The Preamble to the RHA.

55 S 13(10) of the RHA.

56 Pienaar 2002 *SAPR/PL* 2 358.

Because *Ndlovu* is about a party holding over in the context of residential property, the study considers only lessees who have had their lease contracts terminated because they were in arrears with the payments of their rent, and who then became parties holding over because they refused to vacate the property. By contrast, anyone who takes control of property without the necessary consent of the owner or person in charge is considered to be a squatter, which includes queue-jumpers in the context of government's land reform and housing programmes.[57]

1 3 Course of the present inquiry

To determine whether the problem can be solved by applying the relevant statutory measures in their correct context, Chapter Two closely examines the objectives, core concepts and the scope of PIE.[58] It shows how imprecise the existing scope of the Act is and attempts to determine what the scope of PIE should be. Special attention is also paid to the eviction procedures. In Chapter Three the Rental Housing Act,[59] which was promulgated precisely for the purpose of regulating the issues between landlords and tenants, is investigated. The main goals and

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[57] A queue-jumper is someone who moves into low-cost housing before the owner/designated person can take control of the property. The issue concerning queue-jumpers however goes beyond the scope of this study.

[58] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

objectives of the Act, which are believed to be undermined by the *Ndlovu* decision, are examined, again with particular attention to the eviction procedures. The chapter shows that the provisions and procedures of the RHA are irreconcilable with those of PIE and that by applying PIE to the rental housing market, the court has hindered the RHA from achieving its goals. Because PIE formed the basis of the *Ndlovu* decision, which still represents the current status of the law concerning eviction of parties holding over, this could prove to be a costly error. In Chapter Four the arguments the court considered in *Ndlovu* before deciding that PIE was applicable in cases of holding over, are analysed and criticised in relation to the minority decision and the views of academic writers. The problems that arise from the application of PIE to the eviction of parties holding over are discussed. In an attempt to resolve the current uncertainty, some suggestions are put forward. In Chapter Five the government's proposed amendments are discussed and related to the findings of this study, followed by brief concluding remarks.

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[59] 50 of 1999.

CHAPTER 2

THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT BEFORE *NDLOVU*

2 1 Introduction

For purposes of comparison, the provisions of The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)[60] need to be examined. Special consideration is also given to the existing imprecise scope of PIE and what it should be, a matter that underpins the argument of this study.

2 2 The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) was promulgated in June 1998 to repeal, among others, the Prevention of Illegal Squatting Act.[61] This Act, which had been introduced in 1951, was out of touch

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60 19 of 1998.

61 52 of 1951; schedule 1 s 11(1) of PIE.

with the new constitutional dispensation.[62] The main problem was that people who were forced to move from land on which they had squatted to alternative land did not get secure title to the new land either. This means that although they had received "new" land, they remained squatters. As Pienaar remarks, the squatters' "problem was not solved [by the Prevention of Illegal Squatting Act], it was only moved."[63]

Since 1996 the "forceful" removal of squatters has come into conflict with section 26(3) of the Constitution, which provides that no one may be evicted from their homes, nor may such homes be demolished, without an order of the court. Hence a new act was needed to regulate the evictions of such vulnerable people as those described above. PIE is the act that was intended to fill this void.

2 2 1 Objectives of PIE

PIE introduced some considerable changes with regard to the forceful removal of squatters.[64] Its objectives are twofold: (i)

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62 Pienaar and Muller "The Impact of The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on Homelessness and Unlawful Occupation Within the Present Statutory Framework" 1999 *Stell LR* 370-371.

63 Pienaar "The effect of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 on Owners and Unlawful Occupiers of Land" 1999 September *Butterworths Property Law Digest* 12; Pienaar and Muller 1999 *Stell LR* 395-396.

64 Pienaar 1999 September *Butterworths Property Law Digest* 12-13.

providing for the prohibition of illegal eviction on the one hand and (ii) prescribing procedures for the eviction of unlawful occupiers on the other.[65] Pienaar and Muller[66] note, however:

> "The title of the Act is misleading. The prevention of the illegal eviction of occupants is adequately addressed and certainly in line with section 26(3) of the Constitution... However, the Act is lacking with regard to the *prevention* of unlawful occupation of land."

Although this means that the Act is ineffective in dealing with the prevention of unlawful occupation, the matter will not be discussed here, since it falls outside the scope of this study. If PIE were indeed intended to be applicable to the rental housing situation, ways must be found to address the problems created by its costly and time-consuming procedures.

2 2 2 Core Concepts

A "building or structure" is defined in PIE as any hut, shack, tent or any other form of temporary or permanent dwelling or shelter.[67] The definition of this term is important in order to provide guidelines on what type of structure could be seen as a "home" from which the unlawful occupant can be evicted. It is

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65 This is according to the long title of the Act. Pienaar and Muller 1999 *Stell LR* 379.

66 Pienaar and Muller 1999 *Stell LR* 395-396.

67 S 1(i) of the Prevention of Illegal Eviction from and Occupation of Land Act 19 of 1998.

so broad that it includes not only temporary structures, but also permanent buildings.

"Land" is defined as any portion of land.[68] This definition could lead to possible problems, because there is no indication that the definition includes buildings that are built on the land in question.[69]

"Owner" in terms of the Act refers to the registered owner of land, and includes an organ of state.[70] This definition is restricted and is the typical common law definition, but is very important to the context of eviction of an unlawful occupant. The definition is important because the "unlawful occupier" should occupy the property without the consent of the "owner" or "person in charge." The definition of "person in charge," that is a person who had the legal authority to give permission to a person to enter or reside upon the land in question at the relevant time,[71] also gives the impression that the Act could include a landlord and an estate agent acting in terms of a mandate of the landlord.

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68 S 1(v) of PIE.

69 If the definition of 'land' is read with that of 'building' or 'structure' it is necessarily inclusive.

70 S 1(ix) of PIE.

71 S 1(x) of PIE.

An "unlawful occupier" according to the Act is "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land. It excludes persons who are occupiers in terms of the Extension of Security of Tenure Act,[72] and persons whose informal rights to land, but for the provisions of PIE, would be protected by the provision of the Interim Protection of Informal Land Rights Act."[73] The Rental Housing Act[74] has of course not been excluded from this definition in similar fashion as the acts mentioned above, because the RHA was promulgated after PIE had come into operation. It would therefore not have been possible for the legislature to mention the RHA as one of the grounds that should expressly be excluded in Section 1 of PIE. Suffice it to mention here already that there is little doubt that it would have been excluded from the realm of PIE if it had been promulgated before PIE.[75] The matter is discussed more fully in Chapter Five.

"Consent" for lawful occupation can be conferred in writing or otherwise. If the occupant received such consent from the owner or the person in charge, the occupant cannot be seen to be unlawful in terms of the Act. This has an effect on the scope of

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72 62 of 1997.

73 S 1(xi) of PIE.

74 50 of 1999.

of PIE, which repealed several acts in part[78] and the Prevention of Illegal Squatting Act fully. It is the repeal of this latter act that makes PIE applicable in cases where squatters, in the wider sense of the word,[79] are to be evicted. Despite the fact that the Act contains many other clues regarding its scope, however, many uncertainties remain.

2 2 3 1 The scope as viewed in terms of the core concepts

The very broad definition of "buildings and structures" does indeed seem to allow for an interpretation that buildings belonging to someone else (e.g. a landlord) are included under the Act, as opposed to only "bare" or "vacant" land, which perhaps contains temporary structures. The court in *Absa Bank v Amod*[80] found that PIE is applicable only to vacant land. However, the definition may intentionally have been phrased broadly to cover cases of queue-jumpers.[81] Nevertheless an

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78 The General Law Amendment Act 24 of 1952, the Black Laws Amendment Act 76 of 1963, the Abolition of Influx Control Act 68 of 1986, the Abolition of Racially based Land measures Act 108 of 1991, the Less Formal Township Establishment Act 113 of 1991, the Provincial and Local Authority Affairs Amendment Act 134 of 1992 and the Abolition of Restriction on the Jurisdiction of Courts Act 88 of 1996.

79 Ch 1 *supra.*

80 [1999] 2 All SA 423 (W).

81 Ch 1 *supra.*

interpretation permitting the scope of the Act to include also buildings of landlords seems to be too long a haul.[82]

As the Act does not make any mention of whether the concept of owner includes a landlord, the term has not been sufficiently defined. It could, however, be conceded for argument's sake that the term might include a landlord, and that the Act accordingly is applicable to all owners, including landlords, who would usually be the registered owners of the land. If only this definition is considered, it does seem as though PIE could be applicable in cases of holding over. However, the occupier has to be unlawful to be evicted in terms of PIE. There seems to be general agreement that this happens only when there was no *initial* consent of the owner to take occupation of the property.[83] A party can therefore only be considered to hold over if the owner did initially give consent. Since this issue was not dealt with by the court before *Ndlovu*, it was never resolved.

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[82] The definition of building is, however, not the best indication that PIE should not be applied to the rental housing market. The definition of 'unlawful occupier' serves as a much better indicator of the scope of PIE.

[83] Gildenhuys "Evictions A Quagmire for the Unwary" 2002 September *LexisNexis Butterworths Property Law Digest* 10. Gildenhuys was quoting Ms. Lamprecht, head of Justice Training College; Guthrie "Defaulting Tenants" 2000 January *De Rebus* 24; Spohr 2002 December *LexisNexis Butterworths Property Law Digest* 5; *Nelson Mandela Metropolitan Municipality v Various Occupiers of Stands in Mnyanda Street, Qaqawuli Phase 2, New Brighton* [2001] All SA 490 (SE); *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 2 SA 1074 (SE); *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Another* 2001 4 SA 1074 (SE); *Esterhuyze v Khamandi* 2001 1 SA 1024 (LCC); *Ellis v Viljoen* 2001 4 SA 795 (C).

The requirement of consent, or lack thereof, as described above restricts the Act to cases where occupation was taken without consent[84] and would therefore exclude the case of a landlord and tenant. This means that while an owner could be considered to be a landlord and the person in charge could give consent, the implication of the meaning of consent, excludes parties holding over. The effect of this is that a party holding over could never be seen as an unlawful occupant in terms of PIE. This is because such a person always had the necessary initial consent that was needed to take control of the property and that the owner's consent was withdrawn at a later stage.

The definition of an unlawful occupier has led to a great deal of controversy. Not only is it very wide, but it is also not clear who would be considered an unlawful occupant in terms of the Act.[85] It does suggest, however, that the legislature did not want to include all forms of "unlawful occupation" under the scope of PIE. Although some authors argue that the definition is wide enough to include tenants who default on their rent,[86] their opponents point out that PIE is not supposed to cover defaulting

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84 In the *Ndlovu* case the majority decided differently, even tough this issue was not clearly dealt with by the court.

85 Gildenhuys 2002 September *LexisNexis Butterworths Property Law Digest* 5.

86 Purshotham "Equity for Tenants" 1999 June *De Rebus* 27; Costa "Landlords and *les miserables*" 2003 March *De Rebus* 22-24.

tenants.[87] According to the latter the Act exists only to prevent squatting and to regulate the illegal eviction of squatters.

There are those who claim that the withdrawal of consent would not affect the people who qualify as unlawful occupants as the Act states "...a person who occupies land without ... consent" and not "a person who is in occupation of land without consent."[88] The head of the Justice Training College,[89] however, states that a distinction should be made between someone who "occupies" the land and someone who is "in occupation" of the land. In other words, there is a difference between someone who takes control of land unlawfully and someone that obtains land lawfully and is later in unlawful occupation as a result of defaulting on the rent.[90] Guthrie agrees that it is not being in unlawful occupation, but the taking of unlawful occupation that renders the Act applicable,[91] which excludes the rental relationship. The reference to "without the express and tacit consent of the owner or the person in charge..." therefore seems

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87 Spohr 2002 December *LexisNexis Butterworths Property Law Digest* 3; Gildenhuys 2002 September *LexisNexis Butterworths Property Law Digest* 10.

88 Gildenhuys 2002 September *LexisNexis Butterworths Property Law Digest* 10. Gildenhuys was quoting Ms. Lamprecht, head of Justice Training College.

89 Ms. Lamprecht, head of Justice Training College, as quoted in Gildenhuys 2002 September *LexisNexis Butterworths Property Law Digest* 5.

90 Gildenhuys 2002 September *LexisNexis Butterworths Property Law Digest* 10.

91 Guthrie 2000 January *De Rebus* 24.

to refer to illegal occupiers who take occupation without the consent of the owner or person in charge. The wording would also seem to exclude someone who occupied the land in terms of a lease agreement as this would constitute consent to occupy the land.

2 2 3 2 The scope as viewed in terms of case law

Case law also serves as an indication of the scope of an Act. Since PIE has successfully been used in several cases relating to squatters,[92] few seem to doubt that PIE relates to squatting. *Groengras Eiendomme v Elandsfontein Unlawful Occupants*[93] serves as an example. In this case, several parties applied to the court for an urgent eviction order in terms of PIE, not only on account of the applicants' trying to prevent serious damage from occurring, but also on account of the dangers that the unlawful occupants were facing by living in a particular situation. The court applied PIE and granted an urgent eviction order against the unlawful occupants.

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92 *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2000 2 SA 67 (C); *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 4 SA 1222 (SCA); *Pedro and others v Transitional Council for the greater George* 2001 1 All SA 334 (C); *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* 2001 4 SA 385 (W); *Ridgway v Janse van Rensburg* 2002 4 SA 186 (C); *Transnet t/a Spoornet v Informal Settlers of Good Hope* [2001] 4 All SA 516 (W); *Illegal Occupiers of Various Erven, Philippi v Monwood Investment Trust Company (Pty) Ltd* [2002] 1 All SA 115 (C).

93 2002 1 SA 125 (T).

A case in which the court found that PIE should not protect squatters against eviction is *Nelson Mandela Metropolitan Municipality v Various Occupiers of Stands in Mnyanda Street, Qaqawuli Phase 2, New Brighton.*[94] This was because occupation had been taken with the consent of the owner and PIE explicitly applies only to people who occupied property without consent to do so. The only question to be answered was therefore whether or not PIE would become applicable once the consent had been revoked.[95] This case serves as an illustration of the position that the provisions of PIE should not be applicable to situations where initial consent to occupy was withdrawn or the agreement was terminated.[96] This means that the provisions of PIE would not be applicable in situations where a lease agreement had existed but was cancelled, as the tenant would have taken control of the property with the consent of the landlord.

Other cases that found that the scope of PIE should be restricted to squatters gave different reasons for restricting PIE to its intended scope. In the case of *Absa Bank v Amod,*[97] the applicants approached the Court for an order to evict the respondent from the house in which he was living because the

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94 [2001] All SA 490 (SE).

95 *Nelson Mandela* 495 G-I.

96 Badenhorst et al *Silberberg and Schoeman's The Law of Property* 528, n 546.

97 [1999] 2 All SA 423 (W).

agreement between them had been terminated. Schwartzman J found not only that the provisions of PIE were not applicable to situations of holding over, but also that the main objective of the Act was the control and regulation of people who live in informal settlements on vacant land.[98] The case therefore excludes evictions in terms of PIE in the context of rental housing. Since land on which buildings exist cannot be seen as "vacant land" and tenants cannot be considered informal settlers, this interpretation narrows the scope of the Act considerably. In terms of such an approach, tenants would still have to be evicted in terms of the common law. *Ross v South Peninsula Municipality*[99] supported the finding of *Absa*.[100] Josman AJ was also of the opinion that the provisions of PIE should only be applied to cases where informal settlements had been set up on vacant land without the permission of the owner. The main concern of *Ross*, however, was that PIE could prove to be helpful in considering "all relevant circumstances"[101] to include the vulnerable groups defined in the Act.[102]

Finally, in the case of *Brisley v Drotsky,*[103] the Supreme Court of Appeal found that PIE should not be applied for evicting a

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98 *Absa* at 430 e; 430 f.

99 2000 1 SA 589 (C).

100 *Ross* at 599 A.

101 *Ross* at 599 A-B.

102 Ss 4(6) and (7) of PIE that provides for added protection to the elderly, children, disabled persons and households headed by women.

103 2002 4 SA 1 (SCA).

defaulting tenant. They found that lease agreements and tenants are covered by section 26(3) of the Constitution, which provides that all relevant circumstances must be taken into consideration, before the court could grant an eviction order. All the judges agreed that this phrase referred neither to the circumstances nor to the provisions of PIE.[104] The Supreme Court of Appeal was of the opinion that the common law eviction procedure should be used when having a defaulting tenant evicted instead of PIE.[105] It did, however, give some content to the term "all the relevant circumstances," specifying that such circumstances should be legally relevant, which would then be similar to the requirement of the common law.[106] This reinforced the view that the common law procedures are extensive enough for evicting a defaulting tenant and that PIE was therefore not applicable.

2 2 3 3 The scope as interpreted in the literature

As seen from these cases, there seemed to be consensus regarding the restriction of PIE to the squatting context until *Ndlovu*. [107] Despite the understanding of PIE reflected in case law, however, there have been many differing opinions as to exactly when the Act would be applicable and whether the Act

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104 *Brisley* 20 [38].

105 *Brisley* 40 [43] and 75 [38].

106 *Brisley* 39 [42].

107 2003 1 SA 113 (SCA).

would be applicable in all cases of unlawful occupation.[108] According to Guthrie, this can only be ascribed to poor draftsmanship.[109] Initially it was thought that the basis of PIE would be to protect illegal squatters from arbitrary evictions.[110] Green,[111] for example, notes that PIE was introduced by the legislature as part of the Government's policy regarding land reform and to afford squatters some protection,[112] adding that it could not have intended to render the age-old law of contract useless, which would lead to lawlessness and anarchy.[113] Guthrie agrees, arguing that if the legislature had intended PIE to be applicable to the rental housing market, it would have expressly mentioned it.[114]

Even though no mention is ever made of tenants in the Act, Purshotham seems to disagree with the notion that PIE is applicable only to squatting.[115] Both he and Costa contend that this Act is applicable to every situation where someone is in

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108 Pienaar "Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits en Lubbe (Eds) *Remedies in Zuid-Afrika en Europa* (2003) 145.

109 Guthrie 2000 January *De Rebus* 24.

110 Spohr 2002 December *LexisNexis Butterworths Property Law Digest* 3.

111 Roger Green, Chairman of the Standing Committee on Property Law Matters of the Law Society of South Africa. Green 2002 October *De Rebus* 10.

112 Green 2002 October *De Rebus* 10.

113 Green 2002 October *De Rebus* 10.

114 Guthrie 2000 January *De Rebus* 24.

115 Purshotham 1999 June *De Rebus* 27.

unlawful occupation of a "home."[116] It should be noted, however, that at the stage at which Purshotham published this paper, the Rental Housing Act had not been promulgated. In 2003, however, Costa was still of the opinion that PIE should include any person that is in "unlawful occupation."[117]

2 2 4 Eviction procedure(s) under PIE

Regulating eviction is the main objective of PIE. There is more than one procedure that can be followed to evict an unlawful occupant in terms of PIE. These include the "normal procedure,"[118] the procedure to be followed by organs of state when a private owner does not act,[119] and urgent applications.[120] For the purposes of this study consideration is given only to the normal proceedings and the urgent proceedings, in an attempt to limit the ambit of the paper. These are the procedures afforded to the private owner that were applied in *Ndlovu*.

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116 Purshotham 1999 June *De Rebus* 27; Costa 2003 March *De Rebus* 22.

117 Costa 2003 March *De Rebus* 24: "Simply put, landlords who are financially comfortable are now by law compelled to have a social conscience in appropriate hardship cases which fall within the limitations prescribed by PIE."

118 S 4.

119 S 6.

120 S 5.

2 2 4 1 Eviction of unlawful occupiers[121]

According to Section 4(2) of PIE, the court must serve written or effective notice of proceedings on the unlawful occupant at least fourteen days before the hearing for an eviction to take place. The notice contemplated in subsection (2) must contain the following information:[122] (i) The fact that proceedings are being instituted in terms of subsection (1) for an eviction order against the unlawful occupier; (ii) The date on which and the time at which the court will hear the proceedings; (iii) the grounds for the intended eviction; and (iv) the fact 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.

The requirement to serve notices on unlawful occupants is really challenging,[123] especially in the case of people living in informal settlements, whose numbers continually fluctuate. The multitude of languages spoken in an informal settlement makes it difficult to serve notices, as can be seen from the recent finding that notices printed in Xhosa and English only may not reach the intended readership.[124] In most informal settlements where

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121 S 4.

122 S 4(5).

123 Badenhorst et al *Silberberg and Schoeman's The Law of Property* 529 n 554.

124 *Illegal Occupiers of Various Erven, Philippi v Monwood Investment Trust Company (Pty) Ltd* [2002] 1 All SA 115 (C).

illiteracy is at a high level, loud announcement must be made because notices would be ineffective.[125]

The period for which an occupier has occupied land unlawfully plays an important role as PIE prescribes different procedures, depending on the length of the unlawful occupation. If the unlawful occupier has occupied the land in question for less than six months at the time when proceedings are initiated, the court may, after considering all the relevant factors[126] grant an eviction order, if the court is of the opinion that it is just and equitable to do so.[127] The court must ascertain whether land has been made available or can reasonably be made available for the relocation of the unlawful occupiers. If the unlawful occupier has occupied the land in question for more than six months at the time the proceedings are initiated the court may grant an eviction order after considering all the relevant circumstances.[128]

If the court is satisfied that all the requirements of sections 4(1) to (7) have been met and that the unlawful occupier has not

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125 *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 4 SA 1222 (SCA).

126 S 4(6) "...after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women."

127 S 4(6).

128 S 4(7). These circumstances are similar to those mentioned in section 4(6) of the same Act.

raised a valid defence, it must grant the eviction order.[129] The order must determine a just and equitable date on which the unlawful occupier must vacate the land[130] and a date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date stipulated by the court.[131] In determining a just and equitable date the court must take all relevant factors into consideration. It may also make an order for the demolition or the removal of buildings and structures.[132]

2 2 4 2 Urgent proceedings for eviction[133]

Before the court can grant an urgent eviction order, the court has to give written or effective notice of intention of the owner or persons in charge to institute urgent proceedings.[134] This notice must contain the same information that the notice in terms of

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129 S 4(8).

130 S 4(8).

131 S 4(8).

132 Ss 4(9) and 4(10) respectively.

133 S 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 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 not granted; and

(c) there is no other effective remedy available.

134 S 5(2).

Section 4(5) must contain.[135] No mention is made of the period of time in which notice must be given, while at least 14 days' notice of the proceedings is required in terms of Section 4.

The court may grant an urgent eviction order, pending a final order, if it is satisfied that there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not evicted immediately.[136] The real and imminent danger that is referred to in this section does not only relate to the applicants. According to the *Groengras Eiendomme v Elandsfontein Unlawful Occupants*,[137] it applies to anybody and to the relevant property. However, the hardship of the owner should outweigh the hardship of the unlawful occupant if the eviction order is not granted. The last requirement that must be met is that there must be no other effective remedy available to the owner.[138]

Both the normal proceedings and the urgent proceedings are time-consuming and expensive.[139] The court could delay the

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135 2 2 4 1 *supra* where s 4(5) is discussed.

136 S 5(1).

137 2002 1 SA 125 (T).

138 These requirements are similar to the common law requirements for an interim interdict. Hopkins and Hofmeyr 2003 March *De Rebus* 17.

139 Green 2002 October *De Rebus* 10. The fact that the court could delay the eviction order makes it more expensive than the common law as the owner would not be able to use the property. In cases where the owner is

eviction order if it is of the opinion that alternative land should be made available and none is available.[140] This could in the end prove to be a very costly exercise for the landlord, and certainly does not promote the provision of adequate housing in South Africa.

2 3 Some concluding remarks

The question of whether parties holding over should be seen as unlawful occupiers raises concern. The fact that the unlawful occupier must have acquired occupation of the property without the express or tacit consent of the owner before an eviction can be granted seems to indicate that the scope of PIE does not include the category of lessee. In contrast with squatters, parties holding over received consent, but did not vacate the property once the consent was withdrawn.

Several courts have given the matter of the scope and applicability of PIE considerable attention in the cases mentioned above.[141] Their interpretation that PIE should only be

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a landlord these delays could amount to a considerable financial loss for the owner.

[140] The court has to consider s 4(7) before it can grant an eviction order. The wording of this section states that the "court *may* grant an eviction order if it is of the opinion that it is just and equitable to do so." It is not clear whether this implies that the court has the discretion to deny the owner an eviction order where it finds that it is just and equitable to do so, for example, where alternative land (housing) has not been made available.

[141] *Absa Bank v Amod* [1999] 2 All SA 423 (W); *Ross v South Peninsula Municipality* 2000 (2) SA 589 (C); *Betta Eiendomme v Ekple-*

applicable in cases where squatters need to be evicted was held to be correct in the Supreme Court of Appeal judgment of *Brisley v Drotsky.*[142] Until *Ndlovu,* no real problems had arisen when PIE was applied in the context of eviction of squatters. The point of departure of this study, that the scope of PIE was misinterpreted in *Ndlovu,* therefore still holds.

Epoh 2000 (4) SA 468 (W); *Ellis v Viljoen* 2001 4 SA 795 (C); *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA) 131.

142 2002 4 SA 1 (SCA).

CHAPTER 3

THE RENTAL HOUSING ACT AND ITS RELIANCE ON COMMON LAW

3 1 Introduction

Because the position of this study is not only that the Rental Housing Act (RHA)[143] would have been a more useful basis for deciding *Ndlovu*, but also that the Prevention of Illegal Eviction from and Occupation of Land Act (PIE)[144] was not intended for parties holding over, this chapter is dedicated to understanding the objectives and the core concepts of the RHA, and the ways in which the Act aims to achieve its objectives. The eviction orders that are prescribed by the Rental Housing Act are of particular relevance.[145]

The most important factor in the context of this thesis is that the RHA provides for a procedure that could be followed when a landlord wants to evict a defaulting tenant. In this way, it balances the rights of landlords with those of tenants.

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143 50 of 1999.

144 19 of 1998.

145 3 2 5 *infra.*

Interestingly, very few writers have devoted time and space to the Rental Housing Act, which seems to indicate that it generally achieves its objectives,[146] or at least that its provisions are not very problematic. Since the *Ndlovu* decision seems to threaten several of these objectives, however, it is necessary to analyse the provisions of this Act in some detail to ascertain whether or not these definitions are wide enough to cater for the situation which in *Ndlovu* was treated so unsatisfactorily under PIE.

3 2 The Rental Housing Act

The RHA was enacted to repeal the Rent Control Act[147] and, among other purposes, to promote rental housing,[148] to improve conditions in the rental housing market[149] and to facilitate the provision of rental housing in partnership with the private sector.[150]

3 2 1 Objectives of the RHA

This Act was introduced to regulate the relationship between lessors and lessees in South Africa by creating measures for the

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146 Mukheibir 2000 *Obiter* 325; Legwaila "An Introduction to the Rental Housing Act 50 of 1999" 2001 *Stell LR* 227; Thomas 2000 *De Jure* 235; Van der Walt 2002 *TSAR* 254-289.

147 80 of 1976.

148 Preamble to the Act.

149 S 2(1)(*a*)(i) of the Rental Housing Act 50 of 1999.

150 S 2(1)(*b*) of the Rental Housing Act 50 of 1999.

protection of landlords and tenants.[151] It can be inferred from the preamble and the objectives of the Act that achieving the aims of section 26 of the Constitution, in terms of which everyone is granted the right to adequate housing, [152] is in fact the main objective of the Act.[153] As pointed out in Chapter One, the government has realised that the provision of adequate housing is a problem, and has accepted the responsibility to promote rental housing.[154] The RHA also provides for the procedure that should be followed when a tenant defaults on payment.

The goals of the RHA have been discussed by some writers,[155] who have emphasised its aim to open up property to persons who rely on rental housing by stimulating investment in the rental housing market, where a serious need for stability is noticeable. Thomas[156] explains:

> "The government is of the opinion that maximum private investment will be attracted within a normalised market. It is nowadays widely accepted that vigorous and open

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151 Mukheibir 2000 *Obiter* 325.

152 Thomas 2000 *De Jure* "In view of the fact that the acquisition of an own home is beyond the financial resources of many people, rental housing is a key component of the housing sector. Thus the government has accepted the responsibility to promote the provision of rental housing and the Rental Housing Act." 235.

153 Legwaila 2001 *Stell LR* 227.

154 Thomas 2000 *De Jure* 235; also see 1 2 *supra.*

155 Mukheibir 2000 *Obiter* 325; Thomas 2000 *De Jure* 237; Legwaila 2001 *Stell LR* 227.

156 Thomas 2000 *De Jure* 236.

competition between suppliers of goods and services to end-users is a prerequisite for any effective functioning market."[157]

Although Pienaar has argued that the market orientation of the Act is a problem, she suggests that more government involvement could act as a stabilising factor.[158] While the problem is more significant than can be dealt with in this study, it must be accepted from an economic perspective that market sensitivity could lead to more investment by the private sector. Making it harder for the landlord to have the tenant evicted could influence the market considerably and could deter the private sector from investing capital into the rental housing market.[159]

None of these objectives seems to overlap with those of PIE.[160] PIE has as its main objectives the prevention of illegal eviction of unlawful occupiers and the prevention of unlawful occupation of land. Neither of these aims seems to be reconcilable with the aims of the RHA described above, which were conceptualised to regulate and stimulate the rental housing market.

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157 Thomas 2000 *De Jure* 236.

158 Pienaar 2002 *SAPR/PL* vol 2 358.

159 Pienaar "Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits en Lubbe (Eds) *Remedies in Zuid-Afrika en Europa* (2003) 158; Green 2002 October *De Rebus* 10; Hopkins and Hofmeyr 2003 March *De Rebus* 15.

160 2 2 1 *supra.*

3 2 2 Core concepts

The Act defines "dwelling" as including "any house, hostel room, hut, shack, flat, apartment, room, outbuilding, garage, or demarcated parking space which is leased as part of the lease."[161] This definition is phrased widely to include any place that can be considered a home or a house. The word "any" indicates that the scope of the Act is such that it includes all agreements where residential property is let. This extends protection to everyone in South Africa that leases any form of a home.[162] However, in contrast with PIE, the RHA never makes any mention of demolition.[163] Where PIE does so, it also does not appear to include rental housing, simply because a landlord would not under normal circumstances apply to the court to have his or her own building "demolished or removed."[164]

"Lease" is defined as "[a]n agreement of lease concluded between a tenant and a landlord in respect of a dwelling for

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161 S 1 of Act 50 of 1999.

162 This definition seems to be in line with the spirit, purport and objectives of the Bill of Rights, especially Section 26 of the Constitution, act 108 of 1996. It indicates that the Rental Housing Act is applicable to all cases where residential property is being let; Thomas 2000 *De Jure* 237, stated that: "the definition of "dwelling" is of utmost importance and the legislator has thrown her net wide by defining "dwelling" as any house, hostel room, hut, shack, flat, apartment, room, outbuilding, garage, or demarcated parking space which is leased as part of a lease."

163 2 3 *Supra.*

164 Eviction does not necessarily include demolition, demolition will only commence in certain cases where it is needed. It is, however, contended that demolition will never be applicable in cases of an owner trying to have a tenant evicted. 2 3 *Supra.*

housing purposes."[165] This definition is just a codification of the common law, which has the effect that the rules of contract law are applicable to the agreement. This seems to indicate that the RHA is applicable to all lease agreements involving residential property and indicates that the RHA is irreconcilable with PIE. It would for example be impossible for a tenant to take control of (i.e. lease) a rental property without consent of the owner, while PIE requires an unlawful occupant to have taken control of the property without the consent of the owner.[166] Even parties holding over were excluded by PIE before *Ndlovu*. Although they occupy a property without consent at the time of the application for their eviction, they did have initial consent to take control of the property, which distinguishes them from squatters in a very real sense. Judging from some recent case law such as *Nelson Mandela Metropolitan Municipality v Various Occupiers of Stands in Mnyanda Street, Qaqawuli Phase 2, New Brighton*;[167] *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others*;[168] *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Another*[169] and *Esterhuyze v Khamandi,*[170] it seems that even where squatters occupied the premises with the initial consent of the owner PIE would not be applicable.

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165 S 1 of Act 50 of 1999.

166 2 2 2 *supra*.

167 [2001] All SA 490 (SE).

168 2000 2 SA 1074 (SE).

169 2001 4 SA 1074 (SE).

170 2001 1 SA 1024 (LCC).

A "landlord" is widely defined as the owner of a dwelling that is leased, and includes the duly authorised agent or a person who is in lawful possession of a dwelling and has the right to lease and sub-lease it.[171] This means that the Act will sometimes be applicable to parties other than the tenant and owner, such as an estate agent who has full authority to contract on behalf of an owner. By not limiting the scope of the Act to instances where an owner leases residential property, but including cases where a duly appointed agent leases out the property, the applicability of the Act is broadened.

For the purposes of this Act, "unfair practice" may relate to, among other things,[172] the changing of locks, damage to property, deposits, demolitions and conversions, forced entry and obstruction of entry, or eviction.[173] Precisely what constitutes unfair practice is regulated by the various provinces.[174] To avoid unfair practice, owners applying for eviction must therefore comply with the regulations of the respective provinces.[175]

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171 S 1 of Act 50 of 1999.

172 Mukheibir 2000 *Obiter* 340. The wording seems to mean that there is no *numerus clausus*.

173 S 1 of Act 50 of 1999.

174 These regulations are determined by the MEC of each province in terms s 15 of the RHA; also see 3 2 5 *infra*.

3 2 3 Ways in which the Act intends to achieve its objectives

"There is a need to balance the rights of tenants and landlords to create mechanisms to protect both tenants and landlords against unfair practices and exploitation."[176] With these words, the legislature reiterates its commitment not only to the provision of housing, but also to involving the private sector in its commitment. Only if both parties are protected, can the right to adequate housing be promoted through rental agreements.

A lessee is granted several rights in terms of the Act. Section 4(1) provides that a landlord may not unfairly discriminate when advertising or negotiating a lease agreement on one or more grounds, including race, gender, sex, pregnancy, marital status, sexual orientation, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language, and place of birth. An equality provision such as this has become standard in many of the recent acts[177] and is inserted to ensure adherence to the constitutional equality guarantee. Because it is very often people from low-income groups who cannot afford to buy a house and have to rely on rental housing, the right to equality and non-discrimination is an especially important right in the context of housing.

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175 For a discussion of some of the regulations enacted by some of the respective provinces see 3 2 5 *infra*.

176 Preamble to RHA.

177 An example of this would be s 6(1) of the Employment Equity Act 55 of 1998.

Other rights of tenants include the right to privacy,[178] the right not to have their persons and homes,[179] or their property searched[180] and their possessions seized or the privacy of their communications infringed[181] except in terms of the law of general application and only when an order of court has first been obtained.[182]

The RHA also affords the landlord a number of rights[183] that are necessary for the smooth operation of a healthy rental market. One of the most important rights to consider is the right to receive prompt and regular payment of rental monies or any charges that may be payable in terms of the lease.[184] Since this is the reason why the landlord lets premises in the first place, some consider it the most important duty of the tenant[185] and the biggest advantage for the landlord. If a problem exists as to what

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178 S 4(2) of the Rental Housing Act 50 of 1999.

179 S 4(3)(*a*) of the Rental Housing Act 50 of 1999.

180 S 4(3)(*b*) of the RHA.

181 S 4(3)(*d*) of the RHA.

182 S 4(3)(*c*) of the RHA.

183 These rights are afforded the landlord as a result of s 25 of the Constitution. Section 25 states: "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. (2) Property may be expropriated only in terms of law of general application (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court."

184 S 4(5)(*a*) of the RHA.

the amount payable should be, it can be referred to the Rental Housing Tribunal.[186] The tenant can approach the tribunal, contending that the amount due in terms of the contract equals an exploitative rental. If the tribunal is of the opinion that this is indeed the case it could adjust the payments to be fair.[187]

The landlord also has the right to require payment of a deposit.[188] The landlord or an estate agent, who has the capacity to act on behalf of the landlord, has certain obligations towards the tenant with regard to the deposit.[189] An example of such an obligation is that the landlord has to invest the deposit into an interest-bearing account and has to pay back the balance of the deposit as well as the interest that accrued on it, after the deposit has been used to pay for all the repairs and unpaid rentals, if there are any.

The landlord is also afforded the right to terminate the lease agreement,[190] although this right is not without qualification. The landlord is required to comply with two requirements.[191] The first is set out in Section 4(5)(*c*), which states that the termination of the lease may not constitute unfair practice. The

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185 Mukheibir 2000 *Obiter* 336.

186 S 13(4)(*c*)(iii) of the RHA.

187 S 13(4)(*c*)(iii) of the RHA.

188 S 5(3)(*c*) of the RHA.

189 S 5(3)(*d*) of the RHA.

190 S 4(5)(*c*) of the RHA.

191 S 4(5)(*c*).

second is that the grounds for termination, before expiry of the lease, should be expressly specified in the lease agreement.[192] This is known in common law terms as a *lex commissoria* or a cancellation clause,[193] and places a duty on the landlord to make sure that the contract does indeed provide for specific instances under which the agreement could validly be cancelled.

A question that is of specific relevance to this study is whether the contract can provide, in a *lex commissoria*, for the termination of the lease agreement if and when the tenant falls into arrears with the rentals. Without a *lex commissoria* being expressly agreed to in terms of the contract, the contract cannot be terminated. Because the tenant has some basic rights that cannot be waived in terms of a contract,[194] however, a contract cannot state that the tenant has to comply with a provision that would be in contravention of Section 5(3). It is therefore safe to assume that defaulting on rent would usually constitute grounds for termination of a contract, as long as the contract provides for termination if a tenant defaults on payments.

The landlord also has the right to repossess the rental housing property on termination of the lease, which should be in a good

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192 S 4(5)(*c*) of the RHA.

193 Mukheibir 2000 *Obiter* 337.

194 S 5(4) of the RHA.

state of repair, except for fair wear and tear.[195] To prevent arbitrary evictions,[196] such repossession can take place only if an order of court has been obtained.[197] Because it is in line with Section 26(3) of the Constitution, which states that no one may be evicted without an order of court, this is an important qualification.

To judge from recent case law, however, the courts seem reluctant to award the landlord the right to evict even a defaulting tenant, without having first complied with the eviction procedure set out in PIE.

3 2 4 The Scope of the RHA

As evident from the core concepts included in Chapter One of the Act, the RHA covers all cases of letting of residential property,[198] which gives it a much wider scope than the Rent Control Act had. The definition of leasing as well as the term "dwelling,"[199] which is very wide, gives proof of this.[200] The

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195 S 4(5)(*d*)(i).

196 S 26(3) of the Constitution.

197 S 4(5)(*d*)(ii) of the RHA.

198 The Act is applicable to urban and rural areas as is evident from s 2(1)(*a*)(ii).

199 See 3 2 2 *supra*.

200 S 1 of the RHA.

legislator clearly wanted to include lease agreements for any form of dwelling that was leased for housing.[201]

The fact that the Act is not dedicated to the provision of rental housing for specific groups, as was the case under the Rent Control Act, is also clearly indicated by several sections, among which is Section 16, which reads as follows:

> "Any person –
>
> who fails to comply with Sections 4 or 5(2) or 9 ... will be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding two years or to both such fine and such imprisonment."

In the light of the fact that Section 4 contains the general provisions and Section 5(2) states that the lease must be reduced to writing if the tenants insist on it.[202]

3 2 5 Eviction procedure(s) in terms of the RHA

In terms of Section 15 of the RHA, the MEC of each province is required to enact regulations relating to any matter that needs to be regulated in order to achieve the objects of the RHA. To guide the MEC of each province as to what such regulations could entail, the legislature has provided the provinces with draft

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201 Thomas 2000 *De Jure* 237.

202 For further indication that the Act is applicable to all cases of rental housing see 3 1 *supra.*

Unfair Practices Regulations.[203] Two regulations that concern eviction are that nobody may be evicted from their home without an order of court[204] and that a tenant who is evicted would have a claim for damages against the landlord, subject to the common law.[205] If a landlord or tenant were to be in contravention of these regulations, it would constitute unfair practice in terms of the RHA. Any landlord or tenant can now lodge a complaint regarding unfair practice with the Rental Housing Tribunal.[206] The Tribunal should be established by the MEC of each province.[207] From the date of its establishment, the Tribunal must determine any dispute relating to unfair practice, unless proceedings have already been instituted in any other court.[208] Any ruling by the Tribunal would be considered an order of a magistrate's court.[209]

Although these regulations serve only as a guideline and MECs are not limited to them, some provinces, such as the Free State Province,[210] have accepted them without change. Others have made more extensive regulations than those suggested in the

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203 Unfair Practice Regulations, 2000.

204 S 8(1) of the Unfair Practice Regulations.

205 S 8(2) of the Unfair Practice Regulations.

206 S 13(1) of the RHA.

207 S 7 of the RHA.

208 S 13(9) of the RHA.

209 S 13(13) of the RHA.

210 Ss 6(1) and 6(2) of the Free State Province Unfair Practice Regulations 2003.

Draft Regulations. The Province of Gauteng has, for example, added several regulations among which is the following badly worded regulation that covers eviction:

> "If a tenant breaches the lease and in order to deprive the tenant of access to or full use of a dwelling, the landlord must-:
>
> (a) Give a tenant seven days notice in which to remedy the breach, unless the tenant is in default of rental payment and remains in default for a period of seven days of due date, then such notice will be dispensed with; and
>
> (b) obtain a valid court order to evict the tenant."[211]

By contrast, the Western Province, which has also accepted and added to the regulations, does not have any regulations expressly dealing with eviction.

The problem with the Unfair Practices Regulations is, however, that not all the provinces have accepted them. And even where they have been accepted, the provinces have the power to deviate from these regulations. At the same time, the Unfair Practices Regulations do not provide any extra protection for tenants against evictions, merely repeating that the landlord needs to obtain an eviction order from the court before an eviction could be effected. In this regard, Pienaar also points out that recent

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[211] Ss 9(1), 9(2) and 9(5) of the Gauteng Province Unfair Practice Regulations 2001.

case law has caused a need for additional provisions to regulate and monitor evictions.[212]

At this point it is necessary to draw attention to the fact that the confusion regarding evictions does not mean that the RHA fails to provide for an adequate eviction procedure. It clearly provides for the application of the common law, except that a common law eviction order can only be lodged in the absence of any dispute regarding unfair practice.[213] Section 13(10) states that:

> "Nothing herein contained precludes any person from approaching a competent court for urgent relief under circumstances where he or she would have been able to do so were it not for this Act, or to institute proceedings for the normal recovery of arrear rental, or for eviction in the absence of a dispute regarding an unfair practice."[214]

With regard to the common law eviction procedure and its application under the RHA, Van der Walt[215] notes that "the Rental Housing Act 50 of 1999 applies and provides some protection against eviction, and ... explicitly does not override the common-law right to eviction."[216] Although the *rei vindicatio* is qualified by tenure reform legislation such as PIE, ESTA and many more, the RHA itself does not override or

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212 Pienaar 2002 *SAPR/PL* 358.

213 See s 13(10) of the RHA.

214 S 13(10) of the RHA.

215 Van der Walt 2002 *TSAR* 254.

216 Van der Walt 2002*TSAR* 266.

qualify the *rei vindicatio*. Even if the Act were to allow for a different eviction order from that of the common law, the *rei vindicatio* would, in terms of Section 13(10), still be available. As Van der Walt notes:

> "Once the occupation right has been terminated, eviction is possible provided a court order has been obtained. Special due process and fairness procedures are not prescribed for the eviction process."[217]

The common law eviction procedure is, therefore, still the procedure to be employed and will be so until the legislator promulgates an act that substantially qualifies the *rei vindicatio*.

3 3 The common law eviction procedure

In the light of this discussion, the common law eviction procedure is the procedure that is to be employed when obtaining an eviction against a tenant. The only qualification to this procedure after the Constitution is that the court has to consider all the relevant circumstances. This includes whether or not it would be just and equitable to grant an eviction order in a specific case.

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[217] Van der Walt 2002 *TSAR* 271.

3 3 1 The nature of the *rei vindicatio*

Van der Walt and Pienaar[218] define the *rei vindicatio* as "the action whereby an owner can recover an existing and identifiable thing from any person who is exercising unlawful physical control over it."[219] The term is derived from the maxim *ubi rem meam invenio ibi vindico*, which means, "wherever I find my property I assert my claim to it."[220] According to the common law, ownership and possession of the property go hand in hand. Possession, in the sense of physical control, can normally not be withheld from the owner, unless the possessor has some other right, such as a contractual right of lease, which can be enforced against the owner.[221]

As it allows an owner to regain property from anyone who is holding it unlawfully,[222] this remedy is seen as the most important remedy that an owner has at his/her disposal. It does not make a difference whether the person in possession of the

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218 Van der Walt & Pienaar *Introduction to the Law of Property* 3 ed, 162.

219 Van der Walt & Pienaar *Introduction to the Law of Property* 3 ed, 162.

220 Badenhorst et al *Silberberg and Schoeman's The Law of Property* 225, n 15.

221 Badenhorst et al *Silberberg and Schoeman's The Law of Property* 225: "According to the court it is inherent in the nature of ownership that possession of the thing should normally be with the owner, and it follows that no other person may withhold it from the owner unless he or she is vested with some right enforceable against the owner (for example, a right of retention or a contractual right)."

222 Van der Merwe *Sakereg* 347.

thing is *mala fide* or *bona fide*; the *rei vindicatio* can be successfully instituted in either situation. When it is used in cases of immovable property, it usually takes the form of an eviction order.[223]

3 3 2 The requirements of the *rei vindicatio*

Graham v Ridley[224] and *Chetty v Naidoo*[225] are seen as the relevant case law regarding the requirements that must be met in order to be successful with the *rei vindicatio*. These requirements are:

a) The person instituting the eviction proceedings in terms of the *rei vindicatio* must prove that he/she is the owner of the property in law. The title deed serves as *prima facie* proof of ownership, but this can be rebutted.

b) The thing must be in the possession of the defendant.

c) The thing has to exist and be identifiable.[226]

To ascertain their exact content, these requirements are discussed separately below, concentrating on the focal point of this

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223 Van der Walt & Pienaar *Introduction to the Law of Property* 3 ed, 163; *Chetty v Naidoo* 1974 3 SA 13 A.

224 1931 TPD 476.

225 1974 3 SA 13 (A).

226 Van der Merwe *Sakereg* 347; Van der Walt & Pienaar *Inleiding tot Sakereg* 4 ed 171; Pienaar "Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits en Lubbe (Eds) *Remedies in Zuid-Afrika en Europa* (2003) 143; Badenhorst et al *Silberberg and Schoeman's The Law of Property* 226.

research, which is the application of the *rei vindicatio* to eviction from immovable property.

The first requirement, according to which a claimant who wants to evict a defaulting tenant has to prove ownership on a balance of probabilities,[227] was laid down in the case of *Ebrahim v Deputy Sheriff, Durban.*[228] If the owner has proved *acquisition* of ownership, then the *continuation* of ownership is presumed.[229] The best way for the owner to prove this is to produce the title deed to the property.[230]

The second requirement is that an owner has to prove that the defendant was in possession at the time the action was instituted.[231] He or she does not have to allege or prove that the

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227 Van der Walt & Pienaar *Introduction to the Law of Property* 3 ed 163; Van der Merwe *Sakereg* 348.

228 1961 4 SA 265 (D) 267 G where it is stated that: "The test whether a claimant has discharged the *onus* of proving his ownership to movable property which is not in his possession is whether, in the result, the probabilities are balanced in his favour." When the *rei vindicatio* is used to retrieve immovable property the same requirements have to be met.

229 Badenhorst et al *Silberberg and Schoeman's The Law of Property* 226; Van der Walt & Pienaar *Introduction to the Law of Property* 164 where it is stated that this is a rebuttable presumption.

230 Badenhorst et al *Silberberg and Schoeman's The Law of Property* 226; Van der Merwe *Sakereg* 348; Van der Walt & Pienaar *Introduction to the Law of Property* 3 ed, 164; *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A) 82 B.

231 Van der Walt & Pienaar *Introduction to the Law of Property* 3 ed, 164.

defendant is unlawfully controlling the property.[232] It goes without saying that the claimant would not be entitled to an eviction order in terms of the *rei vindicatio* if the defendant could prove that he or she is in lawful control of the property.

The third requirement is usually not a problem when applying the *rei vindicatio* in the context of immovable property. The reason for this is that immovable property is not easily destroyed or made unidentifiable. If the property has been used or is not identifiable any more, the *rei vindicatio* is not the remedy that should be used. This requirement might pose problems, for instance where mixing or mingling of movables or money has occurred.[233] However, the same problems do not occur when the requirement is applied to immovable property. Since this thesis deals exclusively with the situation in rental housing, this aspect will not be as difficult to prove as the other requirements of the remedy.

Chetty v Naidoo determined who bears the onus of proof.[234] If the claimant has acquitted himself of the task of proving the

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232 Van der Walt & Pienaar *Introduction to the Law of Property* 3 ed, 164; Van der Merwe *Sakereg* 349; *Krugersdorp Town Council v Fortuin* 1965 2 SA 335 (T); *Chetty v Naidoo* 1974 3 SA 13 (A).

233 Van der Merwe *Sakereg* 349, where the author states: "Aangesien geld moeilik identifiseerbaar is en ook omdat dit deur vermenging die eiendom van die ontvanger word, is dit gewoonlik moeilik om geld te vindiseer"; Van der Walt & Pienaar *Introduction to the Law of Property* 3 ed, 164.

requirements, the onus moves over to the defendant. The defendant then has to show that there is some legal basis entitling him/her to occupation and that he/she can therefore not be evicted.[235] An existing lease agreement could serve as such a legal basis. The onus of proving that there is in fact such a contract usually rests on the defendant, unless the plaintiff acknowledges such a contract, which would place the onus on the plaintiff to prove that the contract was terminated or came to an end.[236] Where a property is held over, a lease agreement is usually the basis on which reliance is placed. If the defendant cannot prove the existence of such a right, the court will grant the eviction order against the defendant. If the defendant is, however, successful in alleging and proving the existence of such a right, the onus once again moves to the claimant. To be successful, the claimant would then have to prove that such an agreement has lapsed, has been terminated or is invalid.[237]

A test of the requirements of the application of the *rei vindicatio* shows that holding over is provided for under the remedy. Since the owner is the plaintiff, and the party holding over occupies the premises unlawfully, both the first and the second requirements

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234 1974 3 SA 13 (A).

235 Badenhorst et al *Silberberg and Schoeman's The Law of Property* 227; Van der Merwe *Sakereg* 349.

236 Van der Merwe *Sakereg* 349.

237 Van der Walt & Pienaar *Introduction to the Law of Property* 3 ed, 164; Van der Merwe *Sakereg* 350; Badenhorst et al *Silberberg and Schoeman's The Law of Property* 226.

offer no obstacle, and as rented premises are always identifiable, the third requirement is also fulfilled.

3 3 3 The influence of constitutional provisions on the *rei vindicatio* with regard to the eviction of a party holding over

The new constitutional dispensation introduced in 1994, with its endorsement of human rights, including dignity, freedom and social responsibility, inevitably places new challenges on existing law. Although not much has changed with regard to the common law itself, the common law eviction procedure under the *rei vindicatio* has already come under the scrutiny of the Constitution of the Republic of South Africa.[238] Since the Constitution states[239] that the common law still applies as long as it does not conflict with the rights contained in the Constitution,[240] the question is whether the *rei vindicatio* can still be applied in the same way as it was applied in the cases of *Graham v Ridley*[241] and *Chetty v Naidoo*.[242] Has the Constitution[243] influenced the application and procedure of the

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238 108 of 1996.

239 S 39(3) of the Constitution.

240 Van der Walt 2002 *SAJHR* 402.

241 1931 TPD 476.

242 1974 3 SA 13 (A).

243 Specifically s 26(3) of the Constitution; Badenhorst et al *Silberberg and Schoeman's The Law of Property* 233: "It is important to notice that section 26(3) will only be relevant in cases where property has been occupied for residential purposes. Lease agreements for trade or business purposes will, therefore, not be affected by section 26(3)."

rei vindicatio? The question could be drawn even narrower, because acts like PIE and ESTA, which came about as a result of the Constitution, have already influenced the *rei vindicatio* in a considerable way.[244] The question here is therefore whether and to what extent the Constitution has changed the common law eviction procedure with regard to the eviction of a party holding over?

In the past the *rei vindicatio* was used to give effect to the policies of apartheid.[245] It was used as an easy and simple procedure to have people evicted. In this way the common-law eviction procedure infringed on the human rights of many. This is why many negative connotations are still attached to the term. It is submitted, however, that the *rei vindicatio* should be considered separately from the laws of apartheid. It is still a very effective remedy that can be used by any owner who wants to regain possession of property. In the light of the fact that the Constitution provides for the right to property,[246] this seems to be an important remedy, which can of course not be used if it infringes any human rights provided for under the Constitution.

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244 Van der Walt 2002 *TSAR* 254-289.

245 Van der Walt 2002 *TSAR* 255.

246 S 25 of the Constitution of South Africa Act 108 of 1996.

The Constitution has, however, qualified the owner's right to have someone evicted. Through its land reform legislation,[247] which includes the RHA, the legislature has attempted to make the eviction procedure fairer than was the case before 1994. In discussing the influence of each of the acts promoting land reform on the *rei vindicatio,* Van der Walt[248] finds that the statutory amendments suggest and should result in substantive amendment of the common law.[249] Since "[s]pecial due process and fairness procedures are not prescribed for the eviction process" in the RHA, however, this Act has had little impact on the common law.[250]

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247 Van der Walt 2002 *TSAR* 265 gives a summary of these acts and what they aim to achieve. These acts include "Rental Housing Act 50 of 1999, protects the occupation rights of (lawful) occupiers of (rural and urban) residential property; the Land Reform (Labour Tenants) Act 3 of 1996 protects (lawful) occupiers of agricultural (rural) land; the Extension of Security of Tenure Act 62 of 1997 protects the occupation rights of persons who (lawfully) occupy (rural) land with the consent of the landowner; the Interim Protection of Informal Land Rights Act 31 of 1996 protects (lawful) occupiers of (rural and urban) land in terms of informal land rights; the Restitution of Land Rights Act 22 of 1994 protects (lawful and unlawful occupiers of (urban and rural) land who have instituted a restitution claim; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 regulates eviction of unlawful occupiers (from urban and rural land)."

248 Van der Walt 2002 *TSAR* 254–289.

249 Van der Walt 2002 *TSAR* 288: "The overall effect of these statutory amendments is, therefore, that the landowner's traditionally strong common-law right to obtain an eviction order is qualified substantially with reference to consideration of social, economic and historical fairness and equity, and at the same time eviction orders and proceedings are subjected to strict procedural checks and controls. In principle, this should result in a substantive amendment of the common law..."

250 Van der Walt 2002 *TSAR* 266 and Van der Walt 2002 *TSAR* 271: "Once the occupation has been terminated, eviction is possible provided a court order had been obtained."

Despite these arguments, a great deal of uncertainty remains as to the extent of the influence of the Constitution regarding the eviction of parties holding over. Although the Constitution determines that the court must consider all relevant circumstances before an eviction order can be granted,[251] it is still not clear exactly which circumstances would be considered relevant by the court. The question can now be asked whether the requirements of the *rei vindicatio* do not constitute sufficient circumstances. Which other circumstances need to be considered?

The answer to this question may be obtained from court decisions. In *Ross v South Peninsula Municipality,*[252] for example, the judge was of the opinion that merely complying with the requirements under the common law was not sufficient for granting an eviction order against the defendant, but failed to mention which circumstances would be considered relevant in such cases, an omission that was considered a lost golden opportunity by several commentators.[253] Instead, the court

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[251] S 26(3) where it is stated that "no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[252] 2000 2 SA 589 (C).

[253] Pienaar "Uitleg en Toepassing van die Wet op Voorkoming van Onwettige Uitsetting en Onregmatige Besetting van Grond 19 van 1998" 2000 *THRHR* 469; Keightley 1999 *SALJ* 28; Hawthorne 2001 vol 3 *De Jure* 591.

decided that the relevant circumstances in terms of PIE would have been enough to satisfy the requirement of relevant circumstances in terms of section 26(3) of the Constitution. Had the claimant therefore considered the relevant circumstances in terms of PIE and the Court found it to be just and equitable, the court might have been able to grant an eviction order that would have satisfied the requirements of section 26(3) of the Constitution. The court nevertheless decided in favour of Mrs Ross by not granting an eviction order against her. According to this decision, the Constitution had a significant influence on the manner in which the *rei vindicatio* could be applied and used, with regards to the onus.

Not only was this decision widely criticised, but both *Ellis v Viljoen*[254] and *Betta Eiendomme (Pty) Ltd v Ekple-Epoh*[255] subsequently found that *Ross v South Peninsula Municipality* had been decided incorrectly.[256] It was argued that since the substance of ownership had not been affected by the Constitution, a landlord could have a defaulting tenant evicted in terms of the common law eviction procedure, as it had been used before the Constitution came into operation. These contradictory decisions did of course not clarify the confusion surrounding

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254 2001 4 SA 795 (C).

255 2000 4 SA 468 (W).

256 Pienaar 2000 *THRHR* 469; Keightley 1999 *SALJ* 28; *Ellis v Viljoen* 2001 4 SA 795 (C); *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 4 SA 468 (W).

what influence the Constitution had on the common-law eviction procedure. Whether or not the Constitution had an influence on the *rei vindicatio* therefore also remained uncertain.[257]

In *Brisley v Drotsky,*[258] the Supreme Court of Appeal cleared up this confusion. The majority found that since section 26(3) could be applied horizontally, it was applicable to cases of eviction of a defaulting tenant. The fact that the Constitution did not prescribe any circumstances, allowed only "legally relevant" factors to be considered. Accordingly, the only two factors that needed consideration were whether or not the claimant was the owner of the property and whether the defendant was in unlawful occupation of the property.[259] Based on these factors, the Court granted the eviction order. While the Constitution was therefore applicable in cases of eviction of a defaulting tenant after *Brisley*, the common law procedure was also applicable, since it had not changed as a result of the Constitution.

The two factors identified by the Supreme Court of Appeal in *Brisley v Drotsky*[260] were whether or not the claimant was the owner of the property and whether the defendant was in unlawful occupation of the property. Since these factors closely resembled

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257 Badenhorst et al *Silberberg and Schoeman's The Law of Property* 235.

258 2002 4 SA 1 (SCA).

259 *Brisley v Drotsky* 2002 4 SA 1 (SCA).

the requirements that the owner had to prove under the common law in order to be successful with the *rei vindicatio*, it seemed that the *rei vindicatio* had not been changed by the Constitution.

By holding that the landlord should comply with the provisions of PIE when in the process of obtaining an eviction order against a defaulting tenant, *Ndlovu v Ngcobo*[261] changed this position drastically. According to the court, the common law had not only changed, but in order to be successful, meeting the normal requirements of the common law would not be sufficient. The claimant would also have to comply with the requirements of PIE.

3 4 Concluding remarks: the RHA and PIE

At this stage it is necessary to evaluate the provisions of the RHA and common law dealing with the eviction of tenants, and to compare these provisions with their counterpart in PIE.

3 4 1 The scope of PIE after *Ndlovu*

The position held in *Ndlovu* is now the law regarding the eviction of parties holding over. As was pointed out above, however, the RHA was promulgated precisely to promote rental housing, by regulating the relationship between lessors and

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[260] 2002 4 SA 1 (SCA).

lessees (not owners and squatters) for the protection of both parties, [262] specifically regarding eviction. Moreover, the scope of the RHA is wide enough to include all forms of rental housing[263] and all lease agreements.[264]

It is true that the Act does not provide tenants with the same degree of protection against eviction as the protection granted by some of the other tenure reform acts to other classes of occupiers. However, regarding the degree of protection afforded different groups, Van der Walt notes that "in general, the nature (content, lawfulness) and duration of occupation and the socio-economic position and vulnerability of the occupiers feature prominently in determining whether the common-law position is retained or amended, without being determinative."[265] As tenants are generally not considered to be as vulnerable as squatters, the perception is that they do not need to be afforded the same degree of protection against eviction. If this were not the case, the needs of wealthy tenants who default on their rentals would be equated to those of squatters.

Most writers note that in trying to even out the rights between landlords and tenants, the legislature was thorough and has

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261 2003 1 SA 113 (SCA).

262 Ss 4 and 5 of the RHA.

263 S 1 of the RHA.

264 3 1 *supra* and 3 2 *supra* and 3 2 5 *supra.*

promulgated a well-written statute for the rental housing context.[266] The procedure provided for in section 13(10) of the RHA,[267] is therefore sufficiently protective of tenants, as is the procedure in cases of unfair practice, which includes the unreasonable prejudicing of the rights or interests of both landlords and tenants. If a landlord therefore commits an unfair practice, a tenant has a further right to approach the Tribunal mentioned in the Act.[268] Also, where a dispute concerning an unfair practice is pending, the landlord is unable to approach the court for a common law eviction order.[269]

In addition to these arguments, the fact that the legislature considered it necessary to include provisions for eviction in the RHA, which was promulgated one year after PIE and the last of the acts, promoting access to housing,[270] must surely mean that they did not consider the eviction procedures of the other acts suitable for tenants. Why would the legislature waste time

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265 Van der Walt 2002 *TSAR* 288.

266 Mukheibir 2000 *Obiter* 325; Thomas 2000 *De Jure* 237.

267 S 13(10): "Nothing herein contained precludes any person from approaching a competent court for urgent relief under circumstances where he or she would have been able to do so *were it not for this Act*, or to institute proceedings for the normal recovery of arrear rental, *or for eviction in the absence of a dispute regarding an unfair practice.*" My emphasis.

268 Ch 4 of the RHA.

269 S 13(10) of the RHA.

270 The Land Reform (Labour Tenants) Act 3 of 1996, the Interim Protection of Land Rights Act 31 of 1996, the Extension of Security of Tenure Act (ESTA) 62 of 1997, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) 19 of 1998 and the Rental Housing Act (RHA) 50 of 1999.

formulating new procedures if the existing procedures were adequate and inclusive of the rental context? With regard to the facts of *Ndlovu* described in chapter one, therefore, it appears that the RHA was not only designed for precisely such cases as *Ndlovu*, but is well equipped to deal with them adequately.

One more question can be asked at this point: Could it be that specific circumstances, like the vulnerability of the tenant, caused the court to provide special protection to the party holding over in this case? The RHA does not provide for specific circumstances, such as the vulnerability of the tenant. Could this be the reason why the court reverted to PIE, which does include provision for vulnerable people, such as women and children, the disabled and elderly people?[271] The court might have wanted to extend the protection of PIE to a field wider than what the act was initially intended to cover in order to protect people who are in a vulnerable position, but for which there is no specific mechanism that protects them against eviction. The majority might have viewed the common law eviction procedure to be too harsh when applied to vulnerable people that have to make use of rental property, thereby extending the protection of PIE to these groups. This can only be determined by studying *Ndlovu*.

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271 Ss 4(6) and 4(7) of PIE.

3 4 2 Contrasts between the RHA and PIE

Some contrasts have been shown to exist between these Acts, which make them irreconcilable. The aim and objectives of the Acts are very different. While PIE addresses the needs, rights and obligations of the respective parties in the context of squatting, the RHA aims at providing adequate housing by regulating the rental housing market. The two Acts therefore contrast vastly in their scope of application. This is not only evident from the provisions of the separate acts, but was also the opinion of the judiciary,[272] until the case of *Ndlovu.*

The definition of "consent" in PIE serves as a good example of these differences. In order for a valid lease agreement to exist, consent from the owner is needed, while in terms of PIE an unlawful occupant is someone who occupied the property without the necessary consent of the owner in the first place. The court in the *Ndlovu* decision did, however, not follow this assumption. The definition of consent excludes any lease agreement between the parties. It is also strange that the only reference to "building" in PIE is a reference to the demolition of a building, whereas no mention of demolition is made in the RHA. If permanent buildings were as easy to demolish as the structures referred to in PIE, confidence in the housing market in South Africa would quickly be dispelled.

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272 2 2 3 2 *supra.*

Rather than contradict the contention of this study, this Chapter has confirmed that view. PIE was not initially intended to regulate rental housing. Despite the question about vulnerable people raised above, there are still some considerable differences between these acts and their respective scope. What then, are the arguments employed by the judiciary in *Ndlovu* with which the decision was justified?

CHAPTER 4

THE *NDLOVU* DECISION DISCUSSED IN TERMS OF THE RENTAL HOUSING ACT AND CRITICS

4 1 Introduction

As mentioned in chapter one, the Supreme Court of Appeal combined *Ndlovu v Ngcobo* and *Bekker v Jika* into one case, since both appellants argued the same issue.[273] It is this decision that has caused so much confusion in the sphere of rental housing. The decision is nonetheless currently the law in South Africa regarding the eviction of defaulting tenants and the applicability of the procedures set out in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) to such evictions. It is discussed in detail in this chapter. The aim is to understand the arguments that were employed in the decision and to determine to what extent, if at all, the problems can be solved by applying the relevant statutory measures in their correct context. To further this aim, the problems that have arisen as a result of the *Ndlovu* decision are also examined.

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[273] *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA) [2].

It might seem strange that the *Ndlovu* decision is discussed in terms of the Rental Housing Act (RHA) when the court failed to consider this Act, but the point was made in chapter one that the RHA rather than PIE, should have been applied in *Ndlovu*. To substantiate the contention that the application of PIE to the rental housing market, more specifically to parties holding over, should not have been allowed and to propose a possible solution, both the majority and minority judgments are evaluated here against the background of chapters two and three.

As noted above, any case regarding the eviction of a defaulting tenant must now follow *Ndlovu*.[274] As the most recent Supreme Court of Appeal decision, this decision has overruled all the relevant prior case law and currently serves as the authority regarding the eviction of parties holding over.

4 2 The decision of the majority: applicability of PIE to parties holding over

The question before the Supreme Court of Appeal was only whether or not PIE was applicable in the two cases before it. Since PIE has its roots in section 26(3) of the Constitution, the court accepted that "no one may be evicted from their home

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274 The legislature has, however, proposed some amendments to PIE. This was done to rectify the problems caused by the *Ndlovu* decision.

without an order of court made after consideration of all the relevant circumstances."

Firstly, the court accepted that both cases concerned holding over. Since PIE protects only "unlawful occupiers" against eviction, it therefore had to decide whether the term included holding over. Because the parties holding over occupied the property without consent at the time of the launch of the evictions,[275] the court found that both parties were "unlawful occupiers" and that parties holding over were therefore included under PIE. Harms JA noted that to exclude parties holding over from the definition would require more than a mere change in the tense of the section. It would have to read "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."[276]

The next important argument that the court considered was whether parliament could have intended the scope of the Act to be so wide as to include cases of holding over. Harms JA stated

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[275] S1(xi) reads as follows: "'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 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)." (My emphasis).

that from the long title of the Act, it can clearly be deduced that PIE had its roots in the Prevention of Illegal Squatting Act (PISA),[277] under which holding over was considered illegal and evictions could be obtained against an occupant quite easily.[278] Since PIE was enacted to right the wrongs of PISA, its eviction procedures should apply to parties holding over. This meant that a party holding over should be protected against eviction orders that could be obtained without any considerable difficulty. Given South Africa's history, the majority saw no reason for parliament not to have wanted the protection of PIE to extend to parties holding over.[279]

In defence of this interpretation, Harms JA pointed out that the situation was not as oppressive towards the landlord as it appeared.[280] Depending on how long a landlord took to apply for an eviction order,[281] he/she could use either section 4(6)[282] or

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276 *Ndlovu* 120 [5].

277 52 of 1951 (herein after referred to as PISA). *Ndlovu* 122 [12].

278 *Ndlovu* 122 [14]. Harms JA also refers to *R v Zulu* 1959 1 SA 263 (A).

279 *Ndlovu* 123 [16] "There seems to be no reason in the general social and historical context of this country why the Legislature would have wished not to afford this vulnerable group the protection of PIE."

280 *Ndlovu* 123 [17].

281 The period is calculated from the moment that the occupation becomes unlawful.

282 If the occupier had occupied the premises unlawfully for less than six months.

4(7)[283] to have an unlawful occupant evicted. The fact that section 4(7) requires the consideration of alternative land should not be an issue, since parties holding over would not want to move onto such land.[284] While the effect of PIE was not enacted to expropriate the landowner, either directly or indirectly, the court found that PIE prevented the owner from exercising his/her full propriety rights until it would be just and equitable for the owner to do so.[285]

The next question was therefore to determine what would be just and equitable. According to Harms JA, when the Court decides whether or not to grant an eviction order, or determines a date for eviction, it has as a wide discretion.[286] Since it cannot be expected of the owner to advance facts regarding the vulnerability of the occupier and the equitability of the eviction, the owner will be entitled to such an order, "unless the occupier opposes and discloses circumstances relevant to the eviction order."[287] Other relevant circumstances are, almost without exception, within the exclusive knowledge of the occupier. This

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283 If the occupier had occupied the premises unlawfully for more than six months.

284 *Ndlovu* 123 [17].

285 *Ndlovu* 123 [17]-124 [17] where the learned Judges of Appeal states: "What PIE does is to delay or suspend the exercise of the landlord's full propriety rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions."

286 *Ndlovu* 124 [18].

287 *Ndlovu* 124 [19].

overrules the case of *Ross v South Peninsula Municipality*,[288] where the court found that in order to provide the court with all the relevant circumstances the landlord had to prove over and above mere ownership and unlawful occupation by the occupier. The applicant therefore only has to prove ownership and that the occupier is in unlawful occupation.

The last argument forwarded by the court concerned tenure-reform legislation, like PIE, ESTA and the RHA. The court found that these acts did not "form a mosaic" of legislation that covered the whole of the property and housing field, as argued by those who opposed the application of PIE to holding over. It therefore rejected the submission, mainly because although the acts mentioned overlapped, they also left some areas uncovered.[289]

As a result of these arguments, the order in *Ndlovu* was that the appeal was upheld. This means that, unless a future Appeal Court overturns this decision or the legislature steps in, this is the position regarding the eviction of parties holding over. In future, the provisions of PIE should be complied with when applying for an eviction order of a defaulting tenant.

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288 2000 1 SA 589 (C).

289 *Ndlovu* 125 [22].

In noting that the minority judgment is so much better formulated and motivated than the *Ndlovu* decision, Lötz and Nagel contend that it should be the correct position.[290] For this reason, the arguments that the minority used to reach their conclusion also need to be considered in this study.

4 3 The minority judgment

The minority report begins with the facts of the case, which are also described in chapter one of this study. About these there seems to be no disagreement. In the context of this study, however, the arguments that necessitated a minority judgment need to be analysed.

To support the contention of the minority, Olivier JA considered a number of cases that had dealt with the application of PIE to cases of eviction of parties holding over. Although he did not mention it expressly, two main arguments find support in these decisions. The first is that the application of PIE is restricted to the eviction of squatters.[291] The second is that PIE is not applicable where an occupier took control of the property with the consent of the owner and became unlawful only at a latter

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290 Lötz and Nagel 2003 *THRHR* 172.

291 *Absa Bank v Amod* [1999] 2 All SA 423 (W); *Ross v South Peninsula Municipality* 2000 1 SA 589 (C); *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 4 SA 468 (W); *Sentrale Karoo Distriksraad v Roman; Sentrale Karoo Distriksraad v Koopman; Sentrale Karoo Distriksraad v*

stage.[292] The minority judgment therefore did not view PIE as applicable in *Ndlovu* at all. It opposed specific arguments forwarded by the majority directly.

4 3 1 The definition of "unlawful occupier"

Olivier JA noted that the English definition of an "unlawful occupier" in section 1 was open to two interpretations. According to the first, "occupies" meant *being and staying* in possession, while according to the second, it meant *taking* possession of a property,[293] a difference that led to confusion. In turning to the Afrikaans text, he found that the word "beset" had been used to translate the term "occupies" in the definition of "unlawful occupier." After consulting a number of dictionaries, he concluded that the word meant *to take* possession or occupation, and had therefore never been intended to apply to ex-tenants, who could simply be seen to *remain* in unlawful occupation.[294] In essence, therefore, the minority regarded the fate of the parties to hinge on a very basic distinction in property law, namely that of the difference between acquisition and

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Krotz 2001 1 SA 711 (LCC); *Van Zyl v Maarman* 2001 1 SA 957 (LCC). See n 21 *supra* and 2 2 3 2 *supra.*

[292] *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 2 SA 1074 (SE); *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Another* 2001 4 SA 1074 (SE); *Esterhuyze v Khamandi* 2001 1 SA 1024 (LCC); *Ellis v Viljoen* 2001 4 SA 795 (C); *Ridgway v Janse van Rensburg* 2002 4 SA 186 (C). See n 21 *supra* and 2 2 3 2 *supra.*

[293] *Ndlovu* 129 [41].

[294] *Ndlovu* 129 [42]; my emphasis.

retention of control. For the former, stricter requirements usually apply when compared with the latter.[295]

This interpretation would mean that a party holding over is someone who takes control lawfully, with the necessary consent, but refuses to vacate the property at a later stage when the consent is withdrawn. As such, he/she would not be covered by PIE. Even squatters, who took control of the property with the necessary consent and later refused to vacate the land, would not be protected by PIE.[296] This interpretation would have confirmed *Nelson Mandela Metropolitan Municipality v Various Occupiers of Stands in Mnyanda Street, Qaqawuli Phase 2, New Brighton.*[297] In this case, in which several families had occupied the land for various periods, some in terms of temporary permits issued to them by the applicant and some with the tacit consent of the applicant,[298] the court found that PIE could not be applied, since the occupier had initially taken control of the property with

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295 Van der Walt & Pienaar *Inleiding tot Sakereg* 4 ed 195-206.

296 *Nelson Mandela Metropolitan Municipality v Various Occupiers of Stands in Mnyanda Street, Qaqawuli Phase 2, New Brighton* [2001] All SA 490 (SE).

297 [2001] All SA 490 (SE).

298 The permits allowed the occupiers temporarily to occupy the stands and erect temporary structures at their own cost. The permit, however, contained a clause that stated that the applicant could cancel the permit without furnishing any reasons for the cancellation. Also included in the permit was that, when the occupier left the stand, either after being requested or on own accord, the occupier would leave the site neat and tidy.

the necessary consent, but had subsequently become unlawful.[299] According to this case, which could have served as an authority for the position that PIE should only be applicable in cases where the occupant *took* control of the property without consent,[300] PIE should not have been applied in cases of holding over.

4 3 2 Legislative intention

The minority disagreed with the majority's interpretation regarding parliament's intention to include holding over under the scope of PIE, arguing that the exclusion of the application of ESTA indicated that PIE should have a more limited ambit.[301] This was a clear indication of the legislature's intention to limit the scope of PIE. Olivier JA therefore held that "[e]x-tenants are persons who had at a certain time [had] consent to occupy the land of another. By definition they are excluded from PIE."[302] Whatever Parliament might have intended, the minority did not think that it was that PIE should cover holding over.

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299 In *Nelson Mandela* at 495 G-I Liebenberg J finds that PIE was *not* applicable when the respondents had the necessary consent, the only question that remained to be answered was whether or not PIE became applicable once the consent had been revoked. The answer would be the same if the tenant had consent and the landlord withdrew this consent as the tenant was in arrears with the rentals, would the tenant be considered an 'unlawful occupant' in terms of PIE?

300 My emphasis.

301 *Ndlovu* 146 [77].

In line with this contention, Olivier JA viewed the definition of "building or structure" in PIE to refer to informal[303] and not to rental housing. He also found the prohibition of the solicitation for payment in section 3 of PIE to be irreconcilable with the letting and hiring of houses, apartments and anything that could be considered a home.[304] The requirement in PIE that the applicant must notify the municipality in terms of section 4(2), while compatible with the eviction of squatters, was also incompatible with the eviction of ex-tenants,[305] as is the case regarding the whole procedure set out in sections 4(2) to (12).[306]

According to the minority judgment, therefore, several of the provisions of PIE are completely incompatible with the rental housing context.

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302 *Ndlovu* 146 [77].

303 *Ndlovu* 146 [79]–147 [80].

304 *Ndlovu* 147 [80].

305 *Ndlovu* 147 [81] and s 4(7) of PIE.

306 *Ndlovu* 147 [82]: "Mr Kuper also referred in support of his argument to the procedure laid down in ss 4(2)-(12) of PIE. He convincingly argued that these procedures are compatible with the eviction of squatters and incompatible with the eviction of ex-tenants from houses. He highlighted the following points:

(a) the requirement of the involvement of the court in a procedure which is clearly inquisitorial and intended to protect those who cannot protect themselves, for example squatters;

(b) the involvement of the municipality concerned;

(c) the discretion given to the court in ss 4(6), (7), (8) and (9);

(d) the provisions relating to the demolition and removal of the buildings or structures that were occupied by the occupier on the land in question – ss 4(10), (11) and (12). This is incompatible with the lease of urban houses, flats, townhouses, rooms, etc."

4 3 3 Oppressive nature of PIE

Concerning the impact of PIE on the common law right to evict, which was not found to be "as oppressive as it seems at first,"[307] the minority disagreed strongly. They viewed the substantive provisions of the Act as the most significant influence and considered them to undermine the common law, as stated in *Graham v Ridley*[308] and *Chetty v Naidoo.*[309] It was remarked that the act's provisions "draw a thick black line through [the decisions in these two cases]". Olivier JA argued that if the Court used the discretion awarded to it in wide and open terms as to whether it would be "just and equitable" to have an unlawful occupier evicted or to allow him/her to stay on,[310] the possibility existed for extremely unjust results for the landowner.[311] When the court considered PIE and its provisions, the learned Appeal Judge argued, the court could deem it just and equitable not to grant an eviction order.[312] The minority did therefore not agree

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307 *Ndlovu* 123 [17].

308 1931 TPD 476.

309 1974 3 SA 13 (A).

310 *Ndlovu* 131 [48] The discretion is given in wide and open terms – is it, in the opinion of the court, 'just and equitable' to grant an eviction order?"

311 *Ndlovu* 131 [48]–132 [49].

312 Ss 4(6) and (7) state that the court *may* grant an eviction order after considering all the relevant circumstances.

with the majority's finding that compliance with the provisions of PIE would not have a considerable effect on the landlord.[313]

Olivier JA stated that the situation is not only oppressive towards the landlord, but the procedures are time-consuming and expensive as well.[314] Nienaber JA, in his minority decision, added that these procedures could be exploited by the parties holding over as a result of the time-consuming nature of the provisions of PIE and that this could also be oppressive towards the landlord.[315]

4 3 4 Establishing what is "just and equitable"[316]

The minority did not provide a direct opinion on how to establish what circumstances would be considered as just and equitable, simply because they did not agree that PIE should have been made applicable in cases such as *Ndlovu*. However, for the relevant history, Olivier JA turned to the Rent Control Act,[317]

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313 *Ndlovu* 123 [17].

314 *Ndlovu* 131 [47]: "[I]f PIE is applicable the procedure for the eviction of an unlawful occupier is cumbersome, costly and time-consuming."

315 *Ndlovu* 155 [102]: "...[PIE] has created the potential, if it is to apply to 'holders-over', for the latter class to exploit the procedural provisions of PIE to keep owners and other rightful claimants at bay for some considerable time."

316 S 26(3) of the Constitution requires that an eviction order may only be granted if the court is of the opinion that the eviction would be "just and equitable" under the circumstances.

317 18 of 1976.

which he found had a limited ambit in that it was only applicable to specific persons and premises. Since this Act was repealed by the Rental Housing Act[318] and not by PIE and it was still in force when PIE came into operation, PIE and the Rent Control Act existed side by side for two years from 5 June 1998 to 1 August 2000, when the RHA was promulgated. Given the strong legal presumption that, unless the wording makes it clear, a later Act does not repeal or alter a preceding Act,[319] the minority was convinced that the legislature did not have the intention of repealing the Rent Control Act with PIE. This meant that the two acts could clearly be distinguished in respect of their scope of application: the Rent Control Act was not supposed to apply to "vacant land" and PIE was never intended to apply to "leased dwellings, garages, parking spaces and business premises."[320]

Added to this, Olivier JA was of the opinion that ex-tenants should not be afforded the same protection as squatters, since they were not as vulnerable as squatters:

> "In endeavouring to fathom what the expression 'unlawful occupier' in PIE means, our task is to find a balanced and justifiable interpretation, without fear, favour or bias. Let me once again emphasise: the class of occupiers which we deal with are not poor, homeless squatters who have been

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318 50 of 1999.

319 *Ndlovu* 148 [84]–[86], *Kent NO v South African Railways and Another* 1946 AD 398.

> forced by past laws to occupy the property of another without the latter's consent or other right to do so, simply out of necessity. We are dealing with a class of occupiers who have entered into valid contracts to acquire or occupy property of another, but due to their own default, breach of contract and refusal to vacate land which is not theirs, are in occupation."[321]

The point here is that since parties holding over are not in the same vulnerable position as squatters, a finding that would exclude them from PIE would not necessarily be unjust or inequitable.

Olivier JA further pointed out that in terms of PIE the occupier occupies the property adverse to the rights of the rightful owner and other innocent third parties. In contrast with the opinion of the majority, he argued, however, that this could be seen as expropriation without compensation, which is unreasonable. As the occupier is not obliged to pay compensation in terms of PIE, this kind of exploitation constitutes something that neither the common law, nor the Constitution, allows.[322] The learned Judge of Appeal found the Constitution to point in the other direction.[323]

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320 *Ndlovu* 149 [87].

321 *Ndlovu* 143 [69]–144 [70].

322 *Ndlovu* 144 [72].

323 *Ndlovu* 144 [73].

4 4 Reconcilability of *Brisley* and *Ndlovu*

An interesting observation that is worth mentioning at this point, is that neither the majority nor the minority judgment mentions the *Brisley*[324] decision, which was delivered by the Supreme Court of Appeal a couple of months prior to the *Ndlovu* decision. Considering that Harms JA and Olivier JA were both on the bench in that case, it is strange that the *Ndlovu* decision differs so radically from *Brisley*. There Harms JA disagreed as follows with the fact that Josman JA gleaned any guidance from PIE:

> "Hy het gevolglik gefouteer deur in die gemelde Wet 'n aanduiding te vind van wat relevante omstandighede vir doeleindes van art 26(3) sou wees alvorens dit vasstaan dat art 26(3) aan die hof 'n diskresie verleen het en wat daardie diskresie is."[325]

In the light of *Brisley*, which also involves a defaulting tenant, it seems strange that Harms JA considers PIE and its provisions to be applicable in the case of *Ndlovu*. Here the occupant had actually asked the court to consider her and her family's socio-economic circumstances, which seems to point to section 4(6) and 4(7) of PIE.[326] However, the Supreme Court of Appeal found that the only legally relevant circumstances to be

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324 *Brisley v Drotsky* 2002 4 SA 1 (SCA).

325 *Brisley* 20 [38].

326 Ss 4(6) and 4(7) of PIE refer to specifically the "elderly, female headed families and children". All these are present in the case of *Brisley v Drotsky*.

considered were whether or not the applicant was the owner and whether or not the occupier was in unlawful occupation.[327] Since these circumstances resemble the requirements of the *rei vindicatio* so closely,[328] the court found that the common law had not been changed by the Constitution[329] with respect to eviction and the requirements with which an owner has to comply.

Having disregarded provisions of PIE such as the availability of alternative land and the vulnerability of the occupier,[330] the majority was in fact left with a procedure that is very similar to

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327 *Brisley* 21 [42].

328 For a discussion of the requirements of the common law eviction procedure see ch 3 *supra*.

329 *Brisley* 21 [42] where the learned Judges of Appeal state: "Artikel 26(3) vereis dat alle relevante omstandighede in ag geneem moet word maar bepaal nie self dat enige omstandighede relevant sal wees nie. Daarvoor moet na die algemeen geldende reg gekyk word. Omstandighede kan slegs relevant wees indien hulle *regtens* relevant is. Indien die artikel aan 'n hof 'n diskresie verleen het om 'n uitsettingsbevel te weier onder sekere omstandighede, soos byvoorbeeld indien die hof dit reg en billik sou ag, sou alle omstandighede wat relevant is met betrekking tot die vraag of dit in 'n bepaalde geval reg en billik sou wees natuurlik relevant wees by die uitoefening van daardie diskresie. Die artikel verleen egter geen diskresie aan die hof om onder sekere omstandighede te weier om 'n uitsettingsbevel toe te staan aan 'n eienaar wat andersins op so uitsettingsbevel geregtig sou gewees het nie"; cf *Betta* 475 [11.1]–[11.2] where Flemming DJP states: "If it is so that ownership plus illegal possession is inadequate, an owner who can prove no more than the total absence of any right of the occupier to mar the owner's right in effect loses ownership *pro tanto* until it suits the occupier to move on – if not succeeded by a new occupier. The Constitution will have indefinitely protected the grabber against lawful rights. Unless, of course, the owner perhaps affirms untrue additional facts? It would be wise to see whether that result is avoidable before deciding that our law has embraced that implication."

330 *Ndlovu* 123 [17].

the common-law procedure. Because the *Ndlovu* decision did not follow *Brisley*, it delivered a totally contradictory finding, without any reference to the prior case. *Ndlovu* overruled the decision of *Brisley*, as *Brisley* found PIE not to be applicable to cases of eviction of a person holding over and *Ndlovu* found PIE to be applicable.

It is clear from the above that the initial position of this study substantially corresponds with the minority judgment, which is in accordance with the underlying assumption of this study that PIE should not have been made applicable to holding over. Despite the discrepancy between the two cases described above, this could have been the end to the study if no serious problems had come in the wake of the decision. *Ndlovu* has, however, led to considerable problems in the rental housing market, as mentioned in chapter one. To realise the aim of the study, the severity of these problems must be determined.

4 5 Existing and expected problems

The *Ndlovu* decision was criticised[331] as soon as it had been handed down. The problems that were mentioned include the

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[331] Green 2002 October *De Rebus* 10; Guthrie 2000 January *De Rebus* 24; Hopkins and Hofmeyr 2003 March *De Rebus* 15-17; Spohr 2002 December *LexisNexis Butterworths Property Law Digest;* Lötz and Nagel 2003 *THRHR* state the following: "Sedert hierdie beslissing die lig gesien het – en daarby word die meerderheidsuitspraak bedoel – het elke denkbare belange groep (selfs staatsdepartemente) daarteen te velde getrek." 173.

cost and time involved in obtaining an eviction order, possible abuse of the provisions of PIE, prevention of the proper functioning of legislation, disregard of the normal rules of contract law, uncertainty regarding the rights that an unlawful occupant has against the owner, and the effect of the *Ndlovu* decision on the rental housing market in general.

Before these problems are described, one aspect of the *Ndlovu* decision that may be misleading must be discussed. That is, the fact that none of the relevant cases prior to this decision used PIE and its procedures for evicting a defaulting tenant, because it was argued that the common law procedure had not been altered by the Constitution. According to the court in the *Absa* decision, for example, PIE was only applicable when dealing with vacant land. For other cases the *rei vindicatio* was applicable, in its pre-constitutional form.

In the case of *Ross*, the court was of the opinion that the circumstances mentioned in PIE could prove valuable when the court needed to consider "all the relevant circumstances", as section 26(3) of the Constitution requires it to do. As it found that the *Absa* case had been correctly decided, however, the court inferred that PIE was not applicable in cases of eviction of parties holding over. In this case, the court did argue that the Constitution had changed the common law eviction procedure with regard to the onus on the owner, in the sense that the owner

had to prove more than had earlier been required under the common law. Since the Judge failed to give content to this notion, however, the decision was subsequently overturned by the *Betta Eiendomme*[332] and *Ellis*[333] decisions respectively. These courts found that the common law was applicable to defaulting tenants in the same way as it had been applied in *Chetty v Naidoo*[334] and *Graham v Ridley.*[335] In *Brisley v Drotsky*,[336] the Supreme Court of Appeal confirmed that the Constitution did not have a considerable influence on the common law eviction procedure.

In *Ndlovu v Ngcobo; Bekker v Jika*,[337] however, PIE was found to be applicable in instances where a landlord wanted to evict a defaulting tenant. Since the *Ndlovu* case is the latest Supreme Court of Appeal case, it serves as authority. Where a defaulting tenant needs to be evicted in future, therefore, the procedures of PIE are to be preferred to those of the common law.

While the Supreme Court of Appeal, by its nature, often sets new precedents, the problem here is that the court's decision has not only caused considerable confusion, but has resulted in a public

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332 2000 4 SA 468 (W).

333 2001 5 BCLR 487 (C).

334 1974 3 SA 13 (A).

335 1931 TPD 476.

336 2002 4 SA 1 (SCA).

337 2003 1 SA 113 (SCA).

outcry.[338] The main problems that were raised by critics of the decision are discussed below.

4 5 1 Time-consuming and expensive eviction procedures

One serious problem with regard to the application of PIE and its provisions to the rental housing market is that the eviction of a defaulting tenant takes much longer than under the common law. It is also a very expensive procedure.[339] The minority in the *Ndlovu* decision foresaw these consequences.[340] Not only is this one of the main reasons why the private sector may choose not to

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338 Van der Walt 2002 *SAJHR* 390; Lötz and Nagel 2003 *THRHR* 172-173.

339 Green 2002 October *De Rebus* 10; Hopkins and Hofmeyr 2003 March *De Rebus* 15; Pienaar "Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits en Lubbe (Eds) *Remedies in Zuid-Afrika en Europa* (2003) 158 states: "Die impak van die *Ndlovu* en *Bekker*-uitsprake is vir grondeienaars, okkupeerders en finansiële instansies verreikend."; Van der Walt 2002 *TSAR* 266 "The act [PIE] explicitly overrides the common-law right to evict."

340 *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA) 131 where Olivier JA stated: "[I]f PIE is applicable the procedure for the eviction of an unlawful occupier is cumbersome, costly and time-consuming" and Nienaber JA in *Ndlovu* 155 stated: "The mechanisms introduced by PIE for dispossessing recalcitrant occupiers have made it more difficult and time-consuming to evict them. As such it has created the potential, if it is to apply to 'holders-over', for the later class to exploit the procedural provisions of PIE to keep owners and other rightful claimants at bay for some considerable time."

invest in the rental housing market,[341] it also has some very harsh implications for poorer people.[342]

As mentioned before, many South Africans rely on rental housing as a source, sometimes their only source, of income or as retirement security.[343] These landlords now have to deal with the cumbersome, time-consuming and expensive procedures of having a defaulting tenant evicted, which many cannot afford. This seems grossly unfair, as the people who rely on the rental monies for their survival could be considered a vulnerable group in their own right.

If such landlords have to evict a tenant by employing the provisions of PIE, they would not only be losing money in terms of the expensive procedure, but also in the form of possible income from a new tenant. The longer the procedure takes, the more money is lost by the landlord. In terms of section 4(2), effective notice, which contains the information set out in section

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341 Pienaar "Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits en Lubbe (Eds) *Remedies in Zuid-Afrika en Europa* (2003) 158.

342 Anonymous 2002 December *De Rebus* 7. The writer of this article stresses that there are poor people who have the same problems with illegal occupants as their more 'wealthy' landlord counterparts, the writer points out that these are real problems in areas such as the greater Soweto area.

343 Green 2002 October *De Rebus* 10 where he states that the majority of landlords are not owners of residential rental property because of excess wealth, but rather to provide for them when they retire Ch 1 *supra.*

4(5) of PIE,[344] must be served on a defaulting tenant. After this, the landlord has to wait until the Court makes an order, which it considers to be just and equitable under the circumstances,[345] while the owner receives no rent during this time. Moreover, after six months of unlawful occupation the court has to determine whether or not alternative housing is available,[346] before it may establish a fair date for the tenant to vacate the property and a date on which the eviction order could be carried out.[347] Lastly, while the landlord could try to retrieve the lost rental monies through an application to court, this is more often than not a futile exercise. If there was no money or commitment to pay the rent in the first place, there usually is little to retrieve afterwards.

Hofmeyr and Hopkins argue that, while "according to the SCA it will always be substantively just and equitable to evict a holder over, ... it will ... cost the owner more money and it will take longer."[348] If this means that a rightful owner has to comply with a cumbersome, costly and time-consuming procedure, while a tenant, who is in arrears with rent, can wait for the procedure to take place, the procedure is clearly prejudiced against the owner. From this, the authors conclude that if the eviction procedure of

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344 See Ch 2 *supra*.

345 Ss 4(6) and 4(7) of PIE.

346 S 4(7) of PIE.

347 S 4(8) of PIE.

348 Hopkins and Hofmeyr 2003 March *De Rebus* 15.

PIE is applicable only in as far as it is similar to the procedure under the common law, except for the fact that it is more expensive and time-consuming, it could be considered an arbitrary expropriation.[349] Not only is this incompatible with the preamble to PIE, which refers to the Constitution and specifically states that ownership should be protected,[350] but it is unfair that the owner is made to endure such a long and expensive procedure to return to a position in which he/she could earn a living from the property that was acquired for this purpose.

4 5 2 Abuse of the provisions of PIE

In addition to the long and costly procedure required by PIE, Hawthorne[351] foresees a real risk of abuse of the provisions and procedures for evicting a defaulting tenant. A tenant could conclude an agreement for the lease of rental housing property, refuse to pay the rent once the contract has been concluded and possession has been taken of the property and stay for free for several months until the case has been concluded. *Brisley v Drotsky*[352] serves as an excellent example of how a tenant can slow down the eviction procedure in another way. In this case the respondent was aided by the Court's reluctance to hear the

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349 Hopkins and Hofmeyr 2003 March *De Rebus* 15.

350 The preamble of PIE refers to s 25 of the Constitution and this section is expressly quoted in the preamble of PIE.

351 Hawthorne 2001 *De Jure* 584.

352 2002 4 SA 1 (SCA).

case on merit. Since PIE does not contain any provisions to prevent abuse of the Act, there seems to be no real deterrent against such abuse. When the tenant is finally evicted, therefore, free housing could be obtained simply by concluding a new lease agreement with a different landlord.

4 5 3 Preventing proper functioning of legislation

Another problem is that the *Ndlovu* decision has eroded the functioning both of the RHA and of PIE. One example of where this has happened as a result of the *Ndlovu* decision is in the application of section 13 (10) of the Rental Housing Act, which states that the landlord can approach a court of law to obtain urgent relief, even for matters that are within the ambit of the jurisdiction of the Tribunal.

Since PIE is now applicable to the eviction of a defaulting tenant, the landlord must also comply with the provisions of PIE regarding urgent eviction.[353] In this regard, Hofmeyr and Hopkins have shown that the landlord, who wants to have a tenant evicted according to section 5 of PIE, can simply prove real and imminent danger by showing that there are added costs and time and lost rental that would not otherwise have been the case.[354] The "hardship" would also be unnecessary,[355] and it is

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353 Ch 2 *supra* for a discussion of the urgent eviction procedures in terms of PIE.

354 Hopkins and Hofmeyr 2003 March *De Rebus* 15-17.

highly unlikely that any other remedy would work as effectively.[356] If these arguments are correct, however, there could be no reason why landlords would have to comply with PIE in the first place, as this situation would be similar to the situation under the common law. This makes little sense.

Using a different argument to the same effect, Costa contends that mere financial loss, even though it was incurred by a tenant's being in arrears, does not constitute grounds that would allow the court to grant an urgent eviction order in terms of PIE.[357] If it had constituted such grounds, the court would be flooded with urgent eviction orders.[358] Some other relevant factor is therefore needed for the court to grant an urgent eviction order under PIE. The landlord can therefore not lodge an urgent eviction order, based on the financial loss he/she would be incurring, as mere financial loss would not constitute a valid ground for the court to grant an urgent eviction order. This serves as another illustration of how the application of PIE to the rental housing market prevents the RHA from achieving its goals.[359] However, even if the landlord were allowed to contend

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355 Hopkins and Hofmeyr 2003 March *De Rebus* 15-17.

356 Hopkins and Hofmeyr 2003 March *De Rebus* 15-17.

357 Costa 2003 March *De Rebus* 23.

358 Costa 2003 March *De Rebus* 23.

359 S 13(10) of the RHA grants a landlord the right to approach the court for an urgent eviction, but if what Costa states is true for urgent proceedings under PIE, the landlord would not be allowed to institute urgent proceedings based on mere financial loss.

that an urgent eviction order should be granted because of his/her added financial loss, the question would remain as to whether the landlord's financial loss outweighed the tenant's potential hardship if he/she were evicted.[360]

The provisions of section 5 of PIE therefore undermine section 13(10) of the RHA and, in so doing, frustrate the speed and low-cost efficiency that the RHA has in mind.[361] As was pointed out in chapter three, the legislature tried to create equilibrium between landlords and tenants and their respective rights and duties by introducing the Rental Housing Act.[362] The reasoning behind implementing the RHA was to ease some of the pressure on government to provide everyone with adequate housing as was indicated.[363] If a proper rental housing market were in place, investors would invest their money in such a market and if tenants felt that they were protected adequately, they would be more willing to make use of rental housing. The use of PIE frustrates this objective.

Another example of how PIE frustrates the purpose of the RHA concerns the provision of the RHA that protects prospective

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360 Ch 2 *supra* in order to be successful with an urgent eviction procedure, the court has to be satisfied that the hardship of the owner outweighs the hardship of the occupier, s 5(1) b.

361 S 13(10) of the RHA.

362 Ch 3 *supra.*

363 Ch 1 *supra.*

tenants against discrimination.[364] According to this, the landlord is not entitled to refuse prospective tenants on the basis of "race, gender, sex, pregnancy, marital status, sexual orientation, ethnic or social origin, colour, age, disability, religion conscience, belief, culture, language and birth."[365] This provision is applicable from the time that a landlord advertises a dwelling.[366] In the course of the outcry in the media that followed the *Ndlovu* decision, the chairman of the Gauteng Rental Housing Tribunal, Yusuf Wadee, was asked what property owners could do to protect themselves against the consequences of this finding. Wadee's reply was that owners would not only have to take greater care after *Ndlovu*, but would have to prevent problems with tenants who cost a lot of time, money and trouble, by screening prospective tenants.[367] Pienaar agrees that this would be one of the ways in which landlords could protect themselves, if they are in fact still interested in letting their property after the *Ndlovu* case.[368] Screening could, of course, result in the refusal to lease to the very people who fall into the expressly-mentioned vulnerable groups in terms of PIE,[369] which would make it harder for people falling into these categories to obtain rental

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364 S 4(1) of the RHA.

365 S 4(1) of the RHA.

366 This section has similar provisions as s 9 of the Constitution and contains a list of exactly the same grounds. Examples of these are age, gender, disability etc.

367 Muller 2002 September *Finance Week* 18.

368 Pienaar "Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits en Lubbe (Eds) *Remedies in Zuid-Afrika en Europa* (2003) 158.

housing, hence frustrating the constitutional objective of access to land. This would also totally frustrate the purpose of the provision in the RHA, which states that the owner may not discriminate against a prospective tenant.

These examples serve to emphasize that the application of PIE in the *Ndlovu* case has caused confusion regarding the functioning of both PIE and the RHA.

4 5 4 Disregarding the normal rules of contract law

If PIE is applied to the rental housing market, it will also have far-reaching effects on the rules of contract law.

A contract could, for example, state that the tenant should vacate the property if he/she fails to pay the rent, in which case the Court, after *Ndlovu,* has the discretion to grant an eviction order, in terms of PIE.[370] However, this it could do, only if it has taken all the relevant circumstances into consideration, which could include more than just the fact that the tenant was in arrears, and if it has considered whether it would be just and equitable to evict. Although the contract would have contained a termination date and might specifically have stipulated what should happen

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369 Ss 4(6) and 4(7).

if a tenant failed to pay, the Court could, after *Ndlovu*, override both these terms of the contract by granting an eviction order that would suspend the eviction until, according to the Court, it would be just and equitable to do so.[371] This example shows that the application of PIE to the contractual relationship between landlord and tenant is futile. Guthrie therefore argues that if PIE "was intended to cover (parties holding over), all manner of commercial contracts would be prejudiced."[372]

Further, the provision of the RHA that a landlord may terminate a lease agreement in terms of the provisions of the contract, if it does not constitute an unfair practice,[373] means that a contract can only be terminated if it is done in accordance with the agreement that the parties concluded. Applying the provisions of PIE would therefore have the effect of undermining these consensual provisions.

Another problem is that in terms of the RHA a contract may not be terminated if the tenant was not aware of the provisions. Only if a contract contains a *lex commissoria* and the tenant knew

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370 Ss 4(6) and 4(7) of PIE, which states that the court *may* grant an eviction order, if the court is of the opinion that it is just and equitable to do so under the circumstances, thereby giving the court a discretion.

371 Ss 4(8) and 4(9) of PIE.

372 Guthrie 2000 January *De Rebus* 24.

373 S 4(5)(*c*).

exactly on which grounds the contract could be terminated[374] may such a tenant be evicted. Applying the provisions of PIE would mean that the tenant could refuse to comply with the provisions of the contract. In such a case, the landlord would have great difficulty evicting the tenant, thereby protecting the transgressor of the provisions of a contract. Not only is this against the normal rules of contract law, but it also fuels the private investor's scepticism about the safety of investments. Private investors might therefore choose not to invest at all, as they cannot protect themselves by means of specific provisions in a contract.

4 5 5 Uncertainty regarding the rights that an unlawful occupant has against the owner

Another problem is the uncertainty regarding the position of an unlawful occupant who is protected by the court against eviction. Once the court has refused eviction, it appears as if the *status quo* supports conversion of unlawful occupation into lawful occupation without any basis. Pienaar resists this interpretation, arguing that the Court's reluctance to grant an eviction order cannot render the unlawful occupant lawful.[375]

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374 S 4(5)(*c*).

375 Pienaar "Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits en Lubbe (Eds) *Remedies in Zuid-Afrika en Europa* (2003) 154.

This is not a problem only where PIE is applied to a defaulting tenant, but is also problematic when applied to squatters. As a defaulting tenant is not a lawful occupant, it is unclear which rights he/she has against the owner, when PIE is applied to the rental housing market. It is not certain whether section 4 of the Rental Housing Act would be applicable in such a case. Could the tenant expect the owner to keep the dwelling in a suitable condition? Could it be expected of the landlord to comply with those regulations that each province has accepted in terms of the RHA? What would the position be if a third party, with whom a contract might have been concluded, moved into the dwelling, and could the owner be expected to provide peaceful and undisturbed possession to the unlawful occupant against such a third party?

These questions serve as an indication of the uncertainty that exists after *Ndlovu* about what exactly the rights of an unlawful occupant could now be against an owner.

4 5 6 The effect of the *Ndlovu* decision on rental housing in general

In addition to the problems discussed above, the *Ndlovu* decision thwarts the government's intention to provide a market in which the private sector would be willing to invest money. As mentioned before, the RHA was promulgated as a direct result of the government's intention to achieve the Constitutional goal of

adequate housing,[376] despite its limited finances and lack of staff. Involving the private sector in this goal[377] is one of the "reasonable steps" taken by the government to fulfil its obligation. The previous Minister of Housing, Sankie Mtembi-Mahanyele, said that she was relying on the private sector to [develop a market-orientated system whereby it could] be the main provider of rental accommodation.[378]

The fact that the RHA is so closely linked to the market means that it has to be sensitive to issues such as risk and the potential of a bad investment. Having to comply with a costly, time-consuming and cumbersome eviction procedure is certain to deter the private sector from further investment and cause the withdrawal of money from the rental housing sector. Pienaar points out:

> "Die moontlikheid dat woonstel- of huiseienaars eiendom aan persone uitverhuur waar daar 'n risiko bestaan dat huurgeld nie betaal kan/gaan word nie, is uiters skraal. Dit het die noodwendige implikasie dat die beskikbare huurmark oornag sedert die uitspraak gekrimp het. Dit is moontlik dat eienaars sou verkies om geensins eiendom uit

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376 S 26 of the Constitution.

377 Fife "Landlords can Relax" 2002 20 September *Financial Mail* 24.

378 Fife 2002 20 September *Financial Mail* 24.

te verhuur nie enersyds of om toekomstige huurders uiters streng te keur, andersyds."[379]

There are many more respects in which the *Ndlovu* decision could have a substantial effect on the rental housing market.[380] Not only could the investment into this market decline, but less rental housing would be available.[381] This could lead to stagnation at a time when the country is in dire need of growth. Some landlords could require huge deposits[382] from prospective tenants to protect themselves in case of a tenant defaulting,[383] which may have some advantages for the landlord, but would exclude the middle- and low-income groups.[384]

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379 Pienaar "Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits en Lubbe (Eds) *Remedies in Zuid-Afrika en Europa* (2003) 158.

380 Pienaar "Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits en Lubbe (Eds) *Remedies in Zuid-Afrika en Europa* (2003) 158; Green 2002 October *De Rebus* 10; Hopkins and Hofmeyr 2003 March *De Rebus* 15.

381 Pienaar "Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits en Lubbe (Eds) *Remedies in Zuid-Afrika en Europa* (2003) 158; Green 2002 October *De Rebus* 10.

382 S 5(3)(*c*) of the Rental Housing Act, 50 of 1999. The landlord has the power to determine this amount.

383 S 5(3)*g* of the Rental Housing Act states '...the landlord may apply such deposit and interest towards the payment of all amounts for which the tenant is liable under the said lease...'

384 Pienaar "Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits en Lubbe (Eds) *Remedies in Zuid-Afrika en Europa* (2003) 158. Although the term "poor" can be seen as a relative term, there are many poor people in South Africa, as mentioned above, in 1995, 80% of the households in South Africa earned an amount of R2500 or less.

On a different level, buyers would be reluctant to buy a property in which the eviction date of a party holding over exceeds the date by which he/she would have liked to buy the property. Similarly, if a landlord falls in arrears with the outstanding bond on a property, even tough the property was sold in the *Bekker*[385] case, the bank could struggle to sell the property if a party holding over may not be evicted before a date that is specified in terms of the court order. Even if the bank does succeed in selling the property, the new owner would not be allowed to move in until the party holding over vacates the premises.

Since it is highly unlikely that the legislature had these scenarios in mind, it is clear that the contention that the *Ndlovu* decision has caused significant confusion. If PIE was supposed to help the landowner evict an illegal occupant and not just to protect the occupant from illegal eviction, as indicated by its title, the scenarios should not have been possible. By denying the RHA the opportunity to function properly, it is not allowed to reach its goals.

4 6 Summary

The serious nature of the problems caused by the application of PIE in the *Ndlovu* case, which has led to its application to holding over, supports the initial position of this study that the

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[385] *Bekker and Another v Jika* 2002 4 SA 508 (E).

decision was incorrect. The decision should therefore be overturned, which is highly likely to happen in the near future.

There are two ways in which this could be effected. Firstly, the Supreme Court of Appeal could hand down another judgment, which states that PIE should not be applied when having a party holding over evicted. Secondly, the legislator could enact legislation that expressly excludes the application of PIE to cases of holding over. The likelihood of these solutions is discussed in Chapter Five.

CHAPTER 5

CONCLUSION AND SUGGESTED SOLUTIONS

5 1 Introduction

In conclusion, this chapter considers what the result would have been if the minority judgment in *Ndlovu* had been accepted. Would this judgment necessarily have prevented the problems that have arisen from *Ndlovu*? If not, the contention of this study could still be disputed.

In Chapter Four it was suggested that a solution could be found to the problems caused by the *Ndlovu* decision in one of two ways. The first was that a later Appeal Court decision could overturn *Ndlovu*. To date, this has not happened. The second way is the enactment of legislation, which can only be effected by Parliament. Since the government has already proposed amendments, this seems to be the way that will be followed. However, since these amendments have not been examined yet, this also needs to be done.

The Chapter concludes with a brief summary and recommendations.

5 2 Impact of the minority decision if it had been upheld

Had the minority decision been accepted, PIE would not have been employed in *Ndlovu*. Since the common law eviction procedure would have been applicable, either in terms of the RHA[386] or because no other legislation provides an adequate eviction procedure to have parties holding over evicted, the eviction procedure would have been neither time-consuming, nor expensive.[387]

Because the minority was of the opinion that the scope of PIE did not include parties holding over, the opportunity would also not have existed for the provisions of PIE to have been abused.[388] Neither would the proper functioning of the RHA have been undermined.[389] Because PIE would have been judged not to be applicable in cases of holding over, a landlord would still have been able to obtain urgent relief in terms of section 13(10) of the RHA. The screening of prospective clients would, however, not need to be as harsh[390] as it would be easier to have

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386 Ch 3 *supra*.

387 4 5 1 - 4 5 6 *supra*.

388 4 5 2 *supra*.

389 4 5 3 *supra*.

390 Pienaar "Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits en Lubbe (Eds) *Remedies in Zuid-Afrika en Europa* (2003) 158 notes: "Dit is moontlik dat eienaars sou verkies om geensins eiendom uit te verhuur nie enersyds of om toekomstige huurders *uiters streng te keur*, andersyds." [my emphasis] This means that as a result

a party holding over evicted.[391] In this way, the non-discrimination clause in terms of the RHA would be honoured.

In addition, the contract between landlords and tenants would have been upheld, with a result that the court would not have had a discretion to deviate from the terms and conditions of the contract, as is the case when PIE is made applicable to the rental housing market.[392] According to *Ndlovu* when a person refuses to vacate the property after a valid lease agreement has been terminated, such a former tenant becomes an unlawful occupier and then PIE is made applicable. PIE, however, does not normally deal with the situation where there is a valid lease agreement it usually deals with unlawful occupiers who make use of informal housing. This would have maintained the legitimacy of the law, which always encourages more private investment.

Other questions that were raised in chapter four (i.e. whether a defaulting tenant could expect the owner to keep the dwelling in

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of the *Ndlovu* decision the owners might employ harsh screening procedures in order to protect themselves against defaulting tenants.

391 Pienaar "Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits en Lubbe (Eds) *Remedies in Zuid-Afrika en Europa* (2003) 158 Pienaar states that after the *Ndlovu* decision one of the ways that landlords could protect themselves is to screen prospective clients and that these processes need to be more harsh than was previously the case. If these amendments are excepted these procedures would not need to as harsh as it would be easier to have a defaulting tenant evicted.

392 4 5 4 *supra*.

a suitable condition; whether it could be expected of the landlord to comply in these circumstances with those regulations that each province has accepted in terms of the RHA; what the position would be if a third party, with whom a contract might have been concluded, moved into the dwelling; whether the owner could be expected to provide peaceful and undisturbed possession to an unlawful occupant against a third party;[393] and so forth) would not have arisen at all. If PIE were not applicable, a party holding over would have no rights against the landlord once the eviction order in terms of the common law has been granted. The occupier would have to vacate the property and hand it over to the landlord, unless the occupier refused, in which case the landlord could have him/her evicted.

It is clear that the minority decision would not have had such a negative impact on the rental housing market as the majority decision has had.[394] In indicating how a proper reliance on the Rental Housing Act and, more particularly, on the common law eviction procedure, could have prevented the confusion in current law concerning the eviction of tenants, the minority decision confirms the view of this study, which is that since the common law still contains the best eviction procedure, it should have been used in *Ndlovu*.[395] However, as the majority went the

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393 4 5 5 *supra*.

394 4 5 6 *supra*.

395 Ch 3 *supra*.

other way, the only solution has been for the government to rectify the problems by way of proposed amendments.[396] These are discussed below.

5 3 Proposed amendments to PIE

During the second half of 2003, the legislature proposed amendments to PIE and invited comments. Although the Bill[397] has not been passed,[398] it is important to consider those amendments that relate to the eviction procedure in cases of holding over where rental housing is applicable. While it appears that the legislature is of the opinion that the case of *Ndlovu v Ngcobo; Bekker v Jika*[399] was decided incorrectly, it needs to be determined whether the proposed changes satisfy the questions raised in this study.

Section 1 of the proposed Amendment Bill, phrases some of the definitions in such a way that the confusion currently surrounding the relevant terms is cleared up. It suggests, for example, that "occupy" should mean *to take possession of land*

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396 5 3 *infra.*

397 Proposed Amendment Bill to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

398 According to the Department of Housing, the reshuffling of the cabinet has had the result that the new Minister of Housing has not signed the proposed amendments. As soon as the new Minister signs the proposed amendments it will be presented to Parliament for promulgation.

399 2003 1 SA 113 (SCA).

or *to erect a building or structure on land.*[400] As this would exclude a person who took lawful control and subsequently became unlawful (parties holding over) from the ambit of PIE, it confirms the position both of the minority judgment and of this study.

The proposed qualification to the definition of "unlawful occupier," that is, the exclusion of any person who had initial consent, but occupied beyond withdrawal of such consent, also automatically excludes parties holding over from the ambit of PIE.[401] This again confirms the position held by the minority and this study.

The most significant change is contained in section 2 of the proposed Amendment Bill, and concerns the applicability of the Act. This section specifically states that PIE "does not apply in respect of any proceedings for the eviction of any tenant or former tenant, or any person occupying land through the title of such tenant or former tenant."[402] If this proposed change were to be accepted, the provisions of PIE would not be applicable when a landlord wants to evict a defaulting tenant.

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400 S 1(3).

401 S 1(4) where the following phrase is proposed to be added to the current definition of unlawful occupant "[A]nd excluding any person who having initially occupied with such consent thereafter continues to occupy once such consent has been withdrawn."

402 S 2(2).

These amendments clearly indicate that the legislature does not agree with the *Ndlovu* decision. The minority in *Ndlovu* was therefore correct, as was the initial position of this study. If the proposed changes are accepted, the equilibrium between landlord and tenant aimed at in the Rental Housing Act would be achieved. The common law eviction procedure[403] would again be applicable in cases where the eviction of a defaulting tenant is sought. As private investors would no longer be faced with an expensive and lengthy procedure, these amendments could also see them increasing their investment in the rental housing market in South Africa and, in so doing, strengthening the market and supporting the government's initiatives of alternatives to access to land in this regard.

5 4 Possible solution

The proposed Amendment Bill to PIE is an example of how the legislature can correct a position when the Court has interpreted the objectives and goals of an act incorrectly. The mis-interpretation could have a disastrous effect on the rental housing market. If these amendments are accepted, the majority of the problems that were identified in chapter four would no longer exist.

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403 Ch 2 *supra.*

Accepting that PIE is not applicable implies that the Rental Housing Act is the only legislation that should be considered when evicting a defaulting tenant. The goals that the legislator envisioned for the RHA are more likely to be achieved if it is recognised that the two acts apply to different fields. Since no other piece of legislation currently deals with the eviction of tenants, however, the legislature's proposed amendments suggest that this is the correct procedure for having a party holding over evicted, regardless of whether the Rental Housing Act prescribes it. Since the Constitution also did not have a considerable influence on the common law eviction procedure in cases of holding over,[404] as was pointed out in chapter three, the requirements are basically the same as they were before the Constitution came into operation.[405] According to the *Brisley* decision the only relevant circumstances that should be considered are "legally relevant" circumstances and those, as the Supreme Court of Appeal pointed out are: (i) whether the applicant is the owner and (ii) whether or not the occupier is in unlawful occupation of the property.[406] The *Brisley* decision has, however, been overruled by the decision of the majority in the *Ndlovu* case.

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404 *Brisley v Drotsky* 2002 4 SA 1 (SCA); Ch 3 *supra.*

405 Ch 3 *supra.*

406 3 3 *supra.*

If the common law is used for the eviction of parties holding over, the cost and time involved in having a party holding over evicted would be more reasonable.[407] Tenants would no longer be able to abuse the lengthy and costly procedure of PIE, as PIE would no longer be available to them.[408] The normal rules of contract law would again be applicable in agreements between landlords and tenants, and contracts would be binding. Landlords would not have to worry about a tenant defaulting, but remaining in possession of the property.[409] It would no longer be necessary to consider the rights that an unlawful occupant would have against an owner, as a tenant could be evicted as soon as he/she does not have the right to be in possession of the property.[410] The amount that could be levied by an owner as a deposit would also be more reasonable.

As a result, the prejudice against owners will be less, private investors will not be as sceptical to invest in the market and, most importantly, the rental housing market would be able to function normally. In short, if the proposed amendments are accepted the RHA is likely to function properly as soon as all the provinces have established the required Tribunals.[411]

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407 4 5 1 *supra.*

408 4 5 2 *supra.*

409 4 5 4 *supra.*

410 4 5 5 *supra.*

5 5 Summary and concluding remarks

Courts are sometimes confronted with difficult decisions, especially where some of the parties are members of a marginalised group. In the *Ndlovu* case the Court was faced with a decision like this. In an attempt to protect a vulnerable party, however, it made obtaining rental housing more difficult for all other groups that rely on rental housing, vulnerable or otherwise. As a result, landlords are probably more wary of leasing to vulnerable people especially.[412] It may be an immense task, but it is vital for the court not to lose sight of the bigger picture, which in this case is the equilibrium between landlord and tenant and the fact that investment in rental housing by the private sector provides much needed rental housing.

It must, however, be considered that the interpretation of the judiciary in *Ndlovu* could have resulted from poor drafting of the legislation.[413] Pope makes a clear point that the current eviction legislation "needs to be tidied up," in order for lawyers and the courts to give effect to the constitutional requirements of section 25 and section 26(3) respectively.[414] However, the fact that none

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411 4 5 3 *supra.*

412 4 5 6 and 4 5 3 *supra.*

413 Guthrie 2000 January *De Rebus* 24.

414 Pope "Eviction and the Protection of Property Rights: a case study of *Ellis v Viljoen*" 2002 *SALJ* 720.

of the previous cases[415] that dealt with the eviction of parties holding over misinterpreted the scope of PIE and that even in the case of *Ndlovu* the judges were split in their decision argues against this interpretation. Be that as it may, the proposed amendments make it clear that the scope of PIE should not include an ex-tenant.[416] If the amendments are enacted, there would be no question about the applicability of PIE to cases of eviction of a party holding over and, to use Pope's terms, the eviction legislation would be tidied up.

It remains to be noted that the court's decision to afford a party holding over the same protection as a squatter could be as a result of the fact that there is no adequate protection for parties holding over in current legislation. While the legislator could enact more legislation to afford parties holding over protection against eviction, the common law eviction procedure would be the procedure employed when having a defaulting tenant evicted until that happens. Really poor people, who have to make use of rental housing, need to be protected more adequately against eviction. The Rental Housing Act does not make any provision

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415 *Absa Bank v Amod* [1999] 2 All SA 423 (W); *Ross v South Peninsula Municipality* 2000 1 SA 589 (C); *Brisley v Drotsky* 2002 4 SA 1 (SCA).

416 S 2(2) of the proposed amendments expressly excludes tenants from the scope and application of PIE, 5 3 *supra.*

for the protection of these persons,[417] neither does the common law. This is why it is very important for the Provincial Governments to establish the required tribunals, which can deal with these cases on a more *ad hoc* basis.

Since it seems unfair to burden the private owner with the provision of housing, the government should perhaps play a more significant role in providing poorer tenants with rental housing. In terms of section 3 of the RHA, the government could provide a rental subsidy housing programme or other assistance measures to provide the poor with rental housing.[418]

At the outset of this study, when only the facts of the *Ndlovu* decision were considered, it seemed strange that the court had failed to consider the RHA, which aims specifically at the regulation of the relationship between landlord and tenant. When PIE was examined, it was still unclear why the act was applied to a case of holding over.[419] The comparison of the provisions of the RHA with those of PIE showed that these acts are irreconcilable. Analysis of the problems that arose as a result of the *Ndlovu* decision, especially the fact that the goals of the RHA

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417 Van der Walt 2002 *TSAR* 270 states that: "This provision for "normal" eviction procedures outside of the act dilutes the reformative effect of the act to a certain extent."

418 S 3(1) of the RHA.

419 Ch 2 *supra.*

could not be achieved if PIE were applicable to the rental housing market, confirmed this interpretation.

The study shows that the government's attempt to address the problem through its proposed amendments is a wise move. The benefits for all interested parties would be far-reaching and rewarding if the provisions of PIE were not applied to the eviction of a defaulting tenant any longer. It is, however, important that in the provision of rental housing, as with everything else, the poor receive special attention.

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