

## **A balancing act between owners and occupants Is PIE unconstitutional?**

**By André Walters**

Sections 4(6) and 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act) provides that the court, hearing an eviction application, has a discretion to refuse an eviction order despite the fact that an applicant is the registered owner and the respondent is an unlawful occupier of the property (s 4(1) read with s 4(6) and s 4(7); see also *Arendse v Arendse and Others* 2013 (3) SA 347 (WCC)).

I submit that the constitutionality, or at the least the necessity, of this discretion should be reconsidered and challenged. I am of the opinion that the discretion in s 4(8) and s 4(9) of the PIE Act is sufficient to ensure a just and equitable order.

The PIE Act was introduced to regulate the eviction process and to afford proper judicial oversight. It was enacted to balance the owner's property rights and the occupant's right to access to housing (see the preamble of the Act and *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC)).

On the one hand, a court may refuse an eviction application if the respondent would be rendered homeless and the granting of the eviction order would not be just and equitable in the circumstances (*Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA)).

On the other hand: 'The blatant disregard manifested by racist statutes for property rights in the past makes it all the more important that property rights be fully respected in the new dispensation, both by the state and by private persons' (the *Port Elizabeth Municipality* case at para 15).

The court has the task 'to ensure that justice and equity prevailed in relation to all concerned' (the *Port Elizabeth Municipality* case at para 13). 'It is to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case.' This includes the interest of the owner (the *Port Elizabeth Municipality* case at paras 23 and 33; *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* [2009] 4 All SA 410 (SCA) at para 6).

The right contained in s 26 of the Constitution is merely defensive. A 'major feature of this cluster of constitutional provisions is that, through s 26(3), they expressly acknowledge that eviction of people living in informal settlements may take place, even if it results in loss of a home' (the *Port Elizabeth Municipality* case at paras 20 – 21).

The Constitutional Court also confirmed that: '[A] property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in

certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted ... . An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity inquiry mandate by PIE' (*City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at para 40).

Even though the court has to balance the two conflicting rights, I find it difficult to comprehend how the scales of justice could be equally balanced if a court exercises its discretion in favour of an unlawful occupant and dismisses an eviction application on the mere finding that it is not just and equitable to grant the eviction.

This raises the question: Does a refusal of an eviction order merely temporarily restrict the owner's right to possession of his property?

If the circumstances that were taken into account by the court remain the same, the applicant could be barred from obtaining an eviction order by bringing a new application, since the respondent could simply plead that the matter is *res iudicata*.

If the owner has to wait until new circumstances arise before the owner can (merely) stand a chance of succeeding with a new eviction application, the owner could potentially be deprived of his or her property indefinitely.

Ignoring the abstract and negative property system for a moment, is the owner then not indirectly expropriated? The owner is left with a bare title in the property that is of little or no commercial and social value to him or her.

In *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C) the court had to consider the constitutionality of the PIE Act. The court found that a refusal of an eviction order in terms of the PIE Act does not arbitrarily deprive the owner of his or her property as the court must exercise its discretion only once all the relevant circumstances have been considered.

My objection is not as much aimed at the arbitrariness of the process, but rather at the fact that the owner's common law right to possession of the property is stripped from the owner by the very legislation that was intended to balance the owner's rights against that of the unlawful occupier. My objection is aimed against the fact that, by practical implementation, the scale is tipped predominantly in favour of the unlawful occupier and that for a potentially unlimited period.

In considering the question regarding expropriation, the court referred to *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at 315 and *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) at 515A – C as support for a definition of the word 'expropriation', as used in the statutory sense. In short, this definition entails 'the process whereby a public authority takes property for a public purpose and usually against payment of compensation'.

This sounds similar to the wording of s 25(2) of the Constitution, yet the word 'expropriation' in the Constitution must mean something much wider. The Constitution limits, rather than defines, legitimate expropriation to only those which are intended for a legitimate public purpose or in the public interest and for which compensation will be paid.

The *Oxford Dictionaries'* website definition of the word 'expropriation' is to 'take (property) from its owner for public use or benefit' ([http://oxforddictionaries.com/definition/english/expropriate?q+expropriation#expropriate\\_14](http://oxforddictionaries.com/definition/english/expropriate?q+expropriation#expropriate_14), accessed 10-7-2013) By exercising a discretion to refuse an eviction order, the PIE Act empowers the court to 'take away property from its owner' by allowing the continued dispossession of the owner.

I concede that it cannot be direct expropriation as actual ownership of the property does not pass to the unlawful occupant. However, I submit that it is nonetheless a form of indirect expropriation in a much wider sense as that allowed by the Constitution.

To properly balance the rights of an owner against that of an unlawful occupant, the discretion contained in s 4(6) and s 4(7) of the PIE Act should be abolished. I propose that a court should not have a discretion to grant or refuse an eviction order, but only retain its discretion created by s 4(8) and s 4(9) of the PIE Act regarding the time afforded to the respondent to vacate the property.

The court could be innovative in the order that it grants, such as:

- Grant the eviction order and grant the respondent sufficient time to obtain alternative accommodation.
- Postpone the eviction application and order the unlawful occupiers to actively seek alternative accommodation themselves and to report in detail to the court on the steps taken.
- Postpone the eviction application in order to receive further relevant evidence.
- Order the city council to file a further detailed report to confirm by when alternative accommodation could be made available (see *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* 2009 (1) SA 470 (W)).
- Order the city council to pay damages to the applicant for as long as the unlawful occupancy is endured, pending alternative accommodation being made available by the city council (see *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA)).

By doing so, the infringement of the owner's property rights are limited and controlled directly by the court process. The unlawful occupier should be forced to be proactive in seeking alternative accommodation versus the very passive attitude the unlawful occupier will adopt if an eviction application is simply refused.

Consider the following hypothetical example: You use your life savings to purchase a holiday home at which your family can spend the June and Christmas holidays. Upon leaving in June, you forgot to lock the back door. The local unemployed, poor and homeless family that lived under the nearby bridge saw the opportunity and made themselves at home. This came to your knowledge only after receiving your electricity bill three months later and after you made a visit to your property a month thereafter. The police refused to assist you because, in their view, it is a civil matter and their policy is not to get involved in civil matters. In your subsequent eviction application the court finds that, seeing that you merely use the house twice a year and the unlawful occupiers have nowhere else to go, it would not be just and equitable to grant an eviction order until the city council has alternative accommodation available. The eviction application is then dismissed because the city council has filed its usual report stating that it is not in a position to provide alternative accommodation.

By now it should be clear, that by refusing eviction orders, the public could lose their confidence in the judiciary, which could lead to some people taking the law into their own hands resulting in unwanted public violence. In some instances (in the words of the Constitutional Court in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) at para 45) it would be 'a recipe for anarchy'.

I submit that the discretion contained in s 4(6) and s 4(7) of the PIE Act is dangerous and superfluous if the discretion in s 4(8) and s 4(9) and the power of the court to regulate its own procedure is properly applied.

The judgment in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others (The Socio-Economic Rights Institute of South Africa intervening as amicus curiae)* 2012 (6) SA 294 (SCA) is of significant importance in PIE Act applications. It deals with various important issues, such as the distinction between evictions sought at the instance of a private owner versus one sought by the city council, the joinder of the city council, the required contents of the city council's report, the city council's obligation to provide temporary alternative accommodation and also the onus in eviction applications.

The judgment at para 19 also deals with the discretion contained in s 4(6) and s 4(7) of the PIE Act. It, however, does not take the issue regarding the discretion any further, other than to state: 'In most instances where the owner of property seeks the eviction of unlawful occupiers, whether from land or the buildings situated on the land, and demonstrates a need for possession and that there is no valid defence to that claim, it will be just and equitable to grant an eviction order.'

It may be argued that the limitation of an owner's property rights could survive the limitation clause contained in s 36 of the Constitution. The question then is: Is the potentially limitless duration of the infringement of an owner's property rights reasonable and truly justifiable in a democratic society based on human dignity, equality and freedom?

In my opinion, any order dismissing an eviction application merely because it is not regarded as just and equitable ignores the very notion that property rights should be fully respected in our new dispensation. It tips both the scale of justice and the scale of equality predominantly in favour of the unlawful occupant. A society based on freedom should also include the freedom of a property owner to deal with his or her hard-earned property as he or she pleases for his or her benefit to the exclusion of others.

Perhaps it is time to once again challenge the constitutionality of the discretion contained in s 4(6) and s 4(7) of the PIE Act, but this time ask the judges to ask themselves the question: 'What if this was your hard-earned property?'.

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