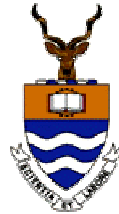


Comment on General Notice 1851 of 2006

PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND AMENDMENT BILL 2006

by



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20 February 2007

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A INTRODUCTION

1. The Centre for Applied Legal Studies (CALS) is a non-profit research, advocacy and public impact litigation institute attached to the University of the Witwatersrand, Johannesburg. CALS' comments on the Prevention of Illegal Eviction from and Unlawful Occupation of Land Bill, 2006 ("the PIE Bill") are based on its extensive engagement in housing rights research in, and public interest litigation on behalf of, poor,¹ informal and inadequately-housed urban communities in the Johannesburg area.
2. CALS' recent research work has encompassed the following housing rights-related themes:
 - The impact of urban renewal on access to housing and basic services for poor and inadequately housed communities in the inner city of Johannesburg;
 - The structure and dynamics of informal settlement populations; and
 - The impact of large-scale forced evictions and/or relocations on access to economic opportunities and social services in informal communities.
3. The housing-related legal assistance CALS has provided to its clients (which range from individuals to communities of over 6000 people) has encompassed:

¹ The term "poor" in this submission is used to refer to those households whose income is such that they qualify for housing assistance in terms of national housing programmes. The average household income in communities with which CALS engages is generally well below R1500 per month. CALS therefore speaks with experience of working in communities which can fairly be characterised as "desperately poor".

- The defence and prevention of mass evictions, without the provision of alternatives, at the instance of organs of state as part of urban planning and regeneration initiatives;
 - Efforts to compel the Johannesburg municipality to effectively implement informal settlement upgrading policies;
 - The defence and prevention of evictions, without the provision of alternatives, at the instance of private landowners;
 - The reversal of illegal water disconnections effected both by private landowners and by organs of state; and
 - The defence and prevention of evictions at the instance of the Johannesburg municipality as part of its efforts to recover incorrectly calculated debt.²
4. CALS therefore comments on the PIE Bill from an informed perspective and trusts that its submission will enhance the quality of the public discussion the Bill will undoubtedly continue to generate.

B THE PIE AMENDMENT BILL

Section 3 of the PIE Bill

5. Section 3 of the PIE Bill proposes that the application of the PIE Act be significantly narrowed. If the Bill is passed, the PIE Act will no longer apply to:
- Tenants and persons who occupied land “in terms of any other agreement” so long as the tenancy or other agreement has been validly terminated; and

² Further information about CALS’ activities, along with examples of its research and legal work can be found on its website: www.law.wits.ac.za/cals.

- Persons who occupied land as its owner and have lost ownership of the land.
6. The explanatory memorandum states that this amendment is necessary in order to reverse the decision of the Supreme Court of Appeal in *Ndlovu v Ngcobo; Bekker v Jika*,³ (“*Ndlovu*”) which confirmed that the PIE Act applies to “holders-over” (i.e. persons who took occupation of land with the consent of the owner and/or the person in charge, which consent was subsequently withdrawn).
 7. The memorandum characterises the impact of the *Ndlovu* decision as undesirable and states that “the Act should cover only those persons who unlawfully invade land without the prior consent of the landowner or the person in charge”. The memorandum does not say why the Act’s application should be restricted in this way.

CALS submits that Section 3 of the PIE Bill will create undesirable and constitutionally unjustifiable inequalities between groups of occupiers who are equally in need of the PIE Act’s protection. It will increase the likelihood and frequency of evictions which lead to homelessness. It may enable organs of state to evict occupiers of state-owned land without considering their needs for alternative housing.

8. The PIE Act is not just any legislation. It is constitutional legislation. Its purpose is to give effect to Section 26 (3) of the Constitution of the Republic of South Africa, 1996. Section 26 (3) states 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”

9. “Arbitrary evictions” may be defined as evictions which take place without due process and/or which take place for the wrong reasons. The constitutional injunction

³ 2003 (1) SA 113 (SCA)

to consider “all the relevant circumstances” is an attempt to ensure that considerations counting for and against the execution of an eviction in a given context will be weighed carefully and judiciously before a person is deprived of access to their current home, or, indeed, to any permanent home. In *Port Elizabeth Municipality v Various Occupiers*⁴ (“*Port Elizabeth Municipality*”) the Constitutional Court had this to say on the purpose of the provision:

The judicial function [in adjudicating an eviction application] is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather 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.

10. The PIE Act, correctly, in CALS’ view, identifies a number of circumstances which *must* be taken into account before a decision is made. These are:

- How the occupier (s) came onto the land in question;
- How long the occupier(s) have lived on the land in question;
- The needs of elderly, disabled, child occupiers, and occupiers in female headed households; and
- The availability of suitable alternative accommodation.

As *Port Elizabeth Municipality* made clear, other relevant contextual factors can and must, where appropriate, be taken into account if doing so would tend toward a just outcome.

11. In essence, what the PIE Bill says is that if an occupier is a lease or bond defaulter, or occupies land in terms “of any other agreement” (a provision so frighteningly broad its impact can only be guessed at) the mandatory circumstances set out in the PIE Act

⁴ *Port Elizabeth Municipality v Various Occupiers* 2004 BCLR 1280 (CC), E-F

no longer matter. *It does not matter* if a land owner wants to evict an elderly, disabled, female lease or bond defaulter supporting 5 children on to the streets in circumstances where she is unlikely to find anywhere else to live, at least in the short term. All that matters is that she defaulted in her lease and/or bond agreement. Moreover the PIE Act's mechanisms for mediation and/or for the joinder of the municipality as housing provider of last resort are not to be extended to this person, simply because she is a lease or bond defaulter.

12. The PIE Bill envisages that a court will be able to rule that the PIE Act applies to bond or lease defaulter if it is satisfied that "*the plight of a person is of such a nature that any act or omission by the owner or person in charge of land was calculated to avoid the application of*" the PIE Act. This provision is very vague. It does not state what constitutes evidence of an ulterior motive, which is ordinarily very difficult to allege and prove, especially in application proceedings in which many occupiers are unlikely to be familiar with what is required to prove bad faith on the part of the landlord.
13. However, the fundamental point is that the good faith of an owner or landlord is hardly sufficient to guarantee the fairness of eviction proceedings brought against a bond or lease defaulter. What is required is a consideration of the social and economic circumstances of the occupier in question as well as the obligations that the state may have to provide that occupier with some form of alternative accommodation, at least in the short term. The PIE Act, as it currently stands, creates the framework for such a consideration. The PIE Bill seeks to place lease and bond defaulters beyond the protection of this framework. It does so arbitrarily.
14. CALS submits that the PIE Bill creates a situation which the Constitutional Court has expressly prohibited. It establishes "*a hierarchical arrangement between the different interests involved [in an eviction application], privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home*". The PIE Bill says that, assuming the person seeking the eviction is acting in

good faith, the existence of a lease or bond agreement (or “any other agreement”) on which the occupier has defaulted is *the* circumstance of paramount importance. In practice, the narrowing of application of the PIE Act is likely to convince Judges and Magistrates across South Africa that the legislature intends that this is *the only relevant circumstance* they need to consider before granting an eviction order.

15. This result would be unconstitutional for two reasons. First it would fly in the face of the constitutional injunction to consider *all relevant* circumstances before coming to a decision. Second, it would create an arbitrary distinction between equally very poor and vulnerable people who are party to lease agreements and those who are not. There is no reason to suppose that a tenant will ordinarily be any less likely to be rendered homeless by an eviction than a non-tenant. What matters is socio-economic status, not abstract legal status. The PIE Bill asks the courts to ignore *socio-economic* status and concentrate on a highly formalistic distinction between two *legal* statuses.
16. CALS has represented many hundreds of people against eviction at the instance of private landowners and organs of state. Many have been so-called “land invaders” - people who occupy land unlawfully because they simply have nowhere else to go. Others have been lease and bond defaulters. Because of the complexities of population movements and social change in urban areas over the past several years, many people live on the same land or in the same buildings as so-called “land invaders” in terms of a lease or bond. Alternatively, they live on different land but are often in exactly the same socio-economic position. Usually they are unemployed, informally employed or, at best, employed on the very lowest rungs of the formal labour market. They earn incomes which do not enable them to sustain a bond or a lease in accommodation anywhere within a reasonable distance of where they actually work.
17. Many of the rent or bond defaulters CALS has represented are people who have defaulted on their leases or bonds *precisely because* their socio-economic status has declined, either because they have been retrenched from their jobs, a major income

earner in the household has died (often of HIV/AIDS) or their informal livelihood strategies have been thwarted by an increasingly formalising and repressive local state, which perceives informal economic activity to be at odds with urban regeneration.

18. CALS submits that the PIE Bill, if passed, may allow many of these peoples' housing needs to be completely ignored in court proceedings for their eviction, simply because, through no real fault of their own, they have defaulted on their lease or bond. The local municipality will not be asked to consider the provision of alternative housing (even on an emergency basis). A court will be effectively blind to the possibility that its order will leave the occupier(s) homeless.
19. In this regard, the PIE Act, as it currently stands, serves an important accountability function. It envisages that if a landowner is entitled to an eviction, but that eviction would leave the occupier homeless, a municipality will ordinarily be required to assist in the provision of alternative accommodation, or at least justify to a court why it cannot provide an alternative on the occupier's eviction.
20. This was the situation in *Modderklip East Squatters v Modderklip Boerdery (Pty) Ltd* ("*Modderklip*")⁵, where the Supreme Court of Appeal prevented the execution of an eviction order in respect of 40000 occupiers in circumstances where the Ekurhuleni municipality would not provide alternative land to the occupiers. The Court was dissatisfied with the municipality's explanation for its unwillingness to come to the occupiers' aid.
21. All of the occupiers were very poor people who would have been rendered homeless, at least in the short term, if they were evicted. The court held that "*to the extent that we are concerned with the execution of the court order, Grootboom made it clear that the government has an obligation to ensure, at the very least, that evictions are executed humanely. As must be abundantly clear by now, the order cannot be*

⁵ 2004 (6) SA 40 (SCA); 2004 (8) BCLR 821 (SCA).

executed – humanely or otherwise – unless the state provides some land.”⁶ (emphasis added)

22. In these circumstances, the Court stayed the eviction of the occupiers and required the state to compensate the owner for the loss of the use of the occupied land for as long as it failed to provide an alternative. In effect, the municipality was held accountable for the situation for its failure to fulfill its constitutionally mandated function as housing provider of last resort.
23. It is true that the occupiers in *Modderklip* were not tenants. However, it is hard to imagine that the Supreme Court of Appeal’s ruling would have been unfair or inappropriate if the occupiers in *Modderklip* were defaulting tenants or bond holders.
24. The PIE Bill as it stands allows municipalities to escape responsibility for dealing with the very real housing crises which can be caused by evictions. Even where the municipality itself is seeking an eviction as landlord in terms of a validly cancelled lease, the PIE Bill does not envisage that it will be required to assist the occupiers it seeks to evict in finding any alternative at all. In circumstances where lease-holding occupiers of state-owned housing are often likely to be very poor and vulnerable people, this is perverse.
25. For all of these reasons, Section 3 of the PIE Bill (provided, of course, that it is not quickly declared unconstitutional once passed) will increase the likelihood of evictions which will render many desperately poor and vulnerable people homeless. As the Constitutional Court has said:

“It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation. The integrity of the rights

⁶ *Modderklip* at para 26.

*based vision of the Constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence.”*⁷

CALS submits further that the Bill will not significantly alleviate the frustrations property owners and landlords have expressed at the difficulty of obtaining a court order to repossess property occupied by persons who have defaulted on their leases. It will make almost no difference to banks who wish to repossess property from defaulting bond-holders.

26. Although the memorandum to the PIE Bill does not expressly say so, Section 3 is doubtless an attempt to preclude the so-called “affluent tenant” from claiming the protection of the PIE Act. This is unnecessary. As the law currently stands, an “affluent tenant” is not given any substantive protection against eviction.

27. This is clearest from the decision of the Supreme Court of Appeal in *Wormald v Kambule* (“*Wormald*”)⁸. There, in considering the nature of the court’s discretion in eviction proceedings to which the PIE Act applies, Maya AJA held that:

*“An owner is in law entitled to the possession of his or her property and to an ejectment order against a person who unlawfully occupies that property except if that right is limited by the Constitution, another statute, a contract or on some other legal basis.”*⁹

28. The judge held further that *“the effect of PIE is not to expropriate the landowner . . . it cannot be used to expropriate someone indirectly. The landowner retains the protection against arbitrary deprivation of property under s 25 of the Bill of Rights. PIE serves merely to delay or suspend the owner’s full proprietary rights until a*

⁷ *P E Municipality* at para 18.

⁸ 2006 (3) SA 562 (SCA)

⁹ At para 11. See also *Brisley v Drotsky* 2002 (4) SA 1 (SCA)

determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions.”¹⁰

29. In the circumstances of the case, the judge held that it was clear that the occupier “*is not in dire need of accommodation and does not belong to the class of poor and vulnerable persons whose protection was obviously in the foremost of the legislature’s minds when it enacted PIE. To my mind, her position is essentially no different to that of the affluent tenant, occupying luxurious premises, who is holding over.*”.¹¹ In the circumstances, the judge ordered the occupier’s eviction.

30. It is therefore clear that the PIE Act, as interpreted by the courts, does not protect affluent tenants. It is also clear that its application cannot lead to an expropriation of property.

31. The potential inconvenience to which the PIE Act does subject property owners and landlords is the cost of, and delay in, their repossession of property. These costs and delays may be occasioned by the court proceedings aimed at the exploration of an occupier’s personal circumstances. South African society is characterised by high levels of poverty, inequality and tenure insecurity. The majority of South Africans do not own land. In these circumstances, CALS submits, at least some delay for the purpose of ensuring a fair and equitable eviction process is not unreasonable.

32. However, the PIE Bill, if passed, will do little to reduce the costs and delays which currently burden property owners and landlords. Even if the PIE Bill is passed into law, owners and landlords will still be required to go to court to effect a lawful eviction. There is no reason to suppose that eviction proceedings after the amendment will be any shorter or less costly than they are now.

¹⁰ At para 15. See also *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA).

¹¹ Para 20.

33. The solution to the problem of costs and delays in eviction proceedings (if they are really problems at all) is to make lawyers and courts function more effectively. It is not to prejudice potentially desperately poor tenants and former bond holders by removing them from the PIE Act's protection.
34. Following the line of reasoning adopted in *Wormald*, it is unlikely that the PIE Act would be applied to protect an affluent bond defaulter, who could find alternative accommodation, in occupation of property repossessed in terms of a bond agreement. Indeed, in *Standard Bank of South Africa v Saunderson and Others*¹² the Supreme Court of Appeal decided that a bank may execute against immovable property burdened by a bond in its favour, without even pleading its case in terms of Section 26 of the Constitution. All the bank as Plaintiff must do, is draw the Defendant bond holder's attention to Section 26 (1) of the Constitution in its summons.
35. For all these reasons, CALS submits that the PIE Bill, if passed, will contribute to an increasing cycle of poverty, desperation and homelessness in South Africa. It will not significantly address the difficulties of property owners, banks and landlords who seek to repossess property from defaulting tenants and bondholders, affluent or otherwise.

Section 4 of the PIE Bill

36. Section 4 of the PIE Bill creates the offence of practicing "constructive eviction". Section 2 of the Bill defines "constructive eviction" as:

"any act or omission, including the deprivation of access to land or to essential services or other facilities related to land, which is calculated or likely to induce a person to vacate occupied land or refrain from exercising access to land"

¹² 2006 (2) SA 264

37. CALS welcomes the addition to the Bill of an inclusive definition of “constructive eviction”. In CALS’ experience, the disconnection of a property’s water or electricity supply is often a tactic employed by unscrupulous landlords or organs of state in order to encourage occupiers to vacate land without having to go to the effort of obtaining an eviction order.

However, CALS submits that the Bill should be strengthened to prevent explicitly the disconnection of water and other essential services to a property by an owner or a person in charge without a court order.

38. If the aim of the PIE Bill is to stop interference with an unlawful occupier’s access to land without process of law, it would be more effective to simply ban service disconnections altogether and explicitly allow for a court to order the reconnection of unlawfully disconnected services. Such a measure would be consonant with, and strengthen, the common law remedy of spoliation, which is itself directed toward the prevention of interference with possession of property without process of law. It would also be commensurate with Section 13 (1) (b) of the Gauteng Unfair Practices Regulations, 2001, made under the Rental Housing Act 50 of 1999, which forbids the termination of water, electricity and gas supplied by a landlord to a tenant without an order of court.

39. This would give occupiers unlawfully dispossessed of access to services a remedy additional to relying on a police investigation and prosecution, which can take many months if it happens at all. Indeed, although Section 8 of the PIE Act makes eviction without a court order a criminal offence, South African Police Service (SAPS) officers are notoriously reluctant to respond to complaints of illegal eviction. CALS is unaware of a single successful prosecution in terms of Section 8 of the PIE Act since its promulgation.

Section 5 of the PIE Bill

40. Section 5 of the PIE Bill repeals the distinction between occupiers living on land for less than six months, and those who have been living on land for more than six months. Its stated purpose is to eliminate unjustifiable discrimination between groups of people who are equally in need. This is welcome.

41. However, for the reasons set out above, the narrowing of the application of the Act envisaged in Section 3 of the Bill simply creates another arbitrary distinction between groups of occupiers who may be in the same socio-economic circumstances. Section 3 of the Bill therefore, to some extent, defeats the underlying purpose of Section 5. CALS submits that this is undesirable.

C SECTION 2 (d) OF THE RENTAL HOUSING AMENDMENT BILL

Section 2 (d) of the Rental Housing Amendment Bill allows for the “repossession of rental housing property” after a ruling of a Rental Housing Tribunal. To the extent that this amendment is intended to remove jurisdiction over evictions in terms of lease agreements from the Magistrates’ and High Courts to a Rental Housing Tribunal, CALS submits that this would be undesirable.

42. Section 2 (d) of the Rental Housing Bill is clearly intended to complement the narrowing of the PIE Act’s application envisaged in Section 3 of the PIE Bill. There are two reasons why it would be undesirable to allow a Rental Housing Tribunal to make a ruling which would have the effect of evicting a defaulting tenant.

43. First, Rental Housing Tribunals are not institutionally equipped to make the far-reaching decisions required to balance out the competing rights and obligations of landowners, landlords, occupiers and the state. Although Section 13 (3) of the Rental Housing Act allows a Rental Housing Tribunal broad powers of subpoena, the Act

provides no explicit mechanism for holding municipalities accountable for performing their function as housing provider of last resort.

44. Second, allowing a Rental Housing Tribunal to order an eviction would be a violation of Section 26 (3) of the Constitution, which provides that no-one may be evicted from their home *without an order of court*. The Rental Housing Tribunal is not a court. Section 26 (3) of the Constitution clearly envisages that only a judicial officer, with the appropriately broad experience of the administration of justice and equity, ought to be allowed to make an order depriving a person of access to their home.

D CONCLUSION

45. The PIE Act is an important and sensitive piece of legislation. After several years of application in its current form, the courts have, in theory at least, achieved an equitable balance between the rights and obligations of landowners, tenants, the landless and the state. A degree of legal certainty has also been achieved. Jurisprudence developed under the PIE Act and Section 26 of the Constitution may, in one sense, be summed up as follows:

- A property owner is entitled to possession of his or her property;¹³
- Everyone is entitled to reasonable measure of tenure security – a place to rest their heads and call “home”;¹⁴
- The state is the housing provider of last resort, at least on an emergency basis;¹⁵
- Evictions which lead to homelessness will almost never be permitted;¹⁶

¹³ See *Wormald*

¹⁴ See *Baartman v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA) and *Port Elizabeth Municipality*

¹⁵ See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC);

¹⁶ See *Port Elizabeth Municipality and City of Johannesburg v Rand Properties* 2006 (6) BCLR 728 (W)

- The state should participate in eviction proceedings in order to prevent evictions which lead to homelessness *and* to be accountable to property owners whose rights to property are unjustifiably infringed by the state's failure to ensure adequate tenure security to all.¹⁷

46. The preservation of these principles is essential to ensure the alleviation of poverty and the maintenance of social stability. The PIE Bill, as it stands, unjustifiably limits their application. In the interests of preserving them, the vague and potentially destructive provisions in Section 3 of the Bill should be expunged altogether.

47. For all of these reasons, CALS submits that that PIE Bill should not be presented to Parliament in its current form.

¹⁷ See *Modderklip*