

**An urban slice of pie:
the Prevention of Illegal Eviction from and
Unlawful Occupation of Land Act
in South Africa**

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Security of tenure had very little meaning for the vast majority of South Africans as Nelson Mandela walked out of Pollsmoor prison. Told what citizenship to have by apartheid, where to live by the Group Areas Act, liable to eviction at the whim of any landlord or security force and easily arrested for trespass, black South Africans faced often insurmountable legal obstacles in establishing their right to occupy their own land. South Africans also found that their recently bought houses could easily be attached and sold by mortgage holders with great ease as interest rates climbed in the early 1990's to over 20 per cent. The one sign of a possible improvement in security of tenure in a dangerous, racist and volatile society was the announcement of the impending constitutional negotiations and the appointment in 1991 of the Advisory Commission on Land Allocations to consider the return to dispossessed black South Africans of land from which they had been forcibly removed.

Controlling the movement of black South Africans was a cornerstone of the oppressive apartheid system. Only since 1986 have black South Africans been able to travel about their own country without fear of arrest for being in the wrong place. For the following four years their freedom of movement was still much curtailed by the state of emergency. In recent years there has been much increased movement to the cities. This case study briefly looks at the consequences of those rapid changes. Private property is substantially still in white hands; housing for poor people moving to the cities is being delivered but does not meet the need of the rapid urbanisation — accordingly thousands simply build shacks on land found suitably close to the cities.

The democratic government decided to repeal the constitutionally unenforceable Prevention of Illegal Squatting Act¹ — and in 1998 passed the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act² (hereinafter called PIE). Most of the land related cases reaching the higher courts³ have dealt with PIE's impact on the lives of people living illegally on land in the burgeoning urban areas.

South Africa's first democratic election took place in 1994. The newly elected government under the interim constitution set up the Land Claims Court with a Land Commission to replace the Advisory Commission — and black South Africans who had been dispossessed of land in terms of legislation which after 1994 would be considered unconstitutional could institute a claim for the return of their land or for compensation.⁴

1. Act 52 of 1951.

2. Act 19 of 1998.

3. South Africa is divided into magisterial districts each with its own Magistrate's court. The Magistrate's court is limited in its jurisdiction. Appeals lie from the Magistrate's court to the High Court which also operates as a court in the first instance in matters falling beyond the jurisdiction of the Magistrate's court. Appeals lie from the High Court to the Supreme Court of Appeal. Appeals on constitutional matters lie to the Constitutional Court the highest court in the land.

4. See section 121 of the (interim) Constitution of the Republic of South Africa Act 200 of 1993; and also Restitution of Land Rights Act 22 of 1994.

After extensive negotiations South Africa's current constitution was adopted in 1996.⁵ Chapter 2 of the 1996 Constitution, the Bill of Rights, contains several important provisions relating to tenure which were to become the focus of litigation over the next 10 years. These include:

- Section 25 which provides for protection of property rights, protection against arbitrary deprivation of property, compensation for expropriation of property and, in particular, section 25(5) which requires that *“the state must take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”*
- Section 25(6) provides that: *“A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress.”*
- Section 26 provides that:
 - “(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.”*
- Section 7(1) provides that that the Bill of Rights *“affirms the democratic values of human dignity, equality and freedom”*⁶ and Section 7(2) that *“the state must respect, protect, promote and fulfil the rights in the Bill of Rights.”*⁷

These constitutional provisions clearly envision a transformative state that not only protects hard won rights but also requires it to progressively ensure their fulfilment.

In recent years South Africa has experienced accelerated urbanisation and increased rural impoverishment — and substantial increases in the price of land in the main urban areas where people are looking for houses and employment. The state has a housing program that has provided in excess of one million low cost houses since 1994. The extent of the challenge in respect of providing secure tenure is apparent from the recent SA Cities Report⁸ which records that notwithstanding the number of houses built, the number of households in the nine largest urban areas without formal shelter has increased from 806,943 in 1996 to 1,023,134 in 2001 and 1,105,507 in 2004. Table 1 reveals the extent of the housing crisis.

The picture in rural areas is even starker. Recent research commissioned by the Nkuzi Development Agency⁹ has shown that the number of farm workers being evicted from farms has increased substantially notwithstanding new protective legislation.¹⁰

5. Constitution of the Republic of South Africa Act 108 of 1996.

6. Section 7(1) Constitution of the Republic of South Africa Act 108 of 1996.

7. Section 7(2) Constitution of the Republic of South Africa Act 108 of 1996.

8. SA Cities Network: State of the Cities Report 2006, pp. 3–42.

9. Summary of key findings from the National Evictions Survey 1984–2004 at page 7. See www.nkuzi.org.za or www.socialsurveys.co.za.

10. In particular The Extension of Security of Tenure Act No 62 of 1997.

Table 1: Change in access to formal housing, 1996-2004 (numbers and percentages)

	Number of households without formal shelter			Number of households with formal shelter			Changes in number of households without formal housing (%)		Changes in number of households with formal housing (%)	
	2004	2001	1996	2004	2001	1996	2001-2004	1996-2001	2001-2004	1996-2001
Buffalo City	60,006	54,647	42,063	148,218	120,464	99,074	9.81	29.92	23.04	21.59
Cape Town	136,623	142,983	125,233	642,197	599,745	516,867	-4.45	14.17	7.08	16.03
Ekurhuleni	200,177	213,091	156,283	559,369	521,385	376,893	-6.06	36.35	7.29	38.34
eThekweni	213,465	150,390	139,801	591,712	572,746	452,339	41.94	7.57	3.31	26.62
Johannesburg	246,845	212,408	155,459	780,091	780,017	561,856	16.21	36.63	0.01	38.83
Mangaung	19,314	43,811	34,747	182,817	132,668	108,405	-55.92	26.09	37.80	22.38
Msunduzi	35,994	16,321	10,102	97,228	90,110	82,849	120.54	61.56	7.90	8.76
Nelson Mandela	66,416	59,795	60,673	218,882	196,148	160,784	11.07	-1.45	11.59	21.99
Tshwane	124,662	129,688	82,582	453,177	423,086	337,609	-3.88	57.04	7.11	25.32
Total of 9 cities	1,105,507	1,023,134	806,943	3,673,691	3,436,369	2,696,676	8.05	26.79	6.90	27.43

Source: SA Cities Network: State of the Cities Report 2006 at pp. 3-42.

To deal with these challenges the government has implemented a land policy consisting of three key programmes:

“Land redistribution, land restitution and land tenure reform. Land redistribution makes it possible for poor and disadvantaged people to buy land with the help of a settlement land acquisition grant. Land restitution involves returning land or compensating victims of land rights lost because of racially discriminatory laws, passed since 19 June 1913. Land tenure reforms aims to bring all people occupying land under a unitary legally validated system of land holding and provides for secure forms of tenure, help to resolve tenure disputes and make awards to provide people with secure tenure”¹¹

In the 10 years since the advent of the new Constitution Parliament has passed key legislation dealing with these aspects including:

- Restitution of Land Rights Act (22 of 1994).
- Land Reform (Labour Tenants) Act (3 of 1996).
- Communal Property Associations Act (28 of 1996).
- The Interim Protection of Informal Land Rights Act (31 of 1996).
- Extension of Security of Tenure Act (62 of 1997).
- Housing Act (107 of 1997).
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (19 of 1998).
- Communal Land Rights Act (11 of 2004).

Shortly after the introduction of the new Constitution the courts started grappling with its impact on tenure issues. The key cases understandably centred on evictions. The Constitution in Section 26(3) provided:

11. Law of South Africa (LAWSA) Volume 14 First Reissue at 76.

“No one may be evicted from their home without an order of court made after considering all the relevant circumstances.... “

In a dramatic shift from old cases where an assertion of ownership was sufficient to obtain eviction, the Cape High Court in Ross¹² in 1999 held that a failure by an applicant landlord/owner to plead “the relevant circumstances” made the summons excipiable and the eviction application in question was dismissed for failure to set out the “relevant circumstances”.

A flurry of cases across the country adopting or rejecting the greater burden being placed on the owner followed — and the new legislation, particularly PIE and the Extension of Security of Tenure Act (ESTA)¹³ (neither of which had been promulgated at the time of Ross) came to play a significant role. Both had been legislated in accordance with the State’s obligation to achieve the progressive realisation of the rights in the Constitution. The Ross case (save in one significant respect) was subsequently overturned — but the shift in court approach had now occurred and subsequent cases giving much greater protection to potential evictees were based on legislation which came into force after it had been decided. The significant aspect of Ross which has remained relevant is that **all** evictions have to be placed before a Magistrate or Judge, even if unopposed.

Further statutory interpretations ensured that in all cases potential evictees (often previously evicted without ever having seen court papers) were to have two sets of papers served on them before an application could proceed.¹⁴ The notice served in terms of Section 4(2) of PIE also had to advise them expressly of their right to legal representation; the Land Claims Court¹⁵ ruled similarly in regard to cases under ESTA and ordered that legal representation was required where evictees faced substantial injustice. Landlords (and courts) initially believed that this legislation regarding “illegal evictions and unlawful occupations” dealt only with the hundreds of thousands of people living in desperate conditions in informal settlements. However in Ndlovu the Supreme Court of Appeal,¹⁶ after a long series of court cases country-wide, settled the position and held that this protective approach applied to all unlawful occupants including those who had not paid rent, or their mortgage, and who had therefore become unlawful occupants.

Eviction law had now changed forever and the new cases were developing a substantive rights jurisprudence and not merely interpreting procedural protections. The next key shift occurred with the Grootboom case where the Constitutional Court¹⁷ — while not following the High Court’s order that shelter should be mandatory for children¹⁸ — held that in failing to provide for those most desperately in need, an otherwise reasonable local authority housing policy was still in breach of the Constitution.

The Grootboom community had itself brought an application to the High Court in Cape Town seeking an order that the government provide *“adequate basic temporary shelter or housing to them and their children pending their obtaining permanent accommodation; or basic nutrition, shelter, healthcare and social services to the respondents who are children.”* The

12. Ross v South Peninsula Municipality 2000(1) SA589 (C).

13. No 62 of 1997.

14. Cape Killarney Property Investments (Pty) Ltd v Mahamba & Others 2001(4) SA1222 (SCA).

15. Nkhuzi Development Assoc v Government of RSA 2002(2)DA733(LCC).

16. Ndlovu v Ngcobo; Bekker & Another v Jika [2002]4 A11 SA384; 2003(1)SA113 (SCA).

17. Government of the RSA & Others v Grootboom & Others 2000(11)BCLR1169(CC); 2001(1) SA46 (CC).

18. Grootboom v Oostenberg Municipality & Others 2000(3) BCLR277(C).

High Court¹⁹ ordered that the children (on the basis of children's rights enshrined in the Constitution) and their parents were entitled to housing and certain services. On appeal by the state, the Constitutional Court did not follow the lower court's approach. It confirmed the justiciability of socio-economic rights contained in the Constitution. Secondly, it declined, on the basis that there was insufficient evidence before it, to determine a minimum core in respect of the right to housing. It then considered the City of Cape Town's housing policy and held that it appeared reasonable, save that it did not provide relief for those "*who have no access to land, no roof over their heads, and were living in intolerable conditions or crisis situations*" — and thus declared the policy to be unconstitutional.

The Grootboom decision was greeted with great acclaim and pressure was brought to bear on all authorities to ensure that housing policies as set out in the integrated development programmes of each of the local authorities would make provision for those most desperately in need. The judgment has reverberated through most South African constitutional matters dealing with socio-economic rights. The interpretation gave a substantive content to an area where procedural protections had been the norm.

The Constitutional Court has recently considered these issues in even greater depth in two key matters, namely: the PE Municipality case²⁰ and the Modderklip²¹ case.

The PE Municipality case reflects a culmination of a series of cases heard in various courts since the inception of the interim constitution²² which laid to rest the possibility of evicting people without a court order. More importantly, it attempts to balance the rights to property enshrined in Section 25 of the Constitution with the rights to housing and in particular the right not to be evicted in terms of Section 26. By firmly protecting those facing eviction the Constitutional Court has granted millions of South Africans still living under insecure tenure significant and increased judicial protection against eviction.

In the PIE case the local authority sought to evict 68 people, including 23 children, who lived in 29 shacks on private land. In a unanimous judgment the presiding Judge reflected on the history of the Prevention of Illegal Squatting Act²³ (referred to as PISA in the judgment), in terms of which anybody illegally occupying land faced criminal prosecution and eviction in a process that "was deliberately made as swift as possible". Accordingly:

"It resulted in the creation of large, well established affluent white areas co-existing side by side with crammed pockets of impoverished and insecure black ones. The principles of ownership in the Roman Dutch law then gave legitimization in an apparently neutral and impartial way to the consequences of manifestly racist and partial laws and policies. In this setting of State-induced inequality the nominally race-free PISA targeted black shack dwellers with dramatically harsh effect. As Van der Walt has pointed out:

"The 'normality' assumption that the owner was entitled to possession unless the occupier could raise and prove a valid defence, usually based on agreement with the owner, formed part of Roman-Dutch law and was deemed unexceptional in early South African law, and it still forms the point of departure in private law.

19. Grootboom v Oostenberg Municipality & Others 2000(3) BCLR277(C).

20. Port Elizabeth Municipality v Various Occupiers 2005(1) SA217CC.

21. President of the RSA & Another v Modderklip Boerdery (Pty) Ltd & Others 2005(8) BCLR786 (CC); 2005(5) SA3(4).

22. Constitution of the Republic of South Africa, Act 200 of 1993.

23. Act 52 of 1951.

However, it had disastrous results for non owners under ... apartheid land law: the strong position of ownership and the (legislatively intensified) weak position of black non-ownership rights of occupation made it easier for the architects of apartheid to effect the evictions and removals required to establish the separation of land holdings along race lines.”

PISA accordingly gave the universal social phenomenon of urbanisation an intensely racialised South African character. The power to enforce politically motivated, legislatively sanctioned and State sponsored eviction and forced removals became a cornerstone of apartheid law..... It was against this background and to deal with the injustices that section 26(3) of the Constitution was adopted and a new statutory arrangement made”²⁴

The Court stressed the need to look at the broad constitutional matrix against which one needs to consider the rights to property and to housing — and particularly the protection against eviction — and stated as follows:

“Much of this case accordingly turns on establishing an appropriate constitutional relationship between section 25, dealing with property rights, and Section 26, concerned with housing rights. The Constitution recognizes that land rights and the right of access to housing and of not being arbitrarily evicted, are closely intertwined. The stronger the right to land, the greater the prospect of a secure home. Thus, the need to strengthen the precarious position of people living in informal settlements is recognized by section 25 in a number of ways. Land reform is facilitated, and the State is required to foster conditions enabling citizens to gain access to land on an equitable basis; persons or communities with legally insecure tenure because of discriminatory laws are entitled to secure tenure or other redress; and person dispossessed of property by racially discriminatory laws are entitled to restitution or other redress. Furthermore, sections 25 and 26 create a broad overlap between land rights and socio economic rights, emphasizing the duty of the State to satisfy both, as this Court said in Grootboom”²⁵

The Court in an earlier matter (First National Bank²⁶) had approved Van der Walt’s²⁷ view of the need:

“... to move away from a static, typically private-law conceptualist view of the constitution as a guarantee of the status quo to a dynamic typically public-law view of the constitution and as an instrument for social change and transformation under the auspices (and I would add ‘and control’) of entrenched constitutional values”²⁸

This Constitutional Court decision accordingly requires that property rights “*have to be understood in the context of the need for the orderly opening up or restoration of secure property rights for those denied access to or deprived of them in the past.*”²⁹

24. PE Municipality at para 10.

25. At para 19.

26. First National Bank of SA Ltd t/a Wesbank v Commissioner for SA Revenue Services & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002(4) SA768 (CC); 2002(7) BCLR 702(CC).

27. Prof A.J. van der Walt Professor of Public Law University of Stellenbosch see “Constitutional Property Law” (2005).

28. At para 16 in PE Municipality.

29. At para 15.

It is in the above context that the court then analyses PIE. After consideration of earlier cases the Court states that PIE now provides “*some legislative texture to guide the courts in determining the approach to eviction*”.³⁰ PIE applies to almost all evictions save those specifically excluded on agriculturally zoned land (where ESTA applies).³¹ The Port Elizabeth Municipality had appealed to the Constitutional Court arguing that it was not constitutionally obliged to provide alternative land to the persons whom they wished to evict. The Supreme Court of Appeal had dismissed their application for eviction on the grounds that the land that they tendered did not offer security of tenure to the evictees. In its judgment the Supreme Court of Appeal held that local authorities bear an obligation in terms of the Housing Act to house people and hence there is a strong obligation on them to prioritise alternative accommodation for evictees. Significantly the Constitutional Court pointed out that in considering an eviction it was not resolving a landlord-tenant dispute because the unlawfulness of the presence of the evictees was clear. What it was seeking to do was to ensure that those without secure tenure could be protected against immediate and arbitrary eviction. Thus the mere presence of a local authority programme on its own would not be sufficient to avoid a refusal of eviction — accordingly:

*“In a society founded on human dignity, equality and freedom it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if by a reasonable application of judicial and administrative statecraft such human distress could be avoided. Thus it would not be enough for the municipality merely to show that it has in place a programme that is designed to house the maximum number of homeless people over the shortest period of time in the most cost effective way”*³²

The Constitutional Court encouraged courts to become engaged in “*active judicial management according to equitable principles of an ongoing, stressful and law-governed social process*”.³³ Accordingly evictions could be managed by the courts with dates and times set, with mediation encouraged and even ordered.

The Constitutional Court summed up as follows:

“In light of the lengthy period during which the occupiers have lived on the land in question, the fact that there is no evidence that either the Municipality or the owners of the land need to evict the occupiers in order to put the land to some productive use, the absence of any significant attempts by the Municipality to listen to and consider the problems of this particular group of occupiers, and the fact that this is a relatively small group of people who appear to be genuinely homeless and in need, I am not persuaded that it is just and equitable to order the eviction of the occupiers”.³⁴

This decision thus showed that ten years after inception of the interim constitution, illegal occupiers of homes, previously subject to instant and immediate arrest and eviction, could now rely on substantial protection under the law.

30. At para 24.

31. See Section 2, PIE.

32. At para 29.

33. At para 36.

34. At para 59.

The subsequent case, Modderklip, dealing with a far greater number of people, reached the Constitutional Court in 2004.³⁵

The owners of the Modderklip farm, based in a peri-urban area saw the farm occupied by homeless people primarily forced out from nearby urban areas as development led to densification. Initially, 400 people moved onto the farm and the farmer laid trespass charges with the local police — but after a request from the department of prisons stopped so doing simply because the prisons felt they did not have space to deal with this problem. The settlement grew from 400 to 18,000 people within the space of one year. The Ekurhuleni Metropolitan Municipality brought pressure to bear on the farmer to evict. He responded by suggesting that it buy the land from him, alternatively expropriate it, and turn it into an extension of the township. The unhelpful local authority stated that it required him to evict failing which it would bring the application to evict at the farmer's cost. The farmer proceeded to obtain an eviction order in the High Court. The local sheriff advised that for the eviction order to be implemented he required a deposit of R1.8 million. The farmer said he would not pay this amount.

The owner of Modderklip believed that he had done all the law required of him — he had approached the court, obtained an order for eviction, and now was looking towards the state authorities to execute the court order. Faced with the demand for R1.8 million he again approached the High Court for assistance.³⁶ The South African Police Services advised the court that it would cost approximately R18 million to evict and raised the question as to where the evictees would stay if evicted. The High Court held that the property rights of the farmer had been breached, the occupiers' rights to housing had also been breached and that effectively an unlawful expropriation had occurred. An order was then handed down in the form of a structural interdict which required of the local authority to spell out a remedy which would eventually see the unlawful occupiers evicted after development of a reasonable plan.

The local authority appealed to the Supreme Court of Appeal³⁷ where it was held that the farmer's property rights had been breached; the state had breached the occupiers' housing rights; and that for as long as the state failed to realise section 26 housing rights for the occupiers (which was in turn a violation of the owner's section 25 rights) the state had to pay constitutional damages to the farmer. This finding sent a shiver through the many local authorities who were failing to devise and implement plans to deal with the ever growing number of unlawful occupiers in informal settlements through the country.

The state appealed to the Constitutional Court.

The Constitutional Court³⁸ found it unnecessary to consider whether sections 25 and 26 had been breached. It dismissed the argument by the state that the Modderklip farm was at fault because it had not urgently and at an early stage rushed to court to evict; it found that the Modderklip owners had tried to remedy the situation by having engaged the state, had tried to sell the land to the state, had at state's insistence obtained an eviction order, and that, what was at stake was the state's failure to satisfy the rule of law provisions in section 34 of the Bill of Rights – a breach occasioned by the failure to enforce the eviction order. It then held that because of the breach of these rule of law rights (as opposed to the Supreme Court of

35. President of the RSA & Another v Modderklip Boerdery (Pty) Ltd & Others 2005(8) BCLR786 (CC); 2005(5) SA3(4)

36. See Modderklip Boerdery (Edms) Bpk v President van die RSA en Andere 2003(6) BCLR638(T), Modderklip Boerdery (Pty) Ltd v Modder East Squatters & Another 2001(4) SA385(W).

37. President of the RSA & Others v Modderklip Boerdery (Pty) Ltd 2004(8) BCLR821(SCA).

38. 2005(8) BCLR786 (CC); 2005(5) SA3 (CC).

Appeal's finding in regard to the breach of Section 25) it was appropriate that the land owner was entitled to compensation.

These two recent judgments dramatically increased the cost to the state of failing to deliver security of tenure for the millions of South Africans previously denied it. Authorities are now obliged to deliver policy programmes “*reasonable both in their conception and implementation*”³⁹ and there is mandatory procedural protection for illegal occupiers prior to any application for eviction being heard in a court. This brings to an end a long South African history of forced evictions sanctioned by law which were central to colonial and apartheid rule.

The local authority held to be in breach of the constitutional obligations to those most desperately in need in the Grootboom matter was the City of Cape Town Municipality. In a subsequent case⁴⁰ the Judge in the first part of the hearing, held that the city was still in breach of its constitutional obligations two years after the Constitutional Court decision in Grootboom and that its policies still did not make provision for those most desperately in need. He thereafter ordered that the local authority not only produce a policy (as had the Judge in the court of first instance in the Modderklip matter) but that they produce it in court within four months for debate as to whether it would now pass constitutional muster. It took more than a year for the matter to return to court, but the result was a new policy by the city setting out what it considered it would do in respect of those most desperately in need. The court held that this improved policy was still in breach of its constitutional obligations — but left it to the potential evictees (the eviction was not granted) to return to court for further relief at a later date if they so wished.⁴¹

Accordingly those suffering in circumstances of insecure tenure are in a dramatically legally stronger position than a decade ago. Court decisions have led to them having substantive protection under the constitution and an ability to obtain orders that the authorities produce constitutionally viable and acceptable plans for fulfilling their obligations.

The development of strong procedural protections in terms of PIE further increases the pressure on all authorities to develop these plans with greater haste. It is no longer possible to undermine the dignity of human beings by evicting them and hoping that they would disappear. Lawyers seeking evictions especially on a large scale report that it is extremely difficult to obtain them, and that it is only in cases where structured orders allowing evictions over time with organised relocation to appropriate alternatives that public authorities can succeed. Thus, Grootboom and its progeny have advanced security of tenure in that they caused the production of new emergency housing⁴² plans by Government and also had a material impact on eviction practice and proceedings.

Poor people who are beneficiaries of low cost or subsidised housing, and who previously found that their houses were easily attached and sold so as to satisfy even small judgment debts, have seen the Constitutional Court intercede on their behalf and curtail default judgments in its decision⁴³ where the court held that such sales in execution can no longer take place unless specifically ordered by a judicial officer.

39. Government of the RSA v Grootboom 2000(11) BCLR1169 (CC) at para 42.

40. City of Cape Town v Neville Rudolph & 49 Others.

41. City of Cape Town v Neville Rudolph & 49 Others unreported judgment Dec 2005.

42. See National Housing Code chapters 12 and 13.

43. Jaftha v Schoeman & Others; Van Rooyen v Stoltz 2005(2) SA140 (CC).

The Department of Justice is currently amending the legislation so as to ensure that this stricter process protecting security of tenure of poor people is properly prescribed. The protection has also been extended in a more limited way to sales in execution in respect of houses sold in default of mortgage payments by the High Court.⁴⁴

The state's policy in ensuring increased security of tenure also had a restitution and a redistribution focus. The restitution aspect has been one of limited but focused and directed legislation. The Restitution of Land Rights Act⁴⁵ promulgated by constitutional dictate provided that people who had been dispossessed of their property after 1913 by law which would under the current constitution be unconstitutional, were entitled to restitution of their property provided they claimed it prior to December 1998. A Land Claims Court was constituted to consider or confirm settlement of these claims — and subsequent substantial amendments to the Act⁴⁶ have seen that the restitution can also take place by a quicker administrative process.

The range of remedies available to claimants in terms of the Act include actual restoration of the land concerned, the grant of alternative state owned land, the award of compensation and the inclusion of the claimant as “*a beneficiary of a state support programme for housing or the allocation and development of rural land.*” In urban claims the tendency has been for claims to be resolved on the basis of payment of compensation. A total of 79,696 claims were lodged of which 41,437 urban claims and 15,060 rural claims have been resolved.⁴⁷ There are a number of judgments confirming and awarding restitution of land rights (including mineral rights).⁴⁸ Space does not allow discussion of these here. The Commission on Restitution of Land Rights, now facing a deadline of 2008 imposed by President Thabo Mbeki, reports⁴⁹ that the number of claims settled in the country in the 2005/6 financial year was 10,842.

The earlier part of this overview considered increased protection to potential evictees brought about by the Constitution and PIE. A group of occupants excluded from PIE protection are those failing under the jurisdiction of The Extension of Security of Tenure Act.⁵⁰ More vulnerable than their urban cousins, these occupants, primarily farm workers, are arguably in greatest need of legislative protection.

The recent Nkhuzi Development Agency report recorded continued and extensive evictions from farms. PIE offered the courts an opportunity to ensure the extended protection of law in urban areas — and we now briefly consider what has happened in rural areas.

ESTA provides that a court may grant an order for eviction against a rural occupier provided certain procedural requirements are complied with, procedural requirements (like PIE) more onerous than those for a normal court application. The Nkhuzi survey unfortunately points to the fact that very few rural evictions appear to be in terms of the Act. When the courts have

44. Standard Bank of SA v Saunderson & Others 2006(2) SA264 (SCA).

45. Act 22 of 1994.

46. Land Restitution and Reform Laws Amendment Act 18 of 1999.

47. See Alan Dodson “Property Restitution in South Africa and Kosovo: Lessons for Fair and Efficient Restitution Procedures”, Paper given at PLAAS Seminar 2006.

48. See inter alia Richtersveld Community v Alexkor 2003(6) BCLR 583 (SCA); Prinsloo v Ndebele-Ndzundza Community 2005 3 All SA528 (SCA); Alexkor Ltd v Richtersveld Community 2003 12 BCLR 1301 (CC).

49. See Cape Times Wed 27 October 2006.

50. Act 62 of 1997.

been faced with rural evictions they have not developed as protective a shell of rights for rural occupiers as has happened with urban dwellers.⁵¹

It has further been suggested that neither the Land Claims Court nor the Supreme Court of Appeal have shown the vision in ESTA matters which the courts have shown in PIE matters. Euijen and Plaskett comment on the ESTA matters:

*“Although it is undoubtedly true that each case is to be decided on its own merits, we don’t agree that this means that no principled jurisprudence can be developed to give guidance on the relevance of and weight to be attached to certain factors above others. The Supreme Court of Appeal has similarly shown itself unwilling to take up this challenge. We submit that the resultant uncertainty inherent in this ad hoc approach will inevitably impact adversely on occupiers’ security of tenure. It is hard enough to enforce rights that are known to one, let alone those that only become known at the time of judgment”*⁵²

Theunis Roux in his exceptional review of the land cases has suggested that the courts and judicial officers in these rural matters “ignored or rejected pro poor and legal arguments that could have been used to justify alternative outcomes”.⁵³

Thus by the end of 2006 it appears that urban eviction matters previously dealt with by administrative clerks and police officers had been replaced by court decisions reflecting procedural and substantive constitutional rights. These protections have not yet been properly extended to rural occupiers. The Constitutional and Supreme Court of Appeal judgments balancing property and housing rights are now in practice throughout the judicial process and a legal framework more sensitive to the fulfilment of the rights of the urban poor of South Africa is in place.

However the future is not as secure. The South African government has twice and now more recently in December 2006 published proposed amendments to the law dealing with evictions.⁵⁴ While published as part of a new housing package, the proposed amendments to PIE, if accepted by parliament, will see that the number of people excluded from its protection will increase significantly; that the procedural protections now in place will be relaxed considerably; and that landlords would be able to get eviction orders on a urgent basis more often and with greater ease. Civil society organisations in South Africa are currently making submissions to the government suggesting that the changes are both unnecessary and unconstitutional. The very fact of their publication suggest that government is submitting to significant pressure from land owners, building societies and banks to relax the significant protective advantages afforded to poor South Africans under the Constitution. The Bills are due to be presented to parliament during 2007. The resultant legislation will be the key indicator of the extent to which South Africa’s new democratic government’s commitment to security of tenure of its poor people are made central to future land and housing policies.

51. See *Nkuzi Development Association v Government of the RSA* 2002(2)SA733(LCC); *Land en Landbou Ontwikkelingsbank van Suid Afrika v Conradie* 2005(4) SA506(SCA); *Navorsingsraad v Klaasen* 2005(3) SA410(LCC); *Mpedi & Others v Swanevelder & Another* 2004(4) SA344(SCA).

52. Constitutional Protection of Property and Law Reform by Mark Euijen & Clive Plasket Annual Survey of SA Law 2005 (unpublished draft).

53. Theunis Roux: Pro-Poor Court, anti Poor Outcomes in 2004(2)SALJ511 at 542.

54. See Government Gazette No 29501, 2 December 2006.