

FINAL RESEARCH REPORT

**THE IMPACT OF THE PREVENTION OF ILLEGAL EVICTIONS FROM AND UNLAWFUL
OCCUPATION OF LAND ACT ON THE RIGHTS OF LANDOWNERS**

By

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ANNEXURE I

Referencing Rubric – IIE Legal Referencing Guidelines

Providing evidence based on valid and referenced academic sources is a fundamental educational principle and the cornerstone of high-quality academic work. Hence, The IIE considers it essential to develop the referencing skills of our students in our commitment to achieve high academic standards. Part of achieving these high standards is referencing in a way that is consistent, technically correct and congruent. This is not plagiarism, which is handled differently.

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If both minor and major errors are indicated, then 10% only (and not 5% or 15%) is deducted from the overall percentage. The examples provided below are not exhaustive but are provided to illustrate the er

Required: Technically correct referencing style	Minor errors in technical correctness of referencing style Deduct 5% from percentage awarded	Major errors in technical correctness of referencing style Deduct 10% from percentage awarded
Consistency The same referencing format has been used for all footnote references and in the bibliography/reference list.	Minor inconsistencies. - The referencing style is generally consistent, but there are one or two changes in the format of footnote referencing and/or in the bibliography. - For example, page numbers for direct quotes (footnote) have been provided for one source, but not in another instance. Two book chapters (bibliography) have been referenced in the bibliography in two different formats.	Major inconsistencies. - Poor and inconsistent referencing style used in footnotes and/or in the bibliography/ reference list. - Multiple formats for the same type of referencing have been used. - For example, the format for direct quotes (footnotes) and/or book chapters (bibliography/ reference list) are different across multiple instances.
Technical correctness Referencing format is technically correct throughout the submission. The correct referencing format for the module's discipline has been used, i.e., either APA, OR Harvard OR Law Position of the reference: a reference is directly associated with every concept or idea. For example, quotation marks, page numbers, years, etc. are applied correctly, sources in the bibliography/reference list are correctly presented.	Generally, technically correct with some minor errors. - The correct referencing format has been consistently used, but there are one or two errors. - Concepts and ideas are typically referenced, but a reference is missing from one small section of the work. - Position of the references: references are only given at the beginning or end of every paragraph. - For example, the student has incorrectly presented direct quotes (footnotes) and/or book chapters (bibliography/reference list).	Technically incorrect. - The referencing format is incorrect. - Concepts and ideas are typically referenced, but a reference is missing from small sections of the work. - Position of the references: references are only given at the beginning or end of large sections of work. - For example, incorrect author information is provided, no year of publication is provided, quotation marks and/or page numbers for direct quotes missing, page numbers are provided for paraphrased material, the incorrect punctuation is used (footnote); the bibliography/reference list is not in alphabetical order, the incorrect format for a book chapter/journal article is used, information is missing e.g. no place of publication had been provided (bibliography); repeated sources on the reference list.
Congruence between footnote referencing and bibliography/ reference list All sources are accurately reflected and are all accurately included in the bibliography/ reference list.	Generally, congruence between the footnote referencing and the bibliography/ reference list with one or two errors. - There is largely a match between the sources presented footnote and the bibliography. - For example, a source appears in the text and/or footnotes, but not in the bibliography/ reference list or vice versa.	A lack of congruence between the footnote referencing and the bibliography. - No relationship/several incongruencies between the footnote referencing and the bibliography/reference list. - For example, sources are included in footnotes, but not in the bibliography and vice versa, a link, rather than the actual reference is provided in the bibliography.
In summary: the recording of references is accurate and complete.	In summary, at least 80% of the sources are correctly reflected and included in a reference list.	In summary, at least 60% of the sources are incorrectly reflected and/or not included in reference list.

CONTENTS

CHAPTER 1 – INTRODUCTION.....	7
1.1. Introduction and Background.....	7
1.2. Problem Statement and research questions	7
1.3. Proposed Research Methodology	8
1.4. Chapter Outlines	8 - 9
1.5. Delimitation and limitations of the study	9
 CHAPTER 2 – LITERATURE REVIEW	 11
2.1. Textbooks	11 - 12
2.2. Journal Articles	12 - 13
 CHAPTER 3 – LEGISLATION	 14
3.1. The Constitution	14
3.1.1. Section 25 – The Property Right.....	14- 16
3.1.2. Section 26 -The Housing Right	16 - 17
3.2. PIE Act.....	17 - 18
3.3. Disaster Management Act.....	18- 19
 CHAPTER 4 – CASE LAW.....	 20
4.1. Modderklip Boerdery v Modder East Squatters	20
4.2. Modder East Squatters v Modderklip Boerdery	20 - 21
4.3. President of the Republic of South Africa v Modderklip Boerdery	21 - 22
4.4. City of Johannesburg v Blue Moonlight	22 - 23
4.5. City of Johannesburg v Changing Tides.....	23 – 24
 CHAPTER 5 – ANALYSIS OF SOURCES	 26
5.1. Legislation	26

5.1.1. The Constitution	26
5.1.2. PIE Act	27
5.1.3. Disaster Management Act	27 - 28
5.2 Case law	28
5.2.1. Modderklip cases	28
5.2.2. Blue Moonlight	28
5.2.3. Changing Tides	29
 CHAPTER 6 – CONCLUSION	30
6.1. Conclusion	30
6.2. Assumptions	30 - 31
6.3. Impact of the PIE Act on rights of landowners.....	31 - 33
 BIBLIOGRAPHY	33 - 38

CHAPTER 1

Title

The impact of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act on the rights of landowners.

1.1. Introduction and background

Unlawful occupation¹ has occurred since foreign travellers settled in other countries although it was not seen as a problem then.² South Africa has experienced unlawful occupation since the 1650s when settlers from all around the globe discovered the wonders it had to offer.³ Since this time, the concept of land ownership and who had a right to stay on the land has changed numerous times.⁴ The first impact was colonization and the laws that it brought with it such as the Black Administration Act⁵. The second impact on land rights was during apartheid where under the Group Areas Act⁶ people were only allowed to own land and live in designated areas. Now under the new Constitutional dispensation, the law aims to fix its past transgressions in terms of land rights.⁷

The most influential legislation enacted after 1996 regarding property law was the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act (Hereafter referred to as the PIE Act).⁸ It was enacted after the Prevention of Illegal Squatting Act⁹ (hereafter referred to as PISA) was repealed for its unconstitutional applications and provisions of racial segregation.¹⁰ The focus of the PIE Act is on residential areas whereas industrial areas are adjudicated over by the common law.¹¹ The PIE Act¹² is supposed to balance the rights of landowners as well as the rights of unlawful occupiers. The Act defines an unlawful occupier stating that is a person who occupies land without the owner's permission or without any right to occupy the land.¹³

1.2. Problem statement and research questions

The same issue remains today, people occupying land they neither own nor have permission from the owner to occupy. Therefore, the objective of the research report is to understand how the PIE Act¹⁴ affects the rights of landowners.

¹ Occupying a property without the consent of the owner; Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998.

² Pienaar, JM. Land Reform 1st ed (2014) 63.

³ Pienaar, JM. Land Reform 1st ed (2014) 63.

⁴ Pienaar, JM. Land Reform 1st ed (2014) 64.

⁵ 38 of 1927.

⁶ 41 of 1950.

⁷ Pienaar, JM. Land Reform 1st ed (2014) 65.

⁸ 19 of 1998.

⁹ 52 of 1951.

¹⁰ Pienaar, JM. Land Reform 1st ed (2014) 687.

¹¹ Pienaar, JM. Land Reform 1st ed (2014) 691.

¹² 19 of 1998.

¹³ S1 of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998.

¹⁴ 19 of 1998.

To accomplish the objective, numerous questions need to be asked and answered. Firstly, what are the rights of landowners, and secondly the effect that the legislation had on these rights? The courts in their application have given more favour to the constitutional rights of the unlawful occupiers than the constitutional rights of the landowners. The additional questions that will help to accomplish the objective are whether the limitation is justified in terms of section 36 of the Constitution of the Republic of South Africa (hereafter referred to as the Constitution) and should the courts order compensation to landowners who suffer prejudice due to the government's incompetence?

The assumptions are that the constitutional rights of the landowners are not being properly balanced with those of the unlawful occupiers. The secondary assumption is that the PIE Act¹⁵ does not sufficiently protect the rights of landowners. These assumptions are based on the research questions and the data that has been collected.

1.3. Proposed research methodology

The research methodology that is used in this research report is the desktop method. This means that the information will be based on existing sources.¹⁶ Essentially it is secondary research because there is no new data being collected to further the research.¹⁷ The research is done by using articles, journals, and books among other sources. A thorough analysis is done on all the sources being used to determine their value and to gain a better understanding of the material.¹⁸

1.4. Chapter outlines

The chapters of this research report will be discussing various topics that affect the research topic as well as its questions and assumptions.

Chapter 1 is an introduction to the research report. It gives insight into the research topic, the research questions as well as the assumptions that flow from the topic. It grants background into the topic and establishes why this research topic is important in the legal field of property. The chapter will also outline the proposed methodology that will be used throughout the research report and the limitations of the research topic.

Chapter 2's focus will be the literature review. In this chapter, the literature review will be discussed in greater detail than the annotated bibliography. The literature that is discussed here will include journal articles, textbooks, and other internet sources. The articles are based on the research report and discuss the authors' views on the PIE Act,¹⁹ the question regarding

¹⁵ 19 pf 1998.

¹⁶ Bhasin, H. "Desktop Research: Definition, Importance and Advantages." October 2020 website at <https://www.marketing91.com/desk-research/> [Accessed 20 July 2022].

¹⁷ Bhasin "Desktop Research: Definition, Importance and Advantages."

¹⁸ Bhasin "Desktop Research: Definition, Importance and Advantages."

¹⁹ 19 of 1998.

whether there should be compensation for landowners, and the authors' view regarding whether the PIE Act²⁰ is unconstitutional amongst others.

The focus of chapter 3 is on the relevant legislation related to the research report. There will be an analysis of the different legislation and a discussion regarding their aims and objectives for the research report. The main legislation that will be discussed in this chapter is the PIE Act.²¹ Additional legislation that will be analysed is the Constitution and the Disaster Management Act.²² The main provisions in the Constitution are section 25²³ and section 26²⁴ which are property rights and housing rights respectively.

Relevant case law relating to the research report will be discussed in chapter 4. The chapter will include an analysis of the case law as well as a discussion of the court's *ratio decidendi* for the judgments. There will additionally be a discussion regarding similarities and differences in the cases and the influence of the case law about the research report. The chapter has numerous cases, some of the most influential cases on this topic are the President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd²⁵ case and the Modder East Squatters v Modderklip Boerdery²⁶ case.

The focus of chapter 5 will be a complete analysis of all the previously mentioned sources as well as any other additional sources that will help to give a better understanding of the research report.

Chapter 6 will be to summarise the content throughout the research report and explain the conclusions that have been drawn from the research. It will explain whether the research objectives and questions were answered and to what extent they were able to give a better understanding of the research report. It will discuss the impact of the PIE Act on the rights of landowners and state whether the assumptions of the research report were found to be true or not.

1.5. Delimitations and limitations of the study

The delimitations of the research report are that it focuses only on a South African application. The research report limited its research questions to only residential land and the rights of these landowners. Industrial land rights and judicial matters occurring before the PIE Act have been excluded in this research report besides regarding background.

The limitations in this type of research are that due to no new research being conducted, the analysis and basis of the research report is secondary work.²⁷ It is possible that the research

²⁰ 19 of 1998.

²¹ 19 of 1998.

²² Disaster Management Act 2002: Amendment of regulations issued in terms of S27 (2).

²³ Constitution of the Republic of South Africa, 1996.

²⁴ Constitution of the Republic of South Africa, 1996.

²⁵ 2005 (5) SA 3 (CC).

²⁶ [2004] 3 All SA 169 (SCA).

²⁷ Bhasin "Desktop Research: Definition, Importance and Advantages".

is not a true reflection of the research population and the manner the data is collected is not always helpful to the type of research the report needs.²⁸

In Conclusion, this chapter sets out the basis for the entire research report. The reason the topic of this research report is important is that the rights of landowners are often forgotten when weighed up against a person in a dire situation. However, the legislation is supposed to protect everyone equally, and therefore it is important to remember that although unlawful occupiers have rights so do landowners. Ayan Rand once said, "Without property rights, no other rights are possible".²⁹ If the property right and consequently the rights of landowners are not protected, then other rights cannot be said to be possible to protect either.

The next chapter will discuss applicable literature and the opinions of authors on this research topic.

²⁸ Bhasin "Desktop Research: Definition, Importance and Advantages."

²⁹ Overall Motivation "65 Property Rights Quotes on Success in Life" no date website at <https://www.overallmotivation.com/quotes/property-rights-quotes/> [Accessed 20 July 2022].

CHAPTER 2

The purpose of this chapter is therefore to determine which literature has been used to answer the research questions. There will be a critical analysis of the literature and how it connects to the research report. The sources of literature that will be discussed in this chapter are journal articles, textbooks, and law blogs. The literature review is critical in this type of research because no new research is being done and everything is secondary research. The basis is the opinions of others and the data they have collected and so without a proper analysis of the sources then the research report will not be able to reasonably answer the research questions. It is important to determine which sources are more valuable than others and which are not about the research report.

2.1. Textbooks

Rautenbach and Venter give an in-depth understanding of constitutional rights, particularly about section 25 and section 26 rights found in the Bill of Rights.³⁰ They discuss the rights that landowners have, the duty of the state to protect these rights as well as what qualifies as deprivation.³¹ Additionally, there is an explanation in regarding and how it can be differentiated between arbitrary deprivation and normal deprivation.³² Moreover, they give insight into the limitation clause.³³ The limitation clause is section 36 of the Constitution³⁴ and states that constitutional rights can only be limited if the limitation is reasonable and justifiable. It is important to first understand the background to properly understand the limitations of rights.

Pienaar's book serves as a foundation by giving background on ownership of land before the Constitutional regime and what legislation was applicable then such as the PISA.³⁵ It also includes a discussion on post-Constitution legislation, particularly the PIE Act, and how this legislation has affected the rights of landowners and unlawful occupiers.³⁶ The author also discusses common law remedies that landowners had to rely on before the legislation and how the legislation differentiates based on whether the property in question is residential or industrial. It provides valuable information based on its comparative nature before and after the Constitutional regime with a focus on property law.³⁷

Van der Walt and Pienaar in turn give a basic understanding of property law and its relation to constitutional law.³⁸ The specific chapter elaborates on the way section 25 is to be interpreted and subsequently how the court interprets it.³⁹ It discusses section 25 as a fundamental right, the nature and scope of the right in addition to the deprivation clause.⁴⁰ The expropriation clause as listed in the Constitution is not particularly relevant to the research question as it

³⁰ Rautenbach, IM & Venter, R. *Constitutional Law* 7th ed (2018).

³¹ Rautenbach et al *Constitutional Law*.

³² Rautenbach et al *Constitutional Law*.

³³ Rautenbach et al *Constitutional Law*.

³⁴ Constitution of the Republic of South Africa, 1996.

³⁵ Pienaar, JM. *Land Reform* 1st ed (2014).

³⁶ Pienaar, JM *Land Reform*.

³⁷ Pienaar, JM *Land Reform*.

³⁸ Van der Walt, AJ. & Pienaar, GJ. *Introduction to the Law of Property* 7th ed (2016).

³⁹ Van der Walt et al *Introduction to the Law of Property*.

⁴⁰ Van der Walt et al *Introduction to the Law of Property*.

deals with expropriation for public purposes.⁴¹ To have a better grasp of the topic, the authors have additionally given case law explanations.⁴²

2.2. Journal Articles

The article by Moola gives a better understanding of the main legislation discussed.⁴³ It discusses the procedure that needs to be followed for evictions and what requirements the applicant must meet for the court to consider their application for eviction.⁴⁴ It also gives insight into when the municipality should be joined as a party to the proceedings as they are sometimes also at fault as the state has a duty to help landowners if they cannot evict unlawful occupiers by themselves.⁴⁵ In terms of procedure, it looks at jurisdiction and the *locus standi* of the person bringing the application. It gives insight as to the factors considered in section 4 of the PIE Act.

Fick's opinion⁴⁶ is that landowners should not be disadvantaged if the court orders a lengthy eviction date. The foundation of this article is regarding whether the court should order those landowners to be compensated for the limitation of their rights when it comes to unlawful occupiers.⁴⁷ The authors' opinion is that unlawful occupiers are caused by the failure of the state to perform their duties.⁴⁸ The conflicting interests of the occupiers and the landowners conclude that section 25(1) is not an absolute right.⁴⁹ There is only been one case where the court has ordered compensation due to constitutional infringement of the property right which in the authors' opinion is unfair.⁵⁰ This view by Fick regarding the inability of the government is found in other articles and is the basis of the article by Smith when he discussed how this occurs in the *Hlope v City of Johannesburg*⁵¹ case.

The article by Smith critically evaluates the meaning of "just and equitable as a requirement for evictions."⁵² Furthermore, the author reviews the steps set out in the *Changing Tides*⁵³ case regarding unlawful occupation and the effect on legal practitioners in their advice for clients.⁵⁴ The author is also of the opinion that the courts in their application of the PIE⁵⁵ Act tend to favour the unlawful occupiers instead of landowners of the amount of homelessness that evictions can cause.⁵⁶

Similar to Fick and Smith, Magagula's opinion is that the government has not entirely been balancing these fundamental rights when they are exercised against each other and that the

⁴¹ Van der Walt et al *Introduction to the Law of Property*.

⁴² Van der Walt et al *Introduction to the Law of Property*.

⁴³ Moolla, M "Having a Slice of PIE – understanding the Act" 2016 DR (24).

⁴⁴ Moolla 2016 DR.

⁴⁵ Moolla 2016 DR..

⁴⁶ Fick, S "Compensating Landowners? The State's (Limited) Duty toward Landowners in Delayed Eviction Matters" 2021 PELJ (24) 1-35.

⁴⁷ Fick 2021 PELJ.

⁴⁸ Fick 2021 PELJ.

⁴⁹ Fick 2021 PELJ.

⁵⁰ Fick 2021 PELJ.

⁵¹ *Hlope and Others v City of Johannesburg Metropolitan Municipality* 2013 (4) SA 212.

⁵² Smith, C "Eviction need for a way out" 2014 DR (40).

⁵³ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA).

⁵⁴ Smith 2014 DR.

⁵⁵ 19 of 1998.

⁵⁶ Smith 2014 DR.

court fails to balance these rights as well.⁵⁷ The author gives background on the position that used to be regarding ownership of land and the court's decisions regarding unlawful occupiers.⁵⁸ The article discusses the common law rights before the Constitution and the courts' attempt to do a balancing act.⁵⁹ The author is also of the opinion that the eviction law offers more protection for the unlawful occupier than the legal landowner and that refusing to evict the court is limiting a constitutional right and therefore the exercise of legal property rights as a whole.⁶⁰

Walters in his journal article believes that the PIE Act is unconstitutional in its provisions and application.⁶¹ The author is of the belief that the act has in fact done the opposite of what it aimed to be where the courts are not balancing the interests of both parties.⁶² Walters objects to the act based on the imbalance it causes in the fundamental rights listed in the Constitution.⁶³ This view has also been stated by Magagula as well as Fick.

Walters additionally states that allowing unlawful occupiers to stay on the land it is an indirect form of expropriation that the Constitution has not accounted for.⁶⁴ Furthermore, the author states that the final decision for eviction should not lie with the courts and there should be a set amount of time applicable to all cases.⁶⁵ This would then mean that landowners will not wait unjustifiable amounts of time for their land back.⁶⁶ Landowners should be free to do as they wish with their property unless they are infringing on other constitutional rights or there are reasonable reasons for its limitation.⁶⁷

Essentially the authors above concur with the argument that the government is not properly fulfilling its duties which would make the eviction process easier and that the courts tend to attach more weight in eviction proceedings to the unlawful occupiers rather than the landowners.

In most of the literature discussed above the authors follow the same pattern of opinion in that the effect of the PIE Act is not one of balance. The inability of the government and municipalities leads to unlawful occupation and longer eviction times. Although ownership rights are not unlimited, the way the limitation is occurring is not always justifiable and reasonable. The authors believe that the court has also not done its part in ensuring the balance of competing interests with there only being one case where compensation was granted for a pro-longed eviction due to no alternative accommodation. The landowner should not be disadvantaged because the unlawful occupiers do not have access to alternative accommodation based on the unfulfillment of government objectives.

⁵⁷ Magagula, S "Balancing the landowners' right to evict with the unlawful occupiers right of access to adequate housing and the government's legitimate interest therein" 2020 DR (47).

⁵⁸ Magagula 2020 DR (47).

⁵⁹ Magagula 2020 DR (47).

⁶⁰ Magagula 2020 DR (47).

⁶¹ Walters, A "A balancing act between owners and occupants – Is PIE unconstitutional?" 2013 DR (22).

⁶² Walters 2013 DR (22).

⁶³ Walters 2013 DR (22).

⁶⁴ Walters 2013 DR (22).

⁶⁵ Walters 2013 DR (22).

⁶⁶ Walters 2013 DR (22).

⁶⁷ Walters 2013 DR (22).

The next chapter will discuss legislation particularly the PIE Act, the Constitution, and the Disaster Management Act which was amended.

CHAPTER 3

The Constitution brought with it a dispensation of human rights and a spirit of unity amongst the people. Due to this dispensation, the PIE Act⁶⁸ was created. PISA⁶⁹ was overwritten by the provisions of the PIE Act which brought with it a stricter process regarding evictions whereby the landowners' rights were not to be treated as absolute. The pandemic of Covid-19 also brought about the amendment to the Disaster Management Act⁷⁰ which also affected evictions during this time. The state of disaster lasted 750 days spanning various stages and back and forth stages depending on the severity of the pandemic at a given time

3.1. The Constitution

The preamble to the Constitution can be interpreted to mean that everyone should be treated equally and therefore should be able to properly enjoy their fundamental rights as they so choose, however noting that these rights are not absolute. These fundamental rights are listed in the Constitution specifically in the Bill of Rights. The rights that are concerned in this research report are specifically, section 25(property rights) and section 26 (housing rights). Property rights of a landowner are the right to use and enjoy the property as well as the right to earn an income and the right to exclude anyone else from enjoying these rights.⁷¹

3.1.1. Section 25- Property Rights

Section 25 deals with property rights and ensures that the protection of the property is held as a constitutional right. The application of this right is to protect property rights but also to give the state a way in which to limit an individual's property rights as well.⁷² This allows for a balance and ensures that the state can limit an individual's rights since it is not absolute right. right unlike the right to life which cannot be infringed. However, for the state to limit these rights it must meet the requirements set out in the provision. Therefore, although the section does allow for the state to limit property rights it also ensures that it will only be done if the requirements are met and in specific circumstances as made provision for. They simply need to have a right over the property in question. This right although initially designed to focus on a vertical application between individuals and the state can also be enforced on a horizontal application against other individuals as part of private law.⁷³ The vertical application is where the law applies between the state and the citizens whereas the horizontal is where the law applies between private citizens as well.⁷⁴

⁶⁸ 19 of 1998.

⁶⁹ 52 of 1951.

⁷⁰ Disaster Management Act 2002: Amendment of Regulations issued in terms of S27(2).

⁷¹ Kimmons, J "What Is the Bundle of Legal Rights of a Property Owner?" September 2020 website at <https://www.thebalancesmb.com/what-is-the-bundle-of-legal-rights-of-a-real-estate-owner-2866918> [Accessed 24 August 2022].

⁷² Rautenbach, IM & Venter, R Constitutional Law 7th ed (2018)

⁷³ Van der Walt et al *Introduction to the Law of Property* 349.

⁷⁴ Constitution Court of South Africa "The Bill of Rights" no date website at <https://www.concourt.org.za/index.php/constitution/your-rights/the-bill-of->

Section 25(1) states that no one may be deprived of their property unless it is of general application, and no one may be arbitrarily deprived of their property.⁷⁵ The definition of the word deprivation is the circumstance in which a person is kept from enjoying or possessing something.⁷⁶ In this case, the deprivation would come from not being able to enjoy a person's property to its full extent. Deprivation becomes arbitrary when the state cannot provide a valid enough reason for the deprivation or the way they have done so is procedurally unfair to the individual.⁷⁷ For the deprivation of property rights to meet the general application requirement, it must have the same advantages and disadvantages for everyone.⁷⁸ Section 25(2) discusses expropriation which means that the individual loses their property rights, and the property is essentially taken away from them for the public good.⁷⁹ This provision also comes with its requirements such as it must be for the public and the individual must get compensation.⁸⁰

Section 25 can be limited by its provision, but it must also meet the requirements set out in section 36(1) of the Constitution, which is the limitation clause. The requirements are that the limitation must be reasonable, of a general application, and justifiable. If the state cannot also meet these requirements, then deprivation or expropriation is not allowed.

The reason this section is important to the research report is that this is the right that landowner's rights stem from. If the property right provision were not included as a constitutional right, then there would be no protection afforded to the individual. There are critiques however that state the expropriation of land should be done without giving the individual compensation to allow for a better division of land for those who suffered injustice and inequality in the past.⁸¹

3.1.2. Section 26 -Housing Rights

Section 26 deals with the right to housing. It is also a fundamental right that allows for the protection of the right to housing as well as the limitation of evictions by an individual. Section 26(1) states that everyone has the right to average housing⁸² and 26(3) states that no person may be evicted without a court order. This constitutional right gave way to the enactment of the PIE Act⁸³ and this led to the abolishment of PISA⁸⁴ for its unconstitutionality and

[rights#:~:text=This%20question%2C%20left%20unanswered%20in,or%20private%20body%20and%20another\). \[Accessed 14 November 2022\].](#)

⁷⁵ Constitution of the Republic of South Africa, 1996.

⁷⁶ Merriam- Webster "Deprivation" website at <https://www.merriam-webster.com/dictionary/deprivation> [Accessed 25 August 2022].

⁷⁷ Van der Walt et al *Introduction to the Law of Property* 349.

⁷⁸ Van der Walt et al *Introduction to the Law of Property* 350.

⁷⁹ Van der Walt et al *Introduction to the Law of Property* 353.

⁸⁰ Van der Walt et al *Introduction to the Law of Property* 353.

⁸¹ Koko, K " Expropriation without compensation: A proxy policy position" July 2022 website at <https://mg.co.za/politics/2022-07-29-expropriation-without-compensation-a-proxy-policy-position/> [Accessed 1 September 2022].

⁸² "Adequate housing means a minimum of 40 square meters, 2 bedrooms with a separate bathroom. The bathroom must have a toilet, basin and shower. A combined kitchen and living area as well as electrical installation." South African Human Rights Commission " The right to adequate housing fact sheet" no date website at <https://www.sahrc.org.za/home/21/files/Fact%20Sheet%20on%20the%20right%20to%20adequate%20housing.pdf> [Accessed 14 November 2022].

⁸³ 19 of 1998.

⁸⁴ 52 of 1951.

discrimination. The right to housing is the foundation that underlies many eviction cases in the courts as it is essentially the battle between two fundamental rights as mentioned above.

Section 26(2) states that the government does have a legal duty to help realise this right however the inability of the state to provide low-cost accommodation and other alternative forms of housing for the underprivileged leads to unlawful occupation and ultimately court cases where the occupiers would have to move again. It leads to a vicious cycle of evictions and poverty that the state finds difficult to break and sometimes cannot afford to break due to a lack of funds.

3.2. Prevention of Illegal Evictions from and Unlawful Occupation of Land Act⁸⁵

As stated above the PIE Act⁸⁶ replaced the PISA⁸⁷ due to its unconstitutionality. The PISA was regulated strictly when it came to unlawful occupiers and the idea of an unlawful occupier was linked to a person having criminal intent.⁸⁸ Under PISA the right of private ownership was the highest right and nothing was more important to protect.⁸⁹

This has now changed due to the constitutional dispensation after 1996. The Constitution is the supreme law of the land and therefore all legislation must be in line with its provisions and bring forth its spirit and its purport.⁹⁰ Therefore, the PIE Act⁹¹ was promulgated in 1998 which the intention of changing the regulation of evictions in South Africa. The preamble gives a guide on the balancing that must be done as it lists both section 25(1) and section 26(1) and states that evictions must be done in a manner that is fair but that an individual has the right to apply to the court for an eviction order.⁹² It gives guidance on the fact that there are groups of people who require more attention in an eviction matter, and it should be considered. PIE⁹³ is a reactive legislation which means that it can only come into application once an unlawful occupier is already living on a property and then only can PIE come into play.⁹⁴

The PIE Act⁹⁵ gives guidance on the definition of an unlawful occupier. Its definition is a person who occupies land without the consent of the land and without having any other right to the land they currently occupy.⁹⁶ The definition of a landowner is defined as the registered owner of the land.⁹⁷ Section 4 is most applicable to the research question as it deals with evictions of unlawful occupiers.⁹⁸ It sets out the procedure that must be followed to allow for a fair court case and gives different requirements if the unlawful occupier has been on the property for more or less than 6

⁸⁵ 19 of 1998.

⁸⁶ 19 of 1998.

⁸⁷ 52 of 1951.

⁸⁸ Piennar, JM *Land Reform* 1st ed (2014) 667.

⁸⁹ Piennar, JM *Land Reform* 667.

⁹⁰ S2 of the Constitution of the Republic of South Africa, 1996.

⁹¹ 19 of 1998.

⁹² Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998.

⁹³ 19 of 1998.

⁹⁴ Piennar, JM *Land Reform* 692.

⁹⁵ 19 of 1998.

⁹⁶ Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998.

⁹⁷ Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998.

⁹⁸ Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998.

months.⁹⁹ Section 4(7) gives extra conditions that need to be considered such as the rights of the elderly, children, and disabled persons.¹⁰⁰ The court in their determination of when it would be just and equitable to evict the unlawful occupiers must consider how long they have occupied the land as well as any other relevant factors.¹⁰¹

Although the legislation does allow for the landowner to file for urgent proceedings section 7(1)(b) states that the hardship suffered by the owner must be more than the hardship suffered by the unlawful occupier otherwise it would not qualify for the urgent proceedings.¹⁰² Is it possible to quantify hardships and then compare them? Each person's hardships are different even if it is the same situation, so the legislation leans more towards the unlawful occupier's rights.

Section 8(1) states that no person may evict anybody without a court order.¹⁰³ This substantially limits the options available to the landowner as their only route is the court order. If the landowner attempts to evict the unlawful occupiers by moving their belongings and structures, then the unlawful occupier can apply to the court for a *mandament van spolie*,¹⁰⁴ against the landowner thus making them pay and rebuild their unlawful structures even though the unlawful occupier is on their land.¹⁰⁵ The consequence for anyone who violates this section will be liable for a fine and even possible jail time of up to two years which can be viewed as unreasonable because the landowner was protecting his property right.¹⁰⁶

Criticisms of the PIE Act¹⁰⁷ are that it is unconstitutional because the court has not been balancing the two fundamental rights.¹⁰⁸ Walters states that the application of the provisions is not doing what the preamble of the legislation set out to do. He additionally states that allowing the court to have the discretion to determine eviction dates is an unreasonable limitation of the property right and that the legislation should have a specific number of days allocated that apply to all cases uniformly.¹⁰⁹ Magagula concurs with Walter's view that the legislation is limiting a constitutional right but not in a reasonable manner.¹¹⁰ There is more protection afforded to housing rights than there is the property right.

3.3. Disaster Management Act

⁹⁹ S4 of Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998.

¹⁰⁰ Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998.

¹⁰¹ Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998.

¹⁰² Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998.

¹⁰³ Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998.

¹⁰⁴ A spoliation remedy is a remedy from the court for the restoration of control that has been taken away unlawfully. Van der Walt et al *Introduction to the Law of Property* 246.

¹⁰⁵ Piennar, JM *Land Reform* 802.

¹⁰⁶ S8(3) of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998.

¹⁰⁷ 19 of 1998.

¹⁰⁸ Walters 2013 *DR*.

¹⁰⁹ Walters 2013 *DR*.

¹¹⁰ Magagula 2020 *DR*.

The Disaster Management Act Amendment that was put into place by the government following the worldwide outbreak of Covid-19 also affects the research question.¹¹¹ This amendment further solidified the provisions of the PIE Act regarding evictions during the time of a state of disaster in the country. Section 70 of the amendment stated that no person may be evicted from their homes during this state of disaster.¹¹² This meant that the option of a court proceeding was taken away from landowners and they had no power to enforce any evictions.¹¹³ This meant that landowners who were earning money from their properties did not have to be paid for the rental, but the occupiers could still live on the property.¹¹⁴ Unlawful occupiers were not legally allowed to be evicted at all.¹¹⁵ The state of disaster ended after 750 days which is a very long time to have limited constitutional rights, eventually, the limitation stops being reasonable and justifiable and just becomes a limitation.

The courts were allowed to decide evictions again from stage 4 to stage 1 but they now had the option to stay the eviction until the end of that stage which meant that even with a successful eviction case, the unlawful occupiers could still be on the property for an indefinite amount of time.¹¹⁶ The courts also had to take into consideration whether there was alternative accommodation and if not then they would not grant an eviction order.¹¹⁷ The only exception that the landowners could rely upon regarding the extended stay was for the court to declare that the stay would not be just and equitable.¹¹⁸ This could be interpreted as expropriation without compensation because the landowners were the ones facing the limitation of their property rights which was for the good of the public, but it was done without compensation.

In Conclusion, the PIE Act¹¹⁹ severely impacted the rights of landowners in negative ways. Its vision of legislation that would balance both the right to housing and the property right is unenlightened in the interpretation of its provisions. The provisions seek to afford more protection for the right to housing and other rights of unlawful occupiers instead of a balance. The fact that the landowner can face jail time for evicting someone without a court order does seem to skew the constitutionality and morality of the legislation. In turn the, Disaster Management Act Amendment¹²⁰ follows the same tune as the PIE Act¹²¹ in which landowners essentially have limited protection for their rights and all that the court is concerned about are the rights of unlawful occupiers. The next chapter will discuss case law and how the courts have applied these pieces of legislation in practice.

¹¹¹ Dube, F & Du Plessis, A "Unlawful Occupiers, Eviction and the National State of Disaster: Considering South Africa's Emergency Legislation and Jurisprudence During COVID-19." 2021 *J.AFR.LAW*. (65) 333-346

¹¹² Disaster Management Act 2002: Amendment of Regulations issued in terms of S27(2).

¹¹³ Dube et al 2021 *J.AFR.LAW* 333-346

¹¹⁴ Schaffer, A "Covid-19 Lockdown plans for landlords and tenants" March 2020 website at <https://www.bizcommunity.com/Article/196/569/201963.html> [Accessed 14 November 2022].

¹¹⁵ Dube et al 2021 *J.AFR.LAW* 333-346

¹¹⁶ Dube et al 2021 *J.AFR.LAW* 333-346.

¹¹⁷ Dube et al 2021 *J.AFR.LAW* 333-346.

¹¹⁸ Dube et al 2021 *J.AFR.LAW* 333-346.

¹¹⁹ 19 of 1998.

¹²⁰ Disaster Management Act 2002: Amendment of Regulations issued in terms of S27(2).

¹²¹ 19 of 1998.

CHAPTER 4

Case law is the application of legislation by the court. It attempts to help us better understand the reasoning behind the court's decision, and the different ways in which the courts interpret legislation and gives guidelines on how to deal with matters that are similar in facts and context. Case law also helps to determine how legislation and morals and values have changed over time as once it would have been just and equitable to sentence a person to the death penalty but that is no longer the case. Case law reflects society's principles combined with legislative authority on a particular subject or matter. The following cases are landmark cases about evictions under the PIE Act and are therefore highly relevant to the research report.

4.1. *Modderklip Boerdery v Modder East Squatters*

The facts of this case lend themselves to the research report. The facts are that some 15 000 people had settled on land they assumed was municipal property but was owned by Modderklip Boerdery who did not permit them to be there.¹²² The owner had laid trespassing charges against the unlawful occupiers, but the police would simply let them go with a warning going as far as to tell the owner not to press any more charges as the jail did not have enough space.¹²³ This led to the owner attempting to sell the land to the municipality which they refused to do.¹²⁴ Ultimately the owner used the PIE Act and got the court to order an eviction which states that the unlawful occupiers had to evict the premises in 2 months.¹²⁵

In this case, although it seemed that the court would adjudicate it as a private law matter, the elements of constitutional law found it.¹²⁶ The rights of landowners are found in section 25 and the right to housing is found in section 26 of the Constitution. The court had to find the right balance between the Constitution and private law principles in deciding this case.¹²⁷

4.2. *Modder East Squatters v Modderklip Boerdery*¹²⁸

This case is the appeal that was held in the Supreme Court of Appeal following the *Modderklip Boerdery v ModderEast Squatters* case. At this point of the appeal, the number of unlawful occupiers had grown from 15 000 to 40 000. The unlawful occupiers had refused to evict the property even though the owner had a valid eviction order from the court.¹²⁹ The sheriff stated that to evict them she would need R1.8 million from the owner and this was not possible. The

¹²² Dugard, J "Modderklip Revisited: Can the courts compel the state to expropriate property where the eviction of unlawful occupiers is not just and equitable?" 2018 *PELJ* (21) 2-20

¹²³ Dugard 2018 *PELJ* 5

¹²⁴ Dugard 2018 *PELJ* 6

¹²⁵ Dugard 2018 *PELJ* 6

¹²⁶ Dugard 2018 *PELJ* 5

¹²⁷ Dugard 2018 *PELJ* 5

¹²⁸ [2004] 3 SA 169 (SCA).

¹²⁹ *Modder East Squatters v Modderklip Boerdery (Pty) Ltd* [2004] 3 SA 169 (SCA).

owner then appealed to other state agencies to help with his eviction matter, but no one was interested in helping.¹³⁰ The state said that they could not assist with the eviction as they believed that it was a civil matter.¹³¹ They would also not provide alternative accommodation to the unlawful occupiers before they had provided it to law-abiding citizens.¹³² This meant that the unlawful occupiers would not leave.

The owner then took the matter on appeal to the SCA whereby the court ruled in favour of Modderklip. The SCA agreed with the findings of the High Court in which the state is obligated to protect the right to property as it is a Constitutional right, but they also have a legal duty to protect the right to housing.¹³³ Therefore, by failing to provide alternative accommodation to the unlawful occupiers the state had failed its constitutional duties and breached the owner's section 25 rights and the unlawful occupiers' section 26 rights.¹³⁴ The court awarded the owner compensation for damages based on the breach of their constitutional property right.¹³⁵ The damages would be calculated according to section 12(1) of the Expropriation Act.¹³⁶

This can be interpreted to mean that the court agrees that by the state not providing alternative accommodation when needed they expropriated the property from the owner without any compensation which is unlawful and unconstitutional. Section 25(3) sets out the requirements for expropriation, one of which is reasonable compensation towards the owner for their property. The SCA used the *Fose v Minister of Safety and Security* case to state that constitutional breaches should afford appropriate relief in the form of constitutional damages.¹³⁷

4.3. *President of the Republic of South Africa v Modderklip Boerdery*¹³⁸

The state has appealed the decision in the SCA to the Constitutional Court. The Constitutional court based its reasoning for the decision on section 34 right to housing instead of using section 25 and section 26 as the other courts had done so previously.¹³⁹ The basis of the state's claim was that firstly they challenged the claim that they had breached the section 25 and section 26 rights of the owners and unlawful occupiers respectively.¹⁴⁰ The second was the notion that if Modderklip had applied for urgent proceedings in terms of section 5 of PIE then the matter would have been dealt with in time.¹⁴¹

The court stated that if Modderklip had applied for an urgent proceeding they would not have been able to satisfy all the requirements set out in section 5 and would therefore have failed

¹³⁰ *Modder East Squatters v Modderklip Boerdery (Pty) Ltd* [2004] 3 SA 169 (SCA).

¹³¹ *Modder East Squatters v Modderklip Boerdery (Pty) Ltd* [2004] 3 SA 169 (SCA).

¹³² *Modder East Squatters v Modderklip Boerdery (Pty) Ltd* [2004] 3 SA 169 (SCA).

¹³³ *Modder East Squatters v Modderklip Boerdery (Pty) Ltd* [2004] 3 SA 169 (SCA).

¹³⁴ *Modder East Squatters v Modderklip Boerdery (Pty) Ltd* [2004] 3 SA 169 (SCA).

¹³⁵ *Modder East Squatters v Modderklip Boerdery (Pty) Ltd* [2004] 3 SA 169 (SCA).

¹³⁶ *Modder East Squatters v Modderklip Boerdery (Pty) Ltd* [2004] 3 SA 169 (SCA).

¹³⁷ *Modder East Squatters v Modderklip Boerdery (Pty) Ltd* [2004] 3 SA 169 (SCA).

¹³⁸ 2005 (8) BCLR 786 (CC).

¹³⁹ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (8) BCLR 786 (CC).

¹⁴⁰ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (8) BCLR 786 (CC).

¹⁴¹ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (8) BCLR 786 (CC).

in their application anyway which would have led to using section 4 as they had done.¹⁴² They had also not been idle in their attempts to get the unlawful occupiers evicted but the municipality had failed to help. Modderklip had acted reasonably in their attempts to find a solution to the eviction matter going as far as to sell the land to the state which was refused.¹⁴³ It is unreasonable to force Modderklip to take the burden of a matter that should involve the state.¹⁴⁴ The limitation of Modderklips' property right was limited unconstitutionally as the state could not rely on section 36¹⁴⁵ because the limitation was not general in its application.

The state is involved in any matter that seems like private law because it must uphold the spirit and purport of the Constitution and its provisions.¹⁴⁶ The Constitutional Court stated that where the balance between the rights of private landowners and the rights of unlawful occupiers cannot be found and it is tipped in the favour of the unlawful occupiers then the state must compensate the owner for the infringement of their rights.

4.4. City of Johannesburg v Blue Moonlight¹⁴⁷

There were 86 people occupying private land who had lived on the land for more than 6 months.¹⁴⁸ They had even paid rent at one point, but they had not paid since the property was bought by Blue Moonlight. Blue Moonlight cancelled leases after a year and posted notices indicating to the tenants that they needed to vacate the premises.¹⁴⁹ They refused, and an eviction application was lodged. The unlawful occupiers now wished to join the city because they have a constitutional duty to provide them with housing.¹⁵⁰ The High Court decided to grant the eviction order and order that the city pays Blue Moonlight a reasonable rental fee for using the property until the date of the eviction.¹⁵¹ The city decided to appeal to the SCA where they upheld the order of eviction but denied that Blue Moonlight should be paid compensation for the property. In the SCA the city made differentiations between people who had been evicted by a private landowner and those who were rendered homeless for other reasons stating that eviction by private owners made those unlawful occupiers a second priority in terms of alternative accommodation for the city.¹⁵²

Blue Moonlight stated in the Constitutional Court that not being paid compensation would be arbitrary deprivation which is unconstitutional based on section 25 of the Constitution and that the PIE Act¹⁵³ was not designed for the state to expropriate land when they wished to.¹⁵⁴ Landowners do not have a duty to provide free accommodation for the public. The court took into consideration the rights of the landowner, the duty of the city to provide housing, whether

¹⁴² *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (8) BCLR 786 (CC).

¹⁴³ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (8) BCLR 786 (CC).

¹⁴⁴ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (8) BCLR 786 (CC).

¹⁴⁵ Constitution of the Republic of South Africa, 1996.

¹⁴⁶ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (8) BCLR 786 (CC).

¹⁴⁷ 2012 (2) SA 104 (CC).

¹⁴⁸ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

¹⁴⁹ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

¹⁵⁰ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

¹⁵¹ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

¹⁵² *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

¹⁵³ 19 of 1998.

¹⁵⁴ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

the city had enough resources, and what would be just and equitable in the circumstances.¹⁵⁵ Although it would be reasonable for the landowner to expect to endure some limitation of their rights in this situation, if the court cannot settle on an appropriate date of eviction, then the landowner cannot be expected to provide free housing forever.¹⁵⁶ The court stated in their judgement that although they cannot be expected to endure forever the landowner must accept that their common law rights are limited by the PIE Act's¹⁵⁷ requirement of just and equitable.¹⁵⁸

There are similarities between the Blue Moonlight and the Modderklip cases however Blue Moonlight did not win its case. The differences between the cases were that firstly the sheer number of people that had to be evicted in Modderklip was too much for the landowner to do without assistance whereas in Blue Moonlight there were only 86 occupiers whom they could have easily evicted.¹⁵⁹ The second was that Blue Moonlight was fully aware of the occupiers when they had bought the land whereas in Modderklip once they were aware of the occupiers took all reasonable steps to evict them.¹⁶⁰ Third is that Modderklip was awarded compensation was due to the state infringing on their section 25 rights by not helping to evict the people whereas in Blue Moonlight they could have invoked the eviction order themselves.¹⁶¹

A critique of this case states that the court decision was based on the fact that the PIE Act¹⁶² limited the right to use and enjoyment by the landowner.¹⁶³ The PIE Act¹⁶⁴ requires that landowners have their rights limited for a time until alternative accommodation would be available even though the city had stated that they do not have the funds, nor did they receive more to help with the Emergency Housing Programme. The city should not differentiate between the reasons that caused people to be homeless because at the end of the day they all need housing. Additionally, although the tenants had started out paying when they stopped paying, they became unlawful occupiers once they stopped paying as set out by the *Ndlovu v Ngcobo*¹⁶⁵ case.

4.5. City of Johannesburg v Changing Tides¹⁶⁶

This is an appeal case brought by the City of Johannesburg. The COJ was appealing the decision of the High Court ruling in which they stated that the unlawful occupiers were only to be evicted at a date upon which the city could provide them with alternative housing.¹⁶⁷ The

¹⁵⁵ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

¹⁵⁶ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

¹⁵⁷ 19 of 1998

¹⁵⁸ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

¹⁵⁹ Van der Walt, AJ *Law of Property Casebook for Students* 8th ed (2019) 478

¹⁶⁰ Van der Walt, AJ *Law of Property Casebook for Students* 478.

¹⁶¹ Van der Walt, AJ *Law of Property Casebook for Students* 477.

¹⁶² 19 of 1998.

¹⁶³ Clark, M "Evictions and Alternative Accommodation in South Africa: An analysis of the jurisprudence and implications for local government." November 2013 website at http://abahlali.org/wp-content/uploads/2008/04/Evictions_Jurisprudence_Nov13.pdf [Accessed 26 August 2022].

¹⁶⁴ 19 of 1998.

¹⁶⁵ [2003] (1) SA 113 (SCA).

¹⁶⁶ 2012 (6) SA 294 (SCA).

¹⁶⁷ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA).

unlawful occupiers were of limited resources and income and would therefore anyway qualify for emergency housing provided by the state.¹⁶⁸ The reason the High Court judge made this decision was based on the ruling made regarding the Blue Moonlight case which at the time was the *stare decisis*¹⁶⁹ even though it was on appeal to the Constitutional Court.¹⁷⁰ The court decided that the city should provide all the people with alternative accommodation to go through with the eviction order.¹⁷¹

This case further explained the meaning of just and equitable as required by section 4(7) of the PIE Act.¹⁷² The court needs to have all relevant facts and considerations before being able to make such a decision.¹⁷³ However, the court also needs to not go out of the bounds of judicial authority in doing so. The case cited another in stating that the city has a duty when people are evicted to provide them with an alternative or emergency accommodation.¹⁷⁴ The court when faced with an eviction application by a private person must answer two questions; whether it would be just and equitable to evict them and then what manner of impact will an eviction order have on these people?¹⁷⁵ Although in answering the first question the court does consider the section 25 right, the consideration of this right is not given its full impact as a constitutional right.¹⁷⁶ The PIE Act¹⁷⁷ that the court relies on asks more questions regarding the unlawful occupier's state that their future than it does the landowner who has essentially been expropriated of their land.¹⁷⁸ The onus is on the applicant of the eviction order to ensure the court knows all relevant facts and considerations which does seem like an unfair burden.¹⁷⁹ The landowner can no longer rely on ownership and the fact that they are unlawful occupiers to get an eviction order.¹⁸⁰

The similarities between the Blue Moonlight case and the Changing Tides case were the enforcement of the court in that the city had to provide alternative accommodation for the unlawful occupiers. The court was also willing to limit the landowners' constitutional rights simply because the PIE Act states that the decision to evict must be just and equitable, but to whom must it be just and equitable? The courts seem to focus this requirement on the unlawful occupiers and do not seem to mind what would be just and equitable for the landowner. Changing Tides property must not feel that the decision to only evict the unlawful occupiers when there is alternative housing is just and equitable to them and their situation whereby, they could not repurpose the land they had bought.

Critiques of this case are that the court could have considered the needs of the unlawful occupiers too much in their determination of just and equitable as the needs of occupiers

¹⁶⁸ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA).

¹⁶⁹ The decision made by higher courts is binding on lower courts. Young, J "Stare Decisis" June 2022 website at https://www.investopedia.com/terms/s/stare_decisis.asp [Accessed 1 September 2022].

¹⁷⁰ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA).

¹⁷¹ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA).

¹⁷² 19 of 1998.

¹⁷³ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA).

¹⁷⁴ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA).

¹⁷⁵ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA).

¹⁷⁶ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA).

¹⁷⁷ 19 of 1998.

¹⁷⁸ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA).

¹⁷⁹ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA).

¹⁸⁰ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA).

should not be considered when the court is granting the eviction order but only how long the eviction can be delayed by.¹⁸¹ The court should also consider the fact that the occupiers are there unlawfully in their decision. If the city cannot provide alternative accommodation, then the property right continues to be infringed upon and it seems that the PIE Act¹⁸² overprotects the rights of unlawful occupiers at the expense of the landowners' rights.¹⁸³ It can be interpreted as a form of indirect expropriation as there is no rush on the unlawful occupier to find alternative accommodation themselves.

In Conclusion, the impact that the *Modder East Squatters v Modderklip Boerdery*¹⁸⁴ and the *President of the RSA v Modderklip Boerdery*¹⁸⁵ cases have on the research report is that the state has a constitutional duty to both unlawful occupiers with the right to housing and the landowner with the right to property and breaching either is an infringement of a constitutional right. The *stare decisis*¹⁸⁶ of compensation will only be applicable in cases where the state has infringed constitutional rights which is clear from the *Blue Moonlight*¹⁸⁷ case where compensation was not awarded. The critiques of the application of the PIE Act¹⁸⁸ and the Constitution in these cases lead to a notion that if the legislation were less rigid in its provisions and its application then there would be more landowners who do not take matters into their own hands. The court should not get to decide when it would be just and equitable for eviction as their considerations seem to heavily favour the unlawful occupiers and disadvantage landowners who legally have no other options as the PIE Act¹⁸⁹ only allow evictions with a court order and it is also in section 26 of the Constitution.

Ultimately the state should help to ensure evictions are humane and speedy to not further infringe any rights of any of the parties. The next chapter will analyse the sources that are well-founded in law and how the case law and legislation have influenced the research topic.

¹⁸¹ Strydom, J & Viljoen, S "Unlawful Occupation of Inner-city Building: A Constitutional Analysis of the Rights and Obligations involved." 2014 *PELJ* (17) 1207-1261

¹⁸² 19 of 1998.

¹⁸³ *Magagula* 2020 *DR*.

¹⁸⁴ [2004] 3 SA 169 (SCA).

¹⁸⁵ 2005 (8) BCLR 786 (CC)

¹⁸⁶ Young 'Stare Decisis'.

¹⁸⁷ 2012 (2) SA 104 (CC).

¹⁸⁸ 19 of 1998.

¹⁸⁹ 19 of 1998.

CHAPTER 5

This chapter will discuss the analysis from the previous chapters 3 and 4. Conclusions will be drawn from the legislation that is influential over the research topic as well as draw conclusions from the case law that was discussed in chapter 4. It will also analyse all the authoritative sources that have been previously mentioned to better establish the legal position of the research report. Drawing conclusions and analysing the information discussed means determining the information that is never explicitly stated in the authoritative sources but is implied in these sources.

5.1. Legislation

5.1.1. The Constitution

The Constitution is the highest law of the land, but it is easier for people to gain justice for infringements of their Constitutional rights if there is enabling legislation that also grants a person the same rights.

The conclusions that can be drawn from the analysis of section 25 of the Constitution, the so-called property right, is firstly that there are limitations to this Constitutional right and therefore no citizen of South Africa is allowed to use and enjoy this right without considering how it will affect other citizens. Citizens can expect, when enjoying this right, some limitation from the government. Secondly it is a right that can be infringed upon by the government but the infringement by the state is conditional upon the state meeting certain requirements. An example of the requirement is that the deprivation must be for public purpose.¹⁹⁰ Thirdly the analysis helps to understand the difference between deprivation, arbitrary deprivation, and expropriation. Fourth the conclusion that can be drawn is that section 25¹⁹¹ is a right that is susceptible to the limitation clause found in section 36 of the Constitution because it is not a non-derogable right¹⁹².

Section 26¹⁹³ in contrast discusses the right to housing as a Constitutional right. The first conclusion drawn is that section 26 is the provision of the Constitution that gave life to the PIE Act¹⁹⁴ because it states that no person may be evicted without a court order which is essentially the basis of the PIE Act.¹⁹⁵ Another conclusion that can be drawn is that the right to housing is a right that is available for everyone without a determination of their status as a citizen. The state also has a positive duty under this section to help make this right more accessible to everyone.

¹⁹⁰ S25(2)(a) of the Constitution of the Republic of South Africa, 1996.

¹⁹¹ The Constitution of the Republic of South Africa, 1996.

¹⁹² Non-derogable rights are rights that can not be infringed upon; Australian Government, Attorney General's Office "What are absolute rights?" no date website at <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/absolute-rights> [Accessed 17 October 2022].

¹⁹³ The Constitution of the Republic of South Africa, 1996.

¹⁹⁴ 19 of 1998.

¹⁹⁵ 19 of 1998.

5.1.2. PIE Act¹⁹⁶

The PIE Act¹⁹⁷ is the main legislation that has an influence over the research topic. Its provisions are important in answering the questions posed by the research report. The first conclusion that can be drawn is that the PIE Act¹⁹⁸ was enacted to give more protection to the section 26(3) right found in the Constitution. This is due to the PISA¹⁹⁹ being abolished. Secondly, it offers more protection for constitutional right in section 26 instead of section 25.²⁰⁰ This is because this legislation limits to some extent the rights of landowners. Another conclusion that can be drawn from the legislation is that extra consideration must be given to groups that include people who cannot effectively stand up for their rights such as children and the elderly. This is due to them being considered disadvantaged groups. Another conclusion is that due to the PIE Act²⁰¹, the options available for remedies in terms of unlawful occupiers are only to go to court, there are no other remedies available in legislation.

There are authors that agree with the conclusion that the PIE Act is unconstitutional because of its unreasonable limitations to the section 25²⁰² right. Walters²⁰³ and Magagula²⁰⁴ both confirm the statement that the legislation is not balancing the rights between section 25 and section 26 found in the Constitution. If the PIE Act²⁰⁵ were to be amended it would allow for a less strict procedure and the court would be able to consider the unlawfulness of the occupiers as well. The Miller, Bosman and Le Roux blog state that there are situations where the PIE Act²⁰⁶ does not help landowners.²⁰⁷

5.1.3. Disaster Management Act²⁰⁸

This act gave way for the provisions of the PIE Act²⁰⁹ not to be infringed during Covid-19. The first conclusion is that the act sought to not allow any person to be homeless during the state of disaster.²¹⁰ It did not allow the courts to hear any matter regarding evictions during this time. The second conclusion which is based on the first is that the amendment did not totally consider the rights of landowners in stage 5 as they did not allow for any eviction matters to be heard in court which meant legally there was no remedies available to landowners for unlawful occupiers. The court now held even more power than previously determined under the amendment which meant that landowners did not get as much protection for their rights.

¹⁹⁶ 19 of 1998.

¹⁹⁷ 19 of 1998.

¹⁹⁸ 19 of 1998.

¹⁹⁹ 52 of 1951.

²⁰⁰ The Constitution of the Republic of South Africa, 1996.

²⁰¹ 19 of 1998.

²⁰² The Constitution of the Republic of South Africa, 1996.

²⁰³ Walters 2013 *DR*.

²⁰⁴ Magagula 2020 *DR*.

²⁰⁵ 19 of 1998.

²⁰⁶ 19 of 1998.

²⁰⁷ Miller, Bosman, Le Roux "Evicting the Unlawful Occupier: Why the PIE is not always so tasty! "June 2014 website at <https://www.mblh.co.za/NewsResources/NewsArticle.aspx?ArticleID=1138> [Accessed 17 October 2022].

²⁰⁸ Disaster Management Act 2002: Amendment of Regulations issued in terms of S27(2).

²⁰⁹ 19 of 1998

²¹⁰ Reg 11CA of the Amendment

The only way the court would not grant a stay of eviction was if the stay would not be just and equitable which considered numerous factors.

The court had even ruled the City of Johannesburg to have acted unconstitutionally when they removed unlawful occupiers from a building during the pandemic.²¹¹ The rights of landowners were limited by this amendment to the point where they had very limited legal remedies available to them.

5.2. Case Law

5.2.1. The Modderklip cases

The case law are applications by the court of the legislation that is discussed above and in chapter 3. From the case law discussed in chapter 4 it can be concluded that there must be an infringement of a constitutional right before the court will order that a party is to be awarded damages. The second conclusion is that although a landowner had gotten an eviction award it did not mean that the unlawful occupiers will follow the eviction order and leave the property. This conclusion can be seen in the *Modderklip East Squatters v Modderklip Boerdery*²¹² case. Another conclusion that can be drawn is that the state is not always willing to help in eviction cases and neither are they properly fulfilling the positive duties imposed on them by the Constitution. Furthermore, the state cannot rely on section 36²¹³ for the limitation of section 25²¹⁴ rights if the limitation only affects one party and not the community in general which is the reasoning the court used in the *President of the RSA v Modderklip Boerdery*.²¹⁵

5.2.2. Blue Moonlight²¹⁶ case

From the Blue Moonlight case it can be concluded that even people who were previously lawful occupiers who had since stopped paying rent or had their leases cancelled would be considered unlawful occupiers. Another conclusion is that the limitation of property rights is reasonable if they occur for a limited period²¹⁷, once the period becomes unlimited then the limitation becomes unreasonable. The court will also determine if the number of people being evicted is too much for the landowner to handle before they order the state to help.²¹⁸

²¹¹ Manyane, M "Court rules against City of Joburg evictions during Covid-19 lockdown" April 2020 website at <https://www.iol.co.za/news/south-africa/gauteng/court-rules-against-city-of-joburg-evictions-during-covid-19-lockdown-46615118> [Accessed 17 October 2022].

²¹² *Modder East Squatters v Modderklip Boerdery (Pty) Ltd* [2004] 3 SA 169 (SCA).

²¹³ The Constitution of the Republic of South Africa, 1996.

²¹⁴ The Constitution of the Republic of South Africa, 1996.

²¹⁵ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (8) BCLR 786 (CC).

²¹⁶ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

²¹⁷ A limited time means a period where the court has specified that the unlawful occupiers must evict the property by a certain date. Legal Wise "Evictions" July 2022 website at <https://www.legalwise.co.za/help-yourself/quicklaw-guides/evictions> [Accessed 15 November 2022].

²¹⁸ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (8) BCLR 786 (CC).

5.2.3. Changing Tides²¹⁹ case

The Changing Tides case was a point of precedent where the court in exercising their power had to understand that they could not go outside their limits and do as they please. An inference drawn from this case is that the section 25²²⁰ right is not given due consideration when the court determines if the eviction would be just and equitable. It does appear that more consideration is given to the section 26 right²²¹ to housing. The landowner can also not rely on ownership but must give the court all facts that are required for the order to be considered just and equitable.

This case has been criticised by Viljoen and Strydom and they disagree with the judgement passed by the court because there was not enough consideration given to the rights of landowners.²²² It can be inferred from this case that the PIE Act does offer more protection for the right to housing thereby causing unreasonable limitations of the property right.

In conclusion, by analysing the sources that have been mentioned in chapter 3 and chapter 4 combined with the literature mentioned in chapter 2 there are numerous conclusions that can be drawn. These sources help to better determine the legal position which in this research report is the impact of the PIE Act²²³ on the rights of landowners. From these sources it can be concluded that the court does not give enough consideration to the rights of landowners, that the PIE Act²²⁴ does allow for more protection for section 26 rights²²⁵ and that in the case law discussed the limitation of the section 25²²⁶ right is inevitable in eviction matters.

The next chapter will conclude the research report and discuss the research questions and to what depth they have been answered.

²¹⁹ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA).

²²⁰ The Constitution of the Republic of South Africa, 1996.

²²¹ The Constitution of the Republic of South Africa, 1996.

²²² Strydom et al 2014 *PELJ* 1207-1261.

²²³ 19 of 1998.

²²⁴ 19 of 1998.

²²⁵ The Constitution of the Republic of South Africa, 1996.

²²⁶ The Constitution of the Republic of South Africa, 1996.

CHAPTER 6

This chapter is a conclusion to the research report. It will determine if the research questions have been answered and to what extent. It will also discuss the research objective and what evidence the objective was based on. This chapter will also determine if the assumptions discussed in chapter 1 were found to be true or false and what evidence led to the conclusion.

6.1. Conclusion

The two research questions that are mentioned in chapter 1 are what the rights of landowners and what effect the legislation had on these rights. In answering the first question the discussion of the bundle of rights afforded to landowners can be found in chapter 3 of the research considering the Constitution. This is because section 25²²⁷ which is the property right is a constitutional right which is found in the Bill of Rights. Therefore, the rights of landowners are the use, enjoyment, right to earn an income from the property and the right to exclude anyone else from using it without their permission.²²⁸

The second question is what effect the legislation has had on these rights? The Constitution does offer constitutional protection for the rights of landowners, but these rights are subject to the limitation clause found in section 36 of the Constitution. The PIE Act²²⁹ which is most influential over these rights is essentially legislation that is limiting the rights of landowners. The PIE Act²³⁰ states that the only way for a landowner to get an eviction is to go to court thereby not allowing common-law remedies to apply. The PIE Act²³¹ also limits the rights of landowners by not giving them the freedom to exclude anyone else from using the property as the court will determine whether it would be just and equitable to grant an eviction order. There is some protection for the rights of the landowners however it can be seen from the application of the PIE Act²³² in the *Changing Tides*²³³ case that the court takes more factors regarding the unlawful occupiers and their section 26²³⁴ rights into consideration than they do the rights of landowners and their section 25²³⁵ rights. The effect of the Disaster Management Act²³⁶ on the rights of landowners was to further cement the imbalance of rights between the right to housing and the rights of landowners as it did not allow for any evictions to be heard during the more severe stages of the Covid-19 pandemic.

6.2. Assumptions

²²⁷ The Constitution of the Republic of South Africa, 1996.

²²⁸ Kimmons 'What Is the Bundle of Legal Rights of a Property Owner?'.
²²⁸ Rautenbach, IM & Venter, R Constitutional Law 7th ed (2018).

²²⁹ 19 of 1998.

²³⁰ 19 of 1998.

²³¹ 19 of 1998.

²³² 19 of 1998.

²³³ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA).

²³⁴ The Constitution of the Republic of South Africa, 1996.

²³⁵ The Constitution of the Republic of South Africa, 1996.

²³⁶ Disaster Management Act 2002: Amendment of Regulations issued in terms of S27(2).

There were also two assumptions mentioned in chapter 1 namely that the rights of landowners were not properly being balanced with the rights of the unlawful occupiers and that the PIE Act does not sufficiently protect the rights of landowners.

Regarding the imbalance of rights, the rights of landowners are given less focus and consideration when the court determines if it would be just and equitable to grant eviction orders. The Modderklip cases also indicate that the state is not properly helping landowners to protect their rights as they did not help Modderklip to evict the vast number of unlawful occupiers that refused to obey the eviction order. The PIE Act²³⁷ also requires the courts to give more consideration to the rights of unlawful occupiers especially those who cannot properly exercise their rights such as children and disabled people. There is case law such as the Blue Moonlight²³⁸ where the court did properly balance the rights of landowners with the rights of the unlawful occupiers which did not lead to an unreasonable limitation of the landowners' constitutional rights. Therefore, based on the above, the assumption was to some extent true however there are situations where the court does properly apply the legislation and balance the rights.

Regarding the insufficient protection by the PIE Act,²³⁹ it can be inferred that the PIE Act²⁴⁰ does not properly protect the rights of landowners. There is some protection offered however it is not to the extent that the legislation should be protecting these rights considering that it is a constitutional right. There are authors such as Walters²⁴¹ and Magagula²⁴² who even state that insufficient protection makes the legislation unconstitutional. Insufficient protection leads to limitations of the rights that are not always reasonable thereby making the limitations unconstitutional. The PIE Act²⁴³ can be viewed as giving more protection to the rights of the unlawful occupiers but there are provisions that also protect the rights of landowners. The legislation however limits the remedies available to the landowner thereby not properly protecting their property right.

6.3. Impact of the PIE Act²⁴⁴ on the rights of landowners

Therefore, based on the previous chapter's discussion of legislation, literature, case law and analysis of sources, the impact of the PIE Act²⁴⁵ on the rights of landowners can be answered. The impact is not completely a negative one as there are situations where the legislation can be used to help better facilitate the rights of landowners however it can largely be seen as not doing this. The PIE Act²⁴⁶ limits the rights of landowners in a manner that is often viewed as unreasonable and unconstitutional. The courts in applying their discretion gained from the PIE

²³⁷ 19 of 1998.

²³⁸ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

²³⁹ 19 of 1998.

²⁴⁰ 19 of 1998.

²⁴¹ Walters 2013 *DR* (22).

²⁴² Magagula 2020 *DR* (47).

²⁴³ 19 of 1998.

²⁴⁴ 19 of 1998.

²⁴⁵ 19 of 1998.

²⁴⁶ 19 of 1998.

Act²⁴⁷ allow more protection for the unlawful occupiers because they are concerned about the increase in homeless that an eviction order will cause as claimed by Smith.²⁴⁸

Although the PIE Act²⁴⁹ was promulgated with the view that the rights between section 25²⁵⁰ and section 26²⁵¹ would be balanced it can be seen from the case law that is not always the situation and that the courts favour the rights of unlawful occupiers more. This means that the impact is therefore a negative one and that the rights of landowners are not properly being given their due consideration and protection from the law.

In conclusion, the PIE Act²⁵² is an influential legislation in governing eviction matters. It sets out requirements and ways that landowners can apply to the court for an eviction order. It also sets out the factors that the court must consider before determining whether an eviction order would be just and equitable. This legislation can be concluded to have negatively impacted the rights of landowners as it offers more protection to the rights of unlawful occupiers and does not give landowners any other method besides court to resolve their issues.

The quote by William Taft speaks largely to the importance of protecting the rights of landowners. He states that "Next to the right of liberty, the right of property is the most important individual right guaranteed by the Constitution."²⁵³ Although he was referring to the American Constitution, the principle behind his quote is still valid in South Africa's application. The rights of landowners must be protected and allowed to be given proper consideration in the courts and is therefore an area of the law that still needs to be developed.

²⁴⁷ 19 of 1998.

²⁴⁸ Smith 2014 *DR*.

²⁴⁹ 19 of 1998.

²⁵⁰ The Constitution of the Republic of South Africa, 1996.

²⁵¹ The Constitution of the Republic of South Africa, 1996.

²⁵² 19 of 1998.

²⁵³ Overall Motivation '65 Property Rights Quotes on Success in Life'.

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