

## EVICTION IN THE RENTAL HOUSING SECTOR IN SOUTH AFRICA

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### 1 INTRODUCTION AND CONTEXTUAL BACKGROUND

The rental housing sector has been riddled with conflict of rights between landlords and tenants for ages.<sup>1</sup> This tension remains and the South African situation, post-1994, is showing varied forms and mutations of such tension in the landlord-tenant relationship. Thus, there is and there has always been a need for mediation between people's need for housing and property ownership and the legal entitlements that come with it. Governments all over the world continuously strive to provide that regulatory framework to ensure a balance between the need for housing and the rights of property owners.<sup>2</sup> In the South African context, that regulation was effected through legislative intervention which, in many respects, curtailed the landlord's common law rights that come with property ownership.<sup>3</sup> Thus there were, among others, rent control measures put in place. In the post-1994 South African legal and policy framework, in line with constitutional injunctions aimed at protecting those in need of housing, new measures were put in place and these measures, by and large, further diluted the bare legal power that common law affords property owners. This brought about a new landscape in the landlord-tenant relationship.

What all the legislative interventions that reduced the common law powers of the landlord left intact is the right to terminate a lease agreement. This has never been in doubt as a premise.<sup>4</sup> What has often been contentious is the next step that follows termination should the tenant not vacate the rental property. This is the stage where the eviction process comes into play.<sup>5</sup> Thus, it is submitted, the landlord — even with all the legislative changes throughout history — remains with the right to evict a tenant whose tenancy has come to an end which

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<sup>1</sup>Cameron J, in *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC), gives an exposition of the context of tenancy and the legislative measures that were introduced to regulate this sphere (paras 29-31).

<sup>2</sup>Maass "Rent Control: A Comparative Analysis" 2012*PER* 41 provides an outline of the measures in different countries. What is clear from her discussion is that the notion of regulating landlord-tenant relationship is an international phenomenon.

<sup>3</sup>For instance, the Rental Control Act 80 of 1976 introduced the Rent Boards which regulated rental amounts charged by the landlord thereby inhibiting the landlord's right to determine the amount to charge for his or her property.

<sup>4</sup>*Maphango v Aengus*, para 29.

<sup>5</sup>S 1 of PIE defines "evict" as "to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and 'eviction' has a corresponding meaning."

could be either by virtue of its fixed lifespan having expired or through termination. Eviction, however, is one of the most drastic steps that can be taken against any person and, for that reason, it is understandable that only a court can order an eviction. Thus, it is not surprising that the South African Constitution<sup>6</sup> pronounces itself definitively on the issue of eviction outside the court processes and even goes further by ensuring that even the court does not have a free hand as it is only after considering the circumstances of the case that it can grant such an eviction application. S 26(3) peremptorily states:

“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.”

Mohamed<sup>7</sup> describes the impact of the legislative measures, in particular the Rental Housing Act,<sup>8</sup> thus:

“For the first time tenants living in outbuildings, backyard shacks or renting any type of residential dwelling will be able to challenge unscrupulous actions. Approximately 10 million people living in rented dwellings countrywide have recourse, theoretically at least, to the RHTs to have their disputes resolved. No longer can a landlord/landlady disconnect water or electricity illegally or lockout a tenant without being challenged. Landlord/landlady can also take action against tenants who overcrowd, refuse to vacate the dwelling after the lease has expired or tenants who breach their lease contract (e.g., non-payment or late payment of rentals).”

Mohamed’s take should be seen in the context of South Africa’s legal history which allowed eviction of unlawful occupiers with ease and offered them no protection. This has changed dramatically. In 1998, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)<sup>9</sup> was introduced as a measure to protect unlawful occupiers by, among others, prohibiting and criminalising<sup>10</sup> unlawful eviction. PIE also laid down procedures that need to be followed in order for an eviction to be effected. S 6 of PIE outlines the consideration that the court has to take into account in making its decision where the landlord is an organ of state, while s4 thereof does the same in a situation where the landlord is not an organ of state. Therefore, there is a distinction between public housing rentals and private housing ones<sup>11</sup> for

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<sup>6</sup>Constitution of the Republic of South Africa, 1996 (hereafter “the Constitution”).

<sup>7</sup>Mohamed *Tenant and Landlord* (2010) 2.

<sup>8</sup>50 of 1999.

<sup>9</sup>19 of 1998 (hereafter “PIE”).

<sup>10</sup>S8(3) of PIE.

<sup>11</sup>Public housing rentals refer to the type of tenancy where the landlord is an organ of state and the accommodation is provided as part of government’s measures to provide accommodation. This distinguishes it from private rental housing where the landlord is a private person or entity. This distinction is significant because PIE prescribes different responsibilities for the different types of land owners when dealing with evictions. S 4 of PIE applies to private landowners while s 6 applies where the landowner is an organ of state.

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the purposes of the application of PIE. In both instances, however, it is required that the eviction should be assessed on the basis of whether it would be just and equitable.<sup>12</sup>

PIE applies to unlawful occupiers who can be divided into two categories. The first category refers to people who occupy someone else's property without any legal title to such property. This usually takes place in the form of people occupying a vacant land, building structures or houses and using them for residential purposes. A recent case in Lwandle in the Western Cape Province is an example of this category of unlawful occupiers. They occupied land belonging to the South African National Roads Agency, better known by its acronym SANRAL, in June 2014.<sup>13</sup> This category of unlawful occupiers has, generally, been seen as the ones PIE was primarily and unquestionably<sup>14</sup> aimed at protecting. Before the enactment of PIE, an unlawful occupation of this nature was forbidden by the Prevention of Illegal Squatting Act<sup>15</sup> (PISA) which PIE replaced. Where PISA criminalised unlawful occupation of land, PIE not only decriminalised it but did the converse by criminalising unlawful eviction. In this regard, Pienaar<sup>16</sup> observed: "The new dispensation introduced an *inverted* position: unlawful occupation would no longer be criminalized per se, while unlawful *eviction* constituted an offence."

The second category of unlawful occupiers refers to people who, at one stage or another, had lawful title to occupy the property but that right no longer exists. There are two examples of this category of unlawful occupiers. The first example includes someone who initially occupied the property on the basis of a lease agreement but that lease agreement has come to an end. It could be, for instance, through termination by the landlord. The other example would be someone whose house has been repossessed by the bank and then sold to another owner. This second category of unlawful occupiers, which is those who had a lawful title to occupy the property at some stage, is the ones who — for some time — created uncertainty when it comes to eviction. It was not immediately clear that PIE applied to their eviction and it took two judgments by the Supreme Court of Appeal and many other cases in the high

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<sup>12</sup>Both ss 4 and 6 of PIE require that the court has to consider all the relevant factors to determine whether it is just and equitable to order eviction.

<sup>13</sup>For a description of the eviction, see Merten "Lwandle evictions illegal, says inquiry" <http://www.iol.co.za/news/politics/lwandle-evictions-illegal-says-inquiry-1.1770224> (last accessed on 29-10-2014).

<sup>14</sup>This is clear from the dissenting judgment in *Ndlovu v Ngcobo, Bekker v Jika* 2003(1) SA 113 (SCA) which held that PIE was not applicable to tenants and mortgagors.

<sup>15</sup>52 of 1951 (hereafter "PISA").

<sup>16</sup>Pienaar *Land Reform* (2014) 667.

court before some certainty was established.<sup>17</sup> There is now certainty that PIE applies to all categories of unlawful occupiers.

This article focuses on eviction as it applies in the field of rental housing. This is informed by the fact that rental housing is a prevalent phenomenon in South Africa, just as in many other countries, and there have been legislative measures introduced with a specific focus on regulating the landlord-tenant relationship. The key legislation in this regard is the Rental Housing Act which, among others, clearly forbids eviction in any other way but with an order of court. The article grapples with the issue of resonance between the Rental Housing Act and PIE against the backdrop of the intended purpose of the Rental Housing Act being to swiftly regulate landlord-tenant relationships. It starts from the premise that there is undeniable tension between the spirit of the Rental Housing Act and PIE, which tension has to be assessed and mitigated with the Constitution as the arbiter because the two pieces of legislation equally claim their origin from and allegiance to the Constitution.

To this end, the article starts by introducing and discussing two recent cases decided by the Constitutional Court. The first is *Maphango v Aengus Lifestyle Properties (Pty) Ltd*<sup>18</sup> and *Malan v City of Cape Town*.<sup>19</sup> These cases represent the two sides of the contested rights terrain in that in *Maphango v Aengus* the landlord was unsuccessful in obtaining an eviction order, while in *Malan v City of Cape Town* the landlord succeeded in obtaining an eviction order. It is as significant a fact that both cases were heard by the Constitutional Court as is that they also represented two types of landlords. The landlord in *Maphango v Aengus* was a private company while the one in *Malan* was an organ of state. It is submitted that comparing and contrasting these two decisions will better show the nature of the conflict of rights that exists in the rental housing industry. After presenting and analysing the two cases, focus turns to the available rental housing legislation with a view to assessing its suitability and adequacy to achieve its stated aim, namely the regulation of landlord-tenant relationships in a balanced way.

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<sup>17</sup>*Brisley v Drotzky* 2002 (4) SA 1 (SCA) and *Ndlovu v Ngcobo, Bekker v Jika* above.

<sup>18</sup>2012 (3) SA 5.

<sup>19</sup>[2014] ZACC 25.

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## 1 1 *Maphango v Aengus Lifestyle Properties (Pty) Ltd*

The applicants approached the Constitutional Court appealing against a judgment of the Supreme Court of Appeal<sup>20</sup> which was a confirmation of a judgment of the South Gauteng High Court by dismissing the applicants' appeal.<sup>21</sup> In dispute was a termination of a lease agreement. The applicants<sup>22</sup> were tenants who had been staying in a residential property of the respondent. The facts that gave rise to the case, and were common cause,<sup>23</sup> were that the respondent had terminated the lease agreements with the applicants by giving them notice which it was entitled to do in terms of their lease agreements. The respondent did this because the original agreement did not allow for rent increases or at least not in the way that the respondent would have wanted to go about it. The tenants resisted this move and refused to accept the new lease agreements. Consequent to this, the respondent served them with termination notices, then terminated the lease agreements, and later instituted eviction proceedings. At the time the respondent applied for eviction, the applicants had already reported the matter to the Rental Housing Tribunal.<sup>24</sup>

The South Gauteng High Court granted the eviction order against the applicants and the applicants appealed to the Supreme Court of Appeal where they were unsuccessful, hence they ended up in the Constitutional Court. The issue before court was coined thus: "The narrow question in this case is when a landlord may cancel a lease and evict its tenants. Behind this lies the impact of the protection the Constitution affords against eviction."<sup>25</sup>

In deciding the case, the court spent a considerable amount of time explaining the necessity and justification of the legislative and policy framework approach that was followed in the

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<sup>20</sup>*Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011(5) SA 19 (SCA).

<sup>21</sup>*Aengus Lifestyle Properties (Pty) Ltd v Maphango* Case No 22346/09, 7 May 2010, unreported.

<sup>22</sup>There were fifteen applicants in the case (para 6 of the Constitutional Court judgment) even though the case had started with nineteen tenants in the South Gauteng High Court. Two tenants' leases had not been properly terminated, hence there was no need for them to be part of the appeal and one had died. As it will be argued later that court proceedings often take too long and this frustrates the purported purpose of the legislature in enacting the Rental Housing Act, it is appropriate to highlight the fate of this particular tenant who died while the case was still in progress.

<sup>23</sup>Cameron J deals with the background of the case in paras 6-28. It is clear that there was no dispute of fact between the parties but only the legal question which the court phrased thus: "The critical question is whether the landlord was lawfully entitled to exercise the bare power of termination in the leases solely to secure higher rents" (para 29).

<sup>24</sup>The Rental Housing Tribunal (hereafter "the Tribunal") was introduced by the Rental Housing Act (s 7) and they have been established in all the nine provinces of South Africa. Although there is a Tribunal in each province, making the number nine, this article uses the word in the singular in line with its use in the legislation.

<sup>25</sup>Para 1.

rental housing sector.<sup>26</sup> Importantly, for the purposes of this article, the court explained the importance of the Rental Housing Tribunal. After making a number of important observations, which will be incorporated in the discussion later, the court referred the matter back to the Rental Housing Tribunal for further attention. It was for the Tribunal, according to the court, to decide whether the conduct of the landlord, to wit terminating the lease agreements for the sole purpose of allowing it to increase rent, constituted unfair practice within the scope of the Rental Housing Act.<sup>27</sup>

### **1 2 Malan v City of Cape Town Case**

The applicant, the tenant, approached the Constitutional Court to appeal against an eviction order granted by the Western Cape High Court.<sup>28</sup> She had been refused leave to appeal by that court and, later, by the Supreme Court of Appeal. This case emanated from a lease agreement between the City of Cape Town and Ms Malan who had been occupying the property since 1979. Her eviction followed the termination of the lease agreement by the respondent based on her breach of the lease agreement. According to the respondent, the applicant had breached the agreement by allowing or not stopping illegal activities that took place on the rental property and by defaulting on her rent payments. Further, and in the event of the court finding that the applicant had not breached the agreement, the respondent still stood by the termination of the lease agreement on the basis of a clause in the agreement to the effect that termination could take place with one month's notice. This last point was abandoned in the Constitutional Court where the respondent conceded the unconstitutionality of the clause.<sup>29</sup>

The court dismissed the appeal because it found that the applicant had breached the lease agreement in the manner argued by the respondent and the eviction was just and equitable in line with the requirements for a number of reasons including the important fact that the respondent had availed alternative accommodation to the applicant. The judgment grappled

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<sup>26</sup>In paras 29-51, the judgment introduces the Rental Housing Act, explains its import and contextualises it in both history in the sector and the justifiability of a measure of this nature before unequivocally endorsing the jurisdiction of the Rental Housing Tribunal to hear the matter.

<sup>27</sup>Para 67.

<sup>28</sup>*City of Cape Town v Malan* 2013 JDR 0838 (WCC).

<sup>29</sup>In this regard the judgment stated: "The City relied on this clause in terminating the agreement. But, in argument, the City correctly conceded that it could not properly terminate on the basis of the power in clause 2 alone. The City thus accepted that to terminate a lease agreement in public rental housing on one month's notice would be oppressive and unconstitutional on the second leg of the test for contractual validity in *Barkhuizen*" (para 62).

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with both procedural and substantive issues — often with the inevitable conflation of the two. There were basically two broad issues before court: Whether the applicant breached the lease agreement thereby justifying its termination, and whether the eviction of the applicant was just and equitable. In order to decide these two issues, the court had to consider the circumstances surrounding the conduct of the parties as well as the effect of an eviction order on such an elderly woman as the appellant was 74 years old.

Regarding the termination of the lease agreement by the respondent, the court found that it was justified because the respondent had proved that there were illegal activities on the applicant's premises despite her denial of the knowledge thereof. The court, as did the court *aquo*, rejected her version that she was not aware of the illegal activities. It was also accepted by the court that the applicant was in breach of her agreement regarding rent payments which point she conceded and only queried the amount. Consequently, the court found that the applicant had breached the agreement.

What followed was an inquiry into whether eviction, as granted by the Western Cape High Court, was just and equitable in line with the provisions of PIE. A number of factors were considered, including the happenings that justified the cancellation of the lease agreement. As a matter of fact, the termination and the justifiability of the eviction seemed so intertwined that the former justified the latter. The reasoning of the judgment makes it abundantly clear that had the conduct of the applicant not been what it was, the termination would have been found to be wrongful.

### 1 3 Overview of the Two Cases

In both cases the Constitutional Court affirmed the application of PIE to the rental housing evictions. It also emphasised the importance of the constitutional protection of the tenants' right of access to adequate housing. They also highlighted the need for the striking of a balance between the rights of the landlord and those of the tenant. In *Maphango v Aengus*, it was made clear that there was a need for a determination whether termination of an agreement for the sole purpose of enabling the landlord to increase rent was permissible in law. The court found that determination could be better made by the Rental Housing Tribunal, and the high court had erred in granting the eviction order while the matter was still

before the Rental Housing Tribunal.<sup>30</sup> Put differently, the court did not answer the question of whether termination of the lease agreement by the respondent for the sole purpose of increasing rent was permissible in law, thus leaving it to the Rental Housing Tribunal to assess the case and determine whether such practice constituted unfair practice as defined by the Rental Housing Act.

In *Malan v City of Cape Town*, the court found the respondent had satisfied the requirement of the eviction having to be “just and equitable” and therefore being entitled to the eviction of the applicant. It is significant that the respondent had provided alternative accommodation to the applicant and she therefore would not be rendered homeless by the eviction. It is almost a certainty that in the absence of this alternative dwelling for the respondent, the court would have found differently.

In both cases, the court affirmed the landlord’s right to terminate a lease agreement and the concomitant right to evict the unlawful occupier. Thus, the common law position has not changed in that regard. What has changed, however, is the manner in which such a right to evict a tenant is exercised. The court goes beyond the right to evict after the lawful termination of the lease agreement by inquiring into whether the eviction is just and equitable. In some situations, the court may just postpone the eviction dependent on some other process such as the tenant who would otherwise be rendered homeless obtaining alternative accommodation.

## **2 RENTAL HOUSING ACT AND ITS APPROACH TO EVICTION**

The Rental Housing legislation has made it clear that eviction applications fall outside the jurisdiction of the Rental Housing Tribunal. The Rental Housing Act did this by omitting eviction from the list of the Tribunal’s competencies. S 6(d) of the Rental Housing Amendment Act<sup>31</sup> solidified this by inserting a specific exclusion clause that reads: “The Tribunal does not have jurisdiction to hear applications for eviction orders.” It follows, therefore, that a landlord who seeks to evict a tenant has to approach the court for relief. He or she has to comply with the stringent procedural requirements that are imposed by PIE.

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<sup>30</sup>There was some uncertainty as to whether the matter was still properly before the Rental Housing Tribunal at the time the high court granted the eviction order because the applicants had withdrawn the matter from the Rental Housing Tribunal after the eviction proceedings started with their reason being to concentrate on the eviction proceedings in the high court (para 17), but the court found that they never abandoned their complaint lodged at the Tribunal (para 46).

<sup>31</sup>43 of 2007.

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For a few years after the enactment of the current legislative measures dealing with rental housing, there was uncertainty as to whether PIE applied to rental housing. This uncertainty originated from the fact that the context of PIE was that of protecting unlawful occupiers in the form of the people who unlawfully occupy land such as squatters. Before the introduction of PIE, PISA applied and it criminalised squatting and also made eviction of squatters a lot easier. With the introduction of the Constitution, it became imperative that the right of access to housing, as contained in s 26 thereof,<sup>32</sup> be given effect to.

The question that confronted the courts and was not clear from legislation was whether PIE covered tenants and hold-overs.<sup>33</sup> This refers to a situation where someone was in lawful occupation of property but his or her legal title to occupy came to an end. Examples are where a property has been sold to new owners as a result of the lawful occupier not being able to make his or her bond payments to the bank in respect of a mortgage,<sup>34</sup> or a tenant having defaulted on his or her payment with the result that, on the basis of his or her breach of the lease agreement, the contract has been terminated.<sup>35</sup> The initial approach of the courts was that of excluding both these situations from the application of PIE with the result that in the absence of the procedural requirements contained in PIE, the common law rules would apply to any eviction proceedings. The example of the earlier approach of the courts is the case of *Brisley v Drotsky*<sup>36</sup> where PIE and its procedural requirements did not come into play even though the case involved eviction of a female single parent with a child.<sup>37</sup>

The same court, the Supreme Court Appeal, and in the same year<sup>38</sup> came to a different conclusion by a majority of three to two judges in *Ndlovu v Ngcobo, Bekker v Jika*.<sup>39</sup> One of the most important arguments placed before the court was that it was absurd for the law to

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<sup>32</sup>S 26(1) states: "Everyone has the right to have access to adequate housing." Ss 26 (2) and (3) take this provision further by, respectively, placing an obligation on the state to implement progressive measures to fulfil this right and forbid arbitrary eviction.

<sup>33</sup> The judgment in *Brisley v Drotsky*(para 26) lists the many cases that have been dealt with by the different divisions of the high court with varied outcomes.

<sup>34</sup>This was the case in *Bekker v Jika* where the owner of a house failed to pay the bank resulting in the property being sold in execution but then refused to vacate it when the new owner wanted to occupy it (para 1 of *Ndlovu v Ngcobo, Bekker v Jika*).

<sup>35</sup>In *Ndlovu v Ngcobo*, the lease agreement had been terminated but the tenant refused to move out of the rented property (para 1 of *Ndlovu v Ngcobo, Bekker v Jika*).

<sup>36</sup>*Brisley v Drotsky*.

<sup>37</sup>See Pienaar 689 for a succinct exposition of the issues before court in that case.

<sup>38</sup> The judgment in *Brisley v Drotsky*was delivered on 28 March 2002 and that in *Ndlovu v Ngcobo, Bekker v Jika*30 August 2002.

<sup>39</sup>*Ndlovu v Ngcobo, Bekker v Jika*.

give more rights to an occupier who acted unlawfully from the beginning and not afford any of the protections to another occupier who once had lawful occupation. This case dealt with two types of unlawful occupiers. In *Ndlovu v Ngcobo*, the occupier's lease agreement had ended but was refusing to leave the rental property, while in *Bekker v Jika* the occupier was refusing to vacate the property after it had been sold resultant of failure to service the mortgage. The court held that PIE was applicable to rental lease agreements.<sup>40</sup> It is important that the Constitutional Court, in *Malan v City of Cape Town*,<sup>41</sup> moved from a premise that accepted it as a given that PIE is applicable to rental housing evictions. It is clear that a non-compliance with the provisions of PIE by the landlord would have led to the court upholding the appeal by the tenant. The landlord would have been found non-compliant with the provisions of PIE and the eviction would not have qualified as just and equitable. What makes it an interesting development is that even as the highest court in the land was endorsing PIE's applicability to rental housing related evictions, moves were still afoot on the part of the other arms of government to clarify the intention of the PIE as to exclude tenants. The scene now seems set for a cogent challenge to any legislation should the Bill excluding tenants and mortgagors from the provisions of PIE be passed. The courts have already disclosed their take on the constitutionality of a law that would deprive the vulnerable from protection through procedural safeguards in the event of eviction. Moreover, it is submitted, there does not seem to be any compelling reason that would justify the non-applicability of PIE to lawful occupiers beyond just that the legislature never intended it for that purpose when introducing PIE.

This is particularly so because in this case the landlord, the City of Cape Town, was an organ of state with the resultant obligations prescribed by s 6 of PIE. Majiedt AJ observed that given the fact that the landlord was an organ of state, the eviction order should have been granted in terms of the provisions of s 6 of PIE instead of s 4 as the high court had done but hastened to point out that in such a procedural error "nothing turns on this".<sup>42</sup>

Evictions, however, remain a key area of dispute in rental housing matters. Eviction, arguably, is the most potent measure available to a landlord in dealing with a problematic

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<sup>40</sup>However, Nienaber JA's dissenting judgment lined with the judgment in *Brisley v Drotsky*, the essence of which was that PIE was intended and should be restricted to the protection on unlawfully occupiers in situations where the occupation was unlawful from the beginning such as squatters.

<sup>41</sup>[2014] ZACC 25.

<sup>42</sup>Para 83.

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tenant. This could be a tenant who, for example, withholds rental payments or causes damage to the rental property. While the decision in *Ndlovu v Ngcobo, Bekker v Jika* brought about legal certainty regarding the applicability of PIE to rental housing related evictions, there is still a lot of discomfort regarding the fairness and justness of this approach. One of the most stinging appraisals of this approach though not directed specifically to rental housing but the application of PIE generally comes from Andre Walters who wrote:

“Perhaps it is time to once again challenge the constitutionality of the discretion contained in s 4(6) and s 4(7) of PIE, but this time ask the judges to ask themselves the question: ‘What if this was your hard-earned property?’”<sup>43</sup>

Walters’ assessment should be seen in the context of a tenant taking advantage of the procedural protections contained in PIE to the unfair disadvantage of the landlord. There are always competing interests between landlords and tenants. The tenant’s asset is his or her rental money while the landlord’s is the property which is basically the core of the rental agreement. The landlord provides the tenant with the use of the rental property and the tenant in turn pays rent in a specified amount. Obviously, a tenant who does not pay the agreed amount on the agreed date or at all, for instance, breaches the agreement. It follows that the landlord is then entitled to act on that breach by terminating the agreement. Until this stage, there are not any real problems. The problems emerge when the landlord seeks to get his or her property back. How does the landlord get the tenant out of the property? This is where the tension comes in because before PIE was made applicable to the rental housing sector, the process was relatively simple. The breach was sufficient and, by the use of the procedures laid by the Magistrate’s Court Act,<sup>44</sup> the landlord could not only evict the tenant but could also attach his or her property until outstanding arrear rental had been paid.<sup>45</sup> It was, basically, not a consideration whether the tenant had alternative accommodation or not.

Incidentally, it is this relative ease with which evictions could be effected in the past that led to the introduction of legislative measures that sought to protect unlawful occupiers. It would be none of the law’s concern whether some members of the evicted family belong to the vulnerable groups or not in the same way as it would be of no legal consequence that the eviction may render them homeless. That is what earned the pre-1994 South African era the

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<sup>43</sup>Walters “A balancing act between owners and occupants: Is PIE unconstitutional?” <http://www.saflii.org/za/journals/DEREBUS/2013/146.pdf> (last accessed 28-10-2014).

<sup>44</sup>32 of 1944.

<sup>45</sup> S 31 of the Magistrate’s Court Act provides for a summons with automatic rent interdict.

stigma of brutality—its sheer insensitivity to human suffering and allegiance to the letter of the law.

This underscores a crucial point in the rental housing sector, namely the due process and the length in time that it takes. As things are, especially after PIE was made applicable to the rental housing sector, it takes a long period of time to get the eviction process going owing to factors such as lengthy court rolls. This also raises the question of whether this state of affairs does not negate the spirit and purpose of the rental housing legislation. The overall purpose of the legislative intervention is to protect both the landlord and the tenant in a fair and equitable manner. To that end, the Rental Housing Tribunal was introduced but it is not empowered to deal with eviction applications as will be discussed below. It is, however, empowered to deal with spoliation and attachment orders.<sup>46</sup> This, it is submitted, is some measure of protection to the landlord who fears the tenant disappearing with, for instance, arrear rental. The landlord can approach the Tribunal for an attachment order which may enable such landlord to seize the belongings of the tenant pending the payment of the outstanding rental.

### **3 THE TRIBUNAL'S LACK OF JURISDICTION IN EVICTION MATTERS**

The rental housing legislation from its inception in 2000<sup>47</sup> sought to, among others, introduce speedy and affordable dispute resolution mechanisms in the rental housing sector. The aim was to provide mechanisms that would enable the landlord and the tenant to have their disputes dealt with swiftly and at minimal or no costs, and instrumental to this process is the Tribunal introduced in terms of the Rental Housing Act<sup>48</sup> and later given more powers by the Rental Housing Amendment Act.<sup>49</sup> The legislation, however, shied from including the jurisdiction to deal with eviction applications on the Tribunal. There are a number of convincing reasons why this approach makes sense under the circumstances. The reasons include the fact that the Tribunal is not a court and is not sufficiently equipped to take such

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<sup>46</sup>S 6(c) of the Rental Housing Amendment Act 43 of 2007.

<sup>47</sup>The Rental Housing Act was first enacted in 2000. It was then amended in 2007 and since then there have been a number of attempts to further amend it through Bills B21-201, B56- 2013 and B56D-2013, principally, to deal with a number of what the drafters call “implementation problems” in the respective memoranda to the Bills.

<sup>48</sup>50 of 1999.

<sup>49</sup>43 of 2007.

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responsibility.<sup>50</sup> Were the Tribunal given the authority to hear eviction applications, these would be arbitrary evictions in contravention of the Constitution.<sup>51</sup>

It is noteworthy that some members of the Tribunal are said to have requested that the powers of the Tribunal be extended to include hearing eviction applications.<sup>52</sup> Equally, research conducted by Urban Landmark found that some landlords engage in illegal evictions either directly or constructively in the form of locking tenants out of the rented property.<sup>53</sup> The research report asserts:

“We found that there are **more lease cancellations than evictions**, with people leaving voluntarily, as well as illegal evictions in the form of ‘**constructive evictions**’ (lock-outs and services cut-offs) that are being used by landlords to get non-paying tenants out of properties, rather than following legal process. This was corroborated by the Chairperson of the Gauteng Rental Housing Tribunal, who stated that cutting electricity and lockouts were a common occurrence and these forms of ‘constructive eviction’ worked most of the time to get non-paying tenants out of properties, however illegal it is.”

The reality that the Tribunal often faces cases where eviction would be in order and is justified by the circumstances, and the related one manifesting in landlords conducting illegal evictions point to a delink between the *de jure* regulation of the rental housing sector and the *de facto* one. What is contained in the legislation and the regulations does not necessarily cascade down to the day-to-day realities in the rental housing industry. It does not help matters that there is not adequate enforcement of the law where a landlord engages in the illegal conduct, namely eviction despite both PIE<sup>54</sup> and the Rental Housing Act prohibiting this conduct.

The question that begs answering is whether it is feasible and perhaps desirable to re-evaluate eviction in the rental housing industry given that the current measures do not seem to be adequate towards the fulfilment of the core purpose of all the legislative measures introduced in this sector thus far; that purpose is to protect the vulnerable, usually if controversially the tenant, against the powerful exploitative landlord. Is the Tribunal, in the absence of authority

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<sup>50</sup>Mohamed “Rental Housing Tribunals and Evictions: *Will the Tribunals have jurisdiction regarding evictions?*” [http://www.ocr.org.za/property\\_law/Rental%20Housing%20Tribunals%20and%20Evictions.pdf](http://www.ocr.org.za/property_law/Rental%20Housing%20Tribunals%20and%20Evictions.pdf) (last accessed 26-10-2014).

<sup>51</sup>In particular s 26(3).

<sup>52</sup>See Mohamed above in that regard.

<sup>53</sup>Urban Landmark “An Investigation Into an Apparent Increase in Evictions From Private Rental Housing” (2010) 5.

<sup>54</sup>S 8 (3) of PIE makes this conduct an offence.

to hear eviction applications, well-positioned and adequately equipped to protect the landlord being harassed by a tenant or *vice versa*? The answer, at present, has to be in the negative.

This, it should be noted, also questions the rationale of the placing of the Tribunal's decisions on par with those of a magistrate's court.<sup>55</sup> Given the limitations of the Tribunal in terms of skills and capacity, was it a wise move to introduce a different system for rental housing issues instead of incorporating it into the existing court structure? Would it not have made it a lot easier had dedicated courts been introduced to focus on rental housing issues? These are important questions that need to be interrogated albeit perhaps too late in the day given that the legislation has been in place for over a decade now. Perhaps the most prudent approach at this stage is to capacitate the Tribunal and give it authority to deal with eviction applications.

#### 4      **PIE AND ITS IMPLICATIONS**

Evictions largely form an integral part of the rental housing sector because it is the only remedy the landlord has when faced with a troublesome tenant who refuses to vacate the rental property after termination of the lease agreement. That such a power has to be tightly controlled given that, as Majiedt AJ aptly described it, “the parties enter into these lease agreements on the basis of vastly disparate bargaining powers”<sup>56</sup> between landlords and tenants is not in question. The issue, it is submitted, is how best to control this power without unnecessarily burdening the landlord further while affording the tenant the necessary protection. *Malan v City of Cape Town* amply demonstrates how a landlord that is powerful and well-resourced can find it difficult to terminate its relationship with a tenant who breached the terms of the lease agreement. It is uncontested that the duty of the landlord to prove breach is the same for both a landlord who is an organ of state as for a private landlord and that duty is derived from common law. Therefore, in line with this submission, if in the *Malan v City of Cape Town* case the landlord had been a private person, he or she would still have had to prove that the tenant breached the lease agreement. The resources<sup>57</sup> used by the

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<sup>55</sup> S 13(13) provides: “A ruling by the Tribunal is deemed to be an order of a magistrate's court in terms of the Magistrates' Court Act 1944 (Act No. 32 of 1944).”

<sup>56</sup> Para 60.

<sup>57</sup> These resources enabled the landlord to have a record (from the tenant file) containing its dealings with the tenant despite the tenant having entered into the agreement with the landlord in 1982 after she had moved into the rental property in 1979 on the basis of the landlord's lease agreement with her late husband. Further, the landlord conducted what are referred to as “extensive consultations” (para 74) with police officials and attached affidavits to the court application. It is significant that such access to resources of this nature is not ordinarily available to every landlord. It is expected of this landlord being a state organ but at the principle level this duty

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City of Cape Town just to prove this point in order to justify the right to terminate even before moving to deal with the eviction application show that many a landlord would have been found wanting in this respect. That is just the first part of the process of terminating a lease agreement on the part of the landlord.

The second part is that of instituting the eviction proceedings themselves. It now being certain that PIE applies to rental housing lease agreements, it follows that a landlord seeking to evict a tenant faces a mammoth task. Firstly, only a court has jurisdiction to deal with eviction applications. Such a landlord would have to approach either the magistrate's court or the high court which is a cumbersome and expensive process. Secondly, the court process takes long to complete, as the two cases dealt with above demonstrate. The *Maphango v Aengus* case started in September 2008 when the tenants were served with termination notices and was finalised by the Constitutional Court on 13 March 2012 giving the tenants a considerable reprieve.<sup>58</sup> The *Malan v City of Cape Town* case started in November 2008 when she was served with the landlord's letter cancelling the lease agreement. It was decided by the Constitutional Court in September 2014.<sup>59</sup> This long period of time that it takes for a dispute to be resolved raises the question: What is the landlord supposed to be doing while the case is still making its way through the court system? Should the tenant then be left on the rental property while the court processes are unfolding? This seems to be the correct legal position but it may also be an inherently unjust one.<sup>60</sup> Take, for instance, someone who sells her property that she uses for residential purposes and uses that money to pay for a new and better dwelling. After paying the owner of the property she is purchasing and having the property transferred into her name, the tenants of the former owner refuse to move out. She has no option but to institute eviction proceedings but that necessarily requires her compliance with the provisions of PIE.

The converse of this story is that of a tenant who has nowhere else to live and learns that the property he is renting has just been bought by a new owner who would like to move in.

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would extend to a private landlord because when it comes to breach, it is submitted, there is not much of a differentiation between private and public housing rentals.

<sup>58</sup>*Maphango v Aengus* (paras 12 & 13). It therefore took over three years for the landlord and the tenants to get legal certainty in the matter.

<sup>59</sup>*Malan v City of Cape Town*. Para 7 of the judgment details the timeline in the dispute between the parties. It took the parties over six years to get justice in the matter.

<sup>60</sup>This is the point Walters, above, is making in questioning the constitutionality of s 4 of PIE. He uses an example of someone who owns a holiday home and forgets to lock it and homeless people occupy it. When the owner discovers this, that owner has to follow the PIE process.

Should this tenant be thrown out because his contract was with the former owner and, for argument's sake, there was a stipulation in the lease agreement that the contract terminates on sale and transfer of property? Bar mercy and indulgence which are wholly dependent on the calibre of the new owner and, of course, his own circumstances, would this particular tenant be without protection if PIE were not applicable to the rental housing lease agreements? It certainly does seem so especially if one sees this from the perspective of the dissenting judgment in the *Maphango v Aengus*.

Taking this conflict of rights and need for protection from the purely hypothetical, a story reported by the Sunday World newspaper of 29 October is apt.<sup>61</sup> In this story, a person bought a house in Soweto in an auction. However, when he went to the property the former owners were still occupying the property. He offered that they could rent from him as he did not need the property for his accommodation. A dispute ensued as, according to him, the former owners did not want to vacate the property. Then suppose this particular new owner needed the property for his family's accommodation – see how difficult the situation can be. This is not to say economic interests are not important as in this case the new owner was simply doing business.

The above scenarios sought to illustrate the urgency so often prevalent in landlord-tenant relationships such that it is not an exaggeration that there may be a need for the rights to be determined immediately lest those involved may be pushed in the direction of taking the law into their own hands.<sup>62</sup> It is true —and this is demonstrated by a number of anecdotal evidence — that an owner (whether landlord or one who needs the residence for his or her own accommodation needs) may find it a better option to illegally evict the occupiers and then deal with the legal consequences. Sadly, in that situation and that is presuming she succeeds, it would be the unlawful occupier who would be pursuing justice through the legal process. It is this friction that the Rental Housing Act sought to deal with through the mechanisms it introduced. However, the situation remains dire and outside the reach of that legislation and its mechanisms.

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<sup>61</sup>Malatji “Khanyi Mbau's dad naked terror”

<http://www.sundayworld.co.za/news/2014/10/29/khanyi-mbau-s-dad-naked-terror> (last accessed 30-10-2014)

<sup>62</sup>The study by Urban Landmark referred to above shows that the length of time it takes to comply with the process laid down by PIE in the rental housing sector accounts for many of the illegal evictions that take place.

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### 5 CONCLUDING REMARKS

The application of PIE to rental housing remains a controversial issue and it was certainly not the intention of the legislature to cover rental housing when the legislation was formulated. Even after the Supreme Court of Appeal judgment that extended the application of PIE to rental housing, the reaction of the executive — the arm of government that drafted the Act in the first place — embarked on measures to clarify the intention of the legislature as it were. The Department of Housing introduced a Bill in 2006<sup>63</sup> and then another one in 2008.<sup>64</sup> The aim as discussed was to do away with the confusion regarding the application of PIE to persons who did not unlawfully invade land or dwelling. The memorandum to the 2008 Bill states:

“It was not the intention that the Act should apply to tenants and mortgagors who default in terms of their prior agreements with landlords and financial institutions, respectively. The Act should cover only those persons who unlawfully invade land without the prior consent of the landowner or person in charge of land.”<sup>65</sup>

These measures, it is submitted, made it clear that PIE was not introduced with the rental housing sector in mind. It is noteworthy, however, that while the 2006 Bill sought to include tenants in the list of those excluded from the application of PIE, the 2008 Bill did not include tenants in the category. This may be some concession that the interpretation of PIE by the courts has won the day and the executive and the legislature, at least for now, are not pursuing the exclusion of tenants from the application of PIE.

With PIE and its process having been confirmed as applicable to protect tenants against eviction, the next issue that calls for consideration is the role of the Rental Housing Tribunal. The Constitutional Court in *Maphango v Aengus* endorsed the Tribunal authority to deal with termination of rental housing agreements. While it is true that eviction applications fall outside the scope of the Tribunal, it is also a fact that evictions usually follow termination of the lease agreement. It is, therefore, submitted that by virtue of the Tribunal having the authority to determine whether a termination constitutes unfair practice, many eviction cases would end up with the Tribunal disguised. It is also a sensible argument that eviction is covered under the Rental Housing Act as a form of unfair practice, and therefore the Tribunal

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<sup>63</sup>Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill (GG 29501 B—2006 of 22 December 2006).

<sup>64</sup>Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill (GG 30458 B8—2008 of 16 November 2007).

<sup>65</sup>Point 2.2 of the memorandum.

lacks only the authority to hear an application to evict a tenant but it has a right to stop an unlawful eviction by the landlord on the basis of it constituting an unfair practice. In essence, the submission is that if a landlord throws the belongings of the tenant out of the rental property, that landlord is evicting the tenant by mere engagement in that act. The tenant, in that case, can approach the Tribunal with a complaint that the landlord is engaging in an unfair practice and the Tribunal cannot refuse to deal with the matter because it lacks jurisdiction to deal with evictions.<sup>66</sup>

While the authority of the Tribunal is a significant one, it remains questionable whether the Tribunal is well capacitated to rise up to the task. There is a general consensus that the Tribunal is not well-equipped to deal with the rental housing issues optimally.<sup>67</sup> Therefore, for the tenant the issue becomes whether there are mechanisms in place within rental housing legislative and regulatory framework to give effect to the rights protected by the Constitution and clarified by the courts. At this stage, it seems, the answer should be in the negative. That said, the protection afforded the tenant by the judgments has to be lauded as is the balancing act that the courts emphasised in protecting the landlord as well as demonstrated in *Malan v City of Cape Town*.

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<sup>66</sup>S 6(d) states: “The Tribunal does not have jurisdiction to hear applications for eviction orders.”

<sup>67</sup>See Mohamed above in this regard.