

**A Submission to the Director General
National Department of Housing
Attention: Mr. R Thatcher**

on

**The Prevention of Illegal Eviction from and Unlawful Occupation of
Land Amendment Bill, 2006**

by

**The Socio-Economic Rights Project of the Community Law Centre
University of the Western Cape**



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I. INTRODUCTION

1. The Community Law Centre (the Centre) at the University of the Western Cape is a research and educational institute working towards realising the democratic values and human rights enshrined in South Africa's Constitution. The Centre focuses on the needs and status of particularly vulnerable groups such as children, women, and people who are poor and living in poverty.
2. The Socio-Economic Rights Project of the Centre works towards contributing to the protection and promotion of socio-economic rights. The Project seeks to use socio-economic rights framework as a tool to improving the living conditions of people living in poverty generally.
3. One of the Project's areas of research is housing rights. The Project has thus engaged extensively in research on housing rights in South Africa, made submissions to Parliament in this area, and has intervened as amicus curiae in some cases on housing rights and evictions, such as, *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC); and *City of Johannesburg v Rand Properties (Pty) Ltd and Others* (currently before the Supreme Court of Appeal).
4. We welcome the opportunity to comment on the Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill, 2006 (hereinafter referred to as 'PIE Amendment Bill').
5. In the subsequent paragraphs, we set out our main concerns with the PIE Amendment Bill, including recommendations.

II. THE PIE AMENDMENT BILL

6. The PIE Amendment Bill proposes to amend the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).

Clause 3 of the PIE Amendment Bill (Amending section 2 of PIE)

7. Clause 3 of the PIE Amendment Bill proposes to narrow the ambit of PIE by excluding some unlawful occupiers from the protection of PIE, despite the fact that they are not currently protected by other legislation.

8. We are therefore concerned that clause 3 of the PIE Amendment Bill (amending section 2 of PIE) proposes to exclude the following unlawful occupiers from the protection of PIE:
 - Tenants whose tenancy has been validly terminated but continue to occupy the land in question;
 - Persons who occupied land in terms of an agreement that has been validly terminated, but continue to occupy the land in question; and
 - Persons who occupied land as its owner and continue to occupy the land despite their lost of ownership of the land.
9. The procedural and substantive protections in PIE emanated from section 26(3) of the Constitution, which protects **everyone** from arbitrary evictions without any distinction. Accordingly, we submit that ‘unlawful occupiers’ are a single group entitled to PIE protection unless they are protected under other legislation. The PIE Amendment Bill proposes to exclude some unlawful occupiers without them being protected by other legislation. Tenants or persons who occupied land in terms of any other agreement, especially those living in hostels, may find themselves in occupation of land illegally due to socio-economic conditions that render them unable to afford rents or meet their obligations under the agreements. At the time of eviction, they would be ‘people living in crisis situations, with no access to land, or roof over their heads’.
10. This exclusion is a rather arbitrary distinction and constitutes unequal protection of their right not to be evicted as afforded by section 26(3) of the Constitution, as PIE will continue to protect unlawful occupiers who unlawfully took occupation of land, while unlawful occupiers whose initial occupation was not unlawful would be denied the same protection. This would result in thousands of poor people currently occupying land unlawful losing PIE protection as a result of the procedural consequences of the proposed amendment. The proposed amendment will expose vulnerable people who are long term occupiers to eviction without due process required under PIE.
11. In *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) the Constitutional Court stated that section 26(1) of the Constitution, at the very least, places a negative obligation on the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing (para 34). The Court further stated that the right of access to adequate housing is entrenched in the Bill of Rights because we value human beings and want to ensure that they are afforded their basic human needs, and that the goal of our Constitution is that the basic needs of **all** in our society be effectively met (paras 44 & 45). Hence, in the absence of alternative

protection measures, the proposed amendment falls short of the constitutional compliance, as the PIE Amendment Bill in essence proposes to remove rights from people already benefiting from them. The PIE Amendment Bill proposes to allow the excluded persons' housing needs to be completely ignored in court proceedings for their eviction.

12. In the memorandum annexed to the PIE Amendment Bill, the Department states that the Supreme Court's decision in *Ndlovu v Ngcobo, Bekker and Another v Jika* 2003 (1) SA 113 (SCA) is not desirable. The Department further states that it was not the intention that PIE should apply to persons whose tenancy or agreement has been validly terminated but they continue to occupy the land in question.
13. The Court in the *Ndlovu* case held that PIE applies to persons who took occupation of land with the consent of the owner or person in charge, which consent was subsequently withdrawn. In arriving at this conclusion, the Court noted that PIE has some roots in the Prevention of Illegal Squatting Act 52 of 1951 (PISA) and that '*PISA did not only deal with persons (irrespective of race) who unlawfully took possession of land but it also dealt with persons (irrespective of race) whose possession was lawful but became unlawful*' (paras 12 & 14). The court stated further that:

*There is clearly a substantial class of persons whose vulnerability may well have been a concern of Parliament, especially if the intention was to invert PISA. It would appear that Schwartzman J overlooked the poor, who will always be with us, and that he failed to remind himself of the fact that the Constitution enjoins courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights, in this case s 26(3). The Bill of Rights and social or remedial legislation often confer benefits on persons for whom they are not primarily intended. The law of unintended consequences sometimes takes its toll. **There seems to be no reason in the general social and historical context of this country why the Legislature would have wished not to afford this vulnerable class the protection of PIE.** Some may deem it unfortunate that the Legislature, somewhat imperceptibly and indirectly, disposed of common law rights in promoting social rights. Others will point out that social rights do tend to impinge or impact upon common law rights, sometimes dramatically (para 16, emphasis added).*

14. While the *Ndlovu* judgment, as seen above, provides a compelling and legitimate justification for why PIE should apply to these occupiers, the Department does not provide any justification for excluding them other

than say that there has been some confusion as to the application of PIE to these categories of unlawful occupiers.

15. We submit that this exclusion will result in (poor and vulnerable) unlawful occupiers being evicted from land in an unfair manner, without any consideration given to their housing needs.
16. Clause 3 of the PIE Amendment Bill further provides that notwithstanding the above exclusion, ‘*a court may order that this Act applies if the court is satisfied that the plight of a person is of such a nature that any act or omission by the owner or person in charge of land was calculated to avoid application of this Act*’.
17. We are concerned that this provision shifts the onus to vulnerable (mostly) poor people to convince the court that PIE applies, which they in many cases do not even know PIE exists.
18. In *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC), the Constitutional Court stated the following:

It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence ... (para 18).

19. Based on the reasons outlined above, we submit that clause 3 of the PIE Amendment Bill is inconsistent with the values of the new constitutional dispensation. Section 26(3) of the Constitution affords protection to **all**. Hence, the PIE Amendment Bill intensifies denial of the right to have access to adequate housing of those excluded from the protection of PIE, despite the fact that they are not protected by other legislation.

In the absence of alternative legislation affording protection to these persons, their exclusion from the protection of PIE would amount to a failure by the government to give effect to their right of access to adequate housing and their right to dignity. Hence, a single set of criteria must be applicable in all cases of unlawful occupation irrespective of whether or not there was prior consent to occupy the land.

Clause 4 of the PIE Amendment Bill (Amending section 3 of PIE)

20. Clause 4 of the PIE Amendment Bill prohibits constructive eviction.
21. We welcome the inclusion of a definition for constructive eviction and its prohibition (criminalisation). It is a commendable addition to the PIE.
22. However, we submit that the PIE Amendment Bill should be strengthened to criminalise all ‘unlawful evictions’ and not just constructive eviction.

All unlawful evictions should be criminalised.

Clause 5 of the PIE Amendment Bill (Amending section 4 of PIE)

23. We welcome the joining of the provincial department of housing and the municipality to the list of persons to whom written notice has to be given of an intention to institute eviction proceedings. This will assist in curbing unfair practices in eviction proceedings.
24. The extension of the notice period from 14 days to two months is also welcomed.
25. We further welcome the repeal of the distinction between persons occupying land for less than six months and persons occupying land for more than six months. As the Department rightly stated in the memorandum annexed to the PIE Amendment Bill, the distinction constituted unequal protection of a person’s right not to be evicted, as afforded by section 26(3) of the Constitution.
26. It is apparent from the above that the underlying purpose of the PIE Amendment Bill is to guarantee equal protection of a person’s right not to be evicted. In contrast, the narrowing of the application of PIE proposed in clause 3 of the PIE Amendment Bill arbitrarily discriminates between occupiers who may be in the same socio-economic conditions.

The application of PIE should not be narrowed as it defeats the underlying purpose of clause 5 of the PIE Amendment Bill and PIE as a whole.

27. Furthermore, clause 5 of the PIE Amendment Bill lists a number of circumstances that ‘**must**’ be taken into account before a decision is made. We note that mediation is not listed under this section as one of the relevant circumstances that have to be considered in granting an eviction order.
28. We also note that mediation is dealt with under clause 8 of the PIE Amendment Bill (amending section 7 of PIE).
29. However, our concern is that it allows room for mediation not to take place by the use of the word ‘**may**’. We believe that for mediation to be seen as a key factor in the granting of an eviction order and be taken seriously with equality of voice for all concerned, it is important that it be listed among the relevant circumstances.
30. The Constitutional Court has emphasised this as a key circumstance to be considered. In *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), the Court emphasised the need for meaningful consultation with individuals and communities affected by housing development (para 84). Also, in the *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC), the Court stated that ‘*where the need to evict people arises, some attempts to resolve the problem before seeking a court order will ordinarily be required*’ (para 56). It went further to add that:

a court involved in future litigation involving occupiers should be reluctant to accept that it would be just and equitable to order their eviction if it is not satisfied that all reasonable steps had been taken to get an agreed, mediated solution (para 61).

To fortify the need for a court to consider whether reasonable steps had been taken to reach an agreed mediated solution, mediation should be explicitly stated under relevant circumstances.

Clause 6 of the PIE Amendment Bill (Amending section 5 of PIE)

31. It is unclear whether two court orders are to be issued under urgent eviction proceedings. Clause 6 of the PIE Amendment Bill (*re* section 5(1) of PIE) provides that ‘*the owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order*’.

Section 5(1) of PIE needs to be clarified as it is confusing how urgent eviction proceedings can be instituted (and an eviction order could be granted based on these proceedings and an unlawful occupier evicted) yet proceedings for a final order are still pending.

32. Furthermore, the PIE Amendment Bill when dealing with urgent proceedings for eviction is silent on alternative accommodation. The availability to the unlawful occupier of suitable alternative accommodation or land is not included in the conditions that a court must take into account before granting an eviction order.
33. The well documented practice in the inner city of Johannesburg for instance has been that urgent court processes are used by the City in order to secure an eviction as quickly as possible, usually well before residents have had a chance to obtain legal advice, thus rendering unlawful occupiers homeless. No consideration is given to the availability of alternative accommodation and without any meaningful consultation.
34. The Constitutional Court has been at pains in all its judgments in eviction cases to emphasise the provision of alternative accommodation for vulnerable groups (those in desperate need), even if temporary as a significant factor. To protect the right to adequate housing of unlawful occupiers who cannot provide for themselves, in granting an urgent eviction order, a court must consider whether alternative accommodation or land is available to those in desperate need and who have no where else to go if evicted.

The PIE Amendment Bill should state explicitly that the court may grant such an order if it is satisfied that provision has been made for alternative accommodation or land for vulnerable individuals who cannot provide for themselves taking into consideration their gender, age, occupation or lack thereof, and state of health.

III. CONCLUSION

35. The PIE was essentially intended to give effect to section 26(3) of the Bill of Rights, by providing persons in eviction proceedings with substantive and procedural protection, thus ensuring that evictions take place in a manner that is consistent with the values of the new constitutional dispensation.

36. However, some of the proposed amendments, identified in this submission, undermine the ideological framework behind PIE, as well as the Constitution, as it renders some vulnerable groups even more vulnerable to eviction and homelessness by excluding them from the protection of PIE. It proposes unequal protection of the right not to be evicted (as afforded by section 26(3) of the Constitution) of desperately poor tenants and persons in similar socio-economic conditions. PIE will continue to protect unlawful occupiers who unlawfully took occupation of land, while unlawful occupiers whose initial occupation was not unlawful would be denied the same protection.
37. We submit that the PIE Amendment Bill must, among others, comply with the Constitution, be workable, and promote equality and transformation of our society. Hence, it should not be submitted to Parliament in its current form.