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A BRIEF OVERVIEW OF THE APPLICATION OF THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF PROPERTY ACT 19 OF 1998 (the "PIE Act")

When does the PIE Act apply?

PIE applies in respect of **all land** within South Africa (irrespective of the zoning of such land) which is **unlawfully occupied** for **residential purposes** (being buildings or structures that are used as dwellings and housing or shelter for human beings).

One of the prevailing cases in this regard is the Supreme Court of Appeal Case of *Ndlovu v Ngcobo; Bekker v Jika* (2002) 4 All SA 384 (SCA) (the "**Ndlovu Case**"). In terms of the PIE Act as interpreted by the Ndlovu Case an unlawful occupier is a person who occupies land:

- Without the express or tacit consent of the owner or person in charge, or
- Without any other right in law to occupy such land

The PIE Act does not apply to a person:

- who is an occupier in terms of the Extension of Security of Tenure Act 62 of 1997;
- protected by the Interim Protection of Informal Land Rights Act 31 of 1996; or
- occupying land, buildings or structures that do not perform the function of a dwelling or shelter for humans.

As noted above PIE applies when a person *unlawfully occupies* land. In the Ndlovu Case it was held that an "unlawful occupier" would include occupiers who had taken occupation lawfully, but whose occupation had subsequently become unlawful. In respect of premises which are leased between a tenant and landlord, in order to proceed with an eviction application, it must, firstly, be established that the lease agreement has been properly terminated, and is no longer in place between the parties, the lease either having been cancelled due to breach by the tenant, or terminated on notice by either party in terms of the lease agreement. If the lease agreement has merely expired, not formally been renewed between the parties, or has been renewed verbally and the tenant has remained in occupation of the premises with the express or tacit consent of the landlord, then the parties are deemed to have entered into a periodic lease agreement (normally terminable on one month's written notice). As such, if there is still a lease agreement in place between the parties and the landlord wishes to evict a tenant that it is not paying rental or is otherwise in breach of his obligations, the landlord must first validly terminate the lease agreement in accordance with the

terms of the lease agreement, the provisions of the Rental Housing Act 50 of 1999 ("Rental Housing Act") and the Consumer Protection Act 68 of 2008, and the tenant must be granted an opportunity to vacate the premises on sufficient notice (in terms of the lease agreement and applicable laws). If the tenant does vacate and the PIE Act finds no application, the landlord will still have a claim for unpaid rental and such other amounts owing to him in terms of the lease agreement (the landlord's rights are usually be governed by the terms of the lease agreement).

Importance of Timeous Proceedings

As a property owner, it is important to proceed with an application to evict an unlawful occupier in terms of the procedure set out in the PIE Act (and the applicable court rules) as soon as you become aware of such illegal occupation as the criteria applied by the court in assessing an eviction application become more onerous once an illegal occupier has been in possession of a premises for more than 6 months. Please note that in the instance of a person that legally had occupation and such person subsequently becomes an illegal occupier, the 6 months starts running from the date that the person became an illegal occupier (e.g. the date the lease agreement as cancelled and the tenant remains unlawfully in occupation).

Where the unlawful occupier has been in unlawful occupation of the land for **less than 6 months**, a court may grant an order for eviction if after, considering all the relevant circumstances:

- it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

Where the unlawful occupier has been in unlawful occupation of the land for **more than 6 months**, a court may grant an order for eviction if, after considering all the relevant circumstances, namely:

- land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier; and
- the rights and needs of the elderly, children, disabled persons and households headed by women;
- it is of the opinion that it is just and equitable to do so,

except where the land is sold in a sale in execution pursuant to a mortgage, then the above requirements do not apply.

Eviction Orders

The court must grant an order for the eviction of the unlawful occupier if the court is satisfied that:

- all the requirements of PIE have been complied with; and that
- no valid defense has been raised by the unlawful occupier

When granting an order for the eviction of the unlawful occupier the court must determine:

- a just and equitable date by which the unlawful occupier must vacate the land; and
- the date on which an eviction order may be carried out, if the unlawful occupier has not vacated the land on the date contemplated above.

The court may also make an order for the demolition and removal of the buildings or structures that were occupied by such person on the land in question.

Eviction orders may be proceeded with on an urgent basis if the necessary requirements as set out in section 5 of PIE and requirements governing urgent applications are met.

Warning against Self-help

Sometimes owners of immovable property are tempted to or take matters into their own hands when tenants become illegal occupiers, given the wrong suffered, the perceived unfairness of the regulatory framework in protecting wrongdoing individuals, the fact that the owner remains liable for debts that such occupants continue to incur in respect of the property, loss of rental and other damages to the property caused by the tenant. In South African law occupants/tenants' rights to use and undisturbed possession of immovable property may not be interfered with by any person including the owner, even if the tenant is in breach of the contract or is in illegal occupation of the premises. When, for example, owners change locks, instruct security guards to deny access to such person or instruct the relevant authorities to cut off water or electricity, this is unlawful and the tenant may through the legal action of proceeding with a *mandament van spolie* obtain a ruling from the court that their use and possession of the property be restored to them (even though such occupation is illegal). On succeeding with such action this may include a cost order being granted against the owner. This action is available in order to prevent people from taking the law into their own hands, in order to protect individuals rights to a home in terms of section 26(3) of the Constitution of the Republic of South Africa, 1996 and to ensure that the current state of affairs remains as is until a court makes a ruling in each case.

To succeed with such an action (a spoliation order) the plaintiff (unlawful occupier) must allege and prove unlawful deprivation of possession of the property (including the use and enjoyment thereof) by the defendant (owner/landlord).

It is never advisable to threaten or take any steps which are not permitted to encourage the illegal occupant to vacate the premises as this will only result in delays in the proper eviction of the illegal occupant and may result in additional adverse costs being incurred by the owner.

Importantly, it is an offence in terms of the PIE Act to evict someone from land other than through a court and on conviction such person will be liable to pay a fine, or to imprisonment for a period not exceeding two years, or to both such fine and imprisonment. In terms of the Rental Housing Act anyone who unlawfully locks out a tenant or shuts off the utilities to the rental housing property will be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

On the converse, affluent illegal occupants that seek to abuse the application of the PIE Act, may have adverse costs orders made against them (including rental for the period they remained in occupation of the premises but failed to pay such rental). Even if legal proceeding are not formally instituted against them this adverse conduct may be recorded on a number of databases and may impact on their ability to rent other premises in the future. 4

Commercial Property

The ejectment of a natural or juristic person that is occupying premises for commercial purposes is more straightforward. In instances where the PIE Act does not apply, ejectment of an unlawful occupier of premises can be obtained by means of instituting legal proceedings on the basis of:

1. The *rei vindicatio*; or
2. A possessory claim.