

RENTAL HOUSING AS ADEQUATE HOUSING

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1 Introduction

Despite the government's policies and housing legislation that aim to give effect to the housing provision (section 26 of the Constitution of the Republic of South Africa, 1996 ("the Constitution")), vulnerable households,¹ including previously disadvantaged households in urban areas, continue to occupy land and buildings with insecure tenure. This is evident from the evictions jurisprudence discussed in this contribution. Homeownership does provide tenure security to the marginalised, but the case law shows that these households should also be enabled to access other forms of formal tenure with strong tenure security. Recently the government has emphasised the importance of rental housing as a form of housing accessible to the urban poor. The current landlord-tenant laws are contract-based and premised on equal bargaining power. Generally, these laws provide sufficient tenure security for higher income groups who can easily access and exit the private rental market as they wish. However, it is questionable whether the free-market approach of the current rental housing laws provides satisfactory tenure security for the urban poor, because these households require increased tenure protection in order to establish themselves in their communities and actively participate in society.

The role of the state as public landlord is considered in light of the Constitution, while taking into account new policy developments in the area of public rental housing. This form of housing is also explored in the current socio-economic context of housing options for the urban poor. Finally, it is suggested that landlord-tenant law should develop in line with the Constitution and differentiate between different rental housing sectors in order to accommodate the desperately poor. It is also argued that such households should be enabled to access affordable public (and social) rental housing with strong tenure protection, which should be enacted in appropriate legislation.

2 The role of the state in the provision of housing

Section 26(1) and (2) of the Constitution ensures the right to have access to adequate housing, while it places an obligation on the state to take legislative

¹ The terms "vulnerable households", "desperately poor" and "urban poor" all refer to the same category of persons, namely the type of households who continuously struggle to find affordable formal accommodation, because of their financial weakness. These households often occupy informal housing because they are financially unable to afford formal housing.

and other measures to give effect to this right.² Furthermore, section 25(6) ensures that households who occupy land with insecure tenure as a result of past racially discriminatory laws are entitled to legally secure tenure and section 25(9) places an obligation on the legislature to enact laws that would give effect to this right. This provision forms part of the land reform programme as it initiates tenure reform, although one should consider its meaning within the broader context of transformation and specifically the transformation of the housing system.

The meaning of these provisions and specifically the role of the state in the provision of housing has developed in evictions jurisprudence. In *Government of the Republic of South Africa v Grootboom*³ the Constitutional Court held that subsections 26(1) and 26(2) must be read together. It also decided that subsection 26(1) at least places a negative obligation on the state to desist from action that would impair the right of access to adequate housing.⁴ In terms of section 26, the government must create a public housing programme aimed at realising the right of access to adequate housing.⁵ In *Jaftha v Schoeman; Van Rooyen v Stoltz*⁶ the Constitutional Court confirmed its decision in *Grootboom* and held that the right of access to adequate housing does contain a negative element, which means that a provision that permits a person to be deprived of existing housing restricts that person's constitutional housing right.⁷

Shortly after *Jaftha*, in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*,⁸ the Constitutional Court postponed the eviction of

² AJ van der Walt *Constitutional Property Law* (2005) 356 states that the constitutional obligation to give effect to the right of access to adequate housing often exists within policy frameworks, legislation and executive action

³ 2001 1 SA 46 (CC) para 34 per Yacoob J

⁴ In *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 33 the Court rejected the contention that s 26(1) imposes a minimum core obligation on the state. The Court found that individuals' needs are too diverse to determine a minimum core threshold for all homeless members of society and that the court is unable to create such a threshold without the necessary information. See also S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 163-173; S Russell "Introduction – Minimum State Obligations: International Dimensions" in D Brand & S Russell (eds) *Exploring the Core Content of Socio-Economic Rights: South Africa and International Perspectives* (2002) 11; P de Vos "The Essential Components of the Human Right to Adequate Housing – A South African Perspective" in D Brand & S Russell (eds) *Exploring the Core Content of Socio-Economic Rights: South Africa and International Perspectives* (2002) 23

⁵ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 41 per Yacoob J. This contention was confirmed in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 226 per Ngcobo J

⁶ 2005 2 SA 140 (CC)

⁷ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 34 per Mokgoro J. At paras 25-26 the Court emphasised that the aim of s 26 in relation to security of tenure had to be interpreted against the historical background of apartheid-type evictions and forced removals. The focus of s 26 is twofold, namely to reject the previous approach followed by the apartheid government with regard to evictions and to create a new dispensation in which the state must desist from interfering with individuals who occupy property. The state should only be allowed to interfere with an individual's access to housing when it is justifiable to do so: paras 26, 28. See also S Liebenberg "The Application of Socio-Economic Rights to Private Law" (2008) *TSAR* 464-467 on the negative obligation as developed in the case law. Liebenberg argues that in light of s 8(2) of the Constitution one should rather refrain from relying on a rigid distinction between positive and negative duties. A contextual approach should rather be followed in every case to determine whether a positive or negative duty should be imposed on (specifically) a private actor (Liebenberg (2008) *TSAR* 468-469)

⁸ 2005 5 SA 3 (CC). See Liebenberg *Socio-Economic Rights* 281-286 for a discussion of the case

unlawful occupiers from private land until alternative accommodation could be provided by the state.⁹ The state was also held liable to compensate the landowner because it failed to help execute the eviction order and therefore failed to protect the private landowner's property rights.¹⁰ In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*¹¹ Ngcobo J stated that the government does have a constitutional duty to make possible the realisation of the right to housing.¹²

The court has also held that the state should be joined in proceedings where private landowners claim eviction of unlawful occupiers (including previous tenants) and where the eviction order would result in the occupiers being homeless.¹³ The court held that the interests of the occupiers, private landowner and state (municipality) would be protected if the state was joined, because the state has a duty to provide the evicted occupiers with adequate housing.¹⁴

In *Modderklip, Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue*,¹⁵ and *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*¹⁶ the courts have recently interpreted the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE") to postpone eviction orders in the case where such an order would render the occupiers, including urban tenants, homeless. The courts allow the continued occupation of unlawful occupiers on private land until the state can make alternative accommodation available.

One could argue that the state does not have a positive duty to provide all homeless persons with access to adequate housing, even though the government is responsible for ensuring that the required laws (generally taking the form of legislation), policies and incentives are developed and sufficient to give effect to the duty enshrined in section 26 of the Constitution.¹⁷ However, from the recent eviction cases it appears that the courts will force the state to be involved in some eviction proceedings with the aim to facilitate vulnerable occupiers who face homelessness. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight*¹⁸ the Supreme Court of Appeal decided that the local authority had a positive duty to provide temporary accommodation to marginalised evictees

⁹ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 68. The same logic was followed in *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2010 JOL 25031 (GSJ); *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 9 BCLR 911 (SCA)

¹⁰ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 68. Van der Walt *Constitutional Property* 367-368. See also *City of Johannesburg Metropolitan Municipality v Blue Moonlight* 2011 4 SA 337 (SCA) paras 70-71

¹¹ 2010 3 SA 454 (CC)

¹² Para 224

¹³ *Sailing Queen Investments v The Occupants La Colleen Court* 2008 6 BCLR 666 (W)

¹⁴ Para 18

¹⁵ 2010 JOL 25031 (GSJ). At para 68 the Court stated that the state is directly involved in eviction cases where occupiers face homelessness, because the state has control over the housing policy and the available housing stock

¹⁶ 2010 9 BCLR 911 (SCA)

¹⁷ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 40 per Yacoob J

¹⁸ 2011 4 SA 337 (SCA)

who faced homelessness.¹⁹ In light of the case law it seems that the courts are forcing the state to prevent an increase in homelessness by accommodating at least occupying persons who would be rendered homeless as a result of an eviction order. According to *Blue Moonlight*:

“It is clear from the Constitutional Court and SCA judgments ... that the City has a positive constitutional duty to the desperately poor not to render them homeless should they be evicted.”²⁰

From the case law it is evident that the duty to make affordable housing available is a state duty. The state must be actively involved in the provision of housing and the state must be able to assist the most vulnerable who face homelessness. The case law shows that the state has not introduced a form of housing that is easily accessible to the desperately poor. Vulnerable evictees are unable to access formal housing other than homeownership, which might take years to establish.²¹ The provision of homeownership for the urban poor is a time-consuming process²² that might eventually be beneficial to some households, but in light of the case law it is clear that other forms of tenure must be introduced by the state to accommodate the marginalised who are in desperate need.

3 The rental housing option

3.1 The state's initial emphasis on homeownership

Since 1994, when the newly elected ANC government came into power, a number of policies have been introduced with the aim to provide adequate housing for vulnerable households. Part of the initial housing policy was to introduce and develop a variety of tenure forms that would provide access to housing and grant secure tenure, but individual ownership has been the main form of tenure delivered in urban areas.²³

Providing tenure security in South African urban areas could be defined as “formalizing land rights through full formal private tenure”.²⁴ The most

¹⁹ Paras 70-72

²⁰ *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2010 JOL 25031 (GSJ) para 128

²¹ A concerning fact is that roughly 50% of state-subsidised housing, including RDP and BNG (the Department of Housing launched the Breaking New Ground (BNG) policy in September 2004, which strives to eradicate informal settlements; the aim is to upgrade informal settlements or relocate occupiers of informal settlements where development is impossible: Republic of South Africa, Department of Housing *Breaking New Ground Policy* (2004)) houses, have not been registered with the deeds office: K Tissington *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (2011) 31

²² More than 12% of the population currently live in RDP houses, while almost 2 million households have at least one member on the waiting list for RDP housing. In Gauteng Province and the Western Cape more than 50% of the households have been on the waiting list for more than five years: Statistics South Africa *GHS Series II, Housing, 2002-2009* (2010) 19, 30. Since 1994, the housing backlog has grown from roughly 1.5 million to more than 2 million: Tissington *Resource Guide to Housing* 33

²³ L Royston “Security of Urban Tenure in South Africa: Overview of Policy and Practice” in A Durand-Lasserve & L Royston (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 165-176

²⁴ C Cross “Why the Urban Poor Cannot Secure Tenure: South African Tenure Policy under Pressure” in A Durand-Lasserve & A Royston (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 195-196. Conversely, the 1994 White Paper on housing stated that “[o]ne of the most significant and short-term interventions required of the Government will be to provide the widest range of options for the rapid attainment of secure tenure” (Republic of South Africa, Department of Housing *White Paper: A New Housing Policy and Strategy for South Africa* (1994) 3.2.2)

complete form of such tenure is private ownership, which is why this is the main form of tenure delivered until now.²⁵ By December 2008, government had built 2.8 million houses and provided such households (consisting of 13.5 million people in total) with private ownership.²⁶ The perception that ownership is the most important and valuable property right (as a right and a question of redress) has prevented a variety of tenure options from being developed and delivered in urban areas.²⁷

It might seem that homeownership is the principal form of tenure for marginalised households, but ownership does not necessarily suit the needs of poor urban occupiers.²⁸ There is a preference among at least some of the urban poor to rent accommodation instead of acquiring ownership.²⁹ Marginalised occupiers who hold land under private tenure could easily be surprised by hidden costs which could lead to distress sales.³⁰

Despite the preference of urban occupiers to rent housing, one could also argue that public rental housing is a better form of tenure (in comparison to owner-occupation) for poor occupiers because the state can regulate, assess and control the market to the extent that it is involved in the provision thereof. If the state is directly involved in the provision of rental housing, as a social landlord, the state would be able to provide marginalised occupiers with secure (adequate) housing, without having to place any unwanted financial burdens on these tenants. The success of such a form of housing depends on the enactment of effective legislation that affords tenure security while also being context-sensitive to the personal needs of the individual households.

In 2009, the government's prime target was to eradicate or upgrade all informal settlements by 2014/2015 through housing delivery, including the development of low-cost housing, medium density accommodation and rental housing.³¹ Currently, the government is again emphasising the need to develop different forms of tenure, especially in the area of rental housing through the development of differentiated public and social housing sectors.³²

3.2 Landlord-tenant laws

Currently, rental housing legislation is limited to the private sector and the social sector. Private rental housing is regulated in terms of the Rental

²⁵ Cross "Why the Urban Poor Cannot Secure Tenure" in *Holding their Ground* 196

²⁶ Republic of South Africa "Housing" (03-08-2009) *South African Government Information* <<http://www.info.gov.za/aboutsa/housing.htm>> (accessed 03-08-2009)

²⁷ Royston "Security of Urban Tenure in SA" in *Holding their Ground* 176-177 See also S Maass *Tenure Security in Urban Rental Housing* LLD dissertation Stellenbosch (2010) 119-120

²⁸ V Watson & M McCarthy "Rental Housing Policy and the Role of the Household Rental Sector: Evidence from South Africa" (1997) 22 *Habitat International* 49 51-52 The authors state that globally, homeownership is not necessarily the best tenure option amongst poor urban dwellers

²⁹ JM Pienaar "The Housing Crisis in South Africa: Will the Plethora of Policies and Legislation have a Positive Impact?" (2002) 17 *SAPL* 336 361 See also Watson & McCarthy (1997) *Habitat International* 53 for percentages of the population preferring rental housing, established during a survey in Cape Town

³⁰ Cross "Why the Urban Poor Cannot Secure Tenure" in *Holding their Ground* 207

³¹ Republic of South Africa "Housing" (05-08-2009) *South African Government Information*

³² Republic of South Africa "Housing" (28-09-2011) *South African Government Information* See also Tissington *Resource Guide to Housing* 8-9 for more detail on the government's revised target, namely *in situ* upgrading

Housing Act 50 of 1999, while the Social Housing Act 16 of 2008 regulates social rental housing.

The Rental Housing Act is the primary statute that regulates private landlord-tenant relationships in urban areas. Generally, the Act supports a free-market approach to rental housing. It protects the rights of the parties in light of their contractual rights and duties. The legislature therefore assumes that the parties have equal bargaining power when entering into the lease and that this would remain their position throughout the term of the lease. The extent of tenure security granted to the tenant depends on the contract and therefore the will of both parties. The Rental Housing Act provides limited tenure protection because it does not override the landlord's common law right to evict the tenant upon termination of the lease.³³ It follows that the Act entrenched the common law rules governing termination of the lease and the consequential right of repossession, even though immediate repossession by the landlord might, in certain circumstances, be suspended. The landlord is entitled to reclaim his property upon termination of the lease by means of a court order.³⁴ Where the tenant fails to redeliver the property upon termination of the lease the landlord has his usual remedies for breach of contract, because the tenant is holding over.³⁵

The Social Housing Act is a direct result of the government's social housing policy.³⁶ The Act makes provision for the creation of social housing institutions,³⁷ responsible for the provision and management of social housing stock,³⁸ while a "lease agreement" is defined as "a standard lease agreement utilised by a social housing institution".³⁹ The aim of the Act is to introduce a social housing sector that can provide affordable rental housing through the creation of social housing institutions (social landlords). The social housing model is suitable for persons earning more than R2 500 per

³³ AJ van der Walt "Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation" (2002) *TSAR* 254 266; A Mukheibir "The Effect of the Rental Housing Act 50 of 1999 on the Common Law of Landlord and Tenant" (2000) 21 *Obiter* 325 329 agrees that the common law rights will remain in force if they are not explicitly amended by the Act

³⁴ S 4(5)(d) of the Rental Housing Act See also T Legwaila "An Introduction to the Rental Housing Act 50 of 1999" (2001) 12 *Stell LR* 277 281; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The Law of Property* 5 ed (2006) 429

³⁵ Mukheibir (2000) *Obiter* 337-338 SI Mohamed *Tenant and Landlord in South Africa* (2003) 28 mentions that where the tenant refuses to vacate the premises upon termination of the lease, the landlord can lodge a complaint with the Rental Housing Tribunal because the act of the tenant amounts to an unfair practice The tenant is obliged to pay the rent while the landlord can only recover arrears after a ruling was obtained from the tribunal This position was amended by s 7(b) of the Rental Housing Amendment Act 43 of 2007

³⁶ Republic of South Africa *A Social Housing Policy for South Africa* (2003) See also Tissington *Resource Guide to Housing* 98 for more detail on the Act and its underlying policy

³⁷ S 2(1)(i)(xv) of the Social Housing Act See s 13(1) and (5) for the definition of a social housing institution

³⁸ Where there is a demand for social housing stock within a municipality's area, the municipality must take measures to facilitate the delivery of social housing within that area and encourage development of social housing through the conversion of existing non-residential stock and upgrading of existing stock: ss 5(a) and 5(b) of the Social Housing Act

³⁹ S 1 of the Social Housing Act

month.⁴⁰ A number of social housing projects have been approved and funded by the government, but social housing is generally perceived as private and not a public housing initiative.⁴¹

Section 2(1)(h) states that government and social housing institutions must ensure secure tenure for residents in social housing stock. The extent of tenure security must be based on the general principles as stated in the Rental Housing Act. The Rental Housing Act does not provide strong tenure protection. Consequently, the Social Housing Act does not provide strong security of tenure either.

In light of the current housing laws one can conclude that the most vulnerable occupiers in urban areas are denied access to the social rental housing sector and to the extent that they can access the private rental sector, their tenure rights would be contract-based and therefore insecure. The government is currently emphasising the need for public rental housing that could accommodate poor households.⁴²

3 3 Public rental housing

The Community Residential Units Programme⁴³ aims to provide public rental housing to very low income households who currently access informal rental housing opportunities.⁴⁴ The purpose of this programme is to upgrade and make available existing hostels, residential units and dilapidated buildings that are owned by local government, to provide inexpensive rental housing to the very poor.⁴⁵ Apparently it would be more cost effective for local government to retain and upgrade buildings than to make it available for private ownership.⁴⁶ Overall, the programme would establish a formal public rental sector. The programme targets current public sector tenants; evictees and households from informal settlements; households who are on the housing backlog; and indigent groups who are able to afford some rent.⁴⁷ The programme is provincially funded,⁴⁸ but it is locally administered. The local municipality, acting as public sector landlord, must collect the rental payments, which should collectively cover the operating costs.⁴⁹ The local

⁴⁰ Development Action Group “Urban Land Matters: Tenure Options for Low Income Groups” (22-02-2011) *Resources* <http://www.dag.org.za/index.php?option=com_content&view=article&id=89:resources&catid=9:research-reports&Itemid=8> (accessed 22-02-2011)

⁴¹ Tissington *Resource Guide to Housing* 102

⁴² Republic of South Africa, Government Communication and Information System *Pocket Guide to South Africa Human Settlements* (2009/2010) 144-145 <http://www.gcis.gov.za/resource_centre/sa_info/pocketguide/2009/019_human_settlements.pdf> (accessed 22-02-2011)

⁴³ The details of the programme are explained in the Department of Human Settlements *National Housing Code: Community Residential Units Part 3 Vol 6* (2009) 11-87

⁴⁴ Department of Human Settlements *National Housing Code* 11 Tissington *Resource Guide to Housing* 103

⁴⁵ Department of Human Settlements *National Housing Code* 12 makes it clear that occupying tenants would not be enabled to purchase the public rental housing stock

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⁴⁷ Department of Human Settlements *National Housing Code* 12 Tissington *Resource Guide to Housing* 103

⁴⁸ Department of Human Settlements *National Housing Code* 15

⁴⁹ 19

municipality is responsible for the efficient management of the stock.⁵⁰ The rent is determined by using a standard square meter rate. In terms of the Housing Code the “[square meter] rate will be calculated by taking the total operating budget for the housing stock and dividing it by the total [square meter] of housing stock that the municipality or provincial department owns”.⁵¹

The tenants are therefore charged the same amount of rent and annual rent increases are directly linked with the increase in operation costs.⁵²

The municipality, who owns the rental stock, must ensure that the tenants sign leases in compliance with the Rental Housing Act.⁵³ The policy is a well-structured and valuable innovation that one can applaud for a number of reasons, including the introduction of a form of tenure that is regulated and administered by the state and that would accommodate the poorest of the poor. The incentive to restore dilapidated buildings in urban areas for residential purposes is also a welcome development, because the desperately poor often require housing options close to where they work, which is usually in the city centre. However, similar to the Social Housing Act, reference to the Rental Housing Act regarding tenure security is troublesome, because security of tenure in terms of the Rental Housing Act is contract-based and does therefore not provide the tenant with strong tenure protection.

The Community Residential Units Programme is still in an introductory phase and legislation has not been promulgated to give effect thereto. Nevertheless, the introduction of a formal public rental sector is a housing development that requires circumspection, as it was used during apartheid to provide weak tenure rights for black people to help orchestrate racial segregation. Public rental housing was the dominant form of tenure for black persons in urban areas during apartheid, specifically in the informal settlements. One of the many apartheid land laws, the Regulations Concerning the Administration and Control of Land in Black Urban Areas of 14 June 1968⁵⁴ serves as an example of how the laws ensured that the black majority occupied land with insecure tenure. The regulations provided that black individuals could occupy urban land under three different forms of tenure, namely “(i) a permit to erect a private dwelling; (ii) a resident’s permit to rent a house from the Local Government; and (iii) a certificate of occupation of a house”.⁵⁵ The rights allocated to black individuals were personal rights and derived from the contractual relationship between the local authority and

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⁵¹ 19-20 includes the possibility of rent relief assistance, although the parties should agree to this arrangement when the lease is drafted

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⁵⁴ GN R 1036 in *GG* 2096 of 14-06-1968. See also s 14(1) of the Group Areas Act 41 of 1950, s 18(1) of the Group Areas Act 77 of 1957 and s 21(1) of the Group Areas Act 36 of 1966 for provisions that provided similarly weak tenure rights

⁵⁵ N Olivier “Urbanisation: Policy/Strategy with Particular Reference to Urbanisation and the Law” (1988) 53 *Koers* 580 582

the individual. The occupier could only enforce his personal right against the local authority, because he did not obtain a real right.⁵⁶

The housing system in Khayelitsha (Cape Town) could be used as an example to illustrate some of the newly introduced tenure options generally used in informal settlements⁵⁷ shortly after apartheid was abolished.⁵⁸ In 1985 Khayelitsha was used to house thousands of black households as state tenants.⁵⁹ Households could either rent state property or rent a site in the informal settlement and build their own homes. As apartheid was abolished, the government introduced the option to purchase a site, but the purchaser had to pay an additional monthly service charge.⁶⁰ The Khayelitsha informal settlement, similar to a number of other informal settlements, was initially used by the apartheid government to accommodate black persons on a temporary basis, but when apartheid was abolished these households could acquire land as homeowners. Alternatively, they could lease public property (either a site or state property) and make rental payments to the state or they could lease land from a private homeowner.

4 Tenure options for the urban poor

To establish what forms of tenure the urban poor currently utilise, one can consider the tenure options accessible in informal settlements, because the majority of households who occupy land in informal settlements are poor.⁶¹ More than 95% of the persons who occupy land in informal settlements are black and therefore presumably previously disadvantaged.⁶² In 2009 it was established that more than 60% of persons living in informal settlements partially or fully “owned” their homes.⁶³ However, since 2002 owner occupation has generally decreased, while there has been a shift from owner occupation to renting.⁶⁴ More than 20% of the South African population rent their homes, while more than 19% of the entire group of renters (the 20%) live

⁵⁶ N Olivier “Property Rights in Urban Areas” (1988) 3 *SAPL* 23 26; Olivier (1988) *Koers* 582 See also Olivier (1988) *SAPL* 26-29 for more detail regarding the various personal rights provided for in the Regulation

⁵⁷ The informal settlement in Khayelitsha refers to those areas not used as transit areas or site and service areas The term “informal settlement” in the rest of this article refers to the general definition of an informal settlement, which excludes transit areas and site and service areas

⁵⁸ The most important laws that initiated the transformation of landholding and the abolishment of apartheid land laws was the Black Local Authorities Act 102 of 1982, the Black Communities Development Act 4 of 1984, the Black Communities Development Amendment Act 74 of 1986 and the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988

⁵⁹ GP Cook “Khayelitsha: New Settlement Forms in the Cape Peninsula” in DM Smith (ed) *The Apartheid City and Beyond* (1992) 125 The literature clearly indicates that these occupiers made rental payments to the state and in exchange they could occupy state land It is highly unlikely that the apartheid government would enter formal leases with these households, but the nature of the occupiers’ tenure was still leasehold

⁶⁰ 128-129 State tenants could therefore become home owners with the help of state subsidies

⁶¹ Statistics South Africa *Housing* 15 It is obvious that poor persons also occupy other forms of housing in areas different from informal settlements These include a rented room in a township or a RDP house in a specific project: Tissington *Resource Guide to Housing* 26

⁶² Statistics South Africa *Housing* 5

⁶³ 12 One should note that some of these “owners” might occupy land in an unauthorised informal settlement, which indicates that they are formally not recognised as owners in the Deeds Registry This is usually the case when they constructed their own structures or bought it from another

⁶⁴ 9, 31

in informal settlements. Unsurprisingly, the majority of households that rent dwellings in informal settlements are low-income occupiers.⁶⁵ A number of persons in informal settlements continue to rent public property from the state and are therefore public sector tenants.⁶⁶

The relationship between public landlord and tenant is unclear, because these tenancies are not regulated formally in accordance with legislative authority. The Community Residential Units Programme is a new development and some public sector tenancies might be established as a result of this programme, but the programme merely refers to the Rental Housing Act regarding the relationship between state landlord and tenant. In terms of the Rental Housing Act the parties can agree on the period of the lease and once the lease has expired, the landlord can claim an eviction order.⁶⁷

Currently, more than 14% of the population occupy their homes rent-free, while more than 30% of this group live in informal settlements.⁶⁸ In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*⁶⁹ the Constitutional Court had to decide whether the occupiers of an informal settlement were unlawful occupiers in terms of PIE. The occupiers occupied state land since the early 1990s and in due course the settlement grew to roughly 20 000 people. The state provided various facilities to the occupiers, including tap water, toilets, electricity and roads. However, the state never negotiated the rights of the occupiers.⁷⁰ According to Yacoob J:

“While it is understandable that the applicants would do everything possible to stay rent-free on municipal property, the circumstance points away from any concession of a right to occupation. The right to occupy, if it existed, would have been one free of charge. It is highly improbable that a concession of this kind would have been made.”⁷¹

Yacoob J concluded that the occupiers never had consent to occupy the land and that they were therefore unlawful occupiers in terms of PIE.⁷² According to Moseneke DCJ, the occupiers’ right to occupy the land was not evidenced by an express agreement but rather by the tacit acceptance by the state.⁷³ The City’s consent was therefore tacit and the occupiers’ lawful occupation was consequently also terminated tacitly by the City.⁷⁴ O’Regan J agreed with Moseneke DCJ that the City consented tacitly to the occupiers’ occupation, at least until the permission was withdrawn.⁷⁵

Sachs J agreed that the Council consented to the occupiers’ occupation, but described their right to occupy differently. According to Sachs J, a special legal

⁶⁵ Tissington *Resource Guide to Housing* 38. Roughly 55% of tenants earn less than R3 500 per month.

⁶⁶ Watson & McCarthy (1997) *Habitat International* 50 state that the aim of public rental housing was tied to the apartheid government’s objective of political control over the African labour force.

⁶⁷ S 4(5)(d) of the Rental Housing Act. See also Legwaila (2001) *Stell LR* 281.

⁶⁸ Statistics South Africa *Housing* 11.

⁶⁹ 2010 3 SA 454 (CC). See also *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes* 2011 7 BCLR 723 (CC).

⁷⁰ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 22 per Yacoob J.

⁷¹ Para 82.

⁷² Para 85.

⁷³ Paras 147, 154.

⁷⁴ Para 160.

⁷⁵ Para 280.

relationship existed between the Council and the occupiers. This relationship was unique in the sense that it could not be located in the usual framework of common law rights, but rather developed from a tension that existed between the public responsibility of the Council, namely to accommodate vulnerable households, and the social rights of the occupiers.⁷⁶ The Council's consent was of a temporary nature and the occupiers' right could be defined as a public law right to temporarily occupy state land.⁷⁷ The fact that the occupiers failed to make any rental payments in return for the right to occupy the land was consistent with the special legal regime that existed between the occupiers and the Council.⁷⁸

Ngcobo J was unwilling to "brand" the occupiers as unlawful occupiers and argued that the question whether the occupiers were unlawful occupiers in terms of PIE was not at the core of the dispute to determine whether the occupiers should be relocated to give effect to a policy that would provide vulnerable households with adequate housing and tenure security. Despite the occupiers' legal tenure status, the government would not have been able to evict the occupiers and render them homeless, because this would have been in conflict with section 26 of the Constitution.⁷⁹

The decision illustrates the extent of the current uncertainty regarding the rights of some persons who occupy land in informal settlements. It seems that the majority agreed that the occupiers did have consent at some point, but it was either withdrawn (Moseneke DCJ, O'Regan J) or it was inherently of a temporary nature (Sachs J).

In light of these observations one can conclude that vulnerable urban occupiers are currently occupying land, specifically in urban informal settlements, by means of a variety of tenure options. Nevertheless, it is doubtful whether any of these forms of tenure is sufficient in light of sections 25(6) and 26 of the Constitution. The majority are owner occupiers; others rent land or property from either private persons or the state, while the remaining group occupy land rent-free. *Joe Slovo* illustrates that persons who occupy land in informal settlements who are neither homeowners nor renters are in all probability uncertain of their rights. One can conclude that marginalised occupiers in urban areas occupy land as homeowners, tenants (private or public), unlawful occupiers or lawful occupiers with some form of tacit consent that can easily be withdrawn. Apart from the formal homeowners, the remaining households occupy land with insecure tenure.

5 Adequate housing

In light of the previous sections one can reach certain conclusions regarding the potential development of landlord-tenant law, specifically related to its development for the purpose of providing housing for the most vulnerable. In addition to the constitutional right of access to housing and the government's

⁷⁶ Para 343

⁷⁷ Para 359

⁷⁸ Para 361

⁷⁹ Para 216

constitutional duty to introduce measures that would give effect to this right, section 25(6) of the Constitution provides that previously disadvantaged households are entitled to legally secure tenure. Unfortunately, previously disadvantaged persons continue to occupy urban land with legally insecure tenure. To a certain extent, recent policies indicate that the government is aware of this problem, because the government has suggested the development of differentiated rental housing sectors that would accommodate the most vulnerable. Unfortunately, the government has failed to emphasise the importance of security of tenure. The case law suggests that the state is primarily responsible to ensure that individuals can access adequate housing and if the government were to introduce a public rental housing sector, it would have to regulate, manage and administer such a sector as public rental landlord. The state would therefore have to be directly involved in the provision of housing on a daily basis. The duty of the state to accommodate the poor and provide access to adequate housing in the landlord-tenant framework is currently to a certain extent shared with social housing institutions as a result of the Social Housing Act.

If the aim of the government is to provide housing in the form of rental housing to give effect to section 26 of the Constitution, the question is how such housing would constitute *adequate* housing as defined in section 26(1). The Constitution does not define adequate housing, nor have the courts construed a fixed meaning for this term, except that government must refrain from depriving occupiers of existing housing and that government must enact legislation to give effect to this right. To construe some definition for adequate housing, reference to international law is justifiable since section 39(1) of the Constitution states that a court, tribunal or forum must consider international law when interpreting the Bill of Rights.

The International Covenant on Economic, Social and Cultural Rights (“ICESCR”)⁸⁰ was signed by South Africa on 4 October 1994, although it has not been ratified yet.⁸¹ Article 11(1) of the ICESCR recognises a right to an adequate standard of living, including housing, which is defined in General Comment No 4.⁸² In General Comment No 4, the Committee on Economic, Social and Cultural Rights (“CESCR”) states that the right to adequate housing should not be interpreted narrowly as merely a “roof over one’s head”,⁸³ but

⁸⁰ International Covenant on Economic, Social and Cultural Rights (1966) UN Doc A/6316 <<http://www2.ohchr.org/english/law/cescr.htm>> (accessed 20-06-2011) In *S v Makwanyane* 1995 3 SA 391 (CC), and later confirmed in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), the Constitutional Court found that the court must consider international law that has been ratified by the government, although the court can also consider international law that has not been ratified

⁸¹ See Liebenberg *Socio-Economic Rights* 106

⁸² UN Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing* (1991) UN Doc E/1992/23 <[http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+4?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4?OpenDocument)> (accessed 20-06-2011)

⁸³ UN Committee on Economic, Social and Cultural Rights *General Comment No 4* para 7 This phrase is similar to the opinion of Yacoob J in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 35

that it should rather be seen as the right to occupy property with security.⁸⁴ The CESCR also states that the “adequacy” of a housing condition depends on various factors, although there are “certain aspects of the right that must be taken into account ... in any particular context”.⁸⁵ One of these aspects is legal security of tenure, stipulated in paragraph 8(a) of General Comment No 4. This paragraph states that any type of tenure, including public and private rental accommodation, should ensure a degree of security of tenure.⁸⁶

According to General Comment No 4 of the CESCR, security of tenure is a key component of the right to adequate housing. The question is whether the South African rental housing legislation (and programmes) give effect to the constitutional obligation as stated in section 26(2). The fact that the legislation does not make provision for tenure security is problematic considering its importance in international law and the repercussions that insecure tenure had for vulnerable occupiers during the apartheid era.⁸⁷ The effect of insecure tenure rights, or legal uncertainty, for vulnerable urban tenants is important to take into account, considering the growth in urbanisation and the increasing demand for urban rental housing. It is doubtful whether the provision of urban rental housing, either in the public or social sector, would comply with section 26 if the tenure rights of tenants are insecure.

There is also a link between urban poverty and tenure status, because tenure status is one of the core elements in the poverty cycle. Weak tenure security exacerbates poverty.⁸⁸ Weak tenure rights create problems such as unstable communities and it discourages investment, which has an effect on socio-economic factors such as poverty, social exclusion and limited access to urban services.⁸⁹ Secure occupation rights have been described as the “main component of the right to housing”.⁹⁰ The government realised the importance of secure tenure when it proclaimed that security of tenure is a cornerstone in its approach to provide housing for homeless persons.⁹¹ However, the importance of urbanisation and the connection thereof with better tenure security has been neglected by the South African development policy.⁹²

⁸⁴ UN Committee on Economic, Social and Cultural Rights *General Comment No 4* para 7 See also UN Commission on Human Settlements *Global Strategy for Shelter to the Year 2000* (1988) UN Doc A/43/8/Add 1 <http://www.unhabitat.org/programmes/housingpolicy/documents/A_43_8_Add_1.pdf> (accessed 20-06-2011)

⁸⁵ UN Committee on Economic, Social and Cultural Rights *General Comment No 4* para 8

⁸⁶ Para 8(a)

⁸⁷ See L. Chenwi “Recommendations of the United Nations Special Rapporteur on Adequate Housing Following his Mission to South Africa” (2008) 9 *ESR Review* 24 25 See also Tissington *Resource Guide to Housing* 25 where the author mentions a number of socio-economic factors that should be taken into consideration when determining the meaning of “adequate housing” These include, access to socio-economic goods such as water, sanitation, electricity and schools

⁸⁸ A Durand-Lasserve & L. Royston “International Trends and Country Contexts – From Tenure Regularization to Tenure Security” in A Durand-Lasserve & A Royston (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 1 7

⁸⁹ Durand-Lasserve & Royston “International Trends” in *Holding their Ground* 9

⁹⁰ 9

⁹¹ Royston “Security of Urban Tenure in SA” in *Holding their Ground* 172

⁹² A Bernstein *Land Reform in South Africa: A 21st Century Perspective* (2005) 44

One of the challenges in urban land reform is to create statutory forms of tenure that would include substantive tenure security, although such protection should not be limited to existing tenure forms but should be extended and applied to a diverse variety of tenure options.⁹³

6 Concluding remarks and recommendations

Tenure security is a fundamental component of the right to adequate housing. The urban rental market in South Africa is diverse. Black urban tenants are entitled to legally secure tenure (section 25(6) of the Constitution) and the courts have interpreted PIE and section 26(3) of the Constitution to ensure better tenure security for marginalised unlawful tenants based on their socio-economic weakness.⁹⁴ The landlord-tenant regime in South Africa should aim to accommodate all urban tenants and provide every household with the necessary level of tenure security.⁹⁵ The landlord-tenant laws in South Africa should therefore be context-sensitive and should preferably be divided in terms of different sectors. Landlord-tenant law is an ideal legal institution in terms of which the government can make affordable housing available to the lowest income group in dire need of housing, because the government can maintain control over the housing stock and be actively involved as landlord.⁹⁶

The proposed public rental sector, as defined in the Community Residential Units Programme, would fail to give effect to the right to have access to adequate housing if it does not afford tenure security. The aim of the government should be to provide the lowest income households with the most secure form of tenure. The essence of this form of housing should be to allow marginalised households to establish themselves in their community in order to participate in society and achieve human development. With the aim to ensure tenure security, the public rental sector could, by example, provide state tenants with periodic tenancies combined with secure tenure. The point of departure should be that the parties may agree on the terms of the periodic tenancy. The basis for this proposition is that a periodic tenancy would allow the tenant to easily serve notice to the local authority and terminate the lease. Low income households often require the necessary mobility to move to a different city or metropolitan area in search for new job opportunities.

⁹³ Royston "Security of Urban Tenure in SA" in *Holding their Ground* 179

⁹⁴ See specifically *City of Johannesburg Metropolitan Municipality v Blue Moonlight* 2011 4 SA 337 (SCA) para 59; *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 9 BCLR 911 (SCA) paras 9-13, 16-17

⁹⁵ In light of the mentioned case law and legislation, the exact scope and ambit of the constitutional right to secure tenure is unclear, especially in the landlord-tenant framework. As mentioned, the landlord-tenant laws entrench the common law right of the landowner to claim eviction upon termination of the lease, which reflects a weak tenure right for the tenant in the sense that she cannot obstruct or prevent eviction by relying on the legislation. To determine the precise strength of a secure tenure right, as envisioned in the Constitution, requires greater reflection in a more dedicated piece since the answer to this question must be found in foreign law, which is a study beyond the scope of this paper. In the following pages I briefly introduce some legal constructions that might be able to provide stronger tenure rights for tenants.

⁹⁶ This does not mean that rental housing should be the only form of housing that the state should use to accommodate low income groups.

Importantly, the essence of such a public sector periodic tenancy should be that the lease is in principle perpetual as far as the tenant is concerned. If the tenant should wish to continue occupying the premises, the local authority landlord would only be able to terminate the lease if there is a serious and legitimate ground for termination of the tenancy as provided for in the lease and appropriate legislation. Grounds for eviction should at least include the following: where the public sector tenant damaged the property or where the tenant caused a serious nuisance to neighbouring occupiers; where the tenant used the property for purposes other than housing; where the dwellings are unsafe or where the building requires reconstruction.

If there is a ground for termination of the lease, the local authority should be able to initiate eviction proceedings in court and firstly prove the ground for termination as stipulated in appropriate legislation. The grounds for possession function as a form of tenure protection, because the local authority landlord would not be able to end the periodic tenancy without successfully proving a ground for possession in court. This suggestion is very different from the current common law position in terms of which the landlord does not have to show any reason for termination of a periodic tenancy.

The current social housing sector is also inadequate to the extent that it makes available rental housing for low income households, but fails to provide tenure security. Currently, social housing institutions are able to let the residential premises to low- and medium-income households on either fixed-term or periodic tenancies. This is not necessarily problematic, because the parties can freely negotiate a lease that would suit their needs. Social sector tenancies should be concluded and enforced in terms of the common law, although statutory forms of protection should become applicable and provide the tenant with tenure security if she prefers to continue occupying the premises.

To give effect to the housing provisions and provide legally secure tenure for social sector tenants, a statutory tenancy should materialise upon termination of the contractual lease. A statutory tenancy entails that where the tenant continues to pay the agreed rent and fulfils the other terms of the lease upon termination of the contractual lease, the contractual lease would automatically convert into a statutory tenancy. The essence of this statutory tenancy would be to provide security of tenure, as the tenant's right to continue occupation would not come to an end and the social landlord would not be able to claim eviction upon termination of the contractual lease. The core of the social sector should be to allow the tenant to choose when she would like to end the tenancy.

The statutory tenancy would continue on a periodic basis until the tenant serves a notice to terminate the lease or until the landlord can prove one of the grounds for possession (listed in the legislation) in court. The grounds for eviction should generally be similar to those applicable in the public sector. The effect of these grounds should be to provide the tenant with tenure protection, as cancellation should be impossible in the absence of one of the listed grounds. If the landlord can prove a ground for possession in court, then

the statutory tenancy would come to an end and the social landlord would be able to claim eviction.

The current public rental housing (as explained in the Community Residential Units Programme) and social housing (based on the Social Housing Act) sectors aim to provide affordable rental options for the most vulnerable households. Both these sectors also aim to increase rental housing stock in urban areas. Vulnerable households, such as evictees, would therefore be able to access formal housing, other than homeownership, and the state would be actively involved in the administration and maintenance of at least the public rental sector. In their current form, neither of these sectors provides secure tenure rights for vulnerable tenants, which is problematic in light of the Constitution. The public and social rental sectors are defective to the extent that they fail to provide vulnerable households with tenure security. Secure occupation rights are defined by the occupier's ability to continue occupying the property on a consecutive basis. The occupation right should in principle be perpetual and the period of occupation should mainly depend on the occupier's will. The tenant should be allowed to legally occupy the property until she wishes to terminate the lease and vacate the premises. Prior to her decision to terminate the lease, she should be enabled to establish herself in the rented property to such an extent that it constitutes her home. Security of tenure implies uninterrupted legal occupation devoid of uncertainty regarding termination of such legal occupation. A contract-based tenancy does not ensure tenure security, because termination of the tenant's occupation right is either fixed (fixed-term tenancy) or dependant on the will of the landowner (periodic tenancy). Security of tenure in landlord-tenant law should be made provision for in legislation and it should empower marginalised households to establish themselves in their community without fear of insecurity, uncertainty and eviction.

SUMMARY

Recently the government has emphasised the importance of rental housing as a form of housing accessible to the urban poor. The current landlord-tenant regime promotes equal bargaining power and contract-based tenure (occupation) rights for tenants. It is questionable whether this free-market approach would provide satisfactory tenure security for the urban poor. In terms of section 26 of the Constitution, the state must be actively involved in the provision of housing and the state must assist the most vulnerable who face homelessness. Public rental housing might be a suitable housing option for vulnerable occupiers because the state can regulate, assess and control the market to the extent that it is involved in the provision thereof. The success of such a form of housing depends on the enactment of effective legislation that affords tenure security while also being context-sensitive to the personal needs of the individual households. The purpose of the Community Residential Units Programme is to introduce a formal public rental sector. However, the tenure rights of these public sector tenants would be similar to those of private and social sector tenants, which is problematic since these tenancies are based on contract. Legislation has not been promulgated to give effect to this programme. If the aim of the government is to provide housing in the form of rental housing, the question is how such housing would constitute *adequate* housing. Security of tenure is a key component of the right to adequate housing. One of the challenges in urban land reform is to create statutory forms of tenure that would include substantive tenure security, although such protection should be extended and applied to a diverse variety of tenure options. Security of tenure implies uninterrupted legal occupation devoid of uncertainty regarding termination of such legal occupation.