

The enforceability of tenants' rights (part 2)*

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4 The doctrine of notice

In terms of the doctrine of notice the holder of an unregistered real right is protected to the extent that the right can be enforced against outside parties on the basis of their prior knowledge of it.¹⁰⁰ The doctrine originates from the principle that “nobody may derive a benefit or advantage from his own bad faith”.¹⁰¹ According to the doctrine, if the acquirer of a real right had knowledge of the existence of a prior personal right that would establish a competing real right upon registration,¹⁰² the acquirer of the first-mentioned real right must give effect to the prior personal right that would give rise to the acquisition of the latter real right.¹⁰³

“From the perspective of property law, this seems to accord a personal right an immunity against divesting upon a change of ownership, which is regarded as the hallmark of a real right. From another point of view, the notion that an outsider may be bound to give effect to an undertaking of another to which he has not consented, flies in the face of the strict notion of contractual privity adhered to by the South African law of contractual obligations.”¹⁰⁴

In *Vansa Vanadium SA Ltd v Registrar of Deeds*,¹⁰⁵ McCreath J held that “[e]ssentially, the doctrine is applicable not to rights which are of a purely personal nature but

* See 2012 *TSAR* 35 for part 1.

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¹⁰⁰ Badenhorst, Pienaar and Mostert (n 3) 83; Mostert *et al* (n 7) 58. See in general Lubbe (n 8). Van der Merwe (n 8) 172 concludes that the doctrine of notice should not apply in South African law, because the basis of the doctrine is already being applied through general principles of the law of delict.

¹⁰¹ Badenhorst, Pienaar and Mostert (n 3) 83. The principle is also known as the rule that *nemo ex suo delicto meliorem suam conditionem facere potest*.

¹⁰² Lubbe (n 8) 248 correctly points out that “an agreement to grant another a limited real right in a thing has an obligatory effect only: the owner is obliged to constitute the real right in the manner prescribed by law, and the grantee has merely a correlative personal right to demand the constitution of the real right. The so-called *jus ad rem acquirendam* is a personal right, and the agreement whence it springs amounts to nothing more than a *causa* for the establishment of a real right by delivery or registration.”

¹⁰³ Mostert *et al* (n 7) 58; *Willoughby's Consolidated Co Ltd v Cophall Stores Ltd* 1913 AD 267 280 and *Grant v Stonestreet* 1968 4 SA 1 (A) 24B. See also Badenhorst, Pienaar and Mostert (n 3) 83 for a different view, namely that the doctrine applies to personal rights in general. Lubbe (n 8) 261 correctly mentions that it is important to distinguish between real and personal rights regarding registration, because if one discards the notion that a contract can only create personal rights, the boundary between the law of obligations and the law of things would become vague and uncertain. Lubbe also mentions that registration affects the character of the right and not the content of the entitlements of the holder of the right.

¹⁰⁴ Lubbe (n 8) 249.

¹⁰⁵ 1997 2 SA 784 (T).

only to rights *in personam ad rem acquirendam*.¹⁰⁶ However, the court extended the application of the doctrine to two cases, namely the right of pre-emption (also referred to as the right of first refusal)¹⁰⁷ and an option to purchase land,¹⁰⁸ because both these contracts relate to the purchase of land, which is a right *in personam ad rem acquirendam*.¹⁰⁹ In *Cussons v Kroon*¹¹⁰ the court referred to the *Vansa Vanadium* case¹¹¹ and decided that there was no reason why the doctrine could not apply where a person has the right that property may not be sold without her prior approval. The basis for the court's decision was that there was no difference between an option to purchase land (*voorkoopsreg*) and the right that property may not be sold without a certain person's prior approval ("*die persoon wat 'n reg het dat 'n eiendom nie sonder sy toestemming verkoop word nie*").¹¹² The court emphasised the fact that both these rights are purely personal and not a right *ad rem acquirendam*.¹¹³

It is not clear whether the supreme court of appeal extended the application of the doctrine to purely personal rights in general or only to the specific personal right in question,¹¹⁴ namely the right that property may not be sold without the person's prior approval. In *De Villiers v Potgieter NO*¹¹⁵ the court referred to the *Cussons* case¹¹⁶ and stated that in terms of the doctrine, a personal right may prevail against a succeeding real right if the acquirer of the real right had prior knowledge of the

¹⁰⁶ the *Vansa Vanadium* case 797C. Van der Merwe (n 8) 162 argues that there is no real distinction between a *ius ad rem acquirendam* and personal rights (*vorderingsregte*), because the former is merely a form of the latter.

¹⁰⁷ See Van der Merwe (n 8) 161 in support of this extension.

¹⁰⁸ This principle was confirmed in the recent case of *Spearhead Property Holdings* (n 96) par 53 where the majority decided that "[i]f the purchaser had notice of the existence of the option prior to purchasing, he must be taken to have bought the property subject to the lessee's personal right against the landlord to exercise it." At par 61 the court concluded that where the purchaser was aware of the lessee's option to purchase the property, the lessee is generally able to exercise his option against the purchaser and claim transfer of the property. The extent of the application of the doctrine of notice to purely personal rights is not clear from the decision.

¹⁰⁹ the *Vansa Vanadium* case (n 105) 797E-F.

¹¹⁰ 2002 1 All SA 361 (A).

¹¹¹ the *Cussons* case par 11.

¹¹² the *Cussons* case par 13.

¹¹³ the *Cussons* case par 13.

¹¹⁴ Bobbert "Kennisleer word bevestig" 2002 *TRW* 117 121 argues that the court did extend application of the doctrine to all personal rights. This argument is based on the court's interpretation of the basic principles of the doctrine at par 13. See the discussion below.

¹¹⁵ 2007 2 SA 311 (SCA). Prior to the *De Villiers* case, in *Harley v Upward Spiral 1196 CC 2006 4 SA 597* (D) par 22, the court mentioned two requirements for the doctrine of notice to apply: "knowledge of the prior right and ... the act of taking transfer, which action is intended to infringe the rights". The court did not specify the nature of the prior right. The case concerned the application of the doctrine of notice in the case of a double sale, particularly with reference to the time at which knowledge of the first sale had to be established. At par 25 the court decided that in order for the doctrine to apply, it was not necessary that the second purchaser should have had knowledge of the first sale at the time when the second sale agreement was concluded; and that the doctrine was therefore still applicable if the second purchaser obtained knowledge of the first sale only at the time of taking transfer. In *Dream Supreme Properties IICC v Nedcor Bank Ltd 2007 4 SA 380* (SCA) the court confirmed *Reynders v Rand Bank Bpk 1978 2 SA 630* (T) to the extent that the doctrine of notice should not apply to sales in execution. The fact that the judgment creditor was aware of a prior sale of the property did not affect the validity of the attachment and sale in execution (par 25-27). The court acknowledged the academic criticism against the *Reynders* case (see for instance Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1980) 277), but decided that the first respondent who obtained default judgment and attached the property in execution did what he was entitled to do in terms of the Uniform Rules par 26.

¹¹⁶ the *De Villiers* case (n 115) par 9. The court also referred to Lubbe (n 8).

personal right.¹¹⁷ The appellant argued that he had a personal right to obtain transfer of the immovable property, because he had a personal right in all the issued shares of a private company that claimed ownership of the immovable property.¹¹⁸ The court assumed, without deciding, that the share agreement still existed and that the doctrine of notice applied to the case.¹¹⁹

Shortly after the *De Villiers* case, the supreme court of appeal had to decide *Bowring NO v Vrededorp Properties CC*,¹²⁰ which also dealt with the doctrine of notice. The case concerned a double sale and the essence of the decision was whether the property had to be transferred back to the original owner before it could be transferred to the first purchaser whose initial right was affected by the acquirer with knowledge. The court decided that in some cases the property could be transferred directly from the acquirer with the knowledge of the initial purchaser.¹²¹ However, before the court came to this decision it compared the right that a purchaser acquires from a contract of sale with the right of a beneficiary under a servitude agreement and held that “[b]oth rights are so-called *iura in personam ad rem acquirendam*, ie personal rights to acquire a real right”.¹²²

The doctrine has been applied in a number of instances, including in the case of double sales;¹²³ unregistered servitudes;¹²⁴ sales in conflict with an option, right of pre-emption and duty not to sell land without a party’s prior approval;¹²⁵ and a sale in conflict with a right of security.¹²⁶ The doctrine of notice has also been applied in cases where a long-term lease has been entered into, but the lease has not been registered.¹²⁷

What is clear from the case law is that *iura in personam ad rem acquirendam* are enforceable against third parties who wish to establish a real right against the property, but who have knowledge of the actual status of an existing personal right,

¹¹⁷ the *De Villiers* case par 9. Unfortunately the court remained silent regarding the nature of the personal right.

¹¹⁸ See the *De Villiers* case par 1-8 for the facts of the case.

¹¹⁹ the *De Villiers* case par 11. It seems that the court accepted that the doctrine applies to personal rights in general, because it did not make an exception to the rule (as established in the *Vansa Vanadium* case (n 105)) that the doctrine applies only to rights *in personam ad rem acquirendam*. The appellant’s right was clearly a personal right, although it related to the acquisition of immovable property, which usually results in the creation of a real right. However, the appellant’s right remained purely personal.

¹²⁰ 2007 5 SA 391 (SCA).

¹²¹ the *Bowring* case (n 120) par 18.

¹²² the *Bowring* case par 17.

¹²³ See *Kazazis v Georghiades* 1979 3 SA 886 (T) 894D-E; the *Cussons* case (n 110) par 13 and the *Bowring* case (n 120) for the most recent case law regarding the application of the doctrine of notice in the event of a double sale. See also Badenhorst, Pienaar and Mostert (n 3) 84-85; Lubbe (n 8) 256. See further on double sales, to the same effect, Sonnekus “Saaklike ooreenkoms ondanks kennis van wilsgebrek” 2009 *TSAR* 709.

¹²⁴ See *Dhayanundh v Narain* 1983 1 SA 565 (N); *Bezuidenhout v Nel* 1987 4 SA 422 (N) 428H-429C for case law regarding the application of the doctrine of notice in the case of unregistered servitudes. See also Badenhorst, Pienaar and Mostert (n 3) 85 in general and *Van den Berg v Van Tonder* 1963 3 SA 558 (T) 564D-F, where the court confirmed that the purchaser must co-operate to have the unregistered servitude registered, but added that the purchaser was not obliged to acknowledge the servitude prior to registration. The only exception to this rule was where non-observance would cause damage to the holder of the unregistered servitude.

¹²⁵ See *McGregor v Jordaan* 1921 CPD 301 309; the *Vansa Vanadium* case (n 105) 797E-F and the *Cussons* case (n 110) par 13. See also Badenhorst, Pienaar and Mostert (n 3) 86.

¹²⁶ *Cato v Alion and Helps* 1922 NPD 469 471-472. See also Lubbe (n 8) 247.

¹²⁷ See *Keskoopersadh v Essop* 1970 1 SA 265 (A) 277A; *Total South Africa (Pty) Ltd v Xypteras* 1970 1 SA 592 (T). See also the *Khan* decision (n 62) and Badenhorst, Pienaar and Mostert (n 3) 85.

namely that the personal right will become a real right upon registration. This is in line with the requirement that all real rights must be registered to acquire the status of a real right. Prior to registration the right remains personal and can therefore not be enforced against third parties. Again, this is one of the fundamental characteristics of a personal right, namely that it is generally not enforceable against third parties. The purpose of the doctrine of notice is to protect the holder of such a right (*ius in personam ad rem acquirendam*) prior to registration against third parties who intend to prevent the “real” right from being registered.¹²⁸ The courts have extended the application of the doctrine to some purely personal rights,¹²⁹ such as the right to first refusal or an option, on the basis that the purely personal right relates to a right *in personam ad rem acquirendam* (for instance the right to purchase immovable property). It has been argued that as a result of the *Cussons* case¹³⁰ all personal rights (including purely personal rights) are currently protected under the doctrine of notice.¹³¹

This extension would lead to great uncertainty regarding the enforceability of purely personal rights, because one of the basic characteristics of a purely personal right is that it is not enforceable against third parties. As mentioned above, it has been accepted that third parties are not obliged to give effect to existing personal rights. The question whether the third party was aware of the existing personal right or not is irrelevant. The acquirer of a real right (for instance a purchaser of land) is not compelled to adhere to an existing purely personal right because the right only binds the contracting parties; successors in title are therefore not bound by the personal right.¹³² If the doctrine of notice is extended to all personal rights it would award personal rights the enforceability status of real rights, because third parties (with knowledge) would have to adhere to these rights simply because they were aware of them. This would be inconsistent with the fundamental principles that distinguish real and personal rights.

As was argued previously, enforcement of a purely personal right against third parties cannot be justified with an analogy to its protection against interference from third parties.¹³³ Any act of a third party that prevents a debtor from giving performance in terms of an agreement *prima facie* contravenes the creditor's personal right and the third party can be held liable for the unlawful conduct. However, the third party would not be held liable for breach of contract, as the third party was not bound by the agreement between the debtor and creditor.¹³⁴ One can conclude that any “[i]nfringement of a personal right by an acquirer of the real right is perceived as unlawful conduct. The criteria for the determination of wrongfulness in the law

¹²⁸ It is not required that the third party acted *mala fide*, but merely that the third party acted knowingly in contravention of the prior right – Lubbe (n 8) 250. See Sonnekus “Waterserwitute, verjaring en die kennisleer” 2009 *TSAR* 776 782-783, who argues convincingly that the doctrine of notice is irrelevant once registration has taken place.

¹²⁹ See the *Vansa Vanadium* case (n 105) 797E-F; the *Cussons* case (n 110) par 13 and the *De Villiers* case (n 115) par 11.

¹³⁰ (n 110).

¹³¹ Bobbert (n 114) 121; Badenhorst, Pienaar and Mostert (n 3) 87. Bobbert (121) mentions that one can infer from the decision in the *Cussons* case (specifically at par 13) that the doctrine is applicable to all personal rights and not only personal rights that acquire the status of a real right upon registration.

¹³² If the agreement between the parties is breached, the holder of the personal right would have a personal remedy against the other contracting party and not against a third party. Importantly, such a personal remedy can only be enforced against the contracting party if that person is in breach of the agreement – Van der Walt (n 3 (1992)) 176.

¹³³ Van der Walt (n 3 (1992)) 187.

¹³⁴ Van der Merwe (n 8) 157.

of delict should be applied.¹³⁵ This protection does not justify an inference in favour of enforcing all purely personal rights against third parties.

Consequently, in light of the already mentioned purpose and effect of the *huur gaat voor koop* rule it appears that the doctrine of notice should not apply to short-term tenancies, because the *huur gaat voor koop* rule protects these tenants regardless of third parties' knowledge of the lease. However, the position is more complicated in the case of unregistered long-term leases, since unregistered long-term leases that do qualify for registration are rights *in personam ad rem acquirendam*. The question is whether the doctrine of notice should protect the long-term tenant's right where he failed to register the lease or whether the *huur gaat voor koop* rule should find application. In addition, to what extent (and for what period) can these two mechanisms provide tenure protection for the unregistered long-term tenant? It seems that the doctrine of notice should afford tenure protection for the unregistered long-term tenant where the successor was aware of the lease, but it is unclear whether the *huur gaat voor koop* rule should fulfil this function where the successor was unaware of the long-term lease.

What now remains is to review the enforceability of tenants' rights in the two instances where confusion over and lack of attention to the fundamental principles of property law have created inconsistent and irrational solutions and responses, namely short-term tenancies and unregistered long-term tenancies.

5 Short-term tenancies

5.1 Introduction

It is trite law that a lease is a contractual agreement between landlord and tenant in terms of which the landlord undertakes to give the tenant use and enjoyment of his property for a limited period, while the tenant undertakes to pay a sum of money.¹³⁶ The definitive nature of contracts, including leases, is that they are agreements that entail obligations.¹³⁷ The details of these obligations are determined by the parties themselves and it is therefore fundamental to any contract, including leases, that the parties must reach consensus.¹³⁸ It is generally accepted that the South African landlord-tenant system distinguishes between long- and short-term leases and that the maximum term of the latter is fixed at less than ten years.¹³⁹ Currently, the nature of the short-term tenant's right is a contested issue. A lease agreement as such, before the lessee takes occupation, creates nothing more than a contractual obligation that binds the parties.¹⁴⁰ In terms of the lease the landlord is obliged to enable the tenant to take occupation. Once the tenant is placed in occupation, it is unclear whether he acquires a real right. This uncertainty has given rise to a number of issues, especially in the case where the tenant's right conflicts with a stronger third party right, for instance where the leased property is sold to a third party during the term of the lease. In consequence of this ambiguity the purpose and application of the *huur gaat voor koop* rule is also unclear in modern South African

¹³⁵ Badenhorst, Pienaar and Mostert (n 3) 87.

¹³⁶ Bradfield and Lehmann (n 64) 71; Kerr *The Law of Sale and Lease* (2004) 245 and De Wet and Van Wyk (n 81) 313.

¹³⁷ Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Kontraktereg Algemene Beginsels* (2004) 8.

¹³⁸ Kerr *The Principles of the Law of Contract* (1998) 3; De Wet and Van Wyk (n 81) 7.

¹³⁹ Cooper (n 64) 276.

¹⁴⁰ Cooper (n 64) 276.

property law.¹⁴¹ According to the case law and the majority of authors, the short-term tenant acquires a limited real right through occupation. Others argue that the effect of the *huur gaat voor koop* rule is to award the short-term tenant a real right. The effect is similar, since occupation is a requirement for the rule to come into effect. The third, minority opinion is that the short-term tenant can only acquire a real right if the lease is registered against the title deed. Since short-term leases are never registered, the implication of the third, minority opinion is that the short-term tenant can never acquire a real right.

5.2 Three diverging opinions

The idea that a tenant could acquire a real right was introduced in the early case of *Green v Griffiths*,¹⁴² where the court found that the lessee of immovable property acquired a real right through occupation or by means of registration. The court referred to English law, although the relevant section in the case that discusses English law concerns the transfer of rights and obligations. The court could therefore have been influenced by the English position, where a short-term lessee indeed acquires a real right without registration. In English land law this is possible as a result of the system of estates in land.¹⁴³ Given the fundamental differences between English and South African land law, a conclusion in the former about the acquisition of a real right through occupation should not be followed in the latter. This decision was nevertheless followed in numerous cases, including the *Kessoopersadh* case, where the court held that a short-term lessee of immovable property acquired a real right through occupation.¹⁴⁴ In the *Khan* case the court decided that in terms of the contractual relationship between the parties the tenant acquired personal rights and these rights are enforceable against the landlord only. One of the contractual rights that the tenant acquires is the right to take occupation of the immovable property and once the tenant takes occupation he acquires a real right.¹⁴⁵

The majority of authors agree with this view. According to Kerr, a short-term tenant has to occupy the premises to acquire a real right.¹⁴⁶ Cooper agrees and refers to the *Kessoopersadh* case¹⁴⁷ in support of this view,¹⁴⁸ while Fourie states that the real right of the lessee would be transferred to a new lessee in the event of cession. Mere occupation would therefore grant the lessee a real right that can be transferred by way of cession.¹⁴⁹ In support of the case law these authors therefore agree that

¹⁴¹ Bradfield and Lehmann (n 64) 104 explain that the rule was adopted in South Africa, but it was extended to the effect that a successor *titulo lucrative* of the lessor (a successor who did not give value) had to give effect to the lease for its entire period, despite the fact that the short-term tenant was not in occupation or the long-term lease was not registered.

¹⁴² (1885-1886) 4 SC 346 351. It is important to note that this case was decided before the enactment of the Deeds Registries Act 47 of 1937.

¹⁴³ In English law a term of years absolute, known as a lease, is an estate in land (a real right) for a fixed period. A term of years absolute is a proprietary interest in land – Gray and Gray *Elements of Land Law* (2009) 306. See also Bright *Landlord and Tenant Law in Context* (2007) 5.

¹⁴⁴ the *Kessoopersadh* case (n 127) 278F-279.

¹⁴⁵ the *Khan* case (n 62) 254G-I.

¹⁴⁶ Kerr *The Law of Sale and Lease* (1996) 384; Kerr (n 136) 438. Kerr mentions that it is important to distinguish between gratuitous and onerous successors. If neither the lessee nor anyone else is in occupation of the premises, the gratuitous successor is bound by the lease, while an onerous successor is not obliged to give effect to the lease if the lessee was not in occupation of the premises once title was transferred – Kerr (n 136) 276.

¹⁴⁷ 278F-279.

¹⁴⁸ Cooper (n 64) 277.

¹⁴⁹ Fourie “Saaklike regte by huur en onderhuur” 1978 *THRHR* 299 300.

“[r]eal rights with regard to immovable property can be created also by the transfer of possession, as in the case of the short-term lease”.¹⁵⁰ Van der Merwe mentions that registration is not required to create the real right, but rather occupation and the tenant’s intention to create a real right. The creation of a real right in land through mere occupation by the short-term tenant is described by Van der Merwe as an exception to the general rule that real rights in land are normally created by way of registration.¹⁵¹ Badenhorst, Pienaar and Mostert agree with Van der Merwe to the extent that they argue that the short-term lessee merely has a personal right against the landlord in terms of which she can demand occupation of the leased property. Once the tenant takes occupation she “acquires a limited real right to the property of another for the duration of the lease and will henceforth be protected by the rule ‘*huur gaat voor koop*’”.¹⁵²

In *Johannesburg Municipal Council v Rand Townships Registrar*¹⁵³ the court considered the origin of the *huur gaat voor koop* rule and found that in Roman law the lessee acquired a personal right against the landowner. The *huur gaat voor koop* principle was introduced in Roman-Dutch law and the lessee acquired a *ius in re aliena* through the operation of this rule, which he could enforce against the world at large.¹⁵⁴ According to Wessels J’s interpretation of the *huur gaat voor koop* rule, the effect of the rule is to provide the short-term lessee with a limited real right that he can enforce against all third parties.

The essence of this decision is supported by a number of authors. Delpont and Olivier argue that the *huur gaat voor koop* rule is an exception to the general rule that the lessee acquires a mere personal right against the landlord. Accordingly, the lessee acquires a limited real right as a result of the operation of the *huur gaat voor koop* rule and successors in title would have to adhere to the lease in consequence of the *nemo plus iuris* rule.¹⁵⁵ It has also been argued that the effect of the *huur gaat voor koop* rule according to the Roman-Dutch authorities is that the tenant acquires a real right against a subsequent purchaser and all other third parties, including the beneficiary of a mortgage bond or holder of a servitude.¹⁵⁶

¹⁵⁰ Van der Merwe (n 3) 433-434.

¹⁵¹ Van der Merwe (n 3) 434 n 253 seems to suggest that the tenant would be able to establish a real right through occupation if he has the requisite intention to do so. Interestingly, the author does not mention how one would determine whether the tenant had this intention. It is strange that the landlord’s consent seems irrelevant, even though it is his/her property that would be burdened by the limited real right. See also Van der Merwe and De Waal *The Law of Things and Servitudes* (1993) 39: real rights in immovable property are created by registration and transfer of possession. In his earlier work Van der Merwe (n 69) 597 argued that the short-term lessee acquired the real right through occupation, while the long-term lessee acquired a real right through registration. The position of long-term tenants is discussed in greater detail later in this article.

¹⁵² Badenhorst, Pienaar and Mostert (n 3) 432. The authors refer to the *Johannesburg* case (n 153) 1320 and *Shell Rhodesia (Pvt) Ltd v Eliasov* 1979 3 SA 915 (R) 918B-C. The authors’ contention that the tenant would be protected by the *huur gaat voor koop* rule because of the real rights that she acquired through occupation is logically problematic if one agrees that real rights are enforceable against the world at large. If the tenant acquires a real right as a result of occupation, the *huur gaat voor koop* rule would have no function or relevance at all.

¹⁵³ 1910 TS 1314.

¹⁵⁴ The *Johannesburg* case (n 153) 1320.

¹⁵⁵ Delpont and Olivier (n 12) 696.

¹⁵⁶ Hugo and Simpson (n 69) 304. The authors also mention that the South African courts applied Roman-Dutch law and eventually the rule was that the short-term lessee acquired a limited real right in land through occupation. Interestingly, the authors mention that the position of both landlord and tenant cannot be explained with reference to the tenant’s real right, but this does not necessarily mean that the tenant does not acquire such a right through the act of possession (305-306).

A couple of authors¹⁵⁷ disagree with the abovementioned arguments that either mere occupation or the *huur gaat voor koop* rule grants the short-term tenant a real right and contend that registration is necessary to create a real right in land, even though registration is unlikely or even impossible in the case of short-term tenancies. On the basis of this approach Lewis critiqued the view of the *Khan* decision,¹⁵⁸ where Rose-Innes J held that a lessee acquires a real right through occupation, with reference to the Deeds Registries Act 47 of 1937. Lewis correctly points out that the view taken by the court is not in line with section 16 of the act, which requires that real rights in land must be conveyed through registration.¹⁵⁹ Section 3(1)(r) of the act also states that all real rights in land must be registered.¹⁶⁰ If the tenant acquires a real right through occupation, sections 16 and 3(1)(r) of the Deeds Registries Act would be pointless.¹⁶¹ Real rights originate in contracts, which provide the acquirer with a personal claim for performance against the grantee. The acquirer's right remains personal and can, prior to registration, only be enforced against the other contracting party. This is in line with the notion of rights *in personam ad rem acquirendam*, which are rights that are intended to be registered but that remain personal until registration.¹⁶² Once the right is registered the holder of the personal right acquires a real right; prior to or in the absence of registration there is no more than a personal right.

Sonnekus also refers to the *Khan* case and the strange view of the court that the role of registration is to provide additional security for the tenant, which would be unnecessary if he already acquired the real right through the act of possession.¹⁶³ Sonnekus also criticises De Wet's¹⁶⁴ conclusion that a lease provides the tenant with a limited real right because a lease places a burden on the landowner's right to use and enjoy his property, just like limited real rights place a burden on the landowner's right to use and enjoy his property.¹⁶⁵ Peculiarly, De Wet's proposition that the short-term tenant acquires a real right through occupation does not apply to long-term tenants. This anomaly is not addressed by De Wet or any of the other authors. It is also not clear why the lessee of a movable does not acquire a limited real right through the act of possession.¹⁶⁶ With reference to the *Khan* case, Sonnekus highlights the uncertainty regarding the nature of the right where the tenant occupied the property and acquired a real right, as suggested in the case, but thereafter left the property. The question is whether the real right, which he acquired through occupation, changes back to the personal right that he had before occupation.¹⁶⁷

Sonnekus and Lewis agree that a short-term lessee cannot acquire a real right through mere occupation, even though he is protected by the *huur gaat voor koop* rule. The view that a tenant can acquire a real right through mere occupation is in

¹⁵⁷ Lewis (n 14); Sonnekus (n 55) and Van der Walt and Pienaar (n 4) 289-290.

¹⁵⁸ At 254J-255A the court decided that the lessee acquired a "registrable real right of occupation since she was in occupation at the time of the contract and thereafter remained in occupation by virtue of the contract".

¹⁵⁹ This statement must be qualified to the extent that a real right in land can be established without registration if it is an original form of acquisition, such as prescription – Sonnekus (n 29) 180.

¹⁶⁰ Lewis (n 14) 600.

¹⁶¹ Lewis (n 14) 600.

¹⁶² Lewis (n 14) 601. Lewis refers to *Registrar of Deeds (Transvaal) v The Ferreira Deep Ltd* 1930 AD 169 176.

¹⁶³ Sonnekus (n 55) 224.

¹⁶⁴ See De Wet (n 69).

¹⁶⁵ Sonnekus (n 55) 226.

¹⁶⁶ Sonnekus (n 55) 227.

¹⁶⁷ Sonnekus (n 55) 228.

conflict with the Deeds Registries Act, as Lewis points out, and it would create uncertainty regarding the position of long-term tenants. Sonnekus implies that, based on this logic, there is no justification why the long-term tenant should not also acquire a limited real right through mere occupation. It seems unreasonable that the short-term tenant can acquire a limited real right through mere possession, while the long-term tenant would have to register the lease in order to obtain such a right. If one applies the view of the majority to long-term leases it follows that the Deeds Registries Act, the Formalities in Respect of Leases of Land Act 18 of 1969, the doctrine of notice and the *huur gaat voor koop* rule would all be redundant. The two authors also agree that the majority view would cause great uncertainty for third parties, since mere occupation cannot fulfil the publicity function in the same way that registration does, as far as land is concerned.

5.3 Property principles and the purpose of the *huur gaat voor koop* rule

To determine the nature of the short-term tenant's right it is necessary to take into consideration the fundamental principles that distinguish real from personal rights. As mentioned previously, real rights in land must be registered and these rights can only be conveyed (or burdened) by means of registration. Acquisition of a real right in land through mere occupation would either be an exception to the general rule that real rights in land must be registered or be in contravention of sections 3(1)(r) and 16 of the Deeds Registries Act. Neither of these options should find credibility in the case law or the literature, because it would undermine a fundamental characteristic of real rights in land, namely that these rights can only be acquired (or transferred), in the case of derivative acquisition, through the act of registration. It is generally accepted, based on the publicity principle and the act, that real rights in land are transferred through registration, while real rights in movables are transferred through delivery.¹⁶⁸ The idea that a tenant can acquire a real right in land through mere occupation is irreconcilable with this established principle.

It is true that occupation does play a role in the protection of tenants. In terms of the *huur gaat voor koop* rule, the tenant must take occupation to acquire protection under the rule. However, in this case occupation is a requirement for the protection of the rule to be activated and not a requirement for the vesting or transfer of a real right. Moreover, there is no reason why a real right should be a requirement for the application of the rule; in fact, if the tenant acquired a real right through occupation she would have no need for the protection of the rule. In the case of movables the transferee acquires ownership (real right) by taking delivery and possession, but this is not the case where immovable property is transferred, nor is it the case where a party acquires a limited real right in land. It is likely that the rules that govern the acquisition of real rights in movables and the requirement that the tenant must be in occupation for the *huur gaat voor koop* rule to apply, have somehow been combined to contribute to the current confusion regarding the nature of the short-term tenant's right.

As explained previously, the definitive nature of a lease is a contract that consists of obligations as agreed to by the parties. Neither the classical nor the personalist theory is above criticism, but the classical theory indicates that the object of a real right is a thing, while the object of a personal right is a performance by either or both parties. This distinction supports the view that short-term leases create personal rights, because the object of the parties' rights is performance by the parties in terms

¹⁶⁸ Sonnekus and Neels *Sakereg Vonnisbundel* (1994) 97-98.

of the contract. The fact that the tenant's right indirectly pertains to immovable property does not change the nature of the right, since the tenant's right remains directed at the landlady and her duties in terms of the contract. Considering the subtraction from the *dominium* test as developed in the *Denel* case,¹⁶⁹ which aims to distinguish between real and personal rights, it seems that the intention of both parties to create a real right is as important a factor to determine the nature of the right as the effect of a real right, namely to restrict ownership of the current owner and successors in title. It is highly unlikely that a landlord who enters into a short-term lease would intend to award the tenant a real right. Short-term leases are contractual agreements that allow tenants to occupy landlords' property for a short term. The nature of the tenant's right stems from the contract, which incorporates the parties' intention. If the landlord should wish to award the short-term tenant a limited real right one can be certain that this intention would be clearly expressed in the lease and that the parties would aim to give effect to this intention by registering the right, probably in the form of a long-term lease. It is safe to assume that this is usually not the case with short-term leases, because registration is expensive and it would cause unwanted administrative difficulties for both parties. On top of these difficulties, the parties would never be able to register a short-term lease over part of a building or a building on part of a property because of the deeds registries practice and the indivisibility principle.¹⁷⁰ Even if the short-term lease is for a relatively long period and it was the parties' intention to create a limited real right, it follows that the mere act of occupation must be insufficient to indicate this intention and registration is therefore still necessary. In light of the case law concerning the nature of real rights and the distinction between real and personal rights, it is clear that short-term leases do not fit the definition of limited real rights, because the right does not burden the land to the extent described in the case law. In light of these observations one can conclude that the case law and majority view (led by Kerr and Van der Merwe), which suggest that the tenant acquires a real right through occupation, are irreconcilable with the generally accepted principles that distinguish between real and personal rights.

One principle still requires attention, namely the relative enforceability of real and personal rights. Generally, a real right is enforceable against all third parties, while a personal right is enforceable only against the other contracting party. It seems that the effect of the *huur gaat voor koop* rule, which is to strengthen tenants' occupation rights against stronger third party rights, has contributed to the erroneous view that short-term tenants acquire real rights through occupation. Even though occupation is an important requirement for the application of the *huur gaat voor koop* rule, it cannot by itself provide the tenant with a real right, nor can the *huur gaat voor koop* rule in itself afford the tenant a real right. Furthermore, if one agrees with Kerr and Van der Merwe that the short-term tenant acquires a real right through mere occupation, what would the use of the *huur gaat voor koop* rule be? If tenants did acquire real rights through occupation, there would be no use for the *huur gaat voor koop* rule, because a real right can be enforced against all third parties, including a successor in title. If tenants did acquire real rights through mere occupation, section 16 of the Deeds Registries Act would also be redundant.

Tenants who occupy property under short leases are protected by the *huur gaat voor koop* rule precisely because these leases are not registered and therefore do not

¹⁶⁹ the *Denel* case (n 39) 579.

¹⁷⁰ See n 62 above for a detailed explanation and qualification to this rule.

afford them real rights.¹⁷¹ The essence of the *huur gaat voor koop* rule is to provide tenure security for tenants against successors for the agreed period of the lease. The *huur gaat voor koop* rule was developed as an exception to the general rule that a lessee's personal right is enforceable only against the lessor. The aim of the rule is to protect tenants' occupation rights to the extent provided by their contracts and it is therefore improbable that this rule could provide a tenant with a real right. The logic of the rule is similar to legislation that aims to protect weaker parties by suspending the workings of the common law at a specific period in time and for a particular situation. The remaining question is whether this suspension of the common law is justified.

The application of the doctrine of notice is irrelevant in the case of short leases, because the doctrine applies only to rights *in personam ad rem acquirendam*. Short-term tenants are entitled to enforce their leases against successors in title of the landlord on the basis of the *huur gaat voor koop* rule, regardless of the successors' knowledge of the lease. However, the mere fact that the tenant is entitled to enforce the lease against at least some third parties does not mean that the tenant acquired a real right.¹⁷² Real rights are generally enforceable against third parties and this characteristic of enforceability usually attaches to real rights, but enforceability is only one of a number of characteristics that define real rights. To argue that short-term tenants acquire real rights because they can enforce the right against some third parties (based on the *huur gaat voor koop* rule) would result in a circular argument that completely disregards all the other fundamental characteristics that define real rights, such as transfer and creation.

Finally, one should also consider the position of the short-term tenant where she failed to occupy the premises at the time when the property changed hands, because the general rule is that occupation is a requirement for the application of the *huur gaat voor koop* rule. Despite the tenant's occupation, Bradfield and Lehmann argue that the *huur gaat voor koop* rule would protect the lessee if the successor was aware of the lease at the time when he entered into the contract or when he acquired the real right.¹⁷³ This proposition is in conflict with two accepted principles that relate to the *huur gaat voor koop* rule and the doctrine of notice. Firstly, the only requirement for the application of the *huur gaat voor koop* rule is that the tenant must be in occupation of the premises and one should therefore be cautious about disregarding the only requirement that gives effect to this rule. However, the purpose of the occupation requirement is to publicise the existence of the tenant's right. It follows that where the successor was aware of the short-term lease, occupation by the tenant might not be necessary for the application of the *huur gaat voor koop* rule, since the publicity requirement was already satisfied as a result of the successor's knowledge. The question is whether the successor should be bound by the existent short-term lease as a result of his knowledge, since his knowledge serves the same function as the occupation requirement, namely publicity.

Secondly, in light of the case law discussed earlier, the doctrine of notice applies only to rights *in personam ad rem acquirendam* and short-term leases are purely

¹⁷¹ Badenhorst, Pienaar and Mostert (n 3) 431-432. See also Van der Walt *Property in the Margins* (2009) 116.

¹⁷² Sonnekus and Neels (n 168) 101.

¹⁷³ Bradfield and Lehmann (n 64) 106. The authors also mention that where the short-term tenant failed to take occupation he would be protected under the *huur gaat voor koop* rule if the successor was a gratuitous successor. See n 146 above for a similar view by Kerr and text accompanying n 179 below for the similar position of long-term tenants.

personal rights. If one follows a strict application of the doctrine of notice, the rule should not apply to purely personal rights and it should therefore not extend the application of the *huur gaat voor koop* rule to protect short-term tenants who failed to take occupation of the leased premises. In principle, the *huur gaat voor koop* rule does not apply where the short-term tenant failed to take occupation. Nonetheless, occupation by the short-term tenant serves the same function as registration in the case of long-term leases to the extent that occupation by the tenant would give effect to the *huur gaat voor koop* rule, which would enable the tenant to enforce the lease against successors. Based on policy considerations, rather than doctrine, one could argue that the doctrine of notice should apply to short-term leases where the successor had prior knowledge of the lease, because the purpose of the doctrine is to allow weak (personal) rights to attain its true (real) status. In the case of short-term leases, the true status of the tenant's right would not equate a real right, but rather a personal right combined with strengthened enforceability against third parties as a result of the *huur gaat voor koop* rule.

6 Long-term tenancies

As far as long-term tenants are concerned, it is important to distinguish between registered and unregistered long-term leases,¹⁷⁴ but according to the Formalities in Respect of Leases of Land Act 18 of 1969 one should also distinguish between gratuitous and onerous successors.¹⁷⁵ Registered long-term leases create limited real rights in land and long-term tenants in terms of a registered lease are therefore able to enforce their rights against all third parties, including successors in title, for the full term of the lease.¹⁷⁶ Once the lease is registered, the doctrine of notice and the *huur gaat voor koop* rule become irrelevant. Contrary to this view, Kerr argues that the lease has to be registered to give effect to the *huur gaat voor koop* rule, which provides tenure security for the tenant.¹⁷⁷ Cooper disagrees and correctly points out that when the lessee acquires a real right by means of registration, the lease is enforceable against third parties regardless of whether the successor had knowledge of the lease, how he acquired the property and whether the *huur gaat voor koop* rule applies.¹⁷⁸ The acquisition of a limited real right through registration of the long-term leases renders the *huur gaat voor koop* rule redundant.

The rights of unregistered long-term tenants are regulated in the Formalities in Respect of Leases of Land Act 18 of 1969, although the nature of their tenure rights derives from common-law principles that aim to provide tenure protection for these tenants. It is generally accepted and implicit in the act that long-term tenants in terms of unregistered leases can enforce their rights against gratuitous successors for the full period of the lease, regardless of whether the successor had prior knowledge of the lease.¹⁷⁹ The rights of unregistered long-term tenants are explicitly regulated in the act where these rights conflict with the rights of onerous successors. Section 1(2)

¹⁷⁴ In terms of the Deeds Registries Act 47 of 1937, a long-term lease is a lease for ten years or longer. See the similar definition of a long lease in s 1(2) of the Formalities in Respect of Leases of Land Act 18 of 1969.

¹⁷⁵ See Kerr (n 136) 280-283 for a detailed discussion of the position prior to the Formalities in Respect of Leases of Land Act. See also Cooper (n 64) 305-309.

¹⁷⁶ Bradfield and Lehmann (n 64) 105.

¹⁷⁷ Kerr (n 64) 278.

¹⁷⁸ Cooper (n 64) 276-277, 281.

¹⁷⁹ Bradfield and Lehmann (n 64) 105; Kerr (n 136) 283 and *Hitzeroth v Brooks* 1964 4 SA 443 (EC) 447E-G.

of the act provides that the unregistered long-term tenant can enforce her right for the full period of the lease if the onerous successor knew of the lease.¹⁸⁰ Where the onerous successor was unaware of the lease, the unregistered long-term tenant can still enforce the lease for the first ten years of its existence, provided that the lessee was in occupation of the premises.¹⁸¹

The Formalities Act re-established the position as it existed before the General Law Amendment Act,¹⁸² eliminating the uncertainties brought about by section 2¹⁸³ of the act. Section 2 in effect extinguished the rule that registration was unnecessary against a successor who had knowledge of the long lease. It also implied that “third parties” included gratuitous successors.¹⁸⁴ When the legislature repealed the General Law Amendment Act it restored the common-law position that the gratuitous successor was “bound by an unregistered long lease even though he did not know of its existence”.¹⁸⁵ Cooper correctly mentions that in the absence of registration, the successor could still be bound by the lease, depending on whether the *huur gaat voor koop* rule applied or whether he had knowledge of the lease.¹⁸⁶

In conclusion, the position is that in the case of a long-term lease, tenants are protected in terms of the Formalities in Respect of Leases of Land Act,¹⁸⁷ which clarifies the function of the doctrine of notice and the *huur gaat voor koop* rule. Unregistered long leases are enforceable against third parties for the first ten years by operation of the *huur gaat voor koop* rule, but the tenant must be in occupation of the premises for the rule to apply. If the purchaser had knowledge of the unregistered long lease, the protection would extend beyond the first ten years¹⁸⁸ and protect the tenant for the full period of the lease.

¹⁸⁰ The act states that the lease would be valid against the onerous successor “at the time of the giving of credit or the entry into the transaction by which he obtained the leased land or a portion thereof or obtained a real right in respect thereof”. According to Van der Walt and Pienaar (n 4) 290-291, this right is based on the doctrine of notice. The application of the doctrine of notice in the case where the successor had prior notice of the unregistered long-term lease is in line with the previous discussion regarding the application of this rule, because an unregistered long-term lease is a right *in personam ad rem acquirendam* and this right should therefore be protected under the doctrine of notice. See also Bradfield and Lehmann (n 64) 105; Kerr (n 136) 284 and Cooper (n 64) 284.

¹⁸¹ s 1(2) of the act; the *Hitzeroth* case (n 179) 447F and Bradfield and Lehmann (n 64) 105. Bradfield and Lehmann mention that this form of protection is similar to the protection enjoyed by a short-term tenant in the case where the *huur gaat voor koop* rule applies. Van der Walt and Pienaar (n 4) 290-291 argue that the unregistered long-term lease is enforced on the basis of the *huur gaat voor koop* rule for the first ten years of the lease if the tenant was in occupation.

¹⁸² Act 50 of 1956. The position before the 1956 act was described by O’Hagan J in the case of *Hitzeroth* 447; the court found that for a long lease “to be binding upon onerous successors and creditors of the lessor [it] must be registered against the title of the leased property, unless the successor has had notice of the lease. An unregistered long lease is always binding as between the immediate parties thereto and upon gratuitous successors of the lessor, and is binding upon a purchaser who had no notice of the lease, for a period of not more than ten years, if the lessee was in occupation of the property when it was sold.”

¹⁸³ S 2 provided that “no lease of land which is entered into for a period of not less than ten years ... shall be valid as against third parties if executed after the commencement on this Act, unless registered against the title deeds of the leased land”.

¹⁸⁴ McLennan “Formalities for long leases – a fresh start?” 1969 *SALJ* 345 346.

¹⁸⁵ Kerr (n 146) 260.

¹⁸⁶ Cooper (n 64) 276-277 and 281.

¹⁸⁷ 18 of 1969.

¹⁸⁸ Badenhorst, Pienaar and Mostert (n 3) 430-431; *Ismail v Ismail* 2007 4 SA 557 (EC).

7 Conclusion

The South African landlord-tenant regime is currently under scrutiny.¹⁸⁹ The courts are struggling to establish what type of tenure protection urban residential tenants should enjoy and this uncertainty is accentuated in cases where the tenants are socio-economically vulnerable. The constitution provides in section 25(6) that previously disadvantaged persons, including tenants, whose tenure is insecure because of apartheid law and practices are entitled to improved tenure security and in section 26 that the state must make laws to realise the right of access to adequate housing which, in our view, includes the right to secure tenure as far as tenants are concerned. Our point of departure in this article was that it is first of all necessary to determine how secure tenants' rights are in terms of the common law. The question is whether the common law of landlord and tenant requires statutory improvement to provide secure tenure, and whether the legislation that has been promulgated to date satisfies that requirement. This article aims to answer only the preliminary question, namely what type of tenure security urban residential tenants currently enjoy in terms of the common law.

In the case of short-term leases the parties' intention is usually to award the tenant a mere personal right to occupy the leased premises for a limited period. The mere fact that the short-term tenant can enforce the lease against some third parties (new owners) as a result of the operation of the *huur gaat voor koop* rule does not change the nature of the tenant's personal right. The view that the short-term tenant acquires a real right as a result of the *huur gaat voor koop* rule is historically flawed, because the rule developed in Roman-Dutch law as an exception to the general rule that short-term tenants were unable to enforce their personal rights against successors. The purpose of the rule was to provide tenure protection for tenants to ensure that they could continue to occupy the leased premises for the agreed period of the lease. At no point in time did the nature of the tenant's personal right transform into a real right. The purpose and effect of this rule remain as it was in Roman-Dutch law and the view that the personal right of the tenant changes into a real right because of the rule is both unnecessary and in conflict with modern South African property law doctrine. The only requirement for the *huur gaat voor koop* rule is that the tenant must be in occupation of the premises. This requirement serves a publicity function, but it does not create a real right because doing so is logically unnecessary (the *huur gaat voor koop* rule provides adequate protection for a personal right) and doctrinally impossible.

For similar reasons, the notion that occupation provides the short-term tenant with a real right is in conflict with fundamental common-law principles of property law, with the Deeds Registries Act and with the parties' intention. Occupation can be a factor in the original acquisition of real rights in land, but for derivative acquisition of real rights in land registration is required. The view that occupation is the basis of a real right for short-term tenants derives from confusion between original and derivative acquisition of real rights in land or between acquisition of real rights in movables and immovables; or it is caused by confusion of English with South African legal principles; or it is based on a misapprehension of the role of occupation in triggering the protective effect of the *huur gaat voor koop* rule.

¹⁸⁹ See for instance *The Occupiers, Shulana court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 4 All SA 54 (SCA); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA) and *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 5 SA 19 (SCA).

It does not seem as if the doctrine of notice has any role to play in the case of short-term leases. In light of the case law the doctrine of notice does not apply to purely personal rights such as short-term tenancies. Based on policy considerations one could argue that the doctrine should apply in the case where the successor was aware of the short-term lease before the tenant could take occupation, since the doctrine would fulfil the same publicity function as the tenant's occupation, but this argument is contested and uncertain.

One can conclude that short-term tenants acquire mere personal rights and that they can enforce these rights against some third parties for the agreed period of the lease if the *huur gaat voor koop* rule applies. In terms of the common law, these tenants therefore occupy land with insecure tenure, because their rights are personal and the enforceability potential of their rights is weak, despite the limited protection of the *huur gaat voor koop* rule. This rule merely protects tenants against sale of the property during the term of the lease, but it does not extend that protection outside of the framework of the lease agreement. The common law does not provide for any form of continued occupation rights, because the right of occupation derives purely from the lease. The *huur gaat voor koop* rule does not provide strengthened tenure protection to the extent that the tenant can continue to occupy the premises beyond the agreed period either. Even when the lease is enforced against new owners of the property on the basis of the *huur gaat voor koop* rule, this is done within the four corners of the original contract. Short-term tenants' rights are therefore personal rights and the legally recognised strength of these tenants' tenure, in the sense of duration, is determined by the lease. A short-term tenant's personal right to occupy the landlord's premises derives from the contract, which usually specifies the agreed length of occupation. Once the lease terminates – as specified in the lease – the tenant's legal right of occupation immediately ends and any continued occupation would automatically be unlawful. This is the case for all tenants, including previously disadvantaged tenants who occupy state land.

Weak and marginalised tenants do not enjoy any protection against exploitative lease agreements, nor do they acquire any rights that would enable them to continue the lease beyond the agreed terms of the contract purely on the basis of their socio-economic status or context. From the case law it is clear that this position is troublesome, especially in the private rental market where private landlords rent property to previously disadvantaged weak tenants who are unable to acquire suitable alternative accommodation.¹⁹⁰ The problem with these common-law tenancies is that the occupiers are entitled to occupy land with legally secure tenure if the tenure is legally insecure as a result of past racially discriminatory laws or practices (section 25(6)); that the private landowners may not be deprived of their property in an arbitrary manner (section 25); and that the state is constitutionally obliged to foster conditions that would give effect to the right of access to adequate housing (section 26). The current landlord-tenant regime cannot provide strong tenure rights for these households, nor can it accommodate these occupiers in a different landlord-tenant sector. Ideally, socio-economically weak previously disadvantaged households who are unable to acquire suitable housing should be accommodated by the state (in a public rental sector, or even in a social sector),¹⁹¹ but this is not currently the case. In the meantime, the common law does not recognise a distinction between “normal” tenants, who can look after themselves in a free market, and tenants that are socially

¹⁹⁰ See n 189.

¹⁹¹ See Maass *Tenure Security in Urban Rental Housing* (2010 diss UNISA) 8.4.2.

weak or whose tenure is insecure because of apartheid laws and practices. At least to this extent, the common law therefore does not meet the requirements of sections 25 and 26.

The analysis above shows that registered long-term tenants acquire limited real rights in the leased property for the full period of the tenancy. The nature of these tenants' rights is uncontested and one can conclude that registered long-term tenants have legally secure rights because they acquire real rights in land. As we explained previously, the nature of unregistered long-term tenants' rights is more complex. In terms of the Formalities in Respect of Leases of Land Act, unregistered long-term leases are enforceable for the full term of the lease against onerous successors, provided that the successor was aware of the lease. The act confirms that the doctrine applies only to rights *in personam ad rem acquirendam*. If the long-term tenant was in occupation of the premises, prior to registration of the lease, the onerous successor would be bound by the lease for a maximum period of ten years, irrespective of his knowledge of the lease. Even though the act does not refer to the *huur gaat voor koop* rule, one can assume that this provision gives effect to the rule, since the result of this provision is analogous to that of the rule. In the absence of occupation there is a case to be made that the tenant may be protected against new owners with knowledge of the lease, but this situation is contested and unclear. Unregistered long-term leases are enforceable against gratuitous successors regardless of the successor's knowledge or the fact that the tenant failed to take occupation.

The Formalities in Respect of Leases of Land Act ensures that the tenant would be able to enforce the lease for a minimum period of ten years, provided that he had to be in occupation of the premises. This requirement serves a publicity function with the aim to protect *bona fide* third parties. Unregistered long-term tenants enjoy substantial protection in the sense that they can occupy the leased property for a minimum of ten years, but this is not the case where the tenant failed to take occupation prior to alienation of the premises. Generally speaking, it looks as if the act (which predates the 1996 constitution) ensures the security of tenure of long-term tenants adequately to comply with the requirements of sections 25 and 26 of the constitution.

In conclusion, based on both generally accepted property law doctrine and laws enacted by parliament, short-term tenants' rights and unregistered long-term tenants' rights are personal rights. Registered long-term tenants enjoy limited real rights. At least in the case of registered long-term leases one could probably conclude that those tenants enjoy the kind of tenure security that is required by sections 25 and 26 of the constitution. Given the opportunity to register long-term leases and the additional protection for unregistered long-term leases provided in the Act, it is even possible to conclude that long-term tenants generally enjoy sufficient tenure security to satisfy the constitutional requirements. However, the same cannot be said about short-term tenancies. Short-term tenants who are socially and financially strong and who can look after their own interests in the free market probably enjoy adequate protection from the common-law principles. However, those tenants whose interests are particularly targeted by sections 25(6) and 26(2) of the constitution are not adequately protected by the common law, and the constitution clearly requires statutory action to rectify the situation.¹⁹² The constitution guarantees that everyone has the right to have access to adequate housing and that no person may be evicted

¹⁹² Even though it might be possible for the courts to interpret certain provisions, for instance section 4(5)(c) of the Rental Housing Act, to provide some form of additional tenure security, this possibility has to date not been taken seriously by the courts. See for instance the *Maphango* case (n 189).

from her home in an arbitrary manner.¹⁹³ Apart from the housing provision, which already has a direct impact on the relationship between landlord and tenant, we argue that section 25(6) of the constitution must also have some impact on the current landlord-tenant framework, although the extent of its application is inherently restricted because of the section's focus on the lasting effects of apartheid law. Section 25(6) is aimed at improving previously disadvantaged persons' weak tenure rights to a level that is "legally secure" and this reform-orientated commitment must be given effect to through legislation.¹⁹⁴ In terms of section 25(6), read with section 25(9), previously disadvantaged tenants who currently occupy land with insecure tenure are entitled to improved tenure security.

The one statutory addition to the common-law rights of short-term tenants, the Rental Housing Act 50 of 1999, arguably does not do enough to overcome the security of tenure shortcomings of the common law,¹⁹⁵ at least as far as socially weak and previously disadvantaged short-term tenants are concerned. The act does not explicitly override the common law and it is a moot question whether it can do enough work to provide the security of tenure required by the constitution. The courts have indirectly concluded that the nature of short-term tenants' rights is primarily based on the common law, since the post-1994 landlord-tenant legislation, namely the Rental Housing Act 50 of 1999, has been found to play no significant role in cases involving the protection of these tenants.¹⁹⁶ In principle, these tenants might challenge the current landlord-tenant legislation for being unconstitutional, to the extent that the legislation does not give effect to their constitutional right to secure tenure.¹⁹⁷ In light of recent case law that specifically deals with previously disadvantaged weak short-term tenants who face eviction as a result of termination of their leases and the consequential threat of homelessness,¹⁹⁸ one can conclude that the current landlord-tenant regime is not in line with section 25(6) of the constitution. This question must, however, be left for another occasion, as it requires more extensive analysis of the act.

A related, although different, issue is whether tenants' rights are constitutional property in terms of section 25(1) of the constitution.¹⁹⁹ The question is whether the tenant has a separate constitutionally recognised property interest in the rental property and to what extent that interest should be protected against the property interest of the landowner. This issue might require deeper reflection in a more dedicated piece, but we consider it worthwhile to express a brief opinion on this point since it is a relevant consideration for the argument we make in general. This question has not enjoyed consideration in South African law, but the German Federal constitutional court has decided that a tenant has a constitutional property right that is

¹⁹³ s 26.

¹⁹⁴ s 25(9).

¹⁹⁵ See n 192 above.

¹⁹⁶ See specifically the *Maphango* case (n 189).

¹⁹⁷ In terms of the subsidiarity principle the plaintiff should first challenge the legislation before she can rely on the constitutional right directly: Van der Walt "Normative pluralism and anarchy: reflections on the 2007 term" 2008 *CCR* 77; Du Plessis "'Subsidiarity': what's in the name for constitutional interpretation and adjudication?" 2006 *Stell LR* 207. This principle was criticised by Klare "Legal subsidiarity & constitutional rights: a reply to AJ Van der Walt" 2008 *CCR* 129.

¹⁹⁸ See for instance the cases mentioned in n 189.

¹⁹⁹ S 25(1) of the constitution states that no person may be deprived of property, except in terms of law of general application, and no person may be deprived of property in an arbitrary manner.

protected under article 14(1) of the German constitution.²⁰⁰ The German court adopts the view that the fundamental feature of property in terms of the property guarantee is that property enables the holder of the right to secure a sphere of freedom where she can take control and responsibility for her own life.²⁰¹ The nature of the property in the family home is important in light of this fundamental guarantee, as it can be defined as the core of human existence.²⁰² Based on this decision we argue that tenants' rights should be described as property rights for constitutional purposes, without falling foul of the logical error that spoiled the German decision, namely to conclude that tenants' rights must be equal to ownership or real rights in private law if they are seen as property in constitutional law.²⁰³ As a point of departure our courts should adjudicate landlord-tenant eviction cases from the standpoint that the short-term tenant's right is constitutional property and that the tenant may therefore not be deprived of this right in an arbitrary manner, even though this right could, for private-law purposes, be either a limited real right (registered long-term lease) or a personal right that enjoys either common-law or statutory protection in private law. Given this interpretation one can strengthen short-term tenants' rights to a level that can compete with the landowner's property right in the constitutional setting, although it might be doctrinally different in private law. From first principles, even if the legislature fails to amend the current landlord-tenant legislation and the courts refuse to interpret the legislation (or the common law) to provide increased tenure protection for socio-economically weak tenants who are previously disadvantaged and therefore entitled to occupy land with legally secure tenure in terms of section 25(6) of the constitution, any tenant can argue that she has a constitutionally protected property interest in the leased premises and that her constitutional property right in the premises may not be deprived in an arbitrary manner. It would, however, be preferable to bring current law into line with this constitutional argument by suitable legislation.

SAMEVATTING

DIE AFDWINGBAARHEID VAN HUURDERS SE REGTE

Die artikel heroorweeg die aard van residensiële huurders se regte in die post-1994 grondwetlike bedeling. Artikel 25(6) van die grondwet bepaal dat 'n persoon of gemeenskap wat grond tans okkupeer met okkupasieregte wat onseker is as gevolg van vorige rasgebaseerde wetgewing, geregtig is op okkupasieregte met verblyfsekerheid. Artikel 25(9) gelas die wetgewer om wetgewing te verorden ten einde effek aan hierdie reg te gee. Die doel van die artikel is om te bepaal watter tipe regte huurders tans ingevolge die gemenerereg geniet en of hierdie regte voldoende beskerming bied in die lig van artikel 25(6), gelees met artikel 26 van die grondwet.

Die aard van korttermynhuurders se regte word in die regspraak en literatuur op teenstrydige wyse uiteengesit. Ten einde te bepaal wat die aard en effek van 'n huurder se reg is, verwys die artikel na die algemeen aanvaarde beginsels rakende die verskil tussen saaklike en persoonlike regte; die aard

²⁰⁰ *BVerfGE* 89, 1 (1993). See also Van der Walt *Constitutional Property Clauses A Comparative Analysis* (1999) 139; Van der Walt (n 171) 92-93. S 14(1) of the German constitution states that "[p]roperty and the right of inheritance shall be [are] guaranteed. Their substance [content] and limits shall be [are] determined by law." This translation was taken from Van der Walt (n 200) 121.

²⁰¹ *BVerfGE* 89 7-8.

²⁰² *BVerfGE* 89 7. The second part of the court's argument, namely that the tenant enjoyed the right of disposal, similar to that of the owner, and that the tenant therefore qualified as an owner under a 14 received some criticism, although the criticism was raised against the court's finding that the tenant had a private law ownership interest on the same level as the owner. A more acceptable argument would have been to construe the statutory protection of tenants as restrictions that are placed upon the landowner's ownership – Van der Walt (n 171) 94-95.

²⁰³ See n 202.

en oorsprong van die *huur gaat voor koop*-reël; die aard en oorsprong van die kennisleer; sowel as die Registrasie van Aktes Wet 47 van 1937. Die ondersoek lei tot die gevolgtrekking dat korttermynhuurders slegs persoonlike regte verkry en dat hierdie regte swak verblyfsekerheid bied. Die *huur gaat voor koop*-reël bied wel beskerming vir huurders, maar die omvang van die beskerming is beperk tot die ooreengekome duur van die huur soos vervat in die huurkontrak.

Die geregistreeerde langtermynhuurder verkry wel 'n beperkte saaklike reg en word as sulks beskerm. Die Wet op die Formaliteite met Betrekking tot Huurkontrakte van Grond 18 van 1969 reguleer die posisie van ongeregistreeerde langtermynhuurders en beskerm ongeregistreeerde langtermynhuurders ook in die geval waar opvolgers in titel kennis dra van die huur, in welke geval die opvolger gebonde sal wees vir die volle termyn van die langtermynhuur. Indien die opvolger nie kennis dra van die huur nie sal hy steeds gebonde wees vir die eerste tien jaar van die langtermynhuur. Die enigste vereiste in laasgenoemde geval is dat die huurder in okkupasie moes wees.

Die ondersoek lei tot die gevolgtrekking dat veral korttermynhuurders se verblyfsekerheid ingevolge die gemenerereg swak is en dat sommige okkuperders, soos voorsien in artikel 25(6) van die grondwet, waarskynlik op sterker verblyfregte geregtig is. Die wetgewer is verantwoordelik vir die nodige veranderinge in die huurbehuisingsraamwerk ten einde effek te gee aan artikel 25(6); 'n dramatiese verandering in die gemenerereg is minder gewens aangesien slegs sommige huurders geregtig is op sterker verblyfsekerheid.