

THE CASE IN FAVOUR OF SUBSTANTIVE TENURE REFORM IN
THE LANDLORD-TENANT FRAMEWORK: *THE OCCUPIERS,
SHULANA COURT, 11 HENDON ROAD, YEOVILLE, JOHANNES-
BURG v STEELE; CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY v BLUE MOONLIGHT**

SUE-MARI MAASS

*Postdoctoral Research Fellow, South African Research Chair in Property Law,
Faculty of Law, Stellenbosch University*

AJ VAN DER WALT

*South African Research Chair in Property Law and Professor, Faculty of Law,
Stellenbosch University*

INTRODUCTION

The tenure reform programme, which forms part of the land reform programme, consists of two strategies. These are, first, the transformation of weak tenure through the implementation of dedicated structural reforms,

* This case note is based, in some places verbatim, on sections of Sue-Mari Maass *Tenure Security in Urban Rental Housing* (unpublished LLD thesis, Stellenbosch University, 2010) chs 1, 3 and 8.

and secondly, the development of general anti-eviction provisions that prevent arbitrary forced removals, which were traditionally associated with apartheid land law (A J van der Walt *Constitutional Property Law* (2005) 309–10). The first strategy is provided for in s 25(6) of the Constitution of the Republic of South Africa, 1996, which states that any person whose tenure is legally insecure as a result of past racially discriminatory laws is entitled to tenure which is legally secure. Section 25(6) is aimed at amending weak tenure which cannot be reinforced sufficiently, and introducing new forms of tenure to replace it. The emphasis is on the development of continued, secure occupation rights for individuals who previously occupied land with insecure tenure, (P J Badenhorst, Juanita M Pienaar & Hanri Mostert *Silberberg & Schoeman's The Law of Property* 5 ed (2006) 607). This note is about the scope and efficacy of tenure reform in the area of urban residential tenancy.

A number of households which currently occupy urban property as tenants fit the s 25(6) description of 'persons whose tenure is legally insecure as a result of past racially discriminatory laws'. In particular, this description fits urban tenants who are poor, socially and economically marginalised, and who are unable to acquire secure tenure because of the structural and individual effects of apartheid land policy. On the face of it, previously disadvantaged tenants who currently occupy urban property with insecure, weak tenure rights are entitled to tenure reform as envisioned in s 25(6). If that is the case, it is fairly obvious that the current landlord-tenant regime cannot ensure legally secure tenure rights for these previously disadvantaged households. Consequently, landlord-tenant law will have to be reformed by the legislature (based on ss 25(6) and 25(9) of the Constitution) to provide legally secure occupation rights for previously disadvantaged groups in South Africa.

In this case note we argue that the biggest problem with the current landlord-tenant regime is that it does not distinguish between different categories of tenants, living in different categories of rental property, who are constitutionally entitled to diverse levels of tenure security. We argue that it is constitutionally adequate to afford certain residential occupiers mere procedural safeguards against arbitrary eviction, while other occupiers should be provided with stronger, substantive tenure protection. This is because the latter have a history of having experienced oppression, unequal treatment and forced evictions that were based on, and were the cause of, their weak tenancy rights under apartheid. The differences in the socio-economic power of tenants require a context-sensitive landlord-tenant regime that would provide all tenants with adequate security of tenure by reinforcing some tenants' rights more strongly than others. We illustrate this argument with reference to two recent cases.

The facts and decisions in *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA) (hereafter '*Shulana Court*') and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* 2011 (4) SA 337 (SCA) (see also *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* [2010] JOL

25031 (GSJ)) illustrate the current weakness of tenure rights held by previously disadvantaged residential tenants in urban areas, albeit that this is in only one of the categories of tenants we refer to, namely poor tenants occupying private land. These cases show that residential urban tenants are unable to establish strong, substantive tenure rights on their own; that the common law provides them with no special protection; and that the protection they derive from land reform laws is restricted to procedural measures, even though the courts have in some cases stretched the limits of procedural protection to provide as much protection to evictees as possible. (The difference between substantive and procedural protection is explained in the analysis of the cases below.) We argue that even extensive procedural protection is insufficient in view of the constitutional obligations imposed by s 25(6) and that legislation is required to provide at least certain categories of urban residential tenants, in certain kinds of rental property, with much stronger substantive tenure protection.

The anti-eviction measures that make up the major part of the protection that all urban residential tenants currently enjoy form part of the broader tenure reform programme and are founded on s 26(3) of the Constitution, which states that no person may be evicted from his home without an order of court, made after considering all the relevant circumstances, and that no law shall permit arbitrary evictions. The procedural aim of the anti-eviction measures is to prevent arbitrary eviction and to ensure that evictions take place in a just and orderly fashion. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereafter 'PIE') regulates the eviction of unlawful occupiers. PIE is essentially not concerned with the granting or strengthening of occupation rights, but merely guarantees that evictions are conducted in a proper legal fashion (Van der Walt *op cit* at 326–7; see also D L Carey Miller (with Anne Pope) *Land Title in South Africa* (2000) 516–25 for more detail on the Act). The mere fact that tenants derive the major part of their tenure protection from PIE already indicates that this protection is premised on them no longer being tenants, in the sense that the protection (like PIE) only becomes applicable once their tenancy has been terminated according to law, and once they have become unlawful occupiers. At that stage, protection can logically only assume the form of procedural protection against arbitrary or improper eviction proceedings. The s 26(3)-inspired anti-eviction protection provided by PIE therefore does not contribute anything to the s 25(6)-inspired process of reinforcing weak tenure rights. However, *Shulana Court* and *Blue Moonlight* demonstrate how the courts use procedural safeguards, based on s 26(3) and PIE, to provide temporary protection for specifically marginalised unlawful tenants on the basis of their socio-economic vulnerability. This form of temporary tenure protection could entail in some cases that the private landowner must tolerate the unlawful occupier until the state can provide alternative accommodation. The aim of this form of temporary tenure protection is to ensure that the household does not become homeless. The effect is that the state becomes directly involved in the provision of housing for those who will be rendered

homeless by eviction and is burdened with the positive duty to accommodate such households. At least for socio-economically vulnerable tenants, the s 26(1) and (2) duties imposed upon the state can thus be used by the courts to strengthen the procedural protection that is available in terms of PIE, but even then the protection remains locked into the framework of unlawful occupation once the tenancy had been terminated. This kind of protection can impose a heavy burden on landowners, and the decisions in *Shulana Court* and *Blue Moonlight* indicate that the courts struggle to find an equitable balance between protection of landowners' property rights and weak tenants' s 26 rights.

Section 26(1), read with s 26(2), of the Constitution provides that everyone has the right to have access to adequate housing and that the state must take reasonable measures to achieve the realisation of this right. In light of a number of decisions (see generally *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 (2) SA 140 (CC); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) (hereafter 'Modderklip'); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC); and *Sailing Queen Investments v The Occupants La Colleen Court* 2008 (6) BCLR 666 (W) para 18, where the state was joined in the eviction proceedings due to its constitutional duty) one can conclude that the state does not have a positive duty to provide all homeless persons with access to adequate housing, although the government is responsible for ensuring that the necessary laws are developed to give effect to s 26. Furthermore, the state does have a negative duty to refrain from depriving households of existing access to adequate housing (see specifically *Jaftha v Schoeman*; *Van Rooyen v Stoltz* (supra)). *Blue Moonlight* shows how a court can force the state to assist vulnerable households that face homelessness resulting from eviction. This form of assistance does not form part of the s 26(3) due process measures during eviction, but is rather linked to the access to housing measures in ss 26(1) and 26(2). This distinction indicates that, if marginalised households could occupy rental housing with sufficient tenure security, the need for s 26(3) protection during eviction might be reduced. The courts have repeatedly confirmed that private landowners do not have a positive duty to provide housing in terms of s 26. The question is — what is the role of private landowners, and where do the boundaries of this role lie?

Currently the courts are burdened, during eviction cases, with the impossible task of having to balance the property rights of landowners against the unlawful occupiers' right to have access to adequate housing. In *Shulana Court* and *Blue Moonlight* the private landowners were entitled to eviction orders, but the effect of the orders would have been dire for the occupiers as a result of their socio-economic weakness. These cases illustrate the lack of protection that tenants enjoy in the private-law landlord-tenant framework, especially in the case of weak and marginalised tenants whose tenure is insecure because of the discriminatory laws and practices of apartheid. If private landowners do not bear the burden of providing access to housing,

and if weak and marginalised tenants are entitled to stronger tenure, how should their respective rights be balanced? At the moment the courts are dealing with this question on just one level, namely by considering the temporary restrictions that are implied by procedural protection during eviction. In terms of this protection, landowners may be required to endure the continued presence of evictees on their land in cases where eviction orders are suspended or delayed in order to give the state time to provide alternative accommodation in terms of its s 26 obligations. However, if that burden becomes too heavy, the landowner might be entitled to compensation, as was indicated in *Modderklip*. The GSJ and SCA decisions in *Blue Moonlight* show that the courts do not find it easy to establish this balance.

We argue that the problem should also enjoy attention on another level, and that at least some categories of tenants, in certain kinds of rental property, should be entitled to substantive tenure protection. This kind of protection can only be provided for in legislation. Statutory substantive tenure protection would allow certain categories of residential tenants, in certain kinds of rental property, to occupy their homes on a continuous basis without having to face the possibility of eviction, even when the landlord may otherwise be entitled to terminate the tenancy on private-law grounds. In our view, the courts would not have to construe some tenuous form of protection for post-termination unlawful occupiers as in *Shulana Court* and *Blue Moonlight* if it were possible to provide substantive protection that would have prevented eviction altogether, at least in suitable cases to which s 25(6) arguably applies. The categories of tenants who might qualify for s 25(6)-inspired substantive tenure security of this nature do not necessarily fit the facts in either *Shulana Court* or *Blue Moonlight*. We argue below that the urban residential tenants who should qualify for statutory substantive protection have to be identified and classified carefully with reference to a multitude of factors, including the socio-economic status of the tenants, the nature and location of the rental property, and the identity and nature (e.g public or private) of the landlord.

FACTS

The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele

In *Shulana Court* the Supreme Court of Appeal had to consider an application for rescission of an eviction order granted by default against the appellants (see *Shulana Court* paras 1–3 for the facts of the case). The appellants occupied the respondent's private residential property in terms of an oral periodic tenancy and the rent was paid on a monthly basis. The respondent allegedly decided to renovate the building because it had become dilapidated and overcrowded. The respondent gave the appellants notice of termination of their leases to the effect that the appellants had to vacate the premises within three months, but they failed to do so. The respondent instituted eviction proceedings and the high court granted the eviction order, even though the appellants failed to oppose the proceedings. The appellants applied for rescission of the eviction order.

After referring to *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765B–C and *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para 11, the Supreme Court of Appeal decided that to succeed with the application for rescission at common law the appellants had to show good cause for their default, which can usually be established with a reasonable explanation, and ‘a bona fide defence to the plaintiff’s claim which prima facie has some prospect of success’ (see *Shulana Court* para 4). In support of the rescission application, the appellants explained their personal circumstances. Most of the appellants, including children, disabled persons and households headed by women, had resided in the property for a number of years in overcrowded conditions. All the occupiers were poor and unable to find affordable alternative accommodation in the inner city, while some of the occupiers had a history of having experienced previous evictions (*Shulana Court* para 5). The appellants explained that they took the necessary steps to secure legal assistance and believed that they would be presented in court. The court found that their intention was to oppose the eviction, but that they bona fide misunderstood the proceedings (*Shulana Court* para 8).

The appellant’s bona fide defence was that the eviction order would render them homeless, and that in terms of ss 4(6) and 4(7) of PIE the court may only grant an eviction order if it would be just and equitable to do so. The appellants also relied on ss 26(1) and 26(3) of the Constitution, which respectively guarantee the right to have access to adequate housing and due process in eviction proceedings. Secondly, the appellants argued that due to the fact that the eviction order might render them homeless, the municipality had to be joined in the proceedings, and the failure to join the municipality would render the eviction order premature (*Shulana Court* para 9).

In light of ss 26(1) and 26(2) of the Constitution the court considered the constitutional duty of the state not to interfere with individuals’ existing access to housing, while implementing a housing programme that would assist households in need of housing (see *Jaftha v Schoeman; Van Rooyen v Stoltz* (supra) paras 32–4).

The court highlighted the importance of PIE as a mechanism that strives to give effect to s 26(3), which guarantees that individuals may not be evicted in an arbitrary manner. The court emphasised the duty of the courts to consider all relevant circumstances, specifically the rights and needs of children, the elderly, disabled persons and households headed by women, before granting an eviction order. The court found further that courts must take into account the availability of alternative accommodation before the eviction order is granted. In the light of the courts’ new constitutional approach to acquire, in a proactive way, evidence of all the relevant circumstances and weigh the relevant interests, the court decided that the high court failed to discharge its statutory and constitutional obligations, because it was not sufficiently informed of all the relevant circumstances before it granted the eviction order that would have rendered the occupiers homeless (see *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 32, where Sachs J explained that the courts have a constitutional obligation to acquire evidence on all the relevant circumstances before deciding an eviction case).

Theron AJA considered the appellants' personal circumstances, specifically the fact that the eviction order might render the households homeless, and found that the appellants had established a bona fide defence with some prospect of success. As a result, the appellants also succeeded to show good cause for a rescission order in terms of the common law. The default eviction order was rescinded and the appellants were granted leave to oppose the eviction application (see *Shulana Court* paras 10–18).

City of Johannesburg Metropolitan Municipality v Blue Moonlight

In *Blue Moonlight* the original respondents had occupied (for residential purposes) private commercial property for a number of years in return for rental payments. During the preceding years the rental payments were made to a number of persons, but the ultimate owner, the original applicant, alleged that it had not received any rental from the respondents. The respondents included a number of adults, children, a disabled child, pensioners and households headed by women. It was common cause that all the occupiers were unlawful occupiers in terms of PIE. In order to develop the property the applicant had to demolish the existing structures. Therefore, the applicant served the occupiers with notices to vacate the premises. Upon their failure to comply, the applicant sought an eviction order, having complied with the notice requirements of PIE. In support of the claim, the applicant relied on its property right and the fact that the building was in a dangerous state (as had been determined by the city of Johannesburg). The occupiers were living in extreme poverty and it was apparent that they would not be able to acquire affordable private rental accommodation in the Johannesburg Central Business District, where they were living and working at the time (*Blue Moonlight* (GSJ) paras 10–19).

The occupiers argued that the eviction order would render them homeless and that the city ought to provide them with alternative accommodation (*Blue Moonlight* (GSJ) paras 22–4; the occupiers relied on s 26 of the Constitution, the National Housing Act 107 of 1997, ch 12 of the National Housing Code, and PIE). The Gauteng court found that the city's housing policy only made emergency housing available to persons evicted from government land (not persons evicted from privately owned land) and that the city claimed that it did not have the financial resources to provide housing to the respondents (*Blue Moonlight* (GSJ) para 4). In response, the applicant filed a new notice of motion seeking an alternative form of relief against the city, that being an order that the city should pay 'an amount equivalent to the fair and reasonable monthly rental for the premises should an eviction order not be granted' (*Blue Moonlight* (GSJ) para 5).

The court had to decide whether it could compel private landowners indefinitely to provide housing for unlawful occupiers who are unable to acquire affordable alternative accommodation (in terms of s 4 of PIE), or whether the state should be burdened with this duty (*Blue Moonlight* (GSJ) para 6). The court found that the city had breached its constitutional and statutory obligations and emphasised a private landowner's constitutional

right not to be deprived of property arbitrarily without compensation, concluding that the right to have access to adequate housing should not impose an obligation on private landowners to make their property available for this purpose (*Blue Moonlight* (GSJ) paras 93–6). The court’s remark that an owner may not be arbitrarily deprived of property without compensation is inaccurate, since compensation is only required if there has been an expropriation in terms of s 25(2) of the Constitution. An arbitrary deprivation will be invalid unless it is justifiable in terms of s 36 of the Constitution: see *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services* 2002 (2) SA 769 (CC).

In light of the importance of the right of access to adequate housing and its direct relationship with the right to human dignity; the lack of urban housing stock for African people as a consequence of apartheid land laws which forced African people to occupy dilapidated buildings in the inner city of Johannesburg (*Blue Moonlight* (GSJ) paras 114–17); and the responsibility of the state, and not private landowners, to introduce measures that would give effect to the right of access to adequate housing (*Blue Moonlight* (GSJ) para 127), the Gauteng court fashioned an order that provided relief for the unlawful tenants whose constitutional rights had been breached (*Blue Moonlight* (GSJ) para 156; the court referred to *Minister of Health & others v Treatment Action Campaign* 2002 (5) SA 713 (CC) para 102 in this regard). The Gauteng court held that the private landowner was entitled to an eviction order, but the eviction order was suspended until the respondents could find alternative accommodation. In addition, the state was ordered to pay the applicant an amount equivalent to the fair and reasonable monthly rental of the premises until the occupiers vacated the premises (*Blue Moonlight* (GSJ) paras 191–6; see also *Modderklip* (supra) where the Constitutional Court decided that unlawful occupiers could remain on private land, until the state made alternative accommodation available, provided that the state pay compensation to the landowner for the period during which he was denied use of his land).

In the Supreme Court of Appeal the city appealed against the high court’s order in terms of which it was required to provide accommodation to the occupiers, make rental payments to Blue Moonlight Properties, and remedy its housing policy on the basis that it is unconstitutional (*Blue Moonlight* (SCA) para 41). The court decided that the city is empowered to use its financial resources unilaterally to make provision for the progressive realisation of the right to have access to adequate housing. The court found further that the city is not a mere agent of national or provincial government, but has a positive duty to utilise its funds to give effect to s 26 of the Constitution. In this case, the city had a constitutional duty to provide temporary accommodation to the occupiers (*Blue Moonlight* (SCA) paras 42–53).

The court found that the city’s housing policy distinguishes between persons evicted from privately-owned unsafe buildings, where the city evicts occupiers in terms of the National Building Regulations and Building Standards Act 103 of 1977, and persons evicted from privately-owned

buildings, which are not necessarily unsafe, by private landowners. The SCA found that city's housing policy only makes temporary housing available for desperately poor evictees who were evicted by the state from unsafe buildings. As such, the SCA found that the policy is inflexible and operates in an arbitrary manner to the extent that it does not accommodate desperately poor persons evicted from safe buildings. The arbitrariness of the policy offends against evictees' constitutional right to equality (and human dignity) and was therefore declared unconstitutional (*Blue Moonlight* (SCA) paras 57–67; the Gauteng court therefore erred when it found that the city's housing policy was unconstitutional because it drew a distinction between persons evicted from private and state land: see *Blue Moonlight* (GSJ) para 4).

Finally, the court considered the compensation order in terms of which the city had to make rental payments to Blue Moonlight Properties. The court found that the order of the high court was incorrectly modelled on *Modderklip* (supra), because *Modderklip* is distinguishable from *Blue Moonlight* and therefore not authority for the proposition that constitutional damages is always available whenever the owner's constitutional right to property (s 25(1) of the Constitution) has been limited (*Blue Moonlight* (SCA) para 70). The court emphasised that the compensation order in *Modderklip* (supra) was not ancillary to the eviction order, but was granted after it became apparent that the state ignored the eviction order, which effectively violated the landowner's fundamental rights. The court found therefore that the compensation order was the only viable remedy. Contrary to the facts in *Modderklip* (supra), Blue Moonlight Properties knew about the occupiers when it bought the property and it would have been able to evict the occupiers if the court granted an immediate eviction order (*Blue Moonlight* (SCA) para 71). The court confirmed the eviction order and held that the occupiers had to vacate the premises within two months (*Blue Moonlight* (SCA) para 74).

ANALYSIS

Substantively weak, insecure tenure

Both cases illustrate the lack of protection enjoyed by tenants with substantively weak, insecure tenure. Short-term residential tenants do not enjoy strong tenure security in terms of the common law that regulates the landlord-tenant relationship. The cases also demonstrate the efforts of the courts to use the procedural protection that tenants enjoy in terms of anti-eviction legislation, in some cases to the point where this protection imposes unjustifiable limitations on the property rights of private landowners to compensate for the lack of tenure security. As the decisions in *Shulana Court* and *Blue Moonlight* show, this procedural protection cannot be stretched to overcome all the weaknesses of insecure residential tenancies. We therefore argue that substantive tenure security will have to be introduced and regulated by special legislation.

Substantive tenure protection is different from procedural protection. The essence of substantive tenure security is generally to allow some weak tenants

to continue occupying the leased premises as lawful occupiers (albeit only under certain circumstances and subject to certain conditions), even in circumstances where the owner-landlord would normally have been entitled to terminate the tenancy. Procedural protection protects former tenants against arbitrary or unfair treatment during eviction proceedings once their tenancies have already been legally terminated. Substantive tenure security, on the other hand, entails that the tenant is protected against the otherwise normal termination of the legal basis of the tenancy. The result is that the tenant is allowed to remain a tenant, which means that the termination of the tenancy is precluded or postponed and eviction is avoided altogether. Stronger tenure security therefore avoids termination of the lease, which means that the tenant does not become an unlawful occupier, eviction is not possible, and the courts are not required to balance owners' rights against the housing interests of homeless people and the housing policy of local authorities.

Obviously substantive tenure security is not something that can or should apply to all residential tenants or to all rental properties. Section 25(6) of the Constitution mandates tenure reform with the aim of ensuring that previously disadvantaged households whose tenure of land is legally insecure as a result of past racially discriminatory laws occupy land (or buildings) with legally secure tenure. This section applies to previously disadvantaged households, including poor or otherwise marginalised black households in former black townships, who currently occupy land with insecure tenure. It is now accepted that these households' insecure tenure is either a direct or an indirect consequence of apartheid land laws and practices (see for instance G S Alexander *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006); G Budlender 'The Constitutional protection of property rights' in G Budlender, J Latsky & T Roux (eds) *Juta's New Land Law* (1998) 1-70). Therefore, urban tenants who form part of this designated group are entitled to legally secure tenure if they currently occupy land with insecure tenure. However, it is unclear what type of property rights would constitute 'legally secure tenure' and, more importantly, what type of rights previously disadvantaged tenants should acquire in order for it to be 'legally secure'. During the apartheid era, the disadvantaged groups in the urban areas occupied land with insecure tenure because their rights were based on statutory and administrative permits which constituted a weak, personal right (see for instance s 14(1) of the Group Areas Act 41 of 1950 and s 21(1) of the Group Areas Act 36 of 1966). The reason for their weak tenure was to allow quick and easy evictions and removals by the apartheid government. To give effect to tenure reform it logically follows that previously disadvantaged groups fitting this pattern should now benefit from s 25(6) and that the state has an obligation to ensure that they occupy land with rights that are stronger than the personal rights afforded to them by the common law or the procedural, post-termination protection they enjoy in terms of s 26 and PIE.

Section 26(3) of the Constitution and PIE prescribe the procedural measures that must be complied with to justify fair evictions. These

prescriptions apply in all urban evictions, including cases where previously lawful tenants face eviction following termination of their tenancies (*Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA); *Shulana Court*; *Blue Moonlight*). However, procedural protection is only available once the lease has been lawfully terminated. The extent of protection derived from a suspended eviction order is restricted, because the household's occupation of the premises remains unlawful once the tenancy had been terminated and eventually eviction will probably become inevitable. This kind of protection can therefore not satisfy the demand for substantive tenure protection in s 25(6).

In both cases, the tenants apparently made rental payments and initially occupied the property with consent. (In *Shulana Court* the appellants occupied the premises in terms of a common law periodic tenancy; in *Blue Moonlight* the occupiers made rental payments to the previous owner and in return they were allowed to occupy the property (paras 9–10). During their lawful occupation one can assume that the occupiers made rental payments on a periodic basis and that the parties did not agree on a fixed-term tenancy.) It is unclear when the lawful occupation of the occupiers in *Blue Moonlight* terminated, but the court correctly stated that this was irrelevant, since the notice to vacate which the landowner posted on the buildings effectively cancelled any lease agreement that might have been in existence (*Blue Moonlight* paras 11–13). Consequently, the nature of the occupiers' rights, in both cases, was at least initially a common law periodic tenancy. It is trite law that a periodic tenancy terminates once one of the parties serves a notice to terminate the lease to the other party (W E Cooper *Landlord and Tenant 2* ed (1994) 61–5). Therefore, within the framework of the lease agreement, the landlord (or the tenant) is at liberty to decide when to terminate the lease, without consulting the other party and without taking their circumstances into account. It is evident from the facts of both cases that the occupiers had no legal means to oppose termination of the tenancy. Once the leases ended as a result of the notices to quit, the occupiers' lawful occupation ended and became unlawful. When the landowners served the notices to terminate the leases, the occupiers' right to continue occupying their homes immediately ceased to exist. The effect of the notices was dire for the occupiers in both cases as its effect, which was to terminate their right to occupy their homes lawfully, could not be prevented. Thereafter, their only hope was the limited and temporary due process protection that might be available under PIE. However, the way in which the courts use the procedural anti-eviction protection to compensate for tenants' weak position sometimes places an unjustifiable burden on private landowners, as the decisions in *Shulana Court* and *Blue Moonlight* (GSJ) demonstrate.

In terms of the common law the landowners were fully entitled to terminate the leases and, following that, to obtain eviction orders, but in *Shulana Court* the Supreme Court of Appeal refused to approve the default eviction order because it was not just and equitable in light of the occupiers' personal circumstances. In *Blue Moonlight* the Gauteng court was unwilling to

grant an immediate eviction order because it would have resulted in vulnerable households becoming homeless and would therefore not have been just and equitable. In both cases the courts refused to grant the eviction orders immediately, based on the socio-economic weakness of the occupiers. The courts therefore interpreted s 26(3) of the Constitution and PIE in such a way as to protect the occupiers from being rendered homeless. In both cases, the courts used procedural protection to prevent summary eviction of previously disadvantaged occupiers who formerly occupied the land as lawful tenants.

Once their tenancies had been terminated, these occupiers nevertheless became unlawful occupiers of the land and the protection extended to them by the court order is tenuous. Even though the courts may in cases like this refuse to grant an eviction order, the position of the occupiers subsequent to termination of the tenancy cannot be described as legally secure tenure. The courts were unable to avoid, prevent or suspend termination of the leases and could therefore not provide the occupiers with substantive tenure protection. Therefore, no matter how sympathetic the courts may be towards previously disadvantaged and weak tenants, it is and remains impossible for the courts to ensure substantive tenure protection. To give effect to tenure reform mandated by s 25(6) requires dedicated context-sensitive legislation.

Tenure reform and substantive tenure security

Both logically and morally, the tenure reform that is required to correct the legacy of insecure tenure associated with apartheid marginalisation, social and economic weakness and poverty cannot be restricted to procedural relief during eviction or temporary postponement of eviction. This applies to urban residential tenancies just as much as it applies to rural land because apartheid has left its mark on previously disadvantaged land users in both categories. To satisfy the constitutional obligation in s 25(6), the provision of housing for previously disadvantaged occupiers would be suspect if it were not combined with substantive tenure rights. In the case of urban residential tenancies, legally secure tenure requires a strong right to occupy rental premises on a continuous basis with the aim to establish a home, and without the threat of eviction as a result of weak substantive tenure rights. The tenure rights of tenants who occupy residential land in terms of the common law (specifically a common law periodic tenancy) are legally insecure because landowners can unilaterally terminate their lawful occupation, at any point, by serving them with a notice to quit, without having to give any reason and without any regard for the effect of the eviction. The position at common law reflects the underlying assumption that landlords and tenants are roughly equal in bargaining power and that the law should as far as possible leave it to them to bargain for their respective rights. The common law therefore cannot be expected to accommodate or cater for the extreme inequalities caused by apartheid land law. It should not be up to the courts to provide previously disadvantaged households with substantive tenure rights either. Section 25(9) of the Constitution rightly mandates the legislature to do so.

Based on a purposive interpretation of s 25(6), substantive tenure rights should be provided for in legislation. This is because the limits and conditions of the substantive protection would have to be determined and set out clearly and authoritatively; a task for which the courts are arguably not suited. Landlord-tenant legislation that strengthens tenure rights for previously disadvantaged households would be justified against the background of insecure tenure, which led to forced removals during the apartheid era. These tenure rights would be protected to the extent that the designated group can occupy their homes with substantive tenure rights that are enforceable against the landowner. (This type of constitutional reasoning that recognises historical inequalities and encourages transformation is in line with *Port Elizabeth Municipality v Various Occupiers* (supra) at 222A–229G, where Sachs J explained the connection between transformative constitutional values and the legacy of oppression.) However, dedicated legislation is the only way in which this level of reform can be introduced.

To date, the legislation promulgated to promote tenure reform predominantly makes provision for tenure security in rural areas (see for instance the Extension of Security of Tenure Act 62 of 1997, the Interim Protection of Informal Land Rights Act 31 of 1996, the Communal Property Associations Act 28 of 1996 and the Land Reform (Labour Tenants) Act 3 of 1996). Currently there is no law that ensures substantive tenure rights for vulnerable residential tenants in urban areas. The Rental Housing Act 50 of 1999, the primary statute that regulates landlord-tenant relationships in urban areas, provides limited tenure protection because it does not override the landlord's common law right to evict the tenant upon termination of the lease (André Mukheibir 'The effect of the Rental Housing Act 50 of 1999 on the common law of landlord and tenant' (2000) 21 *Obiter* 325 at 329). In terms of s 4(5)(d), the landlord is entitled to reclaim his property upon termination of the lease by means of a court order (Thabo Legwaila 'An introduction to the Rental Housing Act 50 of 1999' (2001) 12 *Stell LR* 277 at 281). The extent of tenure security granted to the tenant depends on the contract and therefore the will of both parties. The Act does not intervene in the contractual relationship between the parties to provide substantive tenure rights for tenants, but rather reinforces the notion of sanctity of contract. This is evident from the case law, which indicates that the Rental Housing Act is not taken into consideration where the courts have to consider the position of a tenant holding over (see in general *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Ndlovu v Ngcobo*; *Bekker v Jika* (supra); *Jackpersad v Mitha* 2008 (4) SA 522 (D); *Shulana Court* and *Blue Moonlight*). Therefore, the Act does not make provision for substantive tenure protection, nor does it make provision for additional procedural protection. This would not necessarily have been problematic if all urban tenants had equal bargaining power and if all tenants could have afforded to occupy their homes with secure tenure (in the light of *Shulana Court* and *Blue Moonlight* it is clear that this is not the case).

The greatest shortcoming of the Rental Housing Act is that it does not distinguish between different categories of urban residential tenants. Intro-

ducing substantive tenure protection of the kind that we support would require such a distinction because not all tenants require or deserve the same level of protection. Some residential tenants are socially and financially strong enough to be able to look after their own interests in the private residential tenancy market by enforcing their rights under the common law and the Rental Housing Act. There is therefore no need to provide any additional protection for these tenants. This probably applies to the largest section of the private residential rental market. However, there are many residential tenants whose socio-economic position is so marginal that they can only be victims in the private market rental system. If their insecure tenure was caused (directly or indirectly) by apartheid laws and practices, these tenants are entitled to occupy land with legally secure tenure that goes beyond what the common law and the Rental Housing Act provide.

If the legislature should decide to enact new landlord-tenant legislation to comply with its obligations under s 25(6), the law should therefore distinguish between different categories of tenants and different types of landlords to accommodate a variety of income groups with diverse tenure needs (and rights) on different kinds of land. New legislation should be context-sensitive. On the basis of examples in foreign law (especially the UK, Germany and the state of New York) one could argue that a public rental housing sector, where the state acts as public landlord, should primarily accommodate low income households, including previously disadvantaged groups, and that this sector should provide very strong substantive tenure protection. At the other end of the scale, very little if any adjustment to the current private sector system of landlord and tenant rules is required to protect socially and financially robust tenants. A mixed form of social tenancies may feature somewhere in between the two extremes, with stronger substantive protection than exists at present, but not quite as strong as what is required in the public sector. Private landlords who willingly enter into this market might be subjected to much stricter regulation than is now customary in the private rental market.

If the strongest form of substantive protection (mainly in the public sector, where the state is the landlord) means that a tenancy continues for consecutive periods and does not terminate simply because the initial term has expired, the tenant can oppose termination of the tenancy on specified grounds and will be protected against the possibility of eviction. The point of departure should be to allow the tenancy to continue indefinitely until the state (acting as public landlord) can prove a ground for termination of the tenancy. The grounds for termination should allow the public landlord to end the tenancy only in specific circumstances, and the legislation should provide detail regarding the grounds for termination. For example, if the tenant fails to make rental payments, indulges in antisocial behaviour or takes part in criminal acts, the state should be able to end the tenancy. A ground for termination might also exist where the public landlord wishes to renovate a dilapidated and unsafe building. The state should be allowed to terminate the tenancy only if there is a ground for termination, as provided for in the

legislation. If there is not a relevant ground for termination, the lease should continue and allow the tenant to remain in the property without fear of having her lawful occupation terminated, or of eviction. The right to have access to adequate housing would be given effect to, because low income households would be able to access formal housing with substantive tenure protection. In the social sector, where private landlords provide housing for low income groups, possibly with state assistance or support, the protection might be strong without going quite as far as in the public sector.

In the private sector, medium- to high-income households are generally able to access private rental housing in the open market and they probably occupy land with sufficient tenure security when one considers their social and financial power. Consequently, the level of tenure protection should not necessarily be as extensive as in the public sector. The protection that tenants enjoy under the common law and the Rental Housing Act may well be sufficient in this sector.

In the light of *Shulana Court* and *Blue Moonlight* it is apparent that low income households should be accommodated by the state as far as possible with the aim to combat an increase in homelessness, and that this duty should not fall on private landowners. However, in some exceptional instances private landowners might be obliged to provide substantive tenure protection to low income households (for instance Social Housing Institutions who lease land in terms of the Social Housing Act 16 of 2008). This would depend on the nature, identity and social context of the landowner and the tenant, as well as the nature and characteristics of the property. In certain circumstances it might be justified to force private landowners to tolerate marginalised tenants on their property for extended periods (see for instance the facts and decision in *Modderklip* (supra)), although this should not be the rule.

CONCLUSION

The effect of *Blue Moonlight* (GSJ) and *Shulana Court* is that the courts can take into account the personal circumstances of unlawful occupiers (s 26(3) of the Constitution and PIE) and refuse to grant the eviction order if the result would be unjust. The courts are therefore at liberty to grant former tenants whose tenancy has been terminated temporary protection against eviction in terms of PIE, based on the socio-economic weakness of the former tenants. This is a form of procedural protection and can only be temporary. Nevertheless, in light of the Supreme Court of Appeal's decision in *Blue Moonlight* it is also clear that private landowners are not obliged to provide accommodation to marginalised households indefinitely, especially when they are entitled to an eviction order. This duty remains with the state. The burden imposed on private landlords to give effect to anti-eviction protection of evictees should therefore not be excessive or arbitrary.

Section 25(6) of the Constitution aims to eradicate weak tenure forms, but the legislature has failed to date to introduce the necessary structural reforms in the urban landlord-tenant framework to give effect to this constitutional

goal. New landlord-tenant legislation would have to draw a distinction between different categories of tenants, different landlords, the different constitutional rights of the parties involved and it would have to be context-sensitive to the unique circumstances of each case. The same kind and level of substantive tenure protection is not necessarily required throughout the landlord-tenant framework. In some instances mere procedural safeguards should be sufficient, because all tenants are not necessarily in need of additional statutory protection. This would usually be the case where the tenant is financially strong and can easily acquire a new dwelling in the private market. The diversity of tenants in South Africa necessitates a context-sensitive landlord-tenant framework that would provide some tenants with better security of tenure than others, among other things in an effort to protect the rights of landowners.

Black tenants who were previously denied secure tenure are entitled to substantive tenure security (in terms of s 25(6)), while all marginalised tenants are constitutionally entitled to procedural protection if it is justifiable in light of their socio-economic circumstances (*Shulana Court* and *Blue Moonlight*). The extent of statutory substantive tenure protection, combined with procedural safeguards, that would be necessary would depend on the needs and circumstances of the tenant, the nature of the landlord and the nature of the rental property. If the state provides rental housing in the public sector, legislation that provides very strong substantive protection should be constitutionally valid. Extensive substantive tenure protection would be more difficult to justify in the private rental market as it might be too burdensome for the private landlord in light of s 25(1) of the Constitution.

In the public and possibly the social housing sector, tenure security for previously disadvantaged tenants could be improved by affording weak and marginalised tenants substantive rights to continue the lease after termination, while placing restrictions on the rights which the public landlord normally would have had at common law to end the relationship. Consequently, the legislature must introduce statutory rights as part of the tenure reform programme that will allow previously disadvantaged households who are socially weak and vulnerable to continue occupying their homes, while the state must be actively involved (in the majority of cases as public landlord) throughout this process to ensure that adequate housing supply is available and that such households occupy land with secure tenure. In exceptional cases private landowners might have to accommodate vulnerable occupiers, even if it is only temporarily, to prevent unjust eviction.

In the private sector, the rights of private landowners have to be restricted in a constitutionally justified manner without unfairly depriving landowners of their property arbitrarily. The rights of landowners, as protected in s 25(1) of the Constitution, have to be balanced with the strengthened rights of tenants. This does not mean that private landowners are free from any effects of the land reform programme, but they do not bear the primary responsibility to provide access to housing. In so far as their rights are inevitably affected by legitimate state efforts to provide access to housing and security of tenure, those limitations have to comply with the requirements in s 25.