

**The regulation of Airbnb:
A property law perspective**



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Declaration

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Summary

Currently, short-term rental operations like Airbnb are not regulated by national legislation in South Africa. This dissertation determines the implications of short-term rental operations like Airbnb on the relevant South African role-players, namely (a) hosts; (b) guests; (c) neighbours; (d) the tourism industry; (e) the hospitality industry; and (f) the South African Government. The overarching intention of this dissertation is to determine the impact of short-term rental operations on the rights, obligations, and remedies of neighbours within the South African short-term rental context.

In this light, this dissertation explores the current legal position of short-term rental operations in South Africa. Furthermore, the legislation applicable to short-term rentals and the potential challenges of short-term rental operations is explored. Additionally, the potential implications that the Tourism Amendment Bill of 2019 may have on role-players in the short-term rental context is discussed.

The study also explores the applicability of landlord-tenant law in the Airbnb short-term rental context. In particular, the research is centered on determining whether Airbnb hosts can be regarded as landlords and whether Airbnb guests can be regarded as tenants. To this end, the Airbnb terms of service are contrasted with the principles of a lease agreement to determine whether the Airbnb host-guest agreement can be regarded as a lease agreement. This exposition indicates the potential rights, obligations and remedies that would be applicable to Airbnb hosts and guests if they amount to landlords and tenants.

The dissertation also establishes the potential implications of neighbour law on short-term rental operations in South Africa. Specifically, emphasis is placed on determining whether a neighbour has a nuisance law claim when they experience

an interference with the use and enjoyment of their property due to a host's short-term rental operations. In this regard, the research considers case law regarding nuisances to determine potential situations where a short-term host's behaviour could be regarded as posing an unlawful nuisance that is actionable under the common law. This exploration is relevant in determining the factors courts may consider when hearing a nuisance matter in the short-term rental context. Consequently, this dissertation considers the neighbour law remedies that may be available to neighbours whose property rights are infringed by a short-term host's rental operations. In this regard, the requirements of the relevant neighbour law remedies are discussed to determine what a neighbour must prove to rely on the various remedies available.

Furthermore, this dissertation investigates whether the neighbour of a short-term rental host may have a section 25(1) claim for an unconstitutional arbitrary deprivation of property. The purpose of this investigation is to determine the remedies available to neighbours of short-term hosts who experience property interferences due to short-term rental operations.

Finally, this dissertation explores three regulatory approaches to short-term rental operations in South Africa, namely: (a) enacting national legislation to govern short-term rental operations; (b) passing municipal by-laws to allow local municipalities to govern short-term rental operations based on the circumstances relevant to short-term rentals in the specific municipality; and (c) leaving short-term rental operations unregulated and allowing contract law to govern the relationship between host and guest. In this regard, case studies of the regulation of Airbnb in London and Berlin are conducted. These case studies examine the consequences

of London's lenient yet clear regulation of short-term rentals in comparison to Berlin's more stringent regulation of short-term rentals.

Based on the case studies conducted and the exploration of the three potential regulatory approaches, this dissertation proposes that the South African Government enacts national legislation regulating short-term rental operations. It is proposed that the relevant national legislation should provide a framework of regulations that are implemented by municipalities based on the local circumstances of each municipality. In this regard, recommendations for the regulation of short-term rental operations are provided.

Opsomming

Korttermynverhuringsbedrywighede soos Airbnb word nie tans deur nasionale wetgewing in Suid-Afrika gereguleer nie. Hierdie proefskrif bepaal die regsimplikasies van korttermynverhuringsbedrywighede soos Airbnb op die betrokke Suid-Afrikaanse rolspelers, te wete (a) gashere; (b) gaste; (c) bure; (d) die toerismebedryf; (e) die gasvryheidsbedryf; en (f) die Suid-Afrikaanse Regering. Die navorsing het ten doel om vas te stel wat die implikasies van korttermynhuurbedrywighede op die regte, verpligtinge en remedies van bure binne die Suid-Afrikaanse korttermynhuurkonteks behels.

Hierdie studie ondersoek die huidige regsposisie van korttermynhuurbedrywighede in Suid-Afrika. Daar word oorweging geskenk aan wetgewing wat van toepassing mag wees op korttermynverhurings, aan die potensiële uitdagings van korttermynverhuringsbedrywighede en aan die potensiële implikasies wat die Wysigingswetsontwerp op Toerisme van 2019 op rolspelers in die korttermynhuurkonteks mag hê.

Die ondersoek bestudeer die toepaslikheid van verhuurder-huurderwetgewing in die Airbnb-korttermynhuurkonteks. Die navorsing is veral daarop gemik om te bepaal of Airbnb-gashere as verhuurders beskou kan word en of Airbnb-gaste as huurders beskou kan word. Vir hierdie doel word die Airbnb-diensbepalings gekontrasteer met die beginsels van 'n huurooreenkoms om te bepaal of die Airbnb-gasheer-gas-ooreenkoms as 'n huurooreenkoms beskou kan word. Hierdie uiteensetting dui die potensiële regte, verpligtinge en remedies aan wat op Airbnb-gashere en -gaste van toepassing sal wees indien hul as verhuurders en huurders beskou word.

Die proefskrif stel ook die potensiële implikasies van burereg op korttermynhuurbedrywighede in Suid-Afrika vas. Daar word spesifiek daarop gefokus om te bepaal of naburige eienaars 'n eis weens oorlas het wanneer hulle 'n inmenging met die gebruik en genot van hul eiendom ervaar as gevolg van 'n gasheer se korttermynhuurbedrywighede. In hierdie verband word regspraak rakende oorlas oorweeg om potensiële situasies te bepaal waarin 'n korttermynogasheer se gedrag as 'n onregmatige oorlas ingevolge die gemenerereg beskou kan word. Hierdie verkenning is relevant om te bepaal watter faktore howe behoort te oorweeg wanneer hulle 'n oorlas aangeleentheid in die korttermynhuurkonteks aanhoor. Gevolglik word die bureregtelike-remedies wat beskikbaar kan wees vir bure wie se inhoudsbevoegdhede deur 'n korttermynogasheer se huurbedrywighede geskend word, ondersoek. In hierdie verband word die vereistes van die tersaaklike bureregtelike remedies bespreek om te bepaal wat 'n naburige eienaar moet bewys om op die verskillende beskikbare remedies te steun.

Verder ondersoek die studie of die buurman van 'n korttermynhuurgasheer 'n eis vir 'n ongrondwetlike arbitrêre ontneming van eiendom ingevolge artikel 25(1) van die Grondwet kan hê. Die doel van sodanige ondersoek is om vas te stel watter remedies beskikbaar is vir eienaars wat eiendomsinmengings ervaar as gevolg van naburige korttermynhuurbedrywighede.

Laastens ondersoek hierdie proefskrif drie regulatoriese benaderings tot korttermynhuurbedrywighede in Suid-Afrika, naamlik: (a) die uitvaardiging van nasionale wetgewing om korttermynhuurbedrywighede te beheer; (b) die aanneming van munisipale verordeninge om munisipaliteite toe te laat om korttermynhuurbedrywighede plaaslik te beheer, gebaseer op die omstandighede

wat relevant is vir korttermynverhuring in die spesifieke munisipaliteit; en (c) om korttermynverhuringbedrywighede nie spesifiek te reguleer nie en by implikasie te volstaan by die gewone kontrakteregtelike bepalings ten opsigte van die verhouding tussen gasheer en gas.

Gevallestudies word onderneem na die regulering van Airbnb in Londen en Berlyn. Hierdie gevallestudies ondersoek die gevolge van Londen se toegeeflike dog duidelike, spesifieke regulering van korttermynhuur in teenstelling met Berlyn se strenger spesifieke regulering van korttermynhuurtransaksies.

Gebaseer op die gevallestudies wat uitgevoer is en die verkenning van die drie potensiële regulatoriese raamwerke stel hierdie proefskrif voor dat die Suid-Afrikaanse regering nasionale wetgewing instel wat korttermynhuurbedrywighede reguleer. Daar word voorgestel dat die relevante nasionale wetgewing 'n raamwerk van regulasies moet verskaf wat deur munisipaliteite geïmplementeer word gebaseer op die plaaslike omstandighede van elke munisipaliteit. In hierdie verband word aanbevelings vir die spesifieke regulering van korttermynhuurbedrywighede verskaf.

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Chapter 1: Introduction

1 1 Introduction to the research problem

Airbnb is a global online platform that enables people to rent out their entire properties or spare rooms on a short-term basis.¹ In terms of the Airbnb model, the person renting out the property is known as the "host", and the person occupying the property is referred to as the "guest".² The focus of this dissertation falls on the following role-players in the short-term rental Airbnb context: (a) hosts; (b) guests; (c) neighbours; (d) the tourism industry; (e) the hospitality industry, and (f) the South African Government.

More specifically, the study considers short-term rental accommodation with the primary goal of providing the South African Government with recommendations for the regulation of short-term rental accommodation in South Africa. In this regard, this dissertation determines (a) the current legal position of short-term rentals in South Africa; (b) the applicability of landlord-tenant law in the short-term rental context; (c) the neighbour law implications of short-term rentals; (d) the relevance of section 25(1) of the Constitution of the Republic of South Africa, 1996 ("Constitution") in the short-term rental context; (e) factors to consider when regulating short-term rentals in South

¹ S Fick "Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?" (2021) 3 *Stellenbosch Law Review* 455-481 at 456; B Cohen & J Kietzmann "Ride on! Mobility business models for the sharing economy" (2014) 27 *Organization & Environment* 279-296 at 279. M Charles "Airbnb faces tighter regulations in SA" (17-04-2019) *IOL* <<https://www.iol.co.za/capeargus/news/airbnb-faces-tighter-regulations-in-sa-21476254>> (accessed 06-03-2020).

² J Jefferson-Jones "Airbnb and the housing segment of the modern 'sharing economy': Are short-term rental restrictions an unconstitutional taking?" (2015) 42 *Hastings Constitutional Law Quarterly* 557-576 at 558.

Africa; and (f) provides recommendations for the regulation of short-term rentals in South Africa.

Currently, in South Africa, there is no legislation governing short-term rental operations. The Tourism Act 3 of 2014, which could potentially address short-term rentals, presently does not address short-term home rentals like Airbnb.³ Short-term rentals like Airbnb are regulated through municipal by-laws, of which the City of Cape Town is the only municipality that has enacted regulations to govern this area.⁴ However, the National Government has published the Tourism Amendment Bill of 2019 ("Tourism Bill")⁵ as draft legislation that aims to regulate the short-term housing market, of which Airbnb is the industry leader.⁶

According to Airbnb's terms of service, when the guest makes a booking or the host accepts a booking, the parties enter into a contract with each other.⁷ Airbnb has not clarified whether this agreement constitutes short-term tenancy, but simply makes

³ S Fick "Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?" (2021) 3 *Stellenbosch Law Review* 455-481 at 463.

⁴ Proclamation for the City of Cape Town Municipal Planning Amendment By-law, 2019 Province of the Western Cape: Provincial Gazette Extraordinary/PGE 8185 of 06-12-2019; J Steyn "Property law: Airbnb – is hosting your property on Airbnb legal?" (date unknown) *De Klerk & Van Gend Attorneys* <<https://dkvg.co.za/property-law-airbnb-is-hosting-your-property-on-airbnb-legal/>> (accessed 01-04-2020). This dissertation will not focus on the City of Cape Town's municipal by-laws as it will only be applicable to the property owners in the City of Cape municipality. Rather, this dissertation focuses on the impact of short-term rental operations on a nationwide level, therefore with the focus being the Tourism Amendment Bill Notice 235 of 2019.

⁵ Tourism Amendment Bill Notice 235 of 2019.

⁶ S Fick "Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?" (2021) 3 *Stellenbosch Law Review* 455-481 at 458.

⁷ Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 08-05-2020).

mention of "short-term bookings" on their official website.⁸ Additionally, Airbnb does not expressly refer to the act of availing one's property as "renting" or "short-term rentals," but rather "listing" one's property on their platform and "hosting" guests.⁹ Airbnb has, however, cautioned hosts to conclude rental agreements with their guests.¹⁰ According to Airbnb's official page, in some jurisdictions, guests may establish rights as a tenant,¹¹ and the Airbnb host and guest may be subject to landlord-tenant law.¹² This seems to indicate that the agreement between the host and guest on the Airbnb application merely amounts to a contract and not a rental agreement as such. The implication is that hosts and guests may simply be parties to a contract for the use and enjoyment of the property unless the law regards them as landlords and tenants. It is crucial to establish whether a purely contractual or rental agreement comes into effect because the type of agreement determines the rights and obligations of the parties and, very importantly, the remedies available to the various role-players. Therefore, it is imperative to determine whether the landlord-tenant

⁸ Airbnb official website "What legal and regulatory issues should I consider before hosting on Airbnb?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/376/what-legal-and-regulatory-issues-should-i-consider-before-hosting-on-airbnb>> (accessed 08-05-2020).

⁹ Airbnb official website "What legal and regulatory issues should I consider before hosting on Airbnb?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/376/what-legal-and-regulatory-issues-should-i-consider-before-hosting-on-airbnb>> (accessed 15-03-2021).

¹⁰ Airbnb official website "What are some differences between long-term hosting and short-term hosting?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/1354/what-are-some-differences-between-longterm-hosting-and-shortterm-hosting>> (accessed 08-05-2020).

¹¹ Airbnb official website "What are some differences between long-term hosting and short-term hosting?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/1354/what-are-some-differences-between-longterm-hosting-and-shortterm-hosting>> (accessed 08-05-2020).

¹² Airbnb official website "What regulations apply to my city?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/961/what-regulations-apply-to-my-city>> (accessed 08-05-2020).

relationship is suitable for regulating short-term rental operations in South Africa or whether alternatives like specific, dedicated legislation is more apt.

Despite the uncertainties mentioned above, it is clear that short-term rentals like Airbnb are gaining some momentum in South Africa. The recent judgment of *Body Corporate of the Paddock Sectional Title Scheme v Nicholl*¹³ ("*Nicholl*") indicates that short-term rentals are a growing phenomenon in South Africa. Furthermore, it depicts how the rights and obligations of short-term rental role-players, which form the focus of this study, are becoming highly relevant and that there is a need for clarity on the legal position of this short-term rental construct.¹⁴ Additionally, *Nicholl* is important for the determination of whether Airbnb operations amount to short-term tenancy under landlord-tenant law in South Africa. This is due to the court in *Nicholl* referring to the agreement between the Airbnb host and guest as a "lease" and using the words "guests" and "tenants" interchangeably.¹⁵ In *Nicholl*, the respondent was the owner of a unit in a sectional title scheme who utilised her unit as an Airbnb listing.¹⁶ The applicant, the body corporate, expressed the distress faced by neighbours who did not feel safe in their block of flats due to the influx of new short-term guests each week, particularly given that the guests had full access to the complex, similar to every other resident of the sectional title scheme.¹⁷ In terms of the body corporate's pre-existing conduct rules, the respondent could not rent out her property for less than six months; she needed to furnish the applicant with a copy of the lease and introduce her tenants

¹³ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ).

¹⁴ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ).

¹⁵ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 8.5.

¹⁶ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 7.

¹⁷ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 1.

to the applicant.¹⁸ The respondent brought a counter-application contending that these conduct rules constituted a deprivation and limitation of her right as the owner of a sectional title unit and ought to be declared unconstitutional and/or void and/or invalid and unenforceable.¹⁹ The court held that the conduct rules in question were consistent with section 25 of the Constitution, as they did not constitute an arbitrary deprivation of the respondent's right to property and were justifiable limitations of the respondent's property rights.²⁰ Importantly, this case indicates the potential negative implications of short-term rentals on neighbours' property rights. Specifically, this case highlights the real security risk that short-term rental accommodation poses, particularly in apartment blocks where a guest could utilise a unit on the property for nefarious conduct.²¹ It is important to note that the set of facts in *Nicholl* was decided in the context of sectional title schemes. Nevertheless, it is evident that short-term rental operations can generally affect neighbours of *all* residential properties, even those that do not form part of sectional title schemes. Consequently, in line with some of the issues raised in the *Nicholl*-judgment, this dissertation aims to establish whether a neighbour of a short-term rental property has a claim in neighbour law for the nuisances they endure as a result of short-term rental operations.

The lack of dedicated national legislation addressing short-term rental operations has resulted in uncertainty pertaining to the rights and obligations of short-term hosts and guests in South Africa. In other words, it is unclear whether short-term hosts and

¹⁸ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 64.

¹⁹ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 63.

²⁰ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 69.

²¹ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 7.

guests fall under the ambit of landlord-tenant law.²² The clarification is necessary to determine how landlord-tenant law operates in the short-term rental context, especially when neighbours are affected. Additionally, this clarification is essential for the Government when determining how short-term rental operations are regulated in South Africa, given that landlords and tenants have existing rights and obligations that must be considered. Legal certainty is necessary to determine the rights and obligations of hosts and guests under the short-term rental construct and to enable property owners to list their properties on short-term rental platforms like Airbnb without fear of operating outside of the law. This clarity will also promote tourism in South Africa, which is particularly necessary considering the significant impact the Covid-19 pandemic²³ has had and continues to have on the country's tourism industry.²⁴

In light of the above, the dissertation also explores short-term rental operations through the lens of the constitutional right to property entrenched in section 25(1) of the Constitution. This is done to determine whether neighbours have constitutional

²² J Steyn "Property law: Airbnb – is hosting your property on Airbnb legal?" (date unknown) *De Klerk & Van Gend Attorneys* <<https://dkvg.co.za/property-law-airbnb-is-hosting-your-property-on-airbnb-legal/>> (accessed 01-04-2020).

²³ World Health Organization "Coronavirus disease (COVID-19) pandemic" (date unknown) *WHO* <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>> (accessed 11-08-2022). For more on the property law implications of Covid-19, see ZT Boggendoel, E van der Sijde, MT Tlale & S Mahomed *Property and pandemics: Property law responses to Covid-19* (2021).

²⁴ See Statistics South Africa official website "SA tourism industry struggles amidst COVID-19 pandemic" (29-04-2021) *Statssa* <<https://www.statssa.gov.za/?p=14281>> (accessed 28-06-2022); South African Department of Tourism official website "Tourism sector recovery plan COVID-19 response" (01-03-2021) *Department of Tourism* <<https://www.tourism.gov.za/AboutNDT/Documents/Tourism%20Sector%20Recovery%20Plan.pdf>> (accessed 28-06-2022); and CM Rogerson & JM Rogerson "COVID-19 Tourism impacts in South Africa: Government and industry responses" (2020) 31 *Geojournal of Tourism and Geosites* 1083-1091.

remedies at their disposal in the context where short-term rental operations in the context of the Tourism Bill authorising short-term rental operations in a manner that may interfere with neighbours property entitlements.²⁵ These discussions are used to provide recommendations to the South African Government on the regulation of short-term rentals in South Africa in a manner that does not result in an arbitrary deprivation of neighbours' property rights. For this reason, the *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*²⁶ ("FNB") test and subsequent amendments of the test²⁷ are employed to determine whether neighbours of short-term hosts can bring a section 25 claim arguing that the laws that authorise short-term rental operations result in an arbitrary deprivation of their property rights. In this regard, it is important to ascertain whether neighbours have a choice between bringing a claim under neighbour law or under section 25(1) of the Constitution. This enquiry is guided by the

²⁵ While the focus in this dissertation is on section 25 of the South African Constitution, the following constitutional rights may also be impacted by short-term rental operations, namely: section 9, the right to equality; section 10, the right to human dignity; section 12, the right to freedom and security of the person; section 14, the right to privacy; and section 26, the right to housing.

²⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

²⁷ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and Others* 2005 (1) SA 530 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC); *Offit Enterprises (Pty) Ltd v Coega Development Corporation Ltd* 2011 (1) SA 293 (CC); *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC); *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC); *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* 2015 (6) SA 440 (CC); *South African Diamond Producers Organisation v Minister of Minerals and Energy* NO 2017 (6) SA 331 (CC).

principles of subsidiarity, which is essentially a set of guidelines to determine which source of law to turn to when a dispute arises.²⁸

The outcome of the discussions regarding landlord-tenant law, neighbour law, the section 25 analysis, and the comparative case studies form the basis of the recommendations provided to the Government regarding the regulation of short-term rental accommodation in South Africa. These recommendations are provided in a manner that takes cognisance of (a) Airbnb's terms and conditions; (b) the nuisances that neighbours of short-term rentals endure; (c) the existing neighbour law remedies available to aggrieved neighbours; (d) the principles of landlord-tenant law; (e) the regulation of short-term rentals in foreign jurisdictions; (f) the interests of the hospitality industry; (g) the need for the tourism to generate income, (h) and the Government's ability to generate income in the form of tax revenue.

²⁸ L du Plessis introduced the principle of subsidiarity, defining it as a reading strategy adopted by courts whereby courts refrain from deciding on matters that could be taken by lower courts. Furthermore, he described the notion of subsidiarity as an approach whereby courts avoid taking a constitutional decision if it is possible for the case to be decided on a non-constitutional basis. See L du Plessis "Subsidiarity": What's in the name for constitutional interpretation and adjudication? (2006) 17 *Stellenbosch Law Review* at 207-231; AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *Constitutional Court Review* 77-128 proposed the argument that where legislation has been developed to give effect to constitutional rights, or the common law exists to regulate a specific area of the law, these sources of law should be applied as opposed to relying directly on a constitutional right. This idea was developed and expanded in AJ van der Walt *Property and Constitution* (2012) at 35. The subsidiarity principle was brought forth by the principle enunciated in the Constitutional Court decisions of *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) paras 51–52 and *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 437. See further KE Klare "Legal subsidiarity & constitutional rights: A reply to AJ van der Walt" (2008) 1 *Constitutional Court Review* 129–154; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 249; *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC) para 15; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 25.

Given the considerations mentioned above, it is evident that an investigation into the implications of short-term rental operations for short-term hosts, guests, and neighbours is imperative due to the lack of regulation in terms of legislation or by-laws, the absence of case law addressing short-term rentals, and the dearth of literature available in South Africa in this context. Such an investigation is also necessary to protect neighbours' property rights and clarify the remedies available to neighbours aggrieved by the interferences caused by short-term rental operations in South Africa.

1 2 Research aims, hypotheses, and methodology

This LLD dissertation has seven aims. First, it aims to explore the current legal position of Airbnb as short-term rental accommodation in South Africa. Second, it aims to investigate whether landlord-tenant law applies to short-term hosts and guests. Third, it sets out to determine how the rights and obligations of short-term hosts and guests operate in the neighbour law context. Fourth, it seeks to establish whether property owners can bring a claim against a short-term rental host in terms of neighbour law for a nuisance caused by the short-term rentals conducted. Fifth, this dissertation aims to determine whether neighbouring property owners can bring a claim for the arbitrary deprivation of their property under section 25(1) of the Constitution based on the provisions of the Tourism Bill, which is likely to make provision for short-term rentals. In the sixth place, this dissertation aims to determine whether short-term rental operations should be governed by (a) national legislation; (b) municipal by-laws, or (c) short-term rentals are best left unregulated and governed by contract law. Finally, this dissertation seeks to determine whether there are foreign comparative jurisdictions that can assist in determining how best to regulate short-term rentals in South Africa. In this regard, London and Berlin have been identified as comparative jurisdictions that are suitable case studies. London provides an example of lenient short-term

regulations,²⁹ and, in contrast, Berlin provides an example of stringent short-term regulations.³⁰ These jurisdictions are only used as examples where necessary - the dissertation does not intend to conduct a full-fledged legal comparative analysis. Given that the sharing economy³¹ is a fairly new phenomenon,³² the resources available on the topic in the context of landlord-tenant law, neighbour law, and constitutional law are very scarce. Consequently, it was decided that case studies of the jurisdictions are the most appropriate approach for this dissertation.

This dissertation's overarching research question is to determine the neighbour law implications of short-term rental operations in South Africa to understand the remedies available to neighbours of short-term rentals whose property rights are infringed by short-term rental operations. The following research questions will be explored to meaningfully engage with the primary research question: (a) Does the Airbnb model result in a short-term tenancy where Airbnb hosts and guests have the same rights and obligations as landlords and tenants?; (b) Does the neighbour of a short-term host have a claim against the host in terms of nuisance law?; (c) Does the neighbour of a

²⁹ Promoting the sharing economy in London, policy paper of 2015.

³⁰ *Zweckentfremdungsverbots-Gesetz* - Law on the Prohibition of the Misappropriation of Living Space Act of 2013.

³¹ The "sharing economy" is as an all-purpose term describing transactions whereby someone in possession of any property with commercial value, such as a home or a car, shares their property with a stranger in exchange for monetary compensation.

³² For more on the sharing economy see J Jefferson-Jones "Airbnb and the housing segment of the modern 'sharing economy': Are short-term rental restrictions an unconstitutional taking?" (2015) 42 *Hastings Constitutional Law Quarterly* 557-576; NR Mehmed "Airbnb and the sharing economy: Policy implications for local government" (2016) 12 *Spectrum of Public and Non-profit Management, Public Policy and Health Administration Review* 49-73; C Midgett, JS Bendickson, J Muldoon & SJ Solomon "The sharing economy and sustainability: A case for Airbnb" (2017) 13 *Small Business Institute Journal* 51-71; and D Wachsmuth & A Weisler "Airbnb and the rent gap: Gentrification through the sharing economy" (2018) 50 *Environment and Planning A: Economy and Space* 1147-1170.

short-term host have a claim for an unconstitutional arbitrary deprivation of property as set out by the Constitutional Court in the *FNB* judgment?; (d) What can South Africa learn from London and Berlin's approach to regulating short-term rentals through legislation?; and (e) Should short-term rental operations be regulated by legislation in South Africa, and if yes, what should such legislation potentially look like?

Based on the above-proposed research questions, the following is hypothesised: (a) The Airbnb model results in a short-term tenancy where hosts and guests have the same rights and obligations as landlords and tenants, except to the extent that the terms and conditions of Airbnb state otherwise; (b) The neighbour of a short-term host may have a claim against the host in terms of nuisance law depending on the extent of the nuisance caused by their short-term rental operations. However, the suitability of the applicable remedies is uncertain; (c) The neighbour of a short-term host is unlikely to have a claim for an unconstitutional arbitrary deprivation of property as set out by the Constitutional Court in *FNB*; (d) Berlin and London's approach to regulating short-term rentals provides important insights for the regulation of short-term rental operations in South Africa. The London and Berlin case studies indicate that Government needs to ensure that the regulation of short-term rentals is not too stringent and enables property owners to exercise their property rights while supporting the tourism industry, and; (e) There is a need for national legislation regulating short-term rental operations in South Africa to bring clarity to all role-players applicable in this context. However, the national legislation should authorise municipalities to pass by-laws that give effect to the framework provided by the national legislation based on the local circumstances.

In terms of the methodology adopted in this dissertation, this study discusses the common law rules regulating landlords, tenants, and neighbours and applies these

rules in the short-term rental context. The different property rights applicable to hosts, guests, and neighbours provide scope for an examination of how each role-player's rights are different in the short-term context as well as instances where the role-player's rights are interlinked. Additionally, the common law principles of the law of neighbours are applied to the short-term rental context to ascertain the rights and obligations of neighbours who endure nuisances due to short-term rental operations. This was necessary as there is currently very little literature on the rights of landlords, tenants, and neighbours in relation to short-term rental operations like Airbnb. Furthermore, a constitutional analysis is conducted to determine the implications of short-term rental operations on a neighbouring owner's property rights in terms of section 25(1). This was done to determine whether property owners have a claim for arbitrary deprivation of property under section 25(1). In this regard, case law, journal articles, and online newspaper articles with substantiated facts and opinions were used to explore the relationship between hosts and guests and hosts and neighbours in the short-term rental context. Furthermore, literature on the remedies that are generally available to neighbours was consulted to determine the legal recourse available to neighbours where their property rights are impacted by short-term rental operations. Finally, for the case studies of London and Berlin, municipal regulatory sources were explored to conduct the comparison of each jurisdiction's regulation of short-term rental accommodation. The regulations from these jurisdictions formed the basis of the recommendations proposed to the South African Government for regulating short-term rental accommodation in South Africa.

1 3 Overview of chapters

This dissertation consists of seven chapters, including this introductory chapter. Chapter 2 explores the current legal position of Airbnb as short-term rental

accommodation in South Africa. In particular, chapter 2 discusses the current legislation applicable to short-term rentals and the shortfalls of the current legal position of short-term rental operations in South Africa. Furthermore, chapter 2 discusses the potential implications that the Tourism Bill may have on role-players in the short-term rental context, such as hosts, guests, neighbours, municipalities, local businesses, the tourism industry, and the hospitality industry.

Chapter 3 considers the applicability of landlord-tenant law in the short-term rental context. In this regard, chapter 3 explores whether short-term hosts can be regarded as landlords and whether short-term guests can be regarded as tenants. The chapter deliberates on the applicability of landlord-tenant law to determine whether short-term hosts and guests have the same remedies available to them as landlords and tenants.

Chapter 4, in turn, examines the implications of neighbour law on short-term rental operations in South Africa. This fourth chapter considers whether the negative consequences that ensue when using one's property as short-term rental accommodation can be regarded as a nuisance under neighbour law. Furthermore, this chapter investigates what actions might amount to a nuisance in the short-term rental context and considers potential neighbour law remedies available to neighbours whose property rights are infringed.

Chapter 5 investigates whether the neighbour of a short-term host may have a section 25(1) claim for an unconstitutional arbitrary deprivation of property as set out by the Constitutional Court in the *FNB* decision. This fifth chapter sets out to determine whether the laws that authorise short-term rental operations in South Africa create an arbitrary deprivation of a neighbours' property rights. In this regard, chapter 5 considers whether neighbours of short-term hosts have constitutional remedies available to them in terms of section 25.

In the final substantive chapter of this dissertation, chapter 6 explores three regulatory approaches to short-term rental operations in South Africa, namely, (a) enacting national legislation to govern short-term rental operations; (b) passing municipal by-laws to allow local municipalities to govern short-term rental operation's based on the local climate, and (c) leaving short-term rentals unregulated and allowing contract law to govern the relationship between host and guest. In this chapter, a case study of Airbnb's legal position in London is conducted to explore a jurisdiction where short-term rentals were regulated in a manner that gave effect to property owners' entitlements while considering the impact of short-term rentals on the availability of affordable accommodation. Additionally, a case study of the legal position of short-term rentals in Berlin is conducted to consider important lessons learnt from Berlin's stringent regulation of short-term rentals in its city. Case studies of London and Berlin were selected because both jurisdictions enacted legislation that addresses short-term rentals; however, one takes a significantly more stringent approach than the other. Finally, this sixth chapter uses takeaway points from the two case studies to provide recommendations for the South African Government on how to regulate short-term rentals. These recommendations are directed at regulating short-term rentals in a manner that gives effect to owners' property entitlements while also considering neighbours' rights, the impact on the hospitality and tourism industry, and the availability of affordable housing in South Africa.

As a final point, chapter 7 is the concluding chapter that reflects on the research questions and hypotheses. This chapter provides an overview of the dissertation, summarises the findings of chapters 2-6, and provides concluding remarks on the best approach for the regulation of short-term rental operations in South Africa.

Chapter 2: The legal position of Airbnb short-term rentals in South Africa

2 1 Introduction

It is currently unclear which laws are applicable in the short-term rental context due to the absence of overarching legislation dealing with short-term rentals in South Africa. However, in the Airbnb context, the Airbnb host-guest relationship is governed by the contractual agreement formed by the host and guest on the Airbnb online platform.¹ In this regard, this chapter seeks to explore the potential overlap between property law and contract law and the implications thereof. Consequently, this chapter will look at how Airbnb's operations are potentially governed by both the Airbnb terms of service and South African legislation. It is necessary to look at how property law rights and remedies operate alongside Airbnb's hosts' and guests' rights according to the contract concluded through the Airbnb online platform. This determination is essential in establishing against whom neighbouring property owners should bring a claim in the instance of a property law infringement, which is relevant to the neighbour law discussion in chapter 5. This determination will arguably affect the remedies available to neighbours in the instance of an interference with their property rights. In this regard, this chapter's ultimate aim is to determine potential remedies that will be available if the contractual agreement between Airbnb hosts and guests is violated.

¹ Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 16-11-2020).

2 2 Potential regulation of short-term rentals in South Africa

Municipal by-laws ordinarily govern short-term rental accommodation like Airbnb listings.² However, the City of Cape Town is the only municipality to have promulgated by-laws to this effect.³ The South African National Government has published the Tourism Amendment Bill of 2019 ("Tourism Bill")⁴ as draft legislation that aims to regulate the short-term housing market.⁵ Section 1 of the Tourism Bill seeks to insert the definition of "short-term home rental" into the Tourism Act 3 of 2014.⁶ According to the Tourism Bill, "short-term home rental" means "the renting or leasing on a temporary basis, for reward, of a dwelling or a part thereof, to a visitor."⁷ The Tourism Bill furthermore aims to enable the Minister of Tourism to determine "thresholds for short-term home sharing" by publishing a notice to this effect in the Government Gazette.⁸

² It is important to note that Airbnb is the main home-sharing platform that is being used in South Africa. However, there are other online platforms and informal agreements that also enable short-term rentals. This dissertation focuses primarily on Airbnb to determine how this key industry player's terms and conditions impact the legal position of short-term rentals in South Africa. With the aim of considering the broader context of short-term rentals, this dissertation often distinguishes between considerations relevant in the short-term rental context, and considerations relevant specifically in the Airbnb context.

³ Proclamation for the City of Cape Town Municipal Planning Amendment By-law, 2019 Province of the Western Cape: Provincial Gazette Extraordinary/PGE 8185 of 06-12-2019; J Steyn "Property law: Airbnb – is hosting your property on Airbnb legal?" (date unknown) *De Klerk & Van Gend Attorneys* <<https://dkvg.co.za/property-law-airbnb-is-hosting-your-property-on-airbnb-legal/>> (accessed 01-04-2020).

⁴ Tourism Amendment Bill Notice 235 of 2019.

⁵ S Fick "Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?" (2021) 3 *Stellenbosch Law Review* 455-481 at 458.

⁶ Tourism Amendment Bill Notice 235 of 2019 page 6.

⁷ Section 1 of the Tourism Amendment Bill Notice 235 of 2019.

⁸ Tourism Amendment Bill Notice 235 of 2019; South African Government official website "Minister Derek Hanekom meets with Airbnb representatives" (17-05-2019) *South African Government* <<https://www.gov.za/speeches/short-term-home-rentals-17-may-2019-0000>> (accessed 02-09-2020).

The Tourism Bill has stirred up various responses from industry stakeholders who would like the rental housing market to operate in an efficient and equitable manner.⁹ One of the main features of the Rental Housing Act 50 of 1999 ("RHA") is that it obliges the Government to promote access to and the growth of the rental housing market.¹⁰ Arguably, it is vital that an equitable solution to short-term rental operations is established to promote access to and the growth of the rental housing market. In this regard, it is imperative to consider all the relevant role-players involved in the short-term rental context and explore how regulations may impact them.¹¹

There are strong opposing viewpoints from different role-players in the tourism sector about the regulation of short-term rental operations in South Africa.¹² For example, the Tourism Business Council of South Africa ("TBCSA"), which represents hospitality industry companies such as Tsogo Sun Gaming, Bidvest Car Rental, Avis Car Rental, and the City Lodge hotel group, has called for regulation of Airbnb.¹³ The group argues that Airbnb should comply with the same regulations as hotels,

⁹ Anonymous "NAMA weighing in on Airbnb regulation" (25-04-2019) *Property Professional* <<https://propertyprofessional.co.za/2019/04/25/nama-weighing-in-on-airbnb-regulation/>> (accessed 10-08-2020); T Penny "SA tourism body optimistic government will regulate 'unfair' Airbnb" (15-04-2019) *EWN* <<https://ewn.co.za/2019/04/15/sa-tourism-body-optimistic-government-will-regulate-unfair-airbnb>> (accessed 16-11-2020); and DJ De Lange "Regulating 'short-term' rental accommodation in SA" (2019) 20 *Chartered Institute of Government Finance Audit and Risk Officers Journal* 26-30 at 26.

¹⁰ Chapter 2 of the Rental Housing Act 50 of 1999.

¹¹ Chapter 6 of this dissertation explores the potential implications of regulations on the various role-players in the short-term rental context.

¹² DJ De Lange "Regulating 'short-term' rental accommodation in SA" (2019) 20 *Chartered Institute of Government Finance Audit and Risk Officers Journal* 26-30 at 26.

¹³ T Penny "SA tourism body optimistic government will regulate 'unfair' Airbnb" (15-04-2019) *EWN* <<https://ewn.co.za/2019/04/15/sa-tourism-body-optimistic-government-will-regulate-unfair-airbnb>> (accessed 16-11-2020); DJ De Lange "Regulating 'short-term' rental accommodation in SA" (2019) 20 *Chartered Institute of Government Finance Audit and Risk Officers Journal* 26-30 at 26.

guesthouses, B&B's, and resorts,¹⁴ to ensure Airbnb operates in compliance with municipal by-laws and regulations regarding taxation, food safety, and alcohol licenses.¹⁵ In other words, the lack of regulations surrounding short-term rental operations prejudices establishments such as hotels, guesthouses, B&B's, and resorts. It is argued that the present position operates unfairly because hospitality industry establishments are subject to laws that govern the hospitality industry, while short-term rentals facilitate a similar service without being subject to similar regulations. Given that the hospitality industry has suffered significantly during the Covid-19 pandemic,¹⁶ Government regulation of short-term rental accommodation will ensure that short-term hosts do not gain an unfair advantage by operating like hotels without facing similar obligations. Having short-term rentals subject to similar regulations to hospitality establishments will likely deter property owners from using

¹⁴ T Penny "SA tourism body optimistic government will regulate 'unfair' Airbnb" (15-04-2019) *EWN* <<https://ewn.co.za/2019/04/15/sa-tourism-body-optimistic-government-will-regulate-unfair-airbnb>> (accessed 16-11-2020); DJ De Lange "Regulating 'short-term' rental accommodation in SA" (2019) 20 *Chartered Institute of Government Finance Audit and Risk Officers Journal* 26-30 at 26.

¹⁵ T Penny "SA tourism body optimistic government will regulate 'unfair' Airbnb" (15-04-2019) *EWN* <<https://ewn.co.za/2019/04/15/sa-tourism-body-optimistic-government-will-regulate-unfair-airbnb>> (accessed 16-11-2020); DJ De Lange "Regulating 'short-term' rental accommodation in SA" (2019) 20 *Chartered Institute of Government Finance Audit and Risk Officers Journal* 26-30 at 26.

¹⁶ World Health Organization "Coronavirus disease (COVID-19) pandemic" (date unknown) *WHO* <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>> (accessed 11-08-2022). See Statistics South Africa official website "SA tourism industry struggles amidst COVID-19 pandemic" (29-04-2021) *Statssa* <<https://www.statssa.gov.za/?p=14281>> (accessed 28-06-2022); South African Department of Tourism official website "Tourism sector recovery plan COVID-19 response" (01-03-2021) *Department of Tourism* <<https://www.tourism.gov.za/AboutNDT/Documents/Tourism%20Sector%20Recovery%20Plan.pdf>> (accessed 28-06-2022); and CM Rogerson & JM Rogerson "COVID-19 Tourism impacts in South Africa: Government and industry responses" (2020) 31 *Geojournal of Tourism and Geosites* 1083-1091. For more on the property law implications of Covid-19, see also ZT Boggenpoel, E van der Sijde, MT Tlale & S Mahomed *Property and pandemics: Property law responses to Covid-19* (2021).

their property as short-term rental accommodation. In this regard, regulations that result in fewer people using their property as short-term rental accommodation could be beneficial to the hospitality industry because it is likely to decrease the number of short-term rentals existing as competitors to hospitality establishments, consequently resulting in more guests visiting hospitality establishments.

Additionally, in response to the Tourism Bill, the National Association of Management Agents ("NAMA") has also raised various issues concerning short-term rentals, particularly Airbnb's operation in South Africa.¹⁷ NAMA argues that regulating and prescribing the use of privately-owned property is unconstitutional and infringes on property rights within a community sector.¹⁸ Furthermore, NAMA opines that the tourism sector should not be involved in the regulation and governance of community schemes and the manner in which they apply and enforce rules.¹⁹ The association also contends that regulating the registration and licensing of properties listed as short-term rentals will negatively impact the growth of property investment.²⁰ Consequently,

¹⁷ Anonymous "NAMA weighing in on Airbnb regulation" (25-04-2019) *Property Professional* <<https://propertyprofessional.co.za/2019/04/25/nama-weighing-in-on-airbnb-regulation/>> (accessed 10-08-2020). The National Association of Managing Agents is a South African non-profit organisation that promotes the interests of Managing Agents and Community Scheme Management in South Africa. For more information on NAMA, visit their website: National Association of Managing Agents (date unknown) NAMA <https://nama.org.za/> (accessed 28-01-2023).

¹⁸ Anonymous "NAMA weighing in on Airbnb regulation" (25-04-2019) *Property Professional* <<https://propertyprofessional.co.za/2019/04/25/nama-weighing-in-on-airbnb-regulation/>> (accessed 10-08-2020).

¹⁹ Anonymous "NAMA weighing in on Airbnb regulation" (25-04-2019) *Property Professional* <<https://propertyprofessional.co.za/2019/04/25/nama-weighing-in-on-airbnb-regulation/>> (accessed 10-08-2020).

²⁰ Anonymous "NAMA weighing in on Airbnb regulation" (25-04-2019) *Property Professional* <<https://propertyprofessional.co.za/2019/04/25/nama-weighing-in-on-airbnb-regulation/>> (accessed 10-08-2020).

NAMA advocates for short-term rentals located within a community scheme²¹ to remain at the sole discretion of the property owner within a community scheme and for short-term letting to be regulated in terms of the conduct rules of such a community scheme.²²

Community schemes such as sectional title schemes are ordinarily regulated internally by a scheme's specific rules registered with the Community Schemes Ombud Service under the Sectional Titles Schemes Management Act of 2016 ("STSMA").²³ The STSMA and the Community Schemes Ombud Service Act 9 of 2011 regulate the rules and scheme governance in relation to, *inter alia*, the following: occupancy of a unit, use and enjoyment of a section and common property, maintenance, security, common property generally and operation of a business.²⁴ The Community Schemes Ombud Service currently falls under the jurisdiction of the Department of Human Settlements.²⁵ Consequently, input from the Department of

²¹ The Community Schemes Ombud Service Act 9 of 2011 defines a community scheme as "any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not limited to a sectional titles development scheme, a share block company, a home or property owner's association, however constituted, established to administer a property development, and a housing scheme for retired persons."

²² Anonymous "NAMA weighing in on Airbnb regulation" (25-04-2019) *Property Professional* <<https://propertyprofessional.co.za/2019/04/25/nama-weighing-in-on-airbnb-regulation/>> (accessed 10-08-2020).

²³ GJ Pienaar & JG Horn *Sectional titles and other fragmented property schemes* 2 ed (2020) 237-242; CG van der Merwe "The various policy options for the settlement of disputes in residential community schemes" (2014) 25 *Stellenbosch Law Review* 385-407 at 403.

²⁴ GJ Pienaar & JG Horn *Sectional titles and other fragmented property schemes* 2 ed (2020) 237-242; CG van der Merwe "The various policy options for the settlement of disputes in residential community schemes" (2014) 25 *Stellenbosch Law Review* 385-407 at 403.

²⁵ GJ Pienaar & JG Horn *Sectional titles and other fragmented property schemes* 2 ed (2020) 238. CG van der Merwe "The various policy options for the settlement of disputes in residential community schemes" (2014) 25 *Stellenbosch Law Review* 385-407 at 403.

Human Settlements is required to address the issues raised regarding short-term rental units in sectional title schemes.²⁶

Based on the discussion above, it is evident that conflicting positions and interests exist in relation to the regulation of short-term rental operations in South Africa. These conflicting interests are considered in more detail in chapter 6, which focuses on the potential impact of the regulation of short-term rentals and provides recommendations as to how short-term rentals can be regulated in a manner that considers all role-player's interests. Given the absence of current regulations, Airbnb's terms of service regulate the host-guest relationship.²⁷ Therefore, the following section considers the contractual terms of the Airbnb host-guest agreement, as well as Airbnb's policies, to determine the legal position applicable in respect of the Airbnb host-guest relationship.

2 3 Contractual terms governing the Airbnb host and guest relationship

2 3 1 The contractual rights and obligations of Airbnb hosts and guests

Airbnb hosts and guests receive contractual rights and obligations through the Airbnb terms of service.²⁸ In this section, the contractual rights and obligations of Airbnb hosts and guests will be set out and compared. The purpose of this exploration is to determine the interplay between Airbnb hosts and guests with the aim of understanding the foundational principles that govern their relationship.

²⁶ Anonymous "NAMA weighing in on Airbnb regulation" (25-04-2019) *Property Professional* <<https://propertyprofessional.co.za/2019/04/25/nama-weighing-in-on-airbnb-regulation/>> (accessed 10-08-2020).

²⁷ Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 16-11-2020).

²⁸ Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 16-11-2020).

2 3 1 1 *The contractual rights and obligations of Airbnb hosts*

Airbnb hosts acquire various rights and obligations through the contract they conclude in terms of the Airbnb terms of service.²⁹ The contract is concluded on the Airbnb website or Airbnb mobile application, whereby the host, guest, and Airbnb, Inc. are parties to the agreement. Section 7(1)(7) of Airbnb's terms of service provides the following:

"When you accept or have pre-approved a booking request by a Guest, you are entering into a legally binding agreement with the Guest and are required to provide your Host Service(s) to the Guest as described in your Listing when the booking request is made."

Furthermore, section 1(4) of the Airbnb terms of service states the following:

"If you choose to use the Airbnb Platform as a Host or Co-Host (as defined below), your relationship with Airbnb is limited to being an independent, third-party contractor, and not an employee, agent, joint venturer or partner of Airbnb for any reason, and you act exclusively on your own behalf and for your own benefit, and not on behalf, or for the benefit, of Airbnb. Airbnb does not, and shall not be deemed to, direct or control you generally or in your performance under these Terms specifically, including in connection with your provision of the Host Services. You acknowledge and agree that you have complete discretion whether to list Host Services or otherwise engage in other business or employment activities."

While the terms of service do not expressly state the rights and obligations of Airbnb hosts, these provisions ensure that the host is aware of the responsibility attached to listing their property on Airbnb. Airbnb has drafted the terms of the agreement in a manner that aims to prevent Airbnb, as a corporation, from being liable for acts or omissions that occur through the host's actions. Subsequently, it is valuable to determine the rights and obligations of guests, which is why the following section explores the contractual rights and obligations of Airbnb guests.

²⁹ Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 25-08-2020).

2 3 1 2 *The contractual rights and obligations of Airbnb guests*

Airbnb guests acquire various rights and obligations through the contract they conclude in terms of the Airbnb terms of service.³⁰ The contract is concluded *via* the Airbnb website or Airbnb mobile application and is concluded between Airbnb Inc, the guest, and the host, with rights and obligations assigned to each party. While the Airbnb terms of service do not explicitly deal with guests' obligations regarding the use and enjoyment of the property, it is still beneficial to consider the provisions as they indicate the consequences that will ensue if damage to property occurs during the guest's occupation of the property.

In this regard, the Airbnb's terms of service, to which the guest, host, and Airbnb, Inc. are bound by, provides the following:

"If a Host claims and provides evidence that you as a Guest have damaged an Accommodation or any personal or other property at an Accommodation ("Damage Claim"), the Host can seek payment from you through the Resolution Center. If a Host escalates a Damage Claim to Airbnb, you will be given an opportunity to respond. If you agree to pay the Host, or Airbnb determines in its sole discretion that you are responsible for the Damage Claim, Airbnb via Airbnb Payments will, after the end of your stay, collect any such sums from you and/or against the Security Deposit (if applicable) required to cover the Damage Claim pursuant to the Payments Terms. Airbnb also reserves the right to otherwise collect payment from you and pursue any remedies available to Airbnb in this regard in situations in which you are responsible for a Damage Claim, including, but not limited to, in relation to any payment requests made by Hosts under the Airbnb Host Guarantee."³¹

³⁰ Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 25-08-2020).

³¹ Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 25-08-2020). It is worthwhile noting that Airbnb has structured their terms and conditions in a manner that operates in their favour so as to limit their liability as much as possible.

"If you are a Guest or a Co-Host, you understand and agree that Airbnb may make a claim under your homeowner's, renter's or other insurance policy related to any damage or loss that you may have caused, or been responsible for, to any personal or other property (including an Accommodation) of the Host (including without limitation amounts paid by Airbnb under the Airbnb Host Guarantee or amounts paid under Japan Host Insurance). You agree to cooperate with and assist Airbnb in good faith, and to provide Airbnb with such information as may be reasonably requested by Airbnb, to make a claim under your homeowner's, renter's or other insurance policy, including, but not limited to, executing documents and taking such further acts as Airbnb may reasonably request to assist Airbnb in accomplishing the foregoing."³²

In light of these provisions in the Airbnb terms of service, it can be argued that the provisions protect the Airbnb host in the event that any damage to their property occurs. However, these provisions potentially operate in an unfair manner toward the Airbnb guest. In terms of these provisions, although the guest has a right to respond to the host's damage claim, the final decision lies with Airbnb, which has the "sole discretion" to determine whether a guest is responsible for the damage claim brought by the host. Having the final decision lie with Airbnb is potentially unfair because it gives Airbnb the opportunity to act in its own interest. Based on these provisions, Airbnb could make a decision where guests are forced to pay for the property damage. In this regard, Airbnb could exercise its decision-making power in its own favour to prevent the company from having to make payments from the Host Guarantee fund. Accordingly, Airbnb's terms of service can be subject to criticism in that while it abides by the *audi alterem partem*³³ principle, its dispute resolution procedures appear to

³² Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 25-08-2020).

³³ The Latin phrase "*audi alterem partem*" translates to "let the other side be heard as well." See C Rautenbach *Introduction to legal pluralism in South Africa* 5 ed (2018) at 265; S Peté, D Hulme, M Du Plessis, R Palmer, O Sibanda, & T Palmer *Civil procedure: A practical guide* 3 ed (2016) at 168.

operate in a procedurally unfair manner in view of the *nemo iudex in causa sua*³⁴ principle.

In light of these potentially unfair terms, the Consumer Protection Act 68 of 2008 ("CPA") may be relevant. The CPA provides protection and specific guidelines for tenants who are included in the definition of "consumers" in the CPA.³⁵ In this regard, it would be beneficial for Airbnb guests to be regarded as tenants as they would be classified as consumers and would therefore be protected by the CPA against unfair terms found in contracts.³⁶

Section 21(3) of the Airbnb terms of service provides the following in relation to Airbnb guests being consumers:³⁷

"If your country of residence or establishment is outside of the United States and China, these Terms will be interpreted in accordance with Irish law. The application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) is excluded. The choice of law does not impact your rights as a consumer according to the consumer protection regulations of your country of residence. If you are acting as a consumer, you agree to submit to the non-exclusive jurisdiction of the Irish courts. Judicial proceedings that you are able to bring against us arising from or in connection with these Terms may only be brought in a court located in Ireland or a court with jurisdiction in your place of residence. If Airbnb wishes to enforce any of its rights against you as a consumer, we may do so only in the courts of the jurisdiction in which you are a resident. If you are acting as a business, you agree to submit to the exclusive jurisdiction of the Irish courts."

³⁴ The Latin phrase "*nemo iudex in causa sua*" translates to "no one should be a judge in his own cause." See C Rautenbach *Introduction to legal pluralism in South Africa* 5 ed (2018) at 265.

³⁵ SI Mohamed "Is the Rental Housing Act all that matters?" (2016) 24 *Property Law Digest* 1-3 at 2.

³⁶ Sections 48, 49, 51, 52 of the Consumer Protection Act 68 of 2008 govern unfair terms and conditions.

³⁷ Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 25-08-2020).

This provision is important in that Airbnb acknowledges its guests are consumers. The CPA defines a “consumer” as:

- “(a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;
- (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);
- (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
- (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e).”

The CPA definition of a “consumer” indicates that a consumer is a person who has received marketing regarding a particular service, who enters into a transaction with a supplier in the supplier’s ordinary course of business. In terms of the Airbnb model, the Airbnb host would be regarded as the “supplier” as they are the party who facilitates short-term rental operations by “supplying” guests as consumers with a “service” in the form of access to their property for an agreed upon time period. The ordinary course of business of a host is that of listing their property as short-term rental accommodation. In this regard, the host’s actions towards the guest can be seen as a service rendered in the ordinary course of the host’s business. In light of the CPA’s definition of a “consumer,” it appears that Airbnb guests would be regarded as “consumers,” resulting in the CPA providing protection to Airbnb guests irrespective of their classification in terms of landlord-tenant law.³⁸

³⁸ Airbnb official website “Terms of service” (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 25-08-2020).

Section 2(9)(b) of the CPA explicitly states that in the event of conflicting provisions between the CPA and any other Act, the Act which affords greater protection to the consumer will apply. Importantly, where a tenancy relationship is not covered by the RHA or other laws, based on the subsidiarity principles,³⁹ the common law is applicable.⁴⁰ Thus, while it would be beneficial for Airbnb guests to be regarded as tenants so that they have the rights and remedies of the RHA, Airbnb guests will, at the very least, still receive protection through the CPA as consumers.

2.3.2 Airbnb's policies protecting the Airbnb host

Airbnb has implemented various policies applicable to the hosts and guests that exist to protect hosts and provide remedies to the hosts in the event of property interferences due to their short-term rental operations on the Airbnb platform.⁴¹ Airbnb has an "extenuating circumstances policy,"⁴² which gives Airbnb guests and hosts the

³⁹ AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *Constitutional Court Review* 77-128 proposed the argument that where legislation has been developed to give effect to constitutional rights or the common law exists to regulate a specific area of the law, these sources of law should be applied as opposed to relying directly on a constitutional right. This idea was developed and expanded in AJ van der Walt *Property and Constitution* (2012) at 35. The subsidiarity principle was brought forth by the principle enunciated in the Constitutional Court decisions of *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) paras 51–52 and *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 437. See further KE Klare "Legal subsidiarity & constitutional rights: A reply to AJ van der Walt" (2008) 1 *Constitutional Court Review* 129–154; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 249; *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC) para 15; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 25.

⁴⁰ SI Mohamed "Is the Rental Housing Act all that matters?" (2016) 24 *Property Law Digest* 1-3 at 2.

⁴¹ Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 16-11-2020).

⁴² Airbnb official website "What if I need to cancel because of an emergency or unavoidable circumstance?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/1320/what-if-i-need-to-cancel-because-of-an-emergency-or-unavoidable-circumstance>> (accessed 04-04-2020).

option of cancelling their booking without any cancellation fee.⁴³ The extenuating circumstances policy is applicable to Airbnb hosts and guests if unforeseen circumstances impact them and protect both parties where such circumstances are present.⁴⁴ Despite a deposit not being mandatory, security deposits may be required by Airbnb hosts based on the home's features and the timing of a reservation.⁴⁵ According to Airbnb's terms and conditions regarding security deposits, Airbnb guests are made aware of the host-required security deposit amount before making their reservation.⁴⁶ Where an Airbnb host requires the security deposit, an authorisation hold for the security deposit amount will be placed on the guest's payment method two days before the guest's stay begins.⁴⁷ Once the guest vacates the accommodation, Airbnb initiates a release on the hold for the security deposit, provided no property damage has occurred during the guest's stay.⁴⁸ Guests are only charged if a host

⁴³ J Eveleigh "Here's how the coronavirus impacts on Airbnb industry" (24-03-2020) *The South African* <<https://www.thesouthafrican.com/travel/coronavirus-industry-impact-on-airbnb/>> (accessed 01-04-2020).

⁴⁴ J Eveleigh "Here's how the coronavirus impacts on Airbnb industry" (24-03-2020) *The South African* <<https://www.thesouthafrican.com/travel/coronavirus-industry-impact-on-airbnb/>> (accessed 01-04-2020).

⁴⁵ Airbnb official website "How does Airbnb handle security deposits?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/140/how-does-airbnb-handle-security-deposits>> (accessed 18-06-2020).

⁴⁶ Airbnb official website "How does Airbnb handle security deposits?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/140/how-does-airbnb-handle-security-deposits>> (accessed 18-06-2020).

⁴⁷ Airbnb official website "How does Airbnb handle security deposits?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/140/how-does-airbnb-handle-security-deposits>> (accessed 18-06-2020).

⁴⁸ Airbnb official website "How does Airbnb handle security deposits?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/140/how-does-airbnb-handle-security-deposits>> (accessed 18-06-2020).

requests to collect their security deposit, and no authorisation hold is placed on the guest's payment method.⁴⁹ The amount the host requests will depend on the damages incurred and may or may not be the same as the guest's security deposit.⁵⁰ Problematically, Airbnb's terms of service fail to indicate what will happen if the property damage expenses exceed the hold placed on the guest's payment method.⁵¹ If an Airbnb host requests to collect on their security deposit, the request is handled according to Airbnb's Host Guarantee terms and conditions.⁵² However, it is uncertain whether an Airbnb host would be able to claim from the guest an amount exceeding the security deposit paid by the guest if the damage caused amounts to more than the security deposit. In this regard, Airbnb has provided a potential remedy in the form of "Airbnb's Host Guarantee", which provides financial assistance to hosts who suffer property damage as a result of their guest's actions.⁵³ Airbnb's Host Guarantee program provides property damage protection of up to \$1 million for every host and every property listing at no additional cost to the host.⁵⁴ Naturally, this protection does

⁴⁹ Airbnb official website "How does Airbnb handle security deposits?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/140/how-does-airbnb-handle-security-deposits>> (accessed 18-06-2020).

⁵⁰ Airbnb official website "How does Airbnb handle security deposits?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/140/how-does-airbnb-handle-security-deposits>> (accessed 18-06-2020).

⁵¹ Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 16-11-2020).

⁵² Airbnb official website "How does Airbnb handle security deposits?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/140/how-does-airbnb-handle-security-deposits>> (accessed 18-06-2020).

⁵³ Airbnb official website "Airbnb host guarantee" (date unknown) *Airbnb* <<https://www.airbnb.co.za/guarantee?locale=en>>. (accessed 28-03-2020).

⁵⁴ Airbnb official website "Airbnb host guarantee" (date unknown) *Airbnb* <<https://www.airbnb.co.za/guarantee?locale=en>>. (accessed 28-03-2020).

not come without excessive terms and conditions.⁵⁵ When hosts want to claim under the Host Guarantee, the terms and conditions require that the host be able to provide information relating to liens, encumbrances, mortgages, changes in title, use, occupation, or possession in relation to their Airbnb-listed property.⁵⁶ Additionally, Airbnb hosts must provide documentation of the missing or damaged items and request a reimbursement from the guest through Airbnb's Resolution Center.⁵⁷ In this regard, while the Host Guarantee provides an avenue for financial relief, the terms and conditions make it particularly challenging for an Airbnb host to actually institute a claim.⁵⁸

Airbnb's website states that only in the event that a guest is unwilling or unable to reimburse the host may the host involve Airbnb for assistance.⁵⁹ This implies that the Airbnb guest should attempt to resolve the issue with the guest privately before turning to the Airbnb policies for financial relief in terms of the Host Guarantee. Presently, there is uncertainty regarding the extent to which a host can claim damages in terms of the Host Guarantee. The Host Guarantee indicates that it protects the Airbnb host

⁵⁵ Anonymous "Airbnb: the rules you need to know when holidaying and renting out in South Africa" (22-12-2019) *Businesstech* <<https://businesstech.co.za/news/lifestyle/359646/airbnb-the-rules-you-need-to-know-when-holidaying-and-renting-out-in-south-africa/>> (accessed 31-03-2020).

⁵⁶ Airbnb official website "Airbnb host guarantee" (date unknown) *Airbnb* <<https://www.airbnb.co.za/guarantee?locale=en>> (accessed 28-03-2020).

⁵⁷ Airbnb official website "How does Airbnb handle security deposits?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/140/how-does-airbnb-handle-security-deposits>> (accessed 18-06-2020).

⁵⁸ Anonymous "Airbnb: the rules you need to know when holidaying and renting out in South Africa" (22-12-2019) *Businesstech* <<https://businesstech.co.za/news/lifestyle/359646/airbnb-the-rules-you-need-to-know-when-holidaying-and-renting-out-in-south-africa/>> (accessed 31-03-2020).

⁵⁹ Airbnb official website "How does Airbnb handle security deposits?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/140/how-does-airbnb-handle-security-deposits>> (accessed 18-06-2020).

if there is damage to their property or belongings caused by an Airbnb guest, the Airbnb guest's visitors, or even the Airbnb guest's assistance animal (service animals such as guide dogs).⁶⁰ However, according to the Host Guarantee Terms and Conditions, there will be no coverage in the instance where a guest or an invitee stays beyond the expiration of the booking period, which leaves the host and guest susceptible to the laws governing evictions in South Africa.⁶¹ In addition, the Airbnb Host Guarantee does not protect the host in the event of bodily injury or property damage to guests or others.⁶² Moreover, it does not cover property damage relating to general cleaning, ordinary wear and tear, theft of cash and securities, and non-physical damage like smoking fines.⁶³ However, it is valuable to note that Airbnb does provide Host Protection Insurance, which may cover such incidences.⁶⁴ While the Host Protection Insurance policy is a remedy available to Airbnb hosts, it is not relevant to

⁶⁰ Airbnb official website "How does Airbnb handle security deposits?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/140/how-does-airbnb-handle-security-deposits>> (accessed 18-06-2020), Airbnb official website "What happens if a host wants to collect on their security deposit?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/352/what-happens-if-a-host-wants-to-collect-on-their-security-deposit>> (accessed 18-06-2020).

⁶¹ Airbnb official website "Airbnb host guarantee" *Airbnb* <<https://www.airbnb.co.za/guarantee?locale=en>> (accessed 28-03-2020).

⁶² Airbnb official website "What happens if a host wants to collect on their security deposit?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/352/what-happens-if-a-host-wants-to-collect-on-their-security-deposit>> (accessed 18-06-2020).

⁶³ Airbnb official website "How does Airbnb handle security deposits?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/140/how-does-airbnb-handle-security-deposits>> (accessed 18-06-2020), Airbnb official website "What happens if a host wants to collect on their security deposit?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/352/what-happens-if-a-host-wants-to-collect-on-their-security-deposit>> (accessed 18-06-2020).

⁶⁴ Airbnb official website "What happens if a host wants to collect on their security deposit?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/352/what-happens-if-a-host-wants-to-collect-on-their-security-deposit>> (accessed 18-06-2020).

this dissertation because it does not focus on protecting the property listed on Airbnb's platform. Rather, it focuses on protecting guests' property in terms of their personal belongings used during their stay on the host's property.⁶⁵

In relation to the discussion regarding Airbnb hosts' remedies, it is worthwhile to note that if short-term rental hosts amount to landlords under South African property law, they would have delictual remedies such as the *actio legis Aquiliae*⁶⁶ and the *actio ad exhibendum* at their disposal.⁶⁷ Accordingly, it is necessary to determine whether short-term rental hosts in South Africa amount to landlords, as this will dictate the remedies available to them. For this reason, chapter 3 of this dissertation explores the applicability of landlord-tenant law in the short-term rental context.

Based on the above discussion, it is clear that the terms and conditions of the Host Guarantee do not effectively serve as a remedy for Airbnb hosts due to the strict requirements they need to meet and the red tape present when claiming from Airbnb.⁶⁸

⁶⁵ Airbnb official website "What happens if a host wants to collect on their security deposit?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/352/what-happens-if-a-host-wants-to-collect-on-their-security-deposit>> (accessed 18-06-2020).

⁶⁶ ZT Boggenpoel *Property remedies* (2017) at 183-190; G Wille, F Du Bois, & G Bradfield *Wille's principles of South African law* 9 ed (2007) at 544,1094-1160. See also P van Warmelo "Limits to the Lex Aquilia" (1975) 92 *South African Law Journal* 129-136.

⁶⁷ ZT Boggenpoel *Property remedies* (2017) at 195-199; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 269. CG van der Merwe *Sakereg* 2 ed (1989) at 356; CG van der Merwe, JM Pienaar & A Eisenberg "Law of property (including mortgage and pledge)" 1996 *Annual Survey of South African Law* 332-411 at 376-377; CG van der Merwe "Things" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 27 2 ed (2014) 3-347 at para 242; *Rossouw NO and Another v Land and Agricultural Development Bank of South Africa* 2013 (4) SA 318 (SCA).

⁶⁸ Anonymous "Airbnb: the rules you need to know when holidaying and renting out in South Africa" (22-12-2019) *Businessstech* <<https://businesstech.co.za/news/lifestyle/359646/airbnb-the-rules-you-need-to-know-when-holidaying-and-renting-out-in-south-africa/>> (accessed 31-03-2020).

2 4 Conclusion

This chapter discussed the views of short-term rental role-players in relation to the regulation of short-term rentals like Airbnb in South Africa. Despite the contestation by various organisations, it is likely that the Tourism Bill will create the scope for the regulation of short-term rental operations in South Africa. In addition, this chapter examined the contractual rights, obligations, and remedies of Airbnb hosts and guests arising from Airbnb's terms of service. In this regard, the Airbnb policies and terms and conditions that protect Airbnb hosts were explored. In the discussion of the Airbnb policies, it was apparent that the policies have the potential to negatively impact Airbnb guests and are essentially phrased in favour of the host. After considering contractual rights and obligations, protection for Airbnb guests was discussed, focusing on the RHA and CPA as potential legal avenues to protect Airbnb guests.

Based on the discussion of Airbnb's terms of service, it is evident that the property owner's rights are prioritised, and that the Airbnb host-guest contract seeks to protect hosts from liability, even if it is at the cost of the guest. The exploration of the procedures for damages claims in terms of Airbnb's policies indicates that in the event of damage to property, the guest would account to the host for their actions during their time on the property. Furthermore, it appears that the host would account to Airbnb for consequences that arose due to them listing their property on Airbnb. It logically follows that the guest is not the person who is responsible for the long-term upkeep of the property, but rather they are responsible for their actions for the duration of their stay on the host's property. Consequently, it can be argued that guests are subordinate to hosts in the host-guest relationship. Given that it is the property owner who decides to list their property as short-term rental accommodation, it follows that the short-term host is the party responsible for the actions that arise from their short-

term rental operations. In this regard, it can be argued that the short-term host is the role-player against whom a neighbour would bring a neighbour law claim in terms of nuisance law under the common law. The determination that a host is the party against whom a nuisance law claim should be brought is relevant, as chapter 4 will discuss the implications of neighbour law in the short-term rental context, particularly focusing on the implications of nuisance law.

The principles discussed above regarding the rights, obligations, and remedies of Airbnb hosts and guests have indicated that there is a lack of clarity regarding the host and guest's rights, obligations, and remedies. In this regard, this discussion has laid the foundation for the following chapter, which will consider the applicability of landlord-tenant law in the short-term rental context. Accordingly, the following chapter sets out to determine whether short-term rental hosts and guests amount to landlords and tenants and consequently have rights, obligations, and remedies available in terms of landlord-tenant law.

Chapter 3: Landlord-tenant law in the short-term rental context

3 1 Introduction

Given the absence of regulations governing short-term rentals in South Africa, it is currently unclear whether Airbnb's operations amount to a short-term tenancy. This raises the question of whether landlord-tenant law is applicable in the short-term rental context. Determining whether hosts and guests can respectively be regarded as landlords and tenants in the short-term rental context is necessary for determining which laws, rules, and principles regulate their relationship. If short-term hosts and guests are regarded as landlords and tenants, their relationship, rights, and obligations are regulated and protected by property law principles. If not, contractual rules and principles apply and regulate their relationship, preventing short-term hosts and guests from relying on the rights and remedies that property law offers them.¹

In this chapter, the contractual rights and obligations of Airbnb hosts and guests found in the Airbnb host-guest agreement will be explored. In this regard, the features of a lease agreement will be compared with the Airbnb host-guest agreement to determine whether the contract can be regarded as a lease agreement. Furthermore, this chapter will discuss the potential property law rights and obligations of Airbnb hosts and guests. Moreover, the possibility of classifying short-term rental accommodation as commercial use of property will be explored to establish the existing legislation applicable to short-term rentals. Subsequently, the instances where short-term rentals may potentially be prohibited will be discussed to determine the implications of such prohibitions on property owners' property rights. Finally, this chapter will briefly explore short-term rental operations in terms of sectional title

¹ The contractual rules of Airbnb are discussed in chapter 2 section 2 3.

schemes and body corporate rules and consider the implications of subletting in the short-term rental context.

3 2 Comparing lease agreements and Airbnb host-guest agreements

3 2 1 Introduction

In view of the implications of landlord-tenant law in the short-term rental context, it is important to consider whether there is a legal basis for hosts and guests to be viewed as landlords and tenants based on the agreement concluded between the parties. Consequently, this section contrasts a lease agreement with the Airbnb host-guest agreement to determine whether the Airbnb host-guest agreement contains the general features of a lease agreement.

Due to the multifaceted construct regarding short-term rentals, various pieces of legislation potentially come into play. The relevant pieces of legislation are the Electronic Communications and Transactions Act 25 of 2002 ("ECTA"), the Rental Housing Act 50 of 1999 ("RHA"), the Formalities in Respect of Leases of Land Act 18 of 1969 ("FRLLA"), and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). While these pieces of legislation are not the main focus of this dissertation, it is worth mentioning their relevance in the short-term rental context. It is important to make mention of these pieces of legislation as the legislature will need to take cognisance of the existing provisions governing short-term rentals when regulating short-term rentals like Airbnb in South Africa. Some of the existing provisions in legislation may have an impact on how the Tourism Amendment Bill of 2019 ("Tourism Bill")² regulates short-term rental accommodation. In this regard, the provisions in the following pieces of legislation discuss the

² Tourism Amendment Bill Notice 235 of 2019.

requirements for a valid lease agreement and are contrasted with the provisions of the Airbnb host-guest agreement. Therefore, this section seeks to determine whether the contract concluded through the Airbnb platform meets the requirements of a lease agreement in South African law.

ECTA deals with, *inter alia*, the conclusion of electronic contracts.³ In principle, it is possible to validly conclude a lease agreement in terms of electronic communication.⁴ This is of particular importance, considering the Airbnb agreement is concluded entirely through electronic communication. Thus, the fact that it is possible to conclude a valid lease agreement through electronic communication in terms of ECTA indicates that the Airbnb host-guest agreement concluded on Airbnb's platform may – in principle - be regarded as a lease agreement. Consequently, given that it is possible to conclude a valid lease electronically, this principle should extend to the electronic contract concluded between Airbnb hosts and guests *via* Airbnb's online platform.

The RHA, in turn, regulates the relationship between a landlord and a tenant of residential premises, specifying their rights and obligations while regulating the procedures from inception to termination of the rental agreement.⁵ The RHA does not distinguish between short-term and long-term leases and is silent about the *essentialia* of a lease agreement.⁶ However, the RHA regulates rental housing and defines "rental housing" to include one or more dwellings.⁷ A "dwelling" is further defined to include,

³ SI Mohamed "Is the Rental Housing Act all that matters?" (2016) 24 *Property Law Digest* 1-3 at 2.

⁴ SI Mohamed "Is the Rental Housing Act all that matters?" (2016) 24 *Property Law Digest* 1-3 at 2.

⁵ SI Mohamed "Is the Rental Housing Act all that matters?" (2016) 24 *Property Law Digest* 1-3 at 1.

⁶ SI Mohamed "Is the Rental Housing Act all that matters?" (2016) 24 *Property Law Digest* 1-3 at 2; S Viljoen *The law of landlord and tenant* (2016) at 114-115.

⁷ Section 1 of the Rental Housing Act 50 of 1999.

amongst other things, a flat, a house, or an apartment.⁸ Cornie van der Merwe argues that the RHA may be applicable to the relationship between host and guest in the short-term rental context.⁹ The RHA provides clarity regarding the formalities of the relationship between a landlord and tenant, which will shed light on some of the rights and obligations of hosts and guests in the short-term rental context.¹⁰ Therefore, it would be beneficial for both hosts and guests if the Airbnb host-guest agreement is regarded as a lease agreement because it would then be regulated by the RHA. In light of the certainty that the RHA can bring if the Airbnb host-guest agreement is regarded as a lease, the following section will explore the *essentialia* of a lease agreement to ascertain if the Airbnb host-guest agreement meets the requirements for a lease.¹¹

3 2 2 *Essentialia* of a lease agreement

Various rights and obligations for landlords and tenants emerge through a lease agreement. However, this section focuses on the general features of a lease, with the aim of determining whether the contract concluded in terms of the Airbnb host-guest agreement amounts to a lease agreement.

The nature of the landlord-tenant relationship in South Africa is a contractual relationship whereby parties conclude a lease agreement in order for the landlord-tenant relationship to be created.¹² A lease agreement is entered into when the parties

⁸ Section 1 of the Rental Housing Act 50 of 1999.

⁹ CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 514.

¹⁰ The implications of the RHA are discussed in section 3 4 2 and 3 4 3.

¹¹ Section 6 of the RHA lists the information that needs to be provided in a lease.

¹² S Viljoen *The law of landlord and tenant* (2016) at 54; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 509.

who have the requisite intention agree that the landlord shall give the use and enjoyment of immovable property to the tenant in return for the payment of rent.¹³

Generally, the landlord and tenant will agree upon the duration of the lease. However, in the event that the landlord and tenant do not agree on the lease's duration, the duration of the lease is fixed by residual rules of law.¹⁴

A short-term lease is a lease that exists for less than ten years.¹⁵ However, it is unclear what the minimum period is for a short-term lease.¹⁶ The tenant is contractually bound to pay the determined amount of rent in the proper commodity at the proper place and time in accordance with the lease agreement.¹⁷ It is an essential requirement of all contracts of lease that the parties must agree on the rent.¹⁸ This is confirmed in *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd*,¹⁹ where the court stated that in lease agreements, it is essential that the rent agreed upon by

¹³ AJ Kerr *The law of sale and lease* 3 ed (2004) at 245; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) 509-513; S Viljoen *The law of landlord and tenant* (2016) at 108.

¹⁴ AJ Kerr *The law of sale and lease* 3 ed (2004) at 245; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 514; S Viljoen *The law of landlord and tenant* (2016) at 154-157.

¹⁵ G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 514; AJ Kerr *The law of sale and lease* 3 ed (2004) at 276.

¹⁶ G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 514; AJ Kerr *The law of sale and lease* 3 ed (2004) at 276.

¹⁷ AJ Kerr *The law of sale and lease* 3 ed (2004) at 349. It is worth noting that failure to reduce a lease to writing will not invalidate the agreement *inter partes* between the landlord and tenant. Section 1(1) of the Formalities in respect of Leases of Land Act 18 of 1969 states that "subject to the provisions of subsection (2), no lease of land shall be invalid merely by reason of the fact that such lease is not in writing."

¹⁸ AJ Kerr *The law of sale and lease* 3 ed (2004) at 258; S Viljoen *The law of landlord and tenant* (2016) at 143-144; G Glover Kerr's *Law of sale and lease* 4 ed (2014) at 329; WE Cooper *Landlord and tenant* 2 ed (1994) at 42; *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA).

¹⁹ *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 (3) SA 738 (A).

the parties should be fixed in a definite amount (*merces certa*) or be determinable by a third person in accordance with the maxim: *certum est quod certum redid potest*.²⁰

According to section 5(1) of the RHA, a lease does not need to be in writing or be subject to the provisions of the FRLA. However, this is subject to section 5(2) of the RHA, which states that the landlord must reduce the lease to writing if requested to by a tenant.

According to section 6 of the RHA, the following information must be included in a lease agreement:

- (a) The names of the tenant and the landlord and their addresses in the Republic for purposes of formal communication;
- (b) the description of the dwelling which is the subject of the lease;
- (c) the amount of rental of the dwelling and reasonable escalation, if any, to be paid in terms of the lease;
- (d) if rentals are not paid on a monthly basis, then the frequency of rental payments;
- (e) the amount of the deposit, if any;
- (f) the lease period, or, if there is no lease period determined, the notice period requested for termination of the lease;
- (g) obligations of the tenant and the landlord, which must not detract from the provisions of subsection (3) or the regulations relating to unfair practice;
- (h) the amount of the rental, and any other charges payable in addition to the rental in respect of the property.

When comparing these RHA requirements with the existing provisions of the Airbnb host-guest agreement found in the Airbnb terms of service,²¹ it appears that the host-guest agreement meets these requirements. Therefore, it can be argued that the

²⁰ *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 (3) SA 738 (A) page 746G-H. The English translation of Latin maxim "*certum est quod certum redid potest*," is "if something is capable of being made certain, it should be treated as certain." D Hutchinson & C Pretorius *The law of contract in South Africa* 3 ed (2017) at 244.

²¹ For the existing provisions of the Airbnb host-guest agreement, see Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 25-08-2020).

Airbnb host-guest agreement meets the requirements of a lease agreement, consequently resulting in the host-guest agreement amounting to a short-term, fixed-period lease agreement. In terms of a fixed-period lease, the parties conclude a periodic lease, stipulating the duration of the lease period.²² Similarly, an Airbnb host and guest agree on the duration of the guest's stay when the contract is concluded on the Airbnb platform. In this regard, the agreement between the Airbnb host and guest concluded on the Airbnb platform can be argued to constitute a (short-term) fixed-period lease.

In the Airbnb context, Airbnb's policies state that any stay²³ exceeding 28 days is regarded as a long-term stay that will be subject to Airbnb's long-term hosting policies.²⁴ Furthermore, any stay that is less than 28 days can be regarded as a short-term stay.²⁵ Consequently, the agreement concluded between an Airbnb host and guest can be argued to constitute a short-term lease in that guests generally stay for a few days.

²² AJ Kerr *The law of sale and lease* 3 ed (2004) at 271; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 508, 511; S Viljoen *The law of landlord and tenant* (2016) at 154-157.

²³ Airbnb makes use of the word "stay" to refer to the period in which an Airbnb host accommodates an Airbnb guest on their property. For this reason, in this discussion, the word "stay" is used instead of "visit."

²⁴ Airbnb official website "How do I get started with longer stays" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/2729/how-do-i-get-started-with-longer-stays#:~:text=Airbnb%20automatically%20collects%20from%20guests,the%20stay%20is%20non%20Drefundable.>> (accessed 26-08-2020).

²⁵ Airbnb official website "How do I get started with longer stays" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/2729/how-do-i-get-started-with-longer-stays#:~:text=Airbnb%20automatically%20collects%20from%20guests,the%20stay%20is%20non%20Drefundable.>> (accessed 26-08-2020).

While there is nothing prohibiting the registration of short-term leases, in practice, such leases are not ordinarily registered against the title deed of the leased land.²⁶ In terms of short-term lease agreements, tenants receive a personal right, which fails to provide strong protection in terms of enforceable rights for tenants against successive owners.²⁷ Rather, the personal right of a tenant is weak in that it is only enforceable against the contracting party.²⁸ In contrast, a real right would provide stronger protection for tenants because these rights are enforceable against successive owners and holders.²⁹ Nonetheless, the personal right of the tenant will still provide protection

²⁶ G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 515; WE Cooper *Landlord and tenant* 2 ed (1994) at 77-78. See also section 2(e) of the Sectional Titles Act 95 of 1986 which states that a registrar may register "any lease," which can be interpreted to include short-term leases.

²⁷ S Viljoen *The law of landlord and tenant* (2016) at 54; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 515; AJ Kerr *The law of sale and lease* 3 ed (2004) at 437-439.

²⁸ S Viljoen *The law of landlord and tenant* (2016) at 54; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 515; AJ Kerr *The law of sale and lease* 3 ed (2004) at 437-439.

²⁹ S Viljoen *The law of landlord and tenant* (2016) at 54; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 56-59; AJ Kerr *The law of sale and lease* 3 ed (2004) at 437-438.

for tenants in instances where the *huur gaat voor koop*³⁰ rule and doctrine of notice³¹ are applicable.³²

Furthermore, section 5(7) of the RHA is relevant in the Airbnb context. Section 5(7) states that a list of defects applicable to the dwelling must be attached as an annexure to the lease. In relation to landlords providing tenants with a list of defects to the dwelling, Airbnb's current hosting practices do not meet the RHA's requirements, as hosts do not generally inform guests of any defects to the property.³³ Consequently, if Airbnb hosts and guests do amount to landlords and tenants, hosts will have to provide guests with a list of defects to the dwelling. Hosts will need to furnish these documents prior to the conclusion of the lease agreement on the Airbnb platform to ensure guests are aware of the true condition of the property. Practically speaking, Airbnb hosts could upload the list of defects on their Airbnb listing, so potential guests can make informed decisions about whether they would like to stay on the property given the defects. Currently, Airbnb guests only become aware of any defects once they take occupation of the property. In this regard, guests take risks when concluding the online agreement

³⁰ The *huur gaat voor koop* rule provides that the rights of tenant's in occupation of the leased property are protected against subsequent purchasers when the leased property is sold during the lease period. The *huur gaat voor koop* in the short-term rental context is discussed in section 3 4 3 below.

³¹ The doctrine of notice provides that if an individual or entity acquires ownership over property while having actual knowledge or the foresight of a prior personal right by another party aimed at acquiring ownership over the relevant property at the time of accepting the transfer of the property by registration, the party who holds a prior personal right is entitled to have the subsequent sale and transfer set aside and register ownership in their name. See S Viljoen *The law of landlord and tenant* (2016) at 112 and AJ van der Walt *Constitutional property law* 3 ed (2011) at 140,142.

³² S Viljoen *The law of landlord and tenant* (2016) at 54; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 98, 515-518; AJ Kerr *The law of sale and lease* 3 ed (2004) at 437-439. See chapter 3 section 3 4 3 for a discussion on the *huur gaat voor koop* rule.

³³ See chapter 2 section 2 3 1 regarding the contractual rights and obligations of Airbnb hosts and guests.

as they may find that the photos presented on the Airbnb platform did not display the defects and true state of the property. In this light, the application of section 5(7) of the RHA to the Airbnb legal position would be beneficial in protecting Airbnb guests from entering into agreements without being fully informed of their living circumstances for the duration of their stay.

In addition, section 5(8) of the RHA is of relevance in the Airbnb context. Section 5(8) states that a copy of any applicable House Rules must be attached as an annexure to the lease agreement. In this regard, the current Airbnb operations can be said to meet section 5(8) of the RHA. In terms of House Rules, Airbnb hosts post their House Rules on their listing page. These rules are very clearly written at the bottom of the listing web page, found under the heading “Things to know.” Under the House Rules tab, Airbnb hosts will typically list information such as check-in and checkout times, as well as rules such as no smoking, no pets, and no parties or events are to be held on the property. These House Rules are posted on the listing web page, and a link to the Host Rules is also mentioned on the “Confirm and pay” webpage. Prior to concluding the payment, there is a clause stating, “By selecting the button below, I agree to the Host's House Rules, Airbnb's Rebooking and Refund Policy, and that Airbnb can charge my payment method if I'm responsible for damage.” In this regard, I am of the opinion that this provision clause can be regarded as an online form of providing a tenant with a copy of any House Rules applicable to a dwelling. Furthermore, I argue that given that this clause is positioned right before the guest confirms their booking and pays, it can be regarded as meeting the section 5(8) requirement that states that the House rules need to be attached as an annexure to the lease. Consequently, in my opinion, the House Rules provided by hosts on their

Airbnb listing meets section 5(8) of the RHA's requirements, ensuring that guests are informed about their obligations during their stay.

In light of the above discussion, it is evident that the application of the RHA can be considerably beneficial in the Airbnb context. However, it is important to note that the RHA does not apply in instances of commercial use of property. In this regard, it is pertinent to establish whether renting out property on Airbnb amounts to commercial use of property or whether it remains residential use of property. This determination is relevant as it will indicate whether the Airbnb agreement should be regarded as a commercial agreement or whether it can be regarded as an agreement for residential use of property amounting to a lease agreement. This clarification is also crucial because it will impact the applicability of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE") in the Airbnb context. This determination is relevant because PIE is not applicable in instances of commercial use of property.³⁴ Consequently, the following section will explore whether Airbnb's operations amount to commercial use of property.

3 2 3 Does Airbnb amount to commercial use of property?

In order to conclude that the Airbnb host-guest agreement is a lease agreement, it must first be established that the agreement is in relation to residential use of property as opposed to commercial use of property. This determination will also indicate which pieces of legislation are applicable in the short-term rental context. In this regard, the distinction between residential and commercial use of property is important in the

³⁴ SI Mohamed *Landlord & tenant – rights & obligations* (2019) at 18; *Ndlovu v Ngcobo*; *Bekker and Bosch v Jika* 2003 (1) SA 113 (SCA) para 20.

short-term rental context because the PIE does not apply to commercial property,³⁵ as confirmed in *Yussuf and Another v Ye Khan Investment CC and Another*.³⁶

In light of this, clarity regarding whether short-term rentals amount to commercial use of property is necessary because PIE, amongst other things, prevents illegal evictions, which may be relevant if guests exceed their stay and become unlawful occupiers who potentially need to be evicted from the host's property.³⁷ In this judgment, the High Court scrutinised the aim of PIE and noted that PIE was enacted to prohibit the evictions of unlawful occupiers who have no access to alternative accommodation.³⁸ The court held that PIE is not applicable in guest house/hostel

³⁵ *SI Mohamed Landlord & tenant – rights & obligations* (2019) at 18; *Ndlovu v Ngcobo; Bekker and Bosch v Jika* 2003 (1) SA 113 (SCA) para 20.

³⁶ *Yussuf and Another v Ye Khan Investment CC and Another* (1355/2011) ZAWCHC 416.

³⁷ In September-October 2020, a group of activists in South Africa known as “#WeSeeYou” occupied a property listed on Airbnb in Camps Bay. The group refused to vacate the property despite having exceeded the number of days they had booked to stay on the property as per the host-guest agreement concluded on the Airbnb platform. The occupiers alleged that they would be homeless if they were evicted from the property, which would typically indicate the applicability of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. However, the matter was not litigated in terms of PIE as the Western Cape High Court granted an urgent commercial eviction, which subsequently resulted in the occupiers vacating the Airbnb listing. This incident highlights the relevance of the clarification as to whether short-term rental operations amount to commercial use of property in relation to the applicability of PIE. Additionally, this incident highlights the need for clarity regarding whether Airbnb hosts and guest’s amount to landlords and tenants, as this would dictate the rights, obligations and remedies applicable in the short-term rental context. For more information on the Camps Bay incident, see J Evans “Camps Bay Airbnb taken over by Cape Town group seeking safe space” (22-09-2020) *News24* <<https://www.news24.com/news24/southafrica/news/camps-bay-airbnb-taken-over-by-cape-town-group-seeking-safe-space-20200922>> (accessed 29-01-2023); and Anonymous “Airbnb: When guests refuse to leave” (01-10-2020) *Property Professional* <<https://propertyprofessional.co.za/2020/10/01/airbnb-when-guests-refuse-to-leave/>> (accessed 29-01-2023). See also. J Evans “Camps Bay Airbnb collective gets eviction court date notice” (01-10-2020) *News24* <<https://www.news24.com/news24/SouthAfrica/News/camps-bay-airbnb-saga-occupiers-leave-mansion-as-second-group-yells-at-them-not-to-20201008>> (accessed 29-01-2023).

³⁸ *Yussuf and Another v Ye Khan Investment CC and Another* (1355/2011) ZAWCHC 416 para 4.

scenarios because these properties are commercial properties used for short-term occupiers who are visitors, not long-term occupiers who have nowhere else to live.³⁹ Consequently, the court held that guest houses and hostels do not qualify for protection under PIE.⁴⁰ This judgment is relevant in the short-term rental context because if short-term guests exceed their stay and consequently breach their agreement with the host, they would fall into the definition of an unlawful occupier.⁴¹ In this regard, it is important to note that PIE is applicable in the instance where there are unlawful occupiers⁴² on land, which includes tenants who hold-over,⁴³ and provides the procedure applicable for the eviction of unlawful occupiers.⁴⁴ In light of this, it would be beneficial for short-term rentals to be regarded as residential use of property so that short-term rentals fall within the ambit of PIE. This classification is important in providing hosts with a remedy in the form of an eviction based on the unlawful occupation of their property by guests who exceed their stay.

³⁹ *Yussuf and Another v Ye Khan Investment CC and Another* (1355/2011) ZAWCHC 416 paras 5, 6.

⁴⁰ *Yussuf and Another v Ye Khan Investment CC and Another* (1355/2011) ZAWCHC 416 para 6.

⁴¹ Section 1(xi) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 defines an unlawful occupier as “a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996). (vii) ”

⁴² JM Pienaar *Land reform* (2014) at 659-811; S Viljoen *The law of landlord and tenant* (2016) at 69; *Yussuf v Ye Khan Investment CC* case number 1355/2011, Western Cape High Court, Cape Town.

⁴³ G Wille, F Du Bois, & G Bradfield *Wille's principles of South African law* 9 ed (2007) at 919-920; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 512; S Viljoen *The law of landlord and tenant* (2016) at 69, 310-311; AJ Kerr *The law of sale and lease* 3 ed (2004) at 417,418,421. See also L Hawthorne “The nature of the claim for holding over: An historical analysis” (2010) 16 *Fundamina* 52-63, *Ndlovu v Ngcobo; Bekker and Bosch v Jika* 2003 (1) SA 113 (SCA).

⁴⁴ SI Mohamed “Is the Rental Housing Act all that matters?” (2016) 24 *Property Law Digest* 1-3 at 2.

Notably, the court in *Nicholl* referred to the respondent's Airbnb hosting activities as "utilizing the unit and/or leasing the unit for commercial use and/or as a resort facility and/or a bed and breakfast."⁴⁵ The reference to "commercial use" in *Nicholl* implies that the court considered short-term letting through Airbnb to amount to some form of commercial use of property.⁴⁶ However, Van der Merwe argues that short-term letting in a residential sectional title scheme still amounts to residential use, not commercial use.⁴⁷ He convincingly contends that short-term guests, generally being holidaymakers/goers, are provided holiday accommodation by hosts, which can be considered to be ancillary to the main use of the residential property, which is to provide living-in accommodation.⁴⁸ In this regard, short-term letting is different from a bed and breakfast establishment because the main use of the property remains residential. In contrast, the sole purpose of bed and breakfast establishments is to use the property for hospitality purposes.

Given that the Airbnb host-guest relationship has the potential to amount to a landlord-tenant relationship, it would be illogical for short-term hosting to be classified as "commercial use of property," as that would imply that renting out property in the landlord-tenant scenario also amounts to commercial use of property. From my perspective, renting property is an income source associated with an ownership entitlement (*ius utendi*)⁴⁹, and the length of time that property is rented should not alter

⁴⁵ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 78.

⁴⁶ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 78.

⁴⁷ CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 512.

⁴⁸ CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 512.

⁴⁹ G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 104-105.

the classification of the property's use. In essence, a property owner fulfils the same function when it comes to long-term and short-term rentals: they host a tenant on their property for a specified period in exchange for remuneration. It is nonsensical for property owners to be able to rent their property to a tenant and have their relationship protected in terms of landlord-tenant law, but then fulfil the same function (renting property) for a shorter period and be subject to commercial property laws where the RHA and PIE are not applicable. This approach would force property owners to either rent out their property for an extended time period to fall within the landlord-tenant category or list their property as short-term rental accommodation but be subject to commercial property laws and receive no protection under the RHA or PIE because their actions amount to commercial use of property. This approach cannot be regarded as appropriate in the short-term rental context because it, in essence, discriminates between property owners who want to rent their property for extended periods to generate income and property owners who want to make money off their property occasionally while using their property as their own residence. Nonetheless, given the court's use of the words "commercial use" in *Nicholl*, clarity is needed on whether Airbnb amounts to commercial use of property in light of the important implications such a classification would have on the applicability of the RHA and PIE in the short-term rental context. In light of the above discussion, I argue that using property as short-term rental accommodation remains residential use of property and that the Airbnb host-guest agreement can be regarded as a lease agreement. In this light, the following section will explore the applicability of landlord-tenant law in the short-term rental context to determine (a) whether Airbnb hosts and guests can be regarded as landlords and tenants, respectively; and (b) the potential rights, obligations, and remedies available to Airbnb hosts and guests.

3 3 The applicability of landlord-tenant law in the short-term rental context

Due to the lack of overarching legislation addressing short-term rental operations in South Africa, it is unclear whether short-term hosts can be regarded as landlords and short-term guests can be considered tenants in terms of property law. Legal certainty is necessary to ascertain whether property law principles and rules are applicable in governing the legal relationship between short-term hosts and guests. Furthermore, this clarification is required in order for neighbours to understand the property law implications (if any) of the actions of short-term hosts and guests. Such a determination is necessary because the short-term host-guest relationship may implicate neighbour law, specifically nuisance law, and the remedies available in this context. Therefore, the relevant role-players in the short-term rental context would benefit from sufficient clarity in this regard.

While short-term rental operations could be conducted privately or through other short-term rental platforms, this dissertation focuses on Airbnb as it is the industry leader in the short-term rental market.⁵⁰ According to Airbnb's terms of service, whether Airbnb's operations are subject to landlord-tenant law depends on the laws of the jurisdiction.⁵¹ The official Airbnb website states the following:

"When hosting longer stays, you may be subject to landlord-tenant laws that vary by jurisdiction and may impose more onerous legal obligations on you and provide guests with certain additional legal rights. For example, in certain jurisdictions, guests who stay in a home or apartment for a certain period of time—the exact number of days

⁵⁰ S Fick "Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?" (2021) 3 *Stellenbosch Law Review* 455-481 at 456.

⁵¹ Airbnb official website "What are some differences between long-term hosting and short-term hosting?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/1354/what-are-some-differences-between-longterm-hosting-and-shortterm-hosting>> (accessed 14-07-2020).

depends on jurisdiction—may establish rights as a tenant. Generally, this means that local tenancy laws could protect them, and you may not be able to remove them from your property without proceeding through required eviction processes."⁵²

This provision alerts Airbnb hosts to the fact that their Airbnb guests may amount to tenants, depending on the law of the jurisdiction (provided that the jurisdiction has laws enacted pertaining to short-term rentals). To this effect, it is important to have clarity regarding whether Airbnb hosts and guests in South Africa are landlords and tenants. Such clarity is necessary because it may impact the way in which the rights and obligations of hosts and guests are defined, enforced, and protected, as will be elaborated on in section 3 4 of this chapter. In this regard, the provision of Government regulations pertaining to short-term rental accommodation may be an appropriate way to provide clarity on the particular relationship between hosts and guests in the Airbnb context. Consequently, chapter 6 of this dissertation explores the potential impact of Government regulations surrounding short-term rental operations in South Africa.

While it is unclear whether Airbnb hosts and guests in South Africa do, in fact, amount to landlords and tenants, some inferences can be drawn in this regard from recent case law⁵³ and the wording used in the Tourism Bill.⁵⁴ The Tourism Bill makes use of the words "renting or leasing"⁵⁵ in its definition of "short-term home rental."⁵⁶ Given the fact that the Tourism Bill is an amendment of the Tourism Act 3 of 2014, which seeks to address and regulate short-term rental accommodation in South

⁵² Airbnb official website "What regulations apply to my city?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/961/what-regulations-apply-to-my-city>>. (accessed 14-07-2020).

⁵³ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ).

⁵⁴ Tourism Amendment Bill Notice 235 of 2019.

⁵⁵ Academic literature tends to use the words "renting" and "leasing" interchangeably. However, The Tourism Bill refers to "renting or leasing", which is why this section refers to "renting or leasing".

⁵⁶ Section 1 of the Tourism Amendment Bill Notice 235 of 2019.

Africa,⁵⁷ this wording may be interpreted as the legislature's intention to regard Airbnb's operations as renting or leasing.⁵⁸ Arguably, this implies that the agreement concluded between an Airbnb host and guest on Airbnb's online platform amounts to a rental/lease agreement.

The most relevant South African case regarding short-term rentals in South Africa is the *Nicholl* case.⁵⁹ In this case, the Gauteng High Court referred to the respondent hosting Airbnb guests as "leasing" and used the word "tenant" to refer to the respondent's Airbnb guests.⁶⁰ Based on the language used by the court, it can be inferred that the court recognises Airbnb's operations as amounting to short-term tenancy. However, a clear indication in this regard is still needed.

In light of the discussions above, it is clear that Airbnb hosts and guests amounting to landlords and tenants will have a significant impact on their rights, obligations, and the remedies at their disposal. Consequently, the following section will explore the property law rights and obligations that would ensue if short-term hosts and guests are regarded as landlords and tenants.

⁵⁷ South African Government official website "Minister Derek Hanekom meets with Airbnb representatives" (17-05-2019) *South African Government* <<https://www.gov.za/speeches/short-term-home-rentals-17-may-2019-0000>> (accessed 02-09-2020).

⁵⁸ In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), the court emphasised the importance of considering the purpose and context of a provision when interpreting legislation and determining the intention of the legislature.

⁵⁹ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ).

⁶⁰ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 78.

3 4 Property law rights and obligations

3 4 1 The property law rights and obligations of Airbnb hosts

While it is not evident whether Airbnb hosts amount to landlords, it is worth discussing the property law implications that would apply if Airbnb hosts are regarded as landlords. The outcome of this discussion is beneficial as it will provide clarity on the potential rights, obligations, and remedies of Airbnb hosts in the property law context.

As a landlord, one has the duty to hand over undisturbed use and enjoyment of the property for occupation by the tenant.⁶¹ The property must be in a habitable condition, and landlords are obliged to maintain the property internally and externally for the duration of the lease agreement in the same condition.⁶² Furthermore, a landlord must invest any deposit received from the tenant and place it in an interest-bearing account for the tenant's benefit.⁶³ Landlord's rights include the right (a) to prompt and regular payment of rental; (b) to recover unpaid rental once they have obtained a court order or tribunal ruling; (c) to receive the rental property in a good state of repair (*salva rei substantia*), with reasonable wear and tear excepted upon the termination of the lease agreement, and (d) to claim compensation for damage to the property caused by the

⁶¹ SI Mohamed *Landlord & tenant – rights & obligations* (2019) at 84; S Viljoen *The law of landlord and tenant* (2016) at 174-175; G Bradfield & K Lehmann *Principles of the law of sale and lease* 3 ed (2013) at 150; *Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster en Staal Industriële Korporasie Bpk* 1987 (2) SA 932 (A); *Fourie NO v Potgieterusse Stadsraad* 1987 (2) SA 921 (A).

⁶² SI Mohamed *Landlord & tenant – rights & obligations* (2019) at 84; S Viljoen *The law of landlord and tenant* (2016) at 196-201; *Harlin Properties (Pty) Ltd and Another v Los Angeles Hotel (Pty) Ltd* 1962 (3) SA 143 (A) 150H; *Mpange v Sithole* 2007 (6) SA 578 (W); *Fourie NO v Potgieterusse Stadsraad* 1987 (2) SA 921 (A); *Pete's Warehousing & Sales CC v Bowsink investments CC* 2000 (3) SA 833 (E).

⁶³ Section 5(3) of the Rental Housing Act 50 of 1999; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 501; SI Mohamed *Landlord & tenant – rights & obligations* (2019) at 84; S Viljoen *The law of landlord and tenant* (2016) at 276.

tenant, a member of the tenant's household or a visitor of the tenant.⁶⁴ Consequently, as a landlord, an Airbnb host would have to fulfil the above obligations *and* their obligations as per Airbnb's terms of service.

Unless the contract between the parties states otherwise, a landlord may enforce the payment of rental and/or declare the lease cancelled, should the tenant fail to pay their rent.⁶⁵ In such an instance, the landlord's remedy would be to recover the outstanding rental through the court or the Housing Tribunal.⁶⁶ Furthermore, the landlord could cancel the lease agreement and begin eviction proceedings or make use of the tacit hypothec.⁶⁷ Additionally, according to the RHA, a landlord may institute proceedings in a court for payment of rental arrears and for the tenant's eviction.⁶⁸ Importantly, under section 13 of the RHA, if a tenant behaves in a manner that potentially harms the property, is disrespectful, or negatively impacts the neighbours, the landlord would be able to lodge a complaint at the Rental Housing Tribunal. Consequently, in terms of landlord-tenant law, an Airbnb host as a landlord would

⁶⁴ Section 13(10) of the Rental Housing Act 50 of 1999; G Bradfield & K Lehmann *Principles of the law of sale and lease* 3 ed (2013) at 201; S Viljoen *The law of landlord and tenant* (2016) at 166; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 511.

⁶⁵ SI Mohamed *Landlord & tenant – rights & obligations* (2019) at 66-67; S Viljoen *The law of landlord and tenant* (2016) at 295-297; AJ Kerr *The law of sale and lease* 3 ed (2004) at 361.

⁶⁶ SI Mohamed *Landlord & tenant – rights & obligations* (2019) at 67; S Viljoen *The law of landlord and tenant* (2016) at 295-297; AJ Kerr *The law of sale and lease* 3 ed (2004) at 361.

⁶⁷ SI Mohamed *Landlord & tenant – rights & obligations* (2019) at 67; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 520-524; AJ Kerr *The law of sale and lease* 3 ed (2004) at 389-405; S Viljoen *The law of landlord and tenant* (2016) at 283, 311, and 335-339.

⁶⁸ Section 13(10) of the Rental Housing Act 50 of 1999; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 503; S Viljoen *The law of landlord and tenant* (2016) at 408; *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) para 64.

potentially have these highly beneficial property law remedies available to protect their property rights.⁶⁹

The above discussion has been vital in understanding the landlord-tenant law rights, remedies, and obligations Airbnb hosts would have as landlords. Importantly, it is evident that the rights that landlord-tenant law could offer an Airbnb host are significantly more powerful than the rights hosts have in terms of their Airbnb agreement with guests and Airbnb's policies. In South African law, tenants generally acquire personal rights in relation to the leased property.⁷⁰ While real rights can be enforced against all third parties, personal rights can only be enforced against specific persons bound by the obligation.⁷¹ Real rights are protected by proprietary remedies, while personal rights are protected by contractual remedies.⁷² In light of this, Airbnb

⁶⁹ In the event that the short-term guest is a foreigner, on the assumption that a contract of lease is concluded between the short-term host and guest as landlord and tenant, it is likely that the ordinary breach of contract remedies would be applicable. In terms of litigation against a foreigner, the case of *Bid Industrial Holdings (Pty) Ltd v Strang and Others* 2008 (3) SA 355 (SCA) is relevant, as the court set out the jurisdictional bases that are relevant when litigating against a foreigner. Based on this court case, it is likely that a short-term host would be able to bring a suit against a guest who is a foreigner in a South African court "if the summons is served on the defendant while in South Africa and there is sufficient connection between the suit and the area of jurisdiction of the court concerned so that disposal of the case by that court is appropriate and convenient."

⁷⁰ S Viljoen *The law of landlord and tenant* (2016) at 42; *Smith v Farelly's Trustee* 1904 TS 949 page 958; *Ex Parte Geldenhuys* 1926 OPD 155 page 164; *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) page 1049 D/E-F; *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 615 (C) page 616. *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 (1) SA 879 (A) page 884I-885A; and *National Stadium South Africa (Pty) Ltd and Others v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA) para 31.

⁷¹ S Viljoen *The law of landlord and tenant* (2016) at 47; *Smith v Farelly's Trustee* 1904 TS 949 page 958; *Ex Parte Geldenhuys* 1926 OPD 155 page 164; *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) page 1049 D/E-F; *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 615 (C) page 616; *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 (1) SA 879 (A) page 884I-885A; and *National Stadium South Africa (Pty) Ltd and Others v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA) para 31.

⁷² S Viljoen *The law of landlord and tenant* (2016) at 47-48; *Smith v Farelly's Trustee* 1904 TS 949.

guests, as tenants, would likely acquire personal rights in relation to the leased property; these personal rights are enforceable against the host and protected by contractual remedies.⁷³ Consequently, it follows that Airbnb hosts, as landlords, would be protected by the remedies that landlord-tenant law offers, such as the right to approach a court for an eviction order if an Airbnb guest becomes an unlawful occupier. Therefore, I argue that the applicability of landlord-tenant law in the Airbnb context would be valuable in giving effect to the host's ownership entitlements in a manner that Airbnb's agreement alone does not. Given the numerous terms and conditions⁷⁴ that an Airbnb host would have to meet to claim in the event that the Airbnb guest infringes the rights of the host, it is highly possible that the property owner may incur loss in their personal capacity. On the other hand, if landlord-tenant law is applicable in the Airbnb context, the host, as a property owner, would have more remedies at their disposal.

In light of the beneficial remedies that would be available under landlord-tenant law, it is valuable to explore the potential rights, obligations, and remedies that would be applicable to guests if they amount to tenants under landlord-tenant law. Consequently, the following section explores the property law implications that would ensue in the Airbnb context if guests were regarded as tenants.

page 958; *Ex Parte Geldenhuys* 1926 OPD 155 page 164; *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) page 1049 D/E-F; *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 615 (C) page 616; *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 (1) SA 879 (A) page 884I-885A; and *National Stadium South Africa (Pty) Ltd and Others v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA) para 31.

⁷³ Section 63(1) of the Deeds Registries Act 47 of 1937 regulates the establishment of real rights and requires all real rights in land and only real rights in land to be registered.

⁷⁴ The terms and conditions that an Airbnb host must satisfy make a claim for property damage has been discussed in chapter 2 section 2 3 2.

3 4 2 The property law rights and obligations of Airbnb guests

Despite the legal uncertainty about whether guests amount to tenants, it is necessary to discuss the property law principles that would apply in the Airbnb context if guests were regarded as tenants.

In terms of landlord-tenant law, tenants' rights include the right to (a) privacy and to have the privacy of their communications respected;⁷⁵ (b) not to have their home or property searched,⁷⁶ and (c) not to have their property seized.⁷⁷ In addition, the landlord is obliged to invest any deposit received from the tenant and place it in an interest-bearing account for the tenant's benefit.⁷⁸ Consequently, the tenant will be entitled to their deposit plus interest when vacating the property, provided that the tenant has paid their rent in full and has not damaged the property to the extent that their deposit will need to be used towards repairs of the property.⁷⁹

Non-statutory law rules dictate that the tenant is obliged to fulfil all obligations that they expressly or implicitly undertake to fulfil.⁸⁰ The tenant is obliged (a) to pay the rent; (b) to take good care of the property and not use the property for any purpose other than that for which it was let, and; (c) on termination of the lease agreement, to

⁷⁵ Section 4(2) of the Rental Housing Act 50 of 1999.

⁷⁶ Section 4(3)(a) and (b) of the Rental Housing Act 50 of 1999.

⁷⁷ Section 4(3)(d) of the Rental Housing Act 50 of 1999.

⁷⁸ Section 5 of the Rental Housing Act 50 of 1999.

⁷⁹ SI Mohamed *Landlord & tenant – rights & obligations* (2019) at 61-62. In terms of the relevance and practicality for short-term rentals, the landlord's obligation to invest a tenants' deposit ties into the fact that Airbnb hosts have the right to request a security deposit from Airbnb guests before the guest can take occupation of the Airbnb-listed property. However, given the short nature of short-term rentals, it might be impractical for short-term hosts to place the guests' security deposit in an interest-bearing account for only a few days.

⁸⁰ AJ Kerr *The law of sale and lease* 3 ed (2004) at 348; S Viljoen *The law of landlord and tenant* (2016) at 282.

restore the property in the same order and condition as it was when the tenant received it, apart from reasonable wear and tear (*salva rei substantia*).⁸¹

Where a tenant is deprived of or disturbed in the use and enjoyment of the leased property, be that in whole or in part, the tenant may, in the appropriate circumstances, be relieved of the obligation to pay rent, either in whole or in part.⁸² In such an instance, a court may abate the rental owed by the tenant *pro rata* to the tenant's reduced enjoyment of the property.⁸³ However, this will not be the case in the instance where the interference with the tenant's leased property arises as a result of *vis major*⁸⁴ or *casus fortuitous*.⁸⁵ Moreover, a tenant is entirely absolved from the obligation to pay rent if they are deprived of or did not receive any usage of the property whatsoever.⁸⁶

Based on the above discussion, it would be beneficial for Airbnb guests to be regarded as tenants due to the numerous rights and remedies that tenants receive in terms of landlord-tenant law. Apart from the rights discussed above, one of the important property law rights of a tenant is the *huur gaat voor koop* rule, which also

⁸¹ AJ Kerr *The law of sale and lease* 3 ed (2004) at 249; S Viljoen *The law of landlord and tenant* (2016) at 282. See also L Grobler *The salva rei substantia requirement in personal servitudes* (LLD dissertation, Stellenbosch University 2015).

⁸² AJ Kerr *The law of sale and lease* 3 ed (2004) at 350-351; S Viljoen *The law of landlord and tenant* (2016) at 289-291.

⁸³ AJ Kerr *The law of sale and lease* 3 ed (2004) at 351. See also L Grobler *The salva rei substantia requirement in personal servitudes* (LLD dissertation, Stellenbosch University 2015).

⁸⁴ *Vis major* is a Latin term often also referred to as "an act of God." This term refers to a superior force stemming from a natural occurrence which results in harm, rendering contractual performance impossible.

⁸⁵ *Casus fortuitous* is a Latin term that is often also referred to as "force majeure." *Casus fortuitous* refers to circumstances where an incident beyond both parties' control has occurred that renders contractual performance impossible. AJ Kerr *The law of sale and lease* 3 ed (2004) at 351; S Viljoen *The law of landlord and tenant* (2016) at 289-291.

⁸⁶ AJ Kerr *The law of sale and lease* 3 ed (2004) at 351; S Viljoen *The law of landlord and tenant* (2016) at 289-291.

provides protection to tenants.⁸⁷ Consequently, the *huur gaat voor koop* rule, which applies in the context of short-term tenancy, will be explored next.⁸⁸

3 4 3 *Huur gaat voor koop* rule

This section explores the essence of the *huur gaat voor koop* rule and considers whether the rule finds application in the short-term rental context with the aim of determining whether the rule would be beneficial to short-term guests.

The *huur gaat voor koop* rule is a property law principle that essentially protects the tenant's rights in the event that the leased property is sold during the lease period.⁸⁹ The rule operates as an exception to the general rule that the tenants' personal right is only enforceable against the landlord as it affords the tenant protection to the extent that they can enforce their occupation rights against all successors.⁹⁰ Prior to the tenant taking occupation, a lease agreement merely creates a contractual obligation to bind the relevant parties to the agreement.⁹¹ In terms of the lease agreement, the landlord is obliged to enable the tenant to take occupation; however, it is unclear whether the tenant acquires a real right upon occupation.⁹² Ownership is the only real right with regard to one's own property (*ius in re propria*), while a limited real right (*ius in re aliena*) is a right in property that belongs to another party.⁹³ The nature of short-

⁸⁷ S Viljoen *The law of landlord and tenant* (2016) at 50-51.

⁸⁸ S Viljoen *The law of landlord and tenant* (2016) at 51.

⁸⁹ S Viljoen *The law of landlord and tenant* (2016) at 50-51; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 516-518.

⁹⁰ S Viljoen *The law of landlord and tenant* (2016) at 52; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 516-518.

⁹¹ S Viljoen *The law of landlord and tenant* (2016) at 49. G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 516-518.

⁹² S Viljoen *The law of landlord and tenant* (2016) at 49.

⁹³ S Viljoen *The law of landlord and tenant* (2016) at 11; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 53.

term tenants' rights remains a contested issue due to several misconceptions in literature regarding the effect of the tenant's occupation and the *huur gaat voor koop* rule.⁹⁴ The majority of academic authors are of the opinion that short-term tenants acquire limited real rights through occupation,⁹⁵ while other authors are of the opinion that the *huur gaat voor koop* rule results in short-term tenants acquiring a real right.⁹⁶ The minority of authors opine that the lease must be registered against the title deed for the tenant to acquire a real right and that, in the absence of registration, the tenant will only acquire a personal right as a result of the contract concluded.⁹⁷ In order for the *huur gaat voor koop* rule to be triggered, the tenant must be in occupation of the leased premises.⁹⁸ Viljoen convincingly argues that the *huur gaat voor koop* rule exists to protect tenants against successive owners and cannot be said to provide tenants with a real right because the leases are not registered.⁹⁹ She points out that the essence of the *huur gaat voor koop* rule is to provide tenants with security of tenure against successors for the agreed period.¹⁰⁰ She argues that it is improbable that the

⁹⁴ S Viljoen *The law of landlord and tenant* (2016) at 49. G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 516-518.

⁹⁵ S Viljoen *The law of landlord and tenant* (2016) at 50. See JSA Fourie "Saaklike regte by huur en onderhuur" (1978) 41 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 299-306 at 300; WE Cooper *Landlord and tenant* 2 ed (1994) at 277; AJ Kerr *The law of sale and lease* 2 ed (1996) at 384; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) at 433-434; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 515. See also *Kessoopersadh v Essop* 1970 (1) SA 265 (A) and *Kain v Khan* 1986 (4) SA 251 (C).

⁹⁶ S Viljoen *The law of landlord and tenant* (2016) at 50. For a detailed discussion of the diverging opinions between academic authors see AJ van der Walt & S Maass "The enforceability of tenants' rights: Part II" 2012 *Tydskrif vir Hedendaagse Romeins-Hollandse* 228-246 at 233-236.

⁹⁷ S Viljoen *The law of landlord and tenant* (2016) at 51.

⁹⁸ S Viljoen *The law of landlord and tenant* (2016) at 51.

⁹⁹ S Viljoen *The law of landlord and tenant* (2016) at 52.

¹⁰⁰ S Viljoen *The law of landlord and tenant* (2016) at 52.

huur gaat voor koop rule provides tenants with a real right because the aim of the rule is to provide protection to tenants' occupation rights to the extent provided in the lease agreement.¹⁰¹ Consequently, she concludes that the *huur gaat voor koop* rule protects tenants by enabling them to enforce their occupation rights against all successors, including new owners of the property.¹⁰² In this respect, section 63 of the Deeds Registries Act 47 of 1937 provides that personal rights may not be registered as a general rule.¹⁰³ Accordingly, I am of the opinion that tenants occupying property in terms of short-term leases are protected by the *huur gaat voor koop* rule because short-term leases are not registered and therefore do not afford tenants with real rights.¹⁰⁴ Therefore, Airbnb guests, as short-term tenants, would have a personal right in respect of the property, and the *huur gaat voor koop* rule will be applicable to them when they occupy the property.

In light of the above discussion, it is evident that there are numerous benefits of short-term hosts and guests being regarded as landlords and tenants. Despite these benefits, it is important to note that there are instances where using property as short-term rental accommodation may be prohibited. These instances include prohibitions in terms of sectional title schemes, body corporate rules, and provisions in lease agreements. For this reason, the following section explores the current legal position

¹⁰¹ S Viljoen *The law of landlord and tenant* (2016) at 51-52.

¹⁰² S Viljoen *The law of landlord and tenant* (2016) at 52.

¹⁰³ Section 63(1) of the Deeds Registries Act 47 of 1937 states that "No deed, or condition in a deed, purporting to create or embodying any personal right in respect of immovable property shall be capable of registration." See also S Viljoen *The law of landlord and tenant* (2016) at 52; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 76.

¹⁰⁴ S Viljoen *The law of landlord and tenant* (2016) at 52.

regarding short-term rentals and considers instances where short-term rentals may be prohibited.

3 5 The potential prohibition of Airbnb in a lease agreement, body corporate rules, or sectional title scheme rules

3 5 1 Sectional title schemes and body corporate rules

In light of the uncertainty and lack of legislation governing Airbnb, associations such as body corporates and homeowners' associations have been encouraged to control or prohibit short-term rentals in accordance with their own rules.¹⁰⁵ Particularly, they have been encouraged to ensure that they address the issues of safety that are potentially created through short-term rentals.¹⁰⁶ One of the main concerns is that short-term tenants may not be aware of the sectional title schemes regulations and rules of the body corporate and, therefore cannot (or do not) adhere to them.¹⁰⁷ This lack of knowledge results from the fact that Airbnb hosts and guests only conclude a contract through Airbnb and have only agreed to Airbnb's terms of service. Consequently, Airbnb hosts and guests would only be aware of the sectional title

¹⁰⁵ Anonymous "Cape Town has approved new by-law changes – including new rules for cell towers and Airbnbs" (01-11-2019) *Businessstech* <<https://businesstech.co.za/news/government/350633/cape-town-has-approved-new-by-law-changes-including-new-rules-for-cell-towers-and-airbnbs/>>. (accessed 24-04-2020).

¹⁰⁶ Anonymous "Cape Town has approved new by-law changes – including new rules for cell towers and Airbnbs" (01-11-2019) *Businessstech* <<https://businesstech.co.za/news/government/350633/cape-town-has-approved-new-by-law-changes-including-new-rules-for-cell-towers-and-airbnbs/>>. (accessed 24-04-2020).

¹⁰⁷ CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 509.

schemes regulations and rules of the body corporate if they are provided those documents by the host separately from the Airbnb agreement.¹⁰⁸

It is important to bear in mind that the frequent flow of Airbnb guests in a sectional title scheme makes it difficult for property owners in a sectional title scheme to determine who has the right to access the property and subsequently raises security concerns.¹⁰⁹ Therefore, the use of residential premises occupied by multiple tenants creates an obligation on each tenant to refrain from using the property in a manner that significantly interferes with other tenants' use and enjoyment.¹¹⁰ In light of this, property owners in sectional title schemes are obliged to refrain from using the property in a manner that significantly interferes with the use and enjoyment of other tenants in the scheme. It may be argued that free-flowing strangers in a sectional title scheme can significantly interfere with the use and enjoyment of other tenants and owners in the scheme.

However, Van der Merwe contends that short-term letting in sectional title schemes has the potential to make a positive, sustainable contribution to local communities and tourism if strictly regulated in a manner that minimises any adverse environmental or social consequences.¹¹¹ He is of the opinion that short-term letting should not be prohibited in sectional title schemes where a substantial majority of the scheme's

¹⁰⁸ CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 509.

¹⁰⁹ CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 509.

¹¹⁰ S Viljoen *The law of landlord and tenant* (2016) at 346.

¹¹¹ CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 521.

members adopt special conduct rules to permit short-term letting while restricting the behaviour of short-term tenants.¹¹²

As part of the special conduct rules that Van der Merwe proposes, he suggests that short-term tenants should be obliged to treat the section as their own, leaving it in the position they found it and behaving in a respectful manner towards their neighbours.¹¹³ Furthermore, Van der Merwe submits that the scheme's rules should include an obligation on tenants, their guests, and visitors to notify the building manager or managing agent as soon as practicable in the event of any dispute or complaints arising from neighbours.¹¹⁴

Importantly, Van der Merwe proposes that the conduct rules should include a rule prohibiting excessive noise, nuisance, and anti-social behaviour.¹¹⁵ This conduct rule should clearly indicate that sound-emitting appliances and general noise should not be emitted in a manner that results in noise that is audible on the common property or in adjoining sections.¹¹⁶ The rules proposed by Van der Merwe provide sensible guidelines regarding the behaviour that short-term guests should adopt in order to avoid causing a nuisance to neighbours. His suggestions also form excellent guidelines for the legislature to take into account in the event that short-term rentals

¹¹² CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 521.

¹¹³ CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 519.

¹¹⁴ CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 519.

¹¹⁵ CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 519.

¹¹⁶ CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 519.

are regulated in South Africa.¹¹⁷ Van der Merwe's proposed rules will ensure that an obligation is placed on short-term guests to refrain from acting in a manner that interferes with the use and enjoyment of neighbours' property entitlements. In this respect, his proposed rules promote the operation of short-term rentals in South Africa and encourage regulations that address and prevent undesirable conduct on the part of the hosts and guests.

The discussion above has highlighted various factors property owners in sectional title schemes should take into consideration before listing their property on Airbnb to ensure that their listing does not contravene the sectional title scheme or body corporate's rules. Similar to the manner in which short-term rentals may be prohibited in terms of body corporate and sectional title rules, short-term rental operations facilitated by a tenant may also be prohibited in terms of a lease agreement between a landlord and tenant.¹¹⁸ In light of this, subletting property on Airbnb will be discussed below to understand the legal position regarding subletting in the Airbnb context.

3 5 2 Subletting through Airbnb

Generally, a tenant is entitled to sublet the use and enjoyment of the rental property unless the contract between the landlord and tenant prohibits subletting.¹¹⁹ Under normal circumstances, tenants who choose to sublet their property will likely fall

¹¹⁷ See chapter 6 section 6 7 for my recommendations on the regulation of short-term rentals in South Africa.

¹¹⁸ AE Gold "Community consequences of Airbnb" (2019) 94 *George Washington Law Review* 1579-1637 at 1608.

¹¹⁹ G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 525; G Bradfield & K Lehmann *Principles of the law of sale and lease* 3 ed (2013) at 175; S Viljoen *The law of landlord and tenant* (2016) at 136-137; G Glover *Kerr's law of sale and lease* 4 ed (2014) at 533-544.

subject to landlord and tenant law.¹²⁰ However, in South Africa, there is currently a lack of legal certainty regarding the rights and obligations of a tenant who sublets property leased from a landlord and uses it as short-term rental accommodation.

It is common for tenants to sublet their homes in order to generate additional income.¹²¹ In such instances, the tenant acting as a host will arguably be subject to the same rights and obligations as a landlord.¹²² It is important to note that a sublease does not establish an obligation (*vinculum iuris*) between the landlord and sub-lessee, and the sub-lessee cannot acquire more rights than the original tenant.¹²³ Furthermore, subletting may be strictly regulated in terms of the lease agreement between the tenant and landlord or the body corporate rules in a sectional title scheme.¹²⁴

The Airbnb website highlights the following:

"It's also important to understand and follow other contracts or rules that might apply to your listing, such as leases, timeshare ownership rules, condo board or co-op rules, homeowners association (HOA) rules, or rules established by tenant organizations. Read your lease agreement and check with your landlord, if applicable. If you live in

¹²⁰ AE Gold "Community consequences of Airbnb" (2019) 94 *George Washington Law Review* 1579-1637 at 1608.

¹²¹ AE Gold "Community consequences of Airbnb" (2019) 94 *George Washington Law Review* 1579-1637 at 1608.

¹²² AE Gold "Community consequences of Airbnb" (2019) 94 *George Washington Law Review* 1579-1637 at 1608.

¹²³ G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 525.

¹²⁴ AE Gold "Community consequences of Airbnb" (2019) 94 *George Washington Law Review* 1579-1637 at 1608.

rent controlled or stabilized housing, there may be special rules that apply to you. Contact your local government to ask questions about this topic."¹²⁵

This provision draws potential Airbnb hosts to the fact that they may need their landlord's permission to sublet their property using Airbnb. It also highlights the fact that body corporate rules and sectional title scheme rules may prohibit short-term rentals like Airbnb operating on the property. These terms are important to ensure that potential Airbnb hosts do not breach their lease agreement or break the rules of their sectional title scheme when listing their property on Airbnb. Section 14 of the Airbnb terms of service deals with prohibited activities.¹²⁶ One of the provisions under section 14 states the following:

"You will not...offer, as a Host, any accommodation that you do not yourself own or have permission to make available as a residential or other property through the Airbnb Platform."¹²⁷

Based on the above provisions, it is evident that in order for a tenant to sublet their property on Airbnb, they require the permission of the landlord or owner of the property. Failure to acquire such consent would amount to a breach of contract in relation to the Airbnb terms of service.

3 6 Conclusion

This chapter explored whether the Airbnb host-guest agreement can be regarded as a lease agreement. To this end, the chapter contrasted the provisions of the Airbnb

¹²⁵ Airbnb official website "What regulations apply to my city?" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/961/what-regulations-apply-to-my-city>>. (accessed 14-07-2020).

¹²⁶ Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 25-08-2020).

¹²⁷ Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 25-08-2020).

host-guest agreement with the provisions of the RHA regarding the features of a lease agreement.¹²⁸ Subsequently, it was concluded that the Airbnb host-guest agreement meets the requirements for a lease in terms of the RHA.¹²⁹ The chapter then set out to discuss whether using property as short-term rental accommodation amounts to commercial use of property.¹³⁰ Accordingly, the *Nicholl* case was relevant as the court referred to listing property as short-term rental accommodation on Airbnb as "commercial use" of property. In this respect, I argued that using property as short-term rental accommodation does not change the property from residential use of property to commercial use. This argument was founded on the logic that the primary distinction between short-term rentals and long-term rentals is the length that the tenant remains in occupation of the property. However, the function of the property does not change, as the property is still used as a place of residence for the guest, albeit for a shorter time than it would be under a long-term lease. Subsequent to the conclusion that short-term rentals do not amount to commercial use of property, the applicability of the RHA and PIE was considered. These Acts are relevant as they both have the potential to provide rights, remedies, and protection to the parties and bring clarity to the host-guest relationship. It was concluded that it would be in the best interest of short-term hosts and guests for short-term rental operations to amount to residential use of property to ensure that short-term rentals fall within the ambit of the RHA and PIE.

Following this discussion, landlord-tenant law's applicability in the Airbnb context was explored to determine whether Airbnb hosts amount to landlords and whether

¹²⁸ See section 3 2 1.

¹²⁹ See section 3 2 2.

¹³⁰ See section 3 2 3.

Airbnb guests amount to tenants.¹³¹ As part of this discussion, the property law rights and obligations of hosts and guests in the short-term rental context were considered. To this end, the terms of the Airbnb host-guest agreement regarding hosts' and guests' rights, obligations, and remedies were contrasted with the RHA provisions regarding landlords' and tenants' rights, obligations, and remedies. This exposition led to the finding that it is unclear whether Airbnb hosts and guests amount to landlords and tenants. However, it appears that there is a strong possibility that hosts and guests could be regarded as landlords and tenants, provided certain actions of the parties are adapted to meet the provisions of the RHA. Subsequently, the chapter explored the property law rights and obligations of Airbnb hosts and guests.¹³² In this regard, it was concluded that it would be beneficial for short-term hosts and guests to be regarded as landlords and tenants, as the principles of landlord-tenant law would provide clarity to their rights, obligations, and remedies.

Moreover, the chapter considered the applicability of the *huur gaat voor koop* rule in the short-term rental context.¹³³ It was argued that given that short-term leases are not registered in the Deeds Registry, tenants consequently are not afforded real rights and should therefore be protected by the *huur gaat voor koop* rule. In this light, it was concluded that Airbnb guests as short-term tenants in the short-term rental context should have a personal right and the *huur gaat voor koop* rule should be applicable when they are in occupation of the property.

The final section of this chapter considered the prohibition of short-term rentals in terms of sectional title schemes, body corporate rules, and lease agreements

¹³¹ See section 3 3.

¹³² See section 3 4.

¹³³ See section 3 4 3.

(subletting). This discussion highlighted the importance of short-term hosts conducting short-term rental operations in accordance with sectional title and body corporate rules as well as tenants acquiring the landlord's permission before subletting *via* Airbnb. In terms of the prohibition of short-term rental operations in sectional title schemes, it was concluded that conducting short-term rental operations has the potential to put neighbours at risk due to safety concerns and could amount to an infringement of the conduct rules. Furthermore, in terms of subletting, depending on the lease agreement's terms, a tenant's failure to acquire permission from a landlord to sublet *via* Airbnb could amount to breach of the lease agreement and would be in contravention of one of Airbnb's contractual terms found in the terms of service agreement.

Despite the lack of clarity regarding whether short-term hosts and guests amount to landlords and tenants in South Africa, this discussion was relevant in determining the potential rights and obligations that hosts and guests may have. These potential rights and obligations, along with the clarification regarding instances when short-term rentals may be prohibited, form the basis of the following chapter, which discusses the applicability of neighbour law in the short-term rental context. Chapter 3 formed a stepping stone for chapter 4, as the clarification of host's obligations indicate potential instances where a neighbour could bring a nuisance claim based on the host's failure to fulfil their property law obligations. To this end, chapter 4 discusses nuisance in the short-term rental context and aims to identify the remedies available to neighbours who experience an interference with the use and enjoyment of their property due to their neighbours' short-term rental operations.

Chapter 4: Implications of Airbnb for neighbour law

4 1 Introduction

As the number of short-term rentals in an area increases, so do the potential negative externalities experienced by local residents.¹ This is due to the fact that short-term rentals like Airbnb's are predominantly used by holiday-goers, who aim to fully utilise all the property's amenities.² Given that holiday-goers are typically only on holiday for a short period, in comparison to owners, they are more likely to invite visitors over and use the outdoor facilities, such as a swimming pool or fireplace as often as possible during their stay.³ The presence of short-term guests who are holiday-goers tends to bring about an increase in noise levels, unsanitary conditions, blocked driveways, and illegal disposal of garbage.⁴ This may be due to their lack of knowledge of the neighbourhood dynamic, or they simply disregard the dynamic of the neighbourhood to fully enjoy the property's amenities. Given that every neighbourhood tends to have

¹ GE Lines "Hej, not hej da: regulating Airbnb in the new age of Arizona vacation rentals" (2015) 57 *Arizona Law Review* 1163-1182 at 1169; CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 509.

² GE Lines "Hej, not hej da: Regulating Airbnb in the new age of Arizona vacation rentals" (2015) 57 *Arizona Law Review* 1163-1182 at 1167; CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 509.

³ CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 510.

⁴ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) paras 8, 12; AE Gold "Community consequences of Airbnb" (2019) 94 *George Washington Law Review* 1579-1637 at 1594; A Filippas & JJ Horton "The Tragedy of Your Upstairs Neighbors: When Is the Home-Sharing Externality Internalized?" (2017) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443343 [<https://perma.cc/3TUV-5AP5>] 1-53 at 2.

different ideas of socially acceptable behaviour,⁵ it is likely that what amounts to reasonable behaviour in one neighbourhood might not be reasonable in another. For example, some neighbourhoods have a general understanding that households will not play music loudly or have parties regularly.⁶ Contrastingly, in other areas, loud music and parties may be a frequent occurrence that is tolerated by those in the neighbourhood.⁷ However, guests may stay in a quiet neighbourhood, but do not know that the neighbours have a mutual understanding that noise is ordinarily not tolerated (unless the host informs them).⁸

In terms of neighbour law, owners and occupiers of land have a responsibility not to cause material harm to their neighbour and should ordinarily act with mutual forbearance, tolerance, and care.⁹ In this regard, the reasonableness standard, as discussed in section 4 4, is relevant in determining what would amount to socially

⁵ See CG van der Merwe “Things” in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) 3-347 para 145; J Church & J Church “Nuisance” in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 para 175-181; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman’s The law of property* 6 ed (2019) at 126.

⁶ It is valuable to note that what is regarded as reasonable noise levels is likely to also depend on the municipal by-laws and zoning of the property, as well as whether the relevant property is a sectional title unit.

⁷ For example, in *Laskey and Another v Showzone CC and Other* 2007 (2) SA 48 (C), the court acknowledged that the neighbourhood was one that was accustomed to loud music.

⁸ Section 1 of the Noise Control Regulations in terms of section 25 of the Environment Conservation Act 73 of 1989 states that “[t]he disturbances of short-term guests in the form of noise through parties and loud music will generally only be regarded as a noise disturbance if it ‘exceeds the ambient sound level measured continuously at the same measuring point by 7 decibels or more.’” However, it is important to note that these Noise Control Regulations have been repealed in Gauteng by GN 5479/PG 75/19990820, Free State by GN 24/PG 35/19980424, and Western Cape by RN 627/PG 5309/19981120. Therefore, noise disturbances in these provinces are regulated by by-laws regarding noise control and should be consulted for further information on what amounts to noise disturbances in their area.

⁹ AJ van der Walt *The law of neighbours* (2010) at 34.

acceptable, reasonable behaviour in a particular neighbourhood. While the short-term host may inform the guests of the neighbourhood social norms, it is up to the guests whether they abide by or disregard the neighbourhood's social norms. In this regard, short-term rental operations may negatively impact neighbouring property owners' ability to use and enjoy their property, which would be contrary to the foundational principles of neighbour law.¹⁰ To this end, it is important to establish the relevant obligations on the part of short-term hosts and guests to ensure reasonable use of the property. This determination is important in understanding the remedies available to neighbours to protect their property entitlements in the case of nuisance.

This chapter seeks to explore the extent to which nuisance law could be relevant in instances where short-term rental operations impact various property rights and interests of neighbouring property owners. The chapter will first lay down the foundational principles of nuisance law and set out the remedies ordinarily available to neighbours experiencing property interferences. Thereafter, the chapter will investigate whether and the extent to which the identified nuisance principles are applicable in the short-term rental context. This investigation is necessary to determine whether neighbours of short-term rental accommodation have a common law claim in terms of neighbour law and/or a potential claim under section 25(1) of the Constitution

¹⁰ CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 509; J Ashworth "10 Airbnb horror stories you won't believe are true" (31-10-2019) *Lodgify* <<https://www.lodgify.com/blog/airbnb-horror-stories/>> (accessed 01-04-2020). For sources on the foundational principle of reasonableness in nuisance law, see AJ van der Walt *The law of neighbours* (2010) at 237; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125-126, and T Kotze & Z Boggenpoel "Living together as neighbours: Rethinking the reasonableness standard in nuisance law under the Constitution" (2021) 24 *Potchefstroom Electronic Law Journal* 1-34 at 11.

of the Republic of South Africa, 1996 (“Constitution”).¹¹ In relation to the remedies available to neighbours, the chapter will consider the provisions of Airbnb’s host-guest agreement and the obligations it places on Airbnb hosts and guests in the short-term rental context. This discussion will provide clarity regarding Airbnb hosts and guests’ obligations in terms of the host-guest agreement to determine the interplay between their obligations in terms of the host-guest agreement and common law neighbour law principles.

Ultimately, this chapter aims to determine when a host will be liable for nuisance claims brought by neighbours where the host’s short-term rental operations result in the unlawful infringement of a neighbour’s property rights. In light of these aims, the *Body Corporate of the Paddock Sectional Title Scheme v Nicholl*¹² (“*Nicholl*”) case, which is the leading case on Airbnb in South Africa, is explored for the purpose of determining factors a court would consider when deciding whether a nuisance in the short-term rental context has occurred and what the appropriate remedy may be.

4 2 Nuisance law

4 2 1 Introduction

Neighbour law seeks to regulate the relationship between neighbours.¹³ Neighbour law generally involves at least two properties situated more or less closely together,

¹¹ Chapter 5 of this dissertation explores whether neighbours of short-term rentals have a claim for arbitrary deprivation of property under section 25(1) of the Constitution of the Republic of South Africa, 1996.

¹² *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ).

¹³ SI Mohamed “Is the Rental Housing Act all that matters?” (2016) 24 *Property Law Digest* 1-3 at 2; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman’s The law of property* 6 ed (2019) at 125.

although they need not be strictly adjacent to one another.¹⁴ Nuisance law falls within the sphere of neighbour law and relates to conduct whereby the actions or omissions of a property owner cause damage to a neighbour's property or interfere with a neighbour's comfort, health, and well-being.¹⁵ Nuisance can mean, amongst other things,¹⁶ that the person in occupation of the property is creating a disturbance by making noise, for example,¹⁷ behaving in an abusive manner towards other tenants and/or neighbours, or bringing harmful objects onto the property that could cause damage to the premises.¹⁸ The basis of nuisance law is the understanding that a landowner may not use the property in a manner that results in unnecessary or unreasonable harm or discomfort for neighbouring property owners.¹⁹ In this regard,

¹⁴ AJ van der Walt *The law of neighbours* (2010) at 49, 240-241. Van der Walt argues that the notion of "neighbours" can be interpreted in a wider sense to refer to people who live in close proximity to one another as members of communities even though they do not necessarily reside on or use adjoining parcels of land. See also *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A).

¹⁵ G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125.

¹⁶ For more on nuisance law, see AJ van der Walt *The law of neighbours* (2010) at 237-323; GJ Pienaar & JG Horn *Sectional titles and other fragmented property schemes* (2020) at 259-264; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125-134.

¹⁷ It is worth noting that neighbours are entitled to report noise pollution to local authorities if the noise causes a disturbance that interferes with the peace and enjoyment of the property in terms of their rights found in the Noise Control Regulations in terms of section 25 of the Environment Conservation Act 73 of 1989.

¹⁸ SI Mohamed *Landlord & tenant – rights & obligations* (2019) at 83; CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 509; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 130-134.

¹⁹ AJ van der Walt *The law of neighbours* (2010) at 237; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125. The standard of reasonableness will be explored below at section 4.4.

the standard of reasonableness forms the foundational principle in neighbour law generally and nuisance law more specifically.²⁰

In most instances, it will be the owner of the nuisance-creating property who is liable for the nuisance caused.²¹ However, it is possible that nuisance may emanate from a neighbouring property despite not being caused by the owner of the property.²² If the nuisance is caused by the actions of someone who is not the current owner, such as a tenant or guest, then the question arises of who is liable for the alleged infringement.²³ If a non-owner suffers the nuisance, the question will be whether the non-owner's entitlement to occupy and use the property is sufficient to bring a claim for nuisance in their name.²⁴ Generally, the claimant in a nuisance matter requires a valid legal right, entitlement, or license to use or enjoy the land.²⁵ In such an instance, a tenant who is in occupation of a property neighbouring an Airbnb-listed property

²⁰ AJ van der Walt *The law of neighbours* (2010) at 237; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125.

²¹ AJ van der Walt *The law of neighbours* (2010) at 241; See *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* 2008 (3) SA 134 (SCA) where the nuisance was caused by the golf players, but the owner of the golf course was liable for the nuisance caused. Liability for nuisance caused by someone other than the landowner is discussed extensively by JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-269, at 169-178; D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 456-466.

²² AJ van der Walt *The law of neighbours* (2010) at 241; JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-269, at 169-178; D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 456-466.

²³ AJ van der Walt *The law of neighbours* (2010) at 241; JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-269, at 169-178; D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 456-466. See *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) where the origin of the nuisance was caused by the previous owner.

²⁴ AJ van der Walt *The law of neighbours* (2010) at 241.

²⁵ AJ van der Walt *The law of neighbours* (2010) at 241; JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-269, at 169-178; D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 456-466.

would meet these requirements to bring a claim against the host. However, the landlord of the property could also bring the claim based on the nuisance experienced by their tenant. In the short-term rental context, neighbours (be that the landlord or the tenant) will have to decide whether to bring a nuisance claim against a short-term host or a short-term guest. As argued in chapter 2, bringing a claim against a short-term host would be the most viable approach as the host is the individual who chose to conduct the short-term rental operations which gives rise to the nuisance that the guests create.²⁶ Following chapter 2's determination that a neighbour should bring nuisance law claim against the host, it is important to determine which category of nuisance law is relevant in the short-term rental context. Consequently, the categories of nuisance law are explored below.

4 2 2 Categories of nuisance law

There are three categories of nuisance law, namely statutory nuisance, public nuisance, and private nuisance.²⁷ Van der Walt defines statutory nuisance as the use of land in contravention of statutory or administrative limits or guidelines that have been established to protect the interest of neighbouring property owners and land users.²⁸ An abatement order on the basis of statutory nuisance is the simplest order for termination of a nuisance when the applicant can prove that the nuisance occurs

²⁶ See chapter 2 section 2 4.

²⁷ AJ van der Walt *The law of neighbours* (2010) at 237, 302.

²⁸ S Viljoen *The law of landlord and tenant* (2016) at 205. See AJ van der Walt *The law of neighbours* (2010) at 312 fn 346 where mentions how private nuisance intensified in the context of sectional title ownership.

in violation of a statutory prohibition.²⁹ In such an instance, the applicant would simply need to prove a contravention of the statutory provisions and would not need to prove a common-law nuisance.³⁰ After the applicant has proven the existence of a statutory nuisance and a continuation of the nuisance is unlawful, the court has limited discretion to suspend or refuse the abatement order.³¹ Due to the fact that there are currently no statutes expressly governing short-term rental operations in South Africa (apart from by-laws relating to noise and disturbances), any nuisance directly caused through short-term rentals would not meet the requirements to be classified as a statutory nuisance and is therefore not worth exploring further.

Consequently, since there is no legislation prohibiting conduct as a purported nuisance in the short-term rental context, a claimant would need to bring a claim based on the common-law nuisance or public nuisance. In contrast to statutory nuisance as outlined above, Church and Church define “public nuisance” as a distinct category of nuisance “of which the harmful effect is so extensive as to affect the general public at large or at least a distinct class of person within its field of operation.”³² In terms of the

²⁹ AJ van der Walt *The law of neighbours* (2010) at 265; S Viljoen *The law of landlord and tenant* (2016) at 205; See J Church & J Church “Nuisance” in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 para 197.

³⁰ AJ van der Walt *The law of neighbours* (2010) at 265; S Viljoen *The law of landlord and tenant* (2016) at 205; See J Church & J Church “Nuisance” in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 paras 195, 197.

³¹ AJ van der Walt *The law of neighbours* (2010) at 265. For more on statutory abatement orders see J Church & J Church “Nuisance” in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 para 197. On granting and suspending an abatement order in terms of legislation see *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) SA 81 (SE) paras 90, 94.

³² J Church & J Church “Nuisance” in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* (2006) 115-145 para 211.

public nuisance doctrine,³³ the presence of a public nuisance is generally linked to criminal or offensive behaviour that compromises or endangers public health, safety, welfare, and morality.³⁴ Public nuisance may be relevant in the rare instance where a short-term guest's conduct is dangerous to neighbours, e.g., conducting science experiments in the short-term rental accommodation. However, a situation where a short-term tenant uses the rental accommodation for dangerous conduct is rare and unprecedented³⁵ in South Africa. Consequently, it appears that any nuisance experienced by neighbouring property owners as a result of short-term rental operations arguably will not be classified as a public nuisance. Therefore, public nuisance is not worth exploring further in this context.

Given that public nuisance and statutory nuisance are not likely to be of specific relevance in the short-term rental context, private nuisance appears to be the most applicable in the short-term rental context. Private nuisance is defined as “an act or omission or state of affairs that impedes, offends, endangers or inconveniences another in the ordinary comfortable use or enjoyment of land or premises.”³⁶ The nature of the short-term rental construct is one whereby visitors stay on a property for short periods of time. In this regard, listing one's property as a short-term rental

³³ AJ van der Walt *The law of neighbours* (2010) at 304; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125-134.

³⁴ AJ van der Walt *The law of neighbours* (2010) at 304; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125-134.

³⁵ At the time of this dissertation's publication, there were no reported incidents where short-term guests have used short-term accommodation to engage in dangerous activities that amounted as a public nuisance.

³⁶ J Church & J Church “Nuisance” in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* (2006) 115-145 para 163; AJ van der Walt *The law of neighbours* (2010) at 238. See also GJ Pienaar & JG Horn *Sectional titles and other fragmented property Schemes* (2020) at 243-295.

through a platform like Airbnb may cause a nuisance depending on the guests' behaviour. Depending on the circumstances, the nuisance that arises may negatively impact neighbouring property owners in relation to the ordinary use or enjoyment of their premises. Consequently, the nuisances experienced by neighbouring property owners in the short-term rental context could be dealt with as a private nuisance matter.

Contemporary South African sources regarding neighbour law indicate a doctrinal distinction between nuisance in a narrower sense and nuisance in a wider sense.³⁷ Nuisance in the narrow sense refers to nuisances that create a disturbance (annoyance)³⁸ for neighbours' use and enjoyment of their property, which is commonly prevented, terminated, or mitigated through an interdict.³⁹ In such an instance, an aggrieved neighbour may approach a court to provide temporary or permanent relief in the form of an interdict to stop or prevent a nuisance.⁴⁰ On the other hand, in the

³⁷ AJ van der Walt *The law of neighbours* (2010) at 259, 292; AJ van der Walt "Sport and nuisance law" (2010) 127 *South African Law Journal* 274-303 at 276; *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A). See further *Gien v Gien* 1979 (2) SA 1113 (T); *Die Vereniging van Advokate (TPA) en Andere v Moskeeplein (Edms) Bpk en Andere* 1982 (3) SA 159 (T); *Moskeeplein (Edms) Bpk en 'n Ander v Die Vereniging van Advokate (TPA) en Andere* 1983 (3) SA 896 (T); *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C); *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* 2008 (3) SA 134 (SCA). See J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 paras 174-185.

³⁸ *Holland v Scott* (1881-1882) 2 EDC 307 page 327; *Prinsloo v Shaw* 1938 AD 570 page 590.

³⁹ AJ van der Walt *The law of neighbours* (2010) at 292; JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-269 at 150; D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 453; CG van der Merwe *Sakereg* 2 ed (1989) at 188; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 131.

⁴⁰ AJ van der Walt *The law of neighbours* (2010) at 275, 295; *Gien v Gien* 1979 (2) SA 1113 (T) page 1121C; *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 (2) SA 459 (C)

instance of nuisance in the wide sense, the neighbour affected by nuisance may, in suitable instances,⁴¹ claim compensation for damage to their property that arose as a result of the nuisance.⁴² Case law examples of nuisances in the wide sense include land piled up close to the property boundary that may slide onto the neighbour's property in the event of a rain storm,⁴³ failure to take precautionary measures to prevent slate waste from being washed onto the neighbour's property by a river,⁴⁴ and planting trees along the property boundary whereby the falling leaves resulted in damage to the neighbour's malt drying business.⁴⁵

Given that short-term rental operations have the potential to create nuisances in both the narrow and wide sense, it is valuable for both forms of nuisance to be explored further. In this regard, the following section will discuss the application of nuisance in the narrow and nuisance in the wide sense to the extent that it is relevant in the short-term rental context.

pages 463D-465D. See further *PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms) Bpk* 2008 (2) SA 428 (SCA).

⁴¹ Not every instance of damage arising from a nuisance will justify a claim for compensation or an interdict being ordered. Whether a nuisance is actionable depends on reciprocity in relation to reasonable use and reasonable tolerance. In this regard, whether a claim for compensation or an interdict being ordered will be determined based on if the neighbour can reasonably be expected to tolerate the damage in that specific instance: *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A). See AJ van der Walt *The law of neighbours* (2010) at 293; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 131.

⁴² AJ van der Walt *The law of neighbours* (2010) at 295; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 131; *Gien v Gien* 1979 (2) SA 1113 (T) page 1121C; *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* 2008 (3) SA 134 (SCA).

⁴³ *Levin v Vogelstruis Estates and Gold Mining Co Ltd* 1921 WLD 66.

⁴⁴ *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A).

⁴⁵ *Kirsch v Pincus* 1927 TPD 199.

4 3 Nuisance in the narrow and wide sense

4 3 1 Nuisance in the narrow sense

Nuisance resulting in annoyance or discomfort should be distinguished from nuisance that causes damage to neighbouring property.⁴⁶ Nuisance in the narrow sense, commonly referred to as “annoyances”,⁴⁷ predominantly hinders or disturbs the use and enjoyment of a neighbour’s property.⁴⁸ Case law examples of nuisance in the narrow sense include loud music playing from an inner-city theatre late at night,⁴⁹ stray golf balls landing on a neighbour’s property,⁵⁰ and malicious planting of trees to harm a neighbour’s property.⁵¹

Nuisance in the narrow sense can be regarded as any use of land resulting in ongoing emissions of water, smoke, unpleasant smells, noise, or vibrations on neighbouring land or that in any other manner infringes the normal use and enjoyment of neighbouring property in an ongoing and unreasonable manner.⁵² In such an instance, such actions would constitute a nuisance in the narrow sense, which is unlawful and could be interdicted.⁵³ The remedies available for nuisance in the narrow

⁴⁶ AJ van der Walt *The law of neighbours* (2010) at 262; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman’s The law of property* 6 ed (2019) at 125.

⁴⁷ *Holland v Scott* (1881-1882) 2 EDC 307 page 327; *Prinsloo v Shaw* 1938 AD 570 page 590.

⁴⁸ AJ van der Walt *The law of neighbours* (2010) at 262; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman’s The law of property* 6 ed (2019) at 125.

⁴⁹ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C).

⁵⁰ *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* 2008 (3) SA 134 (SCA).

⁵¹ *Kirsch v Pincus* 1927 TPD 199.

⁵² AJ van der Walt *The law of neighbours* (2010) at 263. See D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 449-450; AJ van der Walt *Constitutional property law* 3 ed (2011) at 234. See further, *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A) page 518; *Vogel v Crewe* 2003 (4) SA 509 (T) page 512F.

⁵³ AJ van der Walt *The law of neighbours* (2010) at 263; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman’s The law of property* 6 ed (2019) at 131.

sense are available to landowners and any other person who has an interest in occupying, using, and enjoying the land.⁵⁴ This includes individuals exercising limited real rights (such as long-term leases and servitudes) as well as personal rights (such as short-term leases) over the land.⁵⁵ In this regard, it is essential for neighbours of short-term rental hosts to know the legal relief available in the event that they experience nuisance in the narrow sense. Therefore, the remedies that are ordinarily available in the context of nuisance in the narrow sense are explored below.

4 3 2 Remedies for nuisance in the narrow sense

Following the discussion of actions that amount to nuisance in the narrow sense, it is valuable for neighbours experiencing these nuisances to be aware of the remedies available to them. The landowner or occupier of the affected neighbouring property can obtain the following remedies in a narrow nuisance matter: (a) an interdict to prohibit or terminate the offending behavior; (b) a delictual remedy to claim compensation for damages resulting from the offending behavior; (c) a claim for pain and suffering as a result of an infringement of the plaintiff's personality rights such as their personal integrity or health; and (d) a claim for compensation based on the *actio iniuriarum*.⁵⁶ However, in terms of the narrow sense, nuisance cases are

⁵⁴ AJ van der Walt *The law of neighbours* (2010) at 263. See also AJ van der Walt *The law of neighbours* (2010) at 41, 240-241 where Van der Walt discusses a wide interpretation of "neighbour". He argues that the notion of neighbours should not only consider the location of the property, but also the legal status of the perpetrator and victim of the nuisance. In this regard, he argues that a neighbour could be anyone who has an interest related to the relevant nuisance, including the community at large.

⁵⁵ AJ van der Walt *The law of neighbours* (2010) at 263.

⁵⁶ AJ van der Walt *The law of neighbours* (2010) at 263; CG van der Merwe *Sakereg 2 ed* (1989) at 188; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 128-132. Intent is required in order to succeed with the *actio iniuriarum*, however negligence is sufficient to succeed with the action for pain and suffering.

predominantly aimed at obtaining an order in the form of an interdict⁵⁷ to: (a) prevent the respondent from proceeding with conduct that would pose a nuisance for the applicant; (b) compel the respondent to take the necessary measures to avert an imminent threat of nuisance; or (c) compel the respondent to terminate ongoing offending behavior that poses or will pose a nuisance to the applicant.⁵⁸ Ordinarily, damages are not claimed for nuisances in the narrow sense because it is difficult to prove that the annoyance in question caused damage to the property.⁵⁹ An interdict is arguably the best-suited remedy for nuisances amounting to annoyances.⁶⁰ In such

⁵⁷ JRL Milton “The law of neighbours in South Africa” 1969 *Acta Juridica* 123-269, at 165; D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 476; AJ van der Walt *The law of neighbours* (2010) at 264. Case law sometimes refers to an interdict in the nuisance context as an “abatement order”, in the sense of a court order directing the respondent to stop or remove the cause of the nuisance. Use of the term “abate” should not be confused with the notion of abatement in the sense of self-help; see D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 476. Van der Merwe notes that, although abatement in the sense of self-help was previously allowed as a remedy for nuisance, it is no longer favoured by the courts and has for all intents and purposes ceased to exist. Compare JRL Milton “The law of neighbours in South Africa” 1969 *Acta Juridica* 123-269 at 165. Unless stated otherwise, any reference to an abatement order in what follows should be interpreted in the same way that the term has been used by recent court cases, namely as a *mandamus* or mandatory interdict, instructing a respondent to remove or reduce the impact of a nuisance. See J Church & J Church “Nuisance” in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 para 197, regarding abatement orders in the context of statutory nuisance.

⁵⁸ AJ van der Walt *The law of neighbours* (2010) at 264; D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 476-477. See also J Church & J Church “Nuisance” in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 paras 195, 197, regarding abatement orders in the context of statutory nuisance.

⁵⁹ AJ van der Walt *The law of neighbours* (2010) at 264; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman’s The law of property* 6 ed (2019) at 131.

⁶⁰ AJ van der Walt *The law of neighbours* (2010) at 263, 275, 295; *Gien v Gien* 1979 (2) SA 1113 (T) page 1121C; *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 (2) SA 459 (C) pages 463D-465D. See further *PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms) Bpk* 2008 (2) SA 428 (SCA).

instances, the objective would primarily be to terminate an ongoing nuisance or prevent a nuisance from occurring.⁶¹ Given that in the context of nuisance law, an interdict is an extraordinary remedy ordered at the court's discretion, an interdict will not be available to a plaintiff who could obtain alternative relief.⁶² However, in certain instances, courts may be willing to grant an interdict to terminate or prevent a nuisance even when the applicant could potentially succeed with a damages claim at a later stage.⁶³ It is only logical that an interdict should be granted when the loss (potentially leading to a claim for damages) could be prevented from occurring in the first place. In this regard, the requirement that an interdict is only available when no other suitable remedy is available does not mean that the plaintiff must first suffer a loss before obtaining redress.⁶⁴

In relation to remedies for nuisance in the narrow sense, an interim interdict (*pendent lite*) and a permanent interdict are of relevance. To obtain a permanent

⁶¹ AJ van der Walt *The law of neighbours* (2010) at 263, 275, 295; *Gien v Gien* 1979 (2) SA 1113 (T) page 1121C; *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 (2) SA 459 (C) pages 463D-465D. See further *PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms) Bpk* 2008 (2) SA 428 (SCA).

⁶² AJ van der Walt *The law of neighbours* (2010) at 264; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 131; *Setlogelo v Setlogelo* 1914 AD 221 page 227.

⁶³ AJ van der Walt *The law of neighbours* (2010) at 264; *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 (2) SA 459 (C) pages 463D-465D. See further *PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms) Bpk* 2008 (2) SA 428 (SCA).

⁶⁴ AJ van der Walt *The law of neighbours* (2010) at 265; *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 (2) SA 459 (C) pages 463D-465D. See further *PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms) Bpk* 2008 (2) SA 428 (SCA).

interdict for common-law nuisance, an applicant would have to prove⁶⁵ a clear right,⁶⁶ injury reasonably apprehended or actually suffered,⁶⁷ and the absence of effective protection by any other remedy.⁶⁸ Importantly, in the instance of a permanent interdict, the applicant would need to prove a clear right on a balance of probabilities.⁶⁹ Although

⁶⁵ *Setlogelo v Setlogelo* 1914 AD 221 page 227; *Free State Gold Areas Ltd v Merriespruit (OFS) Gold Mining Co Ltd and Another* 1961 (2) SA 505 (W) page 524C-D. See also *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) para 13, citing *Patz v Greene & Co* 1907 TS 427; *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 95-96, where the court confirmed that when a statute has been enacted in the interests of a particular person or class of persons, a person who seeks interdictory relief based on the statute and who shows that he/she is a member of that class, need not prove harm as a result of contravention of the statute. However, in the instance that a statutory duty is imposed in the public interest generally, the applicant will be required to prove that he/she suffers or apprehends actual harm in order to obtain interdictory relief on the grounds of a breach of the statute.

⁶⁶ AJ van der Walt *The law of neighbours* (2010) at 268; J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 paras 200-201 indicate that the requirements are slightly different when the application is for an interim interdict. In the instance of an application for an interim interdict, the applicant has to prove a *prima facie* right as well as that the balance of convenience is in their favour. However, proof of a clear right is required for a permanent interdict: *Setlogelo v Setlogelo* 1914 AD 221 page 227. For a recent explanation of the burden of proof in applications for an interim interdict see *Camps Bay Residents Ratepayers Association and Others v Augoustides and Others* 2009 (6) SA 190 (WCC) para 7. See also ZT Boggenpoel *Property remedies* (2017) at 246-248.

⁶⁷ Proof of apprehended harm that may be irreparable is required in order for an interim interdict to be granted. See J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 para 200. See also G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 358-359. See further *Camps Bay Residents Ratepayers Association and Others v Augoustides and Others* 2009 (6) SA 190 (WCC) para 7; *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) paras 54-55.

⁶⁸ *Setlogelo v Setlogelo* 1914 AD 221 page 227; *Lubbe v Die Administrateur, Oranje Vrystaat* 1968 (1) SA 111 (O) page 113. See J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 paras 200-201; AJ van der Walt *The law of neighbours* (2010) at 266; and ZT Boggenpoel *Property remedies* (2017) at 247; and G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 358.

⁶⁹ *Setlogelo v Setlogelo* 1914 AD 221 page 227; ZT Boggenpoel *Property remedies* (2017) at 246.

it is necessary that the nuisance be unlawful,⁷⁰ the applicant would not have to prove fault because it is not a requirement to obtain an interdict for common-law nuisance.⁷¹

An infringement will be regarded as unlawful when it arises as a result of abnormal use of neighbouring property or from an unreasonable infringement of the applicant's personality or property rights.⁷²

On the other hand, when applying for an interim interdict, the applicant need not prove a clear right on a balance of probabilities.⁷³ Rather, they simply need to establish a *prima facie* right.⁷⁴ Once it has been established that the applicant has a *prima facie* right, the court will weigh the impact of granting an interdict on the respondents' ability to exercise their right to use and enjoy their property against the applicants' right to use and enjoy their property.⁷⁵ Interim interdicts requested to prevent or terminate a nuisance in the narrow sense are generally granted or denied on the balance of

⁷⁰ D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 436 refers to unlawfulness as the most important requirement for a successful application for a nuisance remedy.

⁷¹ JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-269 at 166; AJ van der Walt *The law of neighbours* (2010) at 266; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 129-130.

⁷² AJ van der Walt *The law of neighbours* (2010) at 266; See further, D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 436-454; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 132-133.

⁷³ ZT Boggenpoel *Property remedies* (2017) at 246. It is important to note that the notion of an interim interdict being granted based on the establishment of a *prima facie* right has been questioned in *Webster v Mitchell* 1984 (1) SA 1186 (W) page 1189. See also CG van der Merwe *Sakereg* 2 ed (1989) at 149; and G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 358.

⁷⁴ ZT Boggenpoel *Property remedies* (2017) at 246; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 358.

⁷⁵ AJ van der Walt *The law of neighbours* (2010) at 266.

convenience.⁷⁶ In this regard, the court will make its decision in light of the mutual and reciprocal obligations of neighbours to use their property in a manner that does not cause unnecessary harm or injury to their neighbours and takes the context of the situation into account.⁷⁷

The balancing of the applicant and respondent's conflicting interests occurs both in deciding the balance of convenience for an interim interdict and determining the reasonableness issue in the instance of a permanent interdict.⁷⁸ To determine whether the respondent's conduct or omission was unreasonable and consequently unlawful and whether an interdict should be granted or not, the court will consider various factors,⁷⁹ including: the feasibility of abating the nuisance;⁸⁰ the severity of the consequences that will ensue if the cause of the threat or nuisance is not reduced or

⁷⁶ AJ van der Walt *The law of neighbours* (2010) at 266.

⁷⁷ AJ van der Walt *The law of neighbours* (2010) at 266; J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 para 200.

⁷⁸ AJ van der Walt *The law of neighbours* (2010) at 268.

⁷⁹ See AJ van der Walt *The law of neighbours* (2010) at 266-267; and T Kotze & Z Boggenpoel "Living together as neighbours: Rethinking the reasonableness standard in nuisance law under the Constitution" (2021) 24 *Potchefstroom Electronic Law Journal* 1-34 at 12.

⁸⁰ In *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) the court's decision not to grant a remedy was based on the fact that it would not be feasible for the defendant to prevent slate waste from being washed onto the plaintiff's land. In *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C), the relative ease with which the respondent could insulate his property from creating the harmful noise was significant in the court's determination as to whether or not to grant the interdict. In *PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms) Bpk* 2008 (2) SA 428 (SCA) the court refused to grant an interdict because of the debilitating effect it would have on the respondent's use of his land, in comparison to the low incidence of the disease and the availability of simpler and less invasive solutions to lower the risk and limit the damage.

removed;⁸¹ the locality and physical attributes of the property;⁸² the zoning and use of the property in the relevant neighbourhood where the alleged nuisance occurs (the milieu);⁸³ custom with regard to the use of the relevant type of property involved;⁸⁴ whether the plaintiff has “come to the nuisance”;⁸⁵ the prevailing economic and social

⁸¹ The decision in *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* 2008 (3) SA 134 (SCA) can arguably be viewed in light of the urgent likelihood that serious damage to property and personal injury might have followed if the incidence of stray golf balls were not reduced. In *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) the court took into account the relatively small effect of the slate that washed onto the appellant’s land in refusing to grant a mandatory interdict.

⁸² The locality and physical features factor was highlighted in *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C), where the court stated that residents of inner-city apartments had to expect higher noise levels. The court in *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* 2008 (3) SA 134 (SCA) failed to effectively consider the locality principle in relation to the applications displaying neighbourly tolerance based on the property location being next to a golf estate.

⁸³ *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A); *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C). See T Kotze & Z Boggenpoel “Living together as neighbours: Rethinking the reasonableness standard in nuisance law under the Constitution” (2021) 24 *Potchefstroom Electronic Law Journal* 1-34 at 12.

⁸⁴ The custom regarding the use of the type of property involved featured in *Dorland and Another v Smits* 2002 (3) All SA 691 (C), where the court’s decision was influenced by the increasing trend of property owners installing electrified security fencing; and also in *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A) and *Vogel v Crewe* 2003 (4) SA 509 (T), where the court took note of the normality of planting trees in suburban gardens and on pavements. In *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C), the court considered the tradition of using of inner-city venues as restaurants and theatres and their contribution to the continued existence of a vibrant inner-city life to be an important factor in making their decision to grant an interdict directing the respondent to abate the nuisance caused by the noise stemming from the theatre restaurant.

⁸⁵ *Miller v Jackson* 1977 QB 966 (CA); *Du Toit v De Bot, Du Toit v Zuidmeer* 1883 (2) SC 213; CG van der Merwe & M Blumberg “For whom the bells toll – A solution in neighbour law” (1998) 9 *Stellenbosch Law Review* 356–357; CG van der Merwe “Things” in WA Joubert & JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) 3-347 para 145. See J Church & J Church “Nuisance” in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 para 175-181; J Booyen *A critical analysis of the financial and social obligations imposed on sectional title owners in sectional title schemes, as well as their enforcement* (LLD dissertation, University of Stellenbosch 2014) at 201. It is worth noting that in *Allaclas Investments (Pty) Ltd v Milnerton Golf Club (Stelzner and Others Intervening)* 2007 (2) SA 40 (C) para 16 the court stated that “coming to the

conditions;⁸⁶ how the party's conflicting interests correspond when weighed up against each other;⁸⁷ the character of the neighbourhood;⁸⁸ whether the property owner could have achieved the same goal by employing less harmful measures;⁸⁹ the motive with

nuisance" albeit a consideration, can never be a decisive factor in determining the reasonableness of the respondent's actions.

⁸⁶ The court in *Dorland and Another v Smits* 2002 (3) All SA 691 (C) was conscious of the suburban crime problem and the increasing trend of installing electrified security fencing when coming to its decision. The court in *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) highlighted the potential negative impact that restrictive noise controls might have on maintaining the existence of a vibrant inner-city life.

⁸⁷ In *Dorland and Another v Smits* 2002 (3) All SA 691 (C) the court weighed up the applicant's right to use and enjoy her garden and the impact that the electrified security fence would have on that right against the respondent's right to secure her property. The court decided that the respondent's right to secure her property outweighed the applicant's right to use and enjoy her garden. The court highlighted that aesthetics and the mere potential threat of danger from the electrified fence could not outweigh the respondent's interest in securing her property. In making its decision, the court took into account the fact that the respondent had recently suffered a burglary as well as the fact that the use of electrified security fences was becoming increasingly popular. In refusing to grant an abatement order, the court in *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) focused on the fact that the slate washed onto the appellant's land caused little harm, while the cost of preventing further occurrences would have been excessive.

⁸⁸ CG van der Merwe "Things" in WA Joubert & JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) 3-347 para 145. See J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 paras 175-181; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 126.

⁸⁹ CG van der Merwe "Things" in WA Joubert & JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) 3-347 para 145. See J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 paras 175-181; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 126.

which the respondent carried out the alleged nuisance;⁹⁰ and the interest of the public.⁹¹

The balance of convenience, which is considered to determine whether the court should exercise its discretion to grant an interim interdict, is easily confused with the factors that are considered when determining whether the respondent's use of their property is lawful.⁹² When establishing the balance of convenience, the potential impact that granting the interdict would have on either party is taken into consideration.⁹³ In principle, this is a consideration that should only be of relevance once the court has already determined that the respondent's use of their land was unlawful.⁹⁴ In this regard, the lawfulness of the respondent's use of their property is based on whether the respondent's use of their property is reasonable in the circumstances and, conversely, whether the applicant's refusal to tolerate the effects of the respondent's use of their property is reasonable.⁹⁵ Factors such as the feasibility of preventing, mitigating, or terminating the nuisance are relevant in this regard, as

⁹⁰ CG van der Merwe "Things" in WA Joubert & JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) 3-347 para 145. See J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 paras 175-181; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 126. See *Gien v Gien* 1979 (2) SA 1113 (T) page 1121D-E and *Kirsch v Pincus* 1927 TPD 199.

⁹¹ J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 para 200.

⁹² AJ van der Walt *The law of neighbours* (2010) at 268. Compare *Wright v Cockin* 2004 (4) SA 207 (E) with *PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms) Bpk* 2008 (2) SA 428 (SCA).

⁹³ AJ van der Walt *The law of neighbours* (2010) at 269.

⁹⁴ AJ van der Walt *The law of neighbours* (2010) at 269; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 132.

⁹⁵ AJ van der Walt *The law of neighbours* (2010) at 269. *Gien v Gien* 1979 (2) SA 1113 (T) page 1121A-1121H.

they indicate whether the respondent's use of their property was reasonable in the circumstances.⁹⁶

A neighbour seeking an interdict to prevent, mitigate or terminate a nuisance will need to prove that the neighbour's use of their property or the state of affairs that caused the nuisance is excessive and unlawful.⁹⁷ Furthermore, the applicant will need to show that the nuisance occurs in a recurring or continuous manner, as a single occurrence would be insufficient to obtain an interdict.⁹⁸ In this regard, in the short-term rental context, a neighbour would need to prove that the manner in which the short-term host conducts their short-term rental operations is excessive and unlawful. Furthermore, a neighbour would need to prove that the nuisance posed by the neighbour's short-term rental operations occurs in a recurring or continuous manner. Moreover, a neighbour would need to prove (a) that the respondent's use of their property is unreasonable; (b) that their refusal to tolerate the effects of the respondent's short-term rental operations is reasonable. In this regard, they would

⁹⁶ AJ van der Walt *The law of neighbours* (2010) at 269; *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A). See further *Gien v Gien* 1979 (2) SA 1113 (T); *Die Vereniging van Advokate (TPA) en Andere v Moskeplein (Edms) Bpk en Andere* 1982 (3) SA 159 (T); *Moskeplein (Edms) Bpk en 'n Ander v Die Vereniging van Advokate (TPA) en Andere* 1983 (3) SA 896 (T); *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C). See J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 paras 174-185.

⁹⁷ AJ van der Walt *The law of neighbours* (2010) at 270; JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-269, at 150; D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 453; CG van der Merwe *Sakereg* 2 ed (1989) at 188; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125.

⁹⁸ AJ van der Walt *The law of neighbours* (2010) at 270; JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-269, at 150; D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 453; CG van der Merwe *Sakereg* 2 ed (1989) at 188; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 131; *De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 (4) SA 188 (D) page 192.

likely argue that the respondents' use of property exceeds beyond that which a neighbour is expected to tolerate in terms of mutual forbearance; and (c) that there are no alternative remedies available that can adequately protect their rights. In the event that a neighbour of a short-term host is able to prove the above considerations, it is likely that a court would grant them an interdict against the host's short-term rental activities in terms of neighbour law. However, given the severity of a permanent interdict, it would be preferable for a neighbour to bring an application for a temporary interdict. In light of the potential benefits short-term rentals have for the tourism industry, it follows that courts should proceed with caution before granting a permanent interdict against a short-term rental host.

It is important to note that if the nuisance has only occurred once or has not materialised yet, the applicant could still apply for an interdict to prevent the nuisance from occurring or being repeated.⁹⁹ In this regard, an applicant may be granted an interdict without having to show that the potential damage or injury exceeds the ordinary physical comfort level of a reasonable person.¹⁰⁰ In such an instance, the applicant would need to prove that there is a real and imminent threat that the nuisance will occur, continue, or be repeated unless the interdict is granted.¹⁰¹ This implies that

⁹⁹ AJ van der Walt *The law of neighbours* (2010) at 270; CG van der Merwe *Sakereg* 2 ed (1989) at 188; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 127.

¹⁰⁰ AJ van der Walt *The law of neighbours* (2010) at 278; JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-269, at 151-152. Compare *Dorland and Another v Smits* 2002 (3) All SA 691 (C) with *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* 2008 (3) SA 134 (SCA).

¹⁰¹ AJ van der Walt *The law of neighbours* (2010) at 270; ZT Boggenpoel *Property remedies* (2017) at 247; CG van der Merwe *Sakereg* 2 ed (1989) at 188; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 127; *Wright v Cockin* 2004 (4) SA 207

there is no reasonable level of serious physical injury or material damage that neighbours are expected to endure.¹⁰² Furthermore, this suggests that the reasonableness test is applied differently in instances where nuisance causes severe property damage or physical injury in comparison to the manner the reasonableness test is applied when a nuisance merely annoys or inconveniences neighbours.¹⁰³ In the short-term rental context, this would mean that a neighbour could be granted an interdict without proving that the potential harm exceeds the reasonable person's ordinary physical level. In order to do so, the neighbour would need to prove a real and imminent threat that the nuisance will occur, continue, or be repeated unless an interdict is granted. In this regard, a neighbour in the short-term rental context is unlikely to be granted an order unless they can prove previous instances where short-term rentals posed a real and imminent threat.

Apart from the interdict remedy, a plaintiff might, in certain instances, be able to claim compensation (or satisfaction), in terms of the *actio iniuriarum*, for infringement of their personality rights such as health or personal integrity.¹⁰⁴ According to the principles of the *actio iniuriarum* and the action for pain and suffering, these remedies may be available not only in the instance of actual physical or bodily injury, but also in

(E) 218H. See also *Free State Gold Areas Ltd v Merriespruit (OFS) Gold Mining Co Ltd and Another* 1961 (2) SA 505 (W).

¹⁰² AJ van der Walt *The law of neighbours* (2010) at 278; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 128-130.

¹⁰³ AJ van der Walt *The law of neighbours* (2010) at 278; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 128-130.

¹⁰⁴ AJ van der Walt *The law of neighbours* (2010) at 301; D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 478-482; CG van der Merwe *Sakereg* 2 ed (1989) at 188; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 131; J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 paras 170, 203.

the instance of psychological injury.¹⁰⁵ In this regard, Derek van der Merwe is of the view that this remedy should only be available in the instance where a nuisance causes actual and relatively serious injury.¹⁰⁶ Naturally, the law should cover all reasonable instances of injury experienced by neighbours. However, in the short-term rental context, it is highly unlikely that a neighbour will suffer psychological harm, given the short-term stay of guests. In this regard, unless a guest behaves in a traumatising way or the overall influx of visitors weighs heavily on a neighbour's psychological well-being, it is arguably unlikely that psychological injury will occur on the part of a neighbour. Nonetheless, in the unlikely, but plausible case where a nuisance causes physical or psychological injury, the neighbour of short-term rental accommodation may also be able to either bring a compensation claim or claim satisfaction in terms of the *actio iniuriarum*.

The discussion above indicates that a neighbour seeking to obtain a permanent interdict against the neighbouring short-term host to prevent, mitigate, or terminate nuisance caused by short-term rental operations would need to prove¹⁰⁷ a clear

¹⁰⁵ AJ van der Walt *The law of neighbours* (2010) at 301; D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 478-482; CG van der Merwe *Sakereg* 2 ed (1989) at 188; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 32; J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 paras 170, 203.

¹⁰⁶ D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 478-482; J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 para 203; AJ van der Walt *The law of neighbours* (2010) at 301.

¹⁰⁷ In *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) para 13, citing *Patz v Greene & Co* 1907 TS 427; *Roodepoort-Maraiburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 95-96, the court confirmed that when statutes are enacted in the interests of specific individuals/classes of individuals, a person seeking interdictory relief in terms of the statute need not prove harm resulting from contravention of the statute provided that they are able to prove they fall within the category of

right,¹⁰⁸ injury reasonably apprehended or actually suffered,¹⁰⁹ as well as the absence of effective protection by any other remedy.¹¹⁰ Additionally, they would need to prove that the infringement resulting from the host's neighbouring short-term rental operations, in the form of, for instance, noise, smoke, or unpleasant smells is excessive and therefore unlawful.¹¹¹

In light of this discussion of nuisance in the narrow sense, it is also valuable to explore nuisance in the wide sense to determine instances where short-term rental operations might amount to nuisance in the wide sense. Therefore, the following section will explore nuisance in the wide sense in relation to damage to property or personal injury. Subsequently, the section will explore the remedies available to neighbours of a short-term rental who experience nuisance in the wide sense.

persons the statute is designed for. However, if a statutory duty is imposed in the public interest generally, the applicant is required to prove that he/she suffers or apprehends actual harm to obtain interdictory relief based on breach of the statute.

¹⁰⁸ J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 paras 200-201; *Setlogelo v Setlogelo* 1914 AD 221 page 227; *Camps Bay Residents Ratepayers Association and Others v Augoustides and Others* 2009 (6) SA 190 (WCC) para 7.

¹⁰⁹ *Lubbe v Die Administrateur, Oranje Vrystaat* 1968 (1) SA 111 (O) page 113; ZT Boggenpoel *Property remedies* (2017) at 46-47; AJ van der Walt *The law of neighbours* (2010) at 268; J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 para 200; *Camps Bay Residents Ratepayers Association and Others v Augoustides and Others* 2009 (6) SA 190 (WCC) para 7; *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) paras 54-55.

¹¹⁰ *Lubbe v Die Administrateur, Oranje Vrystaat* 1968 (1) SA 111 (O) page 113. See J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 paras 200-201; AJ van der Walt *The law of neighbours* (2010) at 266. See also ZT Boggenpoel *Property remedies* (2017) at 244-248.

¹¹¹ AJ van der Walt *The law of neighbours* (2010) at 272; AJ Van der Walt *Constitutional Property Law* 3 ed (2011) at 234; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125.

4 3 3 Nuisance in the wide sense

Claims for compensation arising due to nuisance are generally associated with nuisance in the wide sense. Nuisance in the wide sense refers to disturbing action or omissions that result in actual damage to the property, which generally results in the neighbour founding a claim for damages in terms of the *actio legis Aquiliae*.¹¹² These nuisance claims occur in the event of abnormal and unreasonable use of property that interferes with the use and enjoyment of a neighbour's property, and cause them actual patrimonial loss or damage¹¹³ or infringes their personality rights.¹¹⁴

In general, compensation for property damage arising as a result of nuisance can be claimed for expenditure incurred in trying to prevent or mitigate the loss or damage;¹¹⁵ actual loss as a result of material damage to corporeal property;¹¹⁶ and depreciation in the property's value, provided that the loss is irreversible and permanent.¹¹⁷ In compensation cases, the reasonableness standard is employed to

¹¹² AJ van der Walt *The law of neighbours* (2010) at 292; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 130; *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A); *Moller v South African Railways and Harbours* 1969 (3) SA 374 (N) 378-379. Compare with *Van der Merwe v Carnarvon Municipality* 1948 (3) SA 613 (C) and *Flax v Murphy* 1991 (4) SA 58 (W) page 63. See also ZT Boggenpoel *Property remedies* (2017) at 183-190.

¹¹³ CG van der Merwe *Sakereg* 2 ed (1989) at 188-189; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125.

¹¹⁴ AJ van der Walt *The law of neighbours* (2010) at 293; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125. See also *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A).

¹¹⁵ AJ van der Walt *The law of neighbours* (2010) at 293; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125. In *Kirsch v Pincus* 1927 TPD 199, the actual expenditure incurred to remove the fallen leaves from the malt drying floor had not been proven, but the court awarded nominal damages.

¹¹⁶ *Levin v Vogelstruis Estates and Gold Mining Co Ltd* 1921 WLD 66.

¹¹⁷ AJ van der Walt *The law of neighbours* (2010) at 293; J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 para 204.

determine whether there was actual damage to the property as a result of the nuisance;¹¹⁸ the extent of the damage,¹¹⁹ and the feasibility of preventing or terminating the nuisance¹²⁰ will help inform the court's decision regarding whether the action or omission that caused the nuisance was unreasonable and unlawful.¹²¹

In particular, compensation claims in terms of the *actio legis Aquiliae* founded on nuisance in the wide sense have arisen as a result of the following actions:¹²² Failure to prevent slate waste from washing onto the neighbour's property by a river;¹²³ dumping hazardous materials close to the property boundary resulting in the neighbour's trees dying;¹²⁴ land piling up near the property boundary from where it can

¹¹⁸ *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A).

¹¹⁹ In *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A) pages 517-518 it was illustrated that not every instance of damage caused by nuisance may justify either a claim for compensation or an interdict. Whether a nuisance is actionable is dependent on whether the neighbour in that instance can reasonably be expected to endure the damage. See G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 128.

¹²⁰ In *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) the court held that the respondent's failure to act was not unreasonable and therefore not unlawful due to the fact that it was not feasible to prevent the damage from occurring or terminating it.

¹²¹ AJ van der Walt *The law of neighbours* (2010) at 293.

¹²² AJ van der Walt *The law of neighbours* (2010) at 293; CG van der Merwe *Sakereg* 2 ed (1989) at 189; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 130.

¹²³ *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A). It is worth noting that compensation was not claimed or awarded in *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A), but the decision suggests that it might have been possible for compensation to have been awarded if the respondent was responsible for the damage caused by slate waste. However, the build-up of the slate waste was caused by the respondent's predecessor in title, and thus the only question was whether the respondent was liable for failure to prevent further damage. The court decided that the respondent was not liable because it was not feasible for him to prevent further damage, which was in any event rather minimal.

¹²⁴ CG van der Merwe *Sakereg* 2 ed (1989) at 189 fn 159, citing a Dutch case (court of Amsterdam 22 June 1910 W9033).

wash onto the neighbour's property in a rain storm;¹²⁵ planting trees along the property's boundary resulting in leaves falling and causing damage to the neighbour's malt drying business;¹²⁶ and failing to take sufficient precautionary measures against the potential collapse of an incomplete building project, which threatens damage to the neighbouring property.¹²⁷

Given the extensive instances where nuisance in the wide sense may be applicable, it is important for neighbours to know what their remedies are in the event that their property interference falls within the context of nuisance in the wide sense. Therefore, the following section explores remedies for nuisance in the wide sense with the view of determining which remedies are available to neighbours of short-term rental properties and what requirements they would need to meet to access the relevant remedies.

4 3 4 Remedies for nuisance in the wide sense

Nuisance in the wide sense refers to nuisances that result in actual harm or damage, which generally results in the neighbour founding a claim for damages in terms of the *actio legis Aquiliae*.¹²⁸ Claims for compensation that arise due to nuisance generally occur in the event of abnormal and unreasonable use of property that interferes with the use and enjoyment of a neighbour's property, and causes them actual patrimonial

¹²⁵ *Levin v Vogelstruis Estates and Gold Mining Co Ltd* 1921 WLD 66.

¹²⁶ *Kirsch v Pincus* 1927 TPD 199.

¹²⁷ CG van der Merwe *Sakereg* 2 ed (1989) at 189 fn 163.

¹²⁸ AJ van der Walt *The law of neighbours* (2010) at 292; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 130; *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A); *Moller v South African Railways and Harbours* 1969 (3) SA 374 (N) 378-379. Compare with *Van der Merwe v Carnarvon Municipality* 1948 (3) SA 613 (C) and *Flax v Murphy* 1991 (4) SA 58 (W) page 63.

loss or damage,¹²⁹ or an infringement of personality rights.¹³⁰ In terms of nuisance in the wide sense, the goal is usually to claim compensation in delict for loss caused by a single, non-continuing, or already completed action.¹³¹ Importantly, damage or loss incurred as a result of the use of neighbouring land does not automatically amount to a nuisance, and therefore a claim for compensation does not automatically arise.¹³² Depending on the circumstances, neighbours may be expected to tolerate the nuisance, which may include having to suffer small losses or incur minor expenses to prevent further damage.¹³³ In this regard, application of the reasonableness standard is necessary because the reasonableness standard determines the unlawfulness of

¹²⁹ CG van der Merwe *Sakereg* 2 ed (1989) at 188-189; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125.

¹³⁰ AJ van der Walt *The law of neighbours* (2010) at 293; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125. See also *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A).

¹³¹ AJ van der Walt *The law of neighbours* (2010) at 259.

¹³² AJ van der Walt *The law of neighbours* (2010) at 294. Although damage was not proved or claimed, the outcome of *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) indicates that the mere fact of damage is insufficient to found a claim for compensation, for instance when preventing the damage is impossible. In such a case causing the damage (or failure to prevent it) is not unreasonable or unlawful.

¹³³ AJ van der Walt *The law of neighbours* (2010) at 294. This point is made in *Kirsch v Pincus* 1927 TPD 199 at 203-204, where the nuisance was only rendered unlawful because of the defendant acted with malice when causing the damage. The court highlighted that if it were not for the defendant's malicious intent and the absence of any benefit derived from the trees on the defendant's land, the plaintiff might well have had to endure the leaves falling onto its malt drying floors. This is due to the fact that if it were reasonable for the defendant to have planted trees on his land, the plaintiff would have had to accept some of those leaves falling onto his land, even if they caused some loss in the form of having to pay for their removal. In *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A) page 518 it also seems that the court expected that the applicant should have included a small fee every year to clean the gutters of his building of leaves, thereby preventing further damage resulting from blocked gutters. In light of this, it can be inferred that neighbours can be expected, within reason, to bear the costs of cleaning fallen or wind-blown leaves from their properties, provided that the trees were not planted unreasonably (maliciously or in an unsuitable position, as in *Kirsch v Pincus*) and that the level of nuisance caused by leaves was reasonable in the circumstances.

nuisances, which determines whether any loss or expense that arises for a neighbour is unreasonable, unlawful, and consequently actionable.¹³⁴ Once it is clear that an action amounts to an actionable nuisance, the party responsible will be liable for the nuisance endured by the neighbouring property owner. Therefore, neighbours of short-term rentals will only have a claim for nuisance in the wide sense once they have proven that their neighbour's actions amount to unreasonable, unlawful use of property.

The overarching question regarding remedies stemming from nuisance claims is whether it is plausible for a plaintiff to bring a compensation claim based on nuisance without providing proof of fault (negligence) in the event that the nuisance infringed the plaintiff's property right. Historical authority in both English and Roman-Dutch law indicate that there is a remedy with which a plaintiff could claim compensation for damage arising from a nuisance without having to prove fault.¹³⁵ Early South African case law indicates that there is a delict, based on nuisance, "of which neither *dolus* nor *culpa* is an element",¹³⁶ implying that proof of fault is not required.¹³⁷ In such

¹³⁴ AJ van der Walt *The law of neighbours* (2010) at 294-295; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125-126.

¹³⁵ AJ van der Walt *The law of neighbours* (2010) at 296-297; CG van der Merwe *Sakereg* 2 ed (1989) at 188; J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 paras 202, 203; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 128-130; *Van der Merwe v Carnarvon Municipality* 1948 (3) SA 613 (C) page 619; *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A) page 517.

¹³⁶ *Van der Merwe v Carnarvon Municipality* 1948 (3) SA 613 (C) page 619; see JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-269 at 169; AJ van der Walt *The law of neighbours* (2010) at 297; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 130.

¹³⁷ AJ van der Walt *The law of neighbours* (2010) at 297; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 130-131.

instances, compensation could ostensibly be claimed for physical damage to property, and for pure economic loss, such as expenses incurred to limit the nuisance, loss of rental income, and property devaluation.¹³⁸ In this regard, the decision of *Bloemfontein Town Council v Richter*¹³⁹ has been interpreted as authority for the proposition that negligence or fault is not required for a compensation claim based on nuisance law. Similarly, in *Van der Merwe v Carnarvon Municipality*,¹⁴⁰ the court expressly stated that negligence was not required in a compensation claim based in nuisance.¹⁴¹ Subsequently, the court in *Flax v Murphy*¹⁴² followed the decision in *Carnarvon Municipality* and decided that negligence was not required for a compensation claim based on nuisance law.¹⁴³ Therefore, in theory, it is possible that a plaintiff, such as the neighbour of a short-term rental property may bring a claim for compensation against the short-term host based on nuisance, without proof of fault, in instances where the nuisance infringed the plaintiff's property rights.¹⁴⁴

Both nuisance in the narrow and wide sense hinges on the standard of reasonableness, which depends on the reasonable use of the property and the reasonable tolerance of the neighbour in relation to the other party's use of their

¹³⁸ D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 477; CG van der Merwe *Sakereg 2 ed* (1989) at 188; *Wynberg Municipality v Dreyer* 1920 AD 439 pages 452-453; AJ van der Walt *The law of neighbours* (2010) at 297.

¹³⁹ *Bloemfontein Town Council v Richter* 1938 AD 195.

¹⁴⁰ *Van der Merwe v Carnarvon Municipality* 1948 (3) SA 613 (C) page 619.

¹⁴¹ *Van der Merwe v Carnarvon Municipality* 1948 (3) SA 613 (C) page 619.

¹⁴² *Flax v Murphy* 1991 (4) SA 58 (W) page 63.

¹⁴³ *Flax v Murphy* 1991 (4) SA 58 (W) page 63.

¹⁴⁴ AJ van der Walt *The law of neighbours* (2010) at 298; CG van der Merwe *Sakereg 2 ed* (1989) at 186; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 130-131.

property.¹⁴⁵ In this regard, the following section will examine the reasonable use doctrine to understand the factors courts may take into consideration for a disturbance to constitute a nuisance in the short-term rental context.

4 4 Normal use and reasonableness of nuisances

4 4 1 Introduction

The discussion on nuisance in the narrow and wide sense highlighted that there is room for neighbours of short-term rentals to experience a host of nuisances.¹⁴⁶ In order to ascertain which potential nuisances neighbours should tolerate and which nuisances they should not have to accept, it must be determined whether the conduct complained of as a purported nuisance is reasonable or not.¹⁴⁷ Nuisance law is predicated on normal and reasonable use of land.¹⁴⁸ Determining whether the use of property is normal and reasonable requires balancing the mutual and reciprocal rights and obligations of neighbours.¹⁴⁹ One must distinguish between normal use with a reasonable level of imposition and abnormal use causing unreasonable

¹⁴⁵ AJ van der Walt *The law of neighbours* (2010) at 269; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 126. See *Holland v Scott* (1881-1882) 2 EDC 307 page 332; *Prinsloo v Shaw* 1938 AD 570 page 590; *Gien v Gien* 1979 (2) SA 1113 (T) page 1121A-1121H.

¹⁴⁶ S Fick "Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?" (2021) 3 *Stellenbosch Law Review* 455-481 at 456-457.

¹⁴⁷ AJ van der Walt *The law of neighbours* (2010) at 15; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 128. See *Holland v Scott* (1881-1882) 2 EDC 307 page 332.

¹⁴⁸ AJ van der Walt *The law of neighbours* (2010) at 15; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 128. See *Holland v Scott* (1881-1882) 2 EDC 307 page 332.

¹⁴⁹ AJ van der Walt *The law of neighbours* (2010) at 274. See JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-269 at 152-156; D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 437-441.

infringement.¹⁵⁰ In *Holland v Scott* (“*Holland*”),¹⁵¹ it was held that nuisance cases are decided with reference to reasonableness and normal use.¹⁵² The court went on to state that unreasonable use of land is an indicator that an action for nuisance might ensue.¹⁵³ Furthermore, all the judges in *Holland* emphasised that nuisance is judged contextually and that in order for a nuisance to be actionable, it must seriously and materially curtail the ordinary comfort and “existence” of the neighbouring property owner.¹⁵⁴ The approach set out in *Holland* was followed in *Graham v Dittmann & Son*¹⁵⁵ and subsequently in *Malherbe v Ceres Municipality*,¹⁵⁶ where the court explained that neighbours must endure a reasonable level of nuisance resulting from the normal use of their neighbours’ property.¹⁵⁷

Since then, it has become trite to say that neighbours must exercise mutual forbearance/tolerance while simultaneously using their property reasonably to limit

¹⁵⁰ AJ van der Walt *The law of neighbours* (2010) at 15; AJ van der Walt “Sport and nuisance law” (2010) 127 *South African Law Journal* 274-303 at 282-284; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman’s The law of property* 6 ed (2019) at 131-132.

¹⁵¹ *Holland v Scott* (1881-1882) 2 EDC 307.

¹⁵² AJ van der Walt *The law of neighbours* (2010) at 15; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman’s The law of property* 6 ed (2019) at 128. See *Holland v Scott* (1881-1882) 2 EDC 307 page 332.

¹⁵³ *Holland v Scott* (1881-1882) 2 EDC 307 page 334; AJ van der Walt *The law of neighbours* (2010) at 15; AJ van der Walt “Sport and nuisance law” (2010) 127 *South African Law Journal* 274-303 at 282-284; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman’s The law of property* 6 ed (2019) at 131-132.

¹⁵⁴ AJ van der Walt *The law of neighbours* (2010) at 26; *Holland v Scott* (1881-1882) 2 EDC 307 page 310.

¹⁵⁵ *Graham v Dittmann & Son* 1917 TPD 288 pages 291-292.

¹⁵⁶ *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A).

¹⁵⁷ AJ van der Walt *The law of neighbours* (2010) at 15, 271-282; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman’s The law of property* 6 ed (2019) at 128.

nuisance for their neighbours.¹⁵⁸ In this regard, the English and Roman law principle of *sic utere tuo ut alienum non laedas* is relevant as it incorporates the idea that one person may not use their property in a manner that causes harm for another.¹⁵⁹ The lawfulness of a property owner's use of their property is determined by deciding whether it is reasonable or, conversely, whether the neighbouring property owner's refusal to tolerate the effects of that use is reasonable under the circumstances.¹⁶⁰ Neighbours are ordinarily expected to tolerate a reasonable volume of smoke, noise, and other emissions from neighbouring land and can only raise an issue when those emissions transgress the limit of reasonableness.¹⁶¹ Emissions will transgress the limit of reasonableness when they result from the abnormal use of the property,¹⁶² when they exceed the limits of reasonable forbearance expected of neighbours, when they result in serious physical damage, or if they severely and urgently endanger the physical integrity, health, or well-being of the neighbour.¹⁶³ For instance, in the context of abnormal use of property, the Appellate Division (as it then was) in *Malherbe v*

¹⁵⁸ AJ van der Walt *The law of neighbours* (2010) at 15, 271-282; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 128.

¹⁵⁹ *Holland v Scott* (1881-1882) 2 EDC 307 page 331; *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) page 120G; AJ van der Walt *The law of neighbours* (2010) at 97-98; GJ Pienaar & JG Horn *Sectional titles and other fragmented property schemes* (2020) at 259.

¹⁶⁰ AJ van der Walt *The law of neighbours* (2010) at 269; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 126. See *Holland v Scott* (1881-1882) 2 EDC 307 page 332; *Prinsloo v Shaw* 1938 AD 570 page 590; *Gien v Gien* 1979 (2) SA 1113 (T) page 1121A-1121H.

¹⁶¹ AJ van der Walt *The law of neighbours* (2010) at 272; AJ van der Walt *Constitutional Property Law* 3 ed (2011) at 234; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125.

¹⁶² See D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 449-450.

¹⁶³ AJ van der Walt *The law of neighbours* (2010) at 272; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125, 127.

*Ceres Municipality*¹⁶⁴ held that it was not abnormal for a local authority in a small town in the Western Cape to plant oak trees on the pavements bordering the streets, and that fallen leaves from those trees could not be regarded as resulting from abnormal use. If the tree's leaves fell onto adjoining properties, the property owners had to tolerate it as the natural result arising from normal use of the streets. In this regard, the court in *Vogel v Crewe*¹⁶⁵ confirmed the view that planting trees is a normal activity due to the vital role that trees play in the environment.¹⁶⁶ However, in *Kirsch v Pincus*¹⁶⁷ leaves falling on the neighbouring property were regarded as a nuisance because the trees were allegedly planted purely with the malicious intent to harm the neighbour, whose company was negatively impacted by the falling leaves. Consequently, these matters indicate that when determining whether an action amounts to a nuisance, the decision must be made based on the circumstances in each case, balancing the neighbours' rights and obligations in the usual manner. To obtain an interdict that prevents or terminates a nuisance, the applicant must prove that the infringement arising from the neighbour's use of their property occurs in the form of, for example, noise, smoke, or unpleasant smells.¹⁶⁸ Subsequently, the

¹⁶⁴ *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A) page 518.

¹⁶⁵ *Vogel v Crewe* 2003 (4) SA 509 (T)

¹⁶⁶ *Vogel v Crewe* 2003 (4) SA 509 (T) page 512F.

¹⁶⁷ *Kirsch v Pincus* 1927 TPD 199.

¹⁶⁸ AJ van der Walt *The law of neighbours* (2010) at 263. See D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 449-450; AJ van der Walt *Constitutional property law* 3 ed (2011) at 234. See also, *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A) page 518; *Vogel v Crewe* 2003 (4) SA 509 (T) page 512F.

applicant will need to prove that the relevant infringement is excessive and consequently unlawful.¹⁶⁹

Based on the above exposition, it is clear that the reasonableness enquiry in nuisance law is a purely contextual one.¹⁷⁰ When determining reasonableness, courts consider contextual factors such as the extent of the interference;¹⁷¹ the suitability of the respondent's use of their property;¹⁷² the nature of the property;¹⁷³ the duration of the interference;¹⁷⁴ the time/times at which the interference occurred;¹⁷⁵ the sensitivity of the applicant to the particular emission or in general;¹⁷⁶ the social utility linked to the

¹⁶⁹ AJ van der Walt *The law of neighbours* (2010) at 271-272; JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-269 at 151; D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 444-446; CG van der Merwe *Sakereg* 2 ed (1989) at 187; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125; J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 para 175; *Graham v Dittmann & Son* 1917 TPD 288 page 294; *De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 (4) SA 188 (D) page 192.

¹⁷⁰ AJ van der Walt *The law of neighbours* (2010) at 272; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 125.

¹⁷¹ *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* 2008 (3) SA 134 (SCA) (influx of stray golf balls hit into applicant's garden, which was situated on a golf estate); *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) (loud music emanating from a theatre was held to be too noisy, despite being in the inner-city context).

¹⁷² Contrast *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A) with *Kirsch v Pincus* 1927 TPD 199. See further *Dorland and Another v Smits* 2002 (3) All SA 691 (C) (use of electrified fencing to secure suburban residential property had become popular (and necessary), and the respondent had recently suffered a burglary, thus seeking to secure her property) as opposed to *Gien v Gien* 1979 (2) SA 1113 (T), where the noise was malicious.

¹⁷³ *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A); *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C).

¹⁷⁴ *Gien v Gien* 1979 (2) SA 1113 (T).

¹⁷⁵ *Graham v Dittman & Son* 1917 TPD 288; *Gien v Gien* 1979 (2) SA 1113 (T); *Die Vereniging van Advokate (TPA) en Andere v Moskeeplein (Edms) Bpk en Andere* 1982 (3) SA 159 (T); *Moskeeplein (Edms) Bpk en 'n Ander v Die Vereniging van Advokate (TPA) en Andere* 1983 (3) SA 896 (T).

¹⁷⁶ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C).

nuisance;¹⁷⁷ malice on the part of the respondent;¹⁷⁸ the nature of the area where the harm occurred and the custom with regard to land use in that area;¹⁷⁹ whether the plaintiff has “come to the nuisance”;¹⁸⁰ and the potential, practical, and economic feasibility of actually preventing, mitigating or terminating the harm.¹⁸¹

I am of the opinion that in the short-term rental context, the nuisance factors that are most relevant and worthy of discussion are (a) noise, (b) threat of danger, personal injury, (c) damage to property; and (d) coming to the nuisance. I am of the opinion that (a) noise is relevant in the context of guests potentially throwing parties or loudly entertaining guests; (b) threat of danger, personal injury, and damage to property is relevant due to strangers having access to common property and unfamiliar faces coming and going in the area; and (c) coming to the nuisance is relevant as some

¹⁷⁷ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C).

¹⁷⁸ *Kirsch v Pincus* 1927 TPD 199; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 133-134.

¹⁷⁹ *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A); *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C).

¹⁸⁰ *Miller v Jackson* 1977 QB 966 (CA); *Du Toit v De Bot, Du Toit v Zuidmeer* 1883 (2) SC 213; CG van der Merwe & M Blumberg “For whom the bells toll – A solution in neighbour law” 1998) 9 *Stellenbosch Law Review* 356–357; CG van der Merwe “Things” in WA Joubert & JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) 3-347 para 145. See J Church & J Church “Nuisance” in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 para 175-181; J Booysen *A critical analysis of the financial and social obligations imposed on sectional title owners in sectional title schemes, as well as their enforcement* (LLD dissertation, University of Stellenbosch 2014) at 201. *Allaclas Investments (Pty) Ltd v Milnerton Golf Club (Stelzner and Others Intervening)* 2007 (2) SA 40 (C) para 16.

¹⁸¹ *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A). See further *Gien v Gien* 1979 (2) SA 1113 (T); *Die Vereniging van Advokate (TPA) en Andere v Moskeeplein (Edms) Bpk en Andere* 1982 (3) SA 159 (T); *Moskeeplein (Edms) Bpk en 'n Ander v Die Vereniging van Advokate (TPA) en Andere* 1983 (3) SA 896 (T); *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C). See J Church & J Church “Nuisance” in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 paras 174-185.

individuals move into neighbourhoods where Airbnb is popular as they would like to enjoy the standard of living in that area, and that decision should not significantly detract from their property rights. In this view, the following section will explore the reasonableness standard, focusing on these three factors and their relevance in the short-term rental context.

The reasonableness standard is set according to the ordinary physical comfort of a reasonable person and is an objective standard applied with due regard to the location of the property, the people who inhabit the property, and the prevailing customs of the community.¹⁸² In this regard, the reasonableness standard is not calibrated according to the “perverse or finicking or over-scrupulous person”¹⁸³ but rather according to the “normal man of sound and liberal tastes and habits”.¹⁸⁴ Furthermore, the location where the infringement occurs is an important factor in determining whether the nuisance is unreasonable.¹⁸⁵ In an area that is generally noisier, the noise levels would

¹⁸² AJ van der Walt *The law of neighbours* (2010) at 276; JRL Milton “The law of neighbours in South Africa” 1969 *Acta Juridica* 123-269 at 151; D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 437-444; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman’s The law of property* 6 ed (2019) at 126, 132; *Dorland and Another v Smits* 2002 (3) All SA 691 (C); *Gien v Gien* 1979 (2) SA 1113 (T) page 1122C.

¹⁸³ *Prinsloo v Shaw* 1938 AD 570 page 590.

¹⁸⁴ *Prinsloo v Shaw* 1938 AD 570 page 590; compare to *Holland v Scott* (1881-1882) 2 EDC 307 page 332. See *Gien v Gien* 1979 (2) SA 1113 (T) page 1121H; JRL Milton “The law of neighbours in South Africa” 1969 *Acta Juridica* 123-269 151; D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD dissertation, University of Pretoria 1982) at 444-446; J Church & J Church “Nuisance” in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 para 175; and G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman’s The law of property* 6 ed (2019) at 126.

¹⁸⁵ AJ van der Walt *The law of neighbours* (2010) at 276; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman’s The law of property* 6 ed (2019) at 126; *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C).

have to be higher to constitute a nuisance than would be the case in a quieter area.¹⁸⁶ In this regard, there is no general standard. Thus, each use of land that results in a disturbance for neighbours must be judged within the context of its physical location to determine whether the disturbance is reasonable or not.¹⁸⁷ Consequently, those living in residential areas cannot reasonably be expected to endure noise associated with industrial areas¹⁸⁸ or smells associated with agriculture,¹⁸⁹ and similarly, residents of inner-city urban neighbourhoods cannot expect to experience the tranquillity of a rural area.¹⁹⁰

4 4 2 Noise as a nuisance law consideration

Nuisance in the form of noise¹⁹¹ is one of the most likely forms of interference that a neighbour will experience at the hand of short-term guests, given that they ordinarily

¹⁸⁶ AJ van der Walt *The law of neighbours* (2010) at 276; *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C).

¹⁸⁷ AJ van der Walt *The law of neighbours* (2010) at 276; illustrated in *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C).

¹⁸⁸ *Graham v Dittman & Son* 1917 TPD 288 page 291.

¹⁸⁹ *Van der Westhuizen v Du Toit* 1912 CPD 184.

¹⁹⁰ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C); J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 para 175.

¹⁹¹ For sources in noise nuisance in general, see CG van der Merwe *Sakereg* 2 ed (1989) at 187-188; and J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 para 187. See also *Blacker v Carter* 1905 (19) EDC 223; *Graham v Dittman and Son* 1917 TPD 288; *Leith v Port Elizabeth Museum Trustees* 1934 EDL 211; *Prinsloo v Shaw* 1938 AD 570; *Ferreira v Grant* 1941 WLD 186; *Van den Berg v OVS Landbou Ingenieurs (Edms) Bpk* 1956 (4) SA 391 (O); *De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 (4) SA 188 (D); *Die Vereniging van Advokate (TPA) v Moskeplein (Edms) Bpk* 1982 (3) SA 159 (T); *Mosekeplein (Edms) Bpk v Die Vereniging van Advokate (TPA)* 1983 (3) SA 896 (T); *Gien v Gien* 1979 (2) SA 1113 (T); *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw and Others* (CC) 2004 (2) SA 81 (SE); *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C); *Ellaurie v Madrasah Taleemuddeen Islamic Institute and Another* 2021 (2) SA 163 (KZD).

tend to have parties, play loud music, swim, and entertain visitors on the property.¹⁹² In light of the discussion of the reasonable use doctrine, the case of *Gien v Gien* (“*Gien*”)¹⁹³ is relevant, as it illustrates the reasonable use doctrine in the context of noise nuisance.¹⁹⁴ The case concerned constant loud noises emanating from an apparatus that the respondent installed on his farm to keep baboons away from his vegetable garden.¹⁹⁵ Due to the fact that the apparatus ran all day and night, it not only disturbed the sleep of the applicant’s household and employees, but also made his animals restless, to the extent that it seriously disrupted his general farming activities.¹⁹⁶ While the sound emanating from the apparatus could be muffled or turned off at night without impairing its efficacy, the respondent was unwilling to do so as he was of the opinion that he was doing what was necessary to protect his property interest and that he had no obligation to adjust his actions to accommodate his neighbours.¹⁹⁷ The respondent, therefore, argued that his actions amounted to him exercising his ownership rights and that his actions could not be regarded as an unlawful nuisance.¹⁹⁸

In response to the respondent’s contention, the Transvaal Supreme Court held that while ownership is the most complete real right that one can have in relation to property, and while it enables the landowner to do what they like on their property, the absolute entitlement of use of the landowner must be exercised within the limits

¹⁹² CG van der Merwe “Should short-term letting be allowed in sectional title schemes?” 2018 *Journal of South African Law* 507-522 at 510.

¹⁹³ *Gien v Gien* 1979 (2) SA 1113 (T).

¹⁹⁴ *Gien v Gien* 1979 (2) SA 1113 (T).

¹⁹⁵ *Gien v Gien* 1979 (2) SA 1113 (T) page 1122D.

¹⁹⁶ *Gien v Gien* 1979 (2) SA 1113 (T) pages 1122D-1123C.

¹⁹⁷ *Gien v Gien* 1979 (2) SA 1113 (T) page 1119E.

¹⁹⁸ *Gien v Gien* 1979 (2) SA 1113 (T) page 1123H.

imposed by objective law and the rights and entitlements of others.¹⁹⁹ Furthermore, the court stated that when a neighbour's free exercise of their use right comes in conflict with the use right of another neighbour, the law limits both rights by imposing reciprocal obligations on each property owner.²⁰⁰ Each property owner's right extends only so far as the neighbouring property owner is obliged to accept and tolerate the effects of exercising that right.²⁰¹ A property owner's actions amount to an unlawful infringement on their neighbour's rights in the event that they act in a manner that exceeds their obligation not to impose a heavier burden on neighbouring owners than they are obliged to accept.²⁰² In such an instance, a neighbour can obtain an interdict to stop the relevant unlawful activities.²⁰³

In the case of *Gien*, the noise emanating from the respondent's apparatus and the impact it had on the applicants exceeded the limits of what neighbours could be expected to tolerate.²⁰⁴ Consequently, the respondent's use of the apparatus was deemed unlawful, and the court granted the applicant an interdict prohibiting the

¹⁹⁹ *Gien v Gien* 1979 (2) SA 1113 (T) page 1120C-E. A similar sentiment was expressed in *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) pages 106H-107B.

²⁰⁰ *Gien v Gien* 1979 (2) SA 1113 (T) page 1121B, citing *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A).

²⁰¹ *Gien v Gien* 1979 (2) SA 1113 (T) page 1121B, citing *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A).

²⁰² AJ van der Walt *The law of neighbours* (2010) at 275; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 126; *Gien v Gien* 1979 (2) SA 1113 (T) page 1121B-1121C; *Prinsloo v Shaw* 1938 AD 570 page 575.

²⁰³ AJ van der Walt *The law of neighbours* (2010) at 275; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 126; *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 (2) SA 459 (C) pages 463D-465D. See further *PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms) Bpk* 2008 (2) SA 428 (SCA); *Gien v Gien* 1979 (2) SA 1113 (T) page 1121C.

²⁰⁴ *Gien v Gien* 1979 (2) SA 1113 (T) page 1121A.

respondent from using the apparatus in a manner that would result in a nuisance for the neighbours.²⁰⁵ The decision in *Gien* is relevant in the short-term rental context as neighbours of short-term rental properties often complain about the high noise levels emanating from the property.²⁰⁶ Furthermore, *Gien* is of relevance as it highlights that a short-term host's actions may amount to an unlawful infringement on their neighbour's rights if they exceed their obligation not to impose a heavier burden on neighbours than their neighbours are obliged to tolerate.²⁰⁷

Laskey and Another v Showzone CC and Others ("Showzone") is another example illustrating the objective, contextual nature of the reasonableness standard in the noise nuisance context.²⁰⁸ This matter is relevant in the context of noise nuisance, as the applicants lived in an inner-city apartment in Cape Town and experienced loud noises due to daily shows staged at the respondent's theatre restaurant in the adjoining building.²⁰⁹ In determining whether the noise emanating from the respondent's theatre restaurant was indeed excessive, the court highlighted that the applicant's apartment was located in a vibrant inner-city setting, where residents should expect to experience

²⁰⁵ *Gien v Gien* 1979 (2) SA 1113 (T) page 1124A.

²⁰⁶ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) paras 8, 12; AE Gold "Community consequences of Airbnb" (2019) 94 *George Washington Law Review* 1579-1637 at 1594; A Filippas & JJ Horton "The Tragedy of Your Upstairs Neighbors: When Is the Home-Sharing Externality Internalized?" (2017) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443343 [<https://perma.cc/3TUV-5AP5>] 1-53 at 2.

²⁰⁷ *Gien v Gien* 1979 (2) SA 1113 (T) page 1121B-1121C; AJ van der Walt *The law of neighbours* (2010) at 275; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 126; *Prinsloo v Shaw* 1938 AD 570 page 575.

²⁰⁸ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras 19-32, 47. The court in this case applied similar considerations as in *Gien v Gien* 1979 (2) SA 1113 (T).

²⁰⁹ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras 1-3.

higher noise levels.²¹⁰ Furthermore, the court noted that in terms of social utility, the theatre restaurant played an intrinsic role in maintaining a much-desired exuberant inner-city life.²¹¹ In this regard, given the social utility of the restaurant, the court was hesitant to grant an interdict that would unnecessarily curb the respondent's business.²¹² However, the applicants argued that in spite of their willingness to endure a fair level of inner-city noise, the noise emanating from the restaurant was unreasonable within the context.²¹³ The court emphasised that when determining whether a property owner's actions amount to an actionable interference, it is the ordinary physical comfort level of a reasonable person that is considered, rather than that of an overly sensitive person.²¹⁴ The court confirmed that people who move to an inner-city residential area should expect higher noise levels than in other residential areas.²¹⁵

Despite this, people living in inner-city residential areas are not expected to tolerate noise levels that exceed what should reasonably be tolerated, even if the excessive noise levels existed prior to their occupation of the property.²¹⁶ Consequently, the reasonableness standard was applied in *Showzone* with reference to the impact that the noise had on the applicants; the location of the properties; the normal use of property in that area; the time and frequency of the noise; the actual volume of the noise emanating from the respondent's property, the practicality and feasibility of

²¹⁰ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras 19, 25-26, 47.

²¹¹ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras 19, 25-26, 47.

²¹² *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras 40-47.

²¹³ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras 4, 28.

²¹⁴ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras 22, 32, 34.

²¹⁵ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras 19-32, 47.

²¹⁶ AJ van der Walt *The law of neighbours* (2010) at 289.

reducing the noise without having an undue impact on the respondent's business, and the fact that the applicants were not overly sensitive and were prepared to tolerate a fair volume of noise for inner-city living.²¹⁷ Following the application of the reasonableness standard, the court held that the noise emanating from the restaurant was unreasonable due to the fact that the noise materially impacted the comfort of the applicants' "existence" during performances;²¹⁸ the noise exceeded limits stipulated by local authority regulations; and because the respondents could feasibly reduce the negative impact of the noise on neighbours by installing simple and relatively inexpensive insulation.²¹⁹ In light of these factors, taking into account the social utility of the restaurant, the time and frequency of the noise, the urban context, and the balance of convenience, the court exercised its discretion in favour of the applicants and decided to issue the interdict.²²⁰ However, the court suspended the granting of the interdict for a four-month period to give the respondents the opportunity to insulate the restaurant so that the noise emanating from the restaurant would no longer pose a nuisance for the applicants.²²¹ Thus, in this instance, the court balanced the interests of the respondent as a restaurant in the inner-city with that of the applicants as residents in the neighbouring property.²²²

The decision in *Showzone* is of relevance to short-term rentals due to the fact that neighbours of short-term rentals often complain about the high noise levels emanating

²¹⁷ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras 19-30, 47.

²¹⁸ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) para 37.

²¹⁹ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) para 37.

²²⁰ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras 40-47.

²²¹ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras 40-47.

²²² *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C).

from the property.²²³ Short-term rentals have great social utility in the tourism industry and can be largely beneficial in contributing to the vibrance of an urban area.²²⁴ In this regard, this case is particularly important as it highlights the fact that the social utility of a short-term rental and locality of the property should be taken into account when determining whether the nuisance posed should be interdicted.²²⁵ Nonetheless, despite the social utility provided, if a neighbouring property is situated in a residential area, it is likely that the same issues that arose in *Showzone* may be applicable in the relevant short-term rental context. However, in *Showzone*, the noise nuisance occurred regularly for up to two hours an evening, therefore causing Showzone's actions to be more than just an occasional intrusion.²²⁶ In this regard, neighbours of short-term rentals may find the consideration of time and frequency to be a stumbling block in their claim for relief, as it is less likely that the nuisance they experience occurs regularly, at least not as regularly as it the *Showzone* case. However, depending on the guests that stay in the short-term accommodation, the context of the situation may dictate that the interference experienced by the neighbours frequently occurs to the point that their use and enjoyment is materially affected.

²²³ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) paras 8, 12; AE Gold "Community consequences of Airbnb" (2019) 94 *George Washington Law Review* 1579-1637 at 1594; A Filippas & JJ Horton "The Tragedy of Your Upstairs Neighbors: When Is the Home-Sharing Externality Internalized?" (2017) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443343 [<https://perma.cc/3TUV-5AP5>] 1-53 at 2.

²²⁴ GE Lines "Hej, not hej da: regulating Airbnb in the new age of Arizona vacation rentals" (2015) 57 *Arizona Law Review* 1163-1182 at 1167, 1169.

²²⁵ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras 40-47.

²²⁶ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) para 32.

The case of *Ellaurie v Madrasah Taleemuddeen Islamic Institute and Another*. (“*Ellaurie*”)²²⁷ is another relevant judgment regarding noise nuisance in the neighbour law context.²²⁸ In this matter, the respondent’s property housed a teaching institute for Islamic religious studies, a mosque, and accommodation for students and staff.²²⁹ The applicant argued that the Call to Prayer emanating from the respondent’s property invaded his private space, disrupted his sleep and meditation, and argued that such interference impacted his right to use and enjoy his property and resulted in a continuous injury.²³⁰ The court held that the Madrasah’s Call to Prayer interferes with the applicant’s private space, which constitutes a continuous injury.²³¹ Consequently, the KwaZulu-Natal High Court granted an interdict ordering the respondent to ensure that Calls to Prayer made from the respondent’s property are not audible within the buildings on the applicant’s property.²³²

Arguably, when deciding to award the interdict, the court in *Ellaurie* failed to correctly apply the reasonableness standard as outlined in previous nuisance law jurisprudence.²³³ Kotze and Boggenpoel argue that the court could have followed a

²²⁷ *Ellaurie v Madrasah Taleemuddeen Islamic Institute and Another* 2021 (2) SA 163 (KZD).

²²⁸ For a case discussion on the *Ellaurie* judgment, see T Kotze & Z Boggenpoel “Living together as neighbours: Rethinking the reasonableness standard in nuisance law under the Constitution” (2021) 24 *Potchefstroom Electronic Law Journal* 1-34.

²²⁹ *Ellaurie v Madrasah Taleemuddeen Islamic Institute and Another* 2021 (2) SA 163 (KZD) para 3.

²³⁰ *Ellaurie v Madrasah Taleemuddeen Islamic Institute and Another* 2021 (2) SA 163 (KZD) para 6.

²³¹ *Ellaurie v Madrasah Taleemuddeen Islamic Institute and Another* 2021 (2) SA 163 (KZD) para 20.

²³² *Ellaurie v Madrasah Taleemuddeen Islamic Institute and Another* 2021 (2) SA 163 (KZD) para 21.

²³³ If viewed from a constitutional law perspective, the court also failed to adequately balance the applicant’s property rights against the respondent’s right to freedom of religion. However, one should of course be mindful of how the particular cause of action was formulated. See *Garden Cities Incorporated Association Not for Gain v Northpine Islamic Society* 1999 (2) SA 268 (C) where the community’s religious views were disregarded. See also T Kotze & Z Boggenpoel “Living together as

more nuanced approach to reasonableness, weighed up additional factors, and incorporated a human rights dimension to the judgment before coming to a finding.²³⁴ In this regard, I am of the opinion that if the court applied the reasonableness standard correctly, it is unlikely that the applicant's request for an interdict would have succeeded. This is due to the fact that the applicant appeared to be intolerant not only of the noise emanating from the Madrasah, but also of the Islamic beliefs of the respondent, indicating that his intolerance of the noise stemmed not purely from the conduct of the respondent resulting in the purported nuisance but also his own personal beliefs.²³⁵ Arguably, the court failed to take into account the ordinary physical comfort level of a reasonable person rather than an overly sensitive person as the reasonableness standard requires.²³⁶ Consequently, it is unlikely that courts in the future will (or *should*) follow the decision made in *Ellaurie* when determining whether the actions of a neighbour amount to a noise nuisance.²³⁷ Nonetheless, in the event that the court's decision sets a precedent followed by other courts in future, it serves as a warning to short-term hosts that their short-term operations may create a noise nuisance that is actionable, regardless of the reasonable person standard. Furthermore, it indicates a manner in which neighbours can bring a nuisance claim against a short-term host and potentially succeed based on their idea of reasonableness. While this decision is subject to criticism, it nonetheless indicates that

neighbours: Rethinking the reasonableness standard in nuisance law under the Constitution" (2021) 24 *Potchefstroom Electronic Law Journal* 1-34.

²³⁴ T Kotze & Z Boggenpoel "Living together as neighbours: Rethinking the reasonableness standard in nuisance law under the Constitution" (2021) 24 *Potchefstroom Electronic Law Journal* 1-34 at 17, 22.

²³⁵ *Ellaurie v Madrasah Taleemuddeen Islamic Institute and Another* 2021 (2) SA 163 (KZD) paras 4, 5, 9, 11.

²³⁶ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras 19-32, 47.

²³⁷ *Ellaurie v Madrasah Taleemuddeen Islamic Institute and Another* 2021 (2) SA 163 (KZD).

it would be possible for a neighbour to argue that a host's short-term rental operations impact their right to use and enjoy their property. Specifically, this case signifies that neighbours could potentially succeed in arguing that noise emitted from neighbouring short-term rentals invade their private space and disrupt their sleep and meditation time. Importantly, a neighbour would need to prove the frequency of such noise, as in this case, the sounds emanating from the mosque occurred on a daily basis. However, given that it is unlikely that this decision will be followed, it would be advisable for neighbours to rather rely on the general principles for an interdict as depicted in *Gien* and *Laskey* above.

In addition to noise as a nuisance law factor, malice is another factor that is, or could be, relevant in the short-term context. Consequently, the following section explores malice as a consideration in nuisance law to determine its implications regarding courts granting interdicts relating to short-term rental operations.

4 4 3 Malice as a consideration in nuisance law

In relation to the consideration of malice as a contextual nuisance law factor, the *Holland* decision is relevant because it established that the presence of malice was not required to succeed with an action based on nuisance.²³⁸ Although malice is not a requirement for unlawfulness in neighbour law, purely malicious use of land without any reasonable benefit for the user could be unlawful if it was intended to harm neighbours.²³⁹ In *Kirsch*, the court took into account the subjective intention of the

²³⁸ *Holland v Scott* (1881-1882) 2 EDC 307 page 331.

²³⁹ AJ van der Walt *The law of neighbours* (2010) at 282; AJ van der Walt "Sport and nuisance law" (2010) 127 *South African Law Journal* 274-303 at 282; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 133-134. See also *Kirsch v Pincus* 1927 TPD 199.

defendant when determining the reasonableness of the defendant's actions.²⁴⁰ In *Kirsch*, the defendant had maliciously planted trees to negatively affect the neighbour's business which led to the court finding that the respondent's actions were unreasonable under the circumstances.²⁴¹ This case is relevant because it indicates that while malice is not a requirement for unlawfulness, it is nonetheless a factor that could render an otherwise (apparently) lawful use of land unreasonable.²⁴² This legal position is relevant in the short-term rental context because it is possible that short-term hosts may act in a malicious manner when conducting their short-term operations. While it is most likely that property owners conduct short-term rental operations to generate income, it is nonetheless possible that hosts intentionally frustrate their neighbour's use and enjoyment of their property or simply show disregard for their right to use and enjoyment of their property. This intentional, disrespectful behaviour could present in short-term hosts allowing their guests to park in their neighbours' driveways or have parties late at night with no consideration given to neighbours.²⁴³ Given the recent trend of individuals purchasing properties to specifically generate income through short-term rentals, it could be possible that a property owner maliciously creates nuisances that make it unpleasant for neighbours to live there in hopes that they will sell their property. In this regard, a particularly

²⁴⁰ AJ van der Walt *The law of neighbours* (2010) at 284; AJ van der Walt "Sport and nuisance law" (2010) 127 *South African Law Journal* 274-303 at 282. See *Kirsch v Pincus* 1927 TPD 199.

²⁴¹ *Kirsch v Pincus* 1927 TPD 199 201 204.

²⁴² AJ van der Walt *The law of neighbours* (2010) at 284; AJ van der Walt "Sport and nuisance law" (2010) 127 *South African Law Journal* 274-303 at 282; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 133-134; *Gien v Gien* 1979 (2) SA 1113 (T) page 1121E; See *Mayor of Bradford v Pickles* [1895] AC 587 (HL) and *Kirsch v Pincus* 1927 TPD 199.

²⁴³ CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 510.

intentional form of malice could be if the short-term host desires to purchase the neighbouring properties to use them to conduct additional short-term rentals and creates nuisances to drive neighbouring owners out of the area.

Apart from malice, the threat of harm principle is another nuisance law factor that is relevant in the short-term context. Consequently, the following section explores the threat of harm principle to determine its implications for courts when granting an interdict regarding short-term rental operations.

4 4 4 Threat of danger, personal injury, and damage to property as a consideration in nuisance law

An important factor in the short-term rental context is the threat of danger, personal injury, and damage to property in terms of nuisance law. The *Dorland and Another v Smits* (“*Dorland*”)²⁴⁴ judgment reflects a conflict between neighbours regarding nuisance allegations in relation to a threat of danger, personal injury, and damage to property. The applicant in *Dorland* argued that the electrified fence constituted a nuisance because of the threat of danger it posed to them when using their garden.²⁴⁵ However, it should be noted that the respondent had recently suffered a burglary which

²⁴⁴ *Dorland and Another v Smits* 2002 (3) All SA 691 (C). The applicants argued that the electrified security fence that the respondent had attached to the common wall between their properties was an eyesore negatively impacting the aesthetic appeal of her house and garden, and therefore requested an interdict to have it removed. In *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) the court took a somewhat contradictory stance by regarding a building that had a negative aesthetic to constitute a nuisance due to how its aesthetics affected neighbours visual enjoyment of their natural surroundings. See JC Knobel “Inbreukmaking op die estetiese as oorlas” (2003) 66 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 500-505; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman’s The law of property* 6 ed (2019) at 126.

²⁴⁵ *Dorland and Another v Smits* 2002 (3) All SA 691 (C) page 700.

resulted in her having the electrified fence installed to protect her property.²⁴⁶ Consequently, the court had to determine whether the respondent's conduct exceeded what a neighbour can reasonably and objectively be expected to tolerate.²⁴⁷ The court weighed up the gravity of harm suffered by the applicant against the utility of the conduct-causing harm and concluded that the respondent's electric fence did not constitute an unreasonable nuisance.²⁴⁸ In coming to this conclusion, the court took into account factors such as the nature of the neighbourhood, the fact that the neighbourhood is not crime-free, and that the respondent had a legitimate interest to protect her property and family, as opposed to the applicant's gardening interest.²⁴⁹

This case is relevant in indicating that conduct or elements that result in the threat of danger do not *per se* constitute a nuisance.²⁵⁰ It is important to note that while danger or potential danger emanating from one property to a neighbouring property *may* constitute a nuisance, the court must determine whether the respondent's actions are unreasonable in the circumstances in order for it to be unlawful.²⁵¹ In this regard, the decision in *Dorland* is relevant to the short-term rental context as it is often argued that short-term rentals bring a threat of danger due to unfamiliar individuals passing through the neighbourhood. The presence of unfamiliar individuals could be a safety hazard for neighbours and the larger community. This potentially exposes neighbours

²⁴⁶ *Dorland and Another v Smits* 2002 (3) All SA 691 (C) page 700.

²⁴⁷ *Dorland and Another v Smits* 2002 (3) All SA 691 (C) page 700; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 127.

²⁴⁸ *Dorland and Another v Smits* 2002 (3) All SA 691 (C) pages 700-701.

²⁴⁹ *Dorland and Another v Smits* 2002 (3) All SA 691 (C) page 700.

²⁵⁰ *Dorland and Another v Smit* 2002 (3) All SA 691 (C) page 699; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 127.

²⁵¹ *Dorland and Another v Smits* 2002 (3) All SA 691 (C) page 699; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 127.

to harm in the form of theft, damage to property, and physical injury.²⁵² Consequently, the presence of a threat of danger posed by short-term guests is an important consideration that courts may have to take into account when determining whether an Airbnb host's conduct amounts to a nuisance.

Another decision relevant to the threat of danger consideration in nuisance law is that of *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* (“*Allaclas*”).²⁵³ In *Allaclas*, the applicants were property owners living on a golf course that sought an interdict suspending the use of the sixth hole of the golf course.²⁵⁴ They argued that the high incidence of stray golf balls being hit onto the residential property posed a serious danger for residents and constituted a nuisance.²⁵⁵ Initially, the court *a quo* decided that the applicants, as landowners of a property adjoining the golf course, had to tolerate a certain level of intrusion arising from stray golf balls and also had to take steps to alleviate and minimise the risk of stray golf balls landing on their property.²⁵⁶ Furthermore, the court highlighted that the respondents indicated a willingness to take reasonable measures to reduce the risk of damage from stray golf

²⁵² *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) paras 8, 12; AE Gold “Community consequences of Airbnb” (2019) 94 *George Washington Law Review* 1579-1637 at 1594; A Filippas & JJ Horton “The Tragedy of Your Upstairs Neighbors: When Is the Home-Sharing Externality Internalized?” (2017) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443343 [<https://perma.cc/3TUV-5AP5>] 1-53 at 2.

²⁵³ *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* 2008 (3) SA 134 (SCA).

²⁵⁴ *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* 2008 (3) SA 134 (SCA) para 7.

²⁵⁵ *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* 2008 (3) SA 134 (SCA) para 7.

²⁵⁶ *Allaclas Investments (Pty) Ltd v Milnerton Golf Club (Stelzner and Others Intervening)* 2007 (2) SA 40 (C) paras 23-24.

balls to the applicants' property.²⁵⁷ In this regard, the court noted that the applicants were not displaying neighbourly tolerance and that their attitude seemed to indicate that the responsibility of preventing the stray golf balls rested solely on the respondents.²⁵⁸

The Supreme Court of Appeal, in turn, held that despite the applicants' choice to live on a golf estate and the fact that the respondent's use of its land for a golf course was not unusual, the high incidence of stray golf balls landing in the applicants' residential properties nonetheless posed a serious danger for the inhabitants and consequently constituted a nuisance.²⁵⁹ Furthermore, the Supreme Court of Appeal held that the applicants had been subject to unreasonably high levels of intrusions by the stray golf balls hitting their properties in such a frequent and dangerous manner that their ability to use their properties in a normal manner was significantly impacted.²⁶⁰ Accordingly, the court granted the applicants an interdict prohibiting the respondents from using the sixth hole of the golf course until the respondents implemented a system of barriers near the tea-off position to prevent a repetition of the disturbance experienced by the applicants.²⁶¹

²⁵⁷ *Allaclas Investments (Pty) Ltd v Milnerton Golf Club (Stelzner and Others Intervening)* 2007 (2) SA 40 (C) para 23.

²⁵⁸ *Allaclas Investments (Pty) Ltd v Milnerton Golf Club (Stelzner and Others Intervening)* 2007 (2) SA 40 (C) para 23.

²⁵⁹ *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* 2008 (3) SA 134 (SCA) paras 16-21.

²⁶⁰ *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* 2008 (3) SA 134 (SCA) paras 7, 18.

²⁶¹ *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* 2008 (3) SA 134 (SCA) para 25.

The *Allaclas* decision is noteworthy because the court took into account the real and urgent threat of personal injury and serious damage to property that the stray golf balls caused, which extended beyond an annoyance that a neighbour may be required to tolerate.²⁶² This consideration is relevant in the short-term rental context as neighbours of short-term rentals often complain of potential security risks and potential damage to property.²⁶³ In this regard, the concerns raised by the applicant in the *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* (“*Nicholl*”)²⁶⁴ case are of relevance, as they indicate the potential harm that short-term guests may cause.²⁶⁵ Specifically, short-term guests may cause damage to the property through misuse of the common property, such as a pool in the instance of short-term rental operations within an apartment block or gated-community. Additionally, the influx of unidentified individuals could be argued to be a threat to neighbours safety as individuals masquerading as guests could physically harm neighbours or steal from them.

²⁶² *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* 2008 (3) SA 134 (SCA) para 10.

²⁶³ AE Gold “Community consequences of Airbnb” (2019) 94 *George Washington Law Review* 1579-1637 at 1594; A Filippas & JJ Horton “The Tragedy of Your Upstairs Neighbors: When Is the Home-Sharing Externality Internalized?” (2017) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443343 [<https://perma.cc/3TUV-5AP5>] 1-53 at 2.

²⁶⁴ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ). While this case was decided in the context of sectional titles, it is still valuable to consider the decision due to its exploration of Airbnb in South Africa and the potential impacts that short-term rentals can have on neighbours. This decision provides an excellent guideline of factors that courts should take into account when determining the impact an Airbnb listing may have on neighbouring property owners. Furthermore, the factors potential impact of short-term rentals on neighbours as discussed in *Nicholl* serve as valuable factors to be considered in the event that the South African government regulates short-term rental operations in the country. See section 4 5 1 below for a discussion of this case.

²⁶⁵ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 7, 8, and 12.

However, it is not guaranteed that these incidents will occur, but rather that these are mere possibilities. In this regard, the situation differs from *Allaclas* because there is arguably no real and urgent threat of personal injury and serious damage to property. In this regard, it may be somewhat challenging for a neighbour to rely on threat of danger, personal injury, and damage to property as a justification for obtaining an interdict. However, if they are able to prove prior negative incidents that have occurred that pose a safety risk to them or other interested parties, it is possible that a court would grant an interdict in their favour.

Apart from the threat of harm, another factor that is relevant in the short-term context is the coming to the nuisance principle. Consequently, the following section explores the coming to the nuisance principle to determine its implications for courts when granting an interdict relating to a host's short-term rental operations.

4 4 5 “Coming to the nuisance” as a consideration in nuisance law

In terms of the coming into nuisance principle, when courts decide whether to grant relief for nuisance interferences, they will consider whether the applicant voluntarily occupied the property in the vicinity of the pre-existing nuisance of which they were aware.²⁶⁶ In relation to the “coming into nuisance”²⁶⁷ principle, the court *a quo*'s

²⁶⁶ AJ van der Walt *The law of neighbours* (2010) at 288-290.

²⁶⁷ *Miller v Jackson* 1977 QB 966 (CA); *Du Toit v De Bot, Du Toit v Zuidmeer* 1883 (2) SC 213; *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras 19-32, 47; CG van der Merwe & M Blumberg “For whom the bells toll – A solution in neighbour law” (1998) 9 *Stellenbosch Law Review* 356–357; AJ van der Walt *The law of neighbours* (2010) at 288-290; CG van der Merwe “Things” in WA Joubert & JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) 3-347 para 145. See J Church & J Church “Nuisance” in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 para 175-181; J Booysen *A critical analysis of the financial and social obligations imposed on sectional title owners in sectional title schemes, as well as their enforcement* (LLD dissertation, University of Stellenbosch 2014) at 201.

decision in *Allaclas Investments (Pty) Ltd v Milnerton Golf Club (Stelzner and Others Intervening)*²⁶⁸ is relevant as the court took the principle into consideration when deciding whether to grant an interdict in favour of the applicant.²⁶⁹ As discussed above, the applicants had made a decision to purchase a house on a golf estate and then complained of the high incidence of stray golf balls landing on their property.²⁷⁰ In this regard, one might expect the court to be reluctant to grant an interdict because the applicants made the conscious choice to live in an area where golf balls could be expected to often land on the applicant's property.²⁷¹ However, the court interestingly noted that while the coming to the nuisance was a relevant factor to be taken into account in assessing the reasonableness of the respondent's actions, the fact that the applicant came to the nuisance can never be a decisive factor.²⁷²

Additionally, in relation to the coming to the nuisance principle,²⁷³ the decision in *Showzone* is also of importance because it confirmed that while people who move into

²⁶⁸ *Allaclas Investments (Pty) Ltd v Milnerton Golf Club (Stelzner and Others Intervening)* 2007 (2) SA 40 (C).

²⁶⁹ *Allaclas Investments (Pty) Ltd v Milnerton Golf Club (Stelzner and Others Intervening)* 2007 (2) SA 40 (C) paras 15-16.

²⁷⁰ *Allaclas Investments (Pty) Ltd v Milnerton Golf Club (Stelzner and Others Intervening)* 2007 (2) SA 40 (C) paras 15-16.

²⁷¹ *Allaclas Investments (Pty) Ltd v Milnerton Golf Club (Stelzner and Others Intervening)* 2007 (2) SA 40 (C) paras 15-16; AJ van der Walt *The law of neighbours* (2010) at 289-290.

²⁷² *Allaclas Investments (Pty) Ltd v Milnerton Golf Club (Stelzner and Others Intervening)* 2007 (2) SA 40 (C) paras 16.

²⁷³ *Miller v Jackson* 1977 QB 966 (CA); *Du Toit v De Bot, Du Toit v Zuidmeer* 1883 (2) SC 213; *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras 19-32, 47; *Allaclas Investments (Pty) Ltd v Milnerton Golf Club (Stelzner and Others Intervening)* 2007 (2) SA 40 (C) paras 15-16; CG van der Merwe & M Blumberg "For whom the bells toll – A solution in neighbour law" (1998) 9 *Stellenbosch Law Review* 356–357; AJ van der Walt *The law of neighbours* (2010) at 288-290; CG van der Merwe "Things" in WA Joubert & JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) 3-347 para 145. See J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms

an inner-city residential property should expect higher noise levels than elsewhere, they should not have to endure noise and other disturbances that exceed what is reasonably expected to be tolerated simply due to the fact that they arrived at the property with the nuisance-creating activity already in place.²⁷⁴

The decisions in *Allaclas* and *Showzone* are relevant to the short-term rental legal position, as some neighbours may have moved into a property aware that their neighbour's property was being used as short-term rental accommodation. However, the nuisances these neighbours experience may be excessive and extend further than what they foresaw when choosing a property in the close vicinity of short-term rental accommodation. In this regard, neighbours foreseeing a potential nuisance when deciding to reside near a short-term rental property does not automatically justify them having to accept the nuisance or the extent to which the nuisance exists.²⁷⁵

In terms of the reasonableness enquiry, the factors discussed above are crucial considerations that courts should take into account when determining whether the conduct of a neighbouring short-term host is unreasonable and consequently unlawful. While nuisance is determined on a contextual basis, the factors discussed above should be considered by courts when determining whether a nuisance arising from short-term operations is actionable.

In order to better understand the remedies available to neighbours of Airbnb listings specifically, the following section will explore the *Nicholl* decision, which is the most

(eds) *The law of South Africa* vol 19 2 ed (2006) 115-145 paras 175-181; J Booysen *A critical analysis of the financial and social obligations imposed on sectional title owners in sectional title schemes, as well as their enforcement* (LLD dissertation, University of Stellenbosch 2014) at 201.

²⁷⁴ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras 16-28.

²⁷⁵ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras 16-28, AJ van der Walt *The law of neighbours* (2010) at 289.

relevant case regarding short-term rentals in the Airbnb context in South Africa. This case study will consider the factors the court took into account in the instance of a nuisance caused by Airbnb's operations, as well as the remedies available to neighbours of an Airbnb listing.

4 5 The implications of neighbour law in the Airbnb context

4 5 1 Nicholl: An Airbnb case study

The case of *Body Corporate of the Paddock Sectional Title Scheme v Nicholl*²⁷⁶ is worth examining as it is the most recent South African case that explores the interplay between Airbnb's operations and the principles of neighbour law.²⁷⁷ In *Nicholl*, the applicant sought a final interdict, ordering that the respondent cease leasing her property for a period of shorter than six months as she had been listing her sectional title unit as a short-term rental on Airbnb.²⁷⁸ After concluding that the applicant had proven a clear right, with injury reasonably apprehended and no other satisfactory remedy being available to the applicant, the court granted the interdict, ordering the respondent to cease leasing her sectional title unit for a period shorter than six months.²⁷⁹

²⁷⁶ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ). Although this case was decided in the sectional title context, it is worthwhile to consider the decision because of its exploration of Airbnb's operations in South Africa, with the particular focus on how short-term rentals can affect neighbours.

²⁷⁷ For a case discussion on the *Nicholl* judgment, see CG van der Merwe "Can a conduct rule banning short-term letting for less than six months in a residential sectional title scheme be declared invalid because it constitutes commercial use of the unit, and then be enforced by a final interdict and declared constitutional?" 2021 *Journal of South African Law* 160-171.

²⁷⁸ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) paras 1, 5.

²⁷⁹ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) paras 61, 78.

The court considered the following concerns of the applicant when making its decision: (a) Short-term leasing of units creates a real security risk to residents (neighbours) in the sectional title scheme;²⁸⁰ (b) with short-term leasing, any short-term guest is allowed to move freely within the complex, which could lead to unauthorised persons masquerading as short-term tenants to gain entry to the complex and commit crimes such as theft, damage to property or injury to residents of the complex;²⁸¹ (c) short-term leasing could result in short-term tenants (such as Airbnb guests) utilising the unit for nefarious conduct;²⁸² (d) short-term leasing results in the body corporate being unable to validate the identity of all tenants entering and exiting the complex;²⁸³ (e) short-term leasing leads to the body corporate not being aware of who is in the property owner's unit at any given time;²⁸⁴ (f) short-term leasing results in short-term tenants having access to the common property like the swimming pool that could be subject to abuse, which would result in increased levies to all property owners of units;²⁸⁵ (g) short-term tenants, who do not have a copy of the scheme's conduct rules, do not necessarily adhere to the rules and consequently compromises the body corporate's ability to enforce the rules amongst all unit owners;²⁸⁶ (h) having short-term tenants increases disruption within the complex where residents live in close proximity to one another;²⁸⁷ and (i) due to the fact that

²⁸⁰ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 7.

²⁸¹ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) paras 8, 12.

²⁸² *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 7.

²⁸³ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 8.

²⁸⁴ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 8.

²⁸⁵ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) paras 8, 10.

²⁸⁶ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) paras 8, 9.

²⁸⁷ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 13.

the unit owner does not reside in her unit, she is unable to grasp the severity of the risks she creates through operating her unit as an Airbnb.²⁸⁸

When addressing the applicant's above-mentioned concerns, the court stated that the concerns are “very serious and very real”.²⁸⁹ However, the court did not address each concern individually and appears to have taken the concerns at face value, accepting them as valid concerns without exploring the perspective of the respondent in relation to each concern. In this regard, I am of the opinion that the court did not sufficiently weigh up the respondent's property rights with the applicant's concerns. Rather, the judgment focused largely on the applicant's concerns, the provisions of the Sectional Title Schemes Management Act 8 of 2011 (“ST SMA”), and the sectional title scheme's Conduct Rules, but failed to give adequate consideration to the respondent's property rights.

Importantly, the court also failed to consider the reasonableness test when deciding that the respondent should cease her short-term rental operations. Additionally, the court dismissed the respondent's argument that the Conduct Rules infringed her property right entrenched in section 25 of the Constitution without conducting a satisfactory section 25 analysis. Instead of conducting a full section 25 analysis considering the *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*; *First National Bank of SA Ltd t/a Wesbank v Minister of*

²⁸⁸ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 14. It is important to note that only some of the factors listed by the court are applicable to short-term rentals in general, because the focus of this case was short-term rentals in a sectional title scheme. Therefore, some of the factors mentioned in this case will not be appropriate as considerations for short-term rentals in a stand-alone house for example.

²⁸⁹ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 8.

*Finance*²⁹⁰ questions, and considering the principles that stemmed from the judgments that followed, the court simply stated that a section 25 deprivation would need to constitute more than just interference with a right incidental to ownership²⁹¹ and noted that a “substantial interference”²⁹² should be considered in a context-specific manner.²⁹³ In this regard, the court concluded that the respondent’s interference could not be regarded as a substantial interference.²⁹⁴ Subsequently, the court held that none of the scheme’s Conduct Rules deprived the respondent of her right to property, and there had been no substantial interference with her property entitlements.²⁹⁵

On the facts, in conducting short-term rental operations, the respondent contravened numerous provisions of the Conduct Rules, the STSMA, and the Regulations thereto.²⁹⁶ The respondent received a written warning from the applicant to desist from using her unit as an Airbnb, which she disregarded and continued to use her unit for these purposes.²⁹⁷ Despite the respondent’s disregard for the applicable provisions of the sectional title’s Conduct Rules and the respondent’s blatant contravention of the rules, I submit that the court’s decision to grant the final interdict was not justified. I am of the opinion that, if anything, the applicant should have applied for a temporary interdict as this would give the respondent the

²⁹⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

²⁹¹ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and Others* 2005 (1) SA 530 (CC).

²⁹² *Offit Enterprises (Pty) Ltd v Coega Development Corporation Ltd* 2011 (1) SA 293 (CC).

²⁹³ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) paras 70-78.

²⁹⁴ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) paras 7-78.

²⁹⁵ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 78.

²⁹⁶ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) paras 15-16.

²⁹⁷ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 20.

opportunity to adjust her short-term operations or engage with the scheme's body corporate to find an equitable way forward. Van der Merwe argues that it was inappropriate for the applicant to apply for a final interdict.²⁹⁸ In this regard, I concur with Van der Merwe.²⁹⁹ He submits that a declaratory order whereby the court states that the respondent ceases to lease her unit for less than six months would have been a more appropriate solution.³⁰⁰ In essence, the outcome of the final interdict granted by the court has the same effect that Van der Merwe's declaratory order approach would have had. In conclusion, the judgment was problematic from the outset, given that an application for a final interdict was brought by the applicant. From my perspective, the manner in which the court addressed the applicant's concerns in comparison to the respondent's concerns was flawed and led to a questionable outcome whereby the court granted the final interdict as per the applicant's request.

While some of the factors the court took into account in *Nicholl* are relevant specifically to sectional title schemes, many of the factors are also relevant in the context of "next-door neighbours".³⁰¹ The concerns outlined by the applicant in the

²⁹⁸ CG van der Merwe "Can a conduct rule banning short-term letting for less than six months in a residential sectional title scheme be declared invalid because it constitutes commercial use of the unit, and then be enforced by a final interdict and declared constitutional?" 2021 *Journal of South African Law* 160-171 at 168.

²⁹⁹ CG van der Merwe "Can a conduct rule banning short-term letting for less than six months in a residential sectional title scheme be declared invalid because it constitutes commercial use of the unit, and then be enforced by a final interdict and declared constitutional?" 2021 *Journal of South African Law* 160-171 at 168.

³⁰⁰ CG van der Merwe "Can a conduct rule banning short-term letting for less than six months in a residential sectional title scheme be declared invalid because it constitutes commercial use of the unit, and then be enforced by a final interdict and declared constitutional?" 2021 *Journal of South African Law* 160-171 at 168.

³⁰¹ Next-door neighbours in this context can be regarded as neighbours adjacent to the short-term rental property.

Nicholl case provide a clear indication of some of the challenges that neighbours of short-term rentals may encounter. The applicant's concerns create an excellent guideline of factors that courts should consider when determining the impact that a short-term rental property may have on neighbouring property owners. In this regard, I argue that the applicant's concerns raised in this case and the general factors considered under the reasonableness test should form the basis of a neighbour law enquiry in the short-term rental context.

The *Nicholl* case is particularly relevant as it highlights the neighbour's safety concerns associated with short-term rentals. Given the various security concerns listed, neighbours of short-term rentals may seek an interdict to prevent or terminate neighbouring property owners from using their property as short-term accommodation because it poses safety risks to neighbours. However, due to the contextual nature of the nuisance test, it is unclear in what instance neighbours of short-term rentals will have a successful claim in terms of neighbour law.

While it is unclear in which instances neighbours will have a claim in terms of neighbour law, the Airbnb terms of service do provide guidance as to who will be liable in the instance of a neighbour law interference. Consequently, the following section will explore the Airbnb host-guest agreement to determine whether liability falls on the Airbnb host or guest. This discussion is relevant in clarifying when an Airbnb guest may be liable for the nuisance caused and in which instance the Airbnb host, as the property owner, may face liability for the nuisance caused.

4 5 2 The impact of Airbnb terms of service on host and guest's rights and obligations
Provided there is no separate agreement between the parties, the contract binding the parties in the Airbnb context would be Airbnb's terms of service, to which both the host

and guest contractually bound themselves.³⁰² Airbnb guests acquire various rights and obligations through the contract they conclude in terms of the Airbnb application.³⁰³

Section 11(1) of Airbnb's terms of service provides the following:

"As a Guest, you are responsible for leaving the Accommodation (including any personal or other property located at the Accommodation) in the condition it was in when you arrived. You are responsible for your own acts and omissions and are also responsible for the acts and omissions of any individuals whom you invite to, or otherwise provide access to, the Accommodation, excluding the Host (and the individuals the Host invites to the Accommodation, if applicable)."³⁰⁴

This provision places most of the responsibility on the Airbnb guest to uphold the property and can be interpreted to mean that Airbnb guests will be responsible for the nuisance they create for neighbours. However, despite a claim against an Airbnb guest being possible in theory, it is more likely that a neighbour would bring an action in neighbour law against the Airbnb host. This is due to the fact that it is the host's decision to rent out their property on Airbnb, which may result in an influx of Airbnb guests coming and going, causing a nuisance. Therefore, it would be challenging to institute an action against the guests as they are ever-changing and do not stay at the property for an extended period of time. In this regard, a neighbour will likely bring a claim against the host because it would be challenging to hold the guests individually liable. Moreover, it may be argued that the owner of the property should be held liable for activities occurring on their property. It is worth noting that if Airbnb guests are

³⁰² Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 09-01-2021).

³⁰³ Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 25-08-2020).

³⁰⁴ Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 25-08-2020).

regarded as tenants and Airbnb hosts are regarded as landlords, they would have different rights and obligations in terms of property law, which may create obligations for them in terms of landlord-tenant law.³⁰⁵ Irrespective of whether hosts and guests are regarded as landlords and tenants, they are still regarded as neighbours and will be subject to neighbour law.

Due to the nature of the Airbnb construct, one would be tempted to assume some vicarious liability³⁰⁶ on the host's part in the event that guests cause a nuisance for neighbours. For example, in *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh*,³⁰⁷ the Supreme Court of Appeal justified a clause in the estate's conduct rules stating that every member of the homeowner's association who invited any third-party into the estate automatically becomes liable for any act or omission caused by the third-party.³⁰⁸ However, Sonnekus convincingly argues that the employer-employee relationship cannot be equated with the relationship between owner/landlord, as guests cannot be classified as employees of the owner/landlord.³⁰⁹ Thus, the principles of vicarious liability arguably do not provide a substantial basis for

³⁰⁵ See discussion of these property law rights and obligations at chapter 3, section 3.3.

³⁰⁶ JM Potgieter, L Steynberg & TB Floyd *Visser & Potgieter Law of damages* 3 ed (2012) at 341: Vicarious liability refers to instances where a delict is committed by an individual in the course of their relationship with another person who is responsible for their conduct.

³⁰⁷ *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh* 2019 (4) SA 471 (SCA). See C Harris "How far do the powers of the homeowner's association stretch?" (01-11-2020) *De Rebus* <<http://www.derebus.org.za/how-far-do-the-powers-of-the-homeowners-association-stretch/>> (accessed 12-02-2020).

³⁰⁸ *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh* 2019 (4) SA 471 (SCA) para 19. See C Harris "How far do the powers of the homeowner's association stretch?" (01-11-2020) *De Rebus* <<http://www.derebus.org.za/how-far-do-the-powers-of-the-homeowners-association-stretch/>> (accessed 12-02-2020).

³⁰⁹ JC Sonnekus "Rights of a block shareholder" in JC Sonnekus (ed) *Sectional titles, share blocks and time-sharing* (2003) vol 2 at 4-12(17).

why the owner/landlord should be responsible for the wrongful conduct of guests.³¹⁰ Furthermore, Sonnekus contends that if South African law does not hold a parent vicariously liable for delictual conduct of minor children, it does not logically follow that an owner/landlord be vicariously liable for the consequences of an independent third-party guest.³¹¹

In the Airbnb context, the Airbnb guest is an adult who enters into a contract and wilfully undertakes the responsibilities that Airbnb's host-guest agreement imputes on them. Given the nature of Airbnb, it is generally individual property owners seeking to generate an income off their property by using their property as short-term rental accommodation.³¹² The typical Airbnb host is not a commercial entity that has deep pockets, but rather an ordinary citizen who most likely is still paying off their mortgage bond on the property.³¹³ In this regard, imputing vicarious liability on the host-guest relationship would be unduly burdensome on ordinary property owners who do not have the means to fund the negligent behaviour of their guests. Imputing vicarious liability on hosts has the potential to create a dangerous situation whereby individuals could make a booking to stay at an Airbnb with the intention of conducting harmful activities such as theft or destruction of the neighbour's property, knowing that they would escape liability because the host would be responsible for their actions. Furthermore, the applicability of vicarious liability in the short-term rental context will

³¹⁰ JC Sonnekus "Rights of a block shareholder" in JC Sonnekus (ed) *Sectional titles, share blocks and time-sharing* (2003) vol 2 at 4-12(17).

³¹¹ JC Sonnekus "Rights of a block shareholder" in JC Sonnekus (ed) *Sectional titles, share blocks and time-sharing* (2003) vol 2 at 4-12(17).

³¹² *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 23.

³¹³ In *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 22, the respondent alleged that she had begun advertising her sectional title unit on Airbnb to generate an income stream to service the mortgage bond registered over the property.

dissuade property owners from using their properties as short-term rental accommodation. This could be harmful to the South African tourism industry that has benefited from Airbnb's operations. Based on this argument, it makes sense that an Airbnb host should not be held vicariously liable for the transgressions of Airbnb guests while residing on the property.

However, in appropriate circumstances, a landowner may be liable for nuisances they created and also for nuisances created by another.³¹⁴ Such liability is generally based on the entitlement of control conferred on the property owner by the right of ownership³¹⁵ or the awareness of the nuisance and their failure to take reasonably practicable steps to prevent or mitigate the harm.³¹⁶ Airbnb's terms of service protects the Airbnb host in this regard.³¹⁷ Airbnb's terms of service includes a clause indicating that guests will be liable for their acts and omissions and any acts and omissions of people they brought onto the property.³¹⁸ While this protects the Airbnb host in terms

³¹⁴ G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 130; *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A).

³¹⁵ *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) page 208; *Three Rivers Ratepayers Association v Northern Metropolitan Local Council* 2000 (4) SA 377 (W) pages 381J-382A; *Flax v Murphy* 1991 (4) SA 58 (W) page 63; *Die Vereniging van Advokate (TPA) en Andere v Moskeeplein (Edms) Bpk en Andere* 1982 (3) SA 159 (T) page 166; JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-269 at 171.

³¹⁶ G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 130. See *Three Rivers Ratepayers Association v Northern Metropolitan Local Council* 2000 (4) SA 377 (W) pages 380G-H, 382A-B; *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A). See *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) where the property owner was held responsible for the actions of his occupiers. In this case, the property owner was liable for the occupiers' failure to pay for the water and electricity they used.

³¹⁷ Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 27-08-2020).

³¹⁸ Airbnb official website "Terms of service" (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 27-08-2020).

of property damage, it may not protect the host in the event that neighbours bring a nuisance claim due to the overall impact of the frequent flow of Airbnb guests. In this regard, it would be beneficial for neighbours if Airbnb guests are regarded as tenants in terms of landlord-tenant law. It would be beneficial in that, as tenants, Airbnb guests would have an obligation in terms of their lease agreement, to refrain from causing a nuisance and abide by the principles of neighbour law.³¹⁹ This classification would also provide protection for Airbnb hosts if they experience nuisance claims from neighbouring property owners as they would be able to hold the guests liable in their capacity as tenants who have an obligation not to create a nuisance.

4 6 Conclusion

This chapter explored the impact of short-term rentals in the neighbour law context, with the focus being on nuisance law. In this regard, the categories of nuisance law, namely (a) statutory nuisance; (b) public nuisance; and (c) private nuisance were explored. Subsequently, it was concluded that while it is possible for public nuisance to be applicable in the short-term rental context, the most relevant category of nuisance law is private nuisance.

To this end, the chapter focused on private nuisance, which led to the discussion on nuisance in the narrow and wide sense. In relation to nuisance law in the narrow sense, the chapter concluded that neighbours of short-term rentals could obtain an interdict against a neighbouring short-term host to prevent, terminate, or mitigate the nuisance caused by the neighbours short-term rental operations. In this regard, it was concluded that the neighbour would need to meet the general requirements of an application for an interdict, namely: (a) a clear right; (b) injury reasonably apprehended

³¹⁹ SI Mohamed *Landlord & tenant – rights & obligations* (2019) at 83.

or actually suffered; and (c) the absence of an alternative, effective protection by any other remedy.

Subsequently, nuisance in the wide sense was discussed in relation to disturbing actions or omissions that cause property damage. In terms of nuisance in the wide sense, the relevant remedy that would be available to a neighbour would be the *actio legis Aquiliae*. In this regard, the requirements for a compensation claim under the *actio legis Aquiliae* were explored, whereby it was concluded that it is possible for a neighbour to bring a compensation claim founded in nuisance law without proving fault for the infringement of their property rights. Consequently, in the instance that a short-term host's conduct amounts to a nuisance, the neighbouring property owner may have a claim for damages in terms of nuisance in the wide sense and/or be granted an interdict by the court in terms of nuisance in the narrow sense.³²⁰

Subsequent to the exploration of nuisance in the narrow and wide sense, the normal use and reasonableness standard of nuisance law were considered. In this regard, the chapter explored instances where neighbours are expected to tolerate reasonable nuisances in the form of smoke, noise, and other emissions. Additionally, the chapter considered instances where a neighbour's actions transgress the limit of reasonableness. Subsequently, the contextual nature of the reasonableness test was examined, exploring the various factors courts have taken into account previously when determining whether a property owner's conduct is reasonable or unlawful and constitutes a nuisance.

³²⁰ AJ van der Walt *The law of neighbours* (2010) at 264; G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 131; *Setlogelo v Setlogelo* 1914 AD 221 page 227.

In this regard, the chapter considered the legal principles and the case law relating to excessive noise, threat of danger, personal injury, and damage to property. Furthermore, the chapter considered the “coming into a nuisance” principle as a consideration for whether neighbours of short-term rentals can apply for legal relief if they moved into the area while being aware of the existing short-term rental. Subsequently, this chapter concluded that nuisance cases are context-specific and that it is unclear in what specific instance a property owner using their property as short-term rental accommodation would amount to posing an unreasonable, unlawful nuisance to neighbouring property owners.³²¹

Thereafter, the *Nicholl* judgment was discussed to determine potential factors courts might take into account when deciding whether to grant an interdict in favour of an applicant who requests that their neighbour’s short-term rental operations be terminated, mitigated, or prevented. Furthermore, the obligations of Airbnb hosts and guests were explored in terms of the Airbnb host-guest agreement and Airbnb’s terms of service. This exploration concluded that Airbnb’s terms of service³²² provide protection for Airbnb hosts, as the terms of service indicate that Airbnb guests will be liable for their acts and omissions, as well as any acts and omissions of people they bring onto the property.³²³ Therefore, it was concluded that in the event of a nuisance law interference, it would be possible for the neighbour of an Airbnb-listed property to hold the Airbnb guest liable for property interferences experienced. Nonetheless, on the basis of neighbour law, the neighbouring property owner would still be able to bring

³²¹ AJ van der Walt *The law of neighbours* (2010) at 26; *Holland v Scott* (1881-1882) 2 EDC 307.

³²² Airbnb official website “Terms of service” (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 07-02-2021).

³²³ Airbnb official website “Terms of service” (date unknown) *Airbnb* <<https://www.airbnb.co.za/terms?locale=en>> (accessed 07-02-2021).

a claim in neighbour law in the event that their neighbours short-term hosting affects their ability to use and enjoy their property.

This chapter provided clarity on the rights and remedies available to neighbours in the short-term rental context, based on neighbour law and the Airbnb terms of service. In this light, this chapter indicated the importance of neighbours having appropriate remedies to protect their property entitlements against infringements caused by short-term rental operations. This chapter highlighted the lack of clarity regarding the remedies available to neighbours of short-term rental accommodation in the instance of property law interferences arising due to short-term rental operations. To this end, the following chapter will explore whether the neighbours of short-term rentals have a claim under section 25(1) of the Constitution due to the interference arising from the laws that authorise short-term rental operations in South Africa. This discussion in chapter 5 sets out to determine whether neighbours of short-term rental accommodation have common law and constitutional remedies available to them in the short-term rental context.

Chapter 5: A section 25(1) analysis in the short-term rental context

5 1 Introduction

The previous chapter of this dissertation indicated that neighbours of short-term rental hosts are likely to have property law remedies available to them in terms of nuisance law when they experience interferences from neighbouring short-term rental operations.¹ Apart from common law remedies, it is possible that they also have constitutional remedies available to them. To this end, this chapter sets out to determine whether neighbours may rely on constitutional remedies if the laws that authorise short-term rental operations interfere with their ownership entitlements.

Section 25(1) of the Constitution of the Republic of South Africa, 1996 ("Constitution") is the constitutional right most directly impacted when it comes to the rights of neighbouring property owners of short-term hosts.² Section 25(1) provides:

"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".³

¹ See section 4 3 in chapter 4 for a discussion on neighbour law remedies in the short-term rental context.

² S Fick "Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?" (2021) 3 *Stellenbosch Law Review* 455-481 at 468. For general sources on constitutional property law, see AJ van der Walt "Transformative constitutionalism and the development of South African property law (part 1)" 2005 *Journal of South African Law* 655-689; AJ van der Walt *Constitutional property law* 3 ed (2011); AJ van der Walt *Property and Constitution* (2012); G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019). Although section 25 is the constitutional right most directly impacted, the following constitutional rights may also be impacted by short-term rental operations, namely: section 9, the right to equality; section 10, the right to human dignity; section 12, the right to freedom and security of the person; section 14, the right to privacy; and section 26, the right to housing.

³ Section 25(1) of the Constitution of the Republic of South Africa, 1996. For a critical analysis of section 25 in general, see AJ van der Walt *Constitutional property law* 3 ed (2011); I Currie & J De Waal *The*

While the provision in section 25(1) does not positively entrench property rights, the negative phraseology of the provision implies that property rights enjoy constitutional protection provided these rights are not unjustifiably limited *nor* amount to arbitrary deprivation of property in terms of the requirements set out in the clause.⁴ The implication of constitutional protection is relevant as neighbours of short-term rental properties may want to argue that the laws that authorise short-term rental operations in South Africa result in an unconstitutional arbitrary deprivation of their property in terms of section 25(1).⁵ In this regard, the methodology as set out by the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* ("*FNB*"),⁶ will be employed to determine whether the laws that authorise short-term rental operations arbitrarily deprive neighbouring property owners of their property entitlements in contravention of section 25(1).⁷ In *FNB*, the Constitutional Court

bill of rights handbook 6 ed (2013); T Roux "Property" in S Woolman, T Roux, & M Bishop (eds) *Constitutional law of South Africa* vol 3 (2 ed OS 2003) chapter 46 1-37.

⁴ In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 72, the implications of the negative phraseology of section 25(1) of the Constitution were explained. Following this, the implication of the negative phraseology of section 25(1) was upheld in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 48. See further AJ van der Walt *Constitutional property law* 3 ed (2011) at 34-42; I Currie & J de Waal *The bill of rights handbook* 6 ed (2013) at 534.

⁵ S Fick "Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?" (2021) 3 *Stellenbosch Law Review* 455-481 at 469-470.

⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

⁷ See AJ van der Walt "Section 25 vortices (part 2)" 2016 *Journal of South African Law* 597-621 at 616-617 where Van der Walt proposes amendments to the *FNB* methodology in view of the case law subsequent to the *FNB* decision. See also BV Slade "The effect of avoiding the *FNB* methodology in

developed a set of questions that form the basis of a section 25(1) analysis⁸ when determining whether the property clause has been infringed.⁹ The Constitutional Court listed a set of questions that a court must consider when determining whether an infringement of property rights is constitutional, namely: (a) whether that which is taken away or interfered with amounts to property; (b) whether there has been a deprivation of the property; (c) whether the deprivation is consistent with the requirements in section 25(1) of the Constitution; and (d) if not, whether the deprivation is justified under section 36 of the Constitution.¹⁰

section 25 disputes" (2019) 40 *Obiter* 36-46 where Slade questions whether courts avoiding the *FNB* methodology in section 25 disputes is justifiable.

⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46. Subsequently, the following cases applied the *FNB* methodology: *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and Others* 2005 (1) SA 530 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC); *Offit Enterprises v Coega Development Corporation (Pty) Ltd* 2011 (1) SA 293 (CC); *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC); *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC); *Jordaan v City of Tshwane Metropolitan Municipality and Others*; *City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited*; *Ekurhuleni Metropolitan Municipality v Livanos and Others* 2017 (6) SA 287 (CC). See further AJ van der Walt *Constitutional property law* 3 ed (2011) at 222; T Roux "Property" in S Woolman, T Roux, & M Bishop (eds) *Constitutional law of South Africa* vol 3 (2 ed OS 2003) chapter 46 1-37 at 46-3 - 46-5.

⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

¹⁰ For case law exploring the distinction between expropriations and deprivations, see *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC) para 33; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46. For a critical discussion on the distinction between expropriations and deprivations, see AJ van der Walt "Striving for a better interpretation - A critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause" (2004) 121

Accordingly, I will use the framework provided in the *FNB* judgment (the *FNB* methodology) to determine whether the laws that authorise short-term rental operations in South Africa result in an arbitrary deprivation of neighbour's property. The outcome of this discussion will indicate whether neighbours of short-term rental hosts have constitutional remedies available to them arising from the potential interference caused by the laws that authorise short-term rentals in South Africa. To this end, the *FNB* case, and the cases decided after *FNB*, will be instructive in ascertaining whether the laws that authorise short-term rental operations in South Africa are (or will be)¹¹ in line with section 25.¹² In turn, each of the questions provided in *FNB* will be discussed below.

South African Law Journal 854-878 at 873; AJ van der Walt "Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*" (2005) 122 *South African Law Journal* 75-89 at 75-77. See also AJ van der Walt *Constitutional property law* 3 ed (2011) at 339-341; EJ Marais "When does state interference with property (now) amount to expropriation? An analysis of the *Agri SA* court's state acquisition requirement (Part I)" (2015) 18 *Potchefstroom Electronic Law Journal* 2983-3031 at 2985.

¹¹ In the instance of the enactment of the Tourism Amendment Bill of Notice 235 of 2019.

¹² Since the *FNB* methodology has been subject to criticism by scholars and developed further in terms of case law, it is necessary that the directive for the application of section 25 provided in *FNB* be used in conjunction with other recent developments. For criticism of the *FNB* methodology, see T Roux "Property" in S Woolman, T Roux, & M Bishop (eds) *Constitutional law of South Africa* vol 3 (2 ed OS 2003) chapter 46 1-37 in general. See also BV Slade "The effect of avoiding the FNB methodology in section 25 disputes" (2019) 40 *Obiter* 1-11; NL Sono "Re-examining the Constitutional Court's Approach to the property question since *First National Bank of SA Ltd T/A Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd T/A Wesbank v Minister of Finance* 2002 4 SA 768 (CC)" (2022) 25 *Potchefstroom Electronic Law Journal* 1-30; T Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 265-281; AJ van der Walt "Section 25 vortices (part 1)" 2016 *Journal of South African Law* 412-427; AJ van der Walt "Section 25 vortices (part 2)" 2016 *Journal of South African Law* 597-621.

Firstly, in order to conduct a section 25 analysis, there needs to be a law authorising the arbitrary deprivation of property. As mentioned, no national legislation currently addresses short-term rentals in South Africa.¹³ However, in the event that the Tourism Amendment Bill of 2019 ("Tourism Bill")¹⁴ is enacted, it is likely that the bill will authorise short-term rental operations in South Africa. On the presumption that the Tourism Bill will likely be enacted to authorise short-term rental operations in South Africa, a section 25 analysis may be conducted. Consequently, the principles of subsidiarity¹⁵ will be used as a threshold to determine whether a neighbour should rely on the common law and/or a constitutional remedy whereby the Tourism Bill is declared unconstitutional to the extent that it results in the arbitrary deprivation of

¹³ S Fick "Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?" (2021) 3 *Stellenbosch Law Review* 455-481 at 463.

¹⁴ Tourism Amendment Bill Notice 235 of 2019.

¹⁵ Lourens du Plessis introduced the principle of subsidiarity, defining it as a reading strategy adopted by courts whereby courts refrain from deciding on matters that could be taken by lower courts. Furthermore, he described the idea of subsidiarity as an approach whereby courts avoid taking a constitutional decision if it is possible for the matter to be decided on a non-constitutional basis. See L du Plessis "Subsidiarity": What's in the name for constitutional interpretation and adjudication? (2006) 17 *Stellenbosch Law Review* 207-231; "AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *Constitutional Court Review* 77-128 proposed the argument that where legislation has been developed to give effect to constitutional rights or the common law exists to regulate a specific area of the law, these sources of law should be applied as opposed to relying directly on a constitutional right. This idea was developed and expanded in AJ van der Walt *Property and Constitution* (2012) at 35. Furthermore, the subsidiarity principle was brought forth by the principle enunciated in the Constitutional Court decisions of *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) paras 51–52 and *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 437. See further KE Klare "Legal subsidiarity & constitutional rights: A reply to AJ van der Walt" (2008) 1 *Constitutional Court Review* 129–154; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 249; *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC) para 15; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 25.

neighbour's property in the short-term rental context. Stated differently, the investigation of section 25(1)'s implications for short-term rental operations may provide clarity on whether neighbours have a claim under nuisance law for the interference caused by short-term rental operations *and* have a constitutional remedy at their disposal, *or* whether neighbours only have a claim based on common law nuisance.

5 2 Principle of subsidiarity

In light of the lack of clarity regarding the remedies available to neighbours in the short-term rental context, it is important to investigate whether neighbours have a choice between bringing a claim under neighbour law *or* under section 25(1) *or* whether both a common law *and* constitutional remedy is available to neighbours. This enquiry could be conducted based on the subsidiarity principles as the principles could potentially serve as a set of guidelines to determine which source of law to turn to when a dispute arises.¹⁶

Constitutional Court jurisprudence has indicated that litigants do not necessarily have a choice in selecting whether they base their cause of action (or defence) on

¹⁶ AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *Constitutional Court Review* 77-128; AJ van der Walt *Property and Constitution* (2012) at 35. The subsidiarity principle was brought forth by the principle enunciated in the Constitutional Court decisions of *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) paras 51–52 and *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 437. See further KE Klare "Legal subsidiarity & constitutional rights: A reply to AJ van der Walt" (2008) 1 *Constitutional Court Review* 129–154; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 249; *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC) para 15; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 25.

legislation, the common law, or a constitutional provision.¹⁷ In terms of the principles of subsidiarity, a litigant who alleges the infringement of a constitutional right must rely on the legislation enacted to protect that right.¹⁸ In this regard, such a litigant cannot directly rely on the underlying constitutional provision that protects the right when they bring the action.¹⁹ An exception to this would be in the instance where the litigant wants to challenge the constitutional validity or efficacy of the legislation.²⁰ Consequently, the first port of call for litigants alleging an infringement of a constitutional right should

¹⁷ *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) paras 51-52; *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) paras 39-40; *Chirwa v Transnet Ltd* 2008 (2) SA 24 (CC) paras 59, 69; *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) paras 29-30; *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC) paras 47-49.

¹⁸ AJ van der Walt *Constitutional property law* 3 ed (2011) at 66; AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *Constitutional Court Review* 77-128 at 100-103, referring to *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) paras 51-52; *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) paras 39-40; *Chirwa v Transnet Ltd* 2008 (2) SA 24 (CC) paras 59, 69; *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) paras 29-30; *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC) paras 47-49. See further L du Plessis "Interpretation" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* vol 2 (2 ed OS 2008) chapter 32 1-193 at 20-22.

¹⁹ AJ van der Walt *Constitutional property law* 3 ed (2011) at 66; AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *Constitutional Court Review* 77-128 at 100-103, referring to *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) paras 51-52; *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) paras 39-40; *Chirwa v Transnet Ltd* 2008 (2) SA 24 (CC) paras 59, 69; *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) paras 29-30; *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC) paras 47-49. See further L du Plessis "Interpretation" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* vol 2 (2 ed OS 2008) chapter 32 1-193 at 20-22.

²⁰ AJ van der Walt *Constitutional property law* 3 ed (2011) at 66; AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *Constitutional Court Review* 77-128 at 101, 104, 115, referring to *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) para 52; *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 437; *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC) para 15; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 249.

be to rely on the relevant legislation enacted to protect the constitutional right in question, as opposed to directly relying on a constitutional provision or the common law.²¹ A litigant may directly rely on the common law (apart from referring to the Constitution to interpret the legislation) when there are gaps in the legislation that should be filled with reference to the common law.²² Furthermore, a litigant may only directly rely on a constitutional provision (apart from referring to the Constitution to interpret the legislation) in the instance where the legislation is attacked for failing to give proper effect to the constitutional right in dispute.²³

As previously indicated, no national legislation currently addresses short-term rentals in South Africa.²⁴ Accordingly, in line with the principles of subsidiarity, neighbours as litigants have no legislation to rely on to protect their constitutional property rights in the short-term rental context. In light of the absence of legislation protecting the neighbours of short-term hosts, neighbours would need to rely on common law remedies. If neighbours are unable to rely on common law remedies, these neighbours should be able to rely directly on constitutional provisions available to them under section 25 of the Constitution. However, in the event that the Tourism

²¹ AJ van der Walt *Constitutional property law* 3 ed (2011) at 66-67; AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *Constitutional Court Review* 77-128 at 103-105, referring to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 25; *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 96; *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) para 37; *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 15; *Chirwa v Transnet Ltd* 2008 (2) SA 24 (CC) para 23.

²² AJ van der Walt *Constitutional property law* 3 ed (2011) at 67.

²³ AJ van der Walt *Constitutional property law* 3 ed (2011) at 67.

²⁴ S Fick "Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?" (2021) 3 *Stellenbosch Law Review* 455-481 at 463.

Bill is enacted, neighbours will likely need to rely on the remedies available to them (if any) in the Tourism Bill. Furthermore, the legal position would require neighbours to rely on the Tourism Bill when they bring a claim alleging an infringement of their property rights entrenched in section 25(1).²⁵ Given the relevance of short-term rental operations in the tourism industry, it is likely that the Tourism Bill will be enacted to authorise short-term rental operations in South Africa. Consequently, the following section conducts a section 25 analysis based on the potential impact of the Tourism Bill on neighbour's property rights on the assumption of the Tourism Bill's enactment.

5 3 Section 25 analysis: The *FNB* methodology

5 3 1 Introduction

In the *FNB* judgment, the Constitutional Court interpreted section 25(1) so as to provide a framework for the regulation of property. Consequently, the court developed a methodology (the "*FNB* methodology") to determine whether a deprivation of property is constitutional. The following questions (stated in the order followed by the court) represent a stage of the methodology that should be employed:²⁶

- a) Does that which has been taken away by the relevant law amount to property for the purpose of section 25 of the Constitution?

²⁵ AJ van der Walt *Constitutional property law* 3 ed (2011) at 66; AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *Constitutional Court Review* 77-128 at 100-103, referring to *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) paras 51-52; *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) paras 39-40; *Chirwa v Transnet Ltd* 2008 (2) SA 24 (CC) paras 59, 69; *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) paras 29-30; *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC) paras 47-49. See further L du Plessis "Interpretation" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* vol 2 (2 ed OS 2008) chapter 32 1-193 at 20-22.

²⁶ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

- b) Has there been a deprivation of such property?
- c) If there has been a deprivation, is such deprivation consistent with the provisions of section 25(1)?
- d) If not, is such deprivation justified under section 36 of the Constitution?
- e) If it is, does it amount to expropriation for purpose of section 25(2)?
- f) If so, does the deprivation comply with the requirements of section 25(2)(a) and (b)?
- g) If not, is the expropriation justified under section 36?

Despite the criticisms of the *FNB* methodology,²⁷ it remains the authoritative precedent for determining whether a deprivation of property is constitutional. In this view, this dissertation will employ the framework as set out in the *FNB* methodology to determine whether the laws that authorise short-term rental operations in South Africa result in an arbitrary deprivation of property for neighbours.

5 3 2 The property question

In order to conduct a section 25 analysis, the first step is to determine whether the right or interest that is allegedly infringed constitutes "property" in terms of section 25

²⁷ See T Roux "Property" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* vol 3 (2 ed OS 2003) chapter 46 1-37; AJ van der Walt "Section 25 vortices (part 1)" 2016 *Journal of South African Law* 412-427; and AJ van der Walt "Section 25 vortices (part 2)" 2016 *Journal of South African Law* 597-621; NL Sono "Re-examining the Constitutional Court's Approach to the property question since *First National Bank of SA Ltd T/A Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd T/A Wesbank v Minister of Finance* 2002 4 SA 768 (CC)" (2022) 25 *Potchefstroom Electronic Law Journal* 1-30; BV Slade "The effect of avoiding the FNB methodology in section 25 disputes" (2019) 40 *Obiter* 1-11. The anomalies in the case law that followed after the *FNB* decision indicate that there are indeed some incongruent aspects of the *FNB* methodology which justifies the criticisms by legal scholars.

of the Constitution.²⁸ If the alleged right or interest amounts to property for the purposes of section 25, the interest is deemed to be deserving of constitutional protection in terms of the property clause. While the Constitution indicates in section 25(4)(b) that property is not limited to land, the Constitution does not provide a clear definition regarding what right or interest would be regarded as worthy of constitutional protection under section 25.²⁹ In *FNB*, the Constitutional Court declined to provide a comprehensive definition of "property" in relation to section 25.³⁰ Sono acknowledges that there are no clear guidelines for courts when addressing the property question.³¹ As a result of the lack of clarity, the definition of "property" must be determined on a case-by-case basis.³² Nonetheless, the question regarding property is rather

²⁸ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46. See also, AJ van der Walt "Section 25 vortices (part 2)" 2016 *Journal of South African Law* 597-621 at 599-605.

²⁹ Section 25(4)(b) of the Constitution of the Republic of South Africa, 1996. See also *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 48.

³⁰ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51. For a discussion on the property threshold question, see G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 617-622.

³¹ NL Sono "Re-examining the Constitutional Court's Approach to the property question since *First National Bank of SA Ltd T/A Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd T/A Wesbank v Minister of Finance* 2002 4 SA 768 (CC)" (2022) 25 *Potchefstroom Electronic Law Journal* 1-30 at 24.

³² T Kotze *The regulation of agricultural land in South Africa: A legal comparative perspective* (LLD dissertation, Stellenbosch University 2020) at 118-119. Case law subsequent to the *FNB* decision adopted the generous approach in the interpretation of constitutional property for the purpose of section 25 of the Constitution of the Republic of South Africa. See *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 32; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and Others* 2015 (6) SA 125 (CC) para 104. See also Rautenbach IM "Dealing with the social dimensions of

straightforward and relatively unproblematic in cases regarding corporeal movables and the ownership of land.³³ Importantly, the court in *FNB* stated that ownership of

property” 2015 *Journal of South African Law* 825-829 at 822; AJ van der Walt “Section 25 vortices (part 1)” 2016 *Journal of South African Law* 412-427 at 427; AJ van der Walt “Section 25 vortices (part 2)” 2016 *Journal of South African Law* 597-621 at 599; EJ Marais “Expanding the contours of the constitutional property concept” 2016 *Journal of South African Law* 576-592 at 576; J Swanepoel *Constitutional property law in Central Eastern European jurisdictions: A comparative analysis* (LLD dissertation, Stellenbosch University 2016) at 211-220; P Badenhorst & C Young “The notion of constitutional property in South Africa: An analysis of the Constitutional Court’s approach in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 (6) SA 125 (CC)” (2017) 28 *Stellenbosch Law Review* 40-45 at 26; M Du Plessis & T Palmer “Property rights and their continued open-endedness – A critical discussion of Shoprite and the Constitutional Court’s property clause jurisprudence” (2018) 29 *Stellenbosch Law Review* 86-87 at 73. The case-by-case approach followed by courts in this regard is evident in the following cases: In *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC) paras 71, 83 where trademarks were accepted as constituting property; in *Phumelela Gaming and Leisure Ltd v Grundlingh and Others* 2007 (6) SA 350 (CC) paras 36-42 where goodwill was accepted as amounting to property; and in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and Others* 2015 (6) SA 125 (CC) para 104 where a grocer’s wine license was accepted to be regarded as property under section 25 of the Constitution. Additionally, see *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O* 2017 (6) SA 331 (CC) where licenses were considered to be property; *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) where personal servitudes were regarded as property; *National Stadium South Africa (Pty) Ltd v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA) where servitudes in general amounted to property; and *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* 2015 (6) SA 440 (CC) where public servitudes were regarded as property. See also J Swanepoel & ZT Boggenpoel “Intangible constitutional property: A comparative analysis” (2018) 28 *Stellenbosch Law Review* 624-637 at 628.

³³ AJ van der Walt “Section 25 vortices (part 2)” 2016 *Journal of South African Law* 597-621 at 599. In *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) it was disputed whether the property at stake was a right to use land temporarily or movable corporeal property (gravel) removed from that land, but the Constitutional Court did not address the property question. Additionally, in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and Others* (2005) 1 SA 530 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC); *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* 2015 (6) SA 440 (CC); *Arun Property Development (Pty) Ltd v Cape Town City* 2015 (1) SA 530 (CC); the subject of the cases related to ownership of land and owners’ entitlements to use their

land “lie[s] at the heart of our constitutional concept of property, both as regards the nature of the right involved as well as the object of the right”.³⁴ Based on the court's consideration of "property" in *FNB*, Roux cautions that the *FNB* methodology has the potential to create a "vortex" effect whereby the court focuses on all property issues under the arbitrariness question, turning the various questions into a telescoped enquiry where all the issues are examined in one enquiry.³⁵ However, Van der Walt is of the opinion that telescoping the property question into the arbitrariness question is not necessarily problematic, provided that the property question continues to be a threshold for a section 25(1) claim.³⁶ In this regard, I am of the opinion that *FNB*'s potential vortex effect may not be detrimental to a section 25(1) claim, provided the court acknowledges the relevance of the property clause before proceeding to address the other questions relevant to the section 25 analysis.

When interpreting “property” in the short-term rental context, the neighbours of short-term rentals are immovable property owners whose right to use and enjoyment of land (*ius dispondendi*) is potentially impacted through short-term rental operations in South Africa. It is evident that short-term rental operations clearly impact immovable property and ownership of land, which lies at the heart of the constitutional concept of

land. However, none of the judgments spent time exploring the property question. See also AJ van der Walt *Constitutional property law* 3 ed (2011) at 115. In contrast, the Constitutional Court in *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others* 2017 (6) SA 331 (CC) explored the property question at length because the particular right was not evidently or clearly property as established in previous cases.

³⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51.

³⁵ T Roux “Property” in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* vol 3 (2 ed OS 2003) chapter 46 1-37 at 46-21.

³⁶ AJ van der Walt *Constitutional property law* 3 ed (2011) at 283-284.

property.³⁷ Consequently, the neighbour of a short-term rental host would, in my view, be able to prove a sufficient claim in terms of section 25 on the basis that their interest amounts to property under section 25 of the Constitution. Consequently, the section 25 enquiry may proceed to address the deprivation question. In this regard, one must evaluate whether a deprivation of the identified property right or interest has occurred.³⁸

5 3 3 The deprivation question

According to *FNB*, when testing potential interferences against section 25 of the Constitution, the second question is whether a deprivation of the identified property interest has occurred.³⁹ Van der Walt highlights that the term "deprivation" may be perplexing as it invariably refers to the taking away of property, giving the impression that deprivation is analogous to an expropriation.⁴⁰ However, he opines that there are textual and conceptual differences between deprivations and expropriations in terms of section 25 of the Constitution.⁴¹ The conceptual distinction between deprivations and expropriations was depicted in *FNB*, where the Constitutional Court held that:

³⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51.

³⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

³⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

⁴⁰ AJ van der Walt *Constitutional property law* 3 ed (2011) at 190; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57.

⁴¹ AJ van der Walt *Constitutional property law* 3 ed (2011) at 190-191.

"[A]ny interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If section 25 is applied to this wide *genus* of interference, 'deprivation' would encompass all species thereof and 'expropriation' would apply only to a narrower species of interference."⁴²

Subsequent to the *FNB* definition of a deprivation, the Constitutional Court proceeded to provide a more narrow definition of deprivation in *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and*

⁴² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57. For the purposes of this study, the focus will be on deprivation of property and the dissertation will therefore not examine expropriation of property and the requirements contained in sections 25(2) and (3). Expropriation will not be examined due to there currently being no relevant statutory authorisation that gives effect to expropriation as a state action in the short-term rental context. Furthermore, expropriation refers to an owner's property being taken away, which is ordinarily not the case in the short-term rental context. Examining deprivations is relevant in the short-term rental context because deprivations limit an owner's use and enjoyment of their property and neighbours in the short-term rental context experience interferences with their use and enjoyment due to short-term rental operations. For case law exploring the distinction between expropriations and deprivations, see *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC) para 33; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46; *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC). For a critical discussion on the distinction between expropriations and deprivations, see AJ van der Walt "Striving for a better interpretation - A critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause" (2004) 121 *South African Law Journal* 854-878 at 873; AJ van der Walt "Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*" (2005) 122 *South African Law Journal* 75-89 at 75-77; AJ van der Walt *Constitutional property law* 3 ed (2011) at 339-341; EJ Marais "When does state interference with property (now) amount to expropriation? An analysis of the *Agri SA* court's state acquisition requirement (Part I)" (2015) 18 *Potchefstroom Electronic Law Journal* 2983-3031 at 2985.

Others ("*Mkontwana*"),⁴³ where it defined "deprivation" as a "substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society."⁴⁴ The narrow definition of deprivation⁴⁵ as set out in *Mkontwana* was subsequently confirmed in *Offit Enterprises (Pty) Ltd v Coega Development Corporation Ltd* ("*Offit*"),⁴⁶ where the court elaborated on the concept of deprivation, stating that deprivation requires one or more entitlements of

⁴³ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and Others* 2005 (1) SA 530 (CC).

⁴⁴ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and Others* 2005 (1) SA 530 (CC) para 32. AJ van der Walt criticises the *Mkontwana* judgment in AJ van der Walt *Constitutional property law* 3 ed (2011) at 204-206, arguing that the court's restrictive definition of deprivation is unnecessary, unclear, and confusing. For an in-depth discussion of the *Mkontwana* judgment, see AJ van der Walt "Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*" (2005) 1 *South African Law Journal* 75-89.

⁴⁵ See T Roux "Property" in S Woolman, T Roux, & M Bishop (eds) *Constitutional law of South Africa* vol 3 (2 ed OS 2003) chapter 46 1-37 at 46-18; T Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 265-281. Roux emphasises that the extent to which the authorising law interferes with a property interest should be taken into account when determining whether the interference is arbitrary as opposed to when determining whether the interference is a deprivation. Furthermore, he highlights that the narrow definition of deprivation has the potential to create a vortex in the sense that it could lead to the entire property challenge being sucked into the deprivation enquiry.

⁴⁶ *Offit Enterprises (Pty) Ltd v Coega Development Corporation Ltd* 2011 (1) SA 293 (CC). In the *Offit* judgment, the Constitutional Court cited *Mkontwana* as authority, but in actual fact applied the *FNB* definition of deprivation to the matter. Significantly, the court gave emphasis to whether the regulatory limitation had a legally relevant impact on a property holder's rights, rather than focusing on what would be regarded as normal in an open and democratic society.

ownership to be impacted and that "the impact [of the interference] must be of sufficient magnitude to warrant constitutional engagement".⁴⁷

Van der Walt is of the opinion that the court in *Mkontwana* may have expressed itself unclearly and intended to state that the extent of deprivation will impact the level of scrutiny applied when a deprivation is tested for constitutionality.⁴⁸ He argues that in the alternative, the court in *Mkontwana* may have intended to say that a deprivation needs to be significant enough to the extent that it has a legally relevant impact on the property owner's use and enjoyment of the property.⁴⁹ In this regard, he points out that *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government ("Reflect-All")*,⁵⁰ and *Offit* indicate that for there to be a deprivation under section 25(1), the impact of a regulatory restriction needs to be legally significant to the extent that its effects may have legal consequences.⁵¹ Furthermore, Van der Walt argues that state action exceeding the boundaries of what is "normal in an open and democratic society" would be in conflict with the Constitution, irrespective of the section 25(1) property clause. In this regard, he is of the opinion that the *Mkontwana* narrow approach to deprivation would render section 25(1) redundant if deprivation is restricted to only being state action exceeding the normal regulatory functions of the democratic state.⁵² He highlights that the dictum in *Mkontwana* potentially results in a misunderstanding of deprivation as it appears to

⁴⁷ *Offit Enterprises (Pty) Ltd v Coega Development Corporation Ltd* 2011 (1) SA 293 (CC) para 41.

⁴⁸ AJ van der Walt *Constitutional property law* 3 ed (2011) at 208.

⁴⁹ AJ van der Walt *Constitutional property law* 3 ed (2011) at 208.

⁵⁰ *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) paras 44-47.

⁵¹ AJ van der Walt *Constitutional property law* 3 ed (2011) at 208-209.

⁵² AJ van der Walt *Constitutional property law* 3 ed (2011) at 204-205.

extend beyond requiring regulatory restrictions on the use of property to be regarded as significant.⁵³ He argues that one should ignore *Mkontwana's* proposition that deprivation should be narrowly interpreted in relation to the phrase "normal in an open and democratic society".⁵⁴ Rather, he suggests that one should follow the clearer approach set out in *FNB*, whereby all restrictions (that are not *de minimis*) that have a perceptible effect on an owner's use and enjoyment of their property should constitute a deprivation under section 25(1) and consequently be subject to its requirements.⁵⁵

Following these developments, the Constitutional Court in *National Credit Regulator v Opperman and Others* ("*Opperman*")⁵⁶ further elaborated on the concept of deprivation. It endorsed the view that in instances where the interference extends beyond normal regulation, in that the interference has a "legally relevant impact on the rights of the affected party",⁵⁷ such interference would constitute deprivation in terms of section 25(1) of the Constitution.⁵⁸ This narrow approach to the meaning of deprivation was subsequently confirmed in *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* ("*Shoprite*")⁵⁹ and *City of Tshwane Metropolitan Municipality v Link Africa Pty Ltd and Others* ("*City of Tshwane*"),⁶⁰ where the Constitutional Court stated

⁵³ AJ van der Walt *Constitutional property law* 3 ed (2011) at 209.

⁵⁴ AJ van der Walt *Constitutional property law* 3 ed (2011) at 209.

⁵⁵ AJ van der Walt *Constitutional property law* 3 ed (2011) at 209.

⁵⁶ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC).

⁵⁷ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 66.

⁵⁸ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 66.

⁵⁹ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC) para 73.

⁶⁰ *City of Tshwane Metropolitan Municipality v Link Africa Pty Ltd and Others* 2015 (6) SA 440 (CC) para 167.

that the limitation must have a "legally relevant impact" on the property in order to amount to a deprivation.⁶¹ The meaning of "legally relevant impact" in the context of establishing whether deprivation of property has occurred seems to refer to a limitation of one or more ownership entitlements.⁶² Interestingly, the narrow approach as set out in *Mkontwana* and *Offit* was subsequently applied in *South African Diamond Producers Organisation v Minister of Minerals and Energy NO* ("*Diamond Producers*"),⁶³ where the court stated that "there will be a deprivation only where the interference is 'substantial' – meaning that the intrusion must be so extensive that it has a legally relevant impact on the rights of the affected party".⁶⁴

Marais contends that the narrow approach of deprivation as set out in *Mkontwana* did not constrict the deprivation definition until the *Diamond Producers* judgment was passed down.⁶⁵ He opines that in *Diamond Producers*, the Constitutional Court

⁶¹ *Tshwane City v Link Africa and Others (Pty) Ltd* 2015 (6) SA 440 (CC) para 167, *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC) para 73.

⁶² EJ Marais "Narrowing the meaning of 'deprivation' under the property clause? A critical analysis of the implications of the Constitutional Court's *Diamond Producers* judgment for constitutional property protection" (2018) 34 *South African Journal of Human Rights* 167-190 at 177. S Fick "Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?" (2021) 3 *Stellenbosch Law Review* 455-481 at 469.

⁶³ *South African Diamond Producers Organisation v Minister of Minerals and Energy NO* 2017 (6) SA 331 (CC).

⁶⁴ *South African Diamond Producers Organisation v Minister of Minerals and Energy NO* 2017 (6) SA 331 (CC) paras 42-51.

⁶⁵ EJ Marais "Narrowing the meaning of 'deprivation' under the property clause? A critical analysis of the implications of the Constitutional Court's *Diamond Producers* judgment for constitutional property protection" (2018) 34 *South African Journal of Human Rights* 167-190 at 176. Marais argues that the *Mkontwana* narrow deprivation interpretation did not construe deprivation in cases preceding *Diamond Producers*, namely, *Offit Enterprises (Pty) Ltd v Coega Development Corporation Ltd* 2011 (1) SA 293 (CC); *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC). and *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport and Others* 2015 (10) BCLR 1158 (CC).

construed deprivation in its application of the *Mkontwana* "substantial interference" and "beyond the normal restrictions" definition when the court found that no deprivation had occurred.⁶⁶ He cautions that the potential constriction of the deprivation definition may result in the exclusion of "all but the most disproportionate property limitations from constitutional scrutiny".⁶⁷ He points out that such constriction could result in property owners who experience non-excessive limitations being excluded from constitutional protection entirely or have no choice, but to rely on fundamental rights beyond the property clause for protection.⁶⁸ Furthermore, Marais is critical of the narrow approach as applied in *Diamond Producers*, as he argues that the narrow approach has the potential to combine the deprivation enquiry and arbitrariness enquiry into one.⁶⁹ He is of the opinion that most limitations would be regarded as "normal"⁷⁰ and argues that courts should lean towards a generous application of the deprivation enquiry given that it is a threshold determination for

⁶⁶ EJ Marais "Narrowing the meaning of 'deprivation' under the property clause? A critical analysis of *Diamond Producers* judgment for constitutional property protection" (2018) 34 *South African Journal of Human Rights* 167-190 at 176.

⁶⁷ EJ Marais "Narrowing the meaning of 'deprivation' under the property clause? A critical analysis of the implications of the Constitutional Court's *Diamond Producers* judgment for constitutional property protection" (2018) 34 *South African Journal of Human Rights* 167-190 at 167, 186-187.

⁶⁸ EJ Marais "Narrowing the meaning of 'deprivation' under the property clause? A critical analysis of the implications of the Constitutional Court's *Diamond Producers* judgment for constitutional property protection" (2018) 34 *South African Journal of Human Rights* 167-190 at 167, 189.

⁶⁹ EJ Marais "Narrowing the meaning of 'deprivation' under the property clause? A critical analysis of the implications of the Constitutional Court's *Diamond Producers* judgment for constitutional property protection" (2018) 34 *South African Journal of Human Rights* 167-190 at 181.

⁷⁰ For examples of "normal" regulatory state action see EJ Marais "Narrowing the meaning of 'deprivation' under the property clause? A critical analysis of the implications of the Constitutional Court's *Diamond Producers* judgment for constitutional property protection" (2018) 34 *South African Journal of Human Rights* 167-190 at 184 and AJ van der Walt *Constitutional property law* 3 ed (2011) at 289-333.

section 25(1) constitutional property protection.⁷¹ In this regard, Fick agrees that a more generous application of the deprivation question would be beneficial.⁷² The opinions of Marais and Fick regarding a generous application of the deprivation question are appealing as it would give effect to the purpose of the property clause in that it would create a wide genus of property owners who would be able to bring a property claim under section 25(1). Conversely, interpreting deprivation in a way that leaves very few property owners with access to a section 25(1) remedy would arguably result in an unintended consequence of section 25(1). In my opinion, section 25(1) sets out to protect all property owners, and a narrow approach would not be in line with the underlying values of section 25(1).⁷³ Given that the property clause exists to provide, *inter alia*, protection for property owners, it does not logically follow that only a small group of litigants have access to a section 25(1) remedy. Therefore, a generous approach would be preferable in the context of interpreting the deprivation question.

Accordingly, in the short-term rental context, when determining whether the interference experienced by neighbours of short-term hosts amounts to deprivation, it will depend on whether the courts follow the narrow approach of *Mkontwana* or the

⁷¹ EJ Marais “Narrowing the meaning of ‘deprivation’ under the property clause? A critical analysis of the implications of the Constitutional Court’s *Diamond Producers* judgment for constitutional property protection” (2018) 34 *South African Journal of Human Rights* 167-190 at 177, 181, 188.

⁷² S Fick “Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?” (2021) 3 *Stellenbosch Law Review* 455-481 at 470.

⁷³ The following cases highlight the Constitutional Court’s emphasis that a purposive approach giving effect to the underlying values of the Constitution should be adopted when interpreting the Constitution and the Bill of Rights in particular: *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 9; *S v Zuma and Others* 1995 (2) SA 642 (CC) para 15; *Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC) paras 148; *Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) paras 46, 172, 213; *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) para 25; and *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 43.

wide approach as set out in *FNB*. In this regard, courts following the narrow approach would require that neighbours are able to prove (a) the law results in a substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society (*Mkontwana*); (b) the impact of the law permitting the interference is of sufficient magnitude to warrant constitutional engagement and impacts one or more ownership entitlements (*Offit*); (c) the law has a legally relevant impact on the rights of the affected party (*Opperman*, *Shoprite*, and *City of Tshwane*); or (d) the interference is substantial and extensive to the point that it has a legally relevant impact on the affected party (*Diamond Producers*).

Importantly, an issue that is present in a narrow approach is the interpretation of what will amount to "normal restrictions on property use or enjoyment found in an open and democratic society", as highlighted in *Mkontwana*. Regulatory state action that would typically amount to a deprivation includes laws protecting public health and safety, such as: (a) regulation of permits and licenses; (b) land-use planning and building; (c) environmental conservation; (d) proscribing the use of property for criminal activities; and (e) restrictions on speeding.⁷⁴ Based on this interpretation of "normal restrictions", laws limiting a neighbour's use and enjoyment of their property to enable short-term rental operations could possibly be regarded as regulatory state action relating to land-use planning and building. If the Tourism Bill is regarded as regulatory state action addressing land-use and planning, it would amount to a deprivation that falls within the definition of "normal restrictions on property use or enjoyment found in an open and democratic society. Arguably, if the narrow approach

⁷⁴ EJ Marais "Narrowing the meaning of 'deprivation' under the property clause? A critical analysis of the implications of the Constitutional Court's *Diamond Producers* judgment for constitutional property protection" (2018) 34 *South African Journal of Human Rights* 167-190 at 184; AJ van der Walt *Constitutional property law* 3 ed (2011) at 196.

is adopted, it would be difficult to challenge any regulatory state action. Since it is unclear whether the Tourism Bill will be regarded as a regulatory state action amounting to a deprivation, it is necessary to consider the consequences that would ensue if the narrow approach were applied in the short-term rental context. In this regard, it is necessary to apply the factors identified under case law stemming from the narrow approach to determine whether the Tourism Bill results in an arbitrary deprivation of neighbours' property in the short-term rental context.

In light of the "normal restrictions" consideration, the following hurdle for neighbours' section 25(1) claim would be addressing what amounts to "an open and democratic society", as pointed out in *Mkontwana*. Given that the sharing economy in which short-term rentals exist is fairly new in South Africa, there are mixed views on the presence of short-term rentals like Airbnb in South Africa. In chapter 2, the opinions of relevant role-players, such as members of the tourism industry and the hospitality industry were considered.⁷⁵ While there is a large call for short-term rentals to be promoted in South Africa, there is also much resistance to short-term rental operations in the country.⁷⁶ Consequently, when conducting a section 25 analysis and considering "normal restrictions" for the purposes of deprivation, courts would need to consider the main two sides of the public policy regarding short-term rentals to determine what would

⁷⁵ See chapter 2 section 2.2.

⁷⁶ See T Penny "SA tourism body optimistic government will regulate 'unfair' Airbnb" (15-04-2019) *EWN* <<https://ewn.co.za/2019/04/15/sa-tourism-body-optimistic-government-will-regulate-unfair-airbnb>> (accessed 16-11-2020); DJ De Lange "Regulating 'short-term' rental accommodation in SA" (2019) 20 *Chartered Institute of Government Finance Audit and Risk Officers Journal* 26-30 at 26; and Anonymous "NAMA weighing in on Airbnb regulation" (25-04-2019) *Property Professional* <<https://propertyprofessional.co.za/2019/04/25/nama-weighing-in-on-airbnb-regulation/>> (accessed 10-08-2020).

amount to "normal restrictions on property use or enjoyment found in an open and democratic society".

Subsequently, in relation to proving any interference, it will be contingent on whether the interferences are substantial enough to the extent that they have a legally relevant impact on the property rights of neighbours of short-term rentals. Property owners who are the neighbours of short-term rentals often endure nuisances caused by short-term guests that interfere with their ownership entitlements.⁷⁷ The extent of the nuisances experienced by neighbours of short-term rentals was extensively discussed in chapter 4, where it was concluded that the nuisances experienced have the potential to substantially interfere with neighbouring property owners' rights to use and enjoy their property.⁷⁸ Given that the nuisance experienced by neighbours of Airbnb hosts has the potential to be excessive and continuous (depending on the frequency of hosting activities and the general behaviour of guests),⁷⁹ this interference can be interpreted as being a legally relevant interference as the neighbouring property owner would be limited in their use and enjoyment of their ownership entitlement. In this regard, the interference with the ownership entitlements of neighbours of short-term hosts in this context can arguably be regarded as complying with the narrow approach to deprivation as established early on in *Mkontwana* and developed through the cases up until *Diamond Producers*.⁸⁰

⁷⁷ S Fick "Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?" (2021) 3 *Stellenbosch Law Review* 455-481 at 456-457.

⁷⁸ See chapter 4 section 4 4, which discusses normal use and reasonableness in the context of Airbnb listings.

⁷⁹ See section 4 4 in chapter 4 for a discussion on normal use and reasonableness in terms of neighbour law, and how these considerations apply in the short-term rental context.

⁸⁰ This discussion of a "legally relevant interference" in the narrow sense, is also applicable in the wide sense, which is discussed in-depth below.

If the narrow approach is applied, it will lead to much uncertainty for neighbours as potential litigants as it would be unclear what amounts to an interference worthy of a section 25 claim. Accordingly, they would be uncertain whether their specific infringement of use and enjoyment amounts to a substantial interference or limitation that “goes beyond the normal restrictions on property use or enjoyment in an open and democratic society”.⁸¹

A neighbour’s ability to bring a section 25(1) claim based on an infringement of their right to use and enjoy their property would also be dependent on the short-term rental host's conduct. If the short-term host uses their property on a regular basis by accommodating short-term guests frequently, their neighbour will likely be able to argue that the interference experienced is excessive, continuous, and occurring for an extended time period.⁸² In such an instance, a neighbour would likely be able to argue that the Tourism Bill authorises a deprivation in the narrow sense, as the duration and frequency allow for extensive interference to neighbours’ use and enjoyment of their property. In other words, the neighbour would be able to argue that the host's short-term rental activities that are authorised by the Tourism Bill cause a substantial interference that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society. Accordingly, if the short-term host does not use their property as short-term rental accommodation often, it is unlikely that the neighbour will be able to succeed with a section 25(1) claim for infringement of their right to use and enjoy their property. In this regard, in terms of the narrow approach,

⁸¹ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and Others* 2005 (1) SA 530 (CC) para 32.

⁸² See section 4.4 in chapter 4 for a discussion on normal use and reasonableness in terms of neighbour law, and how these considerations apply in the short-term rental context.

neighbours who experience interferences that do not cause “a substantial interference that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society” would not be able to have their interference tested against the section 25 requirements. Therefore, due to the strict requirements found under the narrow approach, neighbours of short-term rental hosts are likely to encounter difficulty proving a deprivation. Nonetheless, it is possible that a neighbour would be able to bring a claim for an interference of their right to use and enjoy their property under section 25 in terms of the narrow approach, provided that they are able to meet these requirements as established by case law. In light of this discussion, it is argued that if the *Mkontwana* narrow approach of deprivation is applied, neighbours would be able to prove a deprivation and should therefore be able to have their interference tested against the requirements of section 25(1).

Given that courts are less likely to follow the narrow approach due to its criticisms, it is important to consider the wide approach of *FNB* to determine whether neighbours of short-term rentals will be able to have their interference tested against the section 25 requirements. In terms of the *FNB* wide approach, a neighbour would need to prove that the provision/(s) of the Tourism Bill result in *any* interference regarding the use, enjoyment, or exploitation of private property to bring a claim in terms of section 25(1). Proving that the provisions result in *any* interference is a much more attainable requirement, with a lower burden of proof than the narrow approach, which requires proof of a substantial interference impacting them beyond normal restrictions on property use or enjoyment found in an open and democratic society. Additionally, adopting the wide approach is beneficial because it would ensure that all the *FNB* methodology questions regarding substantive arbitrariness are not telescoped into one question. Consequently, in the short-term rental context, the wide approach is the

preferred approach because it would be available to a wider genus of litigants. Therefore, in terms of the wide approach, neighbours are likely to be able to prove an interference of use and enjoyment of private property (that is not *de minimus non curat lex*⁸³) that is deprived through the authorisation of short-term rental operations under the Tourism Bill.

Based on the discussion above, it is clear that the rights and interests of neighbours in the short-term rental context are worthy of constitutional protection. Consequently, it is argued that the laws that will authorise short-term rental operations in South Africa give rise to a deprivation of property under section 25 in terms of both the narrow and wide approach. Given that a deprivation is only unconstitutional when the deprivation amounts to an arbitrary deprivation, it is necessary to consider the requirements for a valid deprivation. Therefore, the following section will determine (a) whether a neighbour's deprivation is authorised in terms of law of general application; and (b) whether the deprivation is arbitrary.

5 3 4 Requirements for a valid deprivation in terms of section 25(1) of the Constitution

5 3 4 1 Introduction

After establishing that a deprivation exists, the third question in terms of the *FNB* test is whether the deprivation meets the requirements as outlined in section 25(1) of the

⁸³ Merriam-Webster dictionary defines "*de minimus non curat lex*" as the Latin phrase for "the law is not concerned with insignificant or minor matters/the law does not concern itself with trifles". Merriam Webster Dictionary "*de minimis non curat lex*," (date unknown) *Merriam-Webster* <<https://www.merriam-webster.com/dictionary/de%20minimis%20non%20curat%20lex>.> (accessed 21-07-2022).

Constitution.⁸⁴ In this respect, it is important to note that deprivations form part of the normal regulation of property interests and will only be regarded as invalid if it does not comply with the requirements as set out in section 25(1).⁸⁵ The section 25(1) enquiry is two-fold, namely; (1) determining whether the deprivation is authorised in terms of law of general application and (2) establishing whether the deprivation is arbitrary.⁸⁶ Each of these requirements will be discussed in turn.

5 3 4 2 The law of general application question

A requirement in section 25(1) that potentially poses a stumbling block to a neighbouring owner's claim based on section 25(1) is the law of general application requirement. This is due to the fact that the Tourism Bill has not yet been enacted, therefore resulting in there being no law of general application applicable in the Airbnb context that currently authorises the deprivation experienced by neighbours. Section 25(1) provides that no person may be deprived of property, except in terms of law of general application. However, "law of general application" is not limited to legislation that provides for state regulation. The term "law of general application" may also

⁸⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

⁸⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46. See also, AJ van der Walt *Constitutional property law* 3 ed (2011) at 218-225; I Currie & J De Waal *The bill of rights handbook* 6 ed (2013) at 541; T Roux "Property" in S Woolman & M Bishop (eds) *Constitutional law of South Africa* vol 3 (2 ed OS 2003) chapter 46 1-37 at 46-20; K Bezuidenhout *Compensation for excessive but otherwise lawful regulatory state action* (LLD dissertation, Stellenbosch University 2014) at 14, 20-21.

⁸⁶ Section 25(1) of the Constitution of the Republic of South Africa, 1996.

include subordinate legislation; municipal by-laws;⁸⁷ legislative regulations; court rules; international conventions, and the rules of customary law and the common law.⁸⁸

The provision in section 25(1) ensures that any deprivation that occurs must be legitimately authorised in terms of customary law, the common law, or legislation.⁸⁹ In this regard, the deprivation occurs as a result of the law authorising certain actions or effects.⁹⁰ In order for there to be a law of general application, the law must apply generally and should apply in a justifiable manner, directed specifically at an individual or select group of individuals.⁹¹ Therefore, the relevant law of general application must

⁸⁷ There is a debate regarding whether municipal by-laws amount to law of general application. See *North Central Local Council & South Central Local Council v Roundabout Outdoor (Pty) Ltd & Others* 2002 (2) SA 625 (D) where municipal by-laws that placed restrictions on advertising and signs, and thus limited rights of expression, were found to be a law of general application for purposes of section 36 of the Constitution. Conversely, see G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 630, where the authors indicate that administrative regulations are less likely to pass the requirement of amounting to law of general application. See further T Roux "Property" in S Woolman, T Roux, & M Bishop (eds) *Constitutional law of South Africa* vol 3 (2 ed OS 2003) chapter 46 1-37 at 46-21.

⁸⁸ AJ van der Walt *Constitutional property law* 3 ed (2011) at 233-234; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) at 545.

⁸⁹ AJ van der Walt *Constitutional property law* 3 ed (2011) at 234. The wording of section 25(1), which refers to law of general application (as opposed to "a law of general application") indicates that the common law, customary law and legislation are all accepted as law of general application that should not authorise arbitrary deprivation of property. See also E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* (LLD dissertation Stellenbosch University 2015) at 114.

⁹⁰ AJ van der Walt *Constitutional property law* 3 ed (2011) at 236; E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* (LLD dissertation Stellenbosch University 2015) at 114.

⁹¹ E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* (LLD dissertation Stellenbosch University 2015) at 115; S Woolman & H Botha "Limitations" in S Woolman, T Roux, & M Bishop 2 ed *Constitutional law of South Africa* vol 3 (2 ed OS 2003) chapter 34 1- 136 at 34-61.

authorise the deprivation.⁹² It follows that if there is no law of general application, there can be no claim based on section 25(1).

Short-term rental operations in South Africa are currently governed by municipal by-laws,⁹³ and if the Tourism Bill is enacted, it will be governed by the norms and standards envisioned by the Tourism Bill as subordinate legislation.⁹⁴ In this regard, the Tourism Bill is the relevant law potentially authorising the deprivations identified in terms of short-term rental operations in South Africa. In the event that the Tourism Bill is not adopted, the section 25(1) enquiry will fail as there is no law of general application authorising the deprivation. Therefore, to be able to conduct a section 25(1) enquiry, the Tourism Bill would need to be adopted as subordinate legislation that authorises short-term rental operations in South Africa.⁹⁵ Importantly, the Tourism Bill will also need to specify that the bill's norms and standards are classified as

⁹² AJ van der Walt *Constitutional property law* 3 ed (2011) at 237. See also R Brits *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (LLD dissertation Stellenbosch University 2012) 297; ZT Boggenpoel "Compulsory transfer of encroached-upon land: A constitutional analysis" (2013) 76 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 313-326 at 320; NS Siphuma *The lessor's tacit hypothec: A constitutional analysis* (LLM thesis, Stellenbosch University 2013) at 83.

⁹³ The City of Cape Town is the only municipality that has enacted municipal by-laws addressing short-term rental operations. The By-law Amendment has provided some legal certainty to homeowners in the City of Cape Town regarding the time period in which a host may rent their property, now enabling homeowners to let their property for a period not exceeding 30 consecutive days for the same guest. See Proclamation for the City of Cape Town Municipal Planning Amendment By-law, 2019 Province of the Western Cape: Provincial Gazette Extraordinary/PGE 8185 of 06-12-2019.

⁹⁴ S Fick "Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?" (2021) 3 *Stellenbosch Law Review* 455-481 at 463; Proclamation for the City of Cape Town Municipal Planning Amendment By-law, 2019 Province of the Western Cape: Provincial Gazette Extraordinary/PGE 8185 of 06-12-2019; J Steyn "Property law: Airbnb – is hosting your property on Airbnb legal?" (date unknown) *De Klerk & Van Gend Attorneys* <<https://dkvg.co.za/property-law-airbnb-is-hosting-your-property-on-airbnb-legal/>> (accessed 01-04-2020).

⁹⁵ S Fick "Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?" (2021) 3 *Stellenbosch Law Review* 455-481 at 470-471.

regulations because the Tourism Act does not specify whether the norms and standards that stem from the Act amount to regulations.⁹⁶ Despite the lack of clarity, it is likely that the Tourism Bill will be regarded as subordinate legislation amounting to a law of general application given that the norms and standards must be adopted by the Minister of Tourism in terms of legislation.⁹⁷ If the Tourism Bill is adopted,⁹⁸ the norms and standards adopted in terms of the Tourism Bill will exist as subordinate legislation, consequently creating a clear law of general application that will enable a section 25(1) enquiry. Conversely, if the Tourism Bill is not adopted, it is unlikely that neighbours would be able to bring a section 25(1) claim because the law of general application requirement would not be met. Consequently, neighbours of short-term rentals would only have common law remedies available, as discussed in chapter 4.

Since the Tourism Bill is still draft legislation, it is unclear how the final bill will be formulated in terms of its regulation of short-term rentals in South Africa. Nevertheless, the general consensus surrounding the Tourism Bill is that it will authorise short-term rental operations to continue in South Africa.⁹⁹ If the Tourism Bill regulates short-term rentals in such a way that it allows for deprivation of a legally relevant interest for

⁹⁶ S Fick “Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?” (2021) 3 *Stellenbosch Law Review* 455-481 at 470-471.

⁹⁷ S Fick “Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?” (2021) 3 *Stellenbosch Law Review* 455-481 at 470-471.

⁹⁸ It should be noted that there has been considerable opposition to the adoption of the Tourism Bill. See U Henama “Bill will harm tourism and favour hotels” (23-08-2019) *Business Day* <<https://www.businesslive.co.za/bd/opinion/2019-08-23-bill-will-harm-tourism-and-favour-hotels/>> (accessed 11-05-2020); Anonymous “Rule of law project calls on tourism dept to shelve Tourism Amendment Bill” (14-06-2020) *Bizcommunity* <<https://www.bizcommunity.com/Article/196/717/192048.html>> (accessed 11-05-2020).

⁹⁹ South African Government official website “Minister Derek Hanekom meets with Airbnb representatives” (17-05-2019) *South African Government* <https://www.gov.za/speeches/short-term-home-rentals-17-may-2019-0000> (accessed 15-06-2021).

neighbours of short-term rental hosts, then it can be argued that there is a law of general application authorising the deprivation.

Once it has been established whether a law of general application exists in the short-term rental context, the next question is whether the law permits an arbitrary deprivation of property. In this regard, the following section questions whether there would be compliance with the arbitrariness requirement as set out in section 25(1) in the short-term rental context.

5 3 4 3 The arbitrariness question

The subsequent question in terms of the *FNB* test requires courts to determine whether the relevant law authorises an arbitrary deprivation.¹⁰⁰ In this regard, the Constitutional Court stated that a deprivation would amount to an arbitrary deprivation if it is procedurally unfair or if there is not sufficient reason for the deprivation on a scale ranging from rationality to proportionality.¹⁰¹ While the judgment analysed what amounts to substantive arbitrariness, the judgment did not expand on the definition of procedural arbitrariness.¹⁰² While section 25(1) prohibits laws permitting arbitrary deprivation of property, the provision itself fails to distinguish between substantive and procedural grounds that will result in an arbitrary deprivation of property. Despite procedural unfairness not being expanded on in *FNB*, it appears that procedural

¹⁰⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

¹⁰¹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. See further AJ van der Walt *Constitutional property law* 3 ed (2011) at 220-223, 237-241; I Currie & J de Waal *The bill of rights handbook* 6 ed (2013) at 543; T Roux "Property" in S Woolman, T Roux, & M Bishop (eds) *Constitutional law of South Africa* vol 3 (2 ed OS 2003) chapter 46 1-37 at 46-22.

¹⁰² AJ van der Walt *Constitutional property law* 3 ed (2011) at 245.

unfairness constitutes an independent ground that can result in a finding of an arbitrary deprivation of property. In this regard, the test for arbitrariness consists of a procedural *and* a substantive leg. Accordingly, the next section will apply the arbitrariness factors relevant in the short-term rental context to provide a tentative proposal depicting how a section 25 analysis of the laws authorising a neighbour's interference would likely be conducted by South African courts.

5 3 4 4 Procedural arbitrariness

It is currently unclear what amounts to “procedural arbitrariness” as the Constitutional Court in *FNB* did not provide a definition of procedural arbitrariness. However, the Constitutional Court in *Mkontwana* provided some clarity regarding procedural arbitrariness, stating that the notion of procedural arbitrariness is a flexible one that must be established based on the facts of each case in a similar manner to that of procedural fairness in other contexts.¹⁰³ Based on *Mkontwana*, Van der Walt opines that the procedural fairness enquiry under administrative law, in terms of section 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”)¹⁰⁴

¹⁰³ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and Others* 2005 (1) SA 530 (CC) para 65. See also *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 40 where the court confirmed the *Mkontwana* ratio pertaining to the procedural arbitrariness test. Additionally, see *Janse van Rensburg NO v Minister van Handel en Nywerheid* 1999 (2) BCLR 204 (T) 221 and *Cape of Good Hope v Bathgate* 2000 (2) BCLR 151 (C) para 82, where lower courts confirmed that there must be due process in order for there to be procedural fairness.

¹⁰⁴ See also section 33 of the Constitution of the Republic of South Africa, 1996.

is similar to the procedural arbitrariness enquiry in terms of section 25(1) of the Constitution.¹⁰⁵

In *Reflect-All* the Constitutional Court referred to the definition of procedurally unfair deprivation as discussed in *Mkontwana* without elaborating any further on the notion of procedural fairness.¹⁰⁶ Following these two decisions, the court had the opportunity to grapple with the notion of procedural fairness in *Offit*.¹⁰⁷ However, the court also did not expand on the definition of procedural unfairness. This was because, in terms of its application of the *FNB* methodology, it was not necessary to determine arbitrariness as the court had found that the relevant use of property did not constitute a deprivation of property.¹⁰⁸ However, in *Opperman*, the court examined the requirements for procedural fairness and found that in the instance where a statutory provision affords courts "judicial oversight" without providing a court with the discretion to decide on a just and equitable order, it would result in an arbitrary deprivation of property based on procedural unfairness.¹⁰⁹

¹⁰⁵ AJ van der Walt *Constitutional property law* 3 ed (2011) at 265. It is worth noting that subsequent to *Mkontwana* it was suggested that the procedural arbitrariness test under section 25(1) is a separate and independent test, implying that in terms of section 25(1) procedural fairness is assessed on the same basis as matters relating to just administrative action in terms of section 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (PAJA). See *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 69. See also AJ van der Walt "Procedurally arbitrary deprivation of property" (2012) 23 *Stellenbosch Law Review* 88-94 at 88-90; E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* (LLD dissertation Stellenbosch University 2015) at 122-123.

¹⁰⁶ *Reflect-All* 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government 2009 (6) SA 391 (CC) para 40.

¹⁰⁷ *Offit Enterprises (Pty) Ltd v Coega Development Corporation Ltd* 2011 (1) SA 293 (CC) para 41.

¹⁰⁸ *Offit Enterprises (Pty) Ltd v Coega Development Corporation Ltd* 2011 (1) SA 293 (CC) para 44.

¹⁰⁹ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 69. In *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport and Others* 2015 (10) BCLR 1158 (CC) paras 22-24, the Constitutional Court confirmed this point. See also *Mohunram and Another v National Director of Public*

The judgments discussed above indicate a lack of clarity regarding the definition of procedural fairness in the context of arbitrariness under section 25(1).¹¹⁰ Additionally, the judgments that followed the *FNB* decision still do not clarify when a deprivation will be procedurally unfair.¹¹¹ Furthermore, the judgments do not clearly indicate how procedural unfairness under section 25(1) must be distinguished from procedural fairness in terms of section 33 of PAJA.¹¹² Van der Walt questions whether procedural fairness has any meaning to it in the context of section 25(1).¹¹³ He argues that procedurally unfair deprivation of property under section 25(1) is only logical to the extent that it relates to deprivation of property that does not arise as a result of administrative action.¹¹⁴ He distinguishes between deprivations resulting from

Prosecutions and Another (Law Review Project as Amicus Curiae) 2007 (4) SA 222 para 121 where the Constitutional Court indicated that a lack of discretion on the part of a court to forfeit property would result in an arbitrary deprivation of property.

¹¹⁰ AJ van der Walt "Procedural arbitrary deprivation of property" (2012) 23 *Stellenbosch Law Review* 88-94 at 89.

¹¹¹ *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 (1) SA 530 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC).

¹¹² AJ van der Walt "Procedural arbitrary deprivation of property" (2012) 23 *Stellenbosch Law Review* 88-94 at 90-91; AJ van der Walt *Property and Constitution* (2012) at 40-43, 81-91; E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* (LLD dissertation Stellenbosch University 2015) at 123-124.

¹¹³ AJ van der Walt "Procedural arbitrary deprivation of property" (2012) 23 *Stellenbosch Law Review* 88-94 at 89.

¹¹⁴ AJ van der Walt "Procedural arbitrary deprivation of property" (2012) 23 *Stellenbosch Law Review* 88-94 at 93-94; E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* (LLD dissertation Stellenbosch University 2015) at 124; T Roux "Property" in S Woolman, T Roux, & M Bishop (eds) *Constitutional law of South Africa* vol 3 (2 ed OS 2003) chapter 46 1-37.

administrative action and deprivations resulting from the legislation itself and is of the opinion that deprivation of property stemming from administrative action should be adjudicated in terms of PAJA instead of section 25(1).¹¹⁵ He argues that deprivations that do not arise due to administrative action invoking the protections under PAJA should be adjudicated in terms of section 25(1).¹¹⁶ The basis for this argument is that there are no appropriate alternative principles regarding procedural unfairness that exist beyond the administrative law sphere.¹¹⁷ In this regard, Van der Walt argues that procedural arbitrariness under section 25(1) should only be relevant if PAJA does not specifically apply.¹¹⁸ Similarly, Roux argues that section 25(1) of the Constitution will find application in the instance where a law enables a deprivation of property in a procedurally unfair manner.¹¹⁹ Following this argument, section 25(1) should not be applicable in the instance where an administrative action amounting to a deprivation of property is alleged to be procedurally unfair. In such an instance, the litigant will need to rely on the remedies provided in PAJA.¹²⁰

Interestingly, Van der Walt opines that the procedural unfairness test conducted in terms of section 25(1) is likely to resemble the procedural unfairness test set out in

¹¹⁵ AJ van der Walt “Procedural arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 at 94.

¹¹⁶ AJ van der Walt “Procedural arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 at 94.

¹¹⁷ AJ van der Walt “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 at 93-94.

¹¹⁸ AJ van der Walt “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 at 94.

¹¹⁹ T Roux “Property” in S Woolman, T Roux, & M Bishop (eds) *Constitutional law of South Africa* vol 3 (2 ed OS 2003) chapter 46 1-37 at 46-25.

¹²⁰ T Roux “Property” in S Woolman, T Roux, & M Bishop (eds) *Constitutional law of South Africa* vol 3 (2 ed OS 2003) chapter 46 1-37 at 46-25.

PAJA.¹²¹ On the other hand, Roux is of the opinion that there will generally be no overlap between procedural unfairness under section 33 of the Constitution and procedural fairness under section 25(1) of the Constitution.¹²² He argues the absence of an overlap is due to the wording of section 33 of the Constitution, which refers to administrative action instead of "law" as stated under section 25(1).¹²³ He elaborates by saying that a litigant may challenge a matter in terms of PAJA if there was administrative action that deprived a person of property in a procedurally unfair manner.¹²⁴

Van der Walt is of the opinion that procedural fairness in the section 25 context is likely to have application in only two instances, namely (1) where the relevant legislation provides for judicial oversight;¹²⁵ and (2) where the deprivation would only be procedurally fair if the legislation causing the deprivation allows for an occasional review procedure to prevent the deprivation from becoming arbitrary purely due to its duration.¹²⁶ Based on the *Opperman* decision and Van der Walt's approach to procedural fairness, in the short-term rental context, procedural fairness could only be an issue if the Tourism Bill is enacted, and gives courts the power to exercise judicial oversight, but fails to grant them the power to exercise their discretion to give a just and equitable order. Besides this limited scope, it is unlikely that procedural fairness

¹²¹ AJ van der Walt "Procedural arbitrary deprivation of property" (2012) 23 *Stellenbosch Law Review* 88-94 at 94.

¹²² T Roux "Property" in S Woolman, T Roux, & M Bishop (eds) *Constitutional law of South Africa* vol 3 (2 ed OS 2003) chapter 46 1-37 at 46-25.

¹²³ T Roux "Property" in S Woolman, T Roux, & M Bishop (eds) *Constitutional law of South Africa* vol 3 (2 ed OS 2003) chapter 46 1-37 at 46-25.

¹²⁴ T Roux "Property" in S Woolman, T Roux, & M Bishop (eds) *Constitutional law of South Africa* vol 3 (2 ed OS 2003) chapter 46 1-37 at 46-25.

¹²⁵ AJ van der Walt *Constitutional property law* 3 ed (2011) at 270.

¹²⁶ AJ van der Walt *Constitutional property law* 3 ed (2011) at 270.

will be applicable. Substantive arbitrariness is likely to be of more relevance in the short-term rental context as there is potential for neighbours to argue that there is not sufficient reason for the deprivation to occur. Consequently, the following section will explore substantive arbitrariness in the instance of a neighbour experiencing a deprivation arising from a law of general application enabling short-term rental operations.

5 3 4 5 Substantive arbitrariness

In terms of the second leg of the arbitrariness test arising from the *FNB* methodology, namely substantive arbitrariness, courts must determine whether sufficient reason exists for the deprivation.¹²⁷ This enquiry will depend on the facts of each case and should be determined by the court through a strict proportionality test or a less strict rationality review.¹²⁸ In the instance where the court applies the rationality review or test, it must be determined whether the deprivation in that instance is rationally connected to a legitimate government purpose.¹²⁹ On the other hand, when the proportionality test is applied, it must be determined whether the deprivation is proportionate in relation to the purpose it serves, having due regard to the impact that

¹²⁷ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹²⁸ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹²⁹ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

the deprivation has on a particular individual.¹³⁰ Therefore, substantive arbitrariness will be determined on a case-by-case manner.¹³¹ In relation to substantive arbitrariness, the Constitutional Court in *FNB* stated the following:

"Sufficient reason for the particular deprivation is to be established as follows:

(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.

(b) A complexity of relationships has to be considered.

(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well the extent of the deprivation in respect of such property.

(e) Generally speaking, where the property in question is ownership of land or a corporeal movable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right is something less extensive. This judgment is not concerned at all with incorporeal property.

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

¹³⁰ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹³¹ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of the deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the facts of each particular case, always bearing in mind that the enquiry is concerned with arbitrary in relation to deprivation of property under s 25".¹³²

While the factors highlighted in the *FNB* decision provide excellent questions for conducting a section 25(1) analysis, the case does not clarify the manner in which the factors should be applied. However, the approach adopted by subsequent case law indicates that all the factors identified in the *FNB* case will not necessarily be applicable in *all* instances. Rather, courts are likely to only pay regard to the factors relevant to the specific deprivation at hand.¹³³ In this regard, it is likely that the Constitutional Court in *FNB* phrased the factors in a broad manner to cover a large variety of potential issues that should be considered in relation to deprivation. Given that the court did not expressly state that all factors need to be applied, and the subsequent case law did

¹³² *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹³³ For example, see *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and Others* 2005 (1) SA 530 (CC) paras 92-112; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 49; *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) paras 68-77. See also BV Slade "The effect of avoiding the *FNB* methodology in section 25 disputes" (2019) 40 *Obiter* 36-46 at 40-41. While the focus of Slade's article is on expropriations, he discusses the deprivation question in terms of *FNB* and section 25. He highlights that despite courts not always following the *FNB* methodology when dealing section 25, in terms of both section 25(1) and 25(2) claims, litigants will first need to prove a valid deprivation before the enquiry can proceed.

not apply all the factors, it appears that only the factors relevant to the specific matter will be considered. However, the inconsistent manner in which courts apply these factors could be somewhat harmful to litigants in the event that a factor is overlooked by the court that could in fact, be relevant and beneficial to the litigant's claim. In this regard, I argue that the court's post-*FNB* approach could potentially be criticised if it can be shown that the way courts have addressed arbitrary deprivations did not include a consideration of all the *FNB* factors and subsequently failed to consider factors relevant to the case at hand, consequently negatively affecting the litigant.

In terms of the substantive arbitrariness enquiry, the first step is to evaluate the relationship between the means employed (the deprivation) and the ends sought to be achieved (the purpose of the relevant law). If enacted, the Tourism Bill would likely authorise the operation of short-term rentals in South Africa through the norms and standards, which would provide the specific restrictions on the operation of short-term rental operations. Consequently, the relevant deprivation would be that neighbours' use and enjoyment of their property is interfered with due to the Tourism Bill authorising the operation of short-term rentals in South Africa. The ends sought to be achieved by the deprivation would be to (a) promote and ensure growth in the tourism industry; (b) generate more revenue for the South African economy; (c) create tax revenue for Government, and (d) encourage individuals to become property owners as they can generate income by using their property as short-term rental accommodation.¹³⁴ Given the prominence of the sharing economy, with companies like Airbnb dominating the tourism industry in South Africa, it is crucial that the

¹³⁴ HRA Koster, J van Ommersen & N Volkhausen "Short-term rentals and the housing market: Quasi-experimental evidence from Airbnb in Los Angeles" 2019 *Centre for Economic Policy Research* 1-74 at 1.

Government enable property owners to use their property as short-term rental accommodation. By allowing property owners to use their property as short-term rental accommodation, the deprivation has positive consequences because the tourism industry is promoted, the economy is boosted, the Government receives taxes, and individuals are encouraged to become property owners. Therefore, in terms of the rationality of the deprivation, it is argued that a nexus exists between the means employed and the ends sought to be achieved by the deprivation existing in this instance.

Subsequently, the second step in the substantive arbitrariness test requires that a complexity of relationships needs to be considered. In the short-term rental context, the relationships between the relevant role-players are particularly complex and pose a tough balancing act for the South African Government to manage. When it comes to the complexity of relationships, one must have regard for the neighbours who have a right to use and enjoy their property, the short-term host who is entitled to generate income from their property, the tourism industry that requires an economic boost, and the Government who requires more tax revenue for the country to operate. These role-players need to be taken into account because they each have rights and obligations in the short-term rental context that should be kept in mind when determining substantive arbitrariness.

When considering the relationship between the aim of the deprivation and the individual affected in the short-term rental context, the person normally affected by the deprivation is the neighbouring property owner. In the short-term rental context, neighbouring property owners are experiencing an unfair and inequitable situation in that they receive no direct benefit through short-term rental operations while their entitlements to use and enjoy their property are disturbed. Therefore, in the short-term

rental context, a close link between the individual affected by the deprivation (the neighbouring property owner) and the aim of the deprivation (promoting tourism, the economy, tax revenue, and property ownership) does not evidently exist.

When determining whether a deprivation is arbitrary, one must consider the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property. In terms of the purpose of the deprivation, the deprivation in the short-term rental context is directed at promoting tourism, the economy, tax revenue, and property ownership. From the short-term host's side, the nature of the property is that of residential property that is used to generate income through short-term rental operations. From the perspective of neighbours, the nature of their property is residential property, whereby they (rightfully) expect reasonable use and enjoyment of their property. Importantly, in relation to the extent of the deprivation, the extent of the deprivation will be linked to the time frame that the law of general application allows a short-term host to use their property as short-term rental accommodation. Depending on the limits imposed by the legislation, the deprivation has the potential to inhibit neighbours' ability to optimally use and enjoy their property to a great extent. However, it is important to note that the extent to which a neighbour's use and enjoyment of their property is negatively impacted is also likely to vary based on how often the short-term host lists their property as short-term rental accommodation as well as the conduct of the short-term guests when occupying the short-term rental accommodation. It is entirely possible that in some instances, a neighbour of a short-term host may not experience any interference with their right to use and enjoy their property. Contrastingly, it is also possible that a neighbour may experience severe, frequent interferences with their

right to use and enjoy their property. In this regard, the extent to which a neighbour experiences interference will differ on a case-by-case basis.

In terms of the *FNB* methodology, the purpose of the deprivation must be more compelling when ownership is affected in comparison to when a less extensive property right is affected.¹³⁵ In this regard, given that neighbours in the short-term rental context are property owners, it is clear that their right to ownership is affected by the deprivation. Consequently, the purpose of the deprivation of neighbours' property rights needs to be more compelling than if a less extensive property right was affected. In this instance, the purpose of the deprivation of the property rights of neighbours' is to promote the tourism industry, consequently improving the economy and generating tax revenue for the Government. Therefore, based on the compelling benefits of short-term operations in South Africa, it can be argued that the purpose of the deprivation is compelling enough to warrant the interference of a neighbour's use and enjoyment of property.

The *FNB* methodology states that in the instance where a deprivation embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation only embraces some incidents of ownership and those incidents partially.¹³⁶ Arguably, in the short-term rental context, the only incident of ownership limited by the deprivation is the neighbour's right to use and enjoy their

¹³⁵ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. See further AJ van der Walt *Constitutional property law* 3 ed (2011) at 245.

¹³⁶ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

property. Therefore, the purpose of the deprivation need not be as compelling as it would be if all incidents of ownership were limited by the deprivation.

Based on the discussion above, when looking at the nature of the property, it is evident that the deprivation relates to a neighbour's ownership of land. Consequently, it can be argued that in relation to short-term rentals, the test may shift from a rationality test and lean more toward a proportionality analysis. However, in terms of short-term rental operations, it appears that only the use and enjoyment of neighbouring owners' rights are impacted by the deprivation. Consequently, it is most likely that the test applied in the short-term rental context will be that of a continuum between rationality and proportionality. In terms of proportionality, the deprivation of the neighbour's use and enjoyment of their property must be weighed up against the purpose of the deprivation, that being promoting the tourism industry, generating income for the economy, and generating tax revenue for the Government. Subsequently, it is argued that it is unlikely that a neighbour would be able to prove an arbitrary deprivation of property in terms of section 25(1) as the means appear to justify the ends, and the deprivation is proportionate to the purpose. On the assumption that it is unlikely that the Tourism Bill's provisions impacting neighbour's property rights result in an unconstitutional arbitrary deprivation of neighbour's properties, it is not necessary to conduct a section 36(1) analysis.

5 4 Conclusion

This chapter explored whether the neighbour of a short-term rental host may have a constitutional remedy available to them in terms of section 25 of the Constitution as set out by the Constitutional Court in *FNB*. Before undertaking the *FNB* analysis, the principles of subsidiarity were explored as a threshold to determine whether it was viable for a section 25 analysis to be conducted. Importantly, this chapter evaluated

whether a neighbour would have constitutional remedies or common law remedies, or both available to them based on the principles of subsidiarity. Following a brief exploration of the principles of subsidiarity, it was concluded that in the event that the Tourism Bill is enacted, litigants will most likely need to rely on the Tourism Bill and will not be able to rely directly on section 25. Litigants will also not have the common law remedy founded in nuisance law available to them in the instance where they experience property interferences covered in the Tourism Bill (on the assumption that the Tourism Bill provides appropriate remedies to address nuisance law infringements). However, in the event that the Tourism Bill is not enacted, litigants will most likely be able to rely on the common law to bring a claim founded in nuisance law to protect their property rights in the short-term rental context.

Subsequent to determining the viability of a section 25 analysis based on the Tourism Bill's likely enactment, an overview of the *FNB* section 25 methodology was provided. In this respect, the post-*FNB* case law was briefly explored to determine the court's approach to section 25 claims. Thereafter, this chapter employed the *FNB* methodology to determine what a section 25 analysis in the short-term rental context would potentially look like. In addressing the first question of the section 25 analysis set out in *FNB*, namely the property question, it was evident that the alleged interest of neighbours of short-term hosts is likely to be regarded as property for the purpose of section 25, given that ownership of property is affected. The second question of the section 25 analysis considers whether a deprivation of the identified property interest has occurred. In this regard, it was noted that the laws that authorise short-term rental operations in South Africa negatively impact the use and enjoyment of neighbouring property owners' property. Consequently, in terms of this question, it was concluded that the interference caused by the laws that authorise short-term operations in South

Africa would likely comply with both the wide and narrow definition of deprivation (albeit more difficult to prove deprivation under the narrow approach) and consequently amount to a deprivation in terms of section 25 of the Constitution.

In determining whether there was a law of general application authorising the deprivation based on the third question of the section 25 analysis, it was argued that in the event that the Tourism Bill is enacted as subordinate legislation, it would be regarded as a law of general application authorising the deprivation in the short-term rental context. Subsequently, the fourth question in terms of the *FNB* analysis was addressed, which explored whether the relevant deprivation in the short-term rental context amounted to an unconstitutional arbitrary deprivation of property. In relation to the procedural arbitrariness question, it appeared that procedural fairness is unlikely to pose a challenge in the short-term rental context, provided that the Tourism Bill provides for judicial oversight and grants courts the power to exercise their discretion to give a just and equitable order. In terms of the substantive arbitrariness enquiry, it was contended that there is a clear nexus between the means and ends in relation to the deprivation experienced by the neighbouring property owner of a short-term rental. Accordingly, it was concluded that the deprivation caused by the laws allowing for short-term rental operations in South Africa would likely not amount to an unconstitutional arbitrary deprivation of the neighbouring property owner's property when assessed according to the proportionality test. Due to the finding that the deprivation would not amount to an unconstitutional arbitrary deprivation, it was not necessary to conduct a section 36(1) analysis. In this light, it is argued that neighbours of short-term rental hosts are unlikely to be successful with a section 25 claim and should rather rely on neighbour law for infringements of their property rights in the short-term rental context.

Based on this discussion, it is clear that the manner in which short-term rentals are regulated will significantly impact the property rights of hosts and neighbours. It is pertinent that the regulation of short-term rental operations occurs in an equitable manner that considers the various role-players in the short-term rental context. To this end, the following chapter provides recommendations for the regulation of short-term rental operations in South Africa with the overarching theme of providing recommendations that promote short-term rental operations while empowering neighbours to enjoy their property entitlements.

Chapter 6: Recommendations for the regulation of short-term rentals in South Africa

6 1 Introduction

In chapter 5 of this dissertation, a constitutional analysis of short-term rental operations in light of section 25(1) of the Constitution of the Republic of South Africa, 1996 (“Constitution”) was conducted. The outcomes of the previous chapter were that in the event that the Tourism Amendment Bill of 2019 (“Tourism Bill”)¹ is enacted, litigants wanting to bring a claim for arbitrary deprivation of property are unlikely to succeed with a claim in terms of section 25. Consequently, it was argued that in terms of the principles of subsidiarity,² a neighbour would need to rely on remedies stemming from the Tourism Bill and would not be able to rely directly on section 25. In this regard, it was also argued that in the instance of the Tourism Bill’s enactment, neighbours would also not have the common law remedy founded in nuisance law available to them if the norms and standards of the Tourism Bill specifically address nuisances in the short-term rental context. However, if the Tourism Bill is *not* enacted, neighbours will most likely be able to rely on the common law to bring a claim founded in nuisance law to protect their property rights in cases where a host’s short-term rental operations interfere with their right to use and enjoy their property. It is evident that there is a need for Government to regulate short-term rentals in a manner that enables neighbours to use and enjoy their property with minimal interferences to give maximum effect to their ownership entitlements. In this light, chapter 6 will explore the potential consequences

¹ Tourism Amendment Bill Notice 235 of 2019.

² See chapter 5 section 5 2 for a discussion of the principles of subsidiarity in the short-term rental context.

that will ensue if short-term rentals are regulated by legislation and, conversely, what will occur if short-term regulations are only regulated by contract law.

Internationally, there has been considerable development in terms of the regulation of Airbnb.³ Based on these developments, it is valuable to conduct case studies of jurisdictions that have regulated Airbnb to provide adequate, appropriate recommendations in the South African context. The cities of London⁴ and Berlin⁵ are two jurisdictions that have made noteworthy formal attempts to regulate Airbnb's operations within their domains. These two jurisdictions are particularly significant due to the juxtaposition of London adopting fairly lenient regulations that accommodate Airbnb's operations in London, as opposed to Berlin adopting strict regulations for short-term rental operations in the city. Based on the discussions surrounding the regulation of Airbnb in London and Berlin, recommendations will be provided to serve as guidelines to the South African Government as to what it should consider when addressing short-term rentals in South Africa.

There are six main role-players in the short-term rental context, namely (a) hosts; (b) guests; (c) neighbours; (d) the tourism industry; (e) the hospitality industry; and (f) the South African Government. The recommendations provided will consider the main

³ AE Gold "Community consequences of Airbnb" (2019) 94 *George Washington Law Review* 1579-1637 at 1604, 1605.

⁴ Section 44 and 45 of the Deregulation Act of 2015; Airbnb official website "Responsible hosting in the United Kingdom" (date unknown) *Airbnb* <https://www.airbnb.co.za/help/article/1379/responsible-hosting-in-the-united-kingdom?locale=en&_set_bev_on_new_domain=1617824174_Nzg4ZWQ1MGFhYjAy> (accessed 08-04-2021).

⁵ Law on the Prohibition of the Misappropriation of Living Space Act of 2013; Airbnb official website "Berlin" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/854/berlin#:~:text=Short%2Dterm%20rental%20regulations,short%2Dterm%20rentals%20in%20Berlin.>> (accessed 16-05-2022).

role-players and seek to find a way to regulate short-term rentals to bring clarity and certainty to role-players while also promoting tourism in South Africa, which is particularly relevant in light of the Covid-19 pandemic.⁶

In this light, this chapter aims to explore the following three regulatory approaches to short-term rental operations in South Africa, namely, (a) enacting national legislation to govern short-term rental operations; (b) passing municipal by-laws to allow local municipalities to govern short-term rental operations based on the municipality's circumstances, and (c) leaving short-term rental operations unregulated and allowing contract law to govern the relationship between short-term hosts and guest.

The conclusion of these explorations forms the basis of the discussion as to which regulatory approach is best applicable in the South African short-term rental context. The chapter will begin by exploring the operation of the sharing economy, whereafter the importance of regulations governing short-term rentals will be discussed.

⁶ World Health Organization "Coronavirus disease (COVID-19) pandemic" (date unknown) *WHO* <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>> (accessed 11-08-2022). See Statistics South Africa official website "SA tourism industry struggles amidst COVID-19 pandemic" (29-04-2021) *Statssa* <<https://www.statssa.gov.za/?p=14281>> (accessed 28-06-2022); South African Department of Tourism official website "Tourism sector recovery plan COVID-19 response" (01-03-2021) *Department of Tourism* <<https://www.tourism.gov.za/AboutNDT/Documents/Tourism%20Sector%20Recovery%20Plan.pdf>> (accessed 28-06-2022); and CM Rogerson & JM Rogerson "COVID-19 Tourism impacts in South Africa: Government and industry responses" (2020) 31 *Geojournal of Tourism and Geosites* 1083-1091. For more on the property law implications of Covid-19, see also ZT Boggenpoel, E van der Sijde, MT Tlale & S Mahomed *Property and pandemics: Property law responses to Covid-19* (2021).

6 2 The sharing economy that fosters Airbnb's operations

Airbnb is the poster child of the sharing economy.⁷ The sharing economy can be regarded as an all-purpose term describing transactions whereby someone in possession of a car, home, or any property with commercial value, shares their property with a stranger in exchange for monetary compensation.⁸ The sharing economy has positively impacted many communities and individuals and can be seen as a modern source of income stemming from the financialisation of property that creates a motivation to own and maintain property.⁹ Although the sharing economy in the short-term rental context has positively affected many individuals and communities, it has simultaneously caused a significant threat to the hospitality industry.¹⁰

⁷ NR Mehmed "Airbnb and the sharing economy: Policy implications for local government" (2016) 12 *Spectrum of Public and Non-profit Management, Public Policy and Health Administration Review* 49-73 at 49. See also J Jefferson-Jones "Airbnb and the housing segment of the modern 'sharing economy': Are short-term rental restrictions an unconstitutional taking?" (2015) 42 *Hastings Constitutional Law Quarterly* 557-576; C Midgett, JS Bendickson, J Muldoon & SJ Solomon "The sharing economy and sustainability: A case for Airbnb" (2017) 13 *Small Business Institute Journal* 51-71; and D Wachsmuth & A Weisler "Airbnb and the rent gap: Gentrification through the sharing economy" (2018) 50 *Environment and Planning A: Economy and Space* 1147-1170.

⁸ NR Mehmed "Airbnb and the sharing economy: Policy implications for local government" (2016) 12 *Spectrum of Public and Non-profit Management, Public Policy and Health Administration Review* 49-73 at 50.

⁹ J Jefferson-Jones "Airbnb and the housing segment of the modern 'sharing economy': Are short-term rental restrictions an unconstitutional taking?" (2015) 42 *Hastings Constitutional Law Quarterly* 557-576 at 560. See also D Wachsmuth & A Weisler "Airbnb and the rent gap: Gentrification through the sharing economy" (2018) 50 *Environment and Planning A: Economy and Space* 1147-1170; C Midgett, JS Bendickson, J Muldoon & SJ Solomon "The sharing economy and sustainability: A case for Airbnb" (2017) 13 *Small Business Institute Journal* 51-71.

¹⁰ J Jefferson-Jones "Airbnb and the housing segment of the modern 'sharing economy': Are short term rental restrictions an unconstitutional taking?" (2015) 42 *Hastings Constitutional Law Quarterly* 557-576

The idea of sharing and bartering housing resources is a concept that has been in existence for much longer than one may realise.¹¹ From renting rooms at inns to boarding houses and informal arrangements, the foundation of property sharing has often been the quest for affordable shelter along with housing shortages.¹² However, what is different in the modern sharing economy is the way that sharing has been facilitated through technology and the fact that technological innovation is outpacing the changes in housing regulations.¹³ The sharing economy poses a challenge to legislators because it stems from a new system of collaboration regarding property sharing.¹⁴ In this regard, the issue lies in the fact that the existing regulations in place have been designed to regulate competitive property relationships.¹⁵ Due to the shift from a competitive economy to a collaborative economy, the existing laws are unsuitable because they were designed to protect the powerless against the

at 560. See also M Stanley “Global insight: who will Airbnb hurt more – hotels or OTAs” 2015 *Internet, Lodging, Leisure and Hotels* 1-54.

¹¹ J Jefferson-Jones “Airbnb and the housing segment of the modern ‘sharing economy’: Are short-term rental restrictions an unconstitutional taking?” (2015) 42 *Hastings Constitutional Law Quarterly* 557-576 at 561.

¹² RWF Swor “Long term solutions to the short term problem: an analysis of the current legal issues related to Airbnb and similar short-term rental companies with a proposed model ordinance” (2018) 6 *Belmont Law Review* 278-316 at 278.

¹³ J Jefferson-Jones “Airbnb and the housing segment of the modern ‘sharing economy’: are short-term rental restrictions an unconstitutional taking?” (2015) 42 *Hastings Constitutional Law Quarterly* 557-576 at 561.

¹⁴ J Jefferson-Jones “Airbnb and the housing segment of the modern ‘sharing economy’: are short-term rental restrictions an unconstitutional taking?” (2015) 42 *Hastings Constitutional Law Quarterly* 557-576 at 562.

¹⁵ J Jefferson-Jones “Airbnb and the housing segment of the modern ‘sharing economy’: are short-term rental restrictions an unconstitutional taking?” (2015) 42 *Hastings Constitutional Law Quarterly* 557-576 at 562.

powerful.¹⁶ The need to protect the powerless against the powerful is not as relevant in the sharing economy because the relationship is considered a horizontal relationship.¹⁷ In the short-term rental context, this means that short-term hosts and guests are seen as equals, hence the horizontality in the relationship. Therefore, the existing laws that would usually protect guests are not suitable because guests are not powerless in the sharing economy context, and hosts are not all-powerful.¹⁸

In this light, it is evident that the sharing economy is innovative and fast-moving and requires the Government to be just as innovative to adapt to an unprecedented and swiftly changing economy.¹⁹ Consequently, the regulation of short-term rentals is of utmost relevance in ensuring that the laws of the country are in line with the current global position regarding short-term rentals.

6 3 The importance of regulating short-term rental operations in South Africa

Regulating short-term rental operations in South Africa is particularly relevant due to the fact that short-term rental operations currently impact other existing pieces of

¹⁶ J Jefferson-Jones “Airbnb and the housing segment of the modern ‘sharing economy’: are short-term rental restrictions an unconstitutional taking?” (2015) 42 *Hastings Constitutional Law Quarterly* 557-576 at 562.

¹⁷ J Jefferson-Jones “Airbnb and the housing segment of the modern ‘sharing economy’: are short-term rental restrictions an unconstitutional taking?” (2015) 42 *Hastings Constitutional Law Quarterly* 557-576 at 562.

¹⁸ J Jefferson-Jones “Airbnb and the housing segment of the modern ‘sharing economy’: Are short-term rental restrictions an unconstitutional taking?” (2015) 42 *Hastings Constitutional Law Quarterly* 557-576 at 562.

¹⁹ NR Mehmed “Airbnb and the sharing economy: Policy implications for local government” (2016) 12 *Spectrum of Public and Non-profit Management, Public Policy and Health Administration Review* 49-73 at 69.

legislation such as, *inter alia*, (a) the Community Schemes Ombud Service Act 9 of 2011;²⁰ (b) the Consumer Protection Act 68 of 2008;²¹ (c) the Deeds Registries Act 47 of 1937;²² (d) the Electronic Communications and Transactions Act 25 of 2002;²³ (e) the Environment Conservation Act 73 of 1989;²⁴ (f) the Extension of Security of Tenure Act 62 of 1997;²⁵ (g) the Formalities in Respect of Leases of Land Act 18 of 1969;²⁶ (h) the Housing Act 107 of 1997;²⁷ (i) the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998;²⁸ (j) the Promotion of Administrative

²⁰ The Community Schemes Ombud Service Act 9 of 2011 can be applicable in the short-term rental context because it provides for dispute resolution mechanisms in community schemes, which may be relevant in the event of a dispute between community scheme owners relating to short-term rental operations.

²¹ The Consumer Protection Act 68 of 2008 is important in the short-term rental context because it provides rights and remedies for consumers, which can be relevant in light of Airbnb short-term rental guests being regarded as consumers.

²² The Deeds Registries Act 47 of 1937 is relevant in the determination of whether short-term tenants acquire real rights or limited real rights when in occupation of the rental property.

²³ The Electronic Communications and Transactions Act 25 of 2002 finds relevance in the short-term rental context because Airbnb operates online *via* a mobile application and a website, whereby short-term hosts and guests conclude short-term rental agreements using electronic communications.

²⁴ The Environment Conservation Act 73 of 1989 is relevant in the short-term rental context as it provides guidelines on noise pollution when it comes to short-term guests potentially making a noise.

²⁵ The Extension of Security of Tenure Act 62 of 1997 impacts short-term rental operations as it regulates occupation of land. This is relevant in that short-term guests occupy short-term rental property and land owners run the risk of needing to evict guests who stay on the property beyond the occupation dates agreed upon.

²⁶ The Formalities in Respect of Leases of Land Act 18 of 1969 is important in the Airbnb context because the provisions found in the Airbnb terms of service agreement between the host and guest contain provisions typically found in a lease agreement.

²⁷ The Housing Act 107 of 1997 is applicable in the short-term rental context because it indicates the functions of national, provincial, and local government in relation to housing development in South Africa.

²⁸ The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 may be applicable in the short-term rental context in the event that a short-term guest does not vacate the short-

Justice Act 3 of 2000;²⁹ (k) the Rental Housing Act 50 of 1999;³⁰ (l) the Sectional Titles Act 95 of 1986;³¹ (m) the Sectional Titles Schemes Management Act 8 of 2011,³² and (n) the Spatial Planning and Land Use Management Act 16 of 2013.³³ In this regard, regulating short-term rental operations will ensure that Airbnb operates in a manner that is in line with the current legislation that relates to short-term rental operations.

Imposing restrictions on short-term leasing in the short-term rental context can have positive implications, such as protecting the monetary value of properties, promoting

term rental property at the time which the short-term rental agreement with the host has come to an end.

²⁹ The Promotion of Administrative Justice Act 3 of 2000 plays a role in the short-term rental context when considering unconstitutional deprivation of property in terms of section 25 of the Constitution of the Republic of South Africa, 1996 with specific focus given to substantive and procedural arbitrariness.

³⁰ The Rental Housing Act 50 of 1999 (“RHA”) regulates the relationship between landlords and tenants. The RHA is relevant because it may find application in the event that short-term hosts and guests are regarded as landlords and tenants. In this instance, short-term hosts and guests would have the rights, obligations, and responsibilities of landlords and tenants as per the RHA.

³¹ The Sectional Titles Act 95 of 1986 applies in the short-term rental context in the sense that it allows for the establishment of bodies corporate who can create rules to regulate common property. This is relevant in the instance of body corporate rules preventing or limiting short-term rental operations as the Body Corporate believes the short-term host’s facilitation of guests poses a risk to other members in the sectional title scheme.

³² The Sectional Titles Schemes Management Act 8 of 2011 is relevant in the short-term rental context because it grants Body Corporate’s the power to create their own rules to ensure that the sectional title scheme operates in a manner that best benefits the members of the scheme. The power to make these rules is significant in the short-term rental context as it can lead to Body Corporate’s prohibiting or restricting short-term rental operations if they find that it will not be in the best interest of all the scheme members.

³³ The Spatial Planning and Land Use Management Act 16 of 2013 is important in the short-term rental context due to its zoning laws whereby certain areas can be zoned for residential use and others for commercial use of property. The distinction is important in relation to the question of whether short-term rental operations amount to residential or commercial use of property.

public safety, and enforcing taxation standards.³⁴ It is hypothesised that property values could potentially increase if the law enabled property owners to enter the short-term market. In particular, owners would have the opportunity to make quick profits by listing their property as short-term rental accommodation on the Airbnb platform. Making use of the Airbnb platform enables property owners to host guests on their property and generate income without necessarily having to host guests for an extended time-period as in the instance of a “normal” lease agreement whereby the tenant typically stays for an extended period, such as six months or a year.³⁵ By having regulations that authorise short-term rental operations, property owners can earn an income, which can potentially alleviate some burdens of ownership if the income is used towards repairs on the property or making payments towards the property’s mortgage bond.³⁶ Creating an environment where property owners can become short-term hosts strengthens host's section 25 rights as it prevents a deprivation of property on the part of property owners who would like to use their property as a source of income through short-term rental operations. Additionally, owning a property listed as an Airbnb has the potential to increase the property’s market value as it indicates to potential buyers that the property can serve as a source of income. Consequently, allowing short-term rentals can protect the property values in communities by

³⁴ GE Lines “Hej, not hej da: regulating Airbnb in the new age of Arizona vacation rentals” (2015) 57 *Arizona Law Review* 1163-1182 at 1164.

³⁵ CG van der Merwe “Should short-term letting be allowed in sectional title schemes?” 2018 *Journal of South African Law* 507-522 at 508.

³⁶ J Jefferson-Jones “Airbnb and the housing segment of the modern ‘sharing economy’: are short-term rental restrictions an unconstitutional taking?” (2015) 42 *Hastings Constitutional Law Quarterly* 557-576 at 573.

insulating individual owners from the implications of negative housing market downturns.³⁷

In contrast to the positive aspects highlighted above, an influx of tourists making use of short-term rental accommodation potentially results in a decrease in the sense of unity and cohesion between neighbours.³⁸ Permanent residents often argue that short-term tenants do not have ties to the community and, therefore, often do not reflect the values of the community.³⁹ Additionally, the influx of tourists can potentially negatively impact local businesses that exist to cater to the local population's wants and needs.⁴⁰ In this light, the regulation of short-term rental operations is necessary to protect the character of neighbourhoods and the impact short-term rentals may have on public safety.⁴¹ The character of neighbourhoods is significant and worthy of

³⁷ J Jefferson-Jones "Airbnb and the housing segment of the modern 'sharing economy': are short-term rental restrictions an unconstitutional taking?" (2015) 42 *Hastings Constitutional Law Quarterly* 557-576 at 573.

³⁸ D Guttentag "Transformative experiences via Airbnb: is it the guests or the host communities that will be transformed?" 2019 *Journal of Tourism Futures* 1-7 at 4.

³⁹ J Jefferson-Jones "Airbnb and the housing segment of the modern 'sharing economy': are short-term rental restrictions an unconstitutional taking?" (2015) 42 *Hastings Constitutional Law Quarterly* 557-576 at 573. Permanent residents in community schemes may be significantly affected by the presence of short-term tenants. This is predicted based on the fact that residents in community schemes often value neighbourly relations which may be impacted when individuals who do not reflect the community's values occupy the neighbouring properties.

⁴⁰ D Guttentag "Transformative experiences via Airbnb: is it the guests or the host communities that will be transformed?" 2019 *Journal of Tourism Futures* 1-7 at 4.

⁴¹ GE Lines "Hej, not hej da: regulating Airbnb in the new age of Arizona vacation rentals" (2015) 57 *Arizona Law Review* 1163-1182 at 1164.

protection as it implicates the public's well-being and can also safeguard the market value of properties.⁴²

In addition, another issue that arises is that corporations make use of the gap in the law by operating as hosts, achieving the benefits of hotels without having to meet the requirements of hotels.⁴³ These corporations are regarded as "commercial hosts".⁴⁴ Commercial hosts bring changes to the character of a neighbourhood.⁴⁵ As a result of the lack of legislation regulating short-term rental operations, individual hosts may hold multiple listings in an area.⁴⁶ Consequently, without adequate legislation regulating short-term rentals, corporations can take over neighbourhoods and turn properties into a hotel without meeting the regulations that govern the hospitality industry.⁴⁷ In this regard, regulating Airbnb is necessary to prevent commercial hosts from operating hotel-like Airbnb's while avoiding the application of the regulations relevant to the hospitality industry.⁴⁸

⁴² RWF Swor "Long term solutions to the short term problem: an analysis of the current legal issues related to Airbnb and similar short-term rental companies with a proposed model ordinance" (2018) 6 *Belmont Law Review* 278-316 at 301.

⁴³ D Wachsmuth & A Weisler "Airbnb and the rent gap: gentrification through the sharing economy" (2018) 50 *Environment and Planning A: Economy and Space* 1147-1170 at 1150.

⁴⁴ D Wachsmuth & A Weisler "Airbnb and the rent gap: gentrification through the sharing economy" (2018) 50 *Environment and Planning A: Economy and Space* 1147-1170 at 1150.

⁴⁵ D Wachsmuth & A Weisler "Airbnb and the rent gap: gentrification through the sharing economy" (2018) 50 *Environment and Planning A: Economy and Space* 1147-1170 at 1150.

⁴⁶ D Wachsmuth & A Weisler "Airbnb and the rent gap: gentrification through the sharing economy" (2018) 50 *Environment and Planning A: Economy and Space* 1147-1170 at 1150.

⁴⁷ DJ de Lange "Regulating 'short-term' rental accommodation in SA" (2019) 20 *Chartered Institute of Government Finance Audit and Risk Officers Journal* 26-30 at 30.

⁴⁸ RWF Swor "Long-term solutions to the short term problem: An analysis of the current legal issues related to Airbnb and similar short-term rental companies with a proposed model ordinance" (2018) 6 *Belmont Law Review* 278-316 at 286. The hospitality industry is governed by various pieces of legislation including *inter alia* (a) The National Building Regulations and Building Standards Act 103 of

In the short-term context, the sharing economy has positively affected many individuals and communities, but has simultaneously caused a major threat to the hospitality industry.⁴⁹ Airbnb has negatively impacted the hospitality industry, as it has given tourists and locals the opportunity to find cheaper accommodation in unique locations where hotels and bed and breakfast establishments do not exist.⁵⁰ However, the negative effects suffered by the hospitality industry have become the positive effects of Airbnb on the tourism industry.⁵¹ The access to affordable short-term accommodation in unique areas has encouraged locals to travel more within South Africa while also promoting international travel to South Africa.⁵² Tourists are

1997 regarding the construction of the premises; (b) The Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 regarding the products used on the premises; (c) The National Health Act 63 of 1977 whereby the property must have been inspected to receive a certificate of acceptability by the Health Council's Senior Health Inspector; (d) The relevant province's Provincial Gambling and Liquor Act 6 of 2010, if liquor is served to guests on the property, and (e) The Tobacco Products Control Act 83 of 1993 whereby the hospitality establishment must display signs indicating designated smoking and no-smoking areas.

⁴⁹ J Jefferson-Jones "Airbnb and the housing segment of the modern 'sharing economy': Are short-term rental restrictions an unconstitutional taking?" (2015) 42 *Hastings Constitutional Law Quarterly* 557-576 at 560; M Ferreri & R Sanyal "Platform economies and urban planning: Airbnb and regulated deregulation in London" (2018) 55 *Urban Studies Journal Limited* 3353-3368 at 3356. See also M Stanley "Global insight: who will Airbnb hurt more – hotels or OTAs" 2015 *Internet, Lodging, Leisure and Hotels* 1-54.

⁵⁰ Airbnb "Airbnb in South Africa: The positive impact of healthy tourism" 2018 *Press Airbnb* 1-30 at 1, 2, and 6; Anonymous "Government to regulate Airbnb in South Africa" (15-04-2019) *Businessstech* <<https://businessstech.co.za/news/business/311226/government-to-regulate-airbnb-in-south-africa/>> (accessed 30-05-2022); M Stanley "Global insight: who will Airbnb hurt more – hotels or OTAs" 2015 *Internet, Lodging, Leisure and Hotels* 1-54.

⁵¹ Airbnb "Airbnb in South Africa: The positive impact of healthy tourism" 2018 *Press Airbnb* 1-30 at 1, 2, and 6; M Stanley "Global insight: who will Airbnb hurt more – hotels or OTAs" 2015 *Internet, Lodging, Leisure and Hotels* 1-54.

⁵² Airbnb "Airbnb in South Africa: The positive impact of healthy tourism" 2018 *Press Airbnb* 1-30 at 1, 2, and 6.

particularly enticed by Airbnb's because they are often in locations near the beach, malls, restaurants, or entertainment centers.⁵³ What differentiates Airbnb's from hotels and bed and breakfast establishments is the fact that Airbnb's are generally equipped with more amenities and are cheaper than these conventional hospitality establishments.⁵⁴ Furthermore, Airbnb allows tourists to have the opportunity to be immersed in the local culture of remote areas, which is attractive to tourists who hope to get a true cultural experience by living the way locals do.⁵⁵ According to Genesis Analytics, Airbnb generated approximately R8.7 billion from 1 June 2017 to 31 May 2018.⁵⁶ While the hospitality and tourism industries are not the focus of this dissertation, it is important to note their relevance, as any regulation of Airbnb in South Africa will subsequently impact the tourism sector.

As short-term rentals continue to gain momentum in South Africa, it is imperative that legislation supports its economic benefits while curtailing its ability to infringe on

⁵³ Airbnb "Airbnb in South Africa: The positive impact of healthy tourism" 2018 *Press Airbnb* 1-30 at 1, 2, and 6.

⁵⁴ Airbnb "Airbnb in South Africa: The positive impact of healthy tourism" 2018 *Press Airbnb* 1-30 at 1, 2, and 6; J Chica-Olmo, JG González-Morales & JL Zafra-Gómez "Effects of location on Airbnb apartment pricing in Málaga" (2020) 77 *Tourism Management* 1-13 at 10, 11. See also M Stanley "Global insight: who will Airbnb hurt more – hotels or OTAs" 2015 *Internet, Lodging, Leisure and Hotels* 1-54.

⁵⁵ Airbnb "Airbnb in South Africa: The positive impact of healthy tourism" 2018 *Press Airbnb* 1-30 at 1, 2, and 6; M Stanley "Global insight: who will Airbnb hurt more – hotels or OTAs" 2015 *Internet, Lodging, Leisure and Hotels* 1-54 at 46; D Lee "How Airbnb short-term rentals exacerbate Los Angeles's affordable housing crisis: Analysis and policy recommendations" (2016) 10 *Harvard Law and Policy Review* 229-254 at 252.

⁵⁶ Anonymous "Airbnb in South Africa: The positive impact of healthy tourism" (04-10-2018) *Genesis Analytics* <<https://www.genesis-analytics.com/reports-and-other-documents/airbnb-in-south-africa-the-positive-impact-of-healthy-tourism>> (accessed 31-05-2022); Airbnb "Airbnb in South Africa: The positive impact of healthy tourism" 2018 *Press Airbnb* 1-30 at 1.

property owners' rights.⁵⁷ Failure to regulate short-term rental operations will most likely negatively impact Government tax revenue, neighbourhoods, and the tourism and hospitality industry. Additionally, failure to regulate short-term rental operations may also detract from the property rights of landlords, tenants, and neighbours.⁵⁸

It is important to note that Airbnb has the potential to attract tourists to South Africa and generate income for the economy, which is much-needed following the strain placed on the tourism industry due to Covid-19.⁵⁹ In light of the potential positive effect that the Airbnb industry may have on different role-players in the South African society, it would be a disservice to prohibit housing exchanges like Airbnb unequivocally. Therefore, it is argued that short-term rental operations should be regulated in a manner that promotes the tourism sector while also preventing/limiting the infringement of neighbours' property rights and promoting the section 25 property rights of property owners as short-term hosts. In this regard, it is necessary to explore various regulatory approaches to determine which approach will best suit the South African climate.

⁵⁷ AE Gold "Community consequences of Airbnb" (2019) 94 *George Washington Law Review* 1579-1637 at 1637.

⁵⁸ D Guttentag "Transformative experiences via Airbnb: Is it the guests or the host communities that will be transformed?" 2019 *Journal of Tourism Futures* 1-7 at 4.

⁵⁹ J Jefferson-Jones "Airbnb and the housing segment of the modern 'sharing economy': Are short-term rental restrictions an unconstitutional taking?" (2015) 42 *Hastings Constitutional Law Quarterly* 557-576 at 560.

6 4 Three approaches to regulating short-term rental operations in South Africa

6 4 1 Introduction of the three regulatory approaches

There has been a call⁶⁰ for the regulation of short-term rental operations in South Africa for various reasons, with the primary focus being Airbnb's implications for property owners, the hospitality industry, the tourism industry, and the Government.⁶¹ The law needs to be forward-looking and provide clear legislation to prevent uncertainty among the relevant role-players. The gap in the law can potentially lead to property owners interested in becoming Airbnb hosts not being able to meaningfully exercise their property rights, as they are uncertain what their rights and obligations are in the short-term rental context.

There are three predominant regulatory approaches that can be applied in the South African context, namely (a) enacting national legislation to govern short-term rental operations; (b) allowing municipalities to pass municipal by-laws to regulate short-term rental operations based on the circumstances of the municipality; and (c) leaving short-term rental operations unregulated and allowing contract law to govern the relationship between host and guest. In this light, the following section will explore the first regulatory approach of enacting national legislation to govern short-term rental

⁶⁰ Anonymous "Airbnb pushes for new rental laws and rules in South Africa" (11-06-2021) *Businessstech* <<https://businessstech.co.za/news/property/498007/airbnb-pushes-for-new-rental-laws-and-rules-in-south-africa/>> (accessed 31-05-2022); Airbnb official news "Supporting inclusive tourism in South Africa" (04-06-2021) *Airbnb News* <<https://news.airbnb.com/en-uk/supporting-inclusive-tourism-in-south-africa/>> (accessed 31-05-2022); Anonymous "Government to regulate Airbnb in South Africa" (15-04-2019) *Businessstech* <<https://businessstech.co.za/news/business/311226/government-to-regulate-airbnb-in-south-africa/>> (accessed 30-05-2022).

⁶¹ Anonymous "Government to regulate Airbnb in South Africa" (15-04-2019) *Businessstech* <<https://businessstech.co.za/news/business/311226/government-to-regulate-airbnb-in-south-africa/>> (accessed 30-05-2022).

operations in South Africa. To this end, the positive and negative implications of enacting national legislation, whereby short-term rentals are governed solely by national legislation, will be explored.

6 4 2 Enacting national legislation to govern short-term rental operations in South Africa

6 4 2 1 The positive implications of enacting national legislation to govern short-term rental operations in South Africa

Currently, the only form of express legal recognition given to short-term rentals in South Africa is by way of the Tourism Bill.⁶² However, given that the Tourism Bill has not been enacted, there is arguably no express nationwide⁶³ legal recognition for short-term rentals like Airbnb in South Africa yet.⁶⁴ If national legislation is enacted to govern short-term rentals like Airbnb, the Government will be providing

⁶² Tourism Amendment Bill Notice 235 of 2019.

⁶³ On 3 February 2020, the City of Cape Town promulgated the City of Cape Town's Municipal Planning Amendment By-law which addresses short-term rental operations in the municipality. In terms of section 26(jj) of these by-laws, property owners are authorized to use their property as short-term rental accommodation for a period not exceeding 30 consecutive days to the same guest in order for their rental actions to amount to the short-term hosting a short-term guest. While this has brought *some* legal certainty to property owners in the City of Cape Town Municipality, it does not provide overall certainty to the Airbnb role-players throughout the rest of South Africa who lacks clarity on the legal nature of short-term rentals and the rights and obligations of short-term hosts and guests. See Proclamation for the City of Cape Town Municipal Planning Amendment By-law, 2019 Province of the Western Cape: Provincial Gazette Extraordinary/PGE 8185 of 06-12-2019 page 1.

⁶⁴ Anonymous "Government to regulate Airbnb in South Africa" (15-04-2019) *Businessstech* <<https://businessstech.co.za/news/business/311226/government-to-regulate-airbnb-in-south-africa/>> (accessed 30-05-2022); Anonymous "Airbnb pushes for new rental laws and rules in South Africa" (11-06-2021) *Businessstech* <<https://businessstech.co.za/news/property/498007/airbnb-pushes-for-new-rental-laws-and-rules-in-south-africa/>> (accessed 31-05-2022); Airbnb official news "Supporting inclusive tourism in South Africa" (04-06-2021) *Airbnb News* <<https://news.airbnb.com/en-uk/supporting-inclusive-tourism-in-south-africa/>> (accessed 31-05-2022).

legal recognition to the sharing economy and the operation of short-term rentals in South Africa.⁶⁵ Importantly, Airbnb has expressed a desire for the national regulation of its operations in South Africa, seeking clear, sensible rules that will encourage and enable entrepreneurship.⁶⁶ On 4 June 2021, Airbnb published its “vision for inclusive tourism recovery” in South Africa.⁶⁷ In this document, Airbnb stated:

“Airbnb has long backed the need for clear and sensible rules for the short term rental industry in South Africa, and believe establishing a national registration system for short-term rentals can help build sustainable economic growth.

We know from the hundreds of agreements Airbnb has signed with authorities around the world and the wide ranging system of rules that have been introduced, that good rules not only benefit Hosts who list their properties on Airbnb, but also their communities.

First we’re calling for a clear, legal and industry-wide definition of short term rentals, which legitimises hosting and removes unnecessary red tape, to encourage and enable entrepreneurship from everyday South Africans. With a clear definition of short term rentals, and the role they play in South Africa’s tourism industry in place, Airbnb is committed to supporting a simple, smart online national registration system - enabling Hosts to share their registration number on our platform for full transparency to all stakeholders. This would give governments data to enforce smart regulation, offer transparency to communities, while empowering tourism entrepreneurs to grow their businesses.

⁶⁵ Airbnb official news “Supporting inclusive tourism in South Africa” (04-06-2021) *Airbnb News* <<https://news.airbnb.com/en-uk/supporting-inclusive-tourism-in-south-africa/>> (accessed 31-05-2022).

⁶⁶ Airbnb official news “Supporting inclusive tourism in South Africa” (04-06-2021) *Airbnb News* <<https://news.airbnb.com/en-uk/supporting-inclusive-tourism-in-south-africa/>> (accessed 31-05-2022).

⁶⁷ Airbnb official news “Supporting inclusive tourism in South Africa” (04-06-2021) *Airbnb News* <<https://news.airbnb.com/en-uk/supporting-inclusive-tourism-in-south-africa/>> (accessed 31-05-2022).

Achieving this kind of enabling framework will need strong partnership with Government. Airbnb is committed to working with governments to help maximise the benefits of tourism for all. South Africa is no exception.”⁶⁸

Legal certainty is currently a crucial issue affecting the operation of Airbnb in South Africa, as many property owners would like to list their properties on Airbnb but are hesitant because it is unclear whether they are legally permitted to do so.⁶⁹ In this regard, national legislation that is clearly drafted will provide certainty regarding the legal position of Airbnb in South Africa. In the Airbnb context, it is my opinion that appropriate national legislation can be defined as a statute that addresses various issues related to short-term rental operations, such as: (a) the power of municipalities; (b) neighbour law; (c) the tourism industry; (d) the hospitality industry; (e) tax implications; (f) landlord-tenant law; (g) commercial short-term rentals; (h) zoning laws gentrification; and (i) the remedies available for aggrieved parties in the instance of an interference with their rights or interests.

6 4 2 2 The negative implications of enacting national legislation to govern short-term rental operations in South Africa

In the short-term rental context, if national legislation is enacted to address short-term rental operation, it will likely result in legal certainty regarding short-term rental operations in South Africa. However, national legislation on its own is insufficient to address the nuances of short-term rental operations in South Africa. Given the complexity of short-term rental operations, and the various circumstances in different

⁶⁸ Airbnb official news “Supporting inclusive tourism in South Africa” (04-06-2021) *Airbnb News* <<https://news.airbnb.com/en-uk/supporting-inclusive-tourism-in-south-africa/>> (accessed 31-05-2022).

⁶⁹ Anonymous “Airbnb pushes for new rental laws and rules in South Africa” (11-06-2021) *Businessstech* <<https://businesstech.co.za/news/property/498007/airbnb-pushes-for-new-rental-laws-and-rules-in-south-africa/>> (accessed 31-05-2022).

municipalities, it is near impossible for national legislation alone to provide laws that govern short-term rentals. National legislation that empowers municipalities to enact by-laws to govern short-term rentals is a preferred approach. By having national legislation that provides a broad framework, municipalities are able to consider the circumstances at play in their municipality and regulate short-term rentals in accordance with the present circumstances. However, national legislation that does not leave the power to municipalities to enact by-laws will fail to give property owners equal opportunities to use their property as short-term rental accommodation. For example, if national legislation alone regulates short-term rentals, and the provisions strictly prohibit short-term rentals in the vicinity of national heritage sites with the aim of protecting the historical value of the area, then property owners in the City of Cape Town would not be able to conduct short-term rental operations given the number of national heritage sites in Cape Town. This could have a negative outcome, as the tourism industry could benefit from having tourists stay in accommodation that is in the vicinity of national heritage sites. On the other hand, if national legislation allows municipalities to decide when short-term rentals should be limited in the vicinity of national heritage sites, it gives the municipality an opportunity to consider the various factors at play in their municipality, rather than having a nationwide law that negatively impacts short-term rental operations in the area, which could have had a positive impact on the community. In this view, national legislation that does not leave room for municipalities to enact by-laws based on the national legislation framework has the potential to negatively limit short-term rental operations in areas where short-term rentals could flourish and contribute to the local economy in a positive way. Consequently, a legislative approach whereby equality is preferred over equity has the potential to result in inequitable outcomes for the relevant role-players.

A further negative implication of national legislation is that its enactment takes time.⁷⁰ Apart from enactment, national legislation is challenging to amend, and amendment may also be time-consuming.⁷¹ These time constraints pose significant challenges due to short-term rentals becoming increasingly popular, modern technology advancing, and local circumstances changing.⁷² In this regard, it is argued that only enacting national legislation will likely result in an inequitable outcome. If the Tourism Bill is enacted without creating a framework whereby municipalities are able to regulate short-term rentals within the framework, giving due regard to the circumstances of the municipality, then the national legislation is likely to result in a negative, inequitable outcome.

6 4 2 3 Conclusion

Given the exploration of the positive and negative implications of South Africa enacting national legislation to regulate short-term rentals like Airbnb, it is evident that national legislation will provide the much-needed legal certainty regarding the legal position of Airbnb. The discussion has indicated that national legislation may be an adequate approach to regulating short-term rental operations in South Africa. However, national legislation (which will likely be the Tourism Bill) will need to create a framework

⁷⁰ The Department of Justice and Constitutional Development, Republic of South Africa “Process of drafting legislation” (2012) *DoJCD* <https://www.justice.gov.za/docs/articles/2012-drafting-legislation.html> (accessed 13-08-2022).

⁷¹ The Department of Justice and Constitutional Development, Republic of South Africa “Process of drafting legislation” (2012) *DoJCD* <https://www.justice.gov.za/docs/articles/2012-drafting-legislation.html> (accessed 13-08-2022). It is important to note that the Tourism Bill intends for regulations to be enacted to govern short-term rental operations. The enactment of regulations is not as timeous a process and can be suitable for the regulation of short-term rental operations.

⁷² NR Mehmed “Airbnb and the sharing economy: policy implications for local government” (2016) 12 *Spectrum of Public and Non-profit Management, Public Policy and Health Administration Review* 49-73 at 69.

whereby municipalities have a say in how short-term rentals operate within their municipality. The involvement of municipalities is crucial because they have the best knowledge of the particular municipality's circumstances and will be able to regulate short-term rentals in a manner best suited to their location and particular needs. In this regard, it is relevant to explore the positive and negative implications of municipalities regulating Airbnb. This exploration will be instructive in determining whether national legislation will only be beneficial if it grants powers to municipalities to work within the framework provided by national legislation or whether municipal by-laws, without the enactment of national legislation should regulate short-term rentals entirely.

6 4 3 The positive and negative implications of passing municipal by-laws allowing local municipalities to govern short-term rental operations in South Africa

6 4 3 1 The positive implications of allowing municipalities to govern short-term rental operations in South Africa through by-laws

Municipalities are the governmental executives who are most aware of what is happening on the ground in each area in South Africa.⁷³ While the Government may have a vague idea of what is happening on the ground based on reports received from the municipalities, it is the municipality that interacts with the locals daily. Having local municipalities enact municipal by-laws to regulate short-term rental operations may be a beneficial, preferable approach, as it ensures that short-term rentals are regulated in accordance with the area in which it exists. This is a preferred approach as opposed to squeezing the regulations into a one-size-fits-all box, which would be the case if national legislation is the only law that governs short-term rentals. If national legislation is enacted without giving authority to municipalities to govern short-term rentals in

⁷³ See the Housing Act 107 of 1997 for more information on the roles of municipalities in the housing sector in South Africa.

accordance with their local circumstances, such as their zoning laws for example, then the legislation may not be as effective as it has the potential to be. Conversely, if national legislation is enacted to provide a framework of short-term rental laws while municipalities pass municipal by-laws to regulate short-term rentals within the legislative framework, municipalities will take zoning laws into account in a manner that national legislation cannot. Zoning laws are crucial in creating and maintaining the character of a neighbourhood.⁷⁴ In *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government ("Reflect-All")*,⁷⁵ the Constitutional Court stated:

“The protection of the right to property is a fundamental human right, one which for decades was denied to the majority of our society. However, property rights in our new constitutional democracy are far from absolute; they are determined and afforded by law and can be limited to facilitate the achievement of important social purposes. Whilst the exploitation of property remains an important incident of landownership, the state may regulate the use of private property in order to protect public welfare, e.g. planning and zoning regulation but such regulation must not amount to arbitrary deprivation. The idea is not to protect private property from all state interference but to safeguard it from illegitimate and unfair state interference.”⁷⁶

Similarly, the court’s decision in *Malherbe v Ceres Municipality*⁷⁷ indicates that local authorities should exercise their regulatory power in the public interest. In light of these two decisions, it is evident that while short-term rental hosts should be able to exploit

⁷⁴ G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman’s The law of property* 6 ed (2019) at 405.

⁷⁵ *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC).

⁷⁶ *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) para 32.

⁷⁷ *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A).

their property, the Government has a role in regulating the use of private property to protect public welfare.⁷⁸ Consequently, I argue that municipalities should pass by-laws to give effect to the broader interests of the public, which requires consideration of whether the municipality's members benefit from the current character of their neighbourhood, or whether they will be significantly negatively impacted by short-term rental operations in the neighbourhood. In this regard, municipalities are able to meaningfully engage with the community regarding the decisions that will affect them.

The municipality's zoning laws are of particular relevance in the short-term rental context, as it dictates areas that the municipality has identified that need to be used for residential or commercial purposes. The zoning of land also takes into consideration places that are of public interest, for instance, national heritage sites or areas that are regarded as conservation areas. These considerations are crucial in the short-term rental context because if short-term rentals begin operating in the vicinity of national heritage sites or conservation areas, it may have unintended negative consequences. A particularly relevant unintended consequence is that these areas may become tourist hubs. Consequently, the area may become a tourist attraction, which results in property owners no longer using their property as a permanent residence, but rather for short-term rentals to meet tourists' demand for short-term rental accommodation. In this light, property owners may reconstruct their houses to accommodate tourists as guests. Consequently, an influx of short-term rentals in an area that is zoned for protective purposes such as national heritage and conservation may become an area that is gentrified. The gentrification of the neighbourhood may

⁷⁸ *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) para 32.

negatively impact the zone as it is likely to alter the character of the neighbourhood. Given that zoning laws exist to maintain the character of neighbourhoods,⁷⁹ it is pertinent that national legislation enables municipalities to pass by-laws regulating short-term rentals in a manner that considers the zoning implications in each municipality.

On another note, municipalities are aware of the needs of the community. Additionally, municipalities operate to make their decisions in terms of town planning and are able to foresee the impact that short-term rental operations may have in different parts of the municipality. Particularly, municipalities are able to identify areas in the community that need improvement and see fit to promote short-term rental operations in that area to promote tourism and generate income in that area. In this regard, it is beneficial for municipalities to regulate short-term rentals as they are aware of the needs of the community, know the zoning laws and understand why they are necessary, and can consequently regulate short-term rentals in a manner that operates in the public interest.

Given that it is crucial for laws to be in sync with modern technology, which is constantly advancing, the regulation of short-term rental operations through municipal by-laws is appealing as by-laws can be passed in a quicker manner than national legislation and can also be amended in a less complicated manner.⁸⁰ Consequently, it would be quicker and hence more efficient for municipal by-laws to be passed to

⁷⁹ G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) at 405.

⁸⁰ NR Mehmed "Airbnb and the sharing economy: policy implications for local government" (2016) 12 *Spectrum of Public and Non-profit Management, Public Policy and Health Administration Review* 49-73 at 69; The Department of Justice and Constitutional Development, Republic of South Africa "Process of drafting legislation" (2012) *DoJCD* <https://www.justice.gov.za/docs/articles/2012-drafting-legislation.html> (accessed 13-08-2022).

give effect to advancements in technology or changes in the municipality's circumstances. However, the regulation of Airbnb by way of municipal by-laws also has negative implications that are worth exploring. Therefore, the following section explores the negative implications of short-term rentals being regulated by municipal by-laws.

6 4 3 2 The negative implications of allowing municipalities to govern short-term rental operations in South Africa through by-laws

Short-term rental operations have the power to attract tourists to certain areas.⁸¹ While municipalities passing by-laws to regulate short-term rentals can be advantageous, it also has the potential to cause inequality amongst property owners. Typically, most property owners would enjoy the entitlement of making a profit off their property. However, inequality can be created when one municipality creates strict regulations limiting the operation of short-term rentals while another passes more lenient regulations encouraging the operation of short-term rentals in their municipal area. This can be particularly frustrating as some property owners will not be able to enjoy their property entitlements in the same manner as property owners from other municipalities. Although one might argue that this is the price owners pay for choosing to purchase property in a particular area, that argument fails to consider that short-term rentals have only recently gained traction and were potentially not a consideration when the owner purchased the property.

Moreover, municipalities with lenient short-term rental regulations will monetise certain areas, consequently enabling them to grow by becoming tourist hubs. When

⁸¹ D Smith "Renting diversity: Airbnb as the modern form of housing discrimination" (2018) 67 *DePaul Law Review* 581-606 at 582.

tourists are drawn to a certain place, the local businesses benefit from the presence of tourists, as the tourists tend to frequent their stores.⁸² Consequently, business owners in areas where municipalities leniently regulate short-term rentals will have the opportunity to generate more income than businesses in municipalities where short-term rentals are strictly regulated to the point that fewer tourists visit the area. Consequently, business owners in municipalities where short-term rentals are strictly regulated have the potential to become collateral damage as they do not financially benefit from tourists supporting businesses in the way that businesses in more lenient municipalities do.

6 4 3 3 Conclusion

Enacting national legislation that provides a framework whereby municipalities can regulate the operation of short-term rentals in their municipality is preferable as it ensures that the regulations meet the circumstances and particular needs of the area. This approach can have positive implications in that it ensures that short-term rentals operate in line with the zoning laws of a specific municipality. The zoning laws of municipalities are something that national legislation will not be able to adequately address and play an essential role in the prevention and/or management of gentrification in municipalities. In this regard, it is preferable that municipalities are able to enact by-laws that prevent areas that serve as national heritage sites or conservation areas from turning into tourist hubs and becoming subject to gentrification. Furthermore, the manner in which each municipality regulates short-term rental operations will ensure that short-term rentals operate in the public interest

⁸² D Smith "Renting diversity: Airbnb as the modern form of housing discrimination" (2018) 67 *DePaul Law Review* 581-606 at 582.

of the community rather than the individual property owners to the detriment of the public. However, enabling municipalities to regulate short-term rentals through by-laws has the potential to create inequality between property owners, as owners in some municipalities will be subject to stricter by-laws than others. In this light, allowing municipalities to regulate short-term rentals will have an equitable outcome focused on the community impact of short-term rentals, as opposed to an outcome based on equality, focused on the property rights of owners. Given the positive and negative implications of regulating short-term rental operations through municipal by-laws, some may argue that short-term rentals should be allowed to operate in an unrestricted manner, as opposed to being governed by legislation. Therefore, the following section considers the implications of allowing short-term rentals to operate without any legislative intervention.

6 4 4 Allowing short-term rentals to operate in an unregulated manner in South Africa

6 4 4 1 The positive implications of allowing short-term rentals to operate without being subject to regulation in South Africa

The current legal position whereby property owners are able to use their property as short-term rental accommodation without being subject to national legislation or municipal by-laws (in most of the country) has had positive implications for tourists and some property owners in South Africa. Leaving short-term rentals unregulated enables property owners to harness a money-making opportunity by listing their property on short-term rental sites like Airbnb without being limited by legal restrictions (apart from their contractual obligations with their short-term guests). Some may see the current absence of regulation as a concerning legal position, while others find it a liberating opportunity, as they now have the freedom to use their property as they

please. Interestingly in this regard, the lack of legal certainty regarding short-term rentals is the biggest issue for some property owners and the greatest win for others.⁸³

Allowing Airbnb to continue unregulated enables tourists to make the most of their visit to South Africa, as they are able to stay in affordable accommodation in unique areas across the country. Airbnb being unregulated enables property owners to host guests for as long as they wish, meaning that they can generate income from their property as often as they please. Additionally, this means that they can potentially boost tourism in their area all year round. The promotion of tourism in certain areas has knock-on effects, as tourists tend to support the local restaurants and stores in the area surrounding their Airbnb. If Airbnb is regulated in a manner that limits the number of days that property owners are allowed to host within a calendar year, it will result in a decrease in the number of tourists who will visit the area throughout the year, especially if hotels and bed and breakfasts do not operate in the area. In this regard, strict regulation of short-term rentals has indirect consequences for local restaurants and shops. These businesses are likely to receive fewer tourists supporting their businesses compared to the number of tourists that could visit if there was no limit on the number of days property owners could host guests per calendar year. In light of these considerations, one may argue that the enactment of national legislation or by-laws that strictly regulate short-term rentals may hinder the positive contributions short-term rentals bring to the South African economy and tourism industry. However,

⁸³ Anonymous "Airbnb pushes for new rental laws and rules in South Africa" (11-06-2021) *Businessstech* <<https://businessstech.co.za/news/property/498007/airbnb-pushes-for-new-rental-laws-and-rules-in-south-africa/>> (accessed 31-05-2022); Airbnb official news "Supporting inclusive tourism in South Africa" (04-06-2021) *Airbnb News* <<https://news.airbnb.com/en-uk/supporting-inclusive-tourism-in-south-africa/>> (accessed 31-05-2022); Anonymous "Government to regulate Airbnb in South Africa" (15-04-2019) *Businessstech* <<https://businessstech.co.za/news/business/311226/government-to-regulate-airbnb-in-south-africa/>> (accessed 30-05-2022).

this unregulated approach also has negative implications that are important to consider. Therefore, the following section explores the negative implications of short-term rentals operating without being subject to regulation in South Africa.

6 4 4 2 The negative implications of allowing short-term rentals to operate without being subject to regulation in South Africa

Given the call⁸⁴ for the regulation of short-term rental operations by various role-players, ranging from property owners to establishments falling within the ambit of the hospitality industry, it is evident that allowing short-term rentals to operate in an unrestricted manner negatively affects various role-players in the South African economy. The primary issue is the lack of certainty regarding the legality of Airbnb as short-term rental accommodation in South Africa. Continuing to allow short-term rentals to operate in an unrestricted manner leaves property owners uncertain as to whether they can legally list their property on Airbnb. Furthermore, it leaves them uncertain about their rights and obligations, particularly regarding whether they are landlords and have the protection of landlord-tenant law. In this regard, property owners have no clarity on what remedies are available to them in the event that they experience property infringements at the hands of short-term guests.

The lack of certainty surrounding short-term rental operations has also caused significant concern for the hospitality industry. Establishments falling within the

⁸⁴ Anonymous “Airbnb pushes for new rental laws and rules in South Africa” (11-06-2021) *Businesstech* <<https://businesstech.co.za/news/property/498007/airbnb-pushes-for-new-rental-laws-and-rules-in-south-africa/>> (accessed 31-05-2022); Airbnb official news “Supporting inclusive tourism in South Africa” (04-06-2021) *Airbnb News* <<https://news.airbnb.com/en-uk/supporting-inclusive-tourism-in-south-africa/>> (accessed 31-05-2022); Anonymous “Government to regulate Airbnb in South Africa” (15-04-2019) *Businesstech* <<https://businesstech.co.za/news/business/311226/government-to-regulate-airbnb-in-south-africa/>> (accessed 30-05-2022).

hospitality industry have clear rights and obligations as the hospitality industry's operations are regulated by, amongst others, the Tourism Act 72 of 1993 and the Consumer Protection Act 68 of 2008. Airbnb's operations within South Africa have negatively impacted the hospitality industry, as many tourists are using Airbnb-listed properties instead of hotels or bed and breakfasts.⁸⁵ Regarding the competition between Airbnb-listed properties and hotels and bed and breakfast establishments, the deciding factors for guests are generally the facilities of the properties, the prices, and their locality. Some tourists decide to make use of hospitality establishments due to their luxury status, convenience in location, gym facilities, conference rooms, tourism-centered activities, and safety and security measures in place.⁸⁶ However, other tourists have become attracted to Airbnb's due to the affordability, variety in locations, and amenities that Airbnb properties can offer, such as a kitchen, private pool, and braai area.⁸⁷ In this regard, the hospitality industry is facing arguably unfair competition from Airbnb's operations because they are bound by various laws, while Airbnb hosts have the freedom to do as they please with little consequences for their short-term rental operations.

The current absence of laws regarding short-term rental operations results in a potential disregard for zoning laws while also enabling gentrification across the

⁸⁵ See M Stanley "Global insight: who will Airbnb hurt more – hotels or OTAs" 2015 *Internet, Lodging, Leisure and Hotels* 1-54. See chapter 2 section 2.2 for a discussion on the relevant short-term rental role-player's response to Airbnb's operations in South Africa.

⁸⁶ M Stanley "Global insight: who will Airbnb hurt more – hotels or OTAs" 2015 *Internet, Lodging, Leisure and Hotels* 1-54 at 1, 7, 28 and 38.

⁸⁷ M Stanley "Global insight: who will Airbnb hurt more – hotels or OTAs" 2015 *Internet, Lodging, Leisure and Hotels* 1-54; J Chica-Olmo, JG González-Morales & JL Zafra-Gómez "Effects of location on Airbnb apartment pricing in Málaga" (2020) 77 *Tourism Management* 1-13 at 10, 11.

country.⁸⁸ Allowing short-term rentals to continue operating without being regulated can have devastating consequences on communities that are already facing gentrification challenges.⁸⁹ These potentially devastating effects are likely to stem from an influx of tourists and property owners renovating their homes to meet the demand of tourists, consequently altering the character of the neighbourhood. In this light, communities facing gentrification challenges are likely to experience an increase in the speed at which the area is becoming gentrified. This is likely because properties originally used for permanent residence may change to become short-term rental accommodation due to the financial benefits attached to short-term rental operations. Furthermore, the present position has detracted from the municipality's powers in terms of zoning laws, as property owners are able to conduct short-term rentals in areas near conservation and national heritage sites by virtue of them owning residential property near these places.⁹⁰ Consequently, allowing short-term rentals to continue operating without being subject to regulation fails to consider the interests of the various role-players in the short-term rental context and simply prioritises the interests of property owners. Specifically, it provides no clarity for neighbours regarding the obligations of hosts and the remedies available in the event of an

⁸⁸ D Smith "Renting diversity: Airbnb as the modern form of housing discrimination" (2018) 67 *DePaul Law Review* 581-606 at 582; D Lee "How Airbnb short-term rentals exacerbate Los Angeles's affordable housing crisis: Analysis and policy recommendations" (2016) 10 *Harvard Law and Policy Review* 229-254 at 230. See chapter 6 section 6 4 3 1 for a discussion on zoning laws and gentrification in the short-term rental context.

⁸⁹ D Smith "Renting diversity: Airbnb as the modern form of housing discrimination" (2018) 67 *DePaul Law Review* 581-606; D Lee "How Airbnb short-term rentals exacerbate Los Angeles's affordable housing crisis: Analysis and policy recommendations" (2016) 10 *Harvard Law and Policy Review* 229-254 at 240-241.

⁹⁰ D Lee "How Airbnb short-term rentals exacerbate Los Angeles's affordable housing crisis: Analysis and policy recommendations" (2016) 10 *Harvard Law and Policy Review* 229-254 at 230.

interference stemming from the host's short-term rental operations. In essence, allowing short-term rental to operate in an unregulated manner leaves the host and guest with clear rights and obligations in terms of the host-guest agreement, but fails to provide clarity for the other role-players affected by the short-term rental operations. In this light, adopting an approach whereby short-term rentals remain unregulated will have inequitable consequences that will negatively impact the public at large.

6 4 4 3 Conclusion

Allowing short-term rentals to continue operating unregulated can be positive for property owners who intend to list their property on Airbnb all year round, as it means there is no limit on how many days they are allowed to use their property as short-term rental accommodation. Additionally, the presence of Airbnb-listed properties offering short-term rental accommodation in certain areas will result in an increase in the number of tourists visiting the area and may even promote tourism to South Africa in general due to the affordability of short-term accommodation. The increase in tourists staying in Airbnb's is likely to have a positive impact on local restaurants and stores, as tourists are likely to support the nearby enterprises. In this view, leaving Airbnb unregulated has the potential to boost tourism in South Africa and subsequently positively contribute to the economy too.

However, despite the positive impact, leaving short-term rentals unregulated will arguably result in more harm than good. Allowing short-term rentals to operate without being subject to regulation leaves property owners with no clarity regarding the legal position of Airbnb in South Africa. Consequently, property owners will be left uncertain whether they are legally allowed to use their property as short-term rental accommodation. In addition, it will be unclear what their rights, obligations, and remedies are when facilitating short-term rentals within the sharing economy.

Furthermore, allowing Airbnb to continue operating unregulated unfairly disadvantages establishments in the hospitality industry. These establishments are disadvantaged in that they have similar functions to Airbnb-listed properties, but are subject to regulation through various pieces of legislation and consequently have more obligations than short-term hosts.⁹¹ Finally, leaving short-term rental operations unregulated disregards zoning laws, consequently enabling and fast-tracking gentrification.⁹² Additionally, local businesses that operate to cater to the locals in the community will be disadvantaged in the event of gentrification, as their products and services no longer meet the demands of the inhabitants of the community. In conclusion, due to the negative implications on various role-players, it is not viable for short-term rentals to continue operating in South Africa without being subject to regulation. Based on the discussion above, I am of the opinion that short-term rentals cannot remain unregulated. As I will elaborate below, I would argue that short-term rental operations should be legally regulated in the form of national legislation that provides a framework whereby municipalities can enact by-laws to give effect to the framework in a manner that considers the circumstances of a particular municipality.

6 4 5 Conclusion of the three regulatory approaches to Airbnb in South Africa

Following the exploration of the three regulatory approaches to Airbnb in South Africa, it appears that the most suitable approach would be for national legislation to be enacted to authorise short-term rental operations in South Africa on a more overarching level. However, it is pertinent that the national legislation does not only

⁹¹ See M Stanley "Global insight: who will Airbnb hurt more – hotels or OTAs" 2015 *Internet, Lodging, Leisure and Hotels* 1-54.

⁹² D Lee "How Airbnb short-term rentals exacerbate Los Angeles's affordable housing crisis: Analysis and policy recommendations" (2016) 10 *Harvard Law and Policy Review* 229-254 at 230.

provide laws that aim to regulate short-term rentals on a nationwide level. Instead, the national legislation should provide a framework indicating the rights, obligations, and remedies available to hosts, guests, and neighbours. Importantly, the national legislation's framework should authorise municipalities to regulate short-term rental operations based on the circumstances of the particular municipality. Specific recommendations regarding the content of national legislation are discussed in section 6.7 below, with particular reference also to some lessons that can be learnt from the approach to Airbnb in London and Berlin. In my view, it is not viable to leave short-term rental operations completely unregulated in the way it currently operates, as it leaves property owners with no clarity on the legal position of Airbnb, fails to consider zoning laws, enables gentrification, negatively impacts the hospitality industry, and provides no clear remedies for parties negatively affected by Airbnb's operations. In light of the conclusion that it is best for short-term rentals to be authorised in terms of national legislation, but regulated by municipalities in terms of specific by-laws, it is important to conduct foreign case studies to explore instances where the regulation of Airbnb has occurred on a municipal level. In this regard, the following section will explore the regulation of Airbnb in London and Berlin to provide factors that Government could consider when regulating short-term rental operations in South Africa.

6.5 Case study: The regulation of short-term rental operations in London

6.5.1 London's regulatory approach to short-term rental operations

Prior to 2015, section 25 of the Greater London Council (General Powers) Act of 1973 made it illegal to host guests for periods of less than three months without planning

permission from the local authority.⁹³ In this regard, the Ministry of Housing, Communities, and Local Government issued a policy paper outlining the new policy on the short-term use of residential property in London.⁹⁴ This policy aimed to promote the sharing economy in London to enable property owners in London to participate in the sharing economy, supplement their incomes, and offer new experiences to tourists.⁹⁵ The Department for Communities and Local Government passed this policy based on the view that it would be beneficial to London's tourism industry by expanding the pool of competitively priced accommodation while also allowing property owners to earn an extra income.⁹⁶

This policy was necessary due to the fact that in Greater London, it is considered a "change of use" to use residential premises as "temporary sleeping accommodation" for purposes such as listing a property on Airbnb.⁹⁷ The "change of use" principle was originally developed in an effort to balance the affordable housing shortages in London with the demands of the tourism industry.⁹⁸ However, the Deregulation Act of 2015 introduced a "90 night rule".⁹⁹ The "90 night rule" is an exception to the "change of use"

⁹³ W Boon, K Spruit & K Frenken "Collective institutional work: The case of Airbnb in Amsterdam, London and New York" (2019) 26 *Industry and Innovation* 898-919 at 905. See section 25 of the Greater London Council (General Powers) Act of 1973.

⁹⁴ Promoting the sharing economy in London, policy paper of 2015.

⁹⁵ Promoting the sharing economy in London, policy paper of 2015, section 2, 3 and 5.

⁹⁶ Promoting the sharing economy in London, policy paper of 2015, section 7.

⁹⁷ Airbnb official website "Responsible hosting in the United Kingdom" (date unknown) *Airbnb* <https://www.airbnb.co.za/help/article/1379/responsible-hosting-in-the-united-kingdom?locale=en&_set_beve_on_new_domain=1617824174_Nzg4ZWQ1MGFhYjAy> (accessed 08-04-2021); section 44 and 45 of the Deregulation Act of 2015.

⁹⁸ M Ferreri & R Sanyal "Platform economies and urban planning: Airbnb and regulated deregulation in London" (2018) 55 *Urban Studies Journal Limited* 3353-3368 at 3359-3360.

⁹⁹ Airbnb official website "Responsible hosting in the United Kingdom" (date unknown) *Airbnb* <[https://www.airbnb.co.za/help/article/1379/responsible-hosting-in-the-united-](https://www.airbnb.co.za/help/article/1379/responsible-hosting-in-the-united-kingdom?locale=en&_set_beve_on_new_domain=1617824174_Nzg4ZWQ1MGFhYjAy)

principle that allows property owners to use residential premises as “temporary sleeping accommodation” for 90 or fewer nights per calendar year without it being considered a “change of use”.¹⁰⁰ Importantly, the Department for Communities and Local Government corresponded with Airbnb to ensure that the “90 night rule” is strictly abided by.¹⁰¹ In this regard, Airbnb has set a limit on its platform, preventing Airbnb hosts from receiving bookings for more than 90 nights per calendar year.¹⁰² Upon receiving 90 night bookings per calendar year, the Airbnb system automatically limits the property from being booked for the rest of the calendar year, only allowing guests to book for dates that fall within the following year.¹⁰³ However, property owners may

kingdom?locale=en&_set_bev_on_new_domain=1617824174_Nzg4ZWQ1MGFhYjAy> (accessed 08-04-2021); section 44 and 45 of the Deregulation Act of 2015.

¹⁰⁰ Airbnb official website “Responsible hosting in the United Kingdom” (date unknown) *Airbnb* <https://www.airbnb.co.za/help/article/1379/responsible-hosting-in-the-united-kingdom?locale=en&_set_bev_on_new_domain=1617824174_Nzg4ZWQ1MGFhYjAy> (accessed 08-04-2021); section 44 and 45 of the Deregulation Act of 2015.

¹⁰¹ Airbnb official website “I rent out my home in London. What short-term rental laws apply?” (date unknown) *Airbnb* <https://www.airbnb.co.za/help/article/1340/i-rent-out-my-home-in-london-what-shortterm-rental-laws-apply?locale=en&_set_bev_on_new_domain=1653957449_OTRiMWQ1MjMxNGJk> (accessed 31-05-2022).

¹⁰² Airbnb official website “I rent out my home in London. What short-term rental laws apply?” (date unknown) *Airbnb* <https://www.airbnb.co.za/help/article/1340/i-rent-out-my-home-in-london-what-shortterm-rental-laws-apply?locale=en&_set_bev_on_new_domain=1653957449_OTRiMWQ1MjMxNGJk> (accessed 31-05-2022).

¹⁰³ Airbnb official website “I rent out my home in London. What short-term rental laws apply?” (date unknown) *Airbnb* <https://www.airbnb.co.za/help/article/1340/i-rent-out-my-home-in-london-what-shortterm-rental-laws-apply?locale=en&_set_bev_on_new_domain=1653957449_OTRiMWQ1MjMxNGJk> (accessed 31-05-2022).

seek governmental permission to host beyond the 90 night annual limit.¹⁰⁴ Once approval is granted, hosts need to request the limit be removed from their property's listing by filing an exemption under their property's "Regulations" tab.¹⁰⁵ When the process is complete, the "Regulations" tab will state, "The 90 night limit has been removed from your listing," indicating that the host can now have their property listed for more than 90 days.¹⁰⁶

6 5 2 Lessons to be learnt from London's regulation of Airbnb

In London, Airbnb's operations resulted in a change in the laws regulating short-term rentals, balancing the necessity of affordable housing for low-income residents with the need for tourism and allowing locals to generate income from their property.¹⁰⁷ Given the fact that South Africa's tourism industry has suffered immensely during the Covid-19 pandemic, it is essential that Airbnb be regulated in a manner that also supports the tourism industry. Outside of the Covid-19 context, it is equally important

¹⁰⁴ Airbnb official website "I rent out my home in London. What short-term rental laws apply?" (date unknown) *Airbnb* <https://www.airbnb.co.za/help/article/1340/i-rent-out-my-home-in-london-what-shortterm-rental-laws-apply?locale=en&_set_bev_on_new_domain=1653957449_OTRiMWQ1MjMxNGJk> (accessed 31-05-2022).

¹⁰⁵ Airbnb official website "I rent out my home in London. What short-term rental laws apply?" (date unknown) *Airbnb* <https://www.airbnb.co.za/help/article/1340/i-rent-out-my-home-in-london-what-shortterm-rental-laws-apply?locale=en&_set_bev_on_new_domain=1653957449_OTRiMWQ1MjMxNGJk> (accessed 31-05-2022).

¹⁰⁶ Airbnb official website "I rent out my home in London. What short-term rental laws apply?" (date unknown) *Airbnb* <https://www.airbnb.co.za/help/article/1340/i-rent-out-my-home-in-london-what-shortterm-rental-laws-apply?locale=en&_set_bev_on_new_domain=1653957449_OTRiMWQ1MjMxNGJk> (accessed 31-05-2022).

¹⁰⁷ M Ferreri & R Sanyal "Platform economies and urban planning: Airbnb and regulated deregulation in London" (2018) 55 *Urban Studies Journal Limited* 3353-3368 at 3359-3360.

to be mindful of the shortage of affordable housing in South Africa. In this respect, it is important that Airbnb be regulated to take into account the potential negative implications that Airbnb has for providing affordable housing in South Africa.¹⁰⁸ Airbnb has the potential to negatively affect affordable housing in South Africa as property owners may prefer to use their property for short-term rentals rather than long-term leasing, as they can make more money by charging per night instead of per month (especially given that international tourists are typically willing to spend a lot of money on short-term accommodation).¹⁰⁹ Additionally, it has become a popular practice among landlords to refuse to renew leases, harass tenants and resort to extreme measures to remove existing tenants in order to clear out units for the use of short-term rentals.¹¹⁰ Consequently, the number of available residential properties has decreased, leading to an increase in the rent of the remaining properties on the market due to the high demand for long-term residential property.¹¹¹

Airbnb has expressed a clear desire to work with the South African Government to ensure that Airbnb operates in a sustainable way.¹¹² Given that the London Government and the State of Berlin correspond with Airbnb to ensure that their

¹⁰⁸ See S Fick “Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?” (2021) 3 *Stellenbosch Law Review* 455-481 for an in-depth discussion of Airbnb’s effects on housing in Cape Town, South Africa.

¹⁰⁹ S Fick “Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?” (2021) 3 *Stellenbosch Law Review* 455-481 at 456.

¹¹⁰ D Smith “Renting diversity: Airbnb as the modern form of housing discrimination” (2018) 67 *DePaul Law Review* 581-606 at 596; M Hiltzik “Rental sites like Airbnb aren’t as innocuous as they pretend” (30-12-2016) *Los Angeles Times* <<https://www.latimes.com/business/hiltzik/la-fi-hiltzik-20150719-column.html>> (accessed 05-06-2022).

¹¹¹ S Fick “Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?” (2021) 3 *Stellenbosch Law Review* 455-481 at 456.

¹¹² Airbnb official news “Supporting inclusive tourism in South Africa” (04-06-2021) *Airbnb News* <<https://news.airbnb.com/en-uk/supporting-inclusive-tourism-in-south-africa/>> (accessed 31-05-2022).

regulations are enforced on the Airbnb platform, it is likely that the same could be done in South Africa. However, if regulation occurs at *only* municipal level, whereby each municipality regulates Airbnb without any national legislation providing guidelines for the process, then issues may arise as it may be cumbersome for each municipality to effectively engage with Airbnb. However, if the suggested approach is followed, whereby the Government enacts a national framework regulating short-term rental operations in South Africa, the national legislation framework provisions may be implemented on the Airbnb platform. In this regard, it would be beneficial for South Africa to have national legislation in place setting out clear guidelines that Airbnb can use to ensure their platform functions coincide with the country's regulations. Given that the municipal by-laws will operate based on the framework of the national legislation, the municipal by-laws should be drafted to correspond with the settings on the Airbnb platform as per the national legislation's framework.

6 6 Case study: The regulation of Airbnb in Berlin

6 6 1 Berlin's regulatory approach

In 2013, Berlin enacted the *Zweckentfremdungsverbots-Gesetz* ("ZwVbG"),¹¹³ which is an Act that prohibited the use of living spaces for unauthorised purposes and governed the use of residential property.¹¹⁴ The *ZwVbG* was enacted to curtail short-term rental operations because Airbnb's operations had resulted in housing shortages

¹¹³ Law on the Prohibition of the Misappropriation of Living Space Act of 2013. (Gesetz über das Verbot der Zweckentfremdung von Wohnraum - *Zweckentfremdungsverbots-Gesetz* - *ZwVbG*).

¹¹⁴ Airbnb official website "Berlin" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/854/berlin#:~:text=Short%2Dterm%20rental%20regulations,short%2Dterm%20rentals%20in%20Berlin.>> (accessed 10-08-2020).

and, consequently, rent increases in Berlin.¹¹⁵ The State of Berlin was concerned that short-term rental operations in Berlin had the potential to result in insufficient living spaces for Berlin residents as long-term residential properties were being used as short-term accommodation for tourists.¹¹⁶ Consequently, the State of Berlin enacted the *ZwVbG* to ensure that living spaces may only be used for purposes other than residential (such as short-term rentals) with the approval of the responsible district office.¹¹⁷ The *ZwVbG* explicitly addressed home-sharing and short-term rentals, prohibiting hosts from renting their property to short-term visitors unless a room amounts to less than 50% of the residence's total size.¹¹⁸ In addition, short-term hosts were required to have a permit to rent out their entire residence for periods shorter than 60 days.¹¹⁹

However, in 2018, a revised version of the *ZwVbG* was passed. The 2018 *ZwVbG* states that private individuals may apply for a permit from the State of Berlin through the Senate Department for Urban Development and Housing.¹²⁰ This permit will allow

¹¹⁵ Airbnb official website "Berlin" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/854/berlin#:~:text=Short%2Dterm%20rental%20regulations,short%2Dterm%20rentals%20in%20Berlin.>> (accessed 07-04-2021).

¹¹⁶ Section 1, no.1 of the Law on the Prohibition of the Misappropriation of Living Space Act of 2013.

¹¹⁷ Section 1, no.1 of the Law on the Prohibition of the Misappropriation of Living Space Act of 2013.

¹¹⁸ Airbnb official website "Berlin" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/854/berlin#:~:text=Short%2Dterm%20rental%20regulations,short%2Dterm%20rentals%20in%20Berlin.>> (accessed 10-08-2020).

¹¹⁹ Airbnb official website "Berlin" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/854/berlin#:~:text=Short%2Dterm%20rental%20regulations,short%2Dterm%20rentals%20in%20Berlin.>> (accessed 10-08-2020).

¹²⁰ Section 3(3), no.2 of the Law on the Prohibition of the Misappropriation of Living Space Act of 2013; Airbnb official website "Berlin" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/854/berlin#:~:text=Short%2Dterm%20rental%20regulations,short%2Dterm%20rentals%20in%20Berlin.>> (accessed 24-05-2022).

them to rent out their primary residence on a short-term basis.¹²¹ Unfortunately, the 2018 *ZwVbG* did not define “short-term basis”, creating a lack of clarity regarding how long private individuals may rent out their main residence.

The *ZwVbG* was last revised on 16 September 2021.¹²² The revised *ZwVbG* maintains the principles stated above as per the 2018 *ZwVbG* but expressly recognises home sharing in Berlin, making it easier for property owners in Berlin to generate income while simultaneously stimulating the tourism industry by hosting holiday guests through Airbnb.¹²³ However, it remains unclear what amounts to rentals on a “short-term basis”, as the 2018 and 2021 *ZwVbG* does not limit how many nights an individual may rent out their entire primary residence to guests.¹²⁴

In addition, Berlin enacted the *Zweckentfremdungsverbot-Verordnung* (“*ZwVbVO*”)¹²⁵ in 2014. The *ZwVbVO* enables Berliners to rent a room in their primary

¹²¹ Section 3(3), no.2 of the Law on the Prohibition of the Misappropriation of Living Space Act of 2013; Airbnb official website “Berlin” (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/854/berlin#:~:text=Short%2Dterm%20rental%20regulations,short%2Dterm%20rentals%20in%20Berlin.>> (accessed 24-05-2022).

¹²² Law on the Prohibition of the Misappropriation of Living Space Act of 2013; Airbnb official website “Berlin” (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/854/berlin#:~:text=Short%2Dterm%20rental%20regulations,short%2Dterm%20rentals%20in%20Berlin.>> (accessed 24-05-2022).

¹²³ L Rebstock “Wohnung vermieten Berlin: Das sind die Gesetze” (23-09-2018) *Spot a home* <<https://www.spotahome.com/de/blog/wohnung-vermieten-berlin-gesetze/>> (accessed 07-04-2021).

¹²⁴ Airbnb official website “Berlin” (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/854/berlin#:~:text=Short%2Dterm%20rental%20regulations,short%2Dterm%20rentals%20in%20Berlin.>> (accessed 24-05-2022). See BVerfG, Beschluss der 3. Kammer des Ersten Senats vom 29. April 2022 (BVerfG, decision of the 3rd Chamber of the First Senate of April 29, 2022) a German Federal Constitutional Court case that related to the misappropriation of living spaces in terms of the *Zweckentfremdungsverbots-Gesetz*, but unfortunately did not address the legality of the laws limiting short-term rental operations.

¹²⁵ Ordinance on the Prohibition of Misappropriation of Living Space Act of 2014. (Verordnung über das Verbot der Zweckentfremdung von Wohnraum - *Zweckentfremdungsverbot-Verordnung* - *ZwVbVO*).

residence without a permit, provided the share of the room is less than 50% of the total size of the residence.¹²⁶ Despite not needing a permit, hosts do still require a registration number that they can obtain for their respective district office.¹²⁷ Conversely, in relation to approval for short-term rentals in main or secondary apartments, the regulations are somewhat different and more complex. In this regard, the following section explores the requirements that need to be met in order for one to conduct short-term rental operations from their main or secondary property in Berlin.

6 6 2 Approval for short-term rental of a main or secondary apartment in Berlin

In terms of the current legal position regarding short-term rentals in the State of Berlin under the *ZwVbG*, one may only use their apartment for a purpose other than residential if they have applied and obtained approval from the district office in which the apartment is located.¹²⁸ A permit to use one's property for the non-intended use of living space will only be granted on an application if the private interests worthy of protection outweigh the public interest to preserve the relevant living space.¹²⁹ Such approval can be limited or subjected to certain conditions.¹³⁰ A self-occupied main apartment in Berlin may be rented for other than residential purposes in the event that

¹²⁶ Airbnb official website "Berlin" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/854/berlin#:~:text=Short%2Dterm%20rental%20regulations,short%2Dterm%20rentals%20in%20Berlin.>> (accessed 14-08-2022).

¹²⁷ Airbnb official website "Berlin" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/854/berlin#:~:text=Short%2Dterm%20rental%20regulations,short%2Dterm%20rentals%20in%20Berlin.>> (accessed 14-08-2022).

¹²⁸ Service-Portal Berlin official website (date unknown) *Service-Portal Berlin* <<https://service.berlin.de/dienstleistung/328146/>> (accessed 24-05-2022).

¹²⁹ Service-Portal Berlin official website (date unknown) *Service-Portal Berlin* <<https://service.berlin.de/dienstleistung/328146/>> (accessed 24-05-2022).

¹³⁰ Service-Portal Berlin official website (date unknown) *Service-Portal Berlin* <<https://service.berlin.de/dienstleistung/328146/>> (accessed 24-05-2022).

one is not present in their living space, provided that the basic character of the living space as the main residence remains untouched.¹³¹ The Act is silent on how long one may rent out a self-occupied main apartment as a short-term rental, but states that a secondary apartment in Berlin can be rented out as a short-term rental for a maximum of 90 days per year.¹³²

The advertising and offering of the relevant living space must be approved in advance by the relevant district office, whereby a registration number will be issued as part of the approval.¹³³ It is a requirement that the approval and registration number be publicly displayed when offering and advertising the living space, including when such offering and advertisement is made on internet platforms (online), such as the Airbnb website/application.¹³⁴ However, approval is not required if only 49% of the total

¹³¹ Section 3(3), no.2 of the Law on the Prohibition of the Misappropriation of Living Space Act of 2013; Service-Portal Berlin official website (date unknown) *Service-Portal Berlin* <<https://service.berlin.de/dienstleistung/328146/>> (accessed 24-05-2022).

¹³² Section 3(3), no.2 of the Law on the Prohibition of the Misappropriation of Living Space Act of 2013; Service-Portal Berlin official website (date unknown) *Service-Portal Berlin* <<https://service.berlin.de/dienstleistung/328146/>> (accessed 24-05-2022).

¹³³ Service-Portal Berlin official website (date unknown) *Service-Portal Berlin* <<https://service.berlin.de/dienstleistung/328146/>> (accessed 24-05-2022).

¹³⁴ Service-Portal Berlin official website (date unknown) *Service-Portal Berlin* <<https://service.berlin.de/dienstleistung/328146/>> (accessed 24-05-2022). Airbnb official website "Berlin" (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/854/berlin#:~:text=Short%2Dterm%20rental%20regulations,short%2Dterm%20rentals%20in%20Berlin.>> (accessed 24-05-2022). The Airbnb official website for Berlin addresses the permit regulations for Berlin Hosts, stating 'You must then enter your registration number in the appropriate field in your Airbnb listing. You can find that field by following these instructions: Go to "Listings" and select the listing for which you wish to add the registration number, go to "policies and rules" and scroll down until you see the section "laws and regulations", next to "regulations" click on "edit", and finally next to "Add a permit number" click on "add".'

living space of the main residence is being rented.¹³⁵ When determining what 49% of the living space amounts to, half use is assumed for the kitchen and bathroom.¹³⁶ Nonetheless, one must obtain a registration number, which must be publicly displayed when the living space is offered and advertised.¹³⁷ Once the rented area of the main apartment accounts for more than 49% of the total apartment, approval by the district office is required.¹³⁸

As a property owner looking to list their property on Airbnb, to apply for approval and assignment of a registration number, one must provide (a) proof of ownership through a current extract from the land register; (b) a registration certificate, and (c) justification for the application with relevant supporting documents.¹³⁹ Similarly, as an authorised user, such as a tenant seeking to list their rented property on Airbnb, one

¹³⁵ Service-Portal Berlin official website (date unknown) *Service-Portal Berlin* <<https://service.berlin.de/dienstleistung/328146/>> (accessed 24-05-2022).

¹³⁶ Service-Portal Berlin official website (date unknown) *Service-Portal Berlin* <<https://service.berlin.de/dienstleistung/328146/>> (accessed 24-05-2022).

¹³⁷ Service-Portal Berlin official website (date unknown) *Service-Portal Berlin* <<https://service.berlin.de/dienstleistung/328146/>> (accessed 24-05-2022). Airbnb official website “Berlin” (date unknown) *Airbnb* <<https://www.airbnb.co.za/help/article/854/berlin#:~:text=Short%2Dterm%20rental%20regulations,short%2Dterm%20rentals%20in%20Berlin.>> (accessed 24-05-2022). The Airbnb official website for Berlin addresses the permit regulations for Berlin Hosts, stating “You must then enter your registration number in the appropriate field in your Airbnb listing. You can find that field by following these instructions: Go to ‘Listings’ and select the listing for which you wish to add the registration number, go to ‘policies and rules’ and scroll down until you see the section ‘laws and regulations’, next to ‘regulations’ click on ‘edit’, and finally next to ‘Add a permit number’ click on ‘add’.”

¹³⁸ Service-Portal Berlin official website (date unknown) *Service-Portal Berlin* <<https://service.berlin.de/dienstleistung/328146/>> (accessed 24-05-2022).

¹³⁹ Service-Portal Berlin official website (date unknown) *Service-Portal Berlin* <<https://service.berlin.de/dienstleistung/328146/>> (accessed 24-05-2022).

must provide proof of rental.¹⁴⁰ Proof of rental can be a valid rental or sublease agreement, a registration certificate, a declaration of consent from the lessor, and must come with justification for the application with the relevant supporting documents.¹⁴¹ These applications are subject to payment of an application fee.¹⁴² The applications are decided on a subjective basis at the discretion of the housing office of the respective district office where the living space is located.¹⁴³ Given the subjective and individual nature of each application, there is no average processing time for the applications, as the processing time is application dependent.¹⁴⁴

In light of this discussion, it is evident that Berlin has implemented a well-thought-out regulatory scheme whereby the State of Berlin is able to keep track of short-term rental operations and regulate it in a manner that protects access to affordable housing. In this regard, there are various lessons that can be learned from Berlin's approach to regulating short-term rentals, which will be explored below.

6 6 3 Lessons to be learnt from Berlin's regulation of short-term rental operations

Berlin's initial approach to regulating short-term rental operations was a stringent one that significantly limited property owners' rights in order to protect the housing sector. However, the *ZwVbG* was amended in 2018 to give property owners much more freedom to use their property for short-term rentals. The main takeaway from the

¹⁴⁰ Service-Portal Berlin official website (date unknown) *Service-Portal Berlin* <<https://service.berlin.de/dienstleistung/328146/>> (accessed 24-05-2022).

¹⁴¹ Service-Portal Berlin official website (date unknown) *Service-Portal Berlin* <<https://service.berlin.de/dienstleistung/328146/>> (accessed 24-05-2022).

¹⁴² Service-Portal Berlin official website (date unknown) *Service-Portal Berlin* <<https://service.berlin.de/dienstleistung/328146/>> (accessed 24-05-2022).

¹⁴³ Service-Portal Berlin official website (date unknown) *Service-Portal Berlin* <<https://service.berlin.de/dienstleistung/328146/>> (accessed 24-05-2022).

¹⁴⁴ Service-Portal Berlin official website (date unknown) *Service-Portal Berlin* <<https://service.berlin.de/dienstleistung/328146/>> (accessed 24-05-2022).

development of the *ZwVbG* is that a stringent regulatory approach may face backlash from property owners who feel they are unable to partake in the sharing economy due to the strict regulations of short-term accommodation. The inability to enjoy ownership entitlements has the power to dissuade individuals from purchasing property in the long run. It is evident that the ability to rent your property out on a short-term basis arguably forms part of ownership entitlements. In this regard, stringent limitation of short-term rentals detracts from property owners' ownership entitlements.

Furthermore, the Berlin case study indicates that stringent regulation of short-term rentals has the potential to affect the tourism sector negatively. With airlines running specials to boost their sales after their financial crash during Covid-19, global travel is slowly beginning to pick up.¹⁴⁵ However, no matter how affordable the flight is, if individuals cannot find reasonable accommodation, they will not be able to travel. In this respect, Airbnb's operations have enabled individuals to find affordable accommodation in Berlin, therefore promoting travel to Berlin.

Additionally, the Berlin case study highlights that affordable housing is an important consideration when regulating short-term rental operations in South Africa. It indicates that the Government will need to keep in mind that allowing lenient regulation of short-term rentals may result in many properties being used as short-term

¹⁴⁵ United Nations World Travel Organization official website "Tourism enjoys strong start to 2022 while facing new uncertainties" (25-03-2022) *UNWTO* <<https://www.unwto.org/news/tourism-enjoys-strong-start-to-2022-while-facing-new-uncertainties#:~:text=Based%20on%20the%20latest%20available,for%20the%20whole%20of%202021.>> (accessed 06-06-2022); Internationale Tourismus-Börse Berlin "ITB Berlin and IPK International: Upturn in international tourism" (17-03-2022) *ITB* <https://www.itb.com/en/press/press-releases/news_4803.html> (accessed 06-06-2022).

accommodation.¹⁴⁶ Having a surplus of short-term rental properties in South Africa can have negative implications for locals who need accommodation, especially in the inner city.¹⁴⁷ If short-term rental operations are prominent in popular areas like the inner cities, the rent for long-term accommodation will increase as a result of the demand for inner-city accommodation.

Although Berlin's initial approach to regulating short-term rentals was unsuccessful, Berlin's amended regulation of short-term rental operations finds a balance between protecting the housing market, specifically rent prices, while also giving property owners the opportunity to enjoy their ownership entitlements by earning a profit off their property through short-term rentals such as listing their property on Airbnb. The exploration of Berlin's regulatory approach indicates that stringent limitations restricting the use of Airbnb may not be beneficial to all role-players. Berlin's revised regulatory approach has the potential to serve as guidelines to the South African Government to ensure that its regulation of short-term rental operations will enable property owners to generate income, protect access to affordable housing, and stimulate the tourism industry.

6 7 Recommendations for the regulation of short-term rentals like Airbnb in South Africa

6 7 1 Introduction

Based on the exploration of the various options the South African Government has in relation to potentially regulating short-term rentals like Airbnb, it is recommended

¹⁴⁶ S Fick "Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?" (2021) 3 *Stellenbosch Law Review* 455-481 at 460.

¹⁴⁷ S Fick "Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?" (2021) 3 *Stellenbosch Law Review* 455-481 at 476.

that as a point of departure, the Government enact national legislation to address short-term rental operations in South Africa. Such national legislation should provide a framework of the laws applicable to short-term rentals in South Africa whereby municipalities regulate short-term rentals within their municipal area according to their local circumstances. This approach will ensure nationwide certainty on the legal position of short-term rentals in South Africa so that property owners are aware of the legality surrounding conducting short-term rentals on platforms like Airbnb. It is suggested that the national legislation authorise municipalities to create by-laws that give effect to the national legislation. As concluded above, the presence of short-term rentals has the potential to change the character of the neighbourhood, therefore potentially making it necessary to have specific by-laws that address local needs and demands.

Furthermore, based on the discussion in section 6 4 4 2, it is evident that zoning laws are crucial in ensuring that municipalities are able to prevent the gentrification of their community stemming from short-term rental operations. Granting power to municipalities to regulate short-term rentals in line with the overarching national legislation is important, as national legislation will not be able to address the zoning laws of each municipality. Consideration of the zoning laws of each municipality is particularly important in the context of protecting national heritage sites and conservation areas from the negative externalities of short-term rental operations. In this regard, it is suggested that the best approach for the regulation of short-term rentals in South Africa would be the enactment of the Tourism Bill, which will provide the framework for the operation of short-term rentals in the country. However, the enactment of the Tourism Bill will need to authorise municipalities to pass by-laws to give effect to the national legislation in line with the framework provided. In light of this

discussion, the following section will address the importance of regulating short-term rental operations in a manner that clearly addresses the legal position of operations such as Airbnb in South Africa.

6 7 2 National legislation regulating short-term rentals should clearly address the legal position

In light of the lack of clarity surrounding the legality of short-term rental operations, it is necessary for the national regulation enacted by the Government to provide clarity regarding the legal position of short-term rentals in South Africa. The legislation should be clear as to whether short-term rentals like Airbnb are permitted in South Africa and the extent to which it is legal to use one's property as short-term rental accommodation.

To ensure that there is clarity regarding short-term rentals legal position, it is pertinent that "short-term rental" be expressly defined, ideally stating the specific number of days that amount to conducting short-term rental operations. Following the definition of "short-term rental", it is necessary that the statute clearly define what actions amount to conducting short-term rentals of one's property. Consequently, the statute will need to define what makes one a "short-term rental host" (i.e., in the Airbnb context, an "Airbnb host"). This clarification is pertinent for neighbours to know who they can bring an action against in the event that a property law interference arises. In this regard, the statute should list various characteristics of a short-term rental host so that potential plaintiffs can determine whether the person they are dealing with meets the definition of a short-term rental host. The definition will also be beneficial to defendants, as they will be aware of the requirements to be a short-term rental host. With this knowledge, defendants will be able to use the requirements to argue that they do not meet the characteristics of a short-term rental host and, therefore, cannot

be liable for a contravention of the statute. Furthermore, this definition will be valuable as it will allow property owners to compare their actions with the definition of a short-term rental host to provide clarity regarding whether their actions amount to offering short-term rental accommodation. This knowledge will ensure property owners know when they qualify as short-term rental hosts, therefore preventing them from being able to plead ignorance that they were not aware their actions amounted to offering short-term accommodation.

Subsequent to the definition of a short-term rental host, it is necessary that a definition of “short-term rental guest” be provided. The definition of short-term rental guest is necessary to ensure that individuals who amount to guests are aware of their rights, obligations, and remedies regarding their position as a short-term guest. The definition of a short-term guest is particularly valuable to international tourists who would like to know their rights and obligations as guests to protect them from experiencing legal challenges and ensure they know how to handle legal conflicts in South Africa.

Furthermore, the legislature will need to provide clarity regarding whether landlord-tenant law is applicable in the short-term rental context and, if so, to what extent. Therefore, the legislation should indicate whether short-term rental hosts are landlords and whether short-term rental guests are tenants. This clarification is crucial for hosts, guests, and neighbours, as it will indicate what the relevant rights, obligations, and remedies are applicable to each role-player. The understanding of each party’s classification will be relevant when determining which remedies are available to them in terms of the national legislation. This determination is also relevant in understanding whether landlord-tenant law and common law principles of nuisance law are applicable

in the short-term rental context or whether neighbours may only rely on the statute in the instance of a claim for a property law infringement.

Additionally, it is important for the national legislation to differentiate between private individuals who own property and commercial entities who seek to list all the units of an entire building as short-term rental accommodation. This distinction is necessary to prevent commercial landlords from acting as hotels without being subject to the statutory requirements by which hotels operate.

6 7 3 National legislation regulating short-term rentals should address how the regulations will be enforced

Airbnb has expressed support for the national regulation of short-term rental operations in South Africa to provide legal certainty as this would “promote an inclusive and sustainable future for tourism”.¹⁴⁸ Airbnb has expressly suggested that the South African Government implement an online registration process whereby property owners receive a registration number, which the Airbnb host can share on the Airbnb platform to provide transparency to the relevant role-players.¹⁴⁹ However, Airbnb did not provide further clarity on how this system would be implemented.

In this view, I would recommend that the Government give municipalities the right to issue licenses to property owners seeking to conduct short-term rentals on their property. This approach is suggested based on Berlin’s approach to regulating short-term rental operations. In addition, the issuing of licenses should form part of a national registry whereby there is a nationwide database of all individuals who conduct short-

¹⁴⁸ Airbnb official news “Supporting inclusive tourism in South Africa” (04-06-2021) *Airbnb News* <<https://news.airbnb.com/en-uk/supporting-inclusive-tourism-in-south-africa/>> (accessed 31-05-2022).

¹⁴⁹ Airbnb official news “Supporting inclusive tourism in South Africa” (04-06-2021) *Airbnb News* <<https://news.airbnb.com/en-uk/supporting-inclusive-tourism-in-south-africa/>> (accessed 31-05-2022).

term rental operations in South Africa. This approach would be in line with Airbnb's proposed approach. In terms of the registration, when applying for the license, the individual will need to provide proof of ownership/lease agreement allowing for subletting and a building plan of the relevant property. After considering the area's zoning laws and the present situation in the area in relation to gentrification, the municipality may award a license. In the event that the municipality rejects the application for a license, the municipality should be required to give written reasons as to why the application was rejected. Approving licenses for more than a year may be problematic if zoning laws need to be amended or the area becomes more gentrified. Therefore, it is proposed that licenses be valid for one year. The one-year approach is preferable as it ensures that the municipality is not bound to the license's applicability for an extended period in case the municipality's by-laws need to be amended in a manner that affects short-term host's rental operations.

Furthermore, in correspondence with Airbnb, the South African Government can work to ensure that only property owners with licenses approved by the municipality are allowed to list their property on the Airbnb platform. In this regard, if the national legislation imposes a limit on the number of bookings a host may conduct in a year, Airbnb will be required to limit the number of booking dates available on the platform. From the perspective of protecting the interests of the hospitality industry, it may be beneficial for national legislation to limit the number of bookings to allow establishments in the hospitality industry to continue providing profitable services in the form of short-term accommodation. A limitation on the number of booking dates may also assist in preventing owners from turning affordable housing into short-term rental properties when it could be used for affordable long-term residential use. To this

end, Airbnb should put a mechanism in place whereby the booking dates for the property are closed once the maximum prescribed number of days has been booked.

It is valuable to note that Airbnb is only one platform that facilitates short-term rentals, while informal short-term rentals can occur outside of the platform. In this regard, the Government should address instances where property owners privately conduct short-term hosting and exceed the maximum number of days prescribed by legislation. This may be challenging, as there is little that the Government will be able to do to enforce accountability measures. However, the legislation could potentially provide for interested parties who have an issue with a short-term host's short-term rental operations to bring the matter before the Housing Tribunal. Additionally, the Government can recreate a registry whereby property owners are obliged to register their short-term rental operations with the local municipality.¹⁵⁰ In the event that an individual is found to be conducting short-term rental operations without being registered with the municipality, then they may be liable to pay a fine. Furthermore, the Government can stipulate tax consequences stemming from the profits made through short-term rental operations. By creating tax implications for short-term hosts, the South African Revenue Service should be able to identify which individuals are short-term hosts and consequently determine whether their income matches the income that they would receive if they were hosting their property for the number of days stipulated by the national legislation. In other words, if the short-term host's income stemming from their short-term rental operations significantly exceeds the income that the property owner would make operating within the confines of the

¹⁵⁰ See chapter 6 section 6 7 3.

restricted number of days, then it is an indication that they are not acting in accordance with the legislation.

Importantly, in addressing the consequences of exceeding the maximum stay limit, it is important to recognise that some instances may warrant conducting short-term rentals beyond the legislative limits, depending on the circumstances. Consequently, it would be beneficial to allow individuals to bring applications for exemptions from the maximum day limit stipulated according to the national legislation. In such an instance, an individual would apply to the municipality for the exemption, providing reasons as to why the exemption should be granted. The exemption would then be considered by the municipality, and an outcome would be given in a reasonable time, including reasons why the exemption was granted or denied. In this regard, the national legislation should provide a list of factors that municipalities must take into account when considering exemptions to ensure that decisions are not made arbitrarily.

Furthermore, it is necessary for the national legislation to indicate that a rental that exceeds the prescribed number of days will not be regarded as a short-term rental. In this regard, the statute should expressly state that the provisions of the legislation will not provide protection to rental operations exceeding the number of days mentioned unless particular provisions of the statute specify otherwise.

Additionally, the Government should address the consequences of non-compliance with the legislation, giving recognition to the taxation requirements to be complied with. It is important to state whether fines or imprisonment may be appropriate in the relevant instance of non-compliance with the Act. Arguably, imprisonment may be a drastic approach, where the non-compliance with legislation cannot be said to be proportional to the extent that a guilty party should be sentenced to time in jail. In this

regard, I am of the opinion that a fine for non-compliance with the legislation would be an appropriate sanction.

6 7 4 National legislation regulating short-term rentals should prevent “hotelisation”

In addressing the presence of short-term rentals in South Africa, it is important that Government recognises the present situation whereby “hotelisation” is occurring.¹⁵¹ “Hotelisation” can be defined as property owners converting numerous units in a building into rooms that are suitable for short-term accommodation by including amenities that hotels usually offer.¹⁵² By equipping their property with these amenities, the property owners can compete with establishments in the hospitality industry without having to follow the regulations applicable to hospitality industry establishments.¹⁵³

In this light, hotelisation creates an unfair standard whereby hotels face certain stringent laws that short-term rental hosts do not face.¹⁵⁴ It is important that the Government acknowledges the value that the hospitality industry brings to the tourism sector and does not prioritise short-term rentals over the hospitality sector when regulating short-term rentals. Consequently, the Government should set out to prevent hotelisation and minimise inequality suffered by the hospitality industry while upholding the legal standards to which the hospitality industry is subject. Apart from the negative implications of short-term rentals on hotels, neighbours of short-term hosts are also

¹⁵¹ DJ de Lange “Regulating ‘short-term’ rental accommodation in SA” (2019) 20 *Chartered Institute of Government Finance Audit and Risk Officers Journal* 26-30 at 30.

¹⁵² D Lee “How Airbnb short-term rentals exacerbate Los Angeles’s affordable housing crisis: Analysis and policy recommendations” (2016) 10 *Harvard Law and Policy Review* 229-254.

¹⁵³ D Lee “How Airbnb short-term rentals exacerbate Los Angeles’s affordable housing crisis: Analysis and policy recommendations” (2016) 10 *Harvard Law and Policy Review* 229-254.

¹⁵⁴ D Lee “How Airbnb short-term rentals exacerbate Los Angeles’s affordable housing crisis: Analysis and policy recommendations” (2016) 10 *Harvard Law and Policy Review* 229-254.

potentially negatively impacted by short-term rental operations. In this light, the following section explores how the national legislation enacted should give effect to neighbours' ownership rights.

6 7 5 National legislation regulating short-term rentals should give effect to neighbours' ownership rights

When regulating short-term rentals in South Africa, it is imperative that Government takes cognisance of the negative implications that short-term rentals have for neighbours.¹⁵⁵ In this regard, the national legislation should specify instances where a short-term host's conduct will clearly amount to an unlawful nuisance. However, the national legislation should still afford courts the discretion to determine what will amount to an unlawful nuisance on a case-by-case basis. In light of the nuisances identified,¹⁵⁶ the national legislation should provide remedies available to neighbours in the instance where they experience an unlawful nuisance arising from short-term host's short-term rental operations. Based on the above discussion, it is evident that various role-players, including neighbours may require legal recourse in the short-term rental course. However, short-term rental operations also have the potential to result in the gentrification of neighbourhoods, rent increases, and negatively impact the availability of affordable housing. Consequently, the following section will explore the enactment of national legislation that addresses gentrification, combats rent increases, and protects the availability of affordable housing.

¹⁵⁵ D Guttentag "Transformative experiences via Airbnb: is it the guests or the host communities that will be transformed?" 2019 *Journal of Tourism Futures* 1-7 at 4. See chapter 4 section 4 1 for a discussion on the negative implications that short-term rentals may have on neighbours.

¹⁵⁶ See chapter 4 for a discussion on the nuisances that neighbours of short-term host's experience.

6 7 6 National legislation regulating short-term rentals should address gentrification, combat rent increases, and promote access to affordable housing

One of the main concerns regarding short-term rental operations in South Africa is its impact on affordable housing.¹⁵⁷ The current shortage of affordable housing in South Africa indicates that the country cannot afford to have housing prices increase.¹⁵⁸ Given that it has become a popular practice for property owners to attempt to displace and evict tenants to avail their property for short-term rental use, it is vital that the regulation of short-term rentals speaks to this issue.¹⁵⁹ When regulating short-term rentals, it is important that the provisions in national legislation limit the number of days one can conduct short-term rental operations. This measure will give effect to the goal of preventing property owners from converting affordable accommodation into year-round short-term rental accommodation.¹⁶⁰ Alternatively, the legislation should empower municipalities to determine whether there be a limitation on the number of days one can conduct short-term rentals for. This approach may be preferable as it allows the limitation to be based on the circumstances of the area. This would enable

¹⁵⁷ S Fick “Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?” (2021) 3 *Stellenbosch Law Review* 455-481 at 467.

¹⁵⁸ E Harsch “Winding path to decent housing for South Africa’s poor” *United Nations* (date unknown) < [\(accessed 08-01-2023\).](https://www.un.org/africarenewal/web-features/winding-path-decent-housing-south-africa%E2%80%99s-poor#:~:text=Housing%20backlog&text=Although%20the%20Department%20of%20Human,in%20dire%20need%20of%20houses.> (accessed 08-01-2023); Centre for affordable housing finance in Africa “Housing finance in South Africa” (2022) <i>CAHF</i> <<a href=)

¹⁵⁹ D Lee “How Airbnb short-term rentals exacerbate Los Angeles’s affordable housing crisis: Analysis and policy recommendations” (2016) 10 *Harvard Law and Policy Review* 229-254 at 245.

¹⁶⁰ D Lee “How Airbnb short-term rentals exacerbate Los Angeles’s affordable housing crisis: Analysis and policy recommendations” (2016) 10 *Harvard Law and Policy Review* 229-254 at 245.

municipalities that are tourism-centred to promote short-term rentals in their area, while other municipalities may need to limit short-term rentals based on the housing situation and gentrification in their area.

Furthermore, the legislation will also need to give consideration to the current fears of gentrification that plague various areas of South Africa.¹⁶¹ In this regard, it is suggested that the statute empowers municipalities to enact by-laws to address their zoning laws and potential gentrification in the municipality. To this end, the legislation should stipulate that short-term hosts should apply for a short-term rental license from their municipality to conduct short-term rentals.¹⁶²

Based on the potential conflicts identified in the short-term rental context, it is evident that various role-players may require legal recourse in the short-term rental context. Consequently, the following section will explore the idea of a regulatory body overseeing the enforcement of the national legislation and resolving conflict between role-players.

6 7 7 National legislation regulating short-term rentals should provide for a regulatory body that oversees the enforcement of the regulations and resolve conflict between role-players

In light of the above discussion, it is evident that conflict is likely to arise between the various role-players in the short-term rental context. Given that the legislation is intended to provide clarity to the role-players, it will likely inform role-players of their rights, obligations, and remedies, therefore indicating the interplay between the relevant role-players' rights, obligations, and remedies. Consequently, this clarification will enable role-players to be aware of circumstances where their rights are being

¹⁶¹ See section 6 4 3 for a discussion on gentrification in the short-term rental context.

¹⁶² See section 6 7 3 for a discussion on municipalities regulating short-term rentals.

infringed based on the obligations of other role-players. Naturally, role-players whose rights have been infringed will likely want to be compensated in some way. In this regard, it is suggested that the national legislation enacted clarifies whether matters regarding short-term rentals will fall within the ambit of the Housing Tribunal. Alternatively, the national legislation should indicate whether a regulatory body will be created to specifically address issues arising in the short-term rental context.

6 8 Conclusion

The regulation of short-term rental operations in South Africa is essential to provide legal certainty to property owners, tourists, municipalities, landlords, tenants, neighbours of Airbnb-listed properties, and establishments within the tourism and hospitality industry. As short-term rentals like Airbnb increase in popularity in South Africa, it is imperative that legislation supports its economic benefits while limiting its ability to infringe on property owners' rights. The current failure to address short-term rental operations in South Africa has had a negative effect on various role-players, in particular, neighbours of short-term hosts who experience nuisances due to short-term rental operations. Failure to regulate Airbnb's operations will most likely have a negative impact on Government tax revenue, neighbourhoods, zoning laws, and the hospitality industry while also detracting from landlords, tenants, and neighbours' property rights.¹⁶³

It is recommended that the South African Government enact national legislation addressing short-term rentals. The enactment of such legislation should provide a clear, basic framework of the legal position while authorising municipalities to regulate

¹⁶³ D Guttentag "Transformative experiences via Airbnb: Is it the guests or the host communities that will be transformed?" 2019 *Journal of Tourism Futures* 1-7 at 4.

short-term rentals based on their local needs and demands. When regulating Airbnb, the national legislation should address the following:

- (a) What amounts to a short-term rental?
- (b) Who is regarded as a short-term rental host?
- (c) Who is regarded as a short-term rental guest?
- (d) Whether landlord-tenant law is applicable in the short-term rental context.
- (e) The distinction between short-term rental accommodation and hotels and how commercial hosts will be dealt with or prevented.
- (f) How nuisance law applies in the short-term rental context.
- (g) What remedies are available to neighbours of short-term rental properties?
- (h) How gentrification and protecting the availability of affordable accommodation should be dealt with in the short-term rental context.
- (i) Record keeping through a national registry and accountability mechanisms for short-term rental hosts.

The necessity of regulation was highlighted in the case studies conducted on short-term rental regulations in London and Berlin. The case study conducted in this chapter regarding Airbnb's legal position in London was beneficial in highlighting the impact that Airbnb's operations have on housing affordability and the importance of ensuring low-income housing is available to those who need it. Furthermore, London's correspondence with Airbnb to ensure that the Airbnb platform enforces its laws indicates a potential avenue for the South African Government to work alongside Airbnb to protect the relevant role-players once national legislation has been enacted. In turn, the case study of Airbnb's operation in Berlin indicates that short-term rentals on platforms like Airbnb are regarded by property owners as an entitlement that owners would like to exercise to bring in additional income. The main takeaway from

the exploration of Airbnb's legal position in Berlin is that stringent regulation of short-term rentals has the potential to negatively affect the tourism sector and property owners' use and enjoyment of their entitlements. Furthermore, the Berlin case study indicates that the South African Government should ensure that its regulation of short-term rentals will enable property owners to generate income and stimulate the tourism industry. In light of these two case studies, it was concluded that in the regulation of short-term rentals in South Africa, the Government would need to balance the interests of the tourism industry and the hospitality industry while giving effect to property owners' ownership entitlements. Failure to regulate short-term rentals in a manner that provides equity between the relevant role-players has the potential to have devastating effects on the economy, tourism industry, hospitality industry, and the availability of affordable housing.

Chapter 7: Conclusion

7 1 Introduction

This dissertation investigated the neighbour law implications of short-term rental operations like Airbnb in South Africa. The research explored the impact of short-term rental operations on various role-players, namely: (a) hosts; (b) guests; (c) neighbours; (d) the tourism industry; (e) the hospitality industry; and (f) the South African Government. The legal position of Airbnb was explored, whereby the terms of Airbnb's policies were investigated to determine the contractual rights and obligations of Airbnb hosts and guests. The Airbnb terms of service were contrasted with the *essentialia* of a lease agreement to determine whether the Airbnb agreement amounts to a lease agreement, resulting in the applicability of landlord-tenant law in the short-term rental context. Subsequently, the implications of Airbnb for neighbour law were explored, with special consideration given to what would be regarded as normal use of property and reasonableness in terms of nuisance law. In addition, section 25 of the Constitution of the Republic of South Africa, 1996 ("Constitution") was of relevance in conducting a section 25(1) analysis to determine whether the laws authorizing short-term rentals result in an arbitrary deprivation of neighbours property. Finally, recommendations for the regulation of short-term rental operations in South Africa were provided.

7 1 1 Conclusions reached in chapter 2

Chapter 2 evaluated the legal position of Airbnb as short-term rental operations in South Africa to determine the current legislation applicable to short-term rentals and

the potential implications of the Tourism Amendment Bill of 2019 (“Tourism Bill”).¹⁶⁴ Consequently, this chapter explored the potential implications that the Tourism Bill, if implemented, may have on role-players in the short-term rental context, such as hosts, guests, neighbours, municipalities, local businesses, the tourism industry, the hospitality industry, and the South African Government.

Furthermore, this chapter considered the Tourism Bill and explored the contestations by various organisations who argue that the Tourism Bill should not regulate short-term rentals.¹⁶⁵ Additionally, the views of those in favor of the Tourism Bill were considered. Some in favor of the Tourism Bill argue that the Tourism Bill is necessary to provide clarity in the industry to promote tourism and enable property owners to enjoy their ownership entitlements.¹⁶⁶ Others argue that short-term rentals need to be regulated to address the negative impact of Airbnb on the hospitality industry.¹⁶⁷ In contrast, those who oppose the Tourism Bill argue that regulating and prescribing the use of privately-owned property is unconstitutional and infringes on property rights within a community sector.¹⁶⁸ Furthermore, they argue that regulating

¹⁶⁴ Tourism Amendment Bill Notice 235 of 2019. See chapter 2 section 2 1 and 2 2.

¹⁶⁵ See chapter 2 section 2 2.

¹⁶⁶ T Penny “SA tourism body optimistic government will regulate ‘unfair’ Airbnb” (15-04-2019) *EWN* <<https://ewn.co.za/2019/04/15/sa-tourism-body-optimistic-government-will-regulate-unfair-airbnb>> (accessed 16-11-2020); DJ De Lange “Regulating ‘short-term’ rental accommodation in SA” (2019) 20 *Chartered Institute of Government Finance Audit and Risk Officers Journal* 26-30 at 26.

¹⁶⁷ T Penny “SA tourism body optimistic government will regulate ‘unfair’ Airbnb” (15-04-2019) *EWN* <<https://ewn.co.za/2019/04/15/sa-tourism-body-optimistic-government-will-regulate-unfair-airbnb>> (accessed 16-11-2020); DJ De Lange “Regulating ‘short-term’ rental accommodation in SA” (2019) 20 *Chartered Institute of Government Finance Audit and Risk Officers Journal* 26-30 at 26.

¹⁶⁸ Anonymous “NAMA weighing in on Airbnb regulation” (25-04-2019) *Property Professional* <<https://propertyprofessional.co.za/2019/04/25/nama-weighing-in-on-airbnb-regulation/>> (accessed 10-08-2020).

the registration and licensing of properties listed as Airbnb's will negatively impact the growth of property investment.¹⁶⁹ Despite the contestations to the enactment of the Tourism Bill, it was concluded that due to the vast effect that short-term rentals like Airbnb have on numerous role-players, it is likely the Tourism Bill will be enacted to regulate short-term rental operations in South Africa.

Chapter 2 proceeded to explore the contractual rights and obligations of Airbnb hosts in terms of Airbnb's terms of service.¹⁷⁰ Although the terms of service did not expressly address the rights and obligations of hosts, the main takeaway point was that Airbnb hosts are responsible for their property listing and that Airbnb will not be liable for incidents that arise due to the Airbnb host's actions. Accordingly, the contractual rights and obligations of Airbnb guests in terms of Airbnb's terms of service were explored.¹⁷¹ In this respect, it was concluded that Airbnb's terms of service and policies operate to the detriment of the Airbnb guest, with most provisions protecting the rights and interests of the Airbnb host and Airbnb as a company. Given the fact that the host is the individual who decided to conduct the short-term rental operations, it was argued that if a neighbour wants to bring a claim for infringement of their property rights, they would bring it against the short-term rental host, not the guest.

In addition, the provisions of Airbnb's terms of service were explored to determine whether the Consumer Protection Act 68 of 2008 ("CPA") is applicable in the Airbnb context. This discussion was relevant because the CPA provides protection and

¹⁶⁹ Anonymous "NAMA weighing in on Airbnb regulation" (25-04-2019) *Property Professional* <<https://propertyprofessional.co.za/2019/04/25/nama-weighing-in-on-airbnb-regulation/>> (accessed 10-08-2020).

¹⁷⁰ See chapter 2 section 2 3 1 1.

¹⁷¹ See chapter 2 section 2 3 1 2.

specific guidelines for tenants, as tenants are included in the definition of “consumers” in the CPA.¹⁷² In this regard, if Airbnb guests amount to tenants, the CPA should protect them. However, given the lack of clarity regarding the applicability of landlord-tenant law in the Airbnb context, it was unclear whether Airbnb guests would find protection as tenants under the CPA. However, the Airbnb terms of service refer to guests as “consumers”, and the actions of guests meet the CPA’s definition of consumers. Consequently, it was found that irrespective of the uncertainty of whether Airbnb guests are tenants, Airbnb guests should still find protection under the CPA as consumers.

Subsequently, this chapter considered the terms and conditions of the Airbnb “Host Guarantee”, which provides property damage protection for each property listed on Airbnb, with the protection being up to \$1 million.¹⁷³ The discussion found that Airbnb’s Host Guarantee is somewhat inaccessible to hosts when consideration is given to all the things the host would need to prove before they would be able to receive compensation from Airbnb. In addition, the Host Guarantee does not provide coverage for instances where a guest or an invitee stays beyond the expiration of the booking period, which leaves the host and guest susceptible to the laws governing evictions in South Africa. Furthermore, the provisions exclude protection for hosts in the event of bodily injury or property damage to guests or other individuals. This discussion highlighted the lack of legal remedies available to Airbnb hosts, indicating the importance of clarity for hosts regarding landlord-tenant law, as landlord-tenant law would open up the host and guest to a range of property law remedies if it were

¹⁷² SI Mohamed “Is the Rental Housing Act all that matters?” (2016) 24 *Property Law Digest* 1-3 at 2.

¹⁷³ See chapter 2 section 2 3 2.

applicable. In this light, chapter 3 addressed the applicability of landlord-tenant law in the short-term rental context.

7 1 2 Conclusions reached in chapter 3

Chapter 3 investigated whether Airbnb hosts and guests can respectively be regarded as landlords and tenants. This chapter compared the requirements for a valid lease in terms of the Rental Housing Act 50 of 1999 (“RHA”) with the provisions of the Airbnb host-guest agreement to determine whether the Airbnb host-guest agreement can be regarded as a lease agreement.¹⁷⁴ This clarification was important in determining whether landlord-tenant law applies in the Airbnb context. The discussion was relevant as Airbnb’s terms of service do not indicate whether landlord-tenant law is applicable to Airbnb hosts and guests. In determining whether the Airbnb host-guest agreement amounts to a lease, section 6 of the RHA was relevant because it lists the requirements of a lease agreement. In this regard, a comparison was made whereby the provisions of Airbnb’s host-guest listing agreement were compared with section 6 of the RHA. Upon inspection, it was determined that the Airbnb host-guest agreement meets the RHA *essentialia* for a lease agreement. In this regard, it was argued that the agreement between an Airbnb host and guest might be regarded as a short-term fixed-period lease agreement, which may result in the RHA being applicable in the Airbnb context.¹⁷⁵

In relation to the legal position of landlord-tenant law in the Airbnb context, this chapter concluded that there is insufficient research to determine whether short-term hosts and guests will be regarded as landlords and tenants. However, it was noted that landlord-tenant law would be beneficial in the Airbnb context because it would

¹⁷⁴ See chapter 3 section 3 2 1.

¹⁷⁵ See chapter 3 section 3 2 2.

provide additional remedies to both hosts and guests due to the limited remedies provided through Airbnb's terms of service. Nevertheless, along with the additional rights and remedies that landlord-tenant law would provide for Airbnb hosts and guests comes additional obligations on both parties. In this regard, exploring landlord-tenant law in the short-term rental context was necessary to determine whether Airbnb hosts and guests have the same remedies available to them in property law as landlords and tenants do.

Moreover, the chapter considered the various pieces of legislation that may be applicable in the short-term rental context, namely (a) the Deeds Registries Act 47 of 1937; (b) the Formalities in Respect of Leases of Land Act 18 of 1969 ("FRLLA"); (c) the Sectional Titles Act 95 of 1986; (d) the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"); (e) the Rental Housing Act 50 of 1999 ("RHA"); (f) the Electronic Communications and Transactions Act 25 of 2002 ("ECTA"); (g) the Community Schemes Ombud Service Act 9 of 2011; (h) the Consumer Protection Act 68 of 2008 ("CPA"); and (i) the Sectional Titles Schemes Management Act of 2016 ("STSMA").

Furthermore, this chapter explored whether offering short-term rental accommodation amounts to "commercial use" of property.¹⁷⁶ The investigation into whether short-term rentals amount to commercial use of property was of relevance in light of the *Body Corporate of the Paddock Sectional Title Scheme v Nicholl*¹⁷⁷ case, where the court stated that short-term rental operations amount to commercial use of property. Determining whether short-term rental accommodation is regarded as commercial use of property was crucial as it dictates whether the RHA and PIE would

¹⁷⁶ See chapter 3 section 3.2.3.

¹⁷⁷ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ).

be applicable. Accordingly, the legal opinion of Van der Merwe was of relevance, as he argues that short-term letting in a residential sectional title scheme still amounts to residential use, not commercial use.¹⁷⁸ On this note, considering the protection that the RHA and PIE offer hosts and guests, it was emphasised that it would be disadvantageous to hosts and guests if short-term rentals amounted to commercial use of property. In this respect, I argued that short-term rental operations should not be regarded as commercial use of property because the function remains the same, i.e., property used as accommodation for individuals. The only distinction between short-term rentals and general lease agreements is that the time period is shorter in the short-term context. However, the time period does not change the fact that the property is used as residential accommodation for individuals. In this regard, the chapter highlighted the need for clarity regarding whether using one's property as short-term rental accommodation amounts to commercial use of property or is still regarded as using the property for residential purposes.

Subsequently, the chapter examined the property law rights and obligations of Airbnb hosts¹⁷⁹ and guests.¹⁸⁰ This discussion was relevant in determining the property law implications that would ensue if Airbnb hosts are regarded as landlords. It was concluded that an Airbnb host would benefit from being a landlord as landlord-tenant law provides more rights and remedies than the Airbnb host-guest agreement, terms of service, and policies. Additionally, it was found that Airbnb guests would benefit from being regarded as tenants because landlord-tenant law provides them

¹⁷⁸ CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 512.

¹⁷⁹ See chapter 3 section 3 4 1.

¹⁸⁰ See chapter 3 section 3 4 2.

with various rights and remedies, unlike Airbnb's terms and policies, which operate in favour of the host.

Furthermore, the application of the *huur gaat voor koop* rule was explored.¹⁸¹ This discussion explored whether short-term tenants acquire a real right or personal right in terms of a lease agreement. It was argued that short-term tenants only acquire a personal right in relation to the property. In this light, it was concluded that if an Airbnb guest is in occupation of the property, they would have a personal right against the property, and the *huur gaat voor koop* rule would be applicable to them as a short-term tenant.

In addition, this chapter looked at instances where Airbnb could potentially be prohibited by legislation and considered the ramifications of such prohibitions. To this end, this chapter considered the following pieces of legislation, namely the Deeds Registries Act, PIE, the RHA, ECTA, the Community Schemes Ombud Service Act, the CPA, and the STSMA. Subsequently, the legal position of listing properties as short-term rentals in sectional title schemes was explored.¹⁸² The discussion emphasised that Airbnb hosts in sectional title schemes should ensure that their operations align with the body corporate rules and sectional title scheme rules.

Moreover, the legal position regarding subletting was considered in regard to a tenant who lists their rental property on Airbnb.¹⁸³ In this respect, it was concluded that individuals who would like to sublet their property through Airbnb would first need to obtain permission from their landlord before conducting short-term rental operations.

¹⁸¹ See chapter 3 section 3 4 3.

¹⁸² See chapter 3 section 3 5 1.

¹⁸³ See chapter 3 section 3 5 2.

This conclusion was based on the consideration of the obligations placed on potential hosts in terms of Airbnb's terms of service, the RHA, and PIE.

Based on this discussion, the chapter concluded that the lack of clarity regarding the application of landlord-tenant law indicates the need for the South African Government to enact legislation regulating short-term rental operations to clarify the rights, obligations, and remedies of the role-players, particularly in the context where disputes arise.

7 1 3 Conclusions reached in chapter 4

Chapter 4 considered the implications of neighbour law on short-term rentals like Airbnb's operations in South Africa, particularly looking at the implications of nuisance law in the short-term rental context.

To this end, this chapter investigated nuisance law to ascertain (a) the extent to which nuisance law is applicable in the short-term rental context; (b) which category of nuisance law is relevant in the short-term rental context; (c) the application of nuisance in the narrow and wide sense in the short-term rental context; (d) the normal use and reasonableness principles relevant in the short-term rental context; (e) the implications of neighbour law in the short-term rental context; and (f) the remedies that would be available to neighbours of short-term rental hosts under nuisance law.

In relation to nuisance law's applicability, chapter 4 highlighted that short-term rental operations have the potential to bring tourists into a community of mutually invested neighbours, with the tourists often having conflicting needs and wants as opposed to the more permanent residents.¹⁸⁴ In particular, permanent residents sometimes

¹⁸⁴ See chapter 4 section 4 2 1. See also GE Lines "Hej, not hej da: Regulating Airbnb in the new age of Arizona vacation rentals" (2015) 57 *Arizona Law Review* 1163-1182 at 1169.

experience issues such as late-night parties on formerly quiet streets, unfamiliar cars blocking driveways, and have concerns about marginalised groups' safety in an environment where unfamiliar faces can come and go.¹⁸⁵ In this view, it was determined that short-term rental operations have the potential to cause nuisances, resulting in neighbouring property owners' inability to use and enjoy their property effectively.¹⁸⁶ Specifically, it was argued that short-term rental operations fall within the category of private nuisance because short-term rental operations have the potential to result in acts and omissions which inconvenience the ordinary comfortable use and enjoyment of neighbour's property.¹⁸⁷

In addition, this chapter explored nuisance in the narrow and wide sense with the aim of determining the remedies available to neighbours in the event that they experience nuisances that fall within the two categories.¹⁸⁸ In this regard, it was stated that a neighbour seeking an interdict in the narrow sense¹⁸⁹ would need to prove (a) that the short-term host's conduct has caused a nuisance that is excessive and unlawful; (b) the nuisance stemming from the short-term rental operations occurs in a recurring or continuous manner, and (c) that there are no alternative remedies available that could protect their property rights. Subsequently, nuisance in the wide sense was explored.¹⁹⁰ In terms of nuisance in the wide sense, a neighbour would be

¹⁸⁵ GE Lines "Hej, not hej da: Regulating Airbnb in the new age of Arizona vacation rentals" (2015) 57 *Arizona Law Review* 1163-1182 at 1169.

¹⁸⁶ CG van der Merwe "Should short-term letting be allowed in sectional title schemes?" 2018 *Journal of South African Law* 507-522 at 509; J Ashworth "10 Airbnb horror stories you won't believe are true" (31-10-2019) *Lodgify* <<https://www.lodgify.com/blog/airbnb-horror-stories/>> (accessed 01-04-2020).

¹⁸⁷ See chapter 4 section 4 2 2.

¹⁸⁸ See chapter 4 section 4 3.

¹⁸⁹ See chapter 4 section 4 3 1 and 4 3 2.

¹⁹⁰ See chapter 4 section 4 3 3 and 4 3 4.

able to bring a claim against the short-term rental host under the *actio legis Aquiliae*, provided they are able to prove that the host's conduct amounts to unreasonable, unlawful use of property.

Furthermore, this chapter discussed normal use and reasonableness in the context of nuisances.¹⁹¹ It was highlighted that neighbours of short-term rental accommodation often experience noise nuisance, which may amount to an unlawful infringement of neighbours property rights in the event that the nuisance exceeds what a neighbour is expected to tolerate.¹⁹² Additionally, it was noted that due to the social utility that short-term rental operations offer to society, courts would consider the locality of the property and the social utility of the property before deciding to grant an interdict against the host's short-term rental operations. Moreover, in relation to malice as a nuisance law consideration, it was highlighted that some short-term hosts might behave maliciously by letting their guests park in their neighbours driveways or allowing them to have parties late at night.¹⁹³ Subsequently, this chapter considered nuisance law in relation to a threat of danger, personal injury, and damage to property.¹⁹⁴ The threat of harm is particularly relevant because short-term rental operations often result in strangers using the common property and makes it difficult to distinguish between residents and people with nefarious intentions parading as guests. Therefore, it was concluded that if neighbours are able to prove potential threats of harm, they may be granted an interdict. Following this discussion, the coming to nuisance principle was explored.¹⁹⁵ I argued that a neighbour may still apply for an interdict against the nuisance caused,

¹⁹¹ See chapter 4 section 4 4.

¹⁹² See chapter 4 section 4 4 2.

¹⁹³ See chapter 4 section 4 4 3.

¹⁹⁴ See chapter 4 section 4 4 4.

¹⁹⁵ See chapter 4 section 4 4 5.

irrespective of the fact that they made the decision to move into a property neighbouring short-term rental accommodation. In this light, it was concluded that neighbours who experience excessive nuisances that exceed what they foresaw when moving into the property may bring a claim against the short-term host in terms of nuisance law.

Additionally, a case study of *Body Corporate of the Paddock Sectional Title Scheme v Nicholl*¹⁹⁶ was conducted in this chapter, as this case is the most recent South African case that explores the interplay between Airbnb's operations and the principles of neighbour law. Although this case was concerned with neighbour law in a sectional title scheme, it was still valuable to explore because the court explored neighbour law concerns in the Airbnb context. In the case, the court took the following factors into account: (a) Short-term leasing of units creates a real security risk to residents (neighbours) in the sectional title scheme;¹⁹⁷ (b) short-term leasing could result in short-term tenants (such as Airbnb guests) utilising the unit for nefarious conduct;¹⁹⁸ (c) short-term leasing leads to the body corporate not being aware of who is in the property owner's unit at any given time;¹⁹⁹ (d) short-term leasing results in the body corporate being unable to validate the identity of all tenants entering and exiting the complex;²⁰⁰ (e) short-term tenants having full access to the common property including the gardens and swimming pool which they could abuse that could result in increased

¹⁹⁶ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ). See chapter 4 section 4 5 1.

¹⁹⁷ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 7.

¹⁹⁸ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 7.

¹⁹⁹ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 8.

²⁰⁰ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 8.

levies to all the unit's property owners;²⁰¹ (f) with short-term leasing, strangers to the Airbnb host and residents of the complex are allowed to enter and exit the complex at any given time, which could lead to nefarious, unauthorised persons masquerading as Airbnb guests, entering the property and causing damage to property or injury to residents of the complex;²⁰² (g) short-term tenants of the Airbnb host have not entered into lease agreements with a copy of the scheme's conduct rules, which leads to these short-term tenants not adhering to the conduct rules, that, in turn compromises the body corporate's ability to enforce the rules amongst all unit owners;²⁰³ (h) having short-term tenants increases disruption within the complex where residents live in close proximity to one another;²⁰⁴ and (i) due to the fact that the unit owner does not reside in her unit, she is unable to grasp the severity of the risks she creates through operating her unit as an Airbnb.²⁰⁵ In relation to these factors, this chapter concluded that the concerns raised by the applicant in *Nicholl* create an excellent guideline of factors that courts should take into account when determining the impact an Airbnb listing may have on neighbouring property owners.

Subsequent to the case study, this chapter also explored the impact of Airbnb's terms of service on the rights and obligations of Airbnb hosts and guests.²⁰⁶ In this regard, Airbnb's terms of service were explored, whereby it was noted that the Airbnb contract places the responsibility on the guest for acts and omissions caused during their stay on the property. However, it was argued that despite the relevant provisions,

²⁰¹ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) paras 8, 10.

²⁰² *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) paras 8, 12.

²⁰³ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) paras 8, 9.

²⁰⁴ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 13.

²⁰⁵ *Body Corporate of the Paddock Sectional Title Scheme v Nicholl* 2022 (2) SA 472 (GJ) para 14.

²⁰⁶ See chapter 4 section 4 5 2.

it would be challenging for a neighbour to hold a guest liable due to different guests occupying the property and only certain guests' behaviours amounting to nuisances. Rather, it would be more appropriate to hold the Airbnb host liable as they have created an environment where the nuisance could occur based on their decision to use their property as short-term rental accommodation. In this light, it would be beneficial for neighbours if short-term hosts amounted to tenants because then they would have an obligation to act reasonably and refrain from causing a nuisance under neighbour law.

In light of the exploration of the nuisance law principles, chapter 4 concluded that neighbours of short-term rental hosts may have a claim in terms of nuisance law based on the interference with their right to use and enjoy their property due to the host's short-term rental operations. In light of the determination that neighbours have a common law remedy at their disposal in terms of nuisance law, it was necessary to determine whether neighbours will also have a claim under section 25(1) of the Constitution for arbitrary deprivation of property in instances where their neighbours short-term rental operations interfere with their property entitlements. Consequently, the following chapter conducted a section 25 analysis to determine whether the laws that authorise short-term rental operations result in an arbitrary deprivation of a neighbour's property.

7 1 4 Conclusions reached in chapter 5

Chapter 4 concluded that neighbours of short-term hosts are likely to have property law remedies available to them in terms of nuisance law when experiencing a property interference due to their neighbour's short-term rental operations. In light of this, chapter 5 proceeded by determining whether neighbours of short-term rental hosts have constitutional remedies available to them. To reach a conclusion regarding the

remedies available to neighbours, this chapter investigated provisions regarding short-term rentals in terms of the Tourism Bill. By considering the potential provisions of the Tourism Bill, this chapter examined whether the neighbour of a short-term host may have a claim for an unconstitutional arbitrary deprivation of property as set out by the Constitutional Court in *FNB*. Accordingly, an overview of the section 25 methodology based on the test set out in *FNB* was provided.²⁰⁷ Furthermore, this chapter briefly considered the case law that followed the *FNB* judgment, as well as the academic opinions in relation to these judgments. Following this discussion, this chapter conducted a possible section 25 analysis to determine what a section 25 analysis in the short-term rental context would potentially look like.²⁰⁸

However, before conducting the section 25 analysis, the chapter explored the principles of subsidiarity as a threshold to determine whether it is possible to conduct a section 25 analysis in the short-term rental context.²⁰⁹ In terms of the subsidiarity principles, given that the Tourism Bill has not been enacted, neighbours would need to rely on the principles of nuisance law to bring a claim for infringement of their property rights due to their neighbour's short-term hosting activities. However, if the common law nuisance principles are found to not be applicable in the short-term rental context, then neighbours are likely to be able to rely directly on section 25. On the other hand, if the Tourism Bill is enacted, then neighbours will likely have to rely on the remedies available to them in terms of the legislation instead of the common law or section 25 directly. Consequently, it follows that neighbours would need to rely on the Tourism Bill when bringing a section 25 claim. Based on the likelihood that the

²⁰⁷ See chapter 5 section 5 3.

²⁰⁸ See chapter 5 section 5 3 2 – 5 5.

²⁰⁹ See chapter 5 section 5 2.

Tourism Bill will be enacted, the chapter proceeded to conduct a section 25 analysis in relation to the Tourism Bill's potential impact on neighbours' property rights.

In addressing the first question of the section 25 analysis set out in *FNB*, namely the property question, it was evident that the alleged interest of neighbours of short-term hosts is likely to be regarded as property for the purpose of section 25, given that ownership of property was affected.²¹⁰

The second question of the section 25 analysis considered whether a deprivation of the identified property interest has occurred.²¹¹ In relation to deprivation, the laws that authorise short-term rental operations in South Africa negatively impact the use and enjoyment of neighbouring property owners' property. Consequently, in terms of this question, it was concluded that the interference caused by the laws that authorise short-term rental operations in South Africa would likely comply with both the wide and narrow definition of deprivation and consequently amount to a deprivation in terms of section 25 of the Constitution.

Subsequently, the chapter explored the requirements for a valid deprivation in terms of section 25 of the Constitution.²¹² In this respect, the chapter considered the two-fold section 25(1) enquiry, consequently determining whether the deprivation is authorised in terms of law of general application and whether the deprivation is arbitrary.²¹³ It was acknowledged that the fact that the Tourism Bill poses a challenge to the section 25 law of general application requirement, given that there is currently no law authorising short-term rental operations in South Africa. However, on the assumption that the Tourism Bill is enacted, neighbours would be able to argue that the Tourism Bill is the

²¹⁰ See chapter 5 section 5 3 2.

²¹¹ See chapter 5 section 5 3 3.

²¹² See chapter 5 section 5 3 4.

²¹³ See chapter 5 section 5 3 4 2.

law of general application that authorises the deprivation. Conversely, if the Tourism Bill is not enacted, neighbours will not have constitutional remedies at their disposal and will only be able to rely on the common law nuisance remedies discussed in chapter 4.

Following this discussion, the chapter addressed the fourth question in terms of the *FNB* section 25 analysis in relation to determining whether neighbours' deprivation in the short-term rental context amounts to an arbitrary deprivation of property.²¹⁴ In this light, procedural arbitrariness²¹⁵ and substantive arbitrariness²¹⁶ in the short-term rental context were explored. In terms of the procedural arbitrariness enquiry it was argued that procedural fairness would only be an issue if the Tourism Bill is enacted and authorises the courts to exercise judicial oversight, but does not provide them with the power to exercise their discretion to make a just and equitable order. Consequently, in relation to the substantive arbitrariness enquiry it was argued that the short-term rental context requires substantive arbitrariness to be determined on a continuum between a rationality and proportionality analysis. In particular, it was highlighted that the only incident of ownership that is affected by the deprivation is that of the use and enjoyment of neighbouring property. Therefore, despite ownership being the property right impacted, in terms of the rationality analysis, it was argued that there was a nexus between the means employed (the deprivation experienced by the neighbour) and the ends sought to be achieved (the promotion of the tourism industry and generating income for the economy and Government tax revenue.) Furthermore, in terms of the proportionality analysis, it was argued that the neighbour's

²¹⁴ See chapter 5 section 5 3 4 3.

²¹⁵ See chapter 5 section 5 3 4 4.

²¹⁶ See chapter 5 section 5 3 4 5.

deprivation of the use and enjoyment of their property is proportionate to the purpose of promoting the tourism industry, subsequently positively contributing to the South African economy and generating tax revenue for the Government.

Based on the conclusion that the deprivation in the short-term rental context is unlikely to amount to an unconstitutional arbitrary deprivation of a neighbour's property, it was not necessary to conduct a section 36(1) analysis. In this regard, it was argued that it is unlikely that neighbours of short-term rental accommodation would be successful in bringing a section 25 claim for arbitrary deprivation of property and would likely need to rely on the common law nuisance principles for relief in the instance of a property law infringement.

7 1 5 Conclusions reached in chapter 6

Chapter 6 explored the regulation of short-term rentals in South Africa, considering whether short-term rentals like Airbnb should be regulated in South Africa and, if so, how such regulation should look. This chapter considered the basis of the sharing economy and concluded that due to the sharing economy being fast and innovative, it is vital for the laws of the country to keep up with modern developments in the short-term rental context.²¹⁷ This chapter concluded that regulating short-term rental operations in South Africa is essential to provide legal certainty to property owners, tourists, municipalities, landlords, tenants, neighbours of Airbnb-listed properties, and establishments within the tourism and hospitality industry.²¹⁸

The chapter proceeded to consider three potential regulatory approaches to short-term rental operations.²¹⁹ These approaches are (a) enacting national legislation to

²¹⁷ See chapter 6 section 6 2.

²¹⁸ See chapter 6 section 6 3.

²¹⁹ See chapter 6 section 6 4 1.

govern short-term rental operations;²²⁰ (b) passing municipal by-laws to allow local municipalities to govern short-term rental operations based on the relevant circumstances of the municipality,²²¹ and (c) leaving short-term rental operations unregulated and allowing contract law to govern the relationship between host and guest.²²² An exploration of all three approaches indicated that the best approach would be for South Africa to enact national legislation to provide legal recognition and clarity in the short-term rental context, but that such national legislation should give authority to municipalities to regulate short-term rental operations based on the local circumstances in particular municipal areas.²²³ Consequently, it was argued that leaving short-term rentals unregulated is not viable as it would fail to provide clarity on the legal position of Airbnb, fail to consider zoning laws, enable gentrification, negatively impact the hospitality industry, and provide no clear remedies for parties negatively affected by Airbnb's operations.

Subsequently, this chapter conducted two case studies, namely the regulation of Airbnb in London²²⁴ and the regulation of Airbnb in Berlin.²²⁵ The case study of Airbnb's legal position in London was beneficial in highlighting the impact that short-term rental operations have on housing affordability and the importance of ensuring that low-income housing is available to those who need it.²²⁶ In London, Airbnb's operations resulted in a change in the laws regulating short-term rentals, balancing the necessity

²²⁰ See chapter 6 section 6 4 2 1 and 6 4 2 2.

²²¹ See chapter 6 section 6 4 3 1 and 6 4 3 2.

²²² See chapter 6 section 6 4 4 1 and 6 4 4 2.

²²³ See chapter 6 section 6 4 5.

²²⁴ See chapter 6 section 6 5.

²²⁵ See chapter 6 section 6 6.

²²⁶ See chapter 6 section 6 5 2.

of affordable housing for low-income residents with the need for tourism, and allowing locals to generate income from their property.²²⁷ The London case study discussed London's correspondence with Airbnb to ensure that the Airbnb platform enforces its laws, indicating a potential avenue for the South African Government to work alongside Airbnb to protect the relevant role-players once national legislation has been enacted. Given that Airbnb expressed a clear desire to work with the South African Government to ensure that Airbnb operates in a sustainable way,²²⁸ this chapter proposed that the South African Government follow London's approach of ensuring that the Airbnb platform features align with the law.

The case study of Airbnb's operation in Berlin, in turn, indicated that property owners regard short-term rentals on platforms like Airbnb as an entitlement that owners would like to exercise to bring in additional income.²²⁹ In light of Berlin's backlash subsequent to implementing stringent short-term rental laws, the main value of exploring Airbnb's legal position in Berlin was that stringent regulation of short-term rentals has the potential to negatively affect the tourism sector and property owners' use and enjoyment of their entitlements. Berlin's initial stringent regulation of short-term accommodation serves as a warning to the South African Government to ensure that its regulation of Airbnb in South Africa will enable property owners to generate income and stimulate the tourism industry.

From the case studies in this chapter, it was evident that as short-term rentals like Airbnb increase in popularity in South Africa, it is imperative that legislation supports

²²⁷ M Ferreri & R Sanyal "Platform economies and urban planning: Airbnb and regulated deregulation in London" (2018) 55 *Urban Studies Journal Limited* 3353-3368 at 3359-3360.

²²⁸ Airbnb official news "Supporting inclusive tourism in South Africa" (04-06-2021) *Airbnb News* <<https://news.airbnb.com/en-uk/supporting-inclusive-tourism-in-south-africa/>> (accessed 31-05-2022).

²²⁹ See chapter 6 section 6 6 3.

its economic benefits while limiting its ability to infringe on property owners' rights. The current failure to address Airbnb's operations in South Africa has had a negative effect on various role-players, such as the hospitality industry and neighbours of Airbnb-listed properties. In this regard, the chapter concluded that failure to regulate Airbnb's operations would likely negatively impact Government tax revenue, neighbourhoods, zoning laws, and the hospitality industry while also detracting from landlords, tenants, and neighbours' property rights.²³⁰

7 2 The way forward: National legislation giving legal recognition to short-term rentals but enabling municipalities to regulate short-term rentals

Following the discussion in chapter 6 regarding regulatory approaches to short-term rentals, it is recommended that the South African Government enact national legislation addressing short-term rentals.²³¹ The enactment of such legislation should provide a clear, basic framework of the legal position while authorising municipalities to regulate short-term rentals based on their local circumstances.

In the event that national legislation is enacted, it is pertinent that the legislation defines what actions will amount to using property as short-term rental accommodation. Furthermore, the national legislation should address who will be regarded as a short-term rental host and who will be regarded as a short-term rental guest. In this regard, the legislation will need to define actions that will result in one being deemed a short-term rental host/guest. This clarification is necessary so that individuals will know how to behave if they want to be regarded as a short-term

²³⁰ D Guttentag "Transformative experiences via Airbnb: Is it the guests or the host communities that will be transformed?" 2019 *Journal of Tourism Futures* 1-7 at 4.

²³¹ See chapter 6 section 6 7 3.

host/guest and, similarly, how to behave if they would not like to be classified as a short-term host/guest. Following the clarification of who is regarded as a short-term rental host/guest, it is crucial that the legislation addresses whether landlord-tenant law is applicable in the short-term rental context. Consequently, the legislation will need to clarify whether it is necessary for there to be a separate rental agreement or whether the contract concluded through the Airbnb platform serves as a rental agreement binding the parties as landlord and tenant. In this respect, I think the legislation should use the Airbnb host-guest agreement as a framework when determining what the requirements are for a short-term rental agreement. By using the Airbnb host-guest agreement as a framework, it will not be necessary for there to be a separate agreement because the requirements will be met as the legislation is drafted in view of the Airbnb agreement. Furthermore, the legislation will need to specify whether and to what extent landlord-tenant law remedies are available in the short-term rental context. In this regard, I am of the opinion that the legislation should expressly state whether short-term hosts and guests are landlords and tenants. The indication as to whether hosts and guests are landlords and tenants will consequently indicate that landlord-tenant law is applicable in the short-term rental context.

In addition, the legislation should give effect to Airbnb's suggestion of record-keeping, potentially through a national registry.²³² The national registry can be overseen by municipalities. In this regard, property owners who seek to conduct short-term rental operations should apply for a license to conduct short-term rental operations from their property. Upon approval, they will be placed on the national

²³² See chapter 6 section 6 7 3.

registry and receive a registration number which they will use on the Airbnb platform in order to conduct short-term rental operations through the Airbnb platform.

Importantly, a distinction will need to be made between short-term rental accommodation, hotels, and bed and breakfast establishments. In addressing the distinction between hospitality establishments and short-term rental accommodation, it will also be relevant for the legal position regarding commercial hosts to be addressed. In particular, the legislation should indicate whether short-term rental operations amount to commercial use of property or whether it remains residential use of property. This clarification is necessary as it will determine whether the RHA and PIE are applicable, given that the remedies stemming from the RHA and PIE are not available for commercial use of property. Additionally, the legislation should clarify whether commercial hosting is permitted and what the procedure will be for one to be permitted to conduct business as a commercial host. In this regard, the legislation will need to clearly distinguish between the rights, obligations, and remedies of ordinary short-term hosts and commercial short-term hosts. In addressing commercial hosting, the legislation should prevent hotelisation, whereby property owners offer the features of a hotel while claiming their actions amount to short-term rental operations.²³³

Moreover, the legislation will need to acknowledge that short-term rentals have the potential to cause nuisances and state whether, or the extent to which, nuisance law applies in the short-term rental context.²³⁴ In particular, the legislation should give effect to neighbour's ownership rights by indicating specific instances where a host's conduct will be regarded as an unlawful nuisance. Importantly, courts should still have the power to exercise a discretion when deciding matters regarding nuisance in the

²³³ See chapter 6 section 6 7 4.

²³⁴ See chapter 6 section 6 7 5.

short-term rental context. In this regard, it would be appropriate for the legislation to address the remedies that will be available to neighbours of short-term rental properties when they experience a property interference.

Furthermore, it is pertinent that the possible effects of gentrification arising through short-term rentals are addressed by the legislation enacted.²³⁵ The legislation should seek to discourage the conversion of affordable units to short-term rental accommodation and protect residents from displacement and eviction.²³⁶ This can be done by placing a limit on the number of days a property owner may use their property as short-term rental accommodation. However, gentrification is best addressed by the municipality because the municipality is aware of the local circumstances and can regulate short-term rentals in a way that limits the negative effects in terms of gentrification.

The considerations discussed highlight the grey areas of short-term rental operations as identified throughout this dissertation. In this respect, it is essential that the Government should address these concerns to provide legal certainty to Airbnb role-players, including property owners, tourists, municipalities, landlords, tenants, neighbours of Airbnb-listed properties, and establishments within the tourism and hospitality industry. The regulation of short-term rentals like Airbnb may prove to be challenging given the various interests of each role-player. However, case studies of London and Berlin have indicated that equitable regulation of short-term rental accommodation is indeed possible.

²³⁵ See chapter 6 section 6.7.6.

²³⁶ See chapter 6 section 6.7.7.

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